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# DECISIONS OF COURTS AND OPINIONS AFFECTING LABOR

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# DECISIONS OF COURTS AND OPINIONS AFFECTING LABOR: 1925

## INTRODUCTION

This bulletin is the twelfth in a series devoted to the presentation of decisions of courts on questions affecting labor, involving both common and statute law, and includes also opinions of the Attorney General construing and applying the labor laws of the United States. Prior to the year 1912 decisions and opinions were a regular part of the bimonthly bulletins of the Bureau of Labor Statistics and its predecessors; but since that date special volumes containing this matter have appeared. Publication has been annual, with the exception of the bienniums 1919–1920 and 1923–1924. The cases presented are, for the most part, those appearing in the sources used within the calendar year. In exceptional cases decisions appearing somewhat later have been incorporated on account of their connection with other material used, or because of special and immediate interest. The current bulletin also carries certain opinions of the Attorney General of an earlier date than the year 1925, but not sooner available for various reasons.

An attempt is made to select decisions of special interest and importance, together with illustrative decisions setting forth the principles generally applicable in cases affecting the contract of employment, the safety of the employees, their compensation for injuries, the powers and limitations of labor organizations, and in brief, all those principles of law which affect the relations of employer and employee, or the status of these parties. The great bulk of the cases are those decided in the State courts of last resort and in the Federal courts, though in a few States the opinion of intermediate courts of appellate jurisdiction (final as to certain cases) are reproduced.

As in past years, the National Reporter System, published by the West Publishing Co., St. Paul, Minn., is the chief reliance for the material used. The Washington Law Reporter is the source for cases in the District of Columbia; and advance sheets of the Opin-

ions of the Attorney General are examined for matter of interest from the Department of Justice.

An abridgment of the statements and the opinions is necessary in order to save space, the former being usually made in the language of the editors, while essential points in the opinion requiring authoritative exactness are quoted, together with such other excerpts as serve to clarify the points selected for presentation.

Following is a statement of the sources examined for the material of this bulletin:

Supreme Court Reporter, volume 45, page 114, to volume 46, page 107.
Federal Reporter, volume 1 (2d), page 961, to volume 8 (2d), page 320.
Northeastern Reporter, volume 145, page 529, to volume 149, page 656.
Northwestern Reporter, volume 200, page 833, to volume 205, page 944.
Pacific Reporter, volume 230, page 625, to volume 240, page 1119.
Atlantic Reporter, volume 126, page 691, to volume 131, page 144.
Southwestern Reporter, volume 266, page 1, to volume 276, page 1119.
Southeastern Reporter, volume 125, page 385, to volume 130, page 304.
Southern Reporter, volume 101, page 849, to volume 106, page 80.
New York Supplement, volume 206, page 705, to volume 212, page 352.
Washington Law Reporter, volume 53.
Opinions of the Attorney General, volume 33, page 396, to end of volume 34.

Without attempting any summary of the decisions—indeed, their variety is too great to permit a summary in any brief way—attention may be called to the closing word with regard to minimum-wage legislation of a compulsory character in a decision by the Supreme Court on an appeal from the Arizona District of the United States District Court; a decision by the same court with regard to the constitutionality of the "current rate of wages" law of Oklahoma; a decision by the Supreme Court of Arizona sustaining its new workmen's compensation law; one of the Virginia Court of Appeals in construing the compensation act of that State so as to permit consecutive awards for temporary total and permanent partial disability; a decision by the Louisiana Supreme Court to the effect that conduct accepting an arbitration by the Railroad Labor Board makes the award binding; the various efforts of the courts to adjudicate the uncertain boundary between admiralty and State laws in regard to the liability of the employer for injuries to maritime workers; and numerous phases of the workmen's compensation laws and of the legal status and liabilities of labor organizations.

No annual compilation can assume to present a complete review of the legal principles in any field; but contributions are made from year to year, some emphasizing already-established principles and others applying these principles to new situations or developing new rules to cover changing conditions.

HOURS OF LABOR—EIGHT-HOUR DAY—PUBLIC WORKS OF THE UNITED STATES—FOREIGN COUNTRIES—*Opinions of Attorney General, volume 34, page 257 (August 8, 1924).*—The Secretary of State entered into certain contracts for the alteration and repair of buildings of the American Embassy at London, and the question arose as to the application thereto of provisions of the act of June 19, 1912 (37 Stat. 137). This act limits and restricts to eight hours the daily service of laborers and mechanics on the public works of the United States, whether in the immediate employment of a Government agency or employed by contractors. The act is all-embracing in its announced application to "every contract hereafter made to which the United States * * * is a party, * * * which may require or involve the employment of laborers or mechanics." The power of Congress to say, by appropriate legislation, what terms and conditions shall be embodied in the contracts to which the Federal Government may become a party was recognized as complete; "and it undoubtedly has the power to control the hours of labor which may be performed by laborers and mechanics on the public works of the United States wherever situated." However, the Attorney General found "no provision, express or implied, which would indicate that it was the intention of Congress to apply its terms to laborers and mechanics of foreign countries, employed temporarily upon the public works of the United States situated within the territorial limits of a foreign country." Recognizing the intention of the statute to improve labor conditions, the question arose whether Congress could undertake to better labor conditions in a foreign country, and for the benefit of alien laborers and mechanics there employed, "even when the enforcement of the statutory provision would disturb the agreements entered into between contractors and laborers and mechanics in foreign countries." Reference was made to the opinion of Attorney General Moody (25 Op. 441), where the application to work within the Canal Zone was considered; but the rights, power, and authority of the Government acquired by a treaty with the Republic of Panama were the same that "the United States would possess and exercise if it were sovereign of the territory," thus differentiating the conditions there from those under present consideration. The inquiry by the Secretary of State indicated that the enforcement of this provision in the work in London "would disturb the recognized hours of service now in effect between contractors and workmen in England."

Recognizing the rule of construction that the language of an act must be assumed to give expression to the meaning of the legislature, there was recognized an equally well-established rule "that a statute should be construed with reference to the purpose to be accomplished and the mischief to be corrected." As said by the Supreme Court in an earlier case (United States *v.* Kirby, 7 Wall. 482) "all laws should receive a reasonable construction," so that neither "injustice, oppression, or an absurd consequence" would follow from a literal interpretation. "The reason of a law in such cases should prevail over its letter." Applying this principle, the opinion was expressed that the act of 1912 and the earlier one of 1892 fixing an eight-hour day for laborers and mechanics on public works do not apply "to work to be performed by alien laborers and mechanics upon public works of the United States within the territorial limits of a foreign country."

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RETIREMENT OF PUBLIC EMPLOYEES—CLASSIFIED CIVIL SERVICE OF THE UNITED STATES—*Opinions of Attorney General, volume 34, pages 20, 192, 334, 481.*—The act of May 22, 1920 (41 Stat. 614), providing for the retirement of employees in the classified civil service of the United States hardly lies within the scope of labor legislation. However, the principle involved is of interest, and brief reference is made to certain rulings of the Attorney General construing this act.

An opinion of October 11, 1923 (34 Op. 20), rules, as did an earlier opinion (32 Op. 203), that the act provides automatic separation for employees reaching the age of 70, whether or not they receive retirement pay by reason of having rendered service for 15 years or more. In other words, the statute provides for separation from service whether or not annuity is available, subject, however, to the provisions of the law as to retention in service on certification of willingness and efficiency.

Another phase of the law was considered in an opinion delivered June 3, 1924 (34 Op. 192), where deputy collectors of internal revenue and prohibition officers and employees were specifically under consideration. It was held that such persons who have been or may be appointed without regard to the civil service law and rules made pursuant thereto are not, by their appointment, brought within the competitive status that entitles them to the benefits of the retirement act, even though such persons may take an examination to secure a position on an eligible list. An earlier opinion (32 Op. 273) distinguishes between appointees who may be and those who must be appointed within the provisions of the civil service act; only the latter were held to be within the provisions of the retirement act. While the positions in which the persons under consideration are serving may,

unless expressly excepted by statute, be brought within the classified civil service, their status at that time was outside the benefits of the retirement act.

A second question disposed of in the same opinion was as to employees now in positions excepted by law but having formerly had a civil service status, and being now eligible for retransfer to the competitive classified service. The Attorney General was of the opinion that " any person who has acquired a competitive status in the classified civil service retains that status so long as he remains continuously in the executive civil service, although he may have been or may be transferred to a nonclassified position."

Somewhat later (December 22, 1924) the latter question received further consideration on a specific inquiry relative to persons who had been classified employees of the Government, but who leave " a position clearly subject to the retirement act " to accept one in which nomination is made by the President and appointment confirmed by the Senate. Construing the statute and the civil service rules, the conclusion was reached that, while the act does not apply to persons who entered the executive civil service by appointment by the President and confirmation by the Senate, if persons in the classified civil service are given such appointments, " they are, so long as they remain continuously in the executive or judicial civil service of the United States eligible * * * to retransfer to the positions which they formerly held in the classified civil service. That being so, they have not lost the competitive status which they acquired by appointment in the classified civil service." They are accordingly " entitled to the benefits and subject to the obligations of the retirement act " so long as they remain continuously in the positions indicated (34 Op. 334).

An exception to the foregoing statement was found necessary in view of the definite mention of postmasters as not within the provisions of the retirement act. Being thus specifically excepted, " persons in the classified civil service who are appointed postmasters are not entitled to the benefits nor subject to the obligations of the retirement act (34 Op. 481, May 12, 1925).

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STEAM VESSELS—FEDERAL INSPECTION OF STATE-OWNED VESSELS—*Opinions of Attorney General, volume 33, page 500 (June 6, 1923).*—The State of New York maintains and operates upon navigable waters of the United States certain vessels owned by it. The Secretary of Commerce is charged with the enforcement of the steamboat inspection laws of the United States, but was informed by the Attorney General of New York that vessels owned by the State

and operated by the State superintendent of public works were not regarded as subject to the steamboat inspection laws of the United States. The question being referred to the Attorney General, he was of the contrary opinion. Section 4400 of the Revised Statutes provides:

All steam vessels navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this title.

It was pointed out that the basis of the application of the Federal steamboat inspection laws had been held by the courts not to be the nature of the commerce in which engaged, but the clause of the Constitution extending the judicial power of the United States to all cases of admiralty jurisdiction. The contention of the Attorney General was that "a sovereign is free from outside interference, and that, accordingly, the Federal Government can not enforce regulations with respect to property or employees of a sovereign State while they are engaged in its public service." However, the Attorney General found no exception in the section quoted, which applies to "all steam vessels navigating any waters of the United States which are common highways of commerce," excepting only public vessels of the United States and certain others. The power of Congress over interstate commerce was said to be such that where it "has exercised its power by appropriate legislation any inconsistent State statute is void." No State could "erect a permanent obstruction to navigable waters of the United States" without the permission of Congress; "but a State-owned vessel operating in defiance of steamboat inspection laws passed by Congress to protect interstate commerce is an obstruction to interstate commerce differing only in degree from the obstruction caused by a permanent structure encroaching upon navigable waters."

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WORKMEN'S COMPENSATION—"EMPLOYEES OF THE UNITED STATES"—SEAMEN ON SHIPPING BOARD VESSELS—*Opinions of Attorney General, volume 34, pages 120 (March 11, 1924) and 363 (January 17, 1925)*.—The United States Employees' Compensation Commission submitted through the President a question as to the status of seamen on vessels owned and operated by the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation. The commission had taken the view that seamen and other employees of these agencies were employees of the United States and entitled to the benefits of the United States em-

ployees' compensation act. However, certain decisions by the Supreme Court had raised a question as to the correctness of this position, and the matter was accordingly referred for a decision.

It was shown that the corporation itself made certain compensation awards on an agreed basis, and by act of Congress this settlement was declared final and in full satisfaction of any claims of such employees or their legal representatives against the United States. The Attorney General found that the compensation commission had authority to "make compensation to the direct and immediate employees of the Fleet Corporation, except in cases where compensation has already been made by the corporation itself."

A second phase of the question related to "seamen in the merchant service under 'agency' contracts." These were cases in which the vessels were operated not immediately by the corporation but by persons "contracting therewith for the operation of the vessels." The form of the contract in use was examined in some detail and its effects in various aspects considered. The conclusion was reached that the agent was practically an independent contractor, and that the seamen on board the vessel operated by him were his employees and not the employees of the United States. In this view they would not be entitled to compensation under the Federal statute.

At the later date named an opinion was rendered based on further consideration of the questions involved, including a revised contract with the operating agents. Detailed examination was given to the provisions of this contract and the methods of hiring the men, i. e., through "the Fleet Corporation's Sea Service Bureau, upon information by the managing agent that the ship needs a crew." The statutory requirement of a form of contract between the master of a vessel and the individual members of a crew is observed, but thereafter "the crews are carried on the pay rolls of the Fleet Corporation." The managing agent certifies a request for the necessary funds to pay the crew, receives it in the form of a check from the Fleet Corporation, and is merely the channel through which the money is distributed to the crew, payments being actually made by the shipping commissioner.

All the fiscal operations are for the account of the owner—the United States—and are controlled, in detail, by general orders. If the operation of the ships result in a profit, that profit accrues to the United States. If losses result, they are borne by the United States, but the agent nevertheless receives his compensation in either event.

The method by which seamen are hired and paid, as stated by the general counsel for the Shipping Board, supra, shows that they are hired by the United States and paid by the United States from its funds.

In view of these facts the conclusion was reached that "these men thus employed, thus hired, and thus paid, are in fact working for the United States. In other words, they are employees of the United States, and as such are entitled to the benefits of the Federal employees' compensation act."

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WORKMEN'S COMPENSATION—UNITED STATES EMPLOYEES' COMPENSATION COMMISSION—POWERS—"PERSONAL INJURY"—DISEASE—*Opinions of Attorney General, volume 33, page 476 (May 16, 1923).*—An act of Congress of 1916 (39 Stat. 742) provides compensation for the disability or death of an employee of the United States resulting from a personal injury sustained while in the performance of duty. A commission was created by the act with the power of making necessary rules and regulations for its enforcement; also it "shall decide questions arising under this act."

From the beginning of its activities the commission had construed the term "personal injury" as including injury by disease as well as by accident if due to causes and conditions inherent in the employment. This construction, as well as the authority of the commission to make final determinations in respect of its awards, was challenged by an accounting officer of the United States. On reference of the question to the Attorney General, a history of the act as succeeding an earlier and inadequate law, together with some account of the hearings held and of the debate, was reviewed, the Attorney General reaching the conclusion that "Congress intended to include within its scope employees afflicted" with diseases having their origin in improper working conditions, as well as those injured by accident. The power of the commission was held to be broad enough "finally to determine questions arising under said act," the attitude and status of the commission being completely upheld.[1]

[1] The matter is thus briefly disposed of, as it is now of only historical interest, since Congress by an act of the succeeding year (43 Stat. 389) declared that the term "injury" includes not only injuries by accident but also "any disease proximately caused by the employment." It was also provided that, in the absence of fraud or mistake in mathematical calculation, the findings and decision of the commission on the merits of compensation claims should not, if supported by competent evidence, "be subject to review by any other administrative or accounting officer, employee, or agent of the United States."

## DECISIONS OF THE COURTS

ALIENS—EMPLOYMENT AS FISHERMEN—TREATY RIGHTS—POWERS OF STATE—*Lubetich* v. *Pollock*, *United States District Court, District of Washington* (*June 13, 1925*), *6 Federal Reporter* (*2d*), *page 237.*—The sole point of interest from the standpoint of labor in this case is that provision of the law which forbids the engagement of aliens in commercial fishing in waters under the control of the State, either as independent fishermen or as employees. The courts hold generally that fish and game are the property of the State, and the right to take the same may constitutionally be regulated by restrictions forbidding its taking by persons not citizens, by forbidding shipments outside the State, etc. This is not an exercise of the police power of the State, but is a mere dealing of the State with its own property, and the Supreme Court of the United States has so held. (Geer *v.* Connecticut, 161 U. S. 519, cited in Patsone *v.* Pennsylvania, 232 U. S. 138, 34 Sup. Ct. 281.)

That an alien could not complain that he had been deprived of employment by a restriction on the right of a citizen to hire him for such work was also held to be a valid regulation. "Such an occupation is not open to an alien against the legislative will of the State, since it involves an appropriation of property belonging to the State in its sovereign capacity." (Alsos *v.* Kendall, 227 Pac. 286.) The argument of the Supreme Court of Oregon in the case cited "commends itself to our judgment as altogether sound." Nor does the treaty with Italy, of which country the alien was a citizen, bar the restriction, the court citing Mr. Justice Holmes, who delivered the opinion in the Patsone case, in the course of which he said:

> We see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the States to the full extent.

The bill was therefore ordered dismissed.

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ALIENS—RIGHT TO DO BUSINESS—CONSTITUTIONALITY OF ORDINANCE—*George* v. *City of Portland, Supreme Court of Oregon* (*April 28, 1925*), *235 Pacific Reporter, page 681.*—The city of Portland passed an ordinance concerning the soft-drink business, section 6 of which provided that—

> No license to engage in a soft-drink business shall be issued to any person not a citizen of the United States. Any license issued to any

person not a citizen of the United States to engage in a soft-drink business shall be absolutely void.

M. George and others brought a bill in equity to procure a license, and in the complaint maintained that they were residents of the city and were and had been engaged in dispensing soft drinks and that they had complied with all ordinances of the city. They further stated that they had complied with all requirements of the last ordinance except their citizenship, and that they had offered and were willing to pay the license tax to do business. It was averred in substance that solely because they were aliens their applications for licenses had been denied, and that unless an injunction were secured the officers of the city would arrest, fine, and imprison the complainants for noncompliance with the ordinance. The plaintiffs also asked for mandamus to compel the issuance of proper licenses for the conduct of their businesses upon the same terms and conditions accorded to citizens of the United States. From a decree of dismissal plaintiffs appealed.

The city avowed its authority to regulate such matters, and referred to section 4 of chapter 163 of the General Laws of Oregon for 1923, which provided:

> No city, town, or municipality shall issue a license to any person not a citizen of the United States to engage in the business of conducting a soft-drink establishment.

The principal contention of the plaintiffs was that the State and municipal legislation involved violated article 14 of the Federal Constitution, and as to this point the supreme court observed that:

> While the inhibition of the national organic act is directed against "any State," it includes not only the State itself, but also all the governmental agencies authorized by the State, such as municipal corporations like cities and towns.

Section 31 of article 1 of the State constitution provided:

> While foreigners who are or may hereafter become residents of this State shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native-born citizens.

The right to contract concerning soft drinks was considered by the supreme court as being within the protection of the State constitution. The court, speaking through Mr. Justice Burnett, said:

> There is no doubt but that within reasonable limits in the exercise of the police power the State, or its duly authorized subordinate governmental agencies, may regulate any business that is or may be operated in a manner hurtful to the general peace and good order of the community, and may make reasonable classification of the persons permitted to engage in such occupations. Taking, however, the equal-protection feature of the fourteenth amendment to the National Constitution and the terms of section 31 of article 1 of our own

State constitution respecting the privileges of white foreigners who reside here, it is plain that in respect to persons proposing to engage in an otherwise lawful occupation a distinction based solely on whether the applicant is or is not an alien is not permitted in this State.

As to the matters involved in this litigation, aliens are entitled in Oregon to the same treatment accorded to native-born citizens. Under the facts as practically admitted by the pleadings, the plaintiffs should have the relief demanded in the complaint. In other words, they of right may apply for licenses to engage in the business of selling soft drinks in Portland on the same basis that a native American may apply.

The decree of the circuit court was therefore reversed.

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ASSOCIATIONS—CONTRACT OF EMPLOYMENT—LIABILITY OF UNINCORPORATED ORGANIZATION—*Cousin* v. *Taylor et al.*, *Supreme Court of Oregon* (*September 8, 1925*), *239 Pacific Reporter 96.*—Edward M. Cousin brought an action against Walter K. Taylor, S. S. Harrelson, and other defendants to recover for services performed at a rate hearing before the Oregon Public Service Commission.

It appeared from the evidence that the Oregon Telephone Federation, an unincorporated association, was organized by telephone users to obtain a rehearing before the commission for the purpose of securing a reduction of rates. Taylor and one Zumwalt were authorized to engage a wage expert to represent the federation at this hearing, and pursuant to this authority Taylor and Zumwalt employed the plaintiff and promised to pay him for his services $2,000 and necessary disbursements. The trial court gave a judgment of nonsuit as to the defendants except Taylor and Harrelson, while the jury returned a verdict in favor of the plaintiff as against those two.

The supreme court on reviewing the record observed from the recitals in the bill that the federation was voluntary, not organized to conduct business for pecuniary profit and possessing none of the elements of a partnership. It was not a legal entity and had no legal existence apart from its membership. No articles of association were adopted by the members, and no constitution, by-laws, or contract between its members had been drawn. In view of these facts the supreme court held that as there was no statute in the State authorizing such an organization, or defining the duties, powers, and liabilities of the members, and as the association could neither sue nor be sued, therefore a contract entered into in the name of the association or in its behalf would not be binding upon the association nor enforceable against it.

This action, however, was brought not against the association but against individual members, and the court added that no such limitation exists upon them as exists upon the association. They were free to contract within the scope of the authority conferred upon them, and they were bound as principals. The supreme court admitted that no person could be charged upon a contract alleged to have been made upon his responsibility, " unless it can be shown that to the making of that contract upon his responsibility he has given his expressed or implied consent." It appeared from the evidence that the defendants ratified and approved the contract as made by Taylor with the plaintiff and that they received the benefits resulting from the plaintiff's performance of the contract, and for this reason it was held error for the trial court to give judgment of nonsuit against the plaintiff as to such defendants as Taylor and Zumwalt.

Mr. Justice Rand, speaking for the supreme court, stated that:

Since the contract entered into by Taylor could not be enforced against the association, Taylor, in acting as agent for the association of which he was an officer and member, in entering into a contract which has been performed by the other contracting party, is personally liable under the contract, and the same is true as to those who either assented to his appointment or to the contract which he entered into. In the case of a voluntary unincorporated association, in the absence of statute, the law holds the officer or member thereof who assumes to act for the association directly responsible as principal, and the courts usually base the reason for the rule upon the ground that the officer or member has assumed to act for a principal which has no legal existence, and since the principal is not bound, such officer or agent is bound and becomes personally responsible for the consideration contracted to be paid to the other contracting party for his performance of the contract. Otherwise, no one would be liable notwithstanding that the other contracting party has performed.

The judgment was reversed and the cause remanded for a new trial as to certain of the defendants, including Taylor and Harrelson, on the ground that the trial court failed to instruct the jury as to the law on the phases of the case concerning the liability of unincorporated associations and its members.

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ASSOCIATIONS—CONTRACTORS' ORGANIZATIONS—MONOPOLIES—COMMERCE—ANTITRUST ACT—*United States* v. *Fur Dressers' & Fur Dyers' Assn. (Inc.), United States District Court, New York (May 2, 1925), 5 Federal Reporter (2d), page 869.*—The Fur Dressers' & Fur Dyers' Association comprises about 30 firms out of approximately 150 firms in the United States engaged in the business of fur dressing and dyeing, membership being limited to those actually engaged in

the dressing or dyeing of fur skins. The association does about 70 per cent of all the business of dressing and dyeing of fur skins in the United States, excluding the dressing and dyeing of rabbit skins. The United States alleged that the defendant association and others were engaged in a conspiracy to restrain and monopolize interstate trade in fur skins in violation of the antitrust laws (Comp. St., 8820 et seq.), and sought to enjoin the defendants from restraining trade and from putting into effect the rules of the association, and that they be ordered to dissolve. The rules of the association provided every conceivable method to prevent the perpetration of fraud by customers upon members of the association. The names of customers who failed to pay their bills were listed and the information was furnished to members of the association. Discounts were forbidden and other regulations provided for, each member of the association depositing the sum of $500 to secure faithful performance of the rules and regulations.

The United States district court observed first that:

Not every agreement which suppresses competition or restrains trade is illegal. Only such agreements and combinations as unreasonably suppress competition or restrain trade are illegal [citing Chicago Board of Trade *v.* United States, 246 U. S. 231, 38 Sup. Ct. 242; National Association of Window Glass Manufacturers *v.* United States, 263 U. S. 403, 44 Sup. Ct. 148 (see Bul. No. 391, p. 161), and other cases]. Only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.

The district court quoted with approval from the Chicago Board of Trade case, supra, in which the Supreme Court said:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes, competition, or whether it is such as may suppress, or even destroy, competition.

That persons have the right to associate for the purpose of advancing their own interests by discriminating against others, if the discrimination is based on such grounds as failure to pay bills due members of the association, was held proper by the circuit court under the authority of Brewster *v.* Miller (101 Ky. 368, 41 S. W. 301). As to the business and practice of the association, Judge Bondy, speaking for the court, said:

The defendants neither buy nor sell furs. They only dress and dye furs belonging to others at their places of business. Dyeing and dressing furs do not constitute trade or commerce, but only the performance of labor. The rules and regulations of the association, and the agreement of its members to observe the same, if they restrain

trade and commerce, therefore do so only indirectly and remotely, and do not come within the provisions of the antitrust act. "An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

The United States was unable to prove that the rules of the association or compliance therewith directly or unduly affected interstate commerce or that the defendants intended to affect such commerce. It was found that the defendants did nothing to involve interstate commerce.

They created no monopoly. They fixed no prices. The association simply regulated business of its members in a way tending to promote, rather than restrain, legitimate trade. Nothing that the association did or could do under the by-laws was injurious to any of its members or the public. No one, except a person looking for an unfair or dishonest advantage, could object to its regulations.

The petition was therefore dismissed.

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ASSOCIATIONS—EMPLOYERS' ORGANIZATIONS—CONTRACT OF MEMBERSHIP—RESTRAINT OF TRADE—FIXING WAGES—*Androff* v. *Building Trades Employers' Assn., Appellate Court of Indiana (June 12, 1925), 148 Northeastern Reporter, page 202.*—The Building Trades Employers' Association was incorporated for other than pecuniary profit, and for the general welfare of the employers and to assist in the making of trade agreements between employers' and employees' organizations, "to work for the general welfare of the building industry and to create and maintain uniformity, harmony, and certainty in the relationship of employers and organizations of employees." John Androff, defendant, was one of the building employers who had entered this association and had, as had other employers, given bond in the amount of $1,000, recoverable as liquidated damages, to secure the observance of an agreement not to pay more than specified wages to the workmen employed. For a breach of this agreement the association took steps to recover on the bond, securing judgment in the superior court, from which an appeal was taken.

On the appeal Androff maintained that the action was based on a wrong theory, and that the contract on which it rested was void as against public policy and in restraint of trade. The superior court ruled to the contrary and affirmed the judgment below on the ground that the organization was formed for lawful purposes, such purposes being enforceable by lawful means, which "includes the

right to make lawful rules and lawful by-laws for the members, and to enforce them by fines, etc."

It was pointed out that the State of Indiana recognized the right of workmen to combine and to enforce their combinations by any lawful means, the court continuing:

If the employee has the right to say what wages he will work for, the employer should have the right to say what wages he will pay. If men may lawfully combine to accept a minimum wage which they fix, and may enforce that combination among themselves by fine, suspension, or other form of discipline, employers may likewise form a combination for any lawful purpose, including the fixing of a maximum wage, and enforce it by the same means available to the employees.

This finding was supported by a citation from the decision in the case of Iron Molders' Union *v.* Allis-Chalmers Co. (166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315). In this case the Circuit Court of Appeals sustained the right of workmen to organize and to enforce their rules, and a reciprocal right of employers to combine and to cooperate to control the supply and conditions of work to be done, as a practical application of the principle of corresponding and equivalent rights in respect to organization and the enforcement of rules adopted by either organization. To take away the right to enforce the rules and by-laws of labor organizations and similar associations would make them powerless; and the courts "have upheld such organizations so long as they are organized for a lawful purpose, and will aid them in carrying out and enforcing all contracts with reference to the same."

The judgment was therefore affirmed.

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ASSOCIATIONS—EMPLOYERS' ORGANIZATIONS—MONOPOLIES—BLACK LIST—INTERFERENCE WITH EMPLOYMENT—CLAYTON ACT—*Tilbury* v. *Oregon Stevedoring Co. (Inc.) et al., Circuit Court of Appeals, Ninth Circuit (August 3, 1925), 7 Federal Reporter (2d), page 1.*—The Oregon Stevedoring Co. (Inc.) and others, including shipowners and operators at the port of Portland, combined in the form of an unincorporated association to control the longshore and stevedoring business in the port. They made rules and regulations governing such employment and established a registration system requiring all longshoremen to make application for permission to work in loading and discharging ships in interstate and foreign commerce. The organization kept a list of persons who were objectionable, and if an applicant was on this list he could not secure employment. A uniform wage was agreed upon and enforced for longshoremen. It was admitted that the defendants controlled practically all the business

except such as was handled by the Portland Stevedoring Co., which did but a small part. The plaintiffs, Tilbury and Marks, brought a bill to restrain the defendant from violating the Sherman Antitrust Act and for damages under the Clayton Act, and from a decree dismissing the complaint they appealed.

It appeared that Tilbury had been unable to obtain employment as a longshoreman at Portland; that he had applied for but was refused work, being informed that he was on a list of longshoremen whom the defendants would not hire. The plaintiff, Marks, was discharged from his employment for reasons he alleged were unknown to him, and he had been unable to procure employment in his vocation. The plaintiffs alleged irreparable injury.

The Circuit Court of Appeals observed first that it agreed with the district court that the facts failed to show that commerce had in any way been impeded or that the defendants had any purpose other than to regulate fairly the transaction of the business in which they were engaged. Reference was made to the case of United Mine Workers of America *v.* Coronado Coal Co. (259 U. S. 344, 42 Sup. Ct. 570; see Bul. No. 344, p. 157), in which it was held that a conspiracy and intent to obstruct coal mining, although effectual in preventing a part of the production from passing into interstate commerce, would not be a direct obstruction to interstate commerce in coal if there were no intention to restrain such commerce or no proof of such substantial effect upon it as to make such intention reasonably inferable. The court in conclusion said:

> We conclude that it is in accord with reason as well as the doctrine of the adjudged cases to hold that an agreement among employers whereby the hiring of men to work as longshoremen is governed by rules such as obtained in the association complained of with respect to their qualifications and wages is in no respect violative of the acts of Congress.

The decree was affirmed.

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BENEFIT FUNDS—CONTRACT TO FURNISH MEDICAL ATTENTION—DUTY OF EMPLOYER—*Sloss-Sheffield Steel & Iron Co.* v. *Maxwell, Court of Appeals of Alabama (March 17, 1295), 104 Southern Reporter, page 841.*—J. W. Maxwell, employed by the defendant company, had a severe attack of rheumatism and called upon defendant's physician for treatment. He was treated from about May, 1920, until about the same time in 1921, when he was told by the physician to return to his office in two or three weeks. At the end of that time Maxwell was unable to walk and requested the physician on several occasions to call, but the physician did not do so. Maxwell brought an action for damages for the injuries suffered during the period the

physician refused to call, and from the judgment in his favor the employer appealed.

It appeared from the evidence that the company collected from the plaintiff's wages the sum of $1 a month, to be used in furnishing plaintiff with medical attention in case he became sick while in its employment. The dollar was collected for the month of April but not for May, 1921. The plaintiff based his action upon a contract, the consideration being the monthly sum collected from his wages. The court of appeals said that it was generally recognized that "when an employer makes a valid contract with an employee to furnish medical attention in case of sickness or injury, and fails to do so, there is a liability on the part of the employer to the employee for the damages resulting from such failure."

It was insisted that the record did not show that the plaintiff paid the dollar for May, 1921, and that therefore any sickness during that month was not required to be treated under the contract by the employer's physician. It was admitted that the sum was paid in April, and on this point the court quoted with approval from the case of Scanlon *v.* Galveston, H. & S. A. Ry. Co. (Tex. Civ. App., 86 S. W. 930), in which the court said:

> The testimony of plaintiff was sufficient to show that the monthly deduction of wages was made with the understanding that the employee, when sick or injured, should be entitled to the hospital benefits at defendant's expense. This would imply and mean, in the absence of an understanding to the contrary, the continuance of the benefits while the sickness or injury required same.

The court of appeals was of the opinion that under the contract to furnish medical attention the employee had until the end of the month within which to make the payment, where the installment for the preceding month had been paid, and there was no suggestion that he had been discharged. On an application for a rehearing the court held that under the contract the employee, having paid the sum required, was entitled to medical attention provided by the contract, irrespective of what the employer did with the money collected and notwithstanding the fact that the employer received no benefit therefrom. The application for a rehearing was overruled and the judgment was affirmed.

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BENEFIT FUNDS—RAILWAY RELIEF ASSOCIATION—RULES—RIGHT OF APPEAL.—*Hanson* v. *Chicago, Burlington & Quincy R. Co., Supreme Court of Wyoming (February 3, 1925), 232 Pacific Reporter, page 1101.*—Walter N. Hanson, a locomotive engineer in the employ of the defendant railroad company, was a member of the relief department of the company and by this action sought to recover

benefits alleged to be due him. The department was under the management of a superintendent, subject to the final control of an advisory committee composed of six employees and six members chosen by the company, with the general manager of the company as ex officio a member and chairman. The fund of the department was derived from contributions taken from the wages of the members, the company holding the money, paying interest thereon, and paying all operating expenses of the department. Hanson, while on his way home on September 14, 1908, was assaulted and suffered an injury to his eyes. He received medical attention from the department and was unable to return to work for nine weeks. In the latter part of 1917 he made a claim to the department for accident benefits because of impaired vision, which was due to a relapse of the old injury, alleging that he was physically unable to work because of such impaired vision. The superintendent, after considering the medical examinations and reports of physicians, sent a letter to the plaintiff stating that in view of the reports received, "I can not do otherwise than uphold the classification of your case as one of sickness, and can only pay you sick benefits." The letter also stated that he could appeal to the advisory committee. The plaintiff answered by letter stating that he was not satisfied with the decision, and further, "I note what you say about the advisory committee. This will not be considered by me, as it would only be time wasted." In conclusion he stated that if the superintendent would not classify the case as an accident he would bring court action "to collect my just dues."

No appeal was ever taken to the advisory committee, but an action was instituted to which the defendant pleaded as a defense the rules and regulations of the department, contending that the plaintiff had to exhaust his remedies within the organization before invoking the aid of the court. From a directed verdict and judgment for the defendant the plaintiff appealed.

Membership in the association was voluntary, and the regulations provided one scale of payments for accident benefits and one for sick benefits. The rights considered by the court were contract rights and the action was brought thereon. The supreme court, on reviewing the record, held the department to be a beneficial association and that the rights of the members were governed by the contract of membership and the by-laws. The fact that the plaintiff sued on the contract was held to be a ratification of it and inconsistent with his contention that it was procured by duress or undue influence.

The plaintiff contended that the regulations of the department relative to an appeal were unreasonable in that the committee was not required ever to hear an appeal, and further because the com-

mittee could hear one at such a place as might impose hardship on appellant, without notice to the latter or opportunity to be heard. The court took the position that the regulations of such relief associations must be reasonably construed.

No case, however, has been called to our attention, nor have we been able to find one, which holds that provisions for appeal, such as are now before us, are unreasonable. Conceding, though there is authority to the contrary, that the by-laws of a benefit association must be reasonable, it is certainly true they must in all cases receive a reasonable construction.

In the case at bar, as we have seen, the regulations provide that an appeal "shall be heard by said committee without further notice at their next stated meeting, or such future meeting or time as they may designate."

Construing the regulation in the light of the decisions and definitions, the court held that the plaintiff's rights were sufficiently safeguarded. Also, the hearing of appeals without further notice was held reasonable, as the members could, by reading the by-laws, become familiar with the time of stated meetings.

The plaintiff elected to enforce his claim to accident benefits in the courts, but "the trouble is he has disregarded a binding provision" of his contract of membership. That provision was that appeals must be made to the advisory committee. The supreme court considered the regulation mandatory, and not merely permissive, and held that, failing to take the appeal, he could not sue at law for benefits under the contract.

The judgment of the trial court in directing a verdict for the defendant was therefore affirmed.

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CONTRACT OF EMPLOYMENT—AGREEMENT NOT TO ENGAGE IN COMPETING BUSINESS—INJUNCTION—*City Ice Delivery Co.* v. *Evans*, *Court of Civil Appeals of Texas* (*May 23, 1925*), *275 Southwestern Reporter, page 87*.—The company named, a corporation engaged in the business of delivering ice in the city of Dallas to both wholesale and retail consumers, purchased the ice business and good will of Phillips & Hall at about the time that Carl B. Evans entered their employment. Prior to this employment, Evans, defendant in this action, had been in the employ of Phillips & Hall for about five years in charge of an ice wagon. In order to secure the benefit of the good will that was part of the consideration for the purchase price from Phillips & Hall, the plaintiff ice company endeavored to secure, as employees, all of Phillips & Hall's delivery men. A contract of employment was drawn up similar to one used by Phillips & Hall, which provided among other things that the company employed the drivers at a salary of not less than $21 a week; that

the driver was to devote his entire time to the work; that the driver was not to engage, either on his own account or as agent for another, in the ice business within the territory covered by the route he was put in charge of, or within five squares therefrom, for a term of three years immediately after his employment ceased for any reason. It was stated that this agreement was made for the protection of the good will and business which may have been or might be acquired. Evans signed such contract of employment on November 28, 1924, and continued working until the 16th of February, 1925, when he entered the employment of a competing ice company and began the delivery of ice within the same district. Plaintiff's business in the district had amounted to the daily delivery of about 1 ton or 1½ tons of ice, but following Evan's employment in the other company it fell off to about 100 pounds of ice. The plaintiff secured a temporary writ of injunction, which was discharged by an order of the district court of Dallas County, and from this order the plaintiff appealed. The defendant contended that the provisions of the contract binding him not to engage in a similar business for himself or another within the territory or five blocks adjacent to it for three years from the time of the termination of his employment was invalid as lacking consideration, and further that it was against public policy and restricted his freedom of employment.

The court of civil appeals, in reviewing the record, observed that it was a general rule of the law "that all contracts and covenants whose tendency is to destroy legitimate competition in trade are against public policy and void." The rule, however, was held not to apply in this case on the ground that the covenant manifested no such tendency.

The weight of authority was held to be that such covenants are valid, the test generally applied in determining their validity being whether or not restraint placed upon the employee is necessary for the protection of the business or good will, and whether it imposes on the employee any greater restraint "than is reasonably necessary to secure protection to the business of the employer or the good will thereof." The burden was upon the company to establish the necessity for and the reasonableness of the restrictive covenant, and the evidence was held to establish the necessity for this covenant so far as it related to the immediate territory in which Evans delivered ice to plaintiff's customers, but the provision prohibiting Evans from entering the employment of another within five adjacent squares was held not enforceable, it being considered that the plaintiff had established no good will outside of the certain defined territory.

The injunction was therefore modified so as to embrace only the original district, and the case was reversed and remanded with

instructions to the trial court to issue a temporary writ of injunction prohibiting Evans from entering the certain defined territory as the employee of another.

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CONTRACT OF EMPLOYMENT—AGREEMENT NOT TO SOLICIT CUSTOMERS—INJUNCTION—*New York Linen Supply & Laundry Co. (Inc.) v. Schachter et al., Supreme Court of New York, Special Term (July 9, 1925), 212 New York Supplement, page 72.*—Abraham Schachter was discharged from his employment as a driver of a laundry wagon for the New York Linen Supply & Laundry Co. (Inc.). The contract of employment provided that irrespective of the time, manner, or cause of its termination, he should not solicit the customers of his former employer, and further that he should not engage in the same business for a period of five years. Schachter was discharged for good cause according to the complainant, but wrongfully according to himself. Action was brought by the New York Linen Supply & Laundry Co. (Inc.) against Schachter and the new employer for an injunction to restrain the soliciting of the plaintiff's customers until trial of the action.

The supreme court in special term was of the opinion that an injunction must be granted in a clear case of this character, irrespective of the dispute of the wrongfulness of the discharge, under the authority of Eastern New York Wet Wash Laundry Co. *v.* Abraham (173 App. Div. 788, 160 N. Y. Supp. 69). If the period of restraint upon the employee after the termination of the employment is reasonable, the supreme court held, the negative covenant will be enforced.

In Wallach Laundry System *v.* Fortcher (116 Misc. Rep. 712, 191 N. Y. Supp. 409), the court held a two-year period of restraint was reasonable and brought the case within the rule of the Abraham case, supra, in which the period was 18 months. However, the supreme court said in conclusion that: "In the instant case I can not say that the plaintiff has established a clear and convincing claim of the reasonableness of the covenant extending for five years."

The granting of injunctive relief prior to trial was accordingly denied.

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CONTRACT OF EMPLOYMENT—BREACH—AWARD BY RAILROAD LABOR BOARD—ACCEPTANCE OF ARBITRATION—STRIKE AS CAUSE OF DELAY IN RETURN TO WORK—*Hoey v. New Orleans Great Northern R. Co., Supreme Court of Louisiana (June 22, 1925), 105 Southern Reporter, page 310.*—Nicholas J. Hoey, prior to November 24, 1920, was employed by the New Orleans Great Northern Railroad Co. at

85 cents an hour, with time and a half for work on Sundays and all legal holidays. On that day he was summarily discharged. Rule 37 of the national agreement by the railway operatives and railway employees provides that no employee may be discharged without a hearing. Hoey appealed to the Railroad Labor Board, and on May 18, 1922, decision was rendered that he should be reinstated with seniority rights unimpaired, and paid for time lost less his earnings in other employments. A rehearing was denied the railroad. On August 7, 1922, during the progress of a strike by a union of which he was a member, plaintiff was notified to report for work; he notified the company that he would report as soon as the strike was ended. The railroad wrote plaintiff and declared its readiness to pay the money due him for the time lost because of suspension and asked for a statement, which he promptly rendered, but no payment was made thereon. Plaintiff brought an action alleging that he had made every honorable effort to return to work, and that there was due him $2,556.32, the difference between the amount due under his employment with the company and the amount he had earned since. The suit was dismissed and the plaintiff appealed, securing a reversal of the judgment below.

The supreme court considered the defendant's two grounds for exception: (1) That the transportation act does not provide any means for enforcement of its decisions, nor does it give either of the parties the right to enforce the decree in the courts; and (2) that the plaintiff failed to comply with the part of the rule requiring him to return to work and therefore can not enforce that part requiring the railroad to pay his wages and at the same time refuse to return to work. In considering the transportation act (C. S. Ann. Supp. 1923, sec. 10071¼ et seq.), the supreme court said that it was not provided in the act that the successful party may enforce the award made in his favor. The only constraint to be placed upon the parties to do what it is decided they should do is the moral constraint arising from the right of the board to publish its decisions. As to the question of plaintiff's refusal to return to work, the supreme court was of the opinion that he was within his legal rights in refusing to return "while his labor organization was engaged in strike."

The court ruled that the railroad, by its action in acknowledged compliance with the decision of the Railroad Labor Board, had elected to accept the decision of the board and to reinstate Hoey and to pay him for time lost, less the amount he may have earned in other employment. The plaintiff contended that it was thereby placed in the position of one who had submitted to arbitration and

had accepted the decision of the arbitrators, and was estopped from denying plaintiff's right of recovery. To this the court said:

Without passing upon the soundness vel non of this argument, we think plaintiff is entitled to a right of action to recover such amount as he may be able to show is due him under the said decision.

The supreme court further held that when the railroad notified Hoey of its desire to comply with the decision of the board he was misled to his detriment to forego the "immediate exercise of his legal right to require a publication by the Labor Board of its decision and the failure of the defendant company to comply therewith," so that the railroad was equitably estopped from contesting the award.

The fact that Hoey refused to return to work on a certain date was considered as not a good defense to his demand for compensation to such time the court saying:

Inasmuch as plaintiff is not suing for anything beyond the date of his reinstatement by defendant, his reservation of the right to interpret his reinstatement as existent and continuous can not be construed as a refusal to accept the reinstatement which had been theretofore made. On the contrary, it was merely a notice that he would stand on said reinstatement.

The judgment appealed from was therefore set aside and it was ordered that judgment be entered in favor of Hoey. The cause was remanded and reinstated on the docket of the district court for further proceedings according to law.

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CONTRACT OF EMPLOYMENT—BREACH—DISCHARGE WITHOUT NOTICE—GROUNDS—*Ehlers* v. *Langley & Michaels Co., California District Court of Appeal (April 8, 1925), 237 Pacific Reporter, page 55.*—C. W. Ehlers, employed as manager of a department for the sale and installation of drug-store fixtures by Langley & Michaels Co., was dismissed from his employment without notice. He brought an action to recover the amount of salary and commissions accruing during the 40-day period following his discharge, the contention being that the summary dismissal was in violation of the terms of the contract of employment. The trial court awarded a judgment on the verdict in the sum of $814.57, from which judgment the defendant appealed. On this appeal the judgment below was affirmed.

The main contention of the defendant company is grounded upon the principle of law that "it is the duty of the servant to obey all lawful and reasonable orders and instructions of the master, and that willful disobedience thereof warrants peremptory dismissal." (Civ.

Code, secs. 1981, 2000.) The court found no evidence of such disobedience, and continuing, said:

While it is doubtless the law, as appellant contends, that willful disobedience by the servant warrants peremptory dismissal by the master, nevertheless before the law will allow an employer to ignore the specific terms of a contract of employment, which requires notice to be given the employee of its proposed termination, it must appear that there has been some rule, order, or instruction of the employer violated, and that such violation was committed willfully and deliberately on the part of the employee.

Although it is not necessary that the violation be perverse or malicious, or that it be the result of an evil intent toward the master, it must be made clear that the thing done or omitted to be done was done or omitted intentionally, the rule being grounded upon the theory that willful disobedience of specific instructions of the master, if such instructions be reasonable and consistent with the contract of employment, is a breach of duty—a breach of the contract of service.

Being of the opinion that the jury was justified in its conclusion and that there was no breach of duty on the part of the plaintiff, the court affirmed the judgment.

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CONTRACT OF EMPLOYMENT—DISCHARGE—RIGHT TO SUBSEQUENT COMMISSIONS—*Williams* v. *Edward A. Thompson (Inc.)*, *Supreme Court of New York, Appellate Term (April 14, 1925)*, *209 New York Supplement, page 309.*—Fletcher Williams, a former employee of Edward A. Thompson (Inc.), brought an action to recover commissions upon business obtained by him for the defendant under the terms of a contract which provided:

We hereby agree to pay you a commission of 5 per cent on the amount charged by us for services rendered any customers brought to us by you, said 5 per cent to be your property, and to continue to pay this 5 per cent as long as we accept business from any of these customers.

Williams claimed to have procured as customers Stagg & Hungerford prior to his discharge. The trial court allowed commissions on this account up to the time of the discharge, and Williams brought an appeal claiming insufficient relief.

The supreme court noted that the letter or contract specifically stated that the defendant is "to continue to pay this 5 per cent as long as we accept business from any of these customers." There being no suggestion that this obligation was conditional upon a continuance of Williams' employment to solicit business for the defendant, the supreme court held that "when he procured a customer he was to get commission on that customer's business so long as the defendant continued to do business with that customer."

The judgment was therefore reversed and a new trial ordered.

CONTRACT OF EMPLOYMENT—ENFORCEMENT—STATUTE OF FRAUDS—*McLellan* v. *McLellan, Supreme Court of South Carolina (February 28, 1925), 126 Southeastern Reporter, page 749.*—Albert McLellan, a rural letter carrier of the Federal Government, in his spare time worked for his uncle, the defendant, for his board and lodging. Yielding to the requests of his uncle to quit the Government service and work full time for him, Albert McLellan resigned and worked for the defendant 38½ months. In making his proposal the uncle promised "a job just as permanent as the mail route as long as we can get along," and at the same rate of pay. When the contract terminated the defendant owed the plaintiff $1,306.25, to collect which Albert McLellan brought suit. A judgment of nonsuit was granted because the contract was considered by the trial court as being within the statute of frauds. The plaintiff appealed.

The supreme court, quoting with approval from Walker *v.* Railroad Co. (26 S. C. 90, 1 S. E. 373), said:

> But even if the contract, when originally made, was obnoxious to the statute, yet, after it had been fully performed by the plaintiff, the defendant could not then avail itself of the statute. If, as we must conclude after the verdict of the jury, the plaintiff continued to furnish material to the railroad company under the original agreement, which was afterwards recognized and continued by the road masters of the defendant company, without any notice to stop, then the plaintiff, having fully performed his part of the contract, is entitled to recover, * * * even if the contract, when originally made, could be regarded as within the statute [of frauds].

The sum sued for in this instance was for labor actually performed, and the supreme court reversed the judgment and remanded the case for a new trial.

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CONTRACT OF EMPLOYMENT—ENTICING LABORERS—CONSTRUCTION OF STATUTE—*Rhoden* v. *State, Supreme Court of Georgia (September 17, 1925), 129 Southeastern Reporter, page 640.*—The Penal Code of Georgia, section 125, declares:

> If any person shall, by offering higher wages or in any other way, entice, persuade, or decoy, or attempt to entice, persuade, or decoy any servant, cropper, or farm laborer, whether under a written or parol contract, after he shall have actually entered the service of his employer, to leave his employer during the term of service, knowing that said servant, cropper, or farm laborer was so employed, he shall be guilty of a misdemeanor.

Dave Rhoden was charged with enticing an employee of another to leave the employment during his term of service. Error was brought from a judgment of conviction.

Mr. Justice Atkinson, speaking for the supreme court, which upheld the statute, quoted from the case of Employing Printers' Club

*v.* Doctor Blosser Co. (122 Ga. 509, 50 S. E. 353, 356), in which it was said:

The malicious procurement of a breach of contract of employment, resulting in damage, where the procurement was during the subsistence of the contract, is an actionable wrong. * * *

The early English cases limited the action to the enticement of menial servants, but the later cases, beginning with Lumley *v.* Gye (2 E. & B. 216), have extended the doctrine beyond menial servants; and by the modern interpretation of this doctrine by the English courts the rule is extended to a malicious interference with any contract.

The supreme court considered the case Hoole *v.* Dooroh (75 Miss. 257, 22 So. 829), in which the Mississippi statute was attacked as being unconstitutional on the grounds, among others, that it offended the due process clauses of the State and Federal Constitutions. The court there, sustaining the constitutionality of the act, said:

The statute, Code 1892, sec. 1068, which forbids, under civil and criminal penalties, any person interfering with a tenant or laborer of another during the continuance of the lease or contract of service, is not class legislation, since it applies to all persons; and, as it condemns only a breach of civil duty, is not violative of either the Federal or State Constitutions.

It was considered by the court that what was applicable to the statute of Mississippi was equally applicable to the Georgia statute, and for the reasons advanced in the Mississippi case it was held that the Georgia law was valid. The judgment of the court below was therefore affirmed.

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CONTRACT OF EMPLOYMENT—ORAL MODIFICATION—PROFIT SHARING—*M. Shiloff Grocery Co.* v. *Eberline et al., Supreme Court of Iowa (February 17, 1925), 202 Northwestern Reporter, page 86.*—One Eberline was employed by the plaintiff grocery company as a butcher, in charge of that part of the business. At the end of the first year of the employment a settlement was had between the parties, and in April, 1922, the beginning of the second year, the contract of employment was reduced to writing, whereby the defendant was to receive $35 a week as salary, and further:

That if the said employment shall have continued satisfactorily for the balance of said year, then, and in that event, first party agrees to pay to second party, as additional compensation, an amount equal to one-half of the net profits of the meat business for the year 1922.

Eberline quit on August 14, 1922. Some time later the employer brought suit on a note in the amount of $25 and on account in the sum of $141.94, to which action Eberline filed a counterclaim. There

was no question on appeal as to the claims of the plaintiff, and the jury allowed them in full, but the company appealed from a judgment allowing a substantial amount of the counterclaim.

The defendant Eberline pleaded the written contract, and alleged that it had been modified orally to the effect that settlement for profits should be made quarterly instead of annually. He proved the amount of the profits for the first quarter up to July 3, and from July 3 to August 14. The plaintiff contended that the oral modification was void and of no effect "because it was wholly without consideration," that the written contract was executory and that the proviso as to profit sharing imposed no obligation upon the defendant, but acted only as an inducement to continue the employment, and if it became insufficient as an inducement the defendant had complete liberty to quit. It appeared that the employer increased the inducement upon the defendant declaring his purpose to leave, and the supreme court said: "We see no reason for saying that the promise of the employer lacked consideration. * * * We hold, therefore, that the oral modification was not invalid."

Whether the employer and employee actually did orally modify the contract was considered by the court as a proper question for the jury, and that it was submitted in proper form. The oral agreement pleaded and proved by the defendant "contemplated the allowance of profits only for a completed quarter of service on his part. Such was the inducement held out to him. He did not complete the quarter following July 1, and was not entitled to cash profits upon a fraction thereof."

The supreme court therefore considered the verdict as unauthorized, and held that nothing should have been allowed the defendant as profits after the first quarter. The court concluded that if the defendant should within 30 days "file in this court a remittitur of that part of his judgment in excess of the final balance here indicated, the judgment will be affirmed as so modified; otherwise it will be reversed."

The judgment was accordingly affirmed on condition.

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CONTRACT OF EMPLOYMENT—RETIREMENT PAY—STATUS OF OFFER OF EMPLOYER—CONSIDERATION—*Shear Co.* v. *Harrington, Court of Civil Appeals of Texas (October 30, 1924), 266 Southwestern Reporter, page 554.*—H. P. Harrington, age 76, was employed as shipping clerk at the branch house of the defendant company at Hillsboro. In February, 1921, Harold Shear, the vice president of the company, told Harrington that in view of his more than 20 years' service to the company they were going to retire him upon a salary.

On February 5, 1921, the plaintiff Harrington received a letter from the vice president referring to the conversation, and stating in part:

We now think that this is the logical time to make whatever change will be necessary there, and we think that in 30 days, or whenever we can secure a man in whom we have confidence, we would be willing to retire you with a salary of $75 per month the rest of your life. We have a man in mind, and you may expect to hear from us very soon as to the exact time we will need you there. We want you to feel that we look on you as a faithful servant, who has through a long period of years given us good service. We do not offer you this salary as charity. We believe that you are fully entitled to it on account of long and diligent service in our employ.

Plaintiff replied offering his thanks and his services if at any time they desired to use them. On March 1, 1921, he was relieved from service and was paid $75 a month until August, 1921, when he received a letter from the president of the company, Mrs. Shear. The letter in substance stated that due to business depression his retirement pay would have to be decreased to $60 a month. The payments of $60 a month were made from September, 1921, to and including March, 1922, when plaintiff received another letter from Mrs. Shear on March 18, in which she said that he would receive the April check but that the allowance of $60 would be discontinued with that check. Just before the receipt of the letter of March 18, 1922, the shipping clerk who had taken the plaintiff's place became ill and plaintiff, at the request of the manager, took his place for four days. Nothing was said about paying him for those four days. An action was commenced to recover the amount of the pension, and from a judgment in the sum of $1,140 in favor of the plaintiff the defendant appealed.

The court of civil appeals on review said:

It appears that the defendant's offer to retire plaintiff from active service and pay him such salary for life, to be binding and enforceable, must have been supported by some consideration other than his mere assent to or acceptance of such offer. The great weight of authority is that a past consideration, which imposed no legal obligation at the time it was furnished, will not support a subsequent promise to confer a benefit. The defendant in said letters stated that the plaintiff was entitled to be retired from active service on a salary for life, on account of long and diligent service in its employ. There is no contention that such service was not fully paid for at the time it was rendered. All legal obligation was discharged by such payment. If defendant, in making the offer in question, was actuated merely by kindly feeling and generous impulse toward the plaintiff, growing out of the recognition of such long and faithful service, such offer was based on motive and not on consideration, and can not be enforced in court.

The plaintiff offered to work when needed, but the court said, "plaintiff's said offer was merely a supplemental and gratuitous one and was lacking in mutuality, and therefore not binding upon nor enforceable against him."

The judgment was therefore reversed and rendered for the defendant company.

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CONTRACT OF EMPLOYMENT—RIGHT TO DELIVER SPEECH—PROPERTY RIGHT—INJUNCTION—*City of Louisville et al.* v. *Lougher, Kentucky Court of Appeals (May 29, 1925), 272 Southwestern Reporter, page 748.*—A secret organization had employed E. H. Lougher to deliver addresses for an agreed compensation. He had secured a vacant lot in the city of Louisville, Ky., for the purpose of carrying out this contract, but the police officers of the city, under instructions from the board of public safety, undertook to prevent the delivery of the address. Lougher sued for an injunction against any interference with carrying out the contract, claiming that their action was an invasion of his property rights, since, unless he could deliver his speech, he would not receive his agreed compensation.

On hearing it was found that the subject matter of the address was not unlawful, that it was not on any forbidden subject, and that it did not appear that its delivery would create a disturbance of the peace. The police force of the city were required to maintain order and suppress riots, and it was claimed that the city might take such preventive measure as would avoid disturbances; but it was held that unless it was shown that disturbances would be the probable result of the address no interference was lawful, and an injunction was accordingly issued. The city of Louisville and the police officers, defendants, appealed.

The court of appeals observed first that under subsection 4, section 1, of the constitution, the plaintiff had a right to communicate his opinions through an unobjectionable proposed speech, and that subsection 6 entitled the members of an audience to hear him if assembled in a peaceful manner. The proposed assembly in the case at bar was held not an unlawful assembly, the court adding, however, if the plaintiff or any of his sympathetic hearers "should engage in any unlawful speech or conduct after the assemblage had been formed of such a nature as to be reasonably calculated to produce a breach of the peace, then the assemblage would become an unlawful one, and subject to dispersement."

It was insisted that a court of equity could not enjoin police officers from such interferences as were involved in this case, since to do so

" would be the enjoining of criminal proceedings." The court of appeals admitted that it may be conceded that generally police officers will not be so enjoined, but that " such officers will be enjoined ' from illegally doing irreparable injury to the property of individuals,' and the law seems to be well settled that, wherever it is necessary to protect property rights, police officers may be enjoined, and especially so where the remedy of law is inadequate. * * * If they have no duty in the premises the reason for invoking the rule against their being enjoined ceases."

It was said that the old theory was still in force " that one may hold his property undisturbed," and " will be protected in its enjoyment by a court of equity, since he is not compelled to relinquish it to a wrongdoer and to accept in lieu of it what a jury might award him in a suit for damages. Plaintiff's property right, as manifested by his pleading and proof, to deliver the address in this case is as much a property right, as long as he transgresses no law, as is the owner of any other species of property, and on the showing made in this record we are unable to detect wherein the court erred in enjoining the defendants from absolutely preventing plaintiff from attempting to deliver his address."

The court of appeals, in conclusion, having found that the address was not offensive, that portion of the injunction permitting the delivery of the address was affirmed, but the absolute restraint on the police force against " disturbing or dispersing any audience or audiences assembled to hear plaintiff deliver said address or addresses " at any time was held to be too broad. Under the injunction as granted by the court below, it was considered that the officers would be " powerless to preserve the peace or arrest the offenders against the law in the event of any of the occurrences above indicated." This provision was accordingly reversed, with directions to modify.

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CONVICT LABOR—MANUFACTURING IN STATE PRISON—MONOPOLY—CONSTITUTIONALITY OF STATUTE—*Rice* v. *State ex rel. Short, Attorney General, Supreme Court of Oklahoma (December 9, 1924), 232 Pacific Reporter, page 807.*—The State of Oklahoma sought to enjoin Carl Rice and J. E. O'Neil, members of the State board of public affairs, constituting the board of prison control, from entering into a contract with the Cherokee Manufacturing Co. whereby the State was to manufacture shirts at the State penitentiary, with an exclusive option to the company to buy any excess. The complainant contended that the contract violated the constitution, which prohibited the contracting of convict labor; that it did not constitute the exercise of a governmental function; that it created a monopoly;

that the manufacture of shirts in competition with free labor was not business for a public purpose; that it granted exclusive privileges; that it was ultra vires; and that it was a misapplication of public money. In determining the validity or invalidity of the contract the supreme court considered whether or not it was in violation of either the spirit or letter of the constitution, for if it violated either "it must be held invalid."

Section 31 of article 2 of the constitution provided that the right of the State to engage in any occupation or business for public purposes should not be denied or prohibited, and the supreme court took the view that "if the business mentioned in the contract is for a public purpose it finds sanction in the constitutional provision above referred to." In holding that the business was for a public purpose the court said:

> The fact that such employment may produce a commodity to be sold on the market in competition with goods produced by free labor does not render the purpose a private one.
>
> The State is entitled to the labor and service of its convicts while confined in its prisons, and has the authority to produce by such labor things of commercial value. This right must be conceded, and having this right, it necessarily follows that the State has the implied power to sell and dispose of the commodity produced. In so doing the State should be regarded as performing a governmental function, and not as being engaged in a purely private commercial transaction.

The statute having granted authority to the State board to install such business enterprises to employ the inmates of the prisons or institutions, the court was of the opinion that "this grant of authority is general, and carries with it everything reasonably necessary to make it effective. The contract finds sanction in both the constitution and statute, and is not ultra vires."

As to the contention that the contract amounted to a misapplication of public funds, the supreme court referred to the statute creating a State prison revolving fund for the penitentiary and reformatory, under which the State board could, with the approval of the governor, install a business enterprise and use the revolving fund for that purpose. (Comp. St. 1921, secs. 8660–8662.)

The charge that the contract created a monopoly was, in the opinion of the court, "without foundation."

> It can not be said that the contract under consideration contains any feature or discloses any intent to restrict trade. It is not attempted to control the supply or demand for either shirts or the material of which they are made. We fail to see in this contract any element of monopoly which does not arise in the ordinary transaction of sale and purchase.

Neither is the contract violative of the constitution and laws of the State in that it grants an exclusive privilege and stifles competition.

Section 51, article 5, of the constitution provides:

The legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State.

It was not contended that a law granting special privileges had been passed. The legislature authorized the State to establish factories in the penitentiary, and because the contract provides for the sale of the product of a factory so established to the company "does not amount to a grant to it of an exclusive right, privilege, or immunity within the meaning of the constitutional inhibition."

Section 2, article 23, of the constitution provides:

The contracting of convict labor is hereby prohibited.

The court having taken the stand that the State had the right to engage in the business contemplated as it was for a public purpose, the question arose whether "the State proposes in good faith to embark in the business of manufacturing and selling work shirts, or whether the real object of the contract is the contracting of convict labor." The petition did not charge bad faith.

In construing the constitutional provisions relating to convicts the supreme court said:

We can not believe that the constitution makers had in mind the protection of free labor from competition with convict labor. Had they so intended they would have said so.

The court indorsed the sentiment expressed in Henry *v.* State (87 Miss. 1, 67, 39 So. 856, 875), as to the beneficial purpose of the State in furnishing employment to convicts and then concluded:

Having concluded that it was not the purpose of the constitution to prohibit convict labor from coming into competition with free labor, it can not be said the contract is invalid because the product of the labor of convicts may be placed upon the market in competition with like articles produced by free labor. One can not read this contract and say that, by its terms, the State is contracting convict labor to the Cherokee Manufacturing Co. It may be, as contended by the amici curiae, that this is the true purpose, but we must construe the contract according to its terms. We are not justified, in the absence of a charge of fraud or bad faith, in looking beyond the plain terms of the contract to find some excuse for declaring it invalid.

If the policy of the State in maintaining factories and other business enterprises in its penal institutions in competition with the citizens of the State engaged in like enterprises is wrong, the evil must be remedied by the legislature, and not by the courts.

The judgment of the trial court was therefore reversed, with directions to sustain the demurrer to the petition.

CONVICT LABOR—MARKING GOODS—CONSTRUCTION OF STATUTE—ENFORCEMENT—*Choctaw Pressed Brick Co.* v. *Townsend, Warden of State Penitentiary, Supreme Court of Oklahoma (February 24, 1925), 236 Pacific Reporter, page 46.*—The Choctaw Pressed Brick Co. brought an action in the district court for an injunction against the warden of the Oklahoma State Penitentiary to enjoin the sale of "convict-made pressed brick" which "do not bear the label which section 11015 of the Compiled Statutes of 1921 requires to be borne by 'convict-made goods.'"

Without stating the grounds the trial court sustained a demurrer to the petition, and the plaintiff appealed.

It appeared that the plaintiff was a corporation engaged in the manufacture and sale of pressed brick at McAlester, Okla., the city at which the State penitentiary is located. The claim was made that, because of the defendant's failure to label their products as "convict-made goods," the plaintiff was forced into competition with such goods, and as a result thereof was unable to compete with the prices and would thereby be forced to go out of business. It was contended that the business of the plaintiff would be irreparably damaged unless the defendant warden and others be restrained from placing such goods on the public market in violation of the law.

Sections 11015 and 11016 of the Compiled Statutes of 1921 provide that all articles of clothing, etc., or other articles of merchandise manufactured by convicts shall be marked "convict-made goods," prescribing a penalty for violation thereof. The supreme court, on reviewing the record, observed that the legislature had a definite twofold object in view when it enacted the law; such objects being "to protect free labor against competition with convict labor, and to prevent a deception being practiced on the public by the sale of convict-made goods without labeling them as such." The court held that the allegations of pecuniary injury to private property rights by unlawful acts of public officers causing irreparable injury are sufficient to constitute a ground for injunction and to have the cause of action as stated. To the extent that such statutes were intended to prevent financial injury to private rights they are civil in their nature and are "not subject to the strictness of construction with which penal laws are construed."

To the contention that the injunction would not be against the officers, the court quoted from 22 Cyc. 881:

> Although a State itself can not be enjoined, yet when State officials are acting in an unconstitutional or otherwise illegal manner they are not regarded as acting for the State, and they may be enjoined.

After an examination of the decisions in support of the text announced, the court held that the rule seemed unquestionably settled

that "while equity will not lend its processes to prevent the commission of crimes, not to prevent public officers from the enforcement of penal statutes, yet when the commission of a crime results in pecuniary injury to private property rights * * * then the person injured has a rightful resort to equity, and equity will grant relief."

However, it was held equally well settled "that the fact of pecuniary injury must be established by clear and convincing proof. Therefore, the fact of pecuniary injury in the instant case being conceded upon demurrer, there can be no question * * * but that equity will enjoin the State officers in question from continuing such injury."

The judgment below was therefore reversed and the case remanded.

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EMPLOYER AND EMPLOYEE—SERVICE LETTER—CONSTRUCTION OF STATUTE—*Soule* v. *St. Joseph Ry., Light, Heat, & Power Co., Kansas City Court of Appeals, Missouri (June 29, 1925), 274 Southwestern Reporter, page 517.*—Section 9780 of the Missouri Revised Statutes of 1919 provides that an employer must give a service letter to employees leaving his service, and requires that such letter shall set forth—

* * * the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such employee has quit such service.

Harry Soule was employed by the defendant company as a motorman in the operation of a street car from July 15, 1918, until September 12, 1921. Soule requested a service letter three months later setting forth the nature and character of the service rendered and stating truly for what cause such employee quit the service. The request was made to the superintendent of the street railway department, who referred the matter to the superintendent of transportation. The letter given to Soule was as follows:

*To whom it may concern:* The bearer of this letter, Mr. Harry A. Soule, whose signature appears below, worked for this company as motorman from July 15, 1918, to September 12, 1921.

(Signed) O. F. Koss,
*Supt. of Transportation.*

HARRY A. SOULE.

Soule contended that he had presented the letter to several persons but had failed to secure employment. Soule brought an action for damages, alleging that on account of the refusal of the defendant to give him the service letter required by the statute, he has been unable to secure employment from other corporations and individuals. From a judgment for the plaintiff the defendant appealed.

It was observed by the court of appeals that the letter failed to meet the requirements of the statute, and it held that the defendant, having issued the letter upon the request of the plaintiff, was estopped from denying that a proper request was made. The defendant's testimony was chiefly directed toward a showing that Soule's services with the company were highly unsatisfactory, leading to the inference that he was discharged for this reason and that a letter in strict conformity with the statute could have been of no benefit to the plaintiff in securing employment.

There was no testimony tending to show that the failure to give the statutory letter had anything to do with the failure of the plaintiff to obtain employment, and the court held that to say that he was refused employment because he was not given such letter to which he was entitled "would be indulging in mere speculation, and a verdict based on speculation can not stand." The defendant's instruction including the foregoing should have been given, and its refusal was held error by the court on review.

It was urged that the court erred in excluding the company's evidence tending to prove the nature of the service rendered by Soule, and the reason or cause for his quitting; and in support of this it was insisted that such testimony was germane to the issues as tending to show whether or not a statutory service letter would have been of any actual value to the plaintiff. The court was of the opinion that such contentions were of no effect, because "the statute is mandatory, and it was not within the province of defendant to determine the effect of such a letter upon plaintiff's efforts to secure employment."

However, for the error in refusing the instruction prayed for as to damages, the judgment was reversed and the cause remanded.

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EMPLOYERS' LIABILITY—ACTION BY PERSONAL REPRESENTATIVE—CONSTITUTIONALITY OF STATUTE—*Stargo Mines Co.* v. *Coffee, Supreme Court of Arizona (July 14, 1925), 238 Pacific Reporter, page 335.*—Paragraph 3158 of the Arizona Civil Code of 1913 authorizes the personal representative to bring an action for the benefit of a deceased employee's estate. Isabel Carabajal, while working in the mine of the Stargo Mines Co. as a mucker, received injuries from which he died. G. L. Coffee sued as administrator to recover damages for the benefit of the estate of deceased, and the employer contended that the provision of paragraph 3158 was unconstitutional in that the law "should be limited in its objects to the surviving widow and children." It was contended that the extension of the law to the estate was in contravention and in violation of the fourteenth amendment to the Federal Constitution and section 4 of

article 2 of the State constitution. The jury granted the plaintiff $2,000, and from a judgment entered thereon the defendant appealed.

The supreme court observed that the employers' liability law in its general features had been many times passed upon by it and the Federal Supreme Court, and held to be constitutional. The principle of damages for personal injury or death without fault was considered justified on the theory that "they are incidents of the industry," and "can as well be charged to maintenance and overhead and passed on to the general public." It was considered not so much upon the industry or the employer as upon the general public. It was further observed by the court that whatever may have been the thought at one time, "the principle of allowing damages without fault is now thoroughly imbedded in the laws of this country." The reason for extending the benefits of the law to the estate "may not be as cogent and satisfying as those for extending them to the relatives, but can it be said that the estate is wholly foreign to the objects of the law?" One of the considerations of the legislature was that the creditors were to be protected, the legislature having named the estate of the deceased as a beneficiary and the estate not appearing to be wholly without the objects and purpose of the law, "the legislative decision is binding upon the courts."

Failing to see how it violates the State or Federal Constitution, the supreme court held the burden of proof to be upon the defendant, and that the defendant had not sustained that burden.

The judgment was therefore affirmed.

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EMPLOYER'S LIABILITY—ADMIRALTY—FEDERAL STATUTE—NEGLIGENCE—*United States Shipping Board Emergency Fleet Corporation* v. *O'Shea, Court of Appeals of District of Columbia (April 6, 1925), 5 Federal Reporter (2d), page 123.*—Jeremiah O'Shea, employed as a boatswain on the steamship *Dungannon* on January 7, 1920, received injuries arising out of his employment, resulting in damages, for which he sought the sum of $25,000 in a suit against the United States Shipping Board Emergency Fleet Corporation.

The jury found from the evidence that the vessel was owned by the United States, and while on the high seas bound for New Orleans the cargo space was found flooded with fuel oil which had escaped from the tank through the manholes, the oil being about 4 feet deep at the rear of the cargo space. During the next five days the plaintiff and seamen were ordered to work in the hold transferring the oil back to the tank by hand. The deck of the hold was slippery and the air filled with gas fumes, the ventilation being bad because of the hatches being partly closed, made necessary by the weather, and the men were compelled to work in underclothes and bare feet and to bathe in gasoline twice a day. Plaintiff protested on the

ground that the job was dangerous to the men's lives, but the captain read the regulations to them and said that he would land them on the Bermuda Islands within an hour if they did not go back to work. While attempting to fasten the plates on the manholes the plaintiff protested, "because if he let go the lifeline he would get killed," to which the mate replied that he knew it, but that the captain wanted the plates on. The plaintiff slipped and was thrown violently upon the iron coaming surrounding one of the manholes, and sustained severe and permanent physical injuries.

Plaintiff's action was brought under section 8337a, Comp. St. Ann. Supp. 1923 (act of June 25, 1920, 41 Stat. 1007), which provides that:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.

This action extended the admiralty law, adopting by reference the provisions of the employers' liability act of 1908, and its amendments (Comp. St., secs. 8657–8665, 1010) for the benefit of seamen who suffer personal injury in the course of their employment. The employers' liability act permits recovery from common carriers by any person injured while in their employ for such injury as results in whole or in part from the negligence of the officers of the carrier, or by reason of any defect or insufficiency due to its negligence.

The plaintiff received a verdict and judgment in the sum of $15,000, the defendant appealing.

It was the contention of the defendant that the statute in question applied only to merchant vessels not owned by the United States, but the court of appeals observed that it could find "no warrant in the letter or spirit of the act for such a limitation when the vessel is operated by others, as in this case." The vessel was, in fact, operated and managed by the Columbus Shipping Co., but it was merely acting as agent of the Fleet Corporation.

The defendant further contended that the Fleet Corporation was acting as a public agent, and as such could not be sued. This claim was held untenable on the authority of United States *v.* Strang (254 U. S. 491, 41 Sup. Ct., 165), and other cases cited. The defendant maintained that the evidence failed to sustain the charge of negligence, but the court overruled the claim on the ground that "the officers did not exercise a reasonable care for the plaintiff's safety when they required him to perform the work in question under the circumstances disclosed by the evidence." It was conceded that the

officers might be justified under given circumstances in ordering seamen into positions of great personal peril in the line of duty, but no such circumstances were considered as existing in this case.

To the defense of assumption of risk the court said:

The doctrine of "assumption of risk" implies at least some measure of freedom of action upon the part of the employee, whereas in this instance the plaintiff was compelled under penalties to obey the order of his officers. The doctrine, therefore, does not apply to the proven facts of the case.

The judgment was accordingly affirmed.

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EMPLOYERS' LIABILITY—ADMIRALTY—FEDERAL STATUTE—STEVEDORE IN COASTWISE TRADE IN ALASKA—*Alaska S. S. Co.* v. *McHugh*, (*April 13, 1925*), *268 U. S. 23, 45 Supreme Court Reporter, page 396.*—The employers' liability act of 1906, making common carriers in territories of the United States liable for injuries to or death of employee caused by "defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works," was offered as a basis of action in admiralty, and was held by the Supreme Court not to be applicable to injuries sustained by a stevedore employed by a shipowner, a common carrier engaged in coastwise trade in the Territory of Alaska, since the statute is not applicable to marine torts.

The question as to the liability of the carrier was submitted to the Supreme Court on certificate from the United States Circuit Court of Appeals for the ninth circuit. Mr. Justice McReynolds, speaking for the court, said:

This court has never held the act applicable to marine torts. To give it such construction would give rise to a grave constitutional question as to its validity and cause much confusion and uncertainty concerning the reciprocal rights and obligations of ships and those who work upon them. [Citing Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149, 40 Sup. Ct. 438, and other cases.] The language employed * * * opposes the suggestion that the purpose was to regulate purely maritime matters, from time immemorial subject to the law of the sea, which recognizes and enforces rights and remedies radically different from those of the common law.

In the absence of a clear and distinct enunciation of such purpose, we can not conclude that Congress intended to invade the field of admiralty jurisdiction, and materially alter long-recognized rights and established modes of procedure.[2]

[2] Some difficulty attaches to the understanding of this broad statement in view of the amendment of 1920 (see p. 37), which specifically extends to seamen the effect of "all statutes of the United States" modifying common-law actions by railway employees. The act of 1906 was obviously intended to be such a law. It was declared unconstitutional in its wide scope, as extending beyond the powers of Congress to legislate for interstate employees only, but was held valid as regards the District of Columbia and the Territories. No doubt its limited scope makes this law deficient in uniformity of application, but if that were the ground for its rejection in the instant case it would appear easy to have made that statement in lieu of the broad pronouncement of the opinion.

EMPLOYER'S LIABILITY—ADMIRALTY—REPAIRS ON COMPLETED VESSEL—EFFECT OF STATE LAW—*Robins Dry Dock & Repair Co.* v. *Dahl, United States Supreme Court (January 5, 1925), 45 Supreme Court Reporter, page 157.*—Lars Dahl, employed by the Robins Co. to do repair work on the steamer *El Occident*, then lying in navigable waters at Brooklyn, sustained serious injuries when a plank scaffold on which he was walking or standing broke and caused him to fall into the hold. An action was brought in the New York Supreme Court for damages for personal injuries received, alleging that the claimant was injured solely "by and through negligence in that the company did not furnish a safe place to work and failed to provide a safe scaffold as required by the labor laws of the State of New York." Verdict and judgment in the supreme court were affirmed in the appellate division, and the defendant brought error, on the ground that the trial court committed error in the instructions to the jury. The court charged the jury in part:

This is what we call a maritime tort, an action in negligence that is governed by the maritime laws, the admiralty laws, the laws that pertain to navigable waters in this country. * * * The law permits even a maritime case, such as should ordinarily be brought in the United States court, to be tried in a State court. * * * Under the common law the same rule applies in this case as the rules that I have laid down to you, that the burden is upon the plaintiff to prove that the defendant was negligent, and that he himself was free from any contributory negligence. In this case, however, comes a provision known as section 18 of the labor law (Con. Laws, c. 31). * * * No law of the State can modify or affect the rights of workmen who are operating under the maritime law. And it has been held that this section 18 of the labor law does not modify or effect the law, but may be read in conjunction with the law.

The United States Supreme Court, speaking through Mr. Justice McReynolds, said:

The alleged tort was maritime, suffered by one doing repair work on board a completed vessel. The matter was not of mere local concern, but had direct relation to navigation and commerce. The rights and liabilities of the parties arose out of and depended upon the general maritime law, and could not be enlarged or impaired by the State statute. They would not have been different if the accident had occurred in San Francisco.

The jury were distinctly told that they might consider the provisions of the local law in deciding whether or not the employer was negligent. No such instruction would have been permissible in an admiralty court, and it was no less objectionable when given by a State court. The error is manifest and material.

The judgment was therefore reversed.

EMPLOYERS' LIABILITY—ADMIRALTY—RIGHT OF INJURED SEAMAN TO MAINTENANCE AND CURE—*Morris* v. *United States*, *United States Circuit Court of Appeals*, *Second Circuit* (*November 10, 1924*), *3 Federal Reporter* (*2d*), *page 588*.—Charles Morris shipped as a "work-away" at 1 cent a month on the steamship *Polybius*, on a trip from Antwerp to New York City. He was set to work, and when the vessel was two days out, while carrying two heavy pails, he sustained a severe strain, resulting in a ventral hernia. No medical attention was given him during the entire voyage, even when the ship stopped at Porto Delgada, in the Azores. Morris claimed he asked for medical aid at the Azores and various other times, and also asked to be relieved of his obligations to the ship at that point, but the master denied the requests. Because of his illness he refused to work, and when a day out from New York he was asked to clean the smokestack in a storm, and for failure to do so was confined in chains. On the second day after arriving in New York he was operated on at the United States Marine Hospital, remaining there three weeks. He later developed thrombosis of the veins of his right thigh on the outer surface, which "appeared some three weeks after the operation of the hernia." He was then kept in the hospital for seven months longer, "with constant hemorrhages from the wound caused by the operation for thrombosis of the veins." Morris brought libel against the United States for maintenance and cure while in service on the United States steamship, and from a decree of dismissal he appealed.

It was held to be well settled that a seaman who is defiant and subversive to discipline that must be maintained at sea may be punished by the captain. (Comp. St., sec. 8380.) An injured seaman sustaining an injury at sea is entitled to maintenance and cure, but in this case the circuit court of appeals held that the evidence was insufficient to prove that the illness from thrombosis was due to injury or maltreatment received by Morris on board the ship.

The circuit court of appeals held in *The Bouker No. 2* (241 Fed. 831, 154 C. C. A. 537), that where a seaman was not accorded the maintenance and cure which the law imposed upon the shipowner these items could be recovered. The court said in that case, in part:

> The meaning of the phrase "maintenance and cure" is plain. By the custom of the sea the hiring of sailors has for centuries included food and lodging at the expense of the ship. This is their maintenance * * *. We agreed with the remark in *The Mars* (149 Fed. 729, 79 C. C. A. 435), that: "The word 'cure' is used in its original meaning of care, and means proper care of the injured seaman, and not a positive cure, which may be impossible."
>
> Furthermore, "cure" has been held to signify: "the ordinary medical assistance and treatment in case of injury or acute disease, for a reasonable time. The ship is not bound to pay for the (sailor's)

medication for the cure of a chronic disorder for an indefinite length of time." (*The Ella S. Thayer* (D. C.), 40 Fed. 904.) Nor does the liability of the ship extend beyond "expense of effecting a cure by ordinary medical means. This does not include extraordinary medical treatment or treatment after cure effected as completely as possible in a particular case." (*The C. S. Holmes* (D. C.), 209 Fed. 970.)

The voyage lasted about five weeks, and the court held that Morris should have been relieved from duty and at the same time have received medical attention. The treatment he received in New York cured him of hernia.

As to the point that the captain believed Morris to be shamming during the voyage, the circuit court said:

Even though the captain was mistaken, and committed an error of judgment in believing that the appellant was shamming, this fact does not relieve the ship from the responsibility it owed to the seaman. The consequential damage due to the failure to afford medical aid and maintenance is a measure of damages which is to be awarded. The right of recovery for maintenance and cure does not allow recovery for pain and suffering or compensation for injury due to physical incapacity. A right of action for damage for maltreatment is not pleaded here. Appellant makes no proof of loss of wages or medical expense. But he was obliged to work about five weeks when he was entitled to be maintained in rest for cure. He should be compensated for this period.

The circuit court of appeals modified the decree by allowing Morris the sum of $250.

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EMPLOYERS' LIABILITY — ADMIRALTY — VESSEL IN "GRAVEN DOCK"—WORKMEN'S COMPENSATION—*Butler* v. *Robins Dry Dock & Repair Co., Court of Appeals of New York* (*February 25, 1925*), *147 Northeastern, page 235.*—Walter Butler, employed by the defendant dry dock and repair company, on completing the particular operation in which he had been engaged, that of fastening plates to the outside of a vessel in a "graven dock," (i. e., one permanently attached to the land), started to go "wholly or in part up the side of the dock for the purpose of getting bolts and a drink of water preparatory, it is assumed, to continuing his repair work." When he was a few feet away from the place where he had been working a plate from the side of the vessel dropped upon him and caused his death.

The action was brought by the administrator, and from a judgment of nonsuit on the ground that it was not a maritime tort, which was affirmed by the appellate division, plaintiff, by permission, appealed. In determining whether the accident "constituted or was the result of a maritime tort," the court of appeals

observed that it had the views expressed by the Supreme Court of the United States, and that they lead to the conclusion that this was a maritime tort, and that therefore "a State legislature could not exercise the power of confining relief therefor to the compensation act."

The court of appeals further stated that:

It is so well settled that we find on this appeal no dispute of the proposition that the question whether a tort is maritime or not is settled by the test of the locality. (Atlantic Transport Co. *v.* Inbrovek, 234 U. S. 52, 43 Sup. Ct. 733.) Unquestionably a tort occurring upon a vessel floating in navigable waters is maritime in its nature, and it is also practically conceded that by extension of the reasoning applicable to such a situation, an accident occurring upon a vessel resting in a dock floating in navigable water would be a maritime tort.

The contention was that a graven dock, such as the one involved herein, is a part of the land, and that an accident happening to a person on the vessel, and certainly to one standing on the bottom of the dock from which all of the water had been drawn, is not a maritime tort. The decisions of the Supreme Court were considered to be the other way. The court of appeals said in part:

We think that for the purposes of disposition of such a question as this, and also somewhat as a matter of policy lest admiralty law otherwise be robbed of too much of its jurisdiction, it is settled that a vessel floated into a dock of this kind is still in navigable waters, even though the water has been temporarily withdrawn. [Citing cases.]

Butler, having finished the particular operation upon the side of the vessel, had gone a few steps in the direction "of getting a drink of water and seeing about some bolts." The court had no doubt that an accident happening to a workman "standing on a staging on the outside of a vessel or on a dock at its keel and working on the vessel is just as much a maritime tort as though the man was standing on the deck of the vessel." The maritime nature of the work was held not changed by his starting for bolts and a drink of water preparatory to continuing his work, it not appearing "that there was intended any permanent discontinuance of his employment."

The judgments appealed from were reversed and a new trial granted.

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EMPLOYERS' LIABILITY—ADMIRALTY—WORKMEN'S COMPENSATION—ACTION FOR DEATH OF EMPLOYEE—STATE LAW—*Roswall* v. *Grays Harbor Stevedore Co., Supreme Court of Washington (January 8, 1925), 231 Pacific Reporter, page 934.*—Oscar Roswall was em-

ployed by the defendant stevedoring corporation, engaged in the business of loading and unloading ocean-going vessels. While so employed Roswall was assigned to loading and storing lumber on board a vessel in navigable waters, and in the course of his employment he received injuries from which he died. An action was brought by Anna Roswall, as administratrix, for damages for the death of the employee. From a judgment of dismissal the plaintiff appealed. The supreme court on review observed first that:

It is at once apparent that the injured employee was at the time he received his injuries engaged in a maritime service, and that the rights and liabilities of the parties are measured by the maritime law. It is not, however, the rule that this fact alone will bar an action in the common-law courts of the State to recover for the death of the employee. While the general maritime law, like the common law, gave no right of action for a wrongful death, it is generally held by the courts that the maritime law in this respect may be supplemented by State death statutes, and that, where there is such a statute, although local in its application, a recovery may be had in an action in personam brought in a common-law court for a marine tort occurring on navigable waters within the jurisdiction of the State.

Notwithstanding that the action could be brought in a common-law court, the supreme court was of opinion that the action when so brought was "not to be measured by common-law standards." The Federal statute gives to the suitor "the remedy of the common law," not "the right of the common law," and the action wherever brought "is one of maritime cognizance, although necessarily to be supplemented by a State statute."

The question, then, was narrowed to "whether the tort causing the death of the plaintiff's intestate is within the compass of the [compensation] act." The supreme court was of the opinion that it was not, and quoted from State ex. rel. Jarvis *v.* Daggett (87 Wash. 253, 151 Pac. 648, L. R. A. 1916A, 446), in which the same court said:

The maritime law being a part of the law of the United States, the legislature of a State has no power to modify or abrogate it. It follows, therefore, that the legislature in passing the compensation act could not take from a workman any right which he had under the maritime law of the United States. The petitioner here still has the right to pursue his remedy in admiralty. * * * The owner of a steamboat, if he should pay the percentage of his pay roll specified, and his injured seamen should pursue their remedy in admiralty, would receive no protection from the act, and yet would be subject to its burdens.

It was argued by the defendant that the action was founded, not in the common or maritime law, "but on statute, and that the legislature has the power to abolish a death statute, even though it may

grant no other remedy, and the conclusion is drawn that it has done so in the workmen's compensation act." The supreme court considered the principle of the cases misunderstood:

Our holdings are that maritime employments are without the scope of the compensation act, and that the remedies the law affords for injuries occurring in such employments are in no wise affected or impaired by the act. The act, it will be remembered, abolishes actions for personal injuries, as well as actions for wrongful death, and, if the one is not abolished in cases of marine torts, it is difficult to see why the other is so. This being the rule, it would seem to follow as of course that the remedy the law affords for a death caused by a maritime tort remains unimpaired, even though that remedy may be in part statutory.

The compensation act does not abolish the remedy of the death statute entirely. It abolishes the remedy only in those causes falling within the scope of the act.

The conclusion of the court was that the trial court erred in sustaining the demurrer to the complaint, and the judgment was therefore reversed, with instructions to give the defendant leave to answer the complaint.

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EMPLOYERS' LIABILITY—ADMIRALTY—WORKMEN'S COMPENSATION—PAYMENTS FOR TIME LOST—*Kantleberg* v. *G. M. Standifer Const. Co., United States District Court, Oregon (June 28, 1920), 7 Federal Reporter (2d), page 922.*—R. E. Kantleberg, while at work as a caulker in the hold of a vessel belonging to the G. M. Standifer Construction Co., was injured, by a scaffold, upon which he was working, falling upon him. After three or four days in the hospital he was discharged and returned to work at the same wages he received prior to the accident. A few days after the accident he received notice from the State industrial commission, saying that his accident had been reported and requesting him, if he lost time and wages, to fill out an inclosed blank. He filled out the blank, forwarded it to the commission, and received a check for $20.77 on November 14, 1919, and $56.25 December 22, which checks he cashed. On February 3, 1920, another check for $68.89 was sent to him, which he returned saying that if it was for lost time and wages he would accept it, but if intended for compensation for his injuries he declined to do so, because he was more severely injured than he had at first thought, and had learned he was entitled to maintain a proceeding in admiralty to recover damages. The check was returned to him by the commission in a letter saying that it and previous payments "were for temporary time lost and not part of any award for permanent partial disability." Kantleberg then accepted and cashed the check.

Libel was later brought by Kantleberg against the Standifer Construction Co., and from a decree for the libelant the company appealed.

The company denied the negligence charged in the libel, and pleaded that the acceptance by the employee of the payment from the accident commission was a bar, notwithstanding the recent decisions of the Supreme Court that the act of Congress saving to suitors in admiralty "rights and remedies under the workmen's compensation law of any State" is void, because not within the power of Congress to enact. (Knickerbocker Ice *v.* Stewart, 253 U. S. 149, 40 Sup. Ct. 438.) It was further argued that the acceptance by a workman injured on the navigable waters of the State of an allowance from the State industrial commission "is an election of remedies, and a bar to subsequent proceedings in admiralty to recover damages for the injury."

The District Court observed that it was difficult to follow the reasoning which supported the contention that the acceptance of the benefits of a law which is void and which was not binding upon either the employer or the employee "can in any way affect the rights of the latter to maintain an appropriate proceeding against the party liable for his injury, to recover indemnity therefor." A decision on this point was, however, held to be unnecessary, for—

It clearly appears that the payments by the accident commission to the libelant were not intended by it to cover compensation for his injury, but for the temporary loss of time and wages only, and, although the libelant knew and the commission did not, at the time the payments were made and accepted, that during the majority of the time covered thereby he was in fact at work, receiving the same wages as before the accident, the acceptance of such payments does not, in my judgment, amount to an election of remedies, and is not a bar to this action.

It was claimed that Kantleberg had some tubercular trouble which was either caused or aggravated by the accident, but the evidence was, in the opinion of the court, too speculative and uncertain to form a reliable basis for estimated damages.

Considering the nature and character of the injury, the pain and suffering on account thereof, the effect the injury had upon his earning capacity, and all the circumstances surrounding the case, the court was of the opinion that $1,500 was a fair allowance of damages, and a decree was prepared accordingly.

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EMPLOYERS' LIABILITY—FACTORY REGULATIONS—UNGUARDED MACHINERY—*Mabe* v. *Gille Mfg. Co., Kansas City Court of Appeals, Missouri (February 9, 1925), 271 Southwestern Reporter, page 1023.*—Susie May Mabe, a minor aged 18 years, employed by the Gille Manufacturing Co., was engaged to work in packing cans. On February 13, 1922, she was taken off the work in which she had been engaged and placed in the operation of a punch press, and the

same afternoon, in some way unknown to the plaintiff herself, her right hand came in contact with the plunger, and the second, third, and fourth fingers of her hand were so mangled that amputation was necessary. Action was brought by her next friend in her behalf against the employer for damages, and from a judgment for the plaintiff the company appealed.

The petition alleged that the plaintiff was an inexperienced employee, that the defendant knew it, and that it was defendant's duty to have warned her of the dangers connected with the machine. The plaintiff's case was based upon the theory that the machine was not guarded and that no warning was conspicuously posted as required by section 6786, Revised Statutes of 1919. The defendant contended that the statute did not require the guarding of every machine, and that only "machines in manufacturing * * * establishments, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their duties, shall be safely and securely guarded when possible." It appeared from the evidence that the machine could have been guarded, and the court held that the machine was such as to require guarding within the meaning of the statute.

The defendant insisted that the press could be operated without placing the fingers under the die. However, the court was of the conviction that the statute "was enacted to protect those who, in the performance of their duties, were not required to place their fingers within the danger zone, but also those who might become momentarily engrossed in their work, or from lapse of memory, or inattention, place themselves in position to be injured."

It was further contended by the defendant that in performing her work "the risk of injury was open and obvious and known" to the plaintiff and that she therefore assumed the risk. To this the court quoted from the case of Johnson *v.* Brick & Coal Co. (276 Mo. loc. cit. 53, 205 S. W. 617) in which the court said:

> Such risks are purely incidental to the employment, and is such an injury as is liable to occur at any time during the performance of the work undertaken, unaided by any degree by the negligence of the employer.

The court held that the servant does not assume the risk arising from the negligence of the master; nor does the doctrine of assumption of risk apply where the action is based on the violation of the statute.

Defendant's last contention was that the verdict in the sum $7,500 was excessive, and it was admitted that the appellate courts are authorized to order reductions in the amount of unliquidated damages. However, the court was of the opinion that the finding of the jury and the discretion of the trial judge, "while not binding on

this court, must have great weight with us." It was conceded that the loss of the fingers of the right hand was serious and constituted a permanent impairment to plaintiff's activities in the functioning of the hand. Being of the opinion that the verdict was not excessive, the judgment was accordingly affirmed.

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EMPLOYERS' LIABILITY—INJURY TO THIRD PARTY—DUTY OF CARRIER TO PASSENGER—ACTS OF STRIKERS—*Yellow Cab Co. of Atlanta* v. *Carmichael, Court of Appeals of Georgia (January 15, 1925), 126 Southeastern Reporter, page 269.*—S. D. Carmichael arrived in Atlanta, Ga., for the purpose of accepting work from the Seaboard Air Line R. Co. as a machinist. Three other men were with him, and they were met at the station by one Rogers, who was to take them to the machine shops. Rogers had made arrangements with a cab driver of the Yellow Cab Co. to take them to the shops, a distance of 6 miles, and had explained to him that there was a strike in progress at the shops and that he wanted the cab to stop at a certain entrance, because at that entrance there were no strikers on account of armed guards and an injunction from a Federal court. The driver agreed to take them to the entrance designated, but when the point was reached he refused to turn in even upon request to do so. Driving on, the cab came to the main entrance, and the driver was told to stop there, but he would not do so and drove on about 250 yards beyond the main entrance, where he slowed down and four or five strikers or their sympathizers boarded the cab. The men were ordered out of the cab and their lives threatened. The plaintiff stated that he was then forced to enter a waiting automobile, driven up the road about 2 miles and ordered out of the car. He testified that when he stepped to the ground "one of the mob struck him a severe blow over the face with a stick that broke the bridge of his nose and knocked him to the ground in an unconscious condition"; that when he came to he discovered "he had a broken leg and could not walk."

From a decision and judgment for the plaintiff the defendant brought error.

The defendant contended that the alleged act of the driver was not the proximate cause of the injury, but that the third parties were responsible. It was further contended that the consequences were not the natural result of the act of the driver, and that the injury was caused by intervening criminal acts of third persons, which "defendant had no reason to apprehend."

The court of appeals, after reviewing the record, said in part:

A common carrier of passengers for hire is bound to use extraordinary care and diligence to protect its passengers in transit from violence or injury by third persons; and whenever a carrier, through

its agents and servants, knows, or has opportunity to know, of a threatened injury to a passenger from third persons, whether such persons are passengers or not, or when the circumstances are such that injury to a passenger from such a source might reasonably be anticipated, and proper precautions are not taken to prevent the injury, the carrier is liable for damages resulting therefrom.

The court even went further, and held that "a carrier is liable in damages for injuries to a passenger caused by the willful and wanton acts of its employees, even though the purpose of the employees was not to serve their employer by such acts."

The fact that the strikers carried the plaintiff up the road 2 miles before inflicting the injuries complained of was considered by the court of appeals as having no effect on the ruling of the lower court in denying a demurrer. The defendant here had reason to apprehend that "its original wrongful act would probably result in its passenger being criminally assaulted by the third person."

The judgment was accordingly affirmed.

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EMPLOYERS' LIABILITY—INJURY TO THIRD PARTY—NEGLIGENCE—STATUS OF COAL-MINE INSPECTOR—LICENSED MINE ENGINEERS—*Folsom Morris Coal Mining Co.* v. *Scott, Supreme Court of Oklahoma (June 3, 1924), 231 Pacific Reporter, page 512.*—Tom Scott was elected, qualified, and acting district mine inspector for Oklahoma, his district including the defendant Folsom Morris Coal Mining Co.'s mine. On June 17, 1920, he was in the company's mine for the purpose of inspection, as required by law, when he was killed while riding a trip of empty cars being hoisted out of the slope to the shaft. Katie Scott, his widow, brought an action against the coal company, alleging that the company did not employ "competent and qualified engineers to operate the engine pulling cars out of mine," and did not provide safe equipment. She further alleged that Scott was 59 years of age, "had an expectancy of life of $17\frac{3}{10}$ years, and was earning $150, clear of expenses." From a verdict and judgment in the sum of $10,000 the defendant appealed, contending that all the machinery and appliances in the mines "were subject to his (Scott's) control and direction," and if he was injured "it was due to his own carelessness in failing to exercise proper care for his own safety."

In the opinion of the supreme court, Scott was a licensee and the company owed him no duty as to the condition of the premises, "save not knowingly to let him run upon a hidden peril, or wantonly or willfully harm him, unless there is a requirement of statute placing this burden upon it." The case of Parker *v.* Barnard (135 Mass. 116, 46 Am. Rep. 450) was discussed as illustrating the principle

involved. In this Massachusetts case "a policeman entered an open doorway in the nighttime and fell down an open elevator shaft. The court held that he was a licensee, but held that he could recover because of the failure of the owner to comply with a statute requiring such openings to be guarded." The supreme court then said:

So in this case we hold that Scott was a mere licensee, and the defendant only owed him the duty of not willfully injuring him or permitting him to be injured, unless we have a statute imposing some additional duty on the plaintiff, because of the relationship the law creates between them.

Under the provisions of sections 7554 and 7557, Compiled Statutes of 1921, it is the duty of the owner of a mine "to furnish to such inspector the means necessary for entry and inspection." This was said to "contemplate reasonably safe means for entering and inspecting such mine."

The company further contended that the trial court should have held as a matter of law "that the failure of the deceased to go up the manway rather than by the trip, the one being safe and the other dangerous, constituted contributory negligence," but the supreme court considered it a question of fact for the jury rather than a question of law for the court.

The plaintiff alleged that the defendant was negligent in employing and retaining in its employment "an incompetent engineer," and that the defendant knew he was incompetent prior to the accident. Section 7548, Compiled Statutes of 1921, provided that:

A certificate of competency shall entitle the holder thereof to accept and discharge the duties for which he is thereby declared qualified at any mine where his services may be desired.

The supreme court decided in view of this statute that:

It is undisputed that this engineer was the holder of a certificate of competency from the State mining board. * * * It is a violation of law, punishable by fine and imprisonment, for any person to act as mine manager, superintendent, pit boss, hoisting engineer, or fire boss without first having obtained a certificate of competency from this board. * * * When an employer has selected such a person he is protected by the law from any allegations of general incompetency not connected with the particular act complained of.

The trial court, "in the face of conflicting testimony, two or three times referred to the trip as a man trip, and not a coal trip." The supreme court on review considered this a "very material point in the case, and the trial judge should not have given this weight of his personal opinion to the jury." Because of this error, and certain inharmonius instructions, the cause was remanded to the lower court for a new trial.

EMPLOYERS' LIABILITY—INJURY TO THIRD PARTY—"VOLUNTEER"—STRANGER ASSISTING SERVANT IN EMERGENCY—*Baringer* v. *Zachery, Court of Appeals of Kentucky (December 19, 1924), 267 Southwestern Reporter, page 182.*—William N. Zachery was a laborer gathering iron and other junk from a dump in the city of Louisville, and the defendant Baringer was in the business of hauling waste to the dump. One of the defendant's teams, in charge of a colored servant named Owens, brought a load to the dump and became stalled. Being unable to get out of the difficulty, Owens called Zachery to "give him a lift at the wheel." Zachery took hold of a wheel, and while trying to get the wagon out Owens pulled the team around so that one of the animals stepped on Zachery's ankle, causing a very painful and severe injury. A suit was brought to recover damages for the injury, and from a judgment for the plaintiff the defendant appealed on the ground that Zachery was not employed by him but that he was a mere volunteer. It was further insisted that there was no emergency requiring Zachery's assistance.

The court of appeals first said:

It is well settled that a stranger who is injured while rendering assistance to a servant of the master in an emergency is not upon the plane of a mere volunteer or intermeddler, and therefore barred of recovery, but is an emergency assistant whom the servant had a right to engage, and when his assistance is enlisted in an emergency, is owed the same duty by the master and entitled to the same protection from the master as any other servant engaged in like employment, but is not a fellow servant with those regularly engaged.

The court of appeals referred to its decision in the case of Central Kentucky Traction Co. *v.* Miller (147 Ky. 110, 143 S. W. 750, 40 L. R. A. (N. S.) 1184), wherein it was held that the rule that a person not authorized to perform the work can not recover damages from the employer had an exception "where the injured person is an emergency assistant, acting at the request of an employee who has, under such circumstances, authority to request his assistance, although ordinarily he is not invested with such power."

The trial court instructed the jury in substance by instruction No. 2 that it should find for Zachery "if it believed from the evidence that he undertook to aid in moving the wagon without any request from the driver; or if the driver knew that appellee, Zachery, was undertaking to aid in moving the wagon by lifting the wheel, and knew that appellee was in a place of danger from the team, and while that condition existed, if it did exist, the driver pulled the team around so that one of the mules stepped on and injured appellee." The court was of opinion that the instruction ignored the emergency principle upon which "all the cases of this character are rested," and made Zachery a servant of the defendant without knowledge or

consent on the defendant's part, "a rule never recognized in this jurisdiction."

Whether the emergency existed was considered a question of fact for the jury to decide. The judgment was reversed, with directions to the lower court upon another trial to omit instruction No. 2.

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EMPLOYERS' LIABILITY—INSURANCE—REPRESENTATION—CONFLICT OF INTERESTS—MINOR UNLAWFULLY EMPLOYED—*Fidelity & Casualty Co. of New York* v. *Stewart Dry Goods Co., Court of Appeals of Kentucky (March 3, 1925), 271 Southwestern Reporter, page 444.*—John K. Miller, a minor, employed by the Stewart Dry Goods Co. as a messenger, sustained injuries on an elevator of the company and in a suit against the company, received judgment.

The Fidelity & Casualty Co. of New York issued elevator liability policies, and had issued such a policy to the dry goods company, by which it agreed to indemnify it against loss or damages not exceeding $5,000 on account of bodily injury or death occurring while the policy was in force to any person or persons while in the car of its elevator, and further to defend any suit brought against the insured.

A provision in the policy provided that it would not cover loss from liability for or any suit based on injuries or death "suffered or caused by any child employed by the insured contrary to law or any minor while performing any work contrary to law." Kentucky has a law limiting the employment of minors, which Miller claimed had been violated by his employer.

At the time of Miller's suit the insurance carrier, hearing that Miller was a minor, informed the company that in that event it would not be liable for any judgment that might be rendered in favor of Miller, but that it would defend the suit. The dry goods company did not agree with the insurer, contending that the insurer was responsible regardless of its disclaimer. Miller's attorneys offered to compromise the suit for $6,500, and the company agreed to pay $1,500 if the insurer would pay $5,000, its maximum liability. The insurer declined. Judgment was rendered in favor of Miller in the sum of $10,000 against the employer company, which company brought suit against the insurer for that sum, and from a judgment for the employer the insurance company appealed.

The court of appeals observed, on reviewing the record, that where the policy indemnified the employer except as to where an employee was engaged contrary to law, each party was entitled to protect its own interests in the case, and where the insurer is liable on one ground of recovery and the insured is liable on another, neither can exclude the other from participating in the defense.

As to the proposed compromise, the court observed that the company had a right to go on and make the settlement at $6,500 and then sue the insurer, but it "could not fail to make the settlement and then hold the insurer liable because it refused to pay its total liability under the policy, when, if Miller was employed contrary to the statute, it was not liable at all." The judgment in the action for damages had determined that the company was liable to Miller, but did not determine on what ground it was liable. The record did not show on what ground the verdict of the jury was based, and the court was of the opinion that "there can be no inquiry now into this question. The insurer was liable on the policy unless Miller was employed contrary to the statute." The burden of proof was held to be upon the insurance carrier to show that Miller was employed in violation of law and to establish the same facts as were necessary in the action for damages to make out a right in him to recover on this ground.

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

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EMPLOYERS' LIABILITY—MEDICAL SERVICES—CONTRACT SURGEON—MALPRACTICE—DAMAGES—*Borgeas* v. *Oregon Short Line R. Co. et al., Supreme Court of Montana (May 18, 1925), 236 Pacific Reporter, page 1069.*—Carl Borgeas, a section hand employed by the Oregon Short Line Railroad Co. at Apex, Mont., received an injury in the course of his employment in December, 1922. In January, 1923, he quit work because of the injury, the femur bone of his right leg being broken. Borgeas reported the condition and was sent "over his protest" to the Murray Hospital at Butte, without supplying him with the means to pay, and it was alleged that within 10 days he was compelled to leave for want of means. It also appears that the local physician of the company declined to visit him.

Borgeas brought an action for $30,000 on the ground that he was left with a shortened and diseased limb, and for $5,000 for pain and suffering, $2,000 for medical treatment, and $98 for a hospital bill, none of these sums having been paid. From a verdict and judgment in the sum of $35,000 the defendants appealed.

The local doctor, Dr. Stephan, was made a codefendant in the action. The supreme court held that the relation of master and servant, or principal and agent, "does not exist between a railroad company as employer and a surgeon employed to treat an injured employee, the reason being that the employer has no right to control the surgeon in the treatment of the case."

The complaint was held sufficiently clear and intelligible that if the defendant company, by reason of lack of reasonable care, pro-

vides an injured employee with unskillful or careless medical attention, "it would be liable for the carelessness or malpractice of the surgeon, and the allegation of damage therefrom may properly appear in the complaint."

The complaint stated in general and concise language the facts constituting the contract imposing upon the defendant company a duty, which was held by the court to state a cause of action.

As the law imposes upon an injured person the duty of doing all in his power to prevent the accumulation of damages, "if an excuse existed for plaintiff's failure he was entitled to allege these matters," and if his condition was the direct result of defendant company's breach, the breach was the proximate cause and the plaintiff was held entitled to allege that condition.

For the purpose of caring for sick and injured employees the company had secured the services of a hospital at Pocatello, Idaho, and to meet expenses thereof deducted 75 cents per month from the wages of its employees. In doing so it was not promoting its own interests by making a profit out of such employment, and it was held that "such employer is not liable to an injured employee for the carelessness or malpractice of such physicians or surgeons in charge of the case, provided it has used reasonable care in its selection of such physicians or surgeons, since it will be regarded as merely administering a charity or trust fund."

The measure of damages for the failure to provide medical attention and hospital accommodations was stated by the supreme court as being "the reasonable sum expended in securing the same elsewhere." It was further stated in this connection that "it is the duty of one injured while in the employ of such an employer, if refused surgical attention and hospital accommodations, to secure the same elsewhere and to hold his employer for the cost thereof." In addition to the reasonable cost of obtaining services elsewhere, it was stated an injured employee may recover "for additional pain and suffering caused by reason of the refusal of his employer to perform its duty."

The burden, however, was upon the employee of showing that the cause of his condition was the failure of the employer to furnish medical attention.

The employer was held not to have breached the contract to furnish the injured employee medical aid, the testimony being "that the physician had authority to send the plaintiff to the Murray Hospital, and that the bill was paid on its first presentation to the company."

Being of the opinion that the plaintiff had failed to establish a breach of contract alleged by the evidence, the judgment was reversed and the cause remanded, with direction to dismiss the action.

EMPLOYERS' LIABILITY—MEDICAL TREATMENT—NEGLIGENCE—*Koviacs* v. *Edison Portland Cement Co., Supreme Court of New Jersey (April 10, 1925), 128 Atlantic Reporter, page 542.*—Joseph Koviacs was employed by the Edison Portland Cement Co. as a helper in a quarry. The pumps in the quarry did not function, as a result of which the shaft where the plaintiff was directed to work became filled with water to a depth of one or two feet. The plaintiff contended that the water was of a character dangerous to health, and that as a result of working in it he became ill, and one of his legs became diseased so that an amputation was necessary.

In an action for damages, besides the allegation as to negligence in providing a reasonably safe place in which to work, the complaint also alleged that, although the defendant knew the condition of the plaintiff, he "negligently failed to provide the plaintiff with any medical assistance or other means of being cured."

The supreme court was of the opinion that this last contention as to the defendant's providing medical assistance should have been stricken out of the complaint, and further stated:

In a common-law action for negligence such as this, although an employer must answer to an employee in damages for all loss proximately resulting, including physicians' and surgeons' charges, yet, in the absence of contract, there is no duty on the part of an employer to provide medical assistance or other means of being cured to an ill and diseased employee, even though the illness or disease arose from the negligence of the employer. (18 R. C. L. 506; 26 Cyc. p. 1049, and cases there collected.)

The action of the trial court in granting the motion of the defendant to strike out the allegations as to the failure to provide medical assistance was accordingly affirmed.

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EMPLOYERS' LIABILITY—MINOR UNLAWFULLY EMPLOYED—CONTRIBUTORY NEGLIGENCE—WORKMEN'S COMPENSATION—*Gwitt* v. *Foss, Supreme Court of Michigan (April 3, 1925), 203 Northwestern Reporter, page 151.*—Ignatius Gwitt was a minor employed in the factory of the defendant in violation of the law as to age. While so employed he was injured by coming into contact with a saw while cutting up sticks to take home to kindle fires. There was a suit for damages, and on a judgment of $6,166 in his favor the employer brought error.

The court held that the workmen's compensation law of the State applied only where the relation of employer and employee exists, and "there is no such relationship where a minor is employed in violation of a statute." However, the defense of contributory negligence had not been abolished (Beghold *v.* Auto Body Co., 149 Mich. 14, 112 N. W. 691), even "where the negligence of defendant

is negligence in law, arising from violation of a statute." But the defendant's motion for a directed verdict on the ground that Gwitt's contributory negligence was the proximate cause of the injury was overruled. "On such a motion, the testimony must be considered in the light most favorable to plaintiff." An adult would have been chargeable with a degree of care above that required of young boys, whose protection from such hazards was the purpose of the statute. "On the proof submitted, we think the court was right in submitting this question to the jury."

There was a question as to the computation of damages, and the court found that an erroneous instruction had been given, but curable by a remittitur. It was therefore ordered that all in excess of $5,500 be remitted, or a new trial would be granted, but if such remittitur was made within 20 days the judgment would be affirmed.

The same court reversed a judgment based on a directed verdict, holding the minor guilty of negligence as a matter of law, where the employment was after the legal hours, and at work forbidden to a minor, who had been insufficiently instructed as to the dangers of his work, the machine being also unguarded. (Brancheau *v.* Monroe Binder Board Co. (1925), 203 N. W. 149.) The question of contributory negligence was held to be for the jury.

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EMPLOYERS' LIABILITY—MINOR UNLAWFULLY EMPLOYED—CRIMINAL OFFENSE—EVIDENCE—*Rost* v. *F. H. Noble & Co., Supreme Court of Illinois (February 17, 1925), 147 Northeastern Reporter, page 258.*—Joseph Zembrzuski, between 15 and 16 years of age, was employed by the defendant company in operating a drill machine and in carrying, transferring, loading, and unloading boxes filled with material of great weight and hoisting same by the elevator. On March 20, 1920, while carrying to and loading boxes upon the elevator, Zembrzuski was internally injured and ruptured, resulting in strangulated hernia, from which he died on March 23, 1920.

Andrew Rost, as administrator, recovered a judgment for $3,000 against the employer for damages for Zembrzuski's death, and a writ of certiorari was secured to review the record.

The evidence was held by the supreme court sufficient to sustain the verdict that the hernia resulted from the employment, but an instruction to the jury was held erroneous, "for it directs a verdict for the plaintiff if the jury believe from the evidence that the deceased was under the age of 16 years, that he was injured and was at the time working for the defendant, without requiring any finding that the injury was the result of the employment." By another instruction the trial court told the jury that plaintiff was not required to establish his case beyond a reasonable doubt, but only by a preponderance of the evidence, and this the supreme court held erroneous, as the child labor act (Laws 1917, p. 511) made the employment of a

minor under 16 years of age a crime, and the case must be established beyond a reasonable doubt.

The defendant contended that the contributory negligence of the parents of the deceased would bar the action, and that plaintiff must prove by a preponderance of the evidence that the employment and the injury were not due to the negligence or want of care of the parents. To this contention the court said that "the common law has always given the right to maintain an action for a personal injury caused by the negligent act of another. The negligence of the plaintiff which contributed to the injury was a defense to such action."

The doctrine of contributory negligence was held by the supreme court as not applicable to injuries willfully inflicted, to crimes, or to an action for death of a minor unlawfully employed, as the action in the latter case is based on the employer's criminal misdemeanor, and neither the doctrine of contributory negligence of deceased or of beneficiaries, nor of assumption of risk, applies.

The next of kin of the deceased were his parents and a younger brother, and the trial court refused to instruct the jury that they could allow nothing in their verdict to the latter except nominal damages. The supreme court held this to be error, saying that:

> There being no proof of such damages in this case as to the brother, the defendant was entitled to have the jury told that they could not assess anything more than nominal damages on account of the loss to the brother.

For these errors judgments of the appellate court and the circuit court were reversed.

Where injury occurred in an employment in which the child might lawfully be engaged, the failure to procure a certificate of age was held not to be evidence of negligence as a matter of law so as to determine the guilt of the employer; but "the failure to obtain the employment certificate as required by law was evidence of negligence to be considered by the jury along with the other testimony in the case to determine whether or not the defendant was guilty of negligence." (Cox Cash Stores (Inc.) *v.* Allen (Ark., 1925), 268 S. W. 361.)

Where the employer is unaware of the employment of a minor in violation of the law, the engagement being by an unauthorized employee, and the employer being diligent to enforce his rule against such employment, he is not liable for injury, since he can not be said to have "permitted or suffered" the employment in the absence of any knowledge thereof. (Clover Creamery Co. *v.* Kanode (Va., 1925), 129 S. E. 222.)

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EMPLOYERS' LIABILITY—MINOR UNLAWFULLY EMPLOYED—NEGLIGENCE—*Johnson* v. *Endura Manufacturing Co., Supreme Court of Pennsylvania (January 26, 1925), 127 Atlantic Reporter, page 635.*—Frank A. Johnson, a minor over 16 but under 18 years of age, was employed by the defendant company to operate a press used for mak-

ing gaskets. In the performance of his work Johnson permitted his hand to follow the material too far and suffered injuries necessitating the removal of his hand at the wrist. His duties included the oiling and cleaning of the machine, though the accident did not occur while so engaged. The jury was permitted to infer from his statement "that he was employed to perform such service when the press was moving," and following a finding to that effect the trial court entered judgments for the boy and for his father on the ground that there "had been a violation of the child labor act, and the defendant was therefore responsible," irrespective of the "actual cause of the accident." The defendant appealed.

The court in reviewing the record was of the opinion that the contention that plaintiff was employed to oil the machinery while in motion was not upheld by the evidence, and further, assuming that the question was for the jury and its finding be considered conclusive, "we are of the opinion, nevertheless, that no recovery can be had."

The act of 1915 (P. L. 286; Pa. Stat. 1920, sec. 13285 et seq.) provides in part:

> No minor under 18 years of age shall be employed or permitted to work in the operation or management of hoisting machines, in oiling or cleaning machinery in motion.

As the supreme court views the legislation, its purpose was "to make unlawful the hiring of one within the prohibited age" where the main purpose "was to perform some extrahazardous work." The court, speaking through Mr. Justice Sadler, said:

> When the engagement is lawful, and the presence of the minor on the premises therefore proper, then the execution by him of some other incidental service, which comes within the prohibited class, does not tinge the whole employment with illegality.
>
> Ordinarily, however, where the hiring is not prohibited, or the harm does not follow in the course of the permissive doing of the unlawful class of work—the employment being proper—lack of due care on the part of the master must be shown before recovery can be had.
>
> The violation of a penal statute may constitute negligence per se, but no right of action arises therefrom, unless such wrongdoing is the proximate cause of the injury.

The employment of Johnson was permissible. He was not employed generally to oil machinery in motion, such as designated or contemplated by the statute. Had he been, or "though lawfully hired for another purpose, he was injured as a result of so acting, with the consent of the master, his injury would be compensable." The court found neither of these conditions in the case, and held that under the circumstances there could be no recovery "in the absence

of proof that the injury was caused by some act of negligence on the part of defendant, and none was proven."

The judgments were reversed and entered for the defendant.

It may be presumed that suit was brought in the above case on the theory that a larger recovery would be obtained than under the compensation law, where no question of negligence would be raised. In similar circumstances, the Supreme Court of Indiana held an employer liable for the loss of a hand of a minor of employable age, but working without the affidavit as to age required by the law of the State, over against the employer's contention that the compensation law was applicable. "The employment not being lawful, plaintiff's right of action was not barred by the compensation act, and the court had jurisdiction of this suit." (Midwest Box Co. *v.* Hazzard (1925), 146 N. E. 420.) Even though the parent's affidavit "could not affect the competency of the child to perform the work of an employment," the statute would not be annulled by the courts by their construction of it, and "violation of the statute constitutes negligence per se." A larger recovery than under the compensation law was supported, since "a child not lawfully employed can only recover damages by showing that the defendant was at fault," while compensation is paid "whether the particular injury was due to negligence or fault of the employer or not."

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EMPLOYERS' LIABILITY—MINOR UNLAWFULLY EMPLOYED—RECEIPT OF COMPENSATION PAYMENTS—*Wlock* v. *Fort Dummer Mills, Supreme Court of Vermont (May 6, 1925), 129 Atlantic Reporter, page 311.*—Cecelia Wlock, a minor between 14 and 16 years of age, was employed by the Fort Dummer Mills and engaged in operating a certain machine, known as a "ribbon lap" machine. On January 23, 1923, while in the course of her employment on the machine, Cecelia Wlock slipped on some grease or other substance on the floor, and in the resulting fall her left hand was thrown upon some open revolving rolls, inflicting serious and painful injury. An action was instituted for damages, and from a judgment for the plaintiff the defendant excepted.

It appeared that before the bringing of the suit for damages the plaintiff and the defendant entered into an agreement under the compensation act, and that she received the amount of $87.61, which sum she did not return. It was contended by the defendant that the agreement in payment under the compensation act constituted a bar to this action for damages. The defendant also contended that plaintiff had falsely represented her age as being more than 16 years, and that she assumed the risk of her employment.

The child labor law (Gen. Laws, 5832–5845), prohibiting and limiting employment of minors, was held to be a police regulation for the health, safety, and education of children. It was also considered as a duty owed to the State as well as to the children, and that the child labor law and workmen's compensation act should be construed together in such a situation as the one here existing.

It was pointed out by the supreme court that the workmen's compensation act (Gen. Laws, 5758, 5759, recognizing the employment of minors, was applicable to minors only where lawfully employed, and not to minors employed in violation of the provisions of the labor law. The fact that the plaintiff and her parents falsely represented her age as being over 16 was considered as not furnishing the employer with an excuse to exempt himself from liability under the child labor law requiring a certificate permitting such employment.

In line with the position of the court on the previous questions, it was further held that the plaintiff not having deposited a certificate as required by the statute, and her employment therefore being prohibited, she was not an employee within the compensation act.

Mr. Chief Justice Watson, in speaking for the supreme court, said:

Since the plaintiff was not an employee within the true intent and meaning of the workmen's compensation act, she was not subject to the provisions thereof, nor was the remedy there provided applicable in seeking damages for the injuries suffered. A new remedy given by statute in a particular case can not be extended to alter the common law in any other case.

It follows that the plaintiff's agreement of settlement under the workmen's compensation act, and the acceptance of payment pursuant thereto, constitute no bar to this action.

The child labor law is absolute * * * in prohibiting the employment of a child under the age of 16 years, at work connected with railroading or manufacturing, who does not deposit with the employer a certificate that he is eligible to such employment.

Injury to minors in unlawful employment was held actionable, and the defenses of contributory negligence and assumption of risk were held not to apply.

The argument that plaintiff had sustained a 15 per cent injury to her left hand, a loss of 15 per cent of her earning power, was held not improper under the evidence, which showed that she was earning and receiving $17.82 a week at the time of the accident and at the time of the trial of the case she was working at $11.25 a week.

The judgment was therefore affirmed.

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EMPLOYERS' LIABILITY—MINOR UNLAWFULLY EMPLOYED—SAFE PLACE AND APPLIANCES—CONTRIBUTORY NEGLIGENCE—*Buffam* v. *F. K. Woolworth Co., Kansas City Court of Appeals, Missouri (June 15, 1925), 273 Southwestern Reporter, page 176.*—Naomi Buffam was employed by the F. W. Woolworth Co., Kansas City, Mo., branch. About 8 p. m., Saturday, September 22, 1919, plaintiff was ordered by her forelady to go to the stock room and get some hosiery, and while complying with this order plaintiff was injured by falling from a shelf upon which she had climbed to obtain the merchandise.

An action was brought for damages for the injuries received, and from a verdict and judgment for the plaintiff in the sum of $1,000 the defendant appealed.

It appeared that there was no one in the stock room at the time, and that it was the custom of the employees to climb the shelves in the stock room to secure merchandise on the higher shelves. It further appeared that there was one old stepladder, the first round of which was gone, and that the ladder was unstable and not solid, one side of it having no brace whatever. Plaintiff testified that she had seen this ladder a few times while in the stock room, and that she had never seen any other. The petition alleged that the defendant was guilty of negligence in that the company had violated the State laws prohibiting the employment of minors, the plaintiff being under the age of 15 at the time; that the stock room was insufficiently lighted; that the forelady negligently ordered plaintiff to get the merchandise and failed to warn her of the dangers or to furnish a reasonably safe appliance; that the defendant acquiesced in the custom of the employees climbing upon the shelves; and that the defendant permitted this custom, which was not a reasonably safe method of doing work.

The Revised Statutes of 1919, sections 1106–1124, prohibit the employment of children between the ages of 14 and 16 years in certain cases, and require employment certificates of children between the ages of 14 and 16 years. It was contended that the statute was enacted for the purpose of procuring the education of children, but the court was of the opinion that this was not the sole purpose.

The examination of a child seeking a certificate is not only for the purpose of learning the extent of the education of the child, but whether or not the child has the usual normal development for its age, and is of sufficiently sound health and physically able to perform the work it intends to do.

It was said that the absence of a certificate of employment "is not the proximate cause of the injury." The issuance of the certificate "is the sole evidence of the child's qualification to do the work." Any other construction of the statute, in the opinion of the court, "would practically nullify the provisions requiring a certificate of employment and the wholesome requirements to be met in obtaining it."

If plaintiff did not have an employment certificate at the time she was injured, it was negligence per se for defendant to employ her, and a misrepresentation of her age, if there was any, was no defense, and neither can there be any defense of contributory negligence [citing cases]. The employment of plaintiff, under the circumstances, is to be regarded as the proximate cause of the injury. (Boesel *v.* Wells Fargo Co., 260 Mo. 463, 169 S. W. 110.)

The questions of the employer's negligence and the contributory negligence of the child were held to be proper questions for the jury. The defendant insisted that it was not negligent in requiring plaintiff to climb upon the shelf, for the reason that it was a simple act, and "plaintiff alone could judge whether she could safely do it." The court observed that in its opinion it was not a case where a master "has put the servant to a simple task, not inherently dangerous," and observed that—

This work could be done but one way, and that by climbing on shelving with nothing to hold to but the shelves themselves. The use of the stepladder present was not a safe alternative.

The plaintiff testified that she did not stay on the shelf any longer than necessary, and that she had seen her forelady and various employees obtain merchandise in a similar manner. The failure to look for the ladder was considered by the court as not preventing the plaintiff from recovery, because "the jury could say that the manner in which she did the work was just as safe as if she had used the ladder, it being unstable and having its first round gone." There were no stockmen or stock ladies there at the time, and the court of appeals was of the opinion that the plaintiff could not be convicted of contributory negligence because she failed to wait for the stockmen to return; it also appeared that it was not the primary duty of the stockmen to assist in getting the stock down, except on request.

An instruction submitting the issue of employer's negligence in employing plaintiff without obtaining the employment certificate required by statute, which was not properly pleaded in the petition, was held prejudicial error and the judgment was reversed and the cause remanded on that ground.

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EMPLOYERS' LIABILITY—NEGLIGENCE—ASSUMPTION OF RISK—BRAKEMAN FALLING FROM CABOOSE—*Friermood* v. *Oregon-Washington Railroad & Navigation Co., Supreme Court of Washington (April 23, 1925), 235 Pacific Reporter, page 17.*—H. E. Friermood, employed as a freight brakeman by the defendant railroad company, on April 4, 1923, at about 10 o'clock p. m., while in the line of his duties, fell from the top of a caboose and sustained an injury for which he sought to recover damages. It appeared from the evidence that at the time there were two types of cabooses in use upon the railroad, one having a wide cupola and one having a narrow one, the latter having an iron railing around the entire top while the former had an iron railing only at the ends. The caboose with the wide cupola had been in use for some time and was approved by the Interstate Commerce Commission, and it was from this kind

of a caboose that the plaintiff fell. He went upon the top of the caboose at the rear end on a dark and rainy night, and while attempting to pass along the side of the top, not knowing that the railing did not extend clear along the side, he reached the end of the railing, lost his balance, and fell to the ground. It also appeared that he had made two trips with the same caboose attached, but he testified that on these trips he had no occasion to go upon the top. Plaintiff claimed the company was negligent in not informing him that the railing did not extend clear around the top of the caboose. From the judgment of dismissal the plaintiff appealed.

In considering the question as to whether the company was guilty of the negligence charged, the supreme court quoted with approval from Elliott on Railroads, volume 4 (3d ed.), section 1858:

A person who accepts service as a brakeman on a railroad train assumes the ordinary risks of the service into which he enters.

And also from section 1832:

The general rule is that if the employer uses ordinary care to provide and to keep in reasonably safe condition appliances of a kind that are in common use for the purpose, he is not guilty of negligence.

Friermood had been working as a brakeman for over 10 years, and had been with the defendant company during the 3 years preceding the injury. He had on two occasions gone out with a train "with the same caboose attached as the one from which he fell," and, as stated, the type was one in general use and met the requirements of the interstate commerce rules.

Under the circumstances of this case the supreme court held that there was no question of negligence to be presented to the jury and that the trial court properly directed a verdict. In conclusion the court said:

The rule of that class of cases cited by the appellant which hold that the employer is negligent when he introduces, without notice to the employee, some new and unusual device or equipment involving an unexpected and unanticipated danger and does not inform the employee, is not here applicable.

The judgment was therefore affirmed.

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EMPLOYERS' LIABILITY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DUTY OF EMPLOYER—DANGEROUS CHEMICAL—*Chicago, R. I. & P. Ry. Co.* v. *Cheek, Supreme Court of Oklahoma (December 16, 1924), 231 Pacific Reporter, page 1078.*—Joseph Cheek was employed by the defendant railroad company as a section hand. On or about July 26, 1922, Cheek, with other men, was required to handle ties which had been made wet with a strong solution of creosote; they

were furnished only one iron hook to work with. As a consequence the creosote penetrated the clothing, soaking through to the skin and causing burns and sores. Cheek suffered injuries upon the skin, and flesh, and brought an action for damages in the sum of $2,996.90 to cover medical bills and for the pain and suffering. A verdict was returned in his favor in the sum of $2,000 and the defendant appealed, contending that the plaintiff was contributorily negligent and that he knew of the danger and assumed the risk. The evidence tended to show that the condition of the plaintiff was permanent; that the creosote solution was poisonous and calculated to produce such an effect; that the plaintiff had never before in hot weather handled ties saturated to the dripping point, and that no warning was given him. The Supreme Court on reviewing the record said:

It has been held by this court in many cases that the employer owes the employee the duty to use ordinary care to furnish him a reasonably safe place to work, and reasonably safe equipment and appliances to work with.

It is just as familiar a rule that, for the plaintiff, employee, to recover damages against the defendant, employer, it is incumbent upon the plaintiff to show that the defendant owed him a duty which had been breached, resulting in injury and damage.

When the employer uses a chemical which is well known to medical men to be poisonous, for the purpose of preserving its wood railroad ties used in building or repairing its tracks, the court was of the opinion that "it takes notice of the dangers incident to handling such ties, and owes its employees the duty of warning them of any such danger; and when no warning is given the employee has a right to assume, in the absence of knowledge on his part, that it is safe to handle the ties."

The defense of contributory negligence was not pleaded at all as a defense or in mitigation of damages. The supreme court held:

It is doubtful if the inference of assumption of risk could be drawn from the evidence, and certainly not as a matter of law.

The evidence was considered sufficient to show that the plaintiff suffered the injury and that it was "the direct and proximate result of the defendant's failure to warn the plaintiff of the danger incident to handling the creosoted ties, and the failure to furnish sufficient hooks to handle them without plaintiff coming in contact with the creosoted ties."

The judgment was therefore affirmed.

A case involving the same principle was before the Appellate Court of Indiana (Baltimore & Ohio R. Co. *v.* Ranier (1925), 149 N. E. 361), where boys at lunch took refuge in an empty freight car on the employer's premises. In the car was a jug containing sulphuric acid, but with no mark to

identify its nature. There was no stopper in it, and one of the boys, thinking that the jug contained water, in sport threw some of the liquid on a mate, resulting in serious and painful injuries. Judgment was allowed for damages, and on appeal affirmed, the court saying:

> One who has in his possession or under his control a dangerous agency must use care commensurate with the known danger, and especially the danger with reference to immature persons who are likely to come into contact therewith. In order to render the appellant liable in the instant case, it is not necessary that it should have reasonably anticipated that an injury might have happened to some person in the exact manner in which appellee was injured.

However:

> In order to hold a person liable for remote negligence, the injury complained of must be one that under the circumstances might have been reasonably foreseen or anticipated by a person of ordinary prudence, to follow from, or be the natural probable consequence of, the first negligent or wrongful act.

Such negligence having been found to be the proximate cause, i. e., the one that necessarily sets the others in motion, the court affirmed the judgment.

An Oregon case (Voshall *v.* Northern Pacific Terminal Co. (1925), 240 Pac. 891) may here be noted as falling in the same class with the foregoing. Voshall was a common laborer, inexperienced in the work assigned him of polishing brass work on Pullman cars, using a mixture containing oxalic acid, tripoli, wood alcohol, and turpentine. The dust and fumes were inhaled and absorbed, producing infection and permanent injury to the heart. As in the last case above, the court found it "not essential to constitute proximate cause that the precise injury which resulted from the master's negligence should have been foreseen," but "it is sufficient if injury in some form should reasonably have been anticipated."

Neither warning of latent dangers nor protection of any sort having been given, a judgment for damages was held to have been properly given.

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EMPLOYERS' LIABILITY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—GUARD INJURED BY STRIKERS—*Schaff* v. *Bourland, Court of Civil Appeals of Texas (December 4, 1924), 266 Southwestern Reporter, page 843.*—On July 1, 1922, a general strike was called by the Federated Shop Crafts, and many of the defendant's employees joined the strike. On July 10, 1922, A. B. Bourland, the plaintiff, was employed by the defendant Schaff, receiver, to guard the property of the railroad in his charge. Bourland left his home at Hillsboro and traveled by pass from Hillsboro to Denison with three other men who were employed at the same time and for the same purpose. As they were going from the train to the station at Denison they were taken in charge by a mob of strikers, "each one being placed in a separate automobile, and appellee was carried to some point in the country and flogged and cursed and his life threatened, and he was told by the strikers that if he returned to Denison he would be killed." No evidence was introduced showing the extent of the injuries or that Bourland lost any time from work or that he had medi-

cal treatment. Bourland filed his suit for damages, claiming that he was a passenger on defendant's train and that as such he was entitled to a certain degree of care to prevent his receiving the injuries. He also contended that defendant had promised to have some United States marshals at the station to meet the guards, and that the defendant knew that the mob of strikers was at the station and would assault him when he arrived. The defendant filed a general demurrer, a number of special exceptions, and as special defense alleged that there had been no prior violence on the part of the strikers and that the plaintiff was guilty of contributory negligence by informing the strikers, upon his arrival in Denison, of his business. The cause was tried before a jury, and judgment was entered for the plaintiff in the amount of $7,000. An appeal was taken.

In holding that the verdict of the jury for the plaintiff could not be sustained the court said:

No act of violence prior to said time was shown. There is no evidence in the record that the strikers had in any way either threatened or molested any of the employees of appellant or any of the strike breakers or guards, or had in any way threatened to injure any of the property of appellant or injure any of its employees. The mere fact that a strike among the Federated Shop Crafts was in existence was not in itself sufficient to place appellant on notice that any of its other employees or guards of its property would be in any way molested, and there was no evidence that appellant could have foreseen the attack or in any way prevented same.

To the contention of the plaintiff that he was entitled to the same degree of care that a passenger would be entitled to, the court said:

The weight of authority, we believe, is to the effect that while the employee is being carried from the place of his work to his home and back he travels as an employee.

We are of the opinion, under the facts in this cause, appellee having gone to Denison for the purpose of doing guard duty for appellant and being on the pay roll of the company as such, and after having arrived in Denison started to the waiting room of the station to get instructions or directions, and after leaving the train and while going to the waiting room he told the mob his business and what he was there for, he was not entitled to that high degree of care for his protection from the mob required of public carriers for the protection of its passengers.

It was held contributory negligence on the part of the plaintiff to tell the mob the nature of his business. A special charge should have been given the jury.

No other passengers except appellee and his companions who had gone to Denison to do guard duty were molested by the mob, and the evidence tends to show that if appellee had not informed the mob of his business he would not have been molested. If the attack was caused by appellee's action in telling the mob his business in Denison

and the same was the proximate cause of the injury, appellant would not be liable.

The defendant contended that the question whether the assault was sudden and unexpected should have been submitted to the jury. The court was of the opinion that it should have gone to the jury because "if the attack was sudden and unexpected and such as could not have been reasonably anticipated or prevented, appellant would not be liable."

The court of civil appeals therefore reversed the judgment and remanded the cause for further proceedings.

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EMPLOYERS' LIABILITY—NEGLIGENCE OF FOREMAN—STATE MINING LAW—*Philadelphia & Reading Coal & Iron Co.* v. *Kever, United States Circuit Court of Appeals, Third Circuit (March 5, 1925), 4 Federal Reporter (2d), page 531.*—George Kever was killed while in the course of his employment as a coal miner, and an action was brought by his widow on behalf of herself and children for damages for his death. From a judgment for plaintiff the employer brought error. There was evidence on the part of the plaintiff "that the posts and siding boards needed by Kever were not supplied him at his place of work," and it is contended that this constituted negligence on the part of the company. The defendant urged that "under the facts in this case it was the duty of the mine foreman and his assistant fire boss to see to it that suitable props and timbers were available for use by George Kever, and if the failure to have sufficient timbers available was a contributing cause to the accident to George Kever, the negligence, if any, was the negligence of those for whose acts the defendant was not responsible."

The circuit court of appeals, in upholding the contention of the company, said:

Under the mining statutes of Pennsylvania, and the decisions of the supreme court construing and applying such statutes, we are of opinion defendant was entitled to an unqualified affirmance of such request to charge. Without discussing the several cases decided by that court, it suffices to refer to its latest pronouncement, which is found in Lynott *v.* Scranton Coal Co. (269 Pa. 554, 112 Atl. 741). Construing the State mining laws, the court there says: "The mine foreman has charge of the underground workings (art. 12, P. L. 195), is a person whose competency is certified to by the State, and to whom broad powers have been delegated. When the work has been committed to his charge, as permitted by the act, the owner is not ordinarily responsible for injuries which occur from negligent performance of his duties. * * * The act with which we are dealing (Act June 2, 1891, art. 11), makes it 'the duty of the owner, operator, superintendent, or mine foreman of every mine to furnish to the miners all props, ties, rails, and timber necessary for the safe mining of coal and for the protection of the lives of

the workmen.' Requests for such materials, when necessary, are to be made to the 'mine foreman or his assistant.' The owner would not, therefore, be liable for injury arising from the failure to supply props, where the service had been committed to such person (Musin *v.* Pryor Coal Co., 68 Pa. Super. Ct. 88, under the bituminous coal act), unless he has been notified of the default and fails to make proper efforts to protect the employees."

Such being the law of Pennsylvania as declared by its highest court, and the point quoted embodying the same, the court below erred in not so charging.

The judgment was therefore reversed.[3]

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EMPLOYER'S LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—HORSEPLAY—COURSE OF EMPLOYMENT—NEGLIGENCE—*Griffin* v. *Baltimore & Ohio R. R. Co., Supreme Court of Appeals of West Virginia (February 10, 1925), 126 Southeastern Reporter, page 571.*—Benjamin C. Griffin was employed as a laborer in a section gang of the defendant railroad. At the noon hour the foreman and several men were on one side of the track over which a freight train was moving and the plaintiff was on the other side. None of the men were engaged in work for the company; the foreman and the men with him were throwing stones under and between the ends of the moving cars, one of which struck the plaintiff and destroyed the sight of one eye. The employees had engaged in throwing stones at tobacco boxes or at trees many times as a matter of diversion. The foreman started the throwing under and between the cars at the time of the injury, but according to the evidence did not cast the stone which struck the plaintiff. An action was brought under the Federal employers' liability act (U. S. Comp. St., secs. 8657–8665) for permanent injury to the eye, and from a judgment for the defendant the plaintiff brought error, the judgment below being affirmed.

The supreme court based its decision upon the case of Fletcher *v.* Baltimore & Potomac R. Co. (168 U. S. 135, 18 Sup. Ct. 35), and when the main case was previously up before it on a demurrer to the declaration (122 S. E. 912) held:

Where a railroad company knowingly permits and encourages its employees to indulge in dangerous practices on its premises, although

[3] This decision presents a striking illustration of the difference between liability and compensation statutes. The judgment in favor of the widow was reached in litigation which had been in process for at least 10 years, the earliest Federal decision having apparently been rendered in 1916. This refers to an earlier trial, of which the date is not given. It seems safe to assume that the death, for which the action was brought, occurred prior to the enactment of the compensation law of 1915, and also prior to the modification of 1915 to the law relating to the powers and liabilities of mine operators, declaring that mine foremen and their assistants shall be agents of the owners and operators (Acts No. 329, 330 (anthracite and bituminous mines, respectively), Acts of 1915).

The Lynott case, cited above, was decided in 1921, but related to an injury received in 1914. This decision was not final, but reversed a decision of the lower court and remanded the case for a new trial, under a construction of the law more favorable to the plaintiff than that held by the court below. Thus the Kever case, though practically current, reflects a legal situation that is now fortunately almost obsolete.

the acts of such employees are beyond the scope of their employment and totally disconnected therewith, it will be liable to one injured thereby lawfully on its premises at the time of the injury.

The question for decision was whether a jury "could fairly say that the occasional throwing of rocks at targets by the fellow servants of the plaintiff constituted such acts as were dangerous and from a continuation of which an injury to some one should have reasonably been apprehended," even though no one had theretofore been injured.

The plaintiff contended the throwing of rocks under and between the cars was negligent and dangerous, even though target practice is not, and that such throwing, being done with the knowledge and presence of the foreman, who was the representative of the company, made the company liable upon his failure to stop it. This argument was considered by the court as "based upon the theory that the foreman, by reason of his right to fire, discharge, and direct the men, was a vice principal." The court stated that it had held that the relation of vice principal was "to be determined by the character of the negligent act, and not by the grade or the rank of the servant, and that the negligence of a superior servant is the negligence of the master only when that negligence pertains to a nonassignable duty of the master." The supreme court held further:

In cases under the Federal employers' liability act (not based on previous dangerous acts like the one causing an injury), the great weight of authority is that an employee can not recover for an injury unless the injury occurred while he was engaged in the actual work of the master.

The Federal act was held not intended to cover acts of an employee in no way connected with the work he was engaged to perform.

The judgment of the circuit court in favor of the defendant was therefore affirmed.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—PROTECTION DUE EMPLOYEES DURING STRIKE—*St. Louis-San Francisco Ry. Co.* v. *Mills, United States Circuit Court of Appeals, Fifth Circuit (December 17, 1924), 3 Federal Reporter (2d), page 882.*—Ira S. Mills, employed as a car inspector by the company named, was employed on a Monday inspecting both intrastate and interstate trains at the employer's yards in Birmingham, Ala. Prior to and at the time of this service there was a strike in progress and the employer furnished guards for the men who took the places of the strikers. The Thursday evening following the employment, between 10 and 11 o'clock, Mills and another employee finished inspecting an interstate train. Shortly thereafter the two inspectors, accompanied by a guard who had been assigned to take

them to their homes, left the yards and walked to a street car about half a mile away. Soon after boarding the car one of several men upon the back platform of the car put his hand upon the shoulders of one of the inspectors, named Weathers, and told him to get off. Several shots were fired about that time and some of them struck Mills, inflicting wounds from which he died the following day. Odell Mills, administratrix of the estate of the deceased employee, brought an action at law under the Federal employers' liability act (Comp. St., secs. 8657–8665), and from a judgment for the plaintiff defendant brought error.

It appeared from the evidence that prior to the shooting threats of personal violence were made by strikers to the men who were working, and one Wilkins, who was in charge of the guards, knew of these threats.

The circuit court of appeals, on reviewing the record, speaking through Mr. Justice Walker, said:

The employee's day's work being in both intrastate and interstate commerce, while, after finishing his day's work, he was making a trip which was a necessary incident of that work as a whole, he was employed in interstate commerce. Though when the employee was shot he had left his employer's premises and was on a vehicle operated by a third party, it fairly may be said that he was still an employee, if the trip he was making was in immediate connection with his employment, and during that trip the employer owed him a duty, the performance of which was part of the consideration by which he was induced to enter upon and continue in the employment.

There was evidence supporting the finding that there was negligence in the matter of having the employee guarded while on his way home. The court considered it a fair inference that "such protection had to be furnished to obtain labor at the place needed, and that the relation of employer and employee still continued while the employee was on his way from his place of work to his home, accompanied by a guard furnished by the employer pursuant to an implied obligation."

It was contended by the employer that though it negligently failed to furnish protection, yet that that negligence was not a proximate cause of the death, because it would not have occurred but for the supervening of an independent agency. The Circuit Court said to this contention:

Negligence properly may be regarded as the proximate cause of an injury, if it appears that the injury was the natural and probable consequence of the negligence, and that in the light of the attending circumstances it ought to have been foreseen by the wrongdoer. A careless person is liable for all the natural and probable consequences of his misconduct. If the misconduct is of a character which, according to the usual experience of mankind, is calculated

to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct.

The evidence was considered as sufficient to present to the jury the questions whether the employer was or was not under a duty to guard the employee, and whether the employer did or did not negligently fail to perform that duty. Finding no error the circuit court of appeals affirmed the judgment, one judge dissenting, on the ground that the workman was not at the time engaged in interstate commerce.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—STREET RAILWAYS—*Borelli* v. *International Ry. Co., Court of Appeals of New York (March 3, 1925), 147 Northeastern Reporter, page 356.*—Giorgio Bovenzi was employed by the company named in repairing its track, when he received an injury causing his death. An action was brought by the administrator of the estate against the employer under the Federal employers' liability act (U. S. Comp. St., secs. 8657–8665), and from a judgment of the appellate division reversing a judgment of nonsuit and granting a new trial the defendant appealed.

The court of appeals pointed out that in order to recover for the death of employees under the Federal employers' liability act the employer must be a common carrier by railroad, must be engaged in interstate commerce, and the deceased employee at the time of the accident must also be employed in interstate commerce. On reviewing the record, the court observed that none of these three conditions preceding existed in the case.

The International Railway Co. owns all the street railways in the city of Buffalo, and it also has an interurban line to Niagara Falls and a connecting line crossing the Niagara River by bridge and running through Ontario to Queenstown. One of these urban street railways is known as the Ferry Street line, and it was on this that the deceased was injured. The Ferry Street cars go to the Niagara Falls line at Court Street, where the rails connect physically but no car goes further, the passengers being required to transfer.

The safety appliance act (Comp. St., sec. 8605) speaks of "any common carrier engaged in interstate commerce by railroad." The court of appeals noted that this act had never been applied to urban street railroads, although it had to interurban lines. (Spokane & Inland Empire R. Co. *v.* United States, 241 U. S. 344, 36 Sup. Ct. 668, 60 L. Ed. 1037, see Bul. No. 224, p. 203.) It was pointed out that while the arbitration act (U. S. Comp. St., sec. 8666) and the hours of service act (U. S. Comp. St., sec 8677) contain similar language, neither has so far been held to affect street railroads,

although the one statute expressly excepts them and the other does not. The conclusion of the court was that "the defendant in operating the Ferry Street line is not 'a common carrier by railroad.'"

Where the owner of an urban street railway also owned an interurban line and a passenger could go on the urban system only to the city line, where he could buy a ticket into a foreign country, such transportation of a passenger intending to go to a foreign country over the urban line was held by the court of appeals as not engaging in foreign commerce within the meaning of the Federal act.

The order of the appellate division was accordingly reversed and that of the trial term granting a judgment of nonsuit affirmed.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DAMAGES—*Rigsbee* v. *Atlantic Coast Line R. Co., Supreme Court of North Carolina (October 7, 1925), 129 Southeastern Reporter, page 580.*—Edward R. Rigsbee was employed by the Atlantic Coast Line Railroad Co. in the capacity of switchman or brakeman. While coming from the office Rigsbee passed through an open space between two box cars, and while in the act of crossing the east line of the railroad he was struck by the engine of an approaching train and killed. There was evidence that the crossing used by the deceased workman had been used not only by the employees but by others for a period of years. From a judgment in favor of the plaintiff in the sum of $15,000 the defendant appealed on the ground that proper signals had been given upon the approach of the train, and that the intestate heedlessly ran upon the track in front of the train and solely by his own negligence caused his injury and death.

The specific contention of the defendant that the alleged negligence was essentially the sole cause of the accident and consequently a bar to the recovery of damages was held by the supreme court as not being in accord with their decisions.

We adhere to the principle that qualifying facts and conditions may so complicate the question of contributory negligence as to make it one for the jury, even when there has been a failure to look or listen (Cooper *v.* Railroad Co., 140 N. C. 209, 52 S. E. 932, 3 L. R. A. (N. S.) 391); and surely upon the facts disclosed in the case at bar, we can not hold, as a legal inference, that the intestate's alleged negligence was such as entitles the defendant to a dismissal of the action. It is incumbent upon the defendant to establish contributory negligence as a matter of affirmative defense.

Whether the intestate approached the track rapidly or slowly was considered a matter for the jury.

In ascertaining the net earnings of the deceased, the jury was held required to deduct only the reasonably necessary personal expenses

of the deceased and not the amount spent by him for his family or those dependent upon him.

Another contention of the defendant employer was that it was the duty of the intestate to stop, look, and listen simply because the track was a place of danger, as to which the court said that "there is no authority for holding that the law imposed upon the intestate the unqualified duty before going on the track." Whether the crossing was technically a highway was held immaterial. It was used by the public as well as by the employees, and whether the company exercised due care in the operation of its train was considered a matter for the jury to decide in connection with the character of the crossing and the defendant's knowledge of its use.

The verdict of the jury having decided all these points and the supreme court finding no error, the judgment was accordingly affirmed.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—SAFETY APPLIANCES—GRAB IRONS—*Davis, Director General of Railroads*, v. *Manry, United States Supreme Court (January 5, 1925), 45 Supreme Court Reporter, page 163.*—A. E. Manry, employed as a baggage man on a train of the Central of Georgia Railroad, was assisting the crew of the engine in coaling it when he was injured. He alleged in his declaration that it became his duty to assist the crew, that he had "stepped down from the coal chute onto the tender of the locomotive and was going back to the rear of the tender * * * to see that the coupling was duly and properly made." And "just as he was in the act of climbing over the rear of the tender the engineer put the locomotive in motion, and before he [Manry] could turn on the ladder and securely brace and hold himself thereon, * * * he was, by a sudden, unusual, and unnecessary jerk, thrown to the ground and the locomotive backed over him." Both legs were cut off at or just below the knee, and the action was instituted for $50,000 damages. From a verdict and judgment in the sum of $7,500, affirmed by the Court of Appeals of the State of Georgia, the defendant was granted a petition for certiorari to the United States Supreme Court for review.

The plaintiff charged negligence in operating the train and in failing to equip the locomotive with the appliances required by law. On the latter charge it was alleged that the defendants were liable under section 2 of the safety appliance act of April 14, 1910, 36 Stat. 298 (Comp. St., sec. 8618), which provides:

All cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the top of such ladders.

The trial court charged the jury that the above statute required "that all cars having ladders should be equipped with grab irons, that this applied to a tender of a locomotive though it had no roof, and that if plaintiff's injury was due to the absence of a grab iron he was entitled to a verdict." The issue was then stated by the United States Supreme Court to be "as to the effect of the statute."

The defendants contended that the statute quoted did not apply to ladders on a tender. Mr. Justice McKenna, delivering the opinion of the court, said:

The word "roofs" is the determining one. The occurring supposition is that it was used with intelligence and to accomplish its definition, its definition being the expression of its purpose, and that gets aid from the associates of the word in the section.

After reviewing the section above quoted the opinion continued:

It is cars, therefore, which must have handholds or grab irons on their roofs at the tops of such ladders. The section distinguishes between roofs and tops; they do not designate the same thing. And the distinction is natural. This reasoning is not giving exaggeration to verbal differences—defeating purpose. It is made necessary to accomplish the legislative purpose.

The Interstate Commerce Commission has the power to designate the number and dimensions of such safety appliances, and the commission's regulation as to ladders on tenders was quoted by the court as follows:

A suitable metal end or side ladder shall be applied to all tanks more than 48 inches in height measured from the top end of sill and securely fastened with bolts or rivets.

The opinion concluded:

The omission to require a grab iron is a practical construction by the commission—the tribunal to which the application of section 2 was intrusted and which would be solicitous to enforce it—that it applies to cars with roofs and not to tenders, they having no roofs. While the view of the commission is not conclusive with us, it is properly persuasive. We agree with it. The trial court therefore erred in its charge on the effect of the statute, and as the verdict was general with no special finding upon which the verdict could stand without response to the statute, the case must go back for a new trial.

The judgment of the court of appeals was therefore reversed and the case remanded for further proceedings.

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—SIMPLE TOOL DOCTRINE—*Thompson* v. *Chicago Great Western R. Co., Supreme Court of Minnesota (October 23, 1925), 205 Northwestern Reporter, page 439.*—John Thompson, employed by the Chicago Great Western Railroad Co. as a section hand, was pulling spikes with a claw

bar, which according to his story was defective in that the claws were flattened and had too much spread, the result being that it slipped from the head of a spike and precipitated him to the ground, his hand being caught between the bar and a rail. Upon a verdict for the plaintiff the defendant appealed from an order denying its alternative motion for judgment or a new trial.

The supreme court, on review, was of the opinion that the evidence was sufficient to show a defect resulting in an injury to the plaintiff while he was using the tool. The main question considered by the supreme court was as to the rule of the "so-called simple instrumentality cases." Under that rule the supreme court said that "no duty rests upon an employer to inspect simple and common tools for defects arising from their use. Like every other rule of law, it has no application to a case from which there is absent its controlling reason. The reason for this rule is that the servant ordinarily selects the tool, or at least has as good or a better opportunity for inspection than the master." However, that was held not to be the instant case, for the section crew had a number of claw bars at its disposal and the evidence showed that some of them had been discarded. The circumstances of the case were also held to take it out of the rule in that just before the accident the plaintiff had been shoveling cinders. He was put at the new work somewhat suddenly at night and by lantern light, which, while the best available, was not a brilliant illumination. The claw bar causing the injury was selected and furnished by the foreman, the employee having no choice in the matter. For these reasons the supreme court held that the rule of the simple instrumentality cases did not apply. The order denying the motions of the defendant was therefore affirmed.

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EMPLOYER'S LIABILITY—RELEASE—CONTRACT FOR LIFE EMPLOYMENT—*Gerard B. Lambert Co.* v. *Fleming*, *Supreme Court of Arkansas* (*October 19, 1925*), *275 Southwestern Reporter*, *page 912*.—D. P. Fleming, employed by the Gerard B. Lambert Co., sustained severe personal injuries while engaged with a crew of men in cutting and hauling timber. In consideration of Fleming releasing the company and insurance carrier from liability for the injuries received, the company through its woods foreman and its general manager agreed to employ Fleming for life as a night watchman at a salary of $20 per month and board. The employee was given immediate employment as night watchman, and a short while thereafter was given a raise to $35 per month. The term of employment lasted from 1916 until January 3, 1921, when Fleming was discharged. He then instituted an action to recover damages for an

alleged breach of the contract of employment. On the trial of the cause the jury returned a verdict in favor of the employee, assessing damages in the sum of $720. Judgment was rendered on this verdict and the employer appealed. The supreme court, on reviewing the record, found that there was sufficient evidence to prove the existence of a contract in writing, executed by agents of the company within the apparent scope of their authority, and held that the contract did not come within the scope of the statute of frauds. There was no evidence tending to show that the employee could have worked at other employment to reduce the damages, and the burden of proving such being on the defendant, the supreme court could take no notice of such claim after verdict and judgment of the trial court, the verdict being only sufficient to cover compensation from the date of discharge to the date of trial.

The main point in the case was as to the validity of this contract for life employment. The supreme court was of opinion that:

> It is established by adjudged cases that a contract of this character is enforceable. The validity of such a contract, is based upon settled principles of law, the same as any other kind of contract. It must be based upon a consideration, but the release from an antecedent liability affords such consideration.

There was no error, and the evidence sustaining the judgment, it was therefore affirmed.

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EMPLOYERS' LIABILITY—RELIEF DEPARTMENT—CLAIM—NOTICE—STATUTE OF LIMITATIONS—*Carmody* v. *Pennsylvania Co., Court of Appeals of Kentucky (December 16, 1924), 266 Southwestern Reporter, page 1083.*—Thomas Carmody, while employed on one of the Pennsylvania lines west of Pittsburgh, on November 24, 1905, had his arm cut off. In 1899 the Pennsylvania lines west of Pittsburgh formed a relief department, the purpose of which was " to provide accident and sick benefits for the employees of the company whether injured by negligence or not." Membership was optional with the employees; the department was under the management of a superintendent, subject to the final control of an advisory committee composed of six employees and six members selected by the company. The fund was derived from contributions from the wages of the members, and in case of a deficit it was made up by the railroad company, which was the trustee for the department. Carmody was a member of the department, and upon the filing of an application was granted $1.50 a day until the following spring, when the physician of the department pronounced him as well as he would ever be. He was paid $228 in all. The superintendent then offered Carmody a job, but it was refused because he was not assured that it would be

permanent. He then filed suit against the company to recover for his injury, but it was held in the court of appeals that he could not maintain the action because of "the express provision of his contract with the relief department by which he agreed that the acceptance of benefits from the relief fund for any injury should operate as a release from all claims for damages against the company arising from such injury." (Pittsburgh, etc., R. R. Co. *v.* Carmody, 188 Ky. 598, 222 S. W. 1075.) Carmody "then dismissed without prejudice that action and brought this suit against the trustee of the relief fund," and the defendant pleaded the contract above referred to. The contract in part provided:

All questions or controversies of whatsoever character arising in any manner or between any parties or persons in connection with the relief department or the operation thereof, whether as to the construction of language or meaning of the regulations of the relief department or as to any writing, decision, instruction, or acts in connection therewith, shall be submitted to the determination of the superintendent of the relief department, whose decision shall be final and conclusive thereof, subject to the right of appeal of advisory committee within 30 days after notice to the parties interested, of the decision.

It was alleged and proved that no appeal had been taken from the decision of the superintendent rendered in April, 1905, and the petition was dismissed, from which dismissal Carmody appealed.

The court of appeals quoted with approval the decision in Pennsylvania Co. *v.* Reager (152 Ky. 824, 154 S. W. 412, 52 L. R. A. (N. S.) 841), in which it was held "that the by-law of the relief association was valid, and that the injured employee could not, after accepting the relief claimed, ignore the judgment of the superintendent and sue the trustee." On the return of that case it was decided against Reager, and in the decision the court said:

Under sections 2515 and 2519, Kentucky Statutes, an action for relief from fraud or mistake must in all cases be instituted within five years from the discovery of the perpetration of the fraud or the making of the mistake, and when the action for that purpose is not instituted until more than five years after the commission of the fraud or mistake, it must appear that by the exercise of reasonable diligence it could not have been sooner discovered.

The court of appeals was of the opinion that the above and other decisions were with the weight of authority "in so far as they hold that the member who has accepted the benefits of the relief fund must exhaust the remedies given by the rules of the association before appealing to the courts."

This action was brought 14 years after the decision referred to was rendered. "There is no proof of fraud or mistake sufficient to warrant a recovery, and in addition to this the action was filed more

than 10 years after the decision was rendered." The court considered the action plainly barred by limitation "so far as it attacked the judgment on the ground of fraud or mistake."

The judgment was therefore affirmed.

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EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION—COVERAGE—ELECTION—*Bannon* v. *Watson*, *Court of Appeals of Kentucky* (*January 27, 1925*), *268 Southwestern Reporter*, *page 573*.—James R. Watson, a plasterer, was working for W. P. Bannon, a plastering contractor, stuccoing the walls of the Transylvania University in Lexington, when a defective scaffold gave way, inflicting upon Watson serious and permanent injuries. Watson sued Bannon, alleging negligence, and recovered a judgment in the sum of $8,000, from which Bannon appealed upon the ground that both had elected to accept the provisions of the workmen's compensation act. A separate trial on this issue resulted in a finding for the plaintiff, the court finding that "a former employment of the plaintiff by defendant, under which plaintiff had accepted the provisions of the workmen's compensation act, had terminated and the relationship of employer and employee had ended several months before plaintiff's new employment by the defendant had begun, and that under the later employment, which existed at the time of the plaintiff's alleged injury, the plaintiff had not accepted the provisions of the workmen's compensation act." The court concluded that the plaintiff could then sue at common law for personal injuries received.

Over a year later the case was heard by a jury on the merits, with the same result in favor of the plaintiff. The only question considered by the court of appeals was as to whether the pleadings sustained the finding of the lower court on the jurisdictional issue.

Watson ceased working for the defendant in March, 1920, and from then until the latter part of May, 1920, he worked for other contractors. From the latter part of May he was employed by Bannon as a plasterer on the Francis Building, and following that he worked for Bannon in Lexington, and was so working on October 9, when he received the injury, but at no time did he sign the workmen's compensation register nor was he requested to do so.

The court of appeals, in deciding the question as to the jurisdiction of the court, said:

To make an injury compensable under the workmen's compensation act, both employer and employee must theretofore have elected to operate under its provisions in the way pointed out in the act. (Ky. St., secs. 4882, 4956, and 4957.)

It will be observed that it is not alleged in either pleading that the appellant had ever accepted the provisions of that act, or elected to operate under it. Appellant's counsel admit that such an election

was essential to this defense, but argue that in construing the petition most strongly against the plaintiff, it must be inferred that defendant was so operating. * * *

The argument is ingenious, but not conclusive. To be effective defendant's acceptance must have been registered as required by law. Plaintiff could not waive this; hence it would seem that he might state the facts as he understood them, and leave the legal effect to the court. While the pleadings should be construed most strongly against the pleader, it is doubtful in a case like this if the rule extends to the extent of supplying necessary averments for his adversary.

No mention was made of any acceptance of the act by the employee in the affirmative plea of the defendant; and the court was of the opinion that, as he had assumed the burden of proof, the construction should be most strict against the defendant, as there "is no rule of construction that would authorize the court to supply for him the missing averment so essential to his affirmative defense."

The judgment was accordingly affirmed.

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EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION—DISEASE—ACTION FOR DAMAGES—*Donnelly* v. *Minneapolis Manufacturing Co. Supreme Court of Minnesota (December 12, 1924), 201 Northwestern Reporter, page 305.*—D. J. Donnelly alleged that while in the employ of the defendant he contracted "an occupational disease" known as "chronic bronchitis with chemical poisoning," and that it was due to defendant's negligence. From an order sustaining a demurrer to the complaint the plaintiff appealed.

Taking the complaint on its face value, the court found that the plaintiff suffered from the disease and that the cause was the violation by the defendant of a statute requiring proper ventilation. The plaintiff filed an unsuccessful petition for an award before the industrial commission prior to the bringing of this suit. The court said:

Plaintiff has no claim for accidental injury, even though he may have suffered his supposed disabling detriment by reason of and in the course of his employment, for it is not the result of accident as defined in section 66. "Accident" is there defined as "an unexpected or unforeseen event, happening suddenly and violently, with or without human fault, and producing at the time injury to the physical structure of the body." Plaintiff does not claim to have been a victim of a mischance of that kind.

Plaintiff is excluded from all advantage of the provisions of the compensation law furnishing relief on account of occupational disease, for it is provided in subdivision 9 of section 67 that "for the purpose of this act only the diseases enumerated * * * shall be deemed to be occupational diseases." Neither "chemical poisoning"

nor "chronic bronchitis" is included in the enumeration. Therefore they are excluded, and plaintiff is wholly without remedy under the compensation law.

The defendant contended that this was a case of a wrong without a remedy, the purpose and effect of the law being "to take away from employees subject thereto all remedy except where they suffer accidental injury, or become afflicted with one of the occupational diseases for which compensation is allowed."

The supreme court rejected this view, holding that—

It appears clearly to have been the legislative intention to leave actions of the kind now under consideration under the common law, as modified by the compensation act.

Applied in the instant case, the result urged by defendant would not only destroy "a long-existing common-law right," but it would make a mockery of the statute requiring employers to furnish a decent supply of fresh air to their employees.

This case may be summed up by the statement that defendant is charged with violating its statutory duty to furnish adequate ventilation in the room where plaintiff was employed, and that thereby plaintiff claims to have become afflicted with a disease not enumerated in subsection 9 of sec. 67, ch. 82, G. L., 1921. Our conclusion is that the workmen's compensation act does not apply, that the employee has his action for damages, and that the demurrer to the complaint should have been overruled.

The order sustaining the demurrer was reversed.

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EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION—ELECTION—ESTOPPEL—*Queck-Berner* v. *Macy*, *Court of Appeals of New York* (*June 2, 1925*), *148 Northeastern Reporter, page 543*.—Charles A. J. Queck-Berner, employed by V. Everitt Macy upon his private country estate, was, on June 28, 1919, injured in the course of his employment. The plaintiff brought action for damages, and the defendant pleaded as a defense that both plaintiff and defendant, by their joint election, had become subject to the provisions of the compensation act, and that the liability prescribed in the act was exclusive. (Consolidated Laws, ch. 67.) From a verdict and judgment for the plaintiff the defendant appealed.

The court of appeals, on reviewing the record of the case, held that the workmen's compensation law, section 2, as amended by Laws of 1917, chapter 705, which authorized the employer and the employee to elect jointly to come under the provisions of the act, was applicable to an employment in connection with a business not conducted for pecuniary gain in view of section 3 (not section 2), subdivision 5. It was pointed out that the employment in the case was on a country estate or home and was not in connection with a business for pecuniary gain.

The provisions of the statute required that the employer should make his election to come under the act by posting notices thereof and by filing with the commission a written statement. The statute also provided that an employee shall be subject to the act if he shall not at the time of entering into a contract of hire have given to his employer notice in writing that he elects not to be subject to the provisions of the act and filed a copy of those with the commission.

Mr. Justice Lehman, speaking for the court of appeals, in conclusion said:

Here the defendant's attorney repeatedly stated to the court that the plaintiff conceded and had stipulated that there was a joint election, and the plaintiff's attorney conclusively evidenced his acquiescence in those statements, not only by silence but by arguing only the legal effect of a joint election. To allow a judgment in plaintiff's favor to stand, not because the plaintiff has in fact failed to join in the employer's election, or even because there is a real dispute on this point, but because the defendant rested upon a stipulation which both parties regarded as sufficient to show a joint election, would be entirely subversive of justice.

The judgment was therefore reversed.

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EMPLOYERS' LIABILITY — WORKMEN'S COMPENSATION — RAILROAD COMPANIES—FEDERAL STATUTE—CONFLICT OF LAWS—DAMAGES—*Schendel* v. *Chicago, R. I. & P. R. Co., Supreme Court of Minnesota (June 19, 1925), 204 Northwestern Reporter, page 552.*—Clarence Y. Hope, employed by the defendant railroad as a conductor, was engaged in the hauling of coal from mines in Iowa on the defendant's main line to Pershing, 10 miles away. Hope and the rest of the crew lived at Chariton, on the main line southerly of Pershing. On the morning of February 4, 1923, the plaintiff and his crew went to Pershing, hauling several cars, among which were interstate cars, and at dinner time they coupled a caboose to the engine and the crew proceeded to Chariton for dinner. While still in the Pershing yard limits a rear-end collision between Hope's engine and a through passenger train occurred, and he was fatally injured. The accident was caused by the fault of the train dispatcher in letting the engine and caboose onto the main line in front of the coming passenger train.

A. D. Schendel, as special administrator, brought a proceeding under the Federal employers' liability act (U. S. Comp. St., secs. 8657–8665) to recover for Hope's death. There was a verdict and judgment in the sum of $26,047.50 for plaintiff, the defendant's motion for judgment non obstante veredicto being denied. From this judgment the defendant appealed.

It appeared from the evidence that the conductor, Hope, received "manifests" at the mines showing the destination of the loaded coal cars. These "manifests" the conductor was to mail upon reaching the station. Apparently they were in the caboose and were burned in the fire which followed the collision. The question as to whether the deceased was engaged in interstate commerce was considered by the supreme court as a proper question for the jury, and was answered by it in the affirmative.

Hope died on February 13, 1923, nine days after the collision, leaving his wife of 11 weeks and children by a former marriage. Plaintiff was appointed special administrator on February 20, and suit was brought on February 21. On March 2, 1923, a proceeding was instituted by the defendant company under the compensation law. The compensation act (Iowa Code 1924, sec. 1437) provides that an employer may apply for an arbitration. Mrs. Hope answered the petition for arbitration, alleging that the deceased was employed in interstate commerce and that the compensation act was without application, and asked that no relief be granted. She took no part in the proceeding except to answer the appeal. An award was made, and this was pleaded by supplemental complaint as a bar to the question as to whether the decedent was employed in interstate commerce. It was observed by the Supreme Court that the Federal act, within the field which it covers, supersedes the common-law liability and the liability created by death by wrongful act statutes, or employers' liability acts, or compensation acts. It was the contention of the defendant that the compensation award in Iowa was a complete bar to the action under the Federal act in the Minnesota courts. It was further contended that the finding that Hope was engaged in intrastate commerce, under the compensation proceeding, "binds the personal representative of the deceased, proceeding under the Federal act in an earlier-commenced action." It was claimed that the award was res adjudicata in the broad sense and that it was an estoppel upon the question of the character of Hope's employment. The Supreme Court, after discussion, said:

From the facts surrounding the accident, and with causal negligence admitted as here, there arose one cause of action. It was under the Federal act or the Iowa compensation act.

If the action had been brought in a Federal district court in Iowa, as with great propriety it might have been, we can not think that the Federal court would have permitted the defendant to assert as a bar against the plaintiff an award to the beneficiary in the later compensation proceeding, made against the protest of the beneficiary that her rights were determinable in the pending action. The result should be the same if the action were brought in a Federal court in

Minnesota, as it might have been, or in a State district court of Iowa, where it might have been brought with greater convenience than in Minnesota. And it should be the same when brought in a State court of Minnesota designated by Congress as a proper court.

It was the further contention of the plaintiff that though the fact of the character of employment found in the compensation proceeding might in a particular case be an estoppel in a subsequent action, there "can be no estoppel here, because of lack of identity of the parties," the widow as beneficiary under the compensation award, and the administrator as plaintiff in the action for damages. On this point the court held that—

> The right of recovery under the employer's liability act is in the personal representative, not in the beneficiaries. The award under the compensation act is to the beneficiaries. The personal representative of the decedent does not participate. The beneficiaries can not sue under the Federal act.
>
> We follow the Federal authority, and hold that there was not the requisite identity of parties.

The verdict for $26,047.50 granted by the trial court was objected to by the defendant on the ground that it was excessive. The court pointed out that the life expectancy was between 21 and 22 years, and that he contributed $135 to $150 a month to his wife. The testimony showed that prior to his death he suffered great pain, and at times he was conscious and spoke rationally. The court observed that usually a substantial award for pain and suffering is not allowed "unless there is substantial evidence of it, nor is a jury permitted to make an emotional award through sympathy for suffering."

The amount was considered fairly sustained and the judgment was therefore affirmed.

The court added that—

> If subsequent events make it desirable, the trial court, having charge of the distribution of the fund, can require the discharge of liability upon the compensation award, so that the defendant will not be inconvenienced thereby.

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EMPLOYMENT AGENCIES—LICENSES—CONSTITUTIONALITY OF STATUTE—*McBride, Commisisoner of Labor*, v. *Clark*, *Clark* v. *McBride, Commissioner of Labor, Court of Errors and Appeals of New Jersey (January 19, 1925), 127 Atlantic Reporter, page 550.*—These cases, presenting substantially the same questions, were dealt with by the court of errors and appeals at the same time. In the first case the commissioner of labor recovered a penalty in the sum of $250 against Charles Clark for conducting an employment agency without a license in violation of section 3 of chapter 227, Acts of 1918.

The second case was on certiorari directed to the commissioner of labor, bringing before the court the refusal of the commissioner to grant a license to Clark to carry on an employment agency.

It was the contention in both cases that the fifth and fourteenth amendments of the Federal Constitution, and section 1, act 1, of the State constitution, had been violated.

The court of errors and appeals observed, in considering these two cases, that—

> The right of a State under the Constitution of the United States to regulate the business of employment agencies has been clearly established by the Supreme Court of the United States in the case of Brazee *v.* Michigan (241 U. S. 340, 36 Sup. Ct. 561 [see Bul. No. 224, p. 130]), the court in that case using this language: "Considering our former opinions, it seems clear that without violating the Federal Constitution a State, exercising its police power, may require licenses for employment agencies and prescribe reasonable regulations in respect of them, to be enforced according to the legal discretion of a commissioner."
>
> It is common knowledge that the business of an employment agency is one dealing with a great body of our population, both native and foreign born, which is susceptible to imposition, deception, and immoral influences. The right of a State to regulate under its police powers a business which involves dangers to public morals and public health can not at this date be called in question. It is not an infringement of any right that the legislature has prescribed that he who engages in the business of an employment agency should first submit himself to the permission and license of the State, or that he shall be subject to reasonable regulation in the conduct of such business. The conclusion we reach is that the act in question (P. L. 1918, p. 822) is within the police power of the State in so far as it requires the obtaining of a license by one seeking to engage in the business of an employment agency. There was therefore no error in the judgment rendered in the imposition of the fine of $250 on the appellant for conducting his business without such license.

In the second case the court noted that it was obvious that the power of deciding upon the fitness of an applicant for a license must be vested in some authority if the purpose of the act is to be made effective. Under section 10 of chapter 227, Acts of 1918, the commissioner of labor may refuse to issue any license "for any good cause shown" within the meaning of the act. As to whether the power was legally exercised in the individual case, the supreme court decided that "the commissioner having refused the prosecutor's application for a license upon the ground that the applicant had already violated the statute by carrying on the business without a license, well knowing the legal requirements therefor," and as he "obstinately refused to apply for a license," carrying on the business until prosecuted and fined, it is "our opinion that the commissioner was justified in refusing the license."

EMPLOYMENT OF LABOR—OCCUPATION TAX—CONSTITUTIONALITY OF STATUTE—*Marion Foundry Co.*, v. *Landes, City Auditor et al.*, *Clawson* v. *Same, Supreme Court of Ohio (March 10, 1925), 147 Northeastern Reporter, page 302.*—The plaintiffs in each of these cases sought in the court of comon pleas to enjoin the collection of an occupational tax imposed by the city of Marion under an ordinance enacted by the city council on March 10, 1924, entitled:

To levy an occupational tax upon persons, associations of persons, firms, and corporations carrying on certain trades, professions, occupations, businesses, and employments in the city of Marion, Ohio, in the year 1924.

In the schedules contained in the ordinance an attempt was made to classify and tax all persons, associations of persons, firms, corporations, professions, occupations, businesses, and employments operating within the city. Schedule 1 provided a tax of $100 with an additional tax of $2 for each person employed by tanneries, abattoirs, packing houses, etc., including manufactories of every kind, character, and description. Schedule 2 taxes wholesalers and retailers, Schedule 3, occupations and professions, and Schedule 4 undertakes to tax all occupations not specified in Schedules 1, 2, and 3. Judgment was in favor of the city officials, and plaintiffs brought error.

It was contended that the tax violated section 1 of the fourteenth amendment to the Federal Constitution, but on the authority of Southwestern Oil Co. *v.* Texas (217 U. S. 114, 30 Sup. Ct. 496, 54 L. Ed. 688), sustaining a statute of Texas taxing certain classes of business, the supreme court held that the ordinance did not deny due process.

To the contention that the tax contravened sections 1 and 2 of article 2 of the State constitution, the supreme court referred to the case of State ex rel. Zielonka *v.* Carrel, Auditor (99 Ohio St. 220, 124 N. E. 134), wherein the same court held:

The ordinance of the city of Cincinnati providing that an annual tax shall be laid upon all persons, associations of persons, firms, and corporations pursuing any of the trades, professions, vocations, occupations, and businesses therein named is a valid exercise of the legislative power of such city.

It was pointed out that the ordinance specifically declared that the "number of employees is used solely as a unit of measurement to determine the amount of the tax as levied," and that the ordinance did not divide the occupation into component parts and tax both parts.

The ordinance was held not to be within the prohibition of article 12, section 1, of the State constitution, which forbids a poll tax,

since the proposed tax is levied upon the occupation, and "is paid by the person, association, etc., engaged in the occupation—is a tax, not upon the privilege of being but upon the privilege of engaging in an occupation."

The judgment of the court of appeals for the defendants was therefore affirmed and the ordinance sustained.

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EXAMINATION, LICENSING, ETC., OF WORKMEN—BARBERS—EX POST FACTO LAW—*State* v. *Wester, Supreme Court of Washington (June 9, 1925), 236 Pacific Reporter, page 790.*—Lucy Wester, a barber, was at the time charged engaged in her trade in the city of Tacoma. She was convicted of barbering without a license, and upon being sentenced by the trial court appealed.

The law involved is chapter 75, sections 2 and 9, Laws of 1923, which provides in part:

SECTION 2. *License required.*—It shall be unlawful for any person to follow the occupation of barber or practice as a barber in any incorporated town in this State unless he shall first have obtained a license as provided in this act. * * *

SEC. 9. *Licenses to unlicensed lawful practitioners.*—Every person who shall have been continuously and lawfully engaged in practicing the occupation of barber in this State without license for six months prior to the date when this act shall take effect, shall within six months thereafter make application for license to the State treasurer. * * *

After the passage of the 1923 law appellant had applied for a license without examination under section 9 of the act, upon the ground that she had been engaged in barbering in Tacoma for six months prior to the taking effect of the act. The previous law required licenses only in incorporated cities and towns (Rem. Comp. St., sec. 8277), but Lucy Wester did not have this license.

It was her contention that, "in as much as only those who practiced barbering in incorporated towns were required to have a license, to deprive her of a license without examination is to punish her for a past offense, and it is therefore an ex post facto law." The supreme court considered the law not ex post facto, but that such provision as is in this law refers to qualifications, and is not in any sense an attempt to punish for a past offense, adding:

We think it needs no argument to demonstrate the right of the legislature to say that one who has been lawfully following a profession may be admitted without an examination, while those who have been violating the law shall be required to pass one. We have previously upheld statutes of like character.

The appellant further contended that the words "and lawfully" create a special privilege to barbers outside of incorporated towns as against barbers having practiced in cities. The supreme court observed that the same point had been raised as to the previous law on this subject, and that it was decided adversely to appellant's contention in State *v.* Sharpless (31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893; see Bul. No. 48, p. 1111).

The appellant also argued that the law was unconstitutional because section 5 permits examination as to matters which in no wise affect public health, but the supreme court held that the constitutionality of the statute relating to the examination of an applicant for barber's licenses was not presented where the one complaining after conviction for practicing without a license had not taken the examination, or been denied license because of unsatisfactory grades on examination.

To the contention that the rules adopted by the board were unreasonable, the court held that—

> If the rules or system of grading adopted by the board should be unreasonable, unwarranted, or arbitrary, such action does not render the law unconstitutional, but the remedy must be in an appropriate proceeding to review the conduct of the board. (In re Thompson, 36 Wash. 377, 78 Pac. 899, 2 Ann. Cas. 149.)

The judgment was therefore affirmed.

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EXAMINATION, LICENSING, ETC., OF WORKMEN—PLUMBERS—CONSTITUTIONALITY OF STATUTE—*Replogle* v. *City of Little Rock, Supreme Court of Arkansas (November 10, 1924), 267 Southwestern Reporter, page 353.*—Sections 7623 to 7637, inclusive, of Crawford & Moses' Digest, provided that there should be in every city of the first and second classes a board of examiners of plumbers, consisting of four members—two master plumbers and two journeyman plumbers. The board was given power to examine all applicants as to their knowledge of "plumbing, house drainage, and plumbing ventilation, and if satisfied of the competency of the applicant, the board shall issue to each applicant a certificate authorizing them to work at the business of plumbing." The board was authorized to formulate rules regulating the work of plumbing and drainage, such regulations to include materials and workmanship, and the manner of executing the work connected with plumbing and drainage. It was made unlawful for any person to work as a journeyman plumber or to install plumbing fixtures or materials, unless possessing a "certificate of competency."

The city council of Little Rock created a board of examiners of plumbers under the above act and prescribed its powers and duties,

the plumbing department to be under the supervision of the board of health. Fees were set and penalties prescribed.

G. W. Replogle, plaintiff, alleged that he was a practical plumber, well versed and skilled in the art; that one of the rules adopted by the board required applicants to submit to a test in "wiping lead joints," and 60 per cent was marked off for failure to meet such test; that such wiping was an obsolete practice; and that this requirement was an unjust, arbitrary, and discriminatory condition precedent to the issuance of certificates.

The plaintiff failed to meet the test required by the board, and for himself and others similarly situated instituted an action in equity setting up that they desired to pursue their vocation without the certificate required by the ordinance. It was alleged that the ordinances and the act were unconstitutional, and an injunction was asked restraining the city of Little Rock and the chief inspector of plumbing from enforcing the same. From a judgment of dismissal in the Pulaski chancery court the plaintiff appealed.

The court observed first that—

> Any statute or municipal ordinance enacted pursuant thereto which challenges the right of any person to engage in the legitimate and honest occupation of plumbing without restraint or regulation must find its justification in the fact that such a statute or ordinance is necessary to promote the general welfare.
>
> Police power can only be exercised to suppress, restrain, or regulate the liberty of individual action when such action is injurious to the public welfare.
>
> When statutes and municipal ordinances pursuant thereto have been enacted purporting to protect the health and welfare of a community, all doubts as to the constitutionality of such legislation must be resolved in its favor. Such deference and consideration must be given by the courts to the legislature—a coordinate department of the Government—as not to unduly interfere with its supreme legislative power, and never to interfere with such power unless it appears that the exercise is clearly outside the scope of the organic law, which is over all departments of the Government, and which all are bound to observe as fundamental in the protection of the liberty, happiness, and general welfare of the community.

Other discussion followed, and the court continued:

> In that statute under consideration * * * there is nothing in all the act to indicate that its primary purpose was to conserve the public health, except the broad provision that the plumbing department, consisting of the examining board, the chief inspector, and his deputies, shall be under the supervision of the board of health of the city.

It was observed that the power vested in the board without any restriction would enable the board to "arbitrarily prescribe theoretical tests with which no applicant could comply, even though he

might have perfect knowledge of and be thoroughly skilled in all the practical work of the plumber."

The constitutionality of the act must be tested, not by what the board has actually done, but by the power it actually has. The presumption that public servants will do their duty can not be indulged in determining whether the act violates the Constitution.

On rehearing the court said:

Municipal corporations have the power to regulate in a proper and reasonable manner the work done in any common avocation or calling if it affects the public health and safety. But they have not the power to prevent anyone from engaging in these avocations and to place restrictions upon them so long as their work is not done in a manner detrimental to the public welfare.

The judgment was reversed and the cause was remanded with directions.

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FACTORY, ETC., REGULATIONS—LICENSING—INSPECTION—POWERS OF MUNICIPALITY—CONSTITUTIONALITY OF ORDINANCE—*Barnard & Miller* v. *City of Chicago, Supreme Court of Illinois (April 24, 1925), 147 Northeastern Reporter, page 384.*—The plaintiff company filed a bill in equity for an injunction restraining the city of Chicago from enforcing the provisions of an ordinance requiring a license to operate and conduct factories and workshops within the city and regulating their operation, alleging the ordinance to be invalid. The court entered a decree permanently enjoining the city from enforcing the ordinance. The circuit court certified that the validity of the ordinance was involved, and that the public interests require that an appeal be made direct to the supreme court.

The regulatory features of the ordinance require examinations of the premises occupied by the factories or workshops to determine whether all health, safety, and sanitary laws have been complied with. It further provided for the revocation of licenses and for penalty for violations.

The only grounds urged in the decree of the court were that the general assembly "has not granted the city of Chicago the power to enact the ordinance, that it is not a valid police regulation, that it is in contravention of the State statutes on the same subject, and that it is indefinite, uncertain, and unreasonable."

The supreme court in reviewing the record and the validity of the ordinance observed first:

Cities are creatures of the legislature and derive their existence and powers therefrom. Statutes granting powers to municipal corporations are strictly construed, and any fair and reasonable doubt as to the existence of the powers must be resolved against the municipality.

This court has many times held that power to license or tax an occupation must be expressly granted to cities by the legislature or be a necessary incident to a power expressly granted.

If the business sought to be regulated does not tend to injure the public health or public morals, or to interfere with the general welfare, it is not a subject for the exercise of the police power. (Lowenthal *v.* City of Chicago, 313 Ill. 190, 144 N. E. 829.) Section 1 of article 5 of the cities and villages act (Smith-Hurd Rev. St. 1923, ch. 24, sec. 65), with its 100 clauses, is the source of the legislative power of the city council. Its powers are therein enumerated to the exclusion of all other subjects.

The city of Chicago contended that the power to enact the ordinance could be derived from clause 82 of section 1 of article 5 of the cities and villages act authorizing control of the location, use, and construction of factories, etc.; but as the supreme court noted:

That clause, as amended in 1919 (Laws 1919, p. 285), was held void in People *v.* Kaul (302 Ill. 317, 134 N. E. 740), and that decision was reaffirmed by this court in the cases of Moy *v.* City of Chicago (309 Ill. 242, 140 N. E. 845), and Arms *v.* City of Chicago (314 Ill. 316, 145 N. E. 407).

It was further contended that if the decisions just stated stand, their only effect is to declare invalid clause 82 as amended, and that as the amendment is void, or renders the act void, the old law will be revived. To this contention the supreme court said:

The clause specifically authorizes and empowers cities and villages to direct the location and regulate the use and construction of the particular establishments and places therein named, and under the previous holdings of this court that enumeration is the exclusion of all other establishments, occupations, businesses, or places, not nuisances per se, over which cities and villages are given control. (People *v.* City of Chicago, City of Chicago *v.* Pettibone & Co., 267 Ill. 573, 108 N. E. 698.)

The cities and villages act, article 5, section 1, subdivisions 66, 75, 78, authorizing cities to pass and enforce all necessary police ordinances, to declare what shall be a nuisance and to punish such persons as are responsible for the maintenance of the nuisance, and to make health regulations, was held by the supreme court as not authorizing the passage of an ordinance regulating and requiring licenses to operate factories and workshops.

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HOURS OF LABOR—EIGHT-HOUR DAY—"PUBLIC WORK"—*State* v. *Peters, Supreme Court of Ohio (March 24, 1924), 147 Northeastern Reporter, page 81.*—Section 17–1, General Code of Ohio, reads:

Except in case of extraordinary emergency, not to exceed 8 hours shall constitute a day's work and not to exceed 48 hours a week's work, for workmen engaged on any public work carried on or aided

by the State, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation, or association whose duty it shall be to employ or to direct and control the services of such workmen, to require or permit any of them to labor more than 8 hours in any calendar day or more than 48 hours in any week, except in cases of extraordinary emergency. This section shall be construed not to include policemen or firemen.

W. F. Peters was director of public service of the city of Akron, and it was his duty to employ, direct, and control the services of workmen engaged in operating the waterworks of the city of Akron. It was charged that Peters, in violation of the above section, "did unlawfully require and permit" one Hugler, a workman, to labor in the waterworks plant of said city for more than 48 hours in one week, during which time no extraordinary emergency existed.

A demurrer to the indictment was sustained, the prosecuting attorney excepting. The supreme court held that section 17–1 had no application to the employment of labor by a municipality in the operation of a public utility owned by such municipality. The court on this question said:

Cases have been cited which hold that municipally owned utilities are public works, and this inference can readily be drawn from the Stange case [Stange *v.* City of Cleveland, 94 Ohio St. 377, 114 N. E. 261], inasmuch as the workman in that case was engaged in the erection of a filtration plant, and the conviction was sustained. It does not, however, follow that merely because a workman engaged in the construction of a public utility affords a basis for prosecution of the person who requires or permits him to be thus employed, in violation of the statute, a workman employed in maintaining or operating a public utility after completion would justify a prosecution. Many reasons could be advanced for regulating the employment of labor in the construction of a public building, which would have no application to the maintenance and operation of the building or plant after completion. The problems involved in original construction are wholly and essentially different from the problems of maintenance and operation.

It was therefore held that the indictment did not charge an offense under the statute in question.

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HOURS OF LABOR ON PUBLIC WORKS—CONSTITUTIONALITY OF STATUTE—PENAL PROVISIONS—*State* v. *A. H. Read Co., Supreme Court of Wyoming (October 22, 1925), 240 Pacific Reporter, page 208.*—The company named was charged with violation of a law of the State which limits to eight hours per day the employment of laborers and mechanics on public works of the State and its political subdivisions. In the instant case a sidewalk was being laid, the cost to be met by assessments on the adjacent property.

The district court of Laramie County, before which the case was heard, submitted the question to the supreme court as to the constitutionality of the statute. It was held that the State had the right to prescribe the terms under which contractors might engage in public work for the State, and that the fact that private owners met the actual cost by assessments did not affect the "public" aspect of the undertaking. However, as the statute was drawn, it merely declares what is the maximum working-day, without making it a misdemeanor to require or permit a longer period of employment. The second section (4309) provides a penalty as for a misdemeanor for any person or corporation "who shall violate any of the provisions of section 4308." The statute does not, therefore, "create or define a crime, or at least with a certainty that is necessary in a statute creating criminal offenses," so that "it fails to constitute due process of law" as a basis for a criminal charge.

It is argued that nothing is declared unlawful by the statute, and nothing penalized, except a violation of the provisions of the first section, which declares merely a legislative limitation of the time of service upon public works, without expressly commanding or prohibiting anything.

Laws on this subject generally contain a provision specifically declaring it to be unlawful to require or permit workmen to exceed a specified work period. The necessity of making definite and explicit grounds on which an act is declared to be punishable, so that a man will "be able to know with certainty when he is committing a crime," is fundamental. On account of its defectiveness in this respect the statute was declared unconstitutional.

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INTIMIDATION—WARNING BY EMPLOYER—LIBEL—SLANDER—*Decker v. Kentucky Coke Co., Court of Appeals of Kentucky (November 6, 1925), 276 Southwestern Reporter, page 1092.*—James Decker, an employee of the Kentucky Coke Co., in the winter of 1922–23, was admittedly very much dissatisfied with the mine superintendent, W. E. Hicks, whom Decker and others were striving through their union to have removed. About this time there was some disorder about the mines, including some shooting and the receipt by an employee of a threatening letter signed "K. K. K." Decker and several members of the union who were active in attempting to secure the discharge of Hicks formulated charges, complaints, and resolutions, and visited the company to present these complaints. After an investigation the company declined to remove Hicks, and at a later public hearing Hicks was completely exonerated. Decker and his colleagues, not being satisfied, continued their agitation for his removal.

February 23, 1923, a letter was posted in front of the general store at Echols, Ky., which stated in effect that the management had been forced to the conclusion that eight men, including the plaintiff Decker, were not working in a spirit of harmony, that the majority of the men were satisfied, and that the company had endeavored to give steady employment. It further stated that the company considered the attempts to disrupt the organization as disloyalty, and that the management was entirely satisfied with Mr. Hicks. An offer was made in the letter that for any of eight men named in a list following, or others, "the company will pay the cost of moving to any point not closer than Central City, not further than 100 miles from Echols." A concluding paragraph stated that—

In view of recent occurrences, the management further begs to call attention to the fact that any banding together or assembling for the purpose of intimidation is illegal, as also are threats of personal or physical violence, and all illegal acts will be dealt with by summary discharge of the offenders, and by institution of such criminal proceedings as are provided by law.

Suit was brought against the company, alleging that the letter was libel and actionable per se in that it charged them with confederating and banding together for the purpose of intimidating and driving Hicks out of the community. From a judgment for the defendant plaintiff appealed.

The court of appeals, upon reviewing the records, first observed that "A publication which is claimed to be libelous must be read in its ordinary meaning as commonly understood," and that "an innuendo can not extend the meaning of words beyond their natural import; it can only serve to explain some matter already expressed."

Testing the letter in the light of these two principles, the court of appeals was of the opinion that the letter charging the employees with being agitators, who by their agitation were breaking up the morale of the company's organization in forcing the superintendent to resign, was not actionable as being libelous per se. The last paragraph of the letter calling attention to the fact that banding together for the purpose of intimidation was illegal, was considered as being entirely separate and disconnected from the balance of the letter, so that it could not be construed as charging any of the men named in the letter as having done such acts as the paragraph warned them against. The judgment was accordingly affirmed.

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LABOR ORGANIZATIONS—ACTIONS—PROCESS—JURISDICTION—REPRESENTATION—*Christian* v. *International Assn. of Machinists et al., United States District Court, Kentucky (April 1, 1925), 7 Federal Reporter (2d), page 481.*—Charles Christian, plaintiff, was a pas-

senger-car foreman in the employ of the Chesapeake & Ohio Railway Co. in the summer of 1922, and the allegation of the claimant is that he lost that position by reason of a conspiracy in restraint of interstate trade and commerce, involving a strike to which the eight defendants were parties. Christian brought action for damages against the defendants, each of which is an international labor union except the System Federation, No. 41, of the Railway Employees' Department, American Federation of Labor, Chesapeake & Ohio Railway Co. The case was before the United States District Court, Eastern District of Kentucky, on motion to quash service of process.

Mr. Justice Cochran, circuit judge, on reviewing the record, observed first that the suability of the defendants was settled by the United States Supreme Court decision in the case of United Mine Workers of America *v.* Coronado Coal Co. (259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975, see Bul. No. 344, p. 157). The question here was as to whether the defendants were before the court by proper service of process. According to the marshal's return on the summons service was had on each of the defendants except the Railway Employees' Department and the System Federation, No. 41, by presenting a copy to the "local chairman and a member," and on the Railway Employees' Department and the System Federation, No. 41, to its agent described as its president.

The service of process on the local chairman and the member of the international union was held insufficient to give the court jurisdiction in an action for damages under the Sherman Antitrust Act (Comp. St., secs. 8820–8823, 8827–8830), the court adding that it must be held "that the chairman or any other officer of a local union is not a representative of the international union for service of process." Unions, international and local, artificial units and entities, and suable assets, can not be brought before the court except by service of process on a direct representative, where the relation is such that it is reasonable to infer that service of such process on him will be brought home to the union which he represents. The court added that the motions as to six of the defendants would, therefore, on the grounds stated, have to be sustained.

As to the case of the defendant Railway Employees' Department, the president of its subordinate, the System Federation No. 41, was served as its agent. It was not claimed that he was the agent on any other ground than that he was such president. The court held that the motion as to this defendant would have to be sustained.

In the case of the defendant System Federation No. 41 service was had on its president, and the district court added that this was sufficient to bring it before the court "if it is suable in this district

as an entity or unit." An attempt was made to distinguish this organization from the other defendants and to take it out of the decision in the Coronado case, but the district court was unable to agree with the argument and held that it was properly before the court. The motion to quash as to this defendant was overruled.

The court added that as to venue, "in view of the fact that the wrong complained of was committed in this district, it would seem that the suit has been brought in the proper district." The sole trouble in the plaintiff's case was held to be that, "save as to the defendant System Federation No. 41, jurisdiction of the persons of the defendants has not been obtained."

Orders to quash the motion as to all of the defendants except the System Federation No. 41 were therefore entered.

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LABOR ORGANIZATIONS—BOYCOTT — SECONDARY BOYCOTT — INTERSTATE COMMERCE—INTERFERENCE WITH EMPLOYMENT—ACTS OF PERSONS NOT EMPLOYEES—INJUNCTION—*Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, United States District Court, Illinois (July 16, 1924), 2 Federal Reporter (2d), page 993.*—The Western Union Telegraph Co., a public utility doing general business throughout the country, operated an "open shop." As a part of its service equipment it placed cables, wires, and other appliances upon and in many properties and buildings. "Call boxes," an automatic device for calling messengers of the company, were in general use, and as it was more economical to make installations in buildings at the time of the erection of the building, the company would make such arrangements with the owner of a building in the process of construction. As a result plaintiff's workmen and the workmen of one or more of the International Brotherhood of Electrical Workers were often upon the same premises at the same time, though they frequently did not come in contact with one another. The plaintiff telegraph company brought a bill for an injunction upon the ground that upon some 25 or 30 premises the members of the defendant union injured their property, caused strikes or threatened to strike, and did other acts that induced the owners of the premises to prevent the telegraph company from proceeding with its work. Judge Wilkinson, speaking for the court, held that the utility was engaged in interstate commerce, and the principles governing the validity of congressional restraint of indirect obstructions to interstate commerce were discussed and the test applied which was laid down by Chief Justice Taft in speaking for the Supreme Court in United Mine Workers of America *v.* Coronado Coal Co. (259 U. S. 344, 408, 42 Sup. Ct.

570, 582; see Bul. No. 344, p. 157), in which he said (after citing case):

It is clear from these cases that, if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision and restraint.

The intent to restrain interstate commerce, according to the court, "appears as an obvious consequence of the acts of the defendants." Even if the intent be ignored, "a case for equitable relief against an unlawful boycott" was considered to have been made out "in view of the diversity of citizenship of the parties." Having decided that the complainant was entitled to relief, the court proceeded to consider the scope of the injunction to be granted.

In this connection it is to be considered that acts lawful in themselves may be a step in the execution of the plan of an unlawful or criminal conspiracy.

In Hitchman Coal & Coke Co. *v.* Mitchell (245 U. S. 229, 253, 38 Sup. Ct. 65; see Bul. No. 246, p. 145) it was said:

The cardinal error of defendants' position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others.

Quoting from Grenada Lumber Co. *v.* Mississippi (217 U. S. 433, 440, 30 Sup. Ct. 535) the court said:

An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished if the result be hurtful to the public or to the individual against whom the concerted action is directed.

Objection was made on the ground that acts of persuasion were forbidden by the fifth clause of the prayer for injunction, but the court held that the clause applied only to acts done in "furtherance of the unlawful conspiracy to restrain interstate commerce." The Clayton Act, section 20, forbidding injunctions was held not applicable in the present case. As to the clause as a whole the court said:

It does not forbid defendants from persuading the employees of the Western Union Telegraph Co. to terminate the relation of employment. It prohibits interference with the performance by plaintiff's employees of their duties while they continue to be employees of the plaintiff. And, as pointed out, those duties relate to a service which plaintiff is under obligation to the public to render.

It was contended that clause 1 of the prayer "prevents employees from ceasing to work," and therefore "imposes involuntary servitude upon them." One has a right to work for whom he will and to cease work when he wishes "unless he has been guilty of a breach of contract," but—

The cessation of work may be an affirmative step in an unlawful plan. One may not accept employment intending thereby to quit work when that act will enable him to perform one step in a criminal conspiracy. The real wrong is the acceptance of the employment, with intent to make use of it for a criminal purpose. These defendants are under no compulsion to accept employment on buildings where plaintiff's equipment is being installed; and, if they do accept it, they are not permitted to make an unlawful use of it.

In granting the injunction the court added:

Nothing herein shall be construed to prohibit any employee from voluntarily ceasing work unless said act is in furtherance of the conspiracy charged in the bill herein to prevent plaintiff from performing its contracts with its customers and to compel plaintiff to discharge employees who are not members of labor unions which are affiliated with said defendants.

An order conforming to the view of the court was allowed to be drafted by counsel for the complainant, to be entered upon notice.

The case came on appeal to the Circuit Court of Appeals, Seventh Circuit, where it was decided June 1, 1925, the decree below being affirmed. (International Brotherhood of Electrical Workers *v.* Western Union Telegraph Co., 6 Fed. (2d) 444.) The facts were not in dispute. It was contended by the appellants that the injunction imposed on them "involuntary servitude," in violation of the thirteenth amendment to the Constitution, by compelling them, as union men, against their wishes and interests, "to work with nonunion men in the same trade."

The circuit court of appeals observed that none of the defendants were, had been, or prospectively were to be, employees of the plaintiff, and that the things done were not done because of any violation by the employer of any term of the contract of employment. They were not done to induce a payment of higher wages, better working conditions, or other lawful purposes, but they were done to compel their employers or the owners of the premises to injure and annoy the plaintiff and to cause the plaintiff's contracts to be violated, "for the sole reason that appellee [plaintiff] employed nonunion men."

The court considered what the Supreme Court said in American Foundries *v.* Tri-City Council (257 U. S. 184, 212, 42 Sup. Ct. 72; see Bul. No. 309, p. 181) concerning the Duplex Printing Press Co. *v.* Deering (254 U. S. 443, 41 Sup. Ct. 172; see Bul. No. 290, p.

174) to be applicable and control, since, as there, there was "a palpable effort * * * to institute a secondary boycott."

Considering the question of the wrongful exercise of a right, the court quoted with approval from the Supreme Court decision in Gompers *v.* Bucks Stove & Range Co. (221 U. S. 418, 439, 31 Sup. Ct. 492, 497; see Bul. No. 95, p. 323):

> Society itself is an organization, and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized. But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, can not be met, except by his purchasing peace at the cost of submitting to terms which involves the sacrifice of rights protected by the Constitution, or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of Government to protect the one against the many as well as the many against the one.

The decree was therefore affirmed.

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LABOR ORGANIZATIONS—CONSOLIDATION OVER PROTEST—RULES—VIOLATION—COURT REVIEW—INJUNCTION—*Powell* v. *United Association of Plumbers and Steamfitters of United States and Canada, Court of Appeals of New York (May 5, 1925), 148 Northeastern Reporter, page 728.*—Thomas F. Powell, as president of local union No. 299, of the city of White Plains, and others brought a bill for an injunction against the United Association of Plumbers and Steamfitters of United States and Canada to stay the enforcement of the defendant's resolution consolidating the local unions during the pendency of the appeal already taken by the plaintiffs to the convention of the members. Judgment was given for the plaintiff and unanimously affirmed by the appellate division, by which it was held that the resolution was passed in violation of the constitution and by-laws, and was held illegal and its enforcement restrained forever.

The court of appeals on reviewing the record observed, first, that:

> Courts are reluctant to interfere by injunction in controversies that touch the internal management of foreign corporations [citing cases]. Their reluctance may be overcome by the presence of some urgent need, but relief is seldom, if ever, to be extended beyond the call of the emergency.

The threatened disruption of local unions existing within the State made it proper, in the opinion of the court, to preserve the status

quo pending an appeal to the convention. Relief beyond that, if granted, "should wait upon the exhaustion of the remedy within the corporation and the result of the appeal." If the merger is annulled within the corporation, it is obvious that resort to the courts would be unnecessary; and, if sustained, there would be need to consider the fitness of going farther, and the effect of subsequent approval with respect to prior irregularities. These problems were held by the court as being "incapable of solution till * * * they become definite and concrete."

The judgment of the appellate division and that of the special term was therefore modified by striking out the declaration that the resolution and all acts thereunder are null and void, and by providing that the injunction should continue only until the action of the convention; otherwise affirming it.

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LABOR ORGANIZATIONS—CONSPIRACY—INTERFERENCE WITH EMPLOYMENT—CONTRACT AS PROPERTY—INJUNCTION—*J. C. McFarland Co.* v. *O'Brien, United States District Court, Ohio (April 10, 1925), 6 Federal Reporter (2d), page 1016.*—The plaintiff, the J. C. McFarland Co., was a subcontractor under the George A. Fuller Construction Co., general contractor, for certain work in the construction of a large building under erection in the city of Cleveland for the Brotherhood of Locomotive Engineers Building Association (Inc.). The company filed a bill on March 25, 1925, to enjoin unlawful interference by all of the defendants with the performance of its work. Upon hearing, all the unions except the painters and the George A. Fuller Construction Co. were exonerated, and the inquiry then was whether the plaintiff was entitled to preliminary injunction against the remaining defendants. The jurisdiction of the district court was invoked upon the ground of diversity of citizenship.

The court first observed that upon the merits of this controversy the case was not distinguishable from Central Metal Products Corporation *v.* O'Brien (5 Fed. (2d) 389), and the law as therein stated was approved without being restated. (See Bul. No. 344, p. 153.)

The plaintiff had substantially completed his contract, nothing remaining to be done except the finishing down of the doors and metal trim, and this work could be satisfactorily performed, according to the assertion of the plaintiff, only after all the building trades had finished their several tasks. Plaintiff intended to do this work with the same union carpenters it employed to install the work. The officers of the painters' union demanded that this finishing-down work should be allotted to members of their local unions and that their workmen should put on a coat of varnish and rub or finish

down the doors and metal trim in place. The affidavits showed that the coat of varnish was unnecessary and a pure waste, but the demand "included a total wage expenditure of $3,800." The Fuller Co. insisted that the plaintiff comply with this demand, and repeated the insistence from time to time until February 25, when the Fuller Co. advised by letter that it had decided to take the "cleaning down" out of plaintiff's contract and do the work itself. The Fuller Co., acting in accordance with its notice to plaintiff, made an agreement with the W. P. Nelson Co. and the agents of the defendant local unions that the work should be done by the Nelson Co. and that it would employ members of the said local unions. At the time the bill was filed this work of finishing or cleaning down was in progress.

The district court observed that the contract of the plaintiff was property which is protected by law against conspiracy, and that local labor unions have no right to coerce a contractor to join in a conspiracy to deprive a subcontractor of his rights under the subcontract by threats of withdrawing their members from work for other subcontractors on the building and other buildings in which the contractor was interested, regardless of any provision in the labor union constitution and any custom or practice of contractors in dealing with the local union.

It was held that the subcontractor had a right to employ any competent workmen to perform the work required by the contract. The court further held that in law the members of the defendant union "had the right to procure this work from the plaintiff by the same methods as other workers not members of their union would have a right to procure it." While they had the right to combine and act through agents to apply for work and to bargain collectively as to terms upon which it was to be done, it was held that they did not have the right to conspire to deprive the subcontractor of his property in the contract.

After hearing all the evidence the court, while recognizing that the plaintiff had good cause for grievance, held that the preliminary injunction sought for was not the proper remedy. The function of an injunction is "to afford preventive relief, not to redress wrongs already committed," or, as otherwise stated, "its function is not to afford a remedy for what is past, but to prevent future mischief, not to punish or compel persons to do right, but to prevent them from doing wrong." If granted in this case it could only be complied with "by compelling a breach of a contract with a third party not a defendant."

The plaintiff contended that unless the "finishing down was well done the work will not present a good appearance, and may

injure plaintiff's trade reputation." While this complaint was not without weight in the opinion of the court, it was not deemed adequate to warrant the injunction, for the reason that the plaintiff's right at law to recover in one suit upon its contract was regarded as legally adequate.

The application for the preliminary injunction was accordingly denied.

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LABOR ORGANIZATIONS—CONSPIRACY—INTERFERENCE WITH EMPLOYMENT—FINES LEVIED AGAINST EMPLOYER—*People* v. *Walczak*, *Supreme Court of Illinois* (*December 16, 1924*), *145 Northeastern Reporter, page 660.*—Stanley Walczak and others were convicted of conspiracy to extort money from certain persons and to interfere with their business. The conviction was affirmed by the appellate court, and some of the defendants brought error to the supreme court. It appeared from the evidence that James Stamos and his brothers were engaged in the hotel, bakery, and restaurant business in Chicago, and that in April, 1919, their contract with the waitresses expired. A new contract was presented to Stamos by a union delegate, but he refused to sign it and suggested that it be taken to the president of the restaurant association. The delegate refused to do so and took the union card out of the shop and ordered the girls who were at work in the place to walk out, which they did. The following morning there was a general strike at all the restaurants in South Chicago. Stamos and his brothers went to see a committee of union delegates, composed of the defendants Vind, Blevins, Boatman, and a stranger. According to the evidence, Stamos and his brothers were forced to pay the sum of $1,200 and to sell two of their places of business.

The conspiracy charged was shown to have been committed as early as April, 1919, and as late as October, 1919. The law under which the defendants were convicted became effective on July 1, 1919. Fines of $1,000 and $2,000 and indeterminate sentences to the penitentiary were assessed. The supreme court held that they could be indicted and convicted under the law because—

Conspiracy is a continuous offense, and the time of conspiring is to be measured from the commission of the last overt act in pursuance of the conspiracy, and not merely from the origin of the conspiracy.

The court instructed the jury in part:

The court instructs the jury that no labor union has any lawful right to levy a fine against a person not belonging to their union, and any attempt to levy a fine against such person, and to collect

the same by inducing his men to quit his employ, is illegal, and a conspiracy to accomplish this end is a violation of criminal law of this State.

The supreme court held that while the union labor was "in no wise responsible for the unlawful acts of plaintiffs in error, this instruction was based upon the evidence in the case and its giving was not error."

The evidence sustained the finding of the appellate court and the supreme court affirmed the judgment.

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LABOR ORGANIZATIONS—CONSPIRACY—INTERFERENCE WITH PERFORMANCE OF CONTRACT—INJUNCTION—JURISDICTIONAL AWARDS—*O'Brien* v. *Fackenthal*, *United States Circuit Court of Appeals, Sixth Circuit* (*May 16, 1925*), *5 Federal Reporter* (*2d*), *page 389.*—The Central Metal Products Corporation brought proceedings against one O'Brien, head of the Sheet-Metal Workers' Union, for an injunction against interference with certain contracts on buildings being erected for the city of Cleveland. The plaintiff manufactured doors and windows, and likewise employed workmen for their installation, hiring union carpenters to perform the work. The sheet-metal workers claimed that this work fell in their jurisdiction, and demanded the coercion of the contractor to discharge the carpenters and give them the work under threat of strike by other workmen on the buildings so as to prevent their completion. The city yielded, and "became in a sense engaged in a joint conspiracy with the sheet-metal workers to compel the plaintiff to conduct his business in a way distasteful to him." An injunction was allowed restraining the city from breaching its contract with the Metal Products Corporation and against interference with the Sheet-Metal Workers' Union (278 Fed. 827; see Bul. No. 344, page 153). From this injunction an appeal was taken, which was dismissed on the ground that the work had been completed, and the question become moot (284 Fed. 850). A supplemental bill was filed later, setting forth issues apparently alive, and the district court again ordered an injunction, from which this appeal was taken. The court of appeals adopted the reasons set forth by the district court as grounds for its own action, one of the judges dissenting.

The court of appeals points out that the right to strike as a general proposition is not questioned, the point involved being the limits that exist. The Sheet-Metal Workers' Union had not been in an employment relation with the city, and there was no controversy between it and this union. The plaintiff below had a valid contract with the city, and the obvious purpose of the metal workers' union

is to procure its disruption by threatening to injure the city, owner of the buildings, who was itself in no wise concerned in the controversy.

The opinion of the district judge, quoted from in this connection, states that the metal workers relied chiefly for their justification on the claim that they were engaged in enforcing an award made by a so-called "national board of jurisdictional awards." This is an unofficial group, composed of representatives of various interested bodies and organizations, formed for the purpose of settling disputes of this nature. The carpenters refused to accept the findings, and the metal workers undertook to compel its acceptance. Judge Westenhaver, in speaking to this point, said that their contentions were for "impossible rights." Neither Congress nor any State legislature may enact a law determining who should and who should not accept certain kinds of work and render certain classes of service. The fifth and the fourteenth amendments guarantee the right to employment as a part of the right of life, liberty, and property. What legislatures can not do "no groups of labor organizations nor any extralegal national board of jurisdictional awards may do." Not only is the purpose of establishing a monopoly in a certain group of workmen for this kind of work an unlawful purpose, but the methods adopted to enforce this monopolistic award are likewise illegal. Valid subsisting contracts were attacked by recourse to threats and intimidations, and directing their actions toward third persons in such a manner as to warrant classification as secondary boycotts.

The court of appeals sustained the finding in the lower court.

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LABOR ORGANIZATIONS—CONSPIRACY—INTERFERENCE WITH THE MAILS—VIOLATION OF INJUNCTION—CONTEMPT—*Taylor* v. *United States*, *United States Circuit Court of Appeals*, *Seventh Circuit* (*September 19, 1924*), *2 Federal Reporter* (*2d*), *page 444*.—L. R. Taylor, Jacob Sink, and Patrick J. Hanahan were charged with a conspiracy to violate an injunction of a Federal court, with a conspiracy to violate the administration of justice, and with obstruction of the mails. The injunction was issued during the shopmen's strike in July, 1922, enjoining various members of a labor organization from hindering or obstructing the operation of the Chicago & Alton Railroad Co., and from destroying the property of the railroad. While the injunction was in effect certain of the defendants destroyed a railroad bridge near Grieg, Ill., and another one known as the Drake bridge. Two of the defendants were acquitted, while the three above named were found guilty and duly sentenced. They then brought error to the circuit court of appeals.

It was contended that the indictment was too indefinite and uncertain, and that it did not charge the defendants with the commission of an offense. The indictment charged the violation of section 37 of the Criminal Code (Comp. St., sec. 10201), which provides: "If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose," etc. The defendants admitted that they may have entered into an agreement or conspiracy to commit certain acts, but deny that the object, as set forth in the counts of the indictment, constitutes "an offense against the United States." The district court held that the violation of an injunction issued by a Federal court "is an offense against the United States," and in charging the jury the district judge said:

It is also the law that it is an offense against the United States for one to violate an injunction issued by a court of the United States.

The court of appeals took the same position as the district court in holding that the violation of the injunction of a Federal court was an offense against the United States.

The court of appeals, speaking through Mr. Justice Evan A. Evans, said:

It is not necessary for the pleader in a conspiracy count to define the substantive crime—the object of the conspiracy—with the same particularity as would have been necessitated if the substantive crime, rather than the conspiracy, was the offense charged.

This was in answer to the criticism of the indictment that there "is no allegation that the defendants knew that the alleged cars were carrying the mails, nor any allegation that they conspired to knowingly and willfully obstruct and retard the mails." Applying what the judge said above, and examining the indictment, the court found the defendants "then and there unlawfully, knowingly, willfully, and feloniously did conspire, combine * * * to commit an offense against the United States * * *." The court of appeals continued:

Where the conspiracy is "for the purpose of unlawfully, knowingly, and willfully obstructing or retarding the movement and passage of certain United States railway post-office cars," it is unnecessary to specifically allege an unlawful criminal intent, or to specifically allege that the Chicago & Alton trains to the knowledge of plaintiffs in error carried mail.

The evidence unquestionably "connects plaintiffs in error with others in a combination or conspiracy to destroy the bridges," but they insist that what they intended doing was with no intent to obstruct justice or to interfere with the mail. The court of appeals held it for the jury "to weigh the acts of the defendants against their professed innocent intentions."

The judgment was accordingly affirmed.

LABOR ORGANIZATIONS—CONSPIRACY—PICKETING—INJUNCTION—CLAYTON ACT—*Waitresses Union, Local No. 248*, v. *Benish Restaurant Co. (Inc.), United States Circuit Court of Appeals, Eighth Circuit (June 4, 1925), 6 Federal Reporter (2d), page 568.*—In 1921 there were two Benish corporations, one a restaurant company and the other a baking company, one a Missouri corporation and the other a Delaware corporation, and in that year there was a strike in both concerns. Thereafter the two concerns sold out to the Benish Restaurant Co. (Inc.), complainant in the present case. The latter brought suit in a Federal court to enjoin the Waitresses Union, Local No. 249, and others from the peaceful picketing of the restaurant. The proofs disclosed that at the time the picketing was done, in violation of the order sought to be reviewed in this case, there was no strike on among the employees of the present Benish company, nor was there any ground or reason for any such strike of the employees shown. This appeal brought up for review the order granting the plaintiff a temporary injunction restraining defendants from the peaceful picketing of complainant's place of conducting the restaurant. There was no dispute between the company and its employees, nor had there been any strike since the company had been formed, and there had been no strike for more than two years among the employees of either of the two corporations that sold out to the present company.

The circuit court of appeals, on reviewing the record, held that the right of the Benish company to keep its business free from molestation or interference " through an unlawful confederacy or conspiracy between two or more third parties is a property right under section 20 of the Clayton Act (Comp St., sec. 1243d), and that an order enjoining what is called peaceful picketing by members of a labor union under such circumstances is not in violation of the terms of the Clayton Act. In this view of the law the trial court was clearly right."

The temporary order was therefore affirmed.

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LABOR ORGANIZATIONS — CRIMINAL SYNDICALISM—COMMUNISM—ADVOCACY OF CRIMINAL ACTS—*People* v. *Ruthenberg, Supreme Court of Michigan (December 10, 1924), 201 Northwestern Reporter, page 358.*—Act No. 255, Public Acts of Michigan, 1919, defines the crime of criminal syndicalism, specifies acts constituting the offense, and fixes the penalty. The definition follows:

SECTION 1. Criminal syndicalism is hereby defined as the doctrine which advocates crime, sabotage, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political reform. The advocacy of such doctrine, whether by word of mouth or writing, is a felony punishable as in this act otherwise provided.

A national delegate convention of the Communist Party of America was called to meet at Bridgman, Berrien County, State of Michigan, in August, 1922. The defendant, Charles E. Ruthenberg, was present at the convention, being a member of the central executive committee of the Communist Party of America, and, according to his own testimony, a paid employee of the Communist Party and of the Workers' Party. Federal officers traced the convention place, recognized certain communists in attendance, and laid the matter before the county sheriff. The communists recognized the Federal officers and planned to disperse, many of the delegates leaving hurriedly. The sheriff, with deputies and Federal officers, visited the convention place, arrested the defendant and 16 others without warrants, seized their baggage, and put them in jail. A search was made of the convention grounds and many hidden records and documents were found. The defendant was convicted of criminal syndicalism, and he excepted before sentence.

Ruthenberg contended that the statute above referred to violated the State constitution and the fourteenth amendment to the Constitution of the United States. The supreme court said that " to so hold would require us to say that it is violative of the Constitution to make it a crime for one in sympathy with and on his own volition to join in an assemblage of persons formed to teach or advocate crime, sabotage, violence, or other unlawful methods of terrorism as a menace of accomplishing industrial or political reform. We can not make any such holding."

The second query was whether the statute prevented freedom of speech, and to this the supreme court said:

> This statute reaches an abuse of the right to freely speak, write, and publish sentiments, and is squarely within the accountability allowed to be exacted in the very provision invoked. This statute does not restrain or abridge liberty of speech.

The reasons advanced against the constitutionality of the statute had been urged against other similar acts in other jurisdictions, and the court said that they had been held to have no merit. " The act does not violate the fourteenth amendment to the Federal Constitution." The legislature may, to protect persons and property, " denounce as criminal specified acts inimical thereto, and make guilt of an offender rest upon his voluntary act, without any felonious intent."

On the question whether the Communist Party of America was a group, society, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism, the record showed that:

> They spurn the ballot and appeal to direct force. They are under resolve to destroy by force and arms the existing government, national and State, and the supporters thereof who possess the manhood of resistance. They consider their present rights and liberties as

mere license for working the destruction of existing society. They have pledged allegiance to the Third International, a foreign body inimical to a free people, and are carrying out its commands in our midst. Their doctrines teach ultimate insurrection and civil war, with present criminal activities leading up thereto. Their tactics involve the cowardly purpose of injuring until they can destroy. They plan the looting of the Nation and invoke its laws to protect them while instilling their doctrines. The freebooters and pirates of old were small fry compared with their modern brethren. Their hope is to find opportunity to commit crime. Their creed is that of terrorism and violence. They are the red thread of Russian communism, and their avowed purpose is the destruction of the Government of the United States by force.

It was contended that there had been no overt act by the Communist Party committed within the State, and no showing of any intent to commit any in the immediate future. The court held that the statute "does not make criminality dependent upon the commission of an overt act. It reaches those who advocate or teach the commission of crime as a means to accomplish an end, and those who, by choice, assemble with them." Quoting from State *v.* Laundy (103 Or. 443, 204 Pac. 958), the court said:

If it is within the power of the legislature to declare that a given act, when done, constitutes a crime, then it is likewise within the power of the legislature to declare that to advocate the doing of such act is a crime.

And this was held to apply "with equal force to one who voluntarily joins an assembly formed to teach or advocate criminal syndicalism."

The conviction was affirmed and the circuit court advised to proceed to judgment.

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LABOR ORGANIZATIONS—EXCLUSION OF MEMBER—REFUSING TRANSFER CARD—DAMAGES—*Local Union No. 65 of Amalgamated Sheet Metal Workers' International Alliance* v. *Nalty*, *United States Circuit Court of Appeals, Sixth Circuit* (*June 8, 1925*), *7 Federal Reporter* (*2d*), *page 100.*—The Amalgamated Sheet Metal Workers' International Alliance was a union of men engaged in the sheet-metal workers' craft. It is made up of local unions, among which are Locals No. 12, of Pittsburgh, and No. 65, of Cleveland. Stephen J. Nalty was a member of the Pittsburgh local, and secured from it a transfer card on moving to Cleveland to live. His application to the Cleveland local was refused, and subsequent applications were refused. Nalty filed a claim against the Cleveland local for losses resulting from the refusal to admit him to membership. A few months later a member of the Pittsburgh local came to Cleveland, met the executive officers of the Cleveland local, and as a result it

was proposed that Nalty procure another transfer card and present it. Nalty contended that the proposed acceptance was conditioned upon his waiving his claim for losses ensuing from the previous refusal. The general executive committee considered informally plaintiff's claim and confirmed the action of Local No. 65 in refusing to accept his transfer. The following year, in July, 1922, a rehearing was had in New York, at which time the decision of the Cleveland local was again affirmed. Nalty sought employment in Cleveland during this time, but not having a card in the local was unable to procure employment in his trade. He then instituted a suit in the Federal court for damages, securing judgment, on which the union sued out a writ of error. The circuit court of appeals found on reviewing the records that at the time of the refusal to admit the plaintiff upon his transfer card negotiations with employers for an adjustment of the wage scale were in progress, the defendants contending that this was equivalent to a lockout, so as to entitle the local union to refuse to accept a transfer card, under the constitution of the international union, which provides in part:

The transfer card of a member of a local union attached to this International Alliance shall be recognized by the union in which he desires to deposit it upon the payment of the difference, if any, of the initiation fee of the local union to which he belongs and the union in which he desires to deposit it, accompanied with an official receipt, except in localities where strikes or lockouts exist.

The court ruled there was no lockout, and in any case the wage scale was settled before various refusals to issue the card, so that this claim was rejected.

The defendants insisted that the decision of the union can not be reviewed by the courts, but the circuit court of appeals was of the opinion that a member of the union has an action at law for damages for wrongful exclusion or suspension when, as in this case, the decision is not in accord with the union's constitution. The court found no provision in the constitution or by-laws that a member of the order must resort to its tribunal for redress nor that, having done so, the parties are bound by the decision.

The defendant contended that the plaintiff was required to go to work even in another city in mitigation of damages, but the court held such not to be the case, saying:

It would be too much to expect one who is lawfully entitled to membership in a local union, and who has been denied that right, to abandon his home and go to another city for the purpose of mitigating his losses.

The decision of the district court giving the plaintiff damages was accordingly affirmed.

LABOR ORGANIZATIONS—EXPULSION OF LOCAL—POWER OF COURTS—*Greenwood* v. *Building Trades Council of Sacramento et al., California District Court of Appeal, (February 5, 1925), 233 Pacific Reporter 823.*—Local No. 162 of the Sheet Metal Workers' Union was chartered by the Amalgamated Sheet Metal Workers' International Alliance, which in turn was affiliated with and chartered by the American Federation of Labor (building trades department).

The Building Trades Council of the State of California is also affiliated with and chartered by the American Federation of Labor, and the Building Trades Council of the City of Sacramento is duly chartered by the State organization. All of the organizations are voluntary and are connected with the American Federation of Labor.

About January 1, 1922, Local No. 162 was suspended by the International Sheet Metal Workers' Alliance, and thereupon ceased to be a member of the Building Trades Council of the City of Sacramento. About September 1, 1922, Local No. 162 was reinstated by the International Alliance, and about October 1, 1922, applied to the Sacramento council for admission. It was refused on the ground that there were already delegates representing an organization known as Sheet Metal Workers' Union No. 2 of the city of Sacramento. In March, 1923, at the annual convention of the Building Trades Council of the State of California, the said council approved, ratified, and confirmed the action of the Sacramento council in refusing to seat delegates representing Local No. 162. Shortly thereafter the question was taken to the executive council (building trades department) in behalf of Local No. 162, and said executive council rendered a decision and recommendation that all "dual" local unions associated with the Building Trades Council of the State of California or a local building trades council should immediately be dropped, and that the State building trades council and local councils use their good offices to have independent or dual locals affiliate with their respective international unions. Both the Sacramento council and the State council disregarded the decision of the executive council, and the next tribunal before which the matter could be heard was the annual convention of the building trades council department of the American Federation of Labor in October, 1923, at Portland, Oreg.

Pending the settlement of the controversy the Sacramento council sought to collect from the members of Local No. 162 the sum of $4.50 per quarter, and as consideration agreed to issue quarterly working cards. This sum was to be held in escrow until the time of settlement of the dispute. Some dues were paid under this agreement, when further payment by the members was refused. The explanation given for the imposition of this tax was to place members of Local No. 162 on equal footing with Local No. 2. It was

called to the attention of several employers that the members of the building crafts affiliated with the council could not work on jobs with persons not holding quarterly working cards, and also attention was called to the fact that members of Local No. 162 did not hold such cards. This litigation involved only a dispute between members of the voluntary associations named herein, and an injunction or restraining order was issued at the instigation of Local No. 162, enjoining and restraining the members of the Building Trades Council of Sacramento from refusing to work with members of Local No. 162, and also restraining the collection of the $4.50 per quarter. The temporary injunction was granted and the defendants appealed.

The district court of appeal, upon reviewing the record, made a few preliminary observations to the effect that courts will not interfere in controversies between members of voluntary associations until all remedies within the association are exhausted, and though a local union seeking reinstatement as a member of a building trades council will suffer hardship during a period necessary to exhaust internationl by-laws and constitutions, the court held it furnished no ground for interposition.

The court was of the further opinion that there "is no controversy between the parties that, as a general proposition, a court of equity will not interfere to prevent the collection of money, that being a pure matter of law between the respective parties." The law was also considered well established in California that "the right to quit work, either individually or collectively, can not ordinarily be restrained."

It was pointed out that lack of membership was the fundamental difficulty in the case, and were the court to order admission to membership the Sacramento council, being purely a voluntary association, "could immediately defeat that decree by voluntary dissolution," but when any property rights are involved the decree of the court "can not be so defeated."

Mr. Justice Plummer, speaking for the court, said:

It must be remembered that all of these associations are purely voluntary organizations, not governed by any statutes, and therefore permitted, so far as the law is concerned, to adopt any regulations they may see fit in relation to their local membership. * * * When the fact of membership has once been established, the court will, where property rights are involved, restrain the violation of the rules governing voluntary associations at the behest of anyone who has suffered injury by such violations. * * * In the instant case the plaintiffs are not members of the Building Trades Council of the City of Sacramento, and they have no representation in such council. We do not well see how the relation of trustee and cestui que trust can be held established or shown in this case so long as membership

by Local No. 162 in the Building Trades Council of the City of Sacramento is wanting.

When this membership has once been acquired, protection against illegal expulsion will be afforded by the courts.

The fact that one may suffer injury by reason of nonadmission to membership in a voluntary association affords no ground for relief. Membership in a voluntary association is a privilege which the society may afford or withhold at its pleasure, and a court of equity will not interfere to compel the admission of a person not regularly elected, even though the arbitrary rejection of the candidate may prejudice his material interests, where no rights of property or of person are affected, and no rights of citizenship are infringed upon.

Having arrived at the conclusion that the injury by nonadmission afforded no ground for relief, the court was of the opinion that legal right to exclude Local No. 162 was fully established, irrespective of the motives of the Sacramento council. If by so doing the exclusion runs counter to some regulation of a superior organization, the penalties were held to be matters to be enforced by such superior organization.

The judgment appealed from was accordingly reversed.

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LABOR ORGANIZATIONS—EXPULSION OF MEMBER—LIABILITY FOR DAMAGES—SENIORITY RIGHTS—*Order of Railway Conductors* v. *Jones, Supreme Court of Colorado (July 6, 1925), 239 Pacific Reporter, page 882.*—R. F. Jones brought an action against the Order of Railway Conductors and others for procuring his discharge, as alleged, by means of persuasion, threats, coercion, and intimidation, as a conductor on the Denver & Interurban Railroad, and for preventing him from obtaining employment as conductor or in any capacity other than as conductor on a branch line four months of the year. The real defense of the defendants was justification, and they sought to prove it by showing they had never procured his discharge or prevented his employment except when such employment was in violation of the right of other employees of the same class as plaintiff under seniority rights fixed by a contract with the railway company, to which the plaintiff was a party. The district court awarded the plaintiff $30,000 actual and $20,000 exemplary damages, from which judgment the defendant secured a writ of error. The supreme court was of the opinion that the defense was sound if supported by the evidence, and it observed that the court seemed to have left it to the jury to see whether there was justification, and as to this there was no error. On reviewing the evidence the supreme court held that the judgment could not be reversed on this point because there was sufficient evidence to support the verdict.

To induce without justification an employer to break his contract with his employee is an actionable violation of the plaintiff's right

to labor, in the opinion of the court on review. Justification on the part of the defendant must be based upon a right equal or superior to the right of the employee whose contract the employer is persuaded to break. As to the instant case the finding of the jury was that there was no such justification. The contract in this case was supported by a so-called schedule and roster agreed on between the employees and the employers, which stated the class of each man employed by the company and his seniority in that class. One Parker, by his decision as arbitrator, gave the plaintiff and others certain seniority rights on the Colorado & Southern Ry., which is under the same management as the Denver & Interurban. It appeared from the correspondence of the officers of the defendant that they deliberately planned to eliminate the plaintiff as to his seniority rights. In this they were successful, and the effect was to deprive plaintiff of his position on the Fort Collins division and give him one that employed him for four months of a year. Parker's decision became the contract, and the lodge joined in the action by a resolution in 1920. The supreme court put the matter in another form; that is, if the defendants were attempting to maintain rights of their own which were equal or superior to his, "there would be sufficient justification of the course they took," but, "since they left the construction of it to Parker, to whose decision all agreed, efforts to deprive the plaintiff of his seniority given by that decision were open to the claim that there was no longer an equal or superior right to enforce, and therefore no justification." Several decisions were cited by the court in connection with this subject.

Another defense of the union was that the employment was at will, and that the railroad company could discharge the plaintiff without the defendants becoming liable, but the supreme court held that it was not a good defense, since an employee has a right to the free exercise of such will. Most of the assignments of error as to instructions and damages were not considered by the supreme court, as the case was reversed on the ground that the action was barred by the statute of limitations, the evidence showing or tending to show that the plaintiff knew of the unlawful actions of the defendants in 1913, more than six years before the suit which was brought December 16, 1921.

The judgment was reversed for the reason named and a new trial granted.

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LABOR ORGANIZATIONS—EXPULSION OF MEMBER—RIGHT TO MEMBERSHIP—RULES—*Simons* v. *Berry*, *Supreme Court of New York, Appellate Division* (*February 2, 1925*), *208 New York Supplement, page 204.*—David Simons brought an action as a member of a vol-

untary unincorporated association, the International Printing Pressmen's and Assistants' Union of North America, against George L. Berry, as president of the union named. Simons alleged an unlawful attempt to expel him from the union, and demanded judgment to the effect that the attempted expulsion be declared wholly ineffective and void, and that the union be required to issue its usual card of membership; also that he have an injunction against any representations that he was not a member in good standing, or against "calling out any member of said union from any newspaper printing establishment in which plaintiff may be employed." Damages were also asked for.

Motion was made to dismiss the complaint as insufficient, but the trial court denied this motion, whereupon an appeal was taken, the appellate division taking the position that "the complaint is so vague and indefinite that it is quite impossible to determine whether the action is brought to set aside an expulsion of plaintiff from the union or to compel his acceptance as a member upon an application for reinstatement." It was also said to be beyond the power of the court "to compel a voluntary unincorporated association to either admit or reinstate an applicant for membership." The order refusing dismissal of the complaint was therefore reversed and the motion granted, whereupon appeal was further taken to the court of appeals.

On this final appeal (Simons *v.* Berry, 240 N. Y. 463, 148 N. E. 636) the court found the complaint "inartificial and indefinite," but under the rule requiring a liberal construction it took the view that Simons was a member in good standing of the union, "subject to expulsion only upon written charges and after a hearing upon notice." As no charges had been made or hearing given, any notification that he had been expelled was without foundation, though the action of the officers in so doing "made it impossible for him to find employment in his trade." This was said to state a cause of action for equitable relief. There appeared to be no provision for a remedy by appeal to any organ within the association. "Equity will enjoin the denial to a member of the privileges of membership, where the denial, if continued, will work irreparable injury."

The judgment of the appellate division was therefore reversed and the order of the special term affirmed with costs.

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LABOR ORGANIZATIONS—INJUNCTION—CONTEMPT—LIBEL—*Vulcan Detinning Co.* v. *St. Clair, Supreme Court of Illinois (December 16, 1924), 145 Northeastern Reporter, page 657.*—The Vulcan Detinning Co. announced in December, 1921, that at the expiration of its existing contracts with labor unions it would conduct its plants on the "open shop" policy. The unions called a strike upon the refusal of

the company to deal with their representatives, and on January 5, 1923, the company filed a bill for an injunction restraining the men from interfering with the employees and " from interfering with the business and destroying the property of the company." The injunction was issued against certain persons, including the defendant J. N. St. Clair, and they were restrained from in any manner whatsoever, " by use of threats of personal injury, intimidation, or suggestion of danger, interfering with, hindering, obstructing, or stopping any person employed by the Vulcan Detinning Co.," and from applying opprobrious epithets " to any of the employees of, or to any person seeking employment with, said corporation, and from calling any of said employees 'scabs' or other offensive, scurrilous, or opprobrious names."

The following notice appeared in two of the city newspapers:

At their meeting held on February 18, 1923, the members of Vulcan Federal Union No. 15107, voted unanimously to continue their strike against the Vulcan Detinning Co. until an honorable agreement is reached. Those voted as traitors are ex-members W. H. Thomas and John Krapljon, now in the Vulcan works, and Charles Heresheway, at the Western Glass Works. Former union men now at the Vulcan works are George Sourby, Andrew Galick, and Gus Samuelson. No red-blooded man will steal a real man's job. We are out to win and will win. Vulcan Federal Union 15107. By order of the organization.

On February 24, 1923, a petition was filed asking that the court require St. Clair, the president of the local union, and others to show cause why they should not be adjudged guilty of contempt. The chancellor found St. Clair guilty of contempt of court on the basis of the newspaper article and fined him $500. The defendant appealed.

The supreme court reviewed the terms of the injunction first:

When a court orders an injunction which is so broad in its terms that it invades fields of human activities it had no right to invade, its order will be modified or set aside on review, and this orderly remedy by review is always open to any person who feels that his constitutional rights have been invaded. Equity has no right to act for the sole purpose of preventing the commission of crime or the utterance of a libel, unless the act which amounts to a crime or a libel threatens an irreparable injury to property. In order to entitle one to relief by injunction against unlawful interference with his business, positive and substantial injury must be shown, and where it appears that the injury is not of an irreparable nature, and that the wrongs suffered by the plaintiff may be fully and adequately redressed by an action at law for recovery of damages, relief by injunction should be denied. Injunction is an extraordinary remedy, and, where human liberty is involved, the writ should be used with great caution.

It appeared from the findings of the chancellor that the only violation of the injunction was the publication of the notice. The bill was brought by the company, the nonunion men not being parties thereto. The supreme court was of the opinion that the injunction was not sought by the company for the purpose of "protecting the name or the feelings of the employees, but was sought and entered solely for the purpose of protecting the business and property of appellee." The court pointed out that the only question before it was whether "the order awarding the writ of injunction has been violated by appellant doing an act injurious to the property or business of appellee, by intimidating or coercing its employees." It was such acts "that the appellant was prohibited from doing." In deciding the question, the court said:

The notice does not call the employees of the appellee scabs. It refers to three ex-members of the union as "traitors," and it is this term which appellee says is an "offensive, scurrilous, or opprobrious name." The Standard Dictionary says that a traitor is "anyone who acts deceitfully and falsely to his friends and joins their enemies." Therefore, if the order be construed to restrain mere application of the term "scabs, or other offensive, scurrilous, or opprobrious names," to appellee's employees, we do not consider that the order was violated.

The State constitution declares that "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty." The court referred to this section, saying:

If a court of equity has the power to restrain and punish members of a labor union from speaking, writing, or publishing on the subject of a dispute between the union and the employer, then the members of the labor union are not such persons as are within the quoted constitutional provision. If the right of a union man, or any other man, to speak, write, and publish freely on any subject is abused to the harm of another, the remedy is an action for damages, and that remedy is deemed adequate.

The judgment was accordingly reversed, Mr. Justice Farmer dissenting.

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LABOR ORGANIZATIONS—INTERFERENCE WITH EMPLOYMENT—CLOSED SHOP AGREEMENT—PROCURING DISCHARGE OF NONUNION WORKER—*Harmon* v. *United Mine Workers of America, Supreme Court of Arkansas (November 24, 1924), 266 Southwestern Reporter, page 84.*—J. W. Harmon was discharged from the employ of the Western Coal & Mining Co. at the instance of the United Mine Workers of America, a voluntary unincorporated association. Harmon was once a member of defendant association, but had been expelled because he joined the Ku Klux Klan, it being against the constitution of the International Union of the United Mine Workers of America for the members to

belong to the klan. The defendant association had a contract with the coal company by which only members of the association should be employed to dig or mine coal, and after Harmon's expulsion from the association the defendant insisted upon his discharge. Harmon then brought suit for $5,000 actual and $5,000 punitive damages against the association for prevailing upon the employer to discharge him. Defendant demurred, and upon the demurrer being sustained the plaintiff appealed. The supreme court, speaking through Mr. Justice Humphreys, said:

The complaint only alleged an employment of appellant by the Western Coal & Mining Co. at will. It was not alleged that the employment was for a definite period. There can be no damages resulting to an employee on account of a discharge from an employment at will. The motive of the employer in discharging him is immaterial, and can not be questioned. The discharge may have been inspired by a bad motive, for the legal right to determine an employment at will is absolute in either the employer or the employee [citing Cusumano *v.* Schlessinger, 90 Misc. 287, 152 N. Y. Supp. 1081; see Bul. No. 189, p. 333].

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LABOR ORGANIZATIONS—INTERFERENCE WITH EMPLOYMENT—INJUNCTION—*Vail-Ballou Press (Inc.)* v. *Casey, New York Supreme Court (October 3, 1925), 212 New York Supplement, page 113.*—The Vail-Ballou Press (Inc.) is engaged in the business, among other things, of typesetting for books, and employs linotype operators, proof readers, and hand men, which employment requires skilled and trained employees, and whose training involves considerable time and expense. The defendant is a voluntary unincorporated association composed of persons employed in similar work, and is a local union chartered by the International Typographical Union of North America. Prior to March 6, 1921, the plaintiff conducted a union shop, but a strike having occurred, it operated as a non-union shop from that date, and required its employees to enter into a written contract by which they agreed to work for the plaintiff for a period of four years, covenanting not to become members of a labor union.

The plaintiff applied for an injunction to restrain the defendant from threatening various of its employees to persuade them to breach their contracts, on the ground that such acts would inflict substantial and irreparable injury upon plaintiff's business.

The supreme court, in considering the petition for an injunction pendente lite, observed that "it is manifest that no injunction may issue except to prevent unlawful acts." That workmen may legally organize unions and strike to better their conditions was recognized by the court, but if the workmen knowingly and intentionally inter-

fered with the contract rights of the employer with his employees, such conduct was unlawful and entitled the employer to relief. It was admitted that it was not illegal to induce an employee to break his contract of employment where the term was indefinite, because if the employee has agreed to so work either may end the contract whenever he chooses.

In the instant case the plaintiff contended that the defendant knowingly induced the employees to breach their unexpired contracts of employment, and such acts were considered by the court to be unlawful. The contract of employment contained the stipulation that the employee was not to become a member of a labor union and in considering this provision the supreme court was of the opinion that it was not unlawful.

The proof was held to show that there was a deliberate attempt on the part of the defendants to induce the employees to breach their unexpired contracts of employment; the supreme court accordingly granted the injunction restraining the defendants from inducing or attempting to induce the plaintiff's employees to breach their contracts of employment.

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LABOR ORGANIZATIONS—PICKETING—CONSTITUTIONALITY OF ORDINANCE—*Thomas* v. *City of Indianapolis, Supreme Court of Indiana (December 5, 1924), 145 Northeastern Reporter, page 550.*—This decision disposed of several cases, in the first of which the appellants sought to enjoin the city of Indianapolis, the mayor, and other parties from enforcing an "antipicketing" ordinance; there had been a temporary injunction, which had been dissolved. The other cases were appeals from convictions for violations of the ordinance.

Objections were that the city council had no authority to pass the ordinance, and that it was unreasonable and oppressive. The position was taken that picketing is not unlawful of itself, and that a clause in a State statute providing that city councils should have power to pass ordinances "to preserve peace and good order, * * * quell riots, and disperse disorderly assemblages," * * * was not sufficient to authorize such an ordinance.

The supreme court observed that the majority view was that "in the absence of any legislation upon the subject, so-called 'peaceful picketing' is not unlawful." Under the authority to pass ordinances to preserve peace and good order it was held that a city council had the power to pass ordinances prohibiting picketing where accompanied by violence or coercion. "Picketing," as used in the ordinance in question, was defined by the court to mean "the maintenance of an organized espionage upon the works or places of busi-

ness of an employer and those going to and from them." Mr. Justice Gause, speaking for the supreme court, said:

It is probable that the city council * * * believed that all picketing was inimical to the peace and good order of the public, and that the public welfare would best be subserved by prohibiting all picketing in the manner described in the ordinance. If we consider the results that generally follow the placing of pickets near to the premises of one against whom a strike or boycott is being conducted, it can not be said that such an ordinance is unreasonable. We all know that in most of such cases the very presence of the picket is apt to give rise to contentions and arguments that often result in bloodshed and riots.

It is not an unreasonable exercise of the power to preserve peace and good order for the council to prevent that which so often disturbs the peace and destroys good order.

The rights of the individual were declared to be "subservient to the welfare of the general public [citing Watters *v.* City of Indianapolis (191 Ind. 671, 134 N. E. 482; see Bul. No. 344, p. 183)].

Continuing, Mr. Justice Gause said:

The rights which appellants have and assert in this case, such as the right to free speech, peaceable assemblage, and the right to use the public streets, as well as the other rights and privileges urged by appellants, are all subject to such reasonable regulations as the governing body of the government may make for the general good, and, as we deem the ordinance in question to be reasonable and one within the power of the council to adopt, it does not infringe upon any of the constitutional rights of appellants.

The ordinance was held not to apply to one class of citizens only, but to all, and also that the ordinance did not in any way prevent employees from striking or presenting their side of the controversy.

The contention was made that criminal statutes cover the same subject. This was admitted, but the court pointed out that a person could violate the ordinance and a criminal statute separately or jointly, and that such a condition of law was not bad.

The judgments were therefore affirmed.

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LABOR ORGANIZATIONS—STRIKE—ADVERTISEMENT FOR NEW EMPLOYEES—CONSTRUCTION OF STATUTE—*West Allis Foundry Co.* v. *State, Supreme Court of Wisconsin (February 10, 1925), 202 Northwestern Reporter, page 302.*—The West Allis Foundry Co. employed a normal force of about 35 men, including core makers and molders, and it had no contracts with any labor unions regarding employment. On October 8, 1923, notice was given of a uniform cut of 5 cents an hour in wages, and on October 12 a representative of the International Molders' Union called upon the company. On the same day

Local No. 125, nine of whose members were employed by the company, voted to strike, and on October 20 received the sanction of the international union. The representative of the international union again visited the company and suggested a compromise, which was refused, and thereupon 10 men quit work, none of them returning. Picketing was commenced and continued until after February 27, 1924. Both the local and international continuously, from October to the time of the trial, asserted that the strike was still in existence, and published statements to that effect in their monthly journals and quarterly circular letters. The company advertised for help on February 27, 1924, and did not state in the advertisement that there was labor trouble at their place of business. Upon being adjudged guilty of violating a State law requiring such notice if a strike existed, the company secured a writ of error for a review.

As this was a criminal prosecution it was incumbent upon the State to prove that, at the time of the alleged advertisement, there was at the shop a strike actually existing. The court said that there could be no question "that when, by concerted action, a number of the company's employees quit work on October 22 because of the proposed cut in wages, they then entered upon a lawful strike as such term is understood and declared."

There was no legislative standard in the present statute as to when a strike was ended, the question being one "of fact before judicial tribunals in proper proceedings," such as the present; and the supreme court held that "the defendant might, at the time of the advertisement, be lawfully justified in considering that a strike shall be deemed at an end when conditions are such that the business of the employer is not materially affected by it, and there are no reasonable grounds for believing that a continuance thereof will materially affect his business."

Mr. Justice Eschweiler, speaking for the court, said:

Picketing and persuading others to keep away from such employment are but incidents of and not the strike itself. At the time of the advertisement in February, 1924, the force or economic pressure that had been exerted on the employer by such withdrawal was no longer in existence. At such time the employer had more than a normal and usual force of men and more than the normal and usual force of core makers and molders at work. There is no testimony whatsoever to indicate that the employees who were then doing the work that had been done by those who withdrew in October were what are designated as strike breakers or employed solely or principally for the purpose of thwarting the purpose of the striking employees, but were residents of Milwaukee County, or other than bona fide employees. Clearly the conditions in defendant's business were then such that it was not materially affected by the strike, and there were no reasonable grounds for believing that a continuance thereof would materially affect defendant's business.

The court therefore concluded that at the time charged there was not a strike actually existing and that the conviction could not be sustained.

The judgment was accordingly reversed with directions to dismiss, one judge dissenting.

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LABOR ORGANIZATIONS—STRIKES—CONSPIRACY—RESTRAINT OF INTERSTATE TRADE—SHERMAN ANTITRUST ACT—*Vandell et al.* v. *United States, United States Circuit Court of Appeals, Second Circuit (March 2, 1925), 6 Federal Reporter (2d), page 188.*—William L. Vandell and others were convicted of violating the act to protect trade in commerce against unlawful restraint or monopolies. It was alleged that it was part of the conspiracy to destroy the track and roadbed of the International Railway Co. at the village of Elwood, N. Y., and further that it was part of the conspiracy to intimidate employees of the railway company so that by intimidation and coercion they would not continue working for the company, and thereby prevent them from fulfilling their duties to this common carrier so engaged in interstate and foreign commerce.

In 1922 there was a strike of the railway employees, and in August, 1922, dynamite was transported by the defendants Reilly and Breese and placed on the railroad tracks. After the explosion both Reilly and Breese made statements that tended to attach the crime to them. The provisions of the Sherman Antitrust Act (Comp. St., sec. 8820 et seq.) were held to apply to all classes without exception. "It is intended to punish alike monopolies of capital and acts of labor, whenever interstate trade is thereby directly restrained. A conspiracy under the act remains a conspiracy punishable under the laws of the United States, without regard to the position or status of the offenders. [Cases cited.] A conspiracy by striking employees becomes a Federal offense under the law whenever that conspiracy necessarily and directly impedes the channels of interstate commerce. (In re Debbs, 15 Sup. Ct. 900 et seq.)"

The judgment of conviction was therefore affirmed.

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LABOR ORGANIZATIONS — STRIKE — INJUNCTION—ATTEMPTING TO PREVENT EMPLOYER FROM ABANDONING DEPARTMENT OF BUSINESS—*C. B. Rutan Co.* v. *Local Union No. 4, Hatters' Union of America, Court of Chancery of New Jersey (April 20, 1925), 128 Atlantic Reporter, page 622.*—The complainant hat-manufacturing company, finding its "making shop" unprofitable, and that hat bodies could be purchased cheaper, shut it down and discharged the hat makers. Thereupon the finishers quit work, according to the employer's state-

ment, to compel it to reestablish the making shop. The finishers, defendants, claimed they quit—struck—because their fellow unionists were thrown out of work, and they regarded it as against their interests to work for an employer who had a making shop and refused to operate it. The policy of the union was claimed to be expressed in its by-laws, as follows:

No manufacturer shall be allowed the union label who has a plank (making) shop and buys his hats in the rough unless the plank shop is running at full capacity.

The company applied for an injunction to restrain the strike.

That the defendants had the right to, "singly or in concert, refuse to work, out of sympathy for their fellow employees, or because they regarded it as not of advantage to organized labor to work under the circumstances, or for no explained reason at all," was considered by the court of chancery as "beyond question." But the court added:

If, however, the purpose of a strike is, and as the complainant contends it is here, to compel an employer to run his shop against his will, and to his injury reemploy his discharged hands, for whom he has no use, then the strike is unlawful, for the union has no right to prevent employers of labor from profitably prosecuting their businesses.

The court found that the proofs in the case fell short of showing an unlawful purpose on the part of the defendant, although it realized that in the circumstances the complainant "may have to reestablish its plank shop or go out of business altogether." In concluding the opinion the court said:

For such misfortune the members of the union disclaim responsibility, and rightly. They were not under contract to work; they have done nothing more than refrain from working; they have not prevented the complainant from procuring others from taking their places, nor have they in any way interfered with the complainant in the carrying on of its business in its own way. In fine, their attitude has been simply one of hands off and let the complainant get along as best it may without them. This attitude is not open to judicial criticism.

The injunction was therefore denied and the bill dismissed.

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OLD-AGE PENSIONS—CONSTITUTIONALITY OF STATUTE—STATUS AS "POOR LAW"—RETIREMENT OF STATE EMPLOYEES—*Busser* v. *Snyder, State Treasurer, et al., Supreme Court of Pennsylvania (February 2, 1925), 128 Atlantic Reporter, page 80.*—Section 18, article 3, of the Pennsylvania constitution provides:

No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational, or benevolent

purposes, to any person or community, nor to any denominational or sectarian institution, corporation, or association.

The old age assistance act of May 10, 1923 (P. L. 189; Pa. St. Supp. 1924, secs. 16734b1—16734b37), was declared unconstitutional by the court of common pleas of Dauphin County because it was considered to be in violation of the above-quoted provision of the constitution. It was held not to be a poor law and the State officials were enjoined from paying or approving for payment bills incurred thereunder. An appeal was taken to the supreme court.

Various arguments were introduced on both sides—why the act should be sustained and why condemned—but, as stated by the supreme court, "all these theories must be left untouched by judicial opinion; under our form of government the legislature alone promulgates the policies of government and is alone responsible if judgment is not well exercised, socially as well as financially."

The trial court held that the words "charitable, educational, and benevolent" were intended to include pensions or gratuities of every kind, excepting those for military purposes. Proponents of the statute admitted that the legislature selected a class of persons to be benefited as an obligation of society "regardless of their ability to earn a livelihood." No gift of money "shall be made for benevolent purposes to any person, in substance says the constitution, and surely these objects and purposes are within the prohibition."

The fact that the appropriation was made to an agency was considered by the court as having no merit to help the favorable consideration of the law.

The gift is not to the commission, but to the particular persons selected by the legislature to receive it. The commission can not use the money; it merely passes it on to the selected class. It is none the less a gift directly to the individual, even though it pauses for a moment on its way thither in the hands of the agency.

Appropriations for nonsectarian and nondenominational institutions for benevolent purposes were held by the supreme court as not prohibited by section 18, article 3; and, further, that appropriations compensating institutions caring for indigent, infirm, and mentally defective persons were not prohibited by the constitution.

A distinction was made between the act in question, which was a pure grant conditioned on age, residence, and financial conditions, and retirement acts for public-service employees. The latter are "founded on faithful, valuable services actually rendered to the Commonwealth over a long period of years, under a system of classification which the legislature has considered reasonable." Payments "are for delayed compensation," while the act in question entirely lacks any such basis. Neither could it be sustained as a poor law,

substituting outdoor relief, or adding it to the present method of caring for poor persons and paupers under existing systems.

Under the act of 1923 the fundamental basis of poor laws (indigency or inability to work and without means of support) is swept aside as to certain persons, and for it is substituted an age limit for persons having property less than $3,000, and an income less than $365 a year, residence within the Commonwealth for certain length of time, discretion in the commission for the imperative mandate to poor directors, and other manifest substitutions.

With knowledge of what our " poor laws and persons " from time immemorial have meant, it will be readily seen the subjects considered under the old age assistance act of 1923 are not within that class and * * * the legislature can not invade the prohibition set forth in section 18 of article 3 of the constitution. * * * It does not require much imagination to show the contract [contrast] between the persons considered by the act of 1923 and those under the poor laws.

If the legislature could make certain financial restrictions it could raise or lower them at will, in the opinion of the supreme court. In other words, according to the court, " the minute the historical definition of poor persons is broken through, the act enters the field of forbidden legislation through section 18 of article 3, and falls as a poor law."

The decree declaring the statute to be in contravention of this provision of the constitution was therefore affirmed.

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RAILROAD LABOR BOARD—POWERS—JURISDICTION—ATTENDANCE OF WITNESSES—*Robertson* v. *Railroad Labor Board, United States Supreme Court (June 8, 1925), 45 Supreme Court Reporter, page 621.*—The transportation act of February 28, 1920 (Comp. St. Ann. Supp. 1923, section 10071¼hhh), authorizes the Railroad Labor Board " for the efficient administration of the functions vested in " it, to require by subpœna " the attendance of any witness * * * from any place in the United States at any designated place of hearing, and the taking of a deposition before any designated person having power to administer oaths." Paragraph b provides that it may invoke the aid of any United States court in compelling compliance.

The board had issued a subpœna directing one Robertson, residing at Cleveland, Ohio, to appear before it at its office in Chicago on a day named. Robertson failed to appear, but was represented by his attorney, who challenged the jurisdiction of the board. Suit was instituted by the board in the Federal court for the northern district of Ohio, and this court issued a summons directing Robertson to appear and answer. He was personally served at Cleveland by the

proper official, but he failed to appear, the attorney again representing him and claiming that he was not subject to the jurisdiction of the Federal court for Illinois. The court overruled the contention and issued a final decree directing Robertson to appear and testify as originally sought by the Labor Board. From this an appeal was taken to the Supreme Court. The court went fully into the question of jurisdiction, and recognized that Congress has power "to provide that the process of every district court shall run into every part of the United States," though this has not been done by any general law, nor, in terms, by the transportation act. Instances were cited in which process is general, as in the Sherman Act (anti-trust law) and its amendment, the Clayton Act; also in other cases for specific and limited purposes. However, the Judicial Code (sec. 51) provides that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." This general rule, subject only to specific acts of Congress by way of exception, and with such exceptions as are provided in the Judicial Code, must be recognized as governing the situation in the instant case. No specific exception having been made in the transportation act, the phrase "any district court" must be construed as meaning "any court of competent jurisdiction." The Labor Board has power to appear in any court of the United States and institute proceedings therein to compel obedience to its writs. In explicit language the board is authorized to compel persons to come from any place in the United States to any designated place of hearing to furnish evidence; but there was no indication found of any intent on the part of Congress to depart from the long-established policy of litigating the question of contumacy in any other jurisdiction than that of the witness's residence.

The judgment below directing Robertson's appearance before the Federal court for Illinois was reversed on the obvious ground that the board did not bring the proceedings in the proper district of Ohio.

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RAILROADS—STATE AND FEDERAL REGULATIONS—PROTECTION OF HEALTH OF EMPLOYEES—LOCOMOTIVE CAB CURTAINS—CONSTITUTIONALITY OF STATUTE—*Chicago & N. W. Ry. Co.* v. *Railroad Commission of Wisconsin; Chicago, M. & St. P. Ry. Co.* v. *Same; Minneapolis, St. P. & S. S. M. Ry Co.* v. *Same, Supreme Court of Wisconsin (November 27, 1925), 205 Northwestern Reporter, page 932.*—Chapter 139, Laws of Wisconsin, 1923, prohibits any railroad company from using, between the 15th day of November and the 1st day of April,

in each year, any locomotive engine not equipped with approved cab curtains. It provides in part:

Such curtains shall be so constructed as to efficiently inclose the openings between the engine cab and the water tank or coal tender attached to such locomotive engine. The windows of the cab shall be properly and closely fitted and all openings for levers or pipes and all other openings whatsoever through which cold or drafts may bring discomfort to the occupants shall be efficiently protected in such manner as may be required and according to plans approved by the Railroad Commission of Wisconsin.

The law also required all railroad companies to submit plans for such equipment to the railroad commission of the State for approval, and that it should be the duty of the commission to enforce the provisions of the act.

The commission held hearings throughout the State, and on October 31, 1923, issued an order prescribing minimum specifications for cab curtains which should be regarded as a compliance with the law. The Chicago & Northwestern Railway Co., the Chicago, Milwaukee & St. Paul Railway Co., and the Minneapolis, St. Paul & Saulte Ste. Marie Railway Co. brought separate actions to review the order of the commission, and from a judgment of the circuit court affirming the order the plaintiffs appealed.

The supreme court considered the three actions at the same time, and in reviewing the record stated first that the regulation of interstate commerce was entirely within the power of the Federal Government, and that the State legislation must give way to conflicting Federal legislation as affecting interstate commerce, and further that in case of a conflict between State and Federal legislation the interstate carriers must carry out the legislation of the Federal Government. However—

The power of Congress to promote safety in the prosecution of interstate commerce is one subject of legislation. The power of the State to promote the health and welfare of its citizens is quite another. By the exercise of the first power the States do not lose the second, and the legislation of each jurisdiction will stand unless they be repugnant to each other.

The curtains prescribed were in use on the locomotives of several railroads during the year 1924–25 without any suggestion from Federal authorities that their use was repugnant to Federal regulations. Quite to the contrary, the record disclosed a letter addressed by a member of the Interstate Commerce Commission to a member of the State railroad commission in which it was said:

I have carefully read the law and the order of your commission, and examined the blue prints, and do not find that the application of such curtains or other requirements of the law in any way con-

flict with the Federal locomotive-inspection laws or the rules of instructions issued by this commission pursuant thereto.

In the light of this Federal acceptance of the order of the State railroad commission, the Supreme Court was of the opinion that it would not consider the matter any further, on the ground that if a conflict existed it should be left to the Federal authorities to raise the question.

The contention that the law or the order imposed undue burden upon interstate commerce was rejected by the supreme court, its construction of the law being that it is one "which the State has plenary power to pass in the interest of the public health. As a rule, such laws impose a burden upon someone, but it is a burden which must be borne for the public good."

The law and order being considered valid from a standpoint of due process, the judgment of the circuit court was affirmed.

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RAILROADS—STRIKES—DETENTION OF CARS—PENALTY—JUSTIFICATION—*Davis, Agent*, v. *Keystone Steel & Wire Co., Supreme Court of Illinois (April 24, 1925), 148 Northeastern Reporter, page 47.*—A judgment was rendered against the Keystone Steel & Wire Co. in favor of James C. Davis, agent of the United States, under the provisions of the transportation act of 1920 (U. S. Comp. St., Ann. Supp. 1923, sec. 10071¼ et seq.), in the sum of $18,930 for demurrage charges on cars delivered to the company. The company appealed on the ground that the judgment deprived it of its property without due process of law. The defense was made that on July 5, 1919, a strike was called by the defendant's employees, which resulted on October 13 in depriving it of all its employees, and that from August 13 to October 2 the defendant was prevented from unloading the cars delivered to it except one car, which was unloaded on September 26. The unloading was accomplished as fast as the defendant could get the men to do it. The defendant company further contended that the duty to pay demurrage charges was "one imposed by law, and is in the nature of a penalty not arising from any contract, and that the failure to admit its defense deprived it of its property without due process of law."

The only question of interest in this case as a matter of labor law is whether the strike could exempt the company from the payment of demurrage charges. The supreme court, speaking through Mr. Justice Dunn, said:

Since the demurrage was a proper terminal charge, for which the appellant was liable as a part of the transportation of the cars, it was payable by the appellant in accordance with the demurrage

rules and the average agreement, and it was the duty of the appellee to collect it unless the existence of the strike excused the payment. The rules make some exceptions to demurrage charges * * * none of which apply to the circumstances of this case, but no mention is made of failure to load or unload because of a strike. The duty of the consignee to unload is positive. Certain exceptions are stated. The duty to unload is therefore absolute in the absence of the expressed exceptions.

The company claimed that the delay was not its fault, and that the construction of the rules " which denies any defense not provided for in the rules is a violation of the constitutional prohibition of the deprivation of property without due process of law."

The court pointed out that the approval of the schedule by the Interstate Commerce Commission was " conclusive that the charge was reasonable." It was held that the " contract of the parties " was their own contract, " though its terms were prescribed by Congress under its power to regulate commerce between the States," and in so doing " to interfere with the right of private contract when the public interest in interstate transportation demands it." The contract was held as not excusing the company " from liability for demurrage because of interference with its business by a strike."

After discussing several decisions on the point, the court concluded:

> It is immaterial whether the demurrage accrued on interstate or intrastate shipments, because authority to enforce intrastate rates as well as interstate rates was conferred on the President by the act of Congress of August 29, 1916, and the act of March 21, 1918—the Federal control act.

The judgment was therefore affirmed.

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SUNDAY LABOR—OPERATION OF GROCERY STORES, ETC.—POLICE POWER OF CITY—CONSTRUCTION OF ORDINANCE—*State* v. *Somberg, Supreme Court of Nebraska (July 1, 1925), 204 Northwestern Reporter, page 788.*—Ben Somberg was convicted and sentenced upon a complaint charging him with unlawfully opening his store on Saturday and Sunday and selling meats and groceries, etc., in violation of ordinance No. 9805 of the city of Omaha. Plaintiff appealed on the ground that the ordinance was dependent upon section 9795 of the Compiled Statutes of 1922, and that because it does not contain the exceptions of said statute it is void.

The ordinance provided for the closing of all stores selling groceries and meats on Sunday, but did not contain the provision of the statute excepting " works of necessity and charity." The statute came from Ohio, where, as the supreme court observed, it received judicial construction prior to the time it was adopted in Nebraska,

"that construction being that an omission of the exception vitiates the ordinance, because otherwise such ordinance would make the citizen guilty of a crime or misdemeanor not contemplated by statute merely because he had labored without regard to whether what he had done was a work of charity or necessity. In other words, the ordinance without the exception makes a crime out of whole cloth, and without warrant or authority of law." The court stated that it "has long been held in this State, where the legislature adopts the statute of another State which has theretofore been construed by courts of that State, it adopts the settled construction along with the statute, so that, if the only support of the ordinance was this statute, the argument of the defendant would be most persuasive," and if it should be granted that the ordinance was dependent upon section 9795, the defendant would not be guilty in opening and selling, "because so doing is innocent enough in itself and the statute in question vests the city with no power to make him guilty on that ground."

However, it was the contention of the State that the ordinance was valid under the police-power section of the Omaha charter (Comp. St. 1922, sec. 3489, subd. 25). It was observed that the language of subdivision 25 was very broad, that it gave power to the city to make police regulations for the welfare, for health, etc., of the citizens. The supreme court thought it an entirely lawful delegation of the State's power to the municipality, sufficient in terms and in intent to "empower the council to say that the opening of such stores as groceries or meat markets on Sunday is contrary to the general health and welfare."

To the contention of Somberg that the ordinance discriminated, the court quoted with approval from the case of Liberman *v.* State (26 Nebr. 464, 42 N. W. 419), in which the court said:

> Ordinances are made by virtue of the incidental powers of municipal corporations, under the authority conferred by legislative enactment, in the exercise of their legitimate police authority for the preservation of the peace, good order, safety, and health of the inhabitants of the corporation.
>
> An ordinance prohibiting persons from engaging in certain kinds of business on the first day of the week, commonly called Sunday, is not void by reason of such discrimination; the prohibited business not being of public necessity.

The court being of the opinion that the ordinance was not void because of discrimination, and that the city of Omaha had the authority of section 3849, Compiled Statutes 1922, to enact a city ordinance prohibiting storekeeping on Sunday, the judgment of the district court was therefore affirmed.

The Supreme Court of Michigan sustained a similar ordinance of the city of Lansing, finding that the home rule statute of the State authorized "the regulation of trade, occupations, etc." The keeping of a grocery store was said to be

an occupation, sufficiently defined to be understood by those affected by the ordinance. Sunday closing was said to be a "sanitary measure," and the ordinance not being class legislation was valid. (People *v.* Derose (1925), 203 N. W. 95.)

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WAGES—ASSIGNMENT OF FUTURE EARNINGS—GARNISHMENT BY THIRD PARTY—*Southern Railway Co.* v. *Beneficial Loan Society, Court of Appeals of Georgia (December 9, 1924), 125 Southeastern Reporter, page 776.*—This was an action between the Southern Railway Co. and the Beneficial Loan Society to recover from the company a sum owed by it to one of its employees who was indebted to the loan society, and upon judgment being rendered for the latter, the former appealed. The facts and the decision as given in its syllabus by the court of appeals in affirming the judgment are:

Where an employee executed a written order drawn on his employer in favor of a payee therein named, directing the employer to pay out of his future wages certain sums monthly to the payee until payment of the full amount specified in the order, and, after the wages were earned but before they were paid to any one, and before there was any written acceptance of the order, another creditor of the employee sued him and caused summons of garnishment to be served on the employer, the written order was not available to the employer as against such plaintiff to justify the payment of the wages to the payee subsequent to the service of the summons of garnishment.

Applying this principle to the facts of the case, the municipal court of Macon did not err in sustaining the plaintiff's traverse of the garnishee's answer.

The judgment was accordingly affirmed.

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WAGES—BONUS—COMPUTATION—OFFSETS—*Girman* v. *Hampel, Supreme Court of Wisconsin (October 20, 1925), 205 Northwestern Reporter, page 393.*—William Girman was hired as manager of the meat market of Joseph Hampel at a weekly salary of $30 and 15 per cent of the monthly operating profits of the business. The salary was paid in full and the plaintiff brought an action for a balance of $574.24 alleged to be due him as his share of the operating profits. The employer contended that he agreed to pay a bonus from time to time, but that the amount was not fixed, the payment and the amount being left entirely to the judgment and good will of the defendant. From a judgment for the plaintiff the defendant appealed.

The evidence showed that the plaintiff's predecessor had received in addition to his salary a bonus of 15 per cent of the operating profits, and that such bonus was estimated upon the profits as disclosed at the end of each month during the period of employment.

From time to time during the course of the two-year employment, the defendant paid to the plaintiff various sums to be applied upon his share of the operating profits. The lower court found that the sum of $514.24 was the proper balance due plaintiff, and the supreme court was of the opinion that testimony sustained the judgment. To the contention of the defendant that the net losses of one month were deducted from the net profits of another, it was held not allowable under the circumstances of the case, which provided for 15 per cent of the monthly operating profits and not of the yearly profits. The defendant based his contention on the case of Thomas *v.* Columbia Phonograph Co. (114 Wis. 470, 129 N. W. 522), in which case the net profits of one month were offset against the losses of other months; but the plaintiff in that case had acquiesced in such statements, thus showing the construction of the contract by the defendant, which was acquiesced in by the plaintiff. In the instant case no such offsets were computed, and the statement of each month's business reflects the business of such month, and the operating profit in each month was subjected to a deduction of 15 per cent to the plaintiff as a bonus. There is nothing in the present case that conflicts with the holding in the Thomas case, and under the authority of that case the judgment of the lower court was affirmed.

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WAGES—BONUS—CONTRACT—RIGHTS OF EMPLOYEE AFTER LEAVING EMPLOYMENT—*Wellington* v. *Con P. Curran Printing Co., St Louis Court of Appeals, Missouri (January 3, 1925), 268 Southwestern Reporter, page 396.*—Harry A. Wellington was employed by the defendant printing company during the years 1918, 1919, and 1920 as superintendent of the composing room, where he had charge of about 100 men. The employer inaugurated a bonus system in 1918 whereby the employees holding responsible positions with the firm would receive a bonus. A letter was sent to the plaintiff in January, 1918, at which time he was in the employ of the company, advising him of the plan and the terms thereof, and he received a payment for the years 1918 and 1919. The vice president and general manager of the company had told the plaintiff that the bonus system would be continued from year to year, and in 1920 advised plaintiff that his share for that year would probably be as large as $2,500. In January, 1921, the company sent a letter to the plaintiff advising him that his share in the bonus distributed for the year 1920 was $2,500, and that that amount was placed to his credit on the books of the company, with interest at 6½ per cent per year. Withdrawals were to be subject to the approval of the management. On the last day of April, 1921, there was a strike at defendant's plant and the

plaintiff went out with the other employees. Upon request being made for the bonus money and interest it was refused, and an action was brought to recover it. Defendant appealed from a judgment for the plaintiff, contending that there was no contractual relation between the parties, merely a voluntary agreement on the part of the defendant not enforceable because not supported by a new and valid consideration.

The court observed that it seemed to be the general rule that where the promise of a bonus is made at the time the employee entered the service, such promise for additional compensation becomes "a part of the original contract, and is enforceable." Opinions differ, however, where the promise is made after employment has been entered upon under an existing contract. The jury decided in the affirmative the question as to whether the plan adopted in 1918 was carried through 1920, and the court, on appeal, regarded itself as bound by that finding; nor did the court consider the proposition, so vague or indefinite as to be void for want of mutuality or lack of consideration. The court continued:

There is no question but that plaintiff accepted the proposition, and received his share according to this contract for the year 1918, and when defendant continued this plan in force for the year 1920, and in the beginning of the year 1921 set aside $2,500 as plaintiff's share, what was indefinite became definite. Defendant made the offer, and plaintiff accepted, and this created a unilateral contract, and the principle of mutuality of contract as it is applied generally has no place in the consideration of such contracts. They are not based on mutual obligations. As there is no promise on the part of the promisee, there can be no mutual obligations.

The compliance with the terms of the offer was considered a contract supplementary to that of the employment. The court held it an inducement to plaintiff to remain in the employ and to perform efficient service. The plaintiff also was employed by the week, and the court said it could be inferred from the facts that he was induced to stay, "in part at least, by the offer of reward made to him by the defendant."

We think the great weight of authority supports the view that plaintiff, under such a state of facts as we have in this record, is entitled to recover the amount sued for.

The judgment was accordingly affirmed.

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WAGES—BONUS—PAYMENT AT END OF YEAR—TERM OF CONTRACT—*Meredith* v. *Carl Youngstrom Co., Supreme Court of Iowa (November 17, 1925), 205 Northwestern Reporter, page 749.*—One Meredith, employed by the Carl Youngstrom Co., a corporation engaged in conducting a cylinder grinding shop in the city of Des

Moines, returned to work after an adjustment made between the employer and the employees as a result of a strike, and continued to work from 1920 to March 31, 1922, when he voluntarily quit. Meredith contended that he was to receive 85 cents an hour and a bonus of 5 per cent on the wages earned by him, the bonus to be payable at the end of the year. The company paid the bonus for the calendar year 1920, and Meredith brought suit for the bonus on wages earned in 1921 and the first three months of 1922. A jury found that there was such an agreement and awarded a verdict in favor of Meredith, and the defendant appealed.

The contract of employment was held not within the statute of frauds, so as to preclude evidence of contract to pay a bonus on the wages earned, whether for the balance of the first year or for each year of employment. No time of service was fixed by the agreement, and it was held apparent that the employee performed his part of the contract year by year and that he was entitled to and was paid wages at the rate of 85 cents an hour. The contract in the opinion of the supreme court " is not severable." The supreme court in conclusion decided that Meredith was not entitled to the bonus for the work done in 1922 on the ground that the bonus was to be paid for a year or not at all.

For the reason that the judgment granted Meredith the bonus for the work done in 1922, the supreme court reversed the decision.

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WAGES—EXEMPTION—CONSTITUTIONALITY OF STATUTE—*Verino* v. *Hickey, et ux., Supreme Court of Washington (June 18, 1925), 237 Pacific Reporter, page 5.*—Antoni Verino secured a decree from the superior court that certain personal property owned by C. W. Hickey and wife as their community property be made subject to execution and sale toward the satisfaction of a judgment rendered by the superior court in favor of Verino on a claim for work and labor done. Execution was issued in the judgment of $631.30, under which the sheriff seized the property and threatened sale thereof. The defendants claimed the property to be exempt. It was conceded by both parties that the property was within the classes of exempt personal property enumerated in section 563, Remington Compiled Statutes, and " would be exempt from seizure and sale toward the satisfaction of an ordinary money judgment."

Section 564, Remington Compiled Statutes, provides:

No property shall be exempt from execution for clerk's, laborer's, or mechanic's wages earned within this State * * *: *Provided*, That nothing herein shall be construed as repealing or in anywise affecting section 703, infra.

Section 703, referred to in this quoted language, exempts:

Current wages or salary in the amount of one hundred dollars ($100) for personal services rendered by any person having a family dependent upon him for support. * * *

Mr. Justice Parker, speaking for the court, observed that the legislature "can not constitutionally practically destroy all exemption rights or enact exemption laws in violation of the equal privileges and immunities guaranty of the constitution."

As was pointed out, it is a question of giving to a general creditor without any specific lien right superior rights over another general creditor without specific lien right, the claims differing only in respect as to what gave rise to them. In other words, "can the legislature constitutionally classify general debtors and general debts upon a basis of differing natures of the debts, so that all debtors shall not have equal immunity of exemption as against all forced sales to satisfy all their general debts."

On this point the case of Tuttle *v.* Strout (7 Minn. 465, 82 Am. Dec. 108), was quoted with approval, Mr. Chief Justice Emmett saying in that case:

The constitution makes no exception in favor of any particular class of persons, or kind of debts or liabilities; nor should we recognize the right of the legislature to make any such distinctions. If one class of persons, or kind of debts or liabilities, any be excepted, all may be; and the constitutional provision might thus be rendered entirely nugatory.

In conclusion the court held that section 564, providing that no property shall be exempt from execution for clerks', laborers', or mechanics' wages earned within the State, was unconstitutional if impairing the exemption rights granted under section 1, article 19, of the State constitution, which directs protection of "a certain portion of the homestead and other property of all heads of families," and as being further violative of the equal privileges and immunities guaranteed under article 1, section 12, of the State constitution. The order of the superior court decreeing the community property subject to execution and sale was therefore reversed and the cause remanded with the direction to enjoin the sale and award a return of the property.

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WAGES—GARNISHMENT—CONTRACTS FOR PAYMENTS IN ADVANCE—EFFECT—*Packard Motors Co. of Alabama* v. *Tally, Supreme Court of Alabama (March 19, 1925), 103 Southern Reporter, page 455.*—Val Freeman, employed by the Packard Motors Co. of Alabama as a salesman, was by the contract of employment allowed a commission on cars sold by him, and in addition was allowed a drawing account up to $150 each month, any overdrafts being charged against the

following month's account. The contract was to terminate at the will of either of the parties. One Tally sued out a garnishment upon a judgment, and at the time the garnishment was served on the employer the employee had overdrawn several hundred dollars. The employment continued during the pendency of the garnishment, which was several months. The employee continued to draw each month to the amount of his drawing account, which was meantime increased to $175 per month. During the entire time he continued to be indebted to his employer. From a judgment on the garnishment the employer appealed. The supreme court quoted with approval the case of Alexander *v.* Pollock & Co. (72 Ala. 137), in which the court said:

It is perfectly competent for an employer to stipulate with an employee, by bona fide agreement, that he will pay his wages weekly, or monthly, or for any other reasonable time, in advance; and such agreement, when free from fraudulent collusion, will be upheld by the court. And so long as these payments are made in advance no debt can accrue for wages or salary due to such employee; and hence the employer can not be held liable as garnishee under such state of facts. (Callaghan *v.* Pocassett Mfg. Co., 119 Mass. 173; Worthington *v.* Jones, 23 Vt. 546; Archer *v.* People's Savings Bank, 88 Ala. 249, 254, 7 So. 53, 55.)

The supreme court, speaking through Mr. Justice Bouldin, in construing the State statutes, observed:

Our statutes subject wages to become due pursuant to a contract existing or made pending the garnishment. This provision does not reach future installments of wages under a contract that may be terminated at the will of the employee. (Henry *v.* McNamara, 124 Ala. 412, 26 So. 907, 82 Am. St. Rep. 183.) But if wages are earned under such a contract, so that the employee has a right of action in assumpsit for wages earned, the lieu of the garnishment attaches. (Authorities supra.)

If wages are payable under the contract at the end of a month or other period in which they are earned, they become subject to the lien of a pending garnishment, and the employer pays them at his peril. (Lady Ensley Furnace Co. *v.* Rogan & Co., 95 Ala. 594, 11 So. 188; Montgomery Candy Co. *v.* Wertheimer-Swartz Shoe Co., 2 Ala. App. 403, 57 So. 54.) And this is true, although the employer allows the employee to draw on his wages while being earned, or to make an account against his wages, no prior contract therefor existing. (Ely *v.* Flinn, 112 Ala. 311, 20 So. 570.)

The right of an employer to contract to pay wages in advance and to continue to carry out his contract after service of garnishment was considered by the supreme court as being generally recognized. The Alabama rule as laid down in the decisions was stated to be:

An employer, in the conduct of his own business, may stipulate by contract to pay wages in advance, that is, before the closing of

the earning period for which the advance is made, and may carry out such contract after service of garnishment without subjecting himself to double payment. This is but a recognition of his right of contract in the management of his own business. A drawing account is a well-recognized modern business method of furnishing the employee with means of maintenance while engaged in the service from which wages or commissions are to accrue.

To be protected, it was held that the garnishee must make advance payments according to the contract. If payable as drawn or called for by the employee, the advance payments must be so paid, otherwise the garnishment attaches and the garnishee becomes liable for all wages earned and not paid or drawn as to the contract. The employer was held entitled to deduct any indebtedness due from the employee at the time of service or which accrues from advancements lawfully made. (Jefferson County Savings Bank *v.* Nathan, 138 Ala. 342, 35 So. 355.)

The garnishee was held not liable under a contracted employment permitting a drawing account where payments were made only according to the contract.

The judgment of the lower court in favor of the plaintiff was reversed and a judgment entered discharging the employer as garnishee.

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WAGES—GARNISHMENT—DEBT EARNED AND PAYABLE IN FOREIGN COUNTRY—*Weitzel* v. *Weitzel*, *Supreme Court of Arizona* (*December 10, 1924*), *230 Pacific Reporter*, *page 1106*.—Josephine Weitzel sued out a writ of garnishment in the superior court against the Southern Pacific Railroad Co. of Mexico, to reach a debt the company owed Harry E. Weitzel on account of wages earned in Mexico. She wished to apply it on a judgment for alimony obtained in the superior court in an action in which he was personally served. The company claimed that the debt was not subject to garnishment "because it was for wages earned and payable in Mexico." It was also claimed that the Mexican courts would not recognize the "forced payment in Arizona as satisfaction of the debt, but would make it pay the claim in Mexico, notwithstanding its payment in Arizona." The superior court of Arizona dismissed the writ and the plaintiff appealed. The supreme court on review first observed that the corporation—

was in the State doing and carrying on business therein, receiving the State's protection and acknowledging its sovereignty over it, and we think generally subject to its processes.

But the court also said:

Even though the garnishee is in the jurisdiction, if the debt be not also in our jurisdiction it can not be legally appropriated to the

payment of plaintiff's judgment. The court must have jurisdiction of the debt garnished.

The court was of the opinion that though the debt was for wages earned and payable in Mexico, it was subject to garnishment in Arizona, provided payment in such manner would be recognized by Mexican courts. As to the States the court said:

As between the different States of the Union such a judgment would be a bar, since the Federal Constitution requires that each State give full faith and credit to the judgments of the other States.

While it was "probable" that the Mexican courts would honor the judgment of the courts of Arizona, and refuse to compel a second payment of the wages in question, there was not known to be any international rule or law or treaty requiring the same; and as the services were rendered in Mexico and the debt was payable therein, it was held that the company "ought not to be compelled to pay such debt to an Arizona creditor when it is not only possible but probable it would have to pay it again."

The judgment was therefore affirmed.

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WAGES—MINIMUM WAGE LAW—CONSTITUTIONALITY OF STATUTE—MINOR EMPLOYEES—*Stevenson* v. *St. Clair, Supreme Court of Minnesota (January 16, 1925), 201 Northwestern Reporter, page 629.*—Arthur L. Stevenson, a minor, recovered a judgment against the defendant Wesley St. Clair, doing business as the Crocus Hill Pharmacy, for the difference between the agreed wages and the amount fixed under the minimum wage act of 1913. The defendant appealed.

The law had been sustained by the State supreme court in Williams *v.* Evans (129 Minn. 32, 165 N. W. 495, 166 N. W. 504), where its applicability to women was involved. However, in view of the decision in the Adkins case (261 U. S. 525, 43 Sup. Ct. 394), holding the law of the District of Columbia unconstitutional in its application to adult females, it might be assumed for the purpose of this decision that "part of our act fixing a minimum wage for women [is] repugnant to the Federal Constitution"; but the question was left without definite consideration, as not involved in the instant case. The suggestion that the statute in its application to minors was likewise repugnant to the Constitution "we can not accept as settled." The court was of the opinion that in this aspect there was nothing to support an attack on the statute; nor did it conceive that, if the provision relating to adult women was eliminated, the remainder of the act could not stand. The court concluded:

It is not pointed out wherein our act may not stand as to minors, if invalid as to adult women, as well as the act of Congress.

The judgment was therefore affirmed.

WAGES—MINIMUM WAGE LAW—CONSTRUCTION OF STATUTE—CONSTITUTIONALITY—*Murphy, Attorney General,* v. *Sardell, United States Supreme Court (October 19, 1925), 46 Supreme Court Reporter, page 22.*—The Supreme Court of the United States in a memorandum decision affirmed the judgment of the United States District Court for the District of Arizona, holding the minimum wage law of that State unconstitutional. A. Sardell, a merchant in Nogales, Ariz., had in his employ four women working under a contract calling for less than $16 per week wages. The minimum wage law of the State enacted in 1917, and amended in 1923, fixed $16 as the necessary cost of living and made it an offense to pay any female in designated employments a less amount. Sardell insisted that to pay the minimum would ruin his business, but the State authorities undertook to enforce the act, and he sought an injunction. The district court took the position that the law was unconstitutional and granted the injunction. On appeal to the Supreme Court the judgment of the district court was affirmed on the authority of Adkins *v.* Children's Hospital (261 U. S. 525, 43 Sup. Ct. 394; see Bul. No. 344, p. 249). Mr Justice Holmes requested that it be stated that his concurrence was solely upon the ground that he considered himself bound by the decision in Adkins *v.* Children's Hospital (supra). Mr. Justice Brandeis dissented, but without opinion.

Some three months prior to the foregoing decision, the Supreme Court of Kansas had before it cases involving the constitutionality of the minimum wage law of that State. It was there argued that the decision of the Supreme Court in the Adkins case was on local legislation, and not binding as a general principle; but the majority of the court held that, while it might in principle disagree with the majority opinion of the Supreme Court, so long as that decision stood it was "entitled to respectful observance," and "should time demonstrate that the decision does not represent the settled views of the Supreme Court of the United States upon this momentous question of constitutional liberty, the law can be reinstated." The law was therefore held void as an attempt to regulate wages of adult females. (Topeka Laundry Co. *v.* Court of Industrial Relations (1925), 237 Pac. 1041.)

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*of Florida (February 18, 1925), 103 Southern Reporter, page 414.*—WAIVERS—*Henderson-Waits Lumber Co.* v. *Croft, Supreme Court of Florida (February 18, 1925), 103 Southern Reporter, page 414.*—Sections 2522, 2523, 2524 of the Revised General Statutes, holding persons or corporations issuing coupons or other similar devices in payment for labor liable, on demand of any legal holder thereof after 90 days from the date of issuance, for the full face value thereof in current money, notwithstanding any contrary stipulation or provisions which might be contained therein, together with legal interest from demand and an attorney fee of 10 per cent where suit is required to enforce payment, were, in the above-

entitled case, held valid and enforceable. The action was brought by the alleged owner and holder to recover from the defendant issuing company the face value of certain coupons issued by it in payment for labor of its employees. From a judgment for plaintiff in the circuit court the defendant brought error.

Mr. Justice West, delivering the opinion of the court, stated that as the question had been settled in former cases, "it is not conceived that a journey over the same route would be profitable." Mr. Justice Whitfield, however, filed a concurring opinion in which he stated:

It is stipulated in this case that the laborers "were to receive an agreed amount per diem, to be paid in cash on the second and fourth Saturdays in each month," and that the coupon books, redeemable only in merchandise, were issued as a convenience and an accommodation. Obviously the legislature deemed the laborer to be at some disadvantage under existing circumstances in taking the coupon books, redeemable only in merchandise at the employer's store, the books to be used to conserve the laborer's current needs between pay days; and the legislation was designed to place the employer and the laborer on equal grounds in paying and receiving wages. The statute gives to the coupon books a value they would not otherwise have. This is simple justice to the laborer, and is no injury to the employer, who agreed to pay or is required to pay money for the labor. The enactment is a reasonable and not a mere arbitrary provision of law.

Issuing the coupon booklets to laborers in advance of performance of the labor does not affect the validity or applicability of the statutory regulation.

The operation of the mandatory terms of a valid statute can not be hindered by contracts or mutual conduct contrary to the statute. * * * And employers and employees can not, by any course of conduct or by any form of agreement, express or implied, interfere with the operation of the statute upon the subject covered and intended to be regulated by the enactment.

The judgment was accordingly affirmed.

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WAGES—PAYMENT OF LESS AMOUNT THAN CLAIMED—ACCEPTANCE OF CHECK—ESTOPPEL—*Knight* v. *Missouri Pac. R. Co., Supreme Court of Arkansas (October 5, 1925), 275 Southwestern Reporter, page 704.*—Dave Knight, employed by the Missouri Pacific Railroad Co., contended that the company failed to pay him the full amounts due him in the months of February, June, July, September, and October, 1920, and January and June, 1921; that the several items of shortage and the overtime he worked amounted to $59.25. He contended that in addition to this amount he was entitled to 60 days' pay at $3.60 per day as a penalty, under section 7125 of Crawford and Moses Digest, for discharging him without paying him the full

amount due. The suit was brought almost two years after the last alleged shortage, and from judgment for the defendant company he appealed.

Knight contended that as the defendant did not plead accord and satisfaction and that as the checks did not purport to be payments in full, the judgment should be reversed. The checks were introduced and the correctness of the judgment was held to turn upon the effect to be given the checks. It appeared that during the time of the difference monthly checks were accepted by him. The checks specified that they were in payment of services rendered during particular months for which he claimed shortages and overtime. The supreme court was of the opinion that: "The checks were tendered for all services rendered by appellant during the months specified in each, and that by receiving and cashing them appellant estopped himself to claim additional amounts."

The judgment was therefore affirmed.

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WAGES—PAYMENT ON DISCHARGE—CONSTRUCTION OF STATUTE—WAIVER—*Cato* v. *Grendel Cotton Mills, Supreme Court of South Carolina (September 10, 1925), 120 Southeastern Reporter, page 203.*—Section 5592 of the Code of 1922, State of South Carolina, provides a penalty for failure to pay within 24 hours after written demand all wages earned by a discharged workman.

J. M. Cato was employed by the Grendel Cotton Mills Co., and was discharged on August 13, 1923, the company then owing him $19.12. On September 1 Cato made a written demand for his wages. The defendant refused to pay until Cato vacated the company's house which he then occupied, the defendant contending that by an established custom of the mill a discharged employee is not entitled to wages until he vacates the company's house.

Cato brought an action against the company for his wages and the statutory penalty, and the magistrate before whom the case was tried gave judgment for the plaintiff for the full amount less $18 accrued rent. The company appealed on the ground that when Cato was employed he agreed to waive his statutory right by accepting employment subject to the condition that his wages should not become due and payable until he vacated the company's house. The county court dismissed the appeal and affirmed the judgment of the magistrate. The defendant appealed to the supreme court on the ground that it had a right to demand the surrender and possession of the premises as a condition precedent to the payment of wages, and that defendant was entitled to the possession of the house and that the wages did not become due until such possession was surrendered.

The supreme court, on considering the record, first held that the statute requiring the payment of wages on discharge became a part of the contract of employment. The contention of the defendant that the plaintiff waived his statutory right by accepting employment in the company subject to the conditions existing was held to be of no force and effect.

It was observed that the statute in question was passed as a matter of public policy, to remedy the hardships that "no doubt followed" the practice of corporations to discharge their men and refuse "to pay wages until pay day." The employees were, under the custom, compelled to wait for their pay, while in the meantime expenses mounted and "their situation became more precarious every day." In holding that the statutory right to payment of wages on discharge can not be waived, the court, speaking through Mr. Justice Johnson, said:

When a laborer is discharged, and the corporation at that time owes him money, and there is no valid defense to his claim, the corporation can not interpose as a defense to such claim a custom of, or even a contract with, the corporation whereby the laborer must vacate his house before he will be entitled to his pay. Such a condition would contravene the plain intention of the statute and be against public policy.

The judgment was accordingly affirmed.

A similar law of the State of Arkansas was up for consideration in a case involving delay in the payment of discharged workmen, repeated demands being unsuccessful, though promises to pay "in a day or two" were made. The supreme court of the State applied the act, making the maximum penalty the answer to such delay, i. e., the continuance of the wages for a period of 60 days if the delay is so long. (Chicago, R. I. & P. R. Co. *v.* Webb (1925), 272 S. W. 650.)

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WAGES—PUBLIC WORKS—CURRENT RATE—CONSTRUCTION OF STATUTE—*General Construction Co.* v. *Connally, Commissioner of Labor of Oklahoma, United States District Court, Oklahoma (November 24, 1924), 3 Federal Reporter (2d) page 666.*—Sections 7255 and 7257 of the Oklahoma Compiled Statutes, 1921, which required contractors on public works to pay their employees "not less than the current rate of per diem wages in the locality where the work is performed," came up for consideration by the United States district court as to their constitutionality. According to the provisions of the statute there was a penalty for each offense of not less than $50 nor more than $500 or imprisonment not less than three months nor more than six months, each day's violation constituting a separate offense. The phraseology of the act, "not less than the current rate of per diem wages in the locality," together with the stringent

provisions for punishment, was said to "deprive the complainant of his liberty and property without due process of law." The General Construction Co., a corporation, brought a proceeding in equity to restrain the State commissioner of labor from enforcing the provisions of the statute and from prosecuting the plaintiff criminally for failure to comply with section 7255. There was a decree for the plaintiff, one judge dissenting.

Mr. Justice Kennamer, speaking for the court, said:

It is obvious that the statutes requiring the payment of current wages and providing penalties for the violation thereof are so vague and indefinite as to render it impossible for any person to know or to be able to determine in advance for what acts he may be arbitrarily required to answer for a criminal prosecution. The statutes involved in effect delegate to the labor commissioner of the State of Oklahoma the arbitrary power to determine what acts of a contractor working under a contract with the State or municipality he conceives to be a violation of the statute justifying a criminal prosecution. The statute wholly fails to provide an ascertainable standard by which a contractor may determine in advance what is the current wage in any given locality.

Common justice demands that, before a person may be deprived of this liberty by means of a criminal prosecution, he must have been able to comprehend and to know in advance that if he commits certain acts, such acts will violate the provisions of a penal statute, plain and definite in its statements.

Much stress was laid upon cases involving the statutes in question, but an examination of them disclosed "that the precise question to be here determined has not been passed upon by the courts." Such a statute enables the legislature to delegate its powers to agents who may investigate and determine what acts of a citizen constitute a crime. "Clearly this is not due process of law, because due process of law involves the requirements that criminal statutes have definite ascertainable standards of guilt."

A decree for an injunction was accordingly allowed.

This case came on appeal to the Supreme Court of the United States, where it was decided January 4, 1926 (46 Sup. Ct. 126). The judgment below was affirmed, Justice Sutherland, speaking for the court, emphasizing the rule as to certainty as an element of criminal law, saying in part:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

In its opinion in United States *v.* Capital Traction Co. (34 Appeals D. C. 592), the Appellate Court of the District of Columbia said:

The dividing line between what is lawful and unlawful can not be left to conjecture. The citizen can not be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute can not rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.

This statute was said to present a double uncertainty, the words "current rate of wages" being without definite or specific meaning, while the qualifying word "locality" might include an area of such wide variation as to afford no real standard of judgment. These defects being fatal, the statute could not be enforced.

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WEEKLY DAY OF REST—CONSTRUCTION OF STATUTE—OBSERVANCE OF SUNDAY AS RELIGIOUS DUTY—*State* v. *Chesney, Criminal Court of Appeals of Oklahoma (February 24, 1925), 233 Pacific Reporter, page 236.*—John S. Chesney was engaged in the grocery business in Oklahoma City, and had been engaged in such business for a considerable length of time. He belonged to the Seventh Day Adventist Church and observed from Friday at sundown to Saturday at sundown as his Sabbath, which was part of the religious belief of the church. On Sunday Chesney kept his store open.

Sections 1825 and 1826, Compiled Statutes of 1921, forbade the following acts from being done on the first day of the week:

Servile labor, except works of necessity or charity.
Trades, manufactures, and mechanical employment.
All shooting, horse racing, or gaming.
All manner of public selling, or offering or exposing for sale publicly, of any commodities, except that meats, bread, and fish may be sold at any time before 9 o'clock in the morning, etc.
It is sufficient defense in proceedings for servile labor * * * to show that the accused uniformly keeps another day of the week as holy time, and does not labor upon that day, etc.

Chesney was arrested and his business closed up by the county attorney for violating the Sunday law. On trial the defendant was found not guilty of the crime of Sabbath breaking and the State appealed.

The criminal court of appeals stated that the quoted sections of the law had been construed by the court in the case of Kreiger *v.* State (12 Okla. Cr. 566, 160 Pac. 36), and accordingly quoted from the syllabus of that case:

Our Sabbath law proceeds upon the theory, entertained by most of those who have investigated the subject, that the physical, intellectual, and moral welfare of mankind requires a periodical day of rest from labor.

Our legislature has wisely and properly, however, refrained from interfering with or coercing the conscience of those who uniformly, conscientiously, and religiously keep another than the first day of the week as holy time, by exempting them from the penalties of the law; provided they work on the first day of the week in such a manner as not to interrupt or disturb other persons in observing the first day of the week as holy time.

The legislature intended to give them a substance and not a shadow; hence we hold the term "servile labor," as used in our Sunday statutes, to be used as synonymous with the term "secular labor."

Courts which hold that to require Sabbatarians to keep our Sunday does not prevent them from also keeping the seventh day overlook the fact that under the divine commandment that these people are striving to obey it is as imperative that they work six days as that they rest on the seventh, and that, if their conscience compels them to rest one day, and the law also forces them to rest another, they will thus be forced to violate the first provision of the commandment they are consciously attempting to keep.

Under the above ruling the court was of the opinion that the judgment of the lower court should be affirmed.

The judgment was therefore affirmed and the appeal dismissed.

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WEEKLY DAY OF REST—CONSTRUCTION OF STATUTE—POWER HOUSE—REPAIR SHOP—*People* v. *New York Central Railroad Co.*, *Supreme Court of New York, Appellate Division* (*November 28, 1924*), *206 New York Supplement, page 743*.—On Sunday, March 19, 1922, an inspector of the State department of labor observed that one Nichols was assisting in setting a valve in a drill in a power house maintained by the New York Central Railroad for the operation of its trains running into and out of the Grand Central Terminal. Mechanics must be present at the plant at all times for the purpose of maintaining the equipment and making emergency repairs, as the plant is operated 24 hours a day. The defendant was convicted by the court of special sessions of violating the provision of the labor law (Acts 1921, ch. 50) that workmen in factories shall have one day of rest in seven, and, when the day is not a Sunday, that a schedule be filed showing the substituted arrangement. On

the appeal the defendant admitted that a schedule was not posted or filed with the commission. It appeared from the testimony that the repair work was done upon a gallery within the power house, on which gallery was a lathe and drill press. Most of the repair work was done here, though the mechanics made repairs in all parts of the power house. An exception in the law relieved the employer of persons working in a power house, generating plant, and other structures owned or operated by a public-service corporation other than construction or repair shops, from compliance therewith, but the State contended that, "this being a repair shop within a power house, the defendant is guilty of a misdemeanor." The court, speaking through Mr. Justice Martin, said:

The case of People *v.* Transit Development Co. (178 App. Div. 288, 165 N. Y. Supp. 114) is relied upon and appears to sustain that contention. We are unable to agree with that opinion, for the reason that it is apparent that the exception in the statute was to permit emergency work to be performed in power houses furnishing electricity for the operation of trains and other similar purposes. The exception includes all power houses generating electricity and operated by public-service corporations. We realize the statute provides that construction and repair shops of a public-service corporation are not exempted, but that provision has reference to separate or independent construction or repair shops, and not to those doing emergency work required for the continuous operation of a power plant and used on Sundays solely for such purpose. In this case it appears that the work that was being done was a necessary incident to the operation of the plant, and it seems to us that such work was intended to be excepted from the operation of the statute.

It did not appear that the defendant attempted to evade the law by having repair work done within the power house. The burden was on the State to prove a crime and the court was of the opinion that it did not prove that a crime had been committed. In conclusion the court said:

If the construction urged for the people were to be sustained those employed in power plants on Sunday to repair the machinery of the plant, even though it had been stopped temporarily by accident, would be guilty of a crime.

The judgment of conviction was reversed.

A case before the Supreme Court of Minnesota likewise turned on questions of classification, but in that State exceptions to the application of a law proposing to regulate continuous employment were held to be fatal to the act. An employee operating an engine room and power plant of a hotel was said by the court to be doing the same kind of work that he might lawfully do under the act in other establishments. "To be valid, it must operate alike upon all who are similarly situated." As the act in question did not meet this requirement, it was declared to be in violation of both State and Federal constitutions, and therefore void. (State *v.* Pocock (1925), 201 N. W. 610.)

WORKMEN'S COMPENSATION—ACCIDENT—BURNS CAUSED BY USE OF CHEMICAL—*Ward* v. *Beatrice Creamery Co., Supreme Court of Oklahoma (November 12, 1924), 230 Pacific Reporter, page 872.*—B. O. Ward, employed as a pasteurizer in the creamery department of the defendant company, was required to use a substance known as soda ash in the treatment of cream in a room where the temperature was sometimes as high as 120° Fahrenheit. While so employed the plaintiff's body "became burned, scalded, and salivated," causing his health to be undermined, disabling and disfiguring him, and disqualifying him for work as a pasteurizer. The use of the soda ash continued from June, 1922, until March, 1923. Ward brought an action for damages in the sum of $36,000. From a judgment sustaining a demurrer the plaintiff appealed. The only question that the supreme court found to be decided was whether the injury came within the jurisdiction of the State industrial commission. The plaintiff stated that the commission refused to take jurisdiction of the case when submitted to it before the filing of the action for damages. The court held that in that case he should have appealed the case to the supreme court, in that way giving the supreme court the power to assume jurisdiction to pass upon the question in the original action. The court also held that the "failure of the State industrial commission to assume jurisdiction would not thereby become effective to confer jurisdiction upon the State court in this case, if it did not have jurisdiction in the first instance."

The plaintiff contended that the injury was not the result of an accident, and that therefore it was not covered by the compensation act. The supreme court said:

> While it is true that nothing happened suddenly to him, yet the condition was brought about by the continuous use of the soda ash in the heated condition of the place in which he had to work, between the months of June, 1922, and March, 1923.

The court quoted from its decision in Winona Oil Co. *v.* Smithson (87 Okla. 226, 209, Pac. 398):

> The term "accidental injury," as used in the act, must not be given a narrow meaning, but, according to the great weight of English and American authorities, the term is to receive a broad and liberal construction with a view of compensating injured employees where the injury results through some accidental means, was unexpected and undesigned, or may be the result of mere mischance or of miscalculation as to the effect of voluntary action.

The supreme court was of the opinion that the injury due to burns caused by the use of the soda ash was compensable as an accidental injury, and that in such a case the State industrial commission has exclusive jurisdiction to grant relief.

The judgment sustaining the demurrer was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT—DEATH FROM INHALING GAS—*Cantor* v. *Elsmere Garage et al., Supreme Court of New York, Appellate Division (November 12, 1925), 212 New York Supplement, page 327.*—H. Cantor, who was employed by the Elsmere Garage, on December 21, 1924, while working in his employer's garage in the regular course of his employment, inhaled carbon monoxide gas generated by the running motors in the automobiles in the garage, from which he died. The industrial board found that the death was naturally and unavoidably the result of the injuries which he received. From an award in favor of the widow and minor children the employer and insurance carrier appealed.

The supreme court on review held that the evidence was sufficient to sustain the finding as fact, the only question involved in the appeal being as to the cause of the death. It appeared that the deceased was working with one John Hary, and that the two men moved a car into position while the engine was running. Cantor then went to the door to admit another car, Hary noticing that Cantor "looked funny." The deceased a few moments later fell down, made a noise two or three times when breathing, and died shortly thereafter. There was a strong smell of gas in the garage and the doors were closed. The ambulance doctor found when he arrived that Cantor's face and lips were blue, which was conceded to be the effect of carbon monoxide poisoning. The supreme court was of the opinion that the accident was the inhaling of the carbon monoxide gas, and that the presence of the gas was unexpected, and that while the breathing was voluntary, "the breathing of a poison gas was not voluntary."

The court found there was present every element of accident and held that the direct resultant injury was poison and death. The award was accordingly affirmed.

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WORKMEN'S COMPENSATION—ACCIDENT—DISEASE—CANCER FOLLOWING TRAUMA—*Austin* v. *Red Wing Sewer Pipe Co., Supreme Court of Minnesota (June 5, 1925), 204 Northwestern Reporter, page 323.*—Henry Austin, employed by the Red Wing Sewer Pipe Co., was engaged in unloading coal from a gondola car when a piece of soft coal weighing 3 or 4 pounds fell back and struck him upon the cheek. The wound bled profusely. It was washed and bandaged, and since has been the subject of bandage and care. The cancerous nature of the injury was not definitely known for about a year and a half, during which Austin worked practically all of the time. When the nature of the injury became known a claim was made for compensation, which the commission allowed. The case was taken to the supreme court on the ground that the evidence did

not justify the award. The medical testimony on the claimant's behalf was to the effect that the cancer resulted directly from the injury. The fact that the cause of cancer is not definitely known and that various theories are advanced was said not to contradict the testimony given, taken together with the other evidence in the case. The court said in part:

It is not for us to decide as a scientific fact that trauma causes cancer or that cancer is a medical mystery. The employee in the course of his employment suffered an injury, upon his cheek, at a place previously free from blemish. Under constant care, it developed a malignant growth which was eventually diagnosed as cancer. The circumstance alone is pretty strong evidence that the injury was the proximate cause of the result, and would be quite convincing to the mind of a layman. There is no apparent break in the chain of causation. If the medical profession conceded that it did not know the cause of cancer, the connecting events between the cause and effect in this case might be sufficient to justify the conclusion that the injury was the legal cause, and that the result should be compensable.

The supreme court reached the conclusion that there was substantial support for the award so that it could not be said "to rest on surmise or suspicion," and it was accordingly confirmed.

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WORKMEN'S COMPENSATION—ACCIDENT — DISEASE — PNEUMONIA—CAUSAL CONNECTION—*Robertson* v. *State Industrial Accident Commission, Supreme Court of Oregon (April 28, 1925), 235 Pacific Reporter, page 684.*—William L. Robertson, employed by Stockton Bros., who were engaged in construction work, suffered an accidental personal injury to his leg, arising out of and in the course of his employment. Within the required time the claimant filed a report of the injury and sought to recover for pneumonia, which he claimed resulted from the accidental injury to his leg. The commission refused to make any award and claimant appealed to the circuit court of the State of Oregon. On trial before a jury testimony was presented on behalf of the claimant, but none for the defendant; the jury found that claimant suffered an accidental injury to his leg; that he was confined in a hospital as a result thereof, and because of the pneumonia growing out of and as the direct proximate result of said injury to his right leg, that he was confined eight weeks, and that he developed pneumonia as the proximate result of and by reason of the original injury. The commission appealed from the judgment of the circuit court reversing its finding.

The law under consideration provided for accidental personal injuries to workmen arising out of industrial occupations, and the

supreme court observed that it was not a scheme of health insurance nor was it devised to insure against occupational or general diseases. The court said:

It may be said in general that disease arising in the course of employment is not within the embrace of the compensatory provisions of the act. However, if the disease arises from an accidental personal injury received in the course of his employment in a hazardous occupation, as defined by the law, such disease does come within the embrace of the compensation act.

As the jury found for the claimant, and there was evidence to support the finding, the supreme court could not reverse the judgment of the court of appeals. The judgment was therefore affirmed.

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WORKMEN'S COMPENSATION—ACCIDENT—DISEASE—TUBERCULOSIS—CAUSAL CONNECTION—*Fraze* v. *McClelland Co., Supreme Court of Iowa (November 17, 1925), 205 Northwestern Reporter, page 737.*—The complainant, employed by the McClelland Co. as a woodworker, was on September 28, 1923, engaged with five or six other employees in moving a heavy oaken door toward an elevator. In such operation, and while the door was near a wall and the plaintiff was between the door and the wall, the door tipped in his direction and squeezed the plaintiff by the weight of it against the wall. The accident was momentary, the door being immediately righted, and the coemployees did not observe it at the time. The complainant continued his assistance in moving the door, but immediately afterward he lay down on a bench, feeling quite sick for the time being, and it was at this time his coemployees learned that he claimed to have been injured. He worked for about three succeeding days, during which he complained of the injury, and on the third day reported to the foreman, who sent him to the company doctor. The doctor found a small red spot on his chest and unsatisfactory internal conditions in the chest. The patient was sent to bed, where he developed a temperature and a serious abscess in one of his lungs, the final development being pulmonary tuberculosis, which rendered the plaintiff a permanent invalid. Compensation was allowed upon his hearing before an arbitrator, by the industrial commission on review, and by the district court on appeal. The insurance carrier and employer appealed on the ground that there was no causal connection shown between the injury and the tuberculosis.

The supreme court, on reviewing the record, noticed that the evidence showed no illness prior to the injury but did show a rapid development of tuberculosis after the injury, together with medical authority showing that tuberculosis may be accelerated by traumatic causes. The supreme court relied a great deal upon the opinion filed by the industrial commissioner, in which he cited decisions of

the courts of last resort of three States wherein it was found that acceleration of pulmonary tuberculosis had resulted from traumatic causes. (Retmier *v.* Cruse, 67 Ind. App. 192, 119 N. E. 32; State ex rel. *v.* District Court, 138 Minn. 334, 164 N. W. 1012; Lundy *v.* George Brown & Co., 93 N. J. L. 107, 106 Atl. 362.)

Finding the evidence sufficient to sustain the finding that the tuberculosis was the cause of the injury, the supreme court affirmed the judgment.

The same court, in a slightly earlier case (Guthrie *v.* Iowa Gas & Electric Co. (June 25, 1925), 204 N. W. 225), found itself unable to uphold an award made by the industrial commissioner in a case of death from tuberculosis. However, the claim was not for the death, but for the loss of a limb, which, it was claimed, had been injured in March, 1917, a tubercular affection developing some two years later to the extent of requiring an amputation in 1922. The leg was struck, and some pain was suffered at the time, but employment continued regularly for some two months, other employment following. The court, summing up the matter as to the testimony of the experts, found that the blow on the knee in 1917—

might have injured the knee so that it might have become a seat for tubercular infection which developed and showed itself in 1919, but that the tubercular condition of the knee might have also resulted without any blow whatever, and the same condition that existed in the patient have been brought about without any injury having occurred.

Coming to the conclusion that the finding of the industrial commissioner was not sustained by "sufficient competent evidence," the court reversed the judgment and remanded the case.

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WORKMEN'S COMPENSATION—ACCIDENT—DISEASE—TYPHOID FEVER—*Brodin's Case, Supreme Judicial Court of Maine (December 11, 1924), 126 Atlantic Reporter, page 829.*—One Brodin was employed by the State highway commission, and was furnished board and lodging at a camp located near the road on which they were working. He drank the water furnished in the camp and became ill with typhoid fever, incapacitating him for work for some time. Compensation was claimed and awarded by the commission. The commission found that he contracted the fever from using the water furnished him while in the camp, and that the fever so contracted was a personal injury by accident arising out of and in the course of his occupation. The State highway commission appealed, contending that there was no accidental injury, and protesting the findings of the commission. The award was sustained.

It had been found as a fact that the claimant contracted typhoid fever from the water furnished, and was consequently disabled. The defendant contended, however, that the finding of law that the fever contracted was a "personal injury by accident" was erroneous, as the fever from which the employee suffered had "no traumatic origin." It claimed that under the statute, "in the absence of an outside, visible, causative accident, or one of traumatic origin,

the disease of typhoid fever is not compensable." The court, in referring to the contentions of the defendant, admitted that the sole question in the case was "whether the claimant sustained a 'personal injury by accident,'" and in considering the point said:

For a definition of the word "accident" we content ourselves with that already adopted by our own court [citing cases]. But neither in these cases, nor in any case, has our court declared as a positive and general rule that a fatal disease, not occupational, nor one preexisting and aggravated by exposure, strain, or other impelling circumstances, is noncompensable, unless preceded by and growing out of a traumatic injury.

Extended consideration was given to English and American cases, in the course of which the court said:

In Vennen *v.* New Dells Lumber Co. (161 Wis. 370, 154 N. W. 640), the defendant supplied drinking water to its employees for their use while on the premises. Vennen drank the water during the hours and on the premises when and where he was employed. Death from typhoid fever ensued. The court in that case said:

"The term 'accidental,' as used in compensation laws, denotes something unusual, unexpected, and undesigned. The nature of it implies that there was an external act or occurrence which caused the personal injury or death of the employee. It contemplates an event not within one's foresight and expectation resulting in a mishap causing injury to the employee. Such an occurrence may be due to purely accidental causes, or it may be due to oversight and negligence. The fact that deceased became afflicted with typhoid fever while in defendant's service would not in the sense of the statute constitute a charge that he sustained an accidental injury; but the allegations go further and state that this typhoid affliction is attributable to the undesigned and unexpected occurrence of the presence of bacteria in the drinking water furnished him by the defendant, as an incident to his employment. The facts and circumstances clearly charge that Vennen's sickness was the result of an unintended and unexpected mishap incident to his employment."

The court concluded that "in the majority of jurisdictions, and we think by weight of authority," it has been held that such disease is compensable, "although not preceded by traumatic causes, provided it is clearly shown that the disease arose out of and in the course of the employment and was unusual, undesigned, unexpected, and sudden."

The appeal was accordingly dismissed and the decree affirmed.

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WORKMEN'S COMPENSATION—ACCIDENT—EXPOSURE TO COLD—DISEASE—CAUSAL CONNECTION—*Lerner* v. *Rump Bros., Court of Appeals of New York (October 20, 1925), 149 Northeastern Reporter, page 334.*—Maurice Lerner, a salesman employed by Rump Bros., on the morning of June 2, 1923, was showing fruit and vegetables to

a customer in the refrigerator of his employer's plant, which he rarely entered. Because of the sudden transition from the atmosphere on the outside of the refrigerating plant to the cold atmosphere of the interior, Lerner received a chill which, as found by the industrial board, "naturally and unavoidably caused a cold to develop," and as a result pulmonary edema, cerebral embolism, and septic endocarditis developed and caused his death on November 22, 1923, the proximate cause of the death being the injury he received in the refrigerator of his employer's plant. An award based on these findings was affirmed by the appellate division, and the employer and insurance carrier appealed.

The question was whether Lerner's death was due to an accidental injury and arose out of the employment. Death was due to disease, and the disease was not an occupational disease. A distinction was pointed out between accidental injury and disease, but it was said by the court that disease may be an accidental injury, the exception arising out of abnormal conditions which must be established to sustain an award.

In order to recover an award when a disease not the natural and unavoidable result of the employment is developed during the employment, it was held that, first the "inception of the disease must be assignable to a determinate or single act, identified in space or time; secondly, it must also be assignable to something catastrophic or extraordinary." A causal connection was sought between the exposure to the cold of the refrigerating plant and the death of Lerner as a result. The temperature of the plant, according to the court, "must have been less than the freezing point of fruits and vegetables, and the outside temperature was probably not excessive." The court of appeals was of the opinion that "the exposure, although occurring at a definite time and place, was not catastrophic or extraordinary." It was further considered that "a resulting cold would present itself as a disease and not as an accident." In holding Lerner's death from disease not compensable as from "accidental injury" the court in conclusion said:

> The definite event here is the change from a hot room to a cold one, as if one should step out of a hot room into the cold in the wintertime without adequate protection. To call the sequent cold an accidental injury would be to distort the fair meaning of the statute and the underlying principle of compensable cases.

The order was therefore reversed, the award of the State industrial board vacated, and the claim dismissed.

**The same court that was reversed in the above case had before it a case of quite similar nature, in which it took the view that an employee engaged regu-**

larly in the work of going into an icebox, and supplied with clothing specially intended to meet the conditions of his employment, did not suffer an accidental injury when he suffered illness from the exposure. "He knew exactly what conditions would there be met. There was no special, unusual, or increased hazard." An award by the industrial board was therefore disallowed. (D'Oliveri *v.* Austin, Nichols & Co. (1925), 207 N. Y. Supp. 699.) It is evident from the decision of the court of appeals in the Lerner case, however, that no such distinction as that implied in the quoted matter was necessary to negative the claim.

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WORKMEN'S COMPENSATION—ACCIDENT—FREEZING OF HAND WHILE CUTTING ICE—*Sherman* v. *Flint Spring Water Ice Co., Supreme Court of Michigan (April 3, 1925), 202 Northwestern Reporter, page 936.*—George Sherman was employed by the defendant ice company, his duty being the pushing of cakes of ice through a channel to the saws by means of a pike pole. While so engaged the ice in a large cake gave way, causing him to lose his balance. In order to save himself he threw his right arm forward, his hand going into the water far enough to wet the mitten he was wearing. He took off the mitten, dried his hand on his clothing, put the mitten on again, and worked about two hours until quitting time. He then discovered his thumb and some of his fingers were frozen. The thermometer that day registered 17° below zero. A claim was made for compensation, and upon an award being granted the employer appealed on the ground that there was no accident within the meaning of the compensation law.

The plaintiff contended that it was the slipping and falling which constituted the accident, and to this the supreme court said:

If we concede that the slipping and falling constituted an accident it does not materially strengthen plaintiff's case, because no injury resulted therefrom. As soon as plaintiff straightened up and stood on his feet he was as physically intact as he was the moment before he fell.

The court held that the injury which plaintiff received was "not the result of slipping and falling," but "was the result of deliberately wearing a wet mitten for two hours when the thermometer was 17° below zero." In conclusion, the court said:

After he fell and wet his mitten, had he dried it or thrown it aside and obtained another he would probably have had no injury, but, be that as it may, wearing a wet mitten on zero day and freezing his hand is not an accident within the meaning of the compensation act. Getting one's hands wet while engaged in handling ice are natural, if not necessary, incidents of the work. We think no compensable accident was shown.

The award was therefore vacated.

WORKMEN'S COMPENSATION — ACCIDENT — INDUSTRIAL DISEASE — MUSCULOSPIRO PARALYSIS—*Chop* v. *Swift & Co., Supreme Court of Kansas (March 7, 1925), 233 Pacific Reporter, page 800.*—Theresa Chop, employed by the defendant packing company, was carrying casings stuffed with frozen meats from one part of the plant to another, the method used being to carry them on her left arm to the number of 15 to 24 links. The meat was quite cold and the temperature of the room was low. She claimed that her arm became so cold that it was numb, and that buckets of warm water were provided into which she would put it after removing the sausage. She testified that after working about 30 days she had pains in her arm. A Doctor Faust treated her, first noticing what is called "wrist drop," and later diagnosing her affliction as "musculospiro paralysis." His theory was that the exposure to cold was the cause. A Doctor Nesselrode testified that he treated her and came to the conclusion that the exposure was a factor in causing what he called neuritis. He also stated that the disease "might be caused by a direct injury or trauma to the nerve, or by chronic infection, or by exposure to extreme cold." The claimant had since worked in two other packing houses, and in an application for insurance in an employees' mutual benefit fund at one of them she represented that "to the best of her knowledge and belief she was in good physical condition and free from defects." The trial jury concluded claimant was not entitled to compensation and an appeal was taken.

The supreme court, on reviewing the record, said:

> The act [workmen's compensation act] does not provide for occupational diseases, but only for injuries by accident sustained in the course of employment and arising out of it. Was there an accident, or was the injury the result of an accident? There was no force or bodily injury of accidental origin. According to the testimony, the injury was the consequence of coldness which resulted in exhaustion and low vitality, culminating in the disease of paralysis. It was not an unexpected and untoward event, but, as the physician said, was something which may follow exposure and render the employee liable to diseases like pneumonia, neuritis, or paralysis, and can not be regarded as an accidental injury as distinguished from a disease.

The case was held to be within the authority of Taylor *v.* Swift & Co. (114 Kan. 431, 219 Pac. 516), wherein the court said:

> But there must be some accident, some mishap, some untoward, unexpected event arising out of and in the course of the employment from which the injury is occasioned. Here there was no accident. The exposure caused by working in and out of a cooler or refrigerated wareroom is undoubtedly hard on the human constitution, it may wear down and gradually weaken a workman's powers of endurance and render him more liable to various diseases, including possibly transverse myelitis as contended for in this case by plaintiff, but such work and such exposure, although regrettable

consequences flow therefrom, do not constitute an industrial accident within the meaning of the compensation act.

Being of the opinion that the injury in the instant case could not be regarded as an accidental one within the meaning of the compensation act, the court affirmed the judgment of the trial court.

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WORKMEN'S COMPENSATION—ACCIDENT—INJURY ARISING OUT OF EMPLOYMENT—INFECTION FROM CONTACT WITH CORPSE—CONSTRUCTION OF STATUTE—*Connelly* v. *Hunt Furniture Co., Court of Appeals of New York (March 31, 1925), 147 Northeastern Reporter, page 366.*—Harry Connelly, employed by an undertaker as an embalmer's helper, while handling a corpse which by reason of the amputation of a leg had become greatly decayed and was full of gangrenous matter, scratched a pimple on his neck with his finger which was infected with the matter from the corpse. General blood poisoning set in, causing his death. A petition for compensation was filed by his dependent mother and an award obtained for death benefits. The appellate division reversed the award and dismissed the claim, holding that the contact was intentional and not accidental, nor was there any traumatism. The industrial board appealed, securing a reversal of the appellate division. Mr. Justice Cardozo, speaking for the court, on reviewing the record, said:

A trifling scratch was turned into a deadly wound by contact with a poisonous substance. We think the infection of the poison was itself an accidental injury within the meaning of the statute. More than this, the contact had its occasion in the performance of the servant's duties. There was thus not merely an accident, but one due to the employment. We attempt no scientifically exact discrimination between accident and disease, or between disease and injury. None perhaps is possible, for the two concepts are not always exclusive, the one of the other, but often overlap. The tests to be applied are those of common speech.

If the death was the outcome of an accident, as the court thought it was—

Only a strained and artificial terminology would refuse to identify the accident with the pernicious contact and its incidents, and confine that description to the scratch or the abrasion, which had an origin unknown. * * * The whole group of events, beginning with the cut and ending with death, was an accident, not in one of its phases, but in all of them. If any of those phases had its origin in causes engendered by the employment, the act supplies a remedy.

In viewing the infection as an "isolated concept" and ignoring the manner of its coming, the court said that upon the authority of science "infection is a disease. It may be this, and yet an accident

too." It was observed that sunstroke, strictly speaking, was a disease, but that the suddenness of its approach and its catastrophic nature "have caused it to be classed as an accident."

Connelly voluntarily scratched the pimple with the polluted finger, and the court admitted that if he had knowingly injected the germ into the cut there would have been a volition inconsistent with an accident, and that a finding might be made that there was a willful intention to bring about the injury, within the provision of section 10 of the compensation act; but, as it appeared, there was no evidence of deceased's appreciation of the danger, and none that the contacts were "designed and deliberate." The right to compensation was held not to be defeated by the voluntary act.

The workmen's compensation law (subd. 7, sec. 2) speaks of "accidental injuries arising out of and in the course of the employment," and of "such disease or infection as may naturally and unavoidably result therefrom." The contention was made that infection is here coupled with disease as something other than an accident or injury, though a possible concomitant. The court observed that infection, like disease, "may be gradual and insidious, or sudden and catastrophic;" and that it may be an aggravation of injuries sustained out of and in the course of the employment, in which event it enters into the award, "though its own immediate cause was unrelated to service." The court further thought that it might be "an aggravation of injuries which in their origin or primary form were apart from the employment, in which event, if sudden and catastrophic and an incident of service, it will supply a new point of departure, a new starting point in the chain of causes, and be reckoned in measuring the award as an injury itself."

The order of the appellate division was reversed and the award of the industrial board affirmed by a divided court.

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WORKMEN'S COMPENSATION—ADMIRALTY—INJURY ON DOCK—*Egan* v. *Morse Dry Dock & Repair Co., Supreme Court of New York, Appellate Division (October 30, 1925), 212 New York Supplement, page 56.*—Michael Egan was engaged in the work of repair and alteration of a vessel lying in the navigable waters of New York Harbor alongside one of the piers which formed part of the defendant's place of business. He was directed to leave the ship on an errand assigned by his foreman, and while returning by means of a ladder he was thrown to the dock, by the fact that the ladder slipped, suffering disabling injuries. He sued under the Federal employers' liability act of 1908 (35 Stats. 65), on the ground that the employer had failed to provide a reasonably safe place in failing to secure the ladder. The trial court dismissed the complaint on preliminary

pleadings, and the plaintiff appealed. Judge McAvoy delivered an opinion for the appellate court affirming this judgment on the ground that the compensation law of the State applied, so that no action for damages would lie. The place of the injury is the test, and unless there was a maritime tort, the right of recovery would not exist except as provided by the law stated.

A vessel in a dry dock afloat upon any navigable waters is considered as located within maritime jurisdiction, as well as one moored to a wharf or lodged beside a pier. There is no doubt that at the time of the injury the vessel was in navigable waters, but it is equally undoubted that at the time of the injury the plaintiff was wholly upon the land, and had not yet boarded the vessel, and his injury was caused by falling upon the land, for the dock or pier was merely an extension of the land to which it was attached.

Various cases were cited and distinguished, concluding with the following statement:

In the light of Gonsalves *v.* Morse Dry Dock & Repair Co. (266 U. S. 171, 45 Sup. Ct. 39 [see Bul. No. 391, p. 48]), decided November 17, 1924, in the United States Supreme Court, where it was held that admiralty will not have jurisdiction if the injuries sustained by the employee were not the result of a tort committed and effected on navigable waters, the rule seems firmly established that a maritime tort can not be predicated upon an injury arising upon the land and totally consummated upon land, or the extension of the land, to wit, a dock or pier, even though the injury occurs while attempting to board a vessel by means of appurtenances which are not a part of the vessel, and which boarding is not completed at the time of the injury, and which injury is affected by contact with the land.

As stated, the judgment below was affirmed.

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WORKMEN'S COMPENSATION—ADMIRALTY—JURISDICTION—AWARD—*Brassel* v. *Electric Welding Co. of America, New York Court of Appeals (November 25, 1924), 145 Northeastern Reporter, page 745.*—Michael Brassel, employed by the Electric Welding Co. of America, sustained injuries when he fell down a hatchway while working on a vessel undergoing repairs in a dry dock in Brooklyn. He made application under the workmen's compensation act for compensation. The injuries were not permanent and the term of disability was short; the industrial board awarded him $15 a week for 16 weeks. The defendant paid this award in full. Brassel later brought a suit for damages. The trial judge held that the industrial board was without jurisdiction to grant an award as the injuries were suffered on navigable waters, and that the award was void. He also held that the fact that it had been paid did not affect the right of action for damages, except to require the jury to deduct it

from the damages sustained. A verdict was returned for $1,600 and the defendant appealed. The court of appeals decided that:

The plaintiff made claim under the statute and must be charged with knowledge of its provisions. The statute provides (workmen's compensation act, Con. Laws, ch. 67, sec. 11) that the liability of an employer thereunder shall be "exclusive and in place of any other liability whatsoever" on account of the injury sustained by the employee. In the light of this provision the employer, when it tendered payment of the award, affixed by implication the condition that the tender was made upon the statutory terms. The employee, by accepting payment, signified his assent to the condition and his willingness to receive the money upon the terms thereby imposed. The transaction thus resulted in an accord and satisfaction.

We are not required to decide whether the employee might have relief upon a showing of mistake. If that might ever be, at least the duty would be his before the beginning of the action to tender back what he had received. He may not litigate his claim for damages while clinging to the fruits of the contract which he affects to disaffirm.

The judgment was therefore reversed.

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WORKMEN'S COMPENSATION—ADMIRALTY — JURISDICTION — ELECTION—*Lee* v. *Licking Valley Coal Digger Co., Court of Appeals of Kentucky (June 19, 1925), 273 Southwestern Reporter, page 542.*— Willis Lee, employed by the Licking Valley Coal Digger Co., was working on coal barges which were being unloaded by a coal digger, a kind of steel shovel. While in the course of his employment, in attempting to pass from one barge to another, he accidentally fell into the river and thus came to his death. The digger was located on a boat or barge which operated only on water. Marie Lee, the only dependent of the deceased, filed a claim for compensation and was awarded $4,000, the maximum allowed by law in such cases for death. The employer appealed to the circuit court of Kenton County, where it was held that the employment in which Lee was engaged at the time of his death was maritime and not cognizable by the compensation board, and that any cause of action was cognizable exclusively in admiralty, in accordance with section 2, article 3, of the Federal Constitution and laws enacted pursuant thereto. The plaintiff appealed.

The question presented was whether or not the compensation board had jurisdiction of the case. It appeared from the evidence that both the employer and employee elected to come under the compensation act, and the question was presented whether or not such a contract was valid, conferring upon the compensation board and on the State courts jurisdiction of a matter which up to that time they had no jurisdiction to hear and determine, and "thus divest ad-

miralty of the exclusive jurisdiction which it had up to that moment enjoyed in matters of that character." The court thought not, and quoted from 7 R. C. L., p. 1039, in which it is said:

It is a universal rule of law that parties can not by consent give, as such, jurisdiction in a matter which is excluded by the laws of the land. In such a case the question is, not whether a competent court has obtained jurisdiction of a party triable before it, but whether the court itself is competent under any circumstances to adjudicate a claim against the defendant.

Mr. Justice Sampson, speaking for the court of appeals on this question, said:

Jurisdiction in matters exclusively maritime was not in the power and grace of the Commonwealth to give or confer at the time of the enactment of the workmen's compensation law. Such causes appertained to admiralty alone. The parties could not therefore by agreement confer jurisdiction upon the board of compensation by accepting the terms, in writing, of the compensation law.

It is now believed settled that a State compensation act, even though elective, is inapplicable if the person injured was employed under a maritime contract, and was injured on water within admiralty jurisdiction [citing cases].

The judgment of the trial court was therefore affirmed.

But see the Brassel case, above.

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WORKMEN'S COMPENSATION — ADMIRALTY — JURISDICTION — ELECTION—*State ex. rel. Cleveland Engineering Construction Co.* v. *Duffy et al., Supreme Court of Ohio (June 16, 1925), 148 Northeastern Reporter, page 572.*—This was an original action in mandamus in which the Cleveland Engineering Construction Co. asked that the defendant Industrial Commission of Ohio be directed to accept premiums from it, payable into the State insurance fund under the workmen's compensation act, for the benefit of its employees who were at times employed "on floating vessels in navigable waters." The petitioner stated that it had come under the compensation act by agreement with its employees, that it had complied with the act and rules of the industrial commission, and had paid premiums, but that on the 16th day of September, 1924, the commission refused to accept further premiums. The petitioner sought to compel the commission to receive the premiums, to which proceeding the latter filed a general demurrer.

The question raised by demurrer was, "What is the extent of the application of the State compensation act to injuries received by one working upon a boat afloat in navigable waters?" The employees of the petitioner were divided into eight classes: (1) Men on floating dredges, (2) pile-driver men, (3) men on barges and scows, (4)

men on floating derricks, (5) men engaged in preparatory work, (6) repair men, (7) tug men, and (8) stevedores.

Other questions raised were whether the rights and liabilities would have a direct relation to navigation under these contracts of employment, and whether the application of the compensation act would materially affect the uniformity of maritime law.

The supreme court, after careful examination of the range of plaintiff's business, held that—

It would seem to disclose nothing that had a direct bearing upon the maritime service, navigation, or maritime commerce, either interstate or foreign. In a remote degree some of the work performed by the plaintiff may be the service in navigation and in commerce by vessels engaged in such service following a channel dredged by the plaintiff or tying up to a wharf which may have been built by plaintiff, or taking refuge behind a breakwater, or piles driven by plaintiff's employees, but it is difficult to see how the laying of gas or water pipes under the bed of a river or building a crib for water supply for a city affects maritime law or navigation.

After an examination of many authorities the supreme court believed the rule to be that "unless some interference with maritime law and navigation or maritime trade is shown, recovery under State compensation laws will be allowed where the parties have contracted with reference thereto and desire to regulate their rights thereby." The demurrer was therefore overruled.

The case subsequently came up for hearing (decided Dec. 1, 1925; 149 N. E. 870) on an answer made by the commission. The commission expressed itself "as willing to receive premiums based on the wages or pay roll of any of the men engaged in the employments mentioned in the plaintiff's petition, save and except when such men are engaged in employments which are maritime, over which a court of admiralty would have jurisdiction in case any of the men were injured while so employed."

Both parties asked for judgment on the pleadings filed, the commission as above, while the company averred the desire of its employees and itself to accept the provisions of the compensation law "in lieu of and in preference to their rights under the maritime law in all cases of injury or loss of life while engaged in said employments." The position of the court is set forth in the following language, quoted from its opinion as set forth by Judge Day:

Upon the record in this case we can not say but that at some time some of the employees in the classes set forth in the petition may be engaged in work purely maritime in character and nature, and then the rights and liabilities of the parties would be controlled by the general rules of maritime law.

In the event such contingency arises, we are of opinion that the employer and employee can not by contract between themselves deny

a court of admiralty jurisdiction and confer the same exclusively upon the industrial commission.

The commission should, however, receive premiums based upon the full pay roll presented at the beginning of the period of coverage, subject to deduction of the amount of wages paid to employees while engaged in purely maritime work.

Taking the position that the industrial commission was "ready and willing" to accept premiums subject to deductions as indicated, the majority held that no "clear right" appeared entitling the petitioner to the writ of mandamus asked for, and it was accordingly denied.

The chief justice and one other judge dissented as to this procedure, holding that the mandamus should have been issued, so that the industrial commission would be required to accept the premiums, making subsequent returns of parts to which it was not entitled on a showing of the maritime employment of the workers when such is the case. Prior determination as to this point would be impossible, and if, as heretofore, the commission should refuse all premiums unless the prior determination was made, another action would be necessary. The court was unanimous in holding that the employees while engaged in maritime employments would not be "entitled to participate in the State insurance fund," while those in nonmaritime employments would be so entitled. The question suggests itself whether, under a different form of insurance, an election by both parties to settle their injury cases under the terms of a compensation law could be interfered with in behalf of any asserted admiralty jurisdiction by one not a party to the proceedings.

See Brassel *v.* Electric Welding Co., above, p. 155.

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WORKMEN'S COMPENSATION — ADMIRALTY — RELEASE — NEGLIGENCE—*The Ross Coddington, United States Circuit Court of Appeals, Second Circuit (February 16, 1925), 6 Federal Reporter (2d), page 191.*—John Cunningham, aged 73, was employed as a night watchman by the Great Lakes Co., a concern engaged in salvage operations. In December, 1921, a steamer was aground in the harbor of Buffalo and a lighter and other property belonging to Great Lakes Co. lay alongside. Cunningham was to act as a night watchman over and on said property. *The Ross Coddington* was a steam tug employed by another concern also engaged in the salvage operation to transport stores, supplies, and workmen. December 30 Cunningham boarded the tug at Buffalo in order to reach the stranded steamer, and as the tug reached the lighter she ran alongside slowly. Another employee of the Great Lakes Co. came to the rail of the lighter, extended his hand to Cunningham and

offered his assistance before a line had been attached from the tug to the lighter. As Cunningham attempted to step upon the lighter the tug moved away and Cunningham fell into the water, suffering severe injuries. Cunningham brought a libel against the tug for damages for his injuries, and from a decree in his favor the party defending the action against the tug appealed.

It appeared from the evidence that shortly after filing the libel the Great Lakes Co. paid Cunningham a sum of money thought to be due under the workmen's compensation law of the State, in consideration of which he executed a general release, discharging his employer of all claims by him against it for injuries sustained.

The party defending (technically known as the "claimant of the tug") contended that the release under the workmen's compensation act was a valid defense in the suit against a third party for the injuries received, but both the lower court and the circuit court of appeals were of the opinion that the release was no bar to the bringing of a libel against one whose tort caused the injury.

The defense was also considered as being unavailable on a broader ground, that is, "the Great Lakes Co. and the tug were not joint tort-feasors."

The libel alleged negligence on the part of the tug on inviting Cunningham to leave the same without having a fastening to keep the two boats moored together, but the court was of the opinion that "there is no evidence whatever that anyone invited Cunningham to leave the tug when he did or as he did except his fellow employee on board the lighter." No action in rem of this nature "will lie against a vessel unless and until some fault in the construction, management, or operation of the craft is shown by a reasonable preponderance of evidence." Finding no negligence on the part of the vessel, the decree was accordingly reversed and the case remanded with directions to dismiss the libel.

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WORKMEN'S COMPENSATION — ALIEN BENEFICIARIES — *Esoni* v. *Tisdale Lumber Co., Supreme Court of New York, Appellate Division (May 6, 1925), 210 New York Supplement, page 244.*— Galzino Esoni, employed by the Tisdale Lumber Co., sustained on October 19, 1921, an accident arising out of the employment which caused his death. An award of compensation was made Madelina Esoni, his widow, and on February 24, 1922, an application for the commutation of the award was made. The widow set forth in her papers that she was an alien and was about to leave for Italy. On April 11, 1922, the industrial board directed that one-half of the future installments payable, as commuted, be paid to the widow (sec. 17 of the workmen's compensation law, Laws 1922, ch. 615).

On December 18, 1924, the board made an additional award to the claimant in this case, Domenico Esoni, father of the deceased employee, and a nonresident alien. Section 17 provides that:

Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or, if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the accident, and except that the commission may, at its option, or upon the application of the insurance carrier, shall commute all future installments of compensation to be paid to such aliens, by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the commission.

It will be observed from the above paragraph that an award may be made to a father or mother who are nonresident aliens only in case "there is no surviving wife or child or children." The supreme court held that these words, unqualified by other words in the section, "would bar an award to this father, since there was in fact a 'surviving wife.'"

The claimant suggested that the words "not residents" in the first clause of the section be used as qualifying words, but, as the supreme court pointed out, these words are "immediately followed by the alternative words 'or about to become nonresidents.'" The utmost that the court considered it could do was to construe "as if it provided for an award to father or mother, nonresident aliens, when, and only when, there are 'no surviving wife or child or children' who are 'aliens not resident (or about to become nonresidents).'"

Even this construction was held to bar the claimant, since at the time the award was made to him there was an alien widow who was about to become nonresident. The court in conclusion held that the legislature could not have intended "to provide solely for that rare case where a wife, the moment her husband is hurt or dies, immediately forms a definite intention to flee to a foreign land. We think it intended to bar the payment of moneys to an alien father or mother in a foreign land whenever a wife or child resided therein or intended to depart therefor."

The award was therefore reversed and the claim dismissed.

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WORKMEN'S COMPENSATION—ATTORNEYS' FEES—CONSTITUTIONALITY OF STATUTE LIMITING FEE—*Yeiser* v. *Dysart* (*April 13, 1925*), *45 Supreme Court Reporter, page 399.*—Compiled Statutes of Nebraska, 1922, section 3031, limiting attorneys' fees for services in

demands or suits under the workmen's compensation act to the amount fixed by the court, was offered as a basis of action in a suit to suspend John O. Yeiser from the right to practice as an attorney, unless he should refund to a client a fee received by him of $620 and interest.

It was the contention of the defendant that the statute was in contravention of the fourteenth amendment of the Federal Constitution, by depriving the defendant of his liberty and property without due process of law.

The specific question before the Supreme Court was whether it could pronounce the law unreasonable, against the opinion of the legislature and the supreme court of the State. The Supreme Court of Nebraska affirmed a decree that the defendant should refund the $620 with interest, and a writ of error was secured. Mr. Justice Holmes, speaking for the court and the constitutionality of the act, said:

> The court adverts to the fact that a large proportion of those who come under the statute have to look to it in case of injury and need to be protected against improvident contracts, in the interest not only of themselves and their families but of the public. When we add the considerations that an attorney practices under a license from the State and that the subject matter is a right created by statute, it is obvious that the State may attach such conditions to the license in respect of such matters as it believes to be necessary in order to make it a public good.

The judgment was therefore affirmed.

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WORKMEN'S COMPENSATION—AWARD—APPORTIONMENT AMONG THREE EMPLOYERS—POWERS OF COMMISSION—OCCUPATIONAL DISEASE—*Schaefer & Co.* v. *Eicher, Supreme Court of Wisconsin (December 9, 1924), 701 Northwestern Reporter, page 396.*—Frank Eicher was employed as a tool sharpener concurrently by three employers, all granite cutters. His work required him to work constantly in air carrying granite dust, and as a result he contracted tuberculosis of the lungs. The industrial commission awarded compensation and assessed the amount against the three employers, each a separate amount on the basis of the number of hours worked for each during the period of incubation of the disease. The plaintiff brought an action to set aside the award, contending that the commission "is without authority to find total compensation, and then divide the liability between several employers."

Judgment being given for the defendants, the plaintiffs (the employers assessed) appealed from the circuit court ruling on the

ground of lack of authority in the commission under the law so to divide and apportion the award. The court observed that no precedent was found in American or English cases, but upheld the ruling of the court below, saying:

The commission is empowered to find the facts. It found the facts as stated. Having found the facts, the award logically and equitably follows as a result of such facts. The appellants were entitled to a judicial review of the commission's proceedings. (Sec. 102.23, Stats. 1923.) But the court "upon the trial of any such action * * * shall disregard any irregularity or error of the commission unless it be made to affirmatively appear that the plaintiff was damaged thereby." (Subd. (2) sec. 102.23.)

The next contention of the plaintiff was that the provisions of the act giving the commission authority to make the award were unconstitutional, even though it be considered within the legislative intention, as an "attempted delegation of judicial authority upon an admininstrative body." The supreme court quoted with approval from Borgnis *v.* Falk Co. (147 Wis. 327, 358, 133 N. W. 209), wherein it was said that the industrial commission—

is an administrative body or arm of the government which, in the course of its administration of a law, is empowered to ascertain some questions of fact and apply the existing law thereto, and in so doing acts quasi judicially, but it is not thereby vested with judicial power in the constitutional sense.

The supreme court then added: "We hold the act in question within the constitutional province of the legislature."

The last objection was that the award did not include all the employers liable, in view of the fact that during a part of the disabled employee's employment he had worked part time for another employer. The court said:

But he was not working for such employer at the time he came down with the disease rendering him unfit for work. This was the date at which liability became fixed. The statute says "when at the time of the accident" the employee was performing services, etc., and the statute including occupational diseases imports the same construction.

The judgment of the circuit court was therefore affirmed.

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WORKMEN'S COMPENSATION—AWARD—BASIS—ABILITY TO EARN—*Leitz* v. *Labadie Ice Co., Supreme Court of Michigan (December 31, 1924), 201 Northwestern Reporter, page 485.*—Carl Leitz, employed by the named defendant as a common laborer, was working on an ice slide on February 2, 1917, when it broke and let him fall some 15 feet, severely injuring his left hip so that he was permanently crip-

pled and was unable to work for two years. He finally secured employment running a punch press in a factory, at which he could work while sitting down. At the time of the accident he was awarded $6.78 a week for total disability, which award was paid from the date of the accident until December, 1919, the time when he secured work. Application was then made for a release on the ground that he was earning more wages than he was receiving at the time of the accident, and the contention of the company was sustained (211 Mich. 565, 179 N. W. 291, same title). The case was remanded, and the plaintiff filed a petition for further compensation on the ground of total disability, claiming that "by reason of his accident he could no longer continue to do the work in which he was engaged at the time the former hearing was had, nor in a condition to do any other kind of common labor." After a hearing the compensation board ordered:

That subsequent to February 1, 1921, applicant should be paid compensation at the rate of $6.78 per week during the period of his total disability and at the rate of 50 per cent of the difference between the average weekly wages he was earning at the time of the accident and the average weekly wages he is able to earn thereafter in the employment in which he was engaged when injured, during any partial disability he may suffer in the future.

Compensation was therefore paid until December 18, 1923, and $6.78 more was tendered as final payment for partial disability for 300 weeks. Defendants then applied for an order to permit them to discontinue payments, and after a hearing the commision of the department of labor and industry made an order continuing the compensation of $6.78 a week from December 11, 1923, the time the payments were stopped by the defendants, for 500 weeks from the date of the accident, "the maximum time allowed by the act for total disability."

The court was of the opinion that under the act an injured employee's right to compensation "is to be tested by his ability to work and earn wages in the same class of employment as that in which he was engaged when injured." The question "whether plaintiff was totally incapacitated as a result of his accidental injury from earning wages in the class of employment in which he was engaged when injured" was considered by the court as being the controlling question in the case, "which was one of fact for the commission to decide, if there was competent testimony before it that he was not."

It was shown that when defendants made their last application the plaintiff had been for some time employed in a bank as a bookkeeper and accountant, earning $25 a week, having qualified for this class of work by study. It was also urged that the plaintiff could

work at common labor if he were to try, but that he preferred clerical work to that of manual labor. The court said:

There, however, was sufficient conflict of testimony as to plaintiff's disability to perform any kind of common labor to raise a question of fact, and, as often noted, the compensation act makes the findings of fact by the commission conclusive, when there is any competent testimony to support its findings.

The award was therefore affirmed.

A quite similar case was before the Supreme Court of Kansas, in which there was permanent partial disability, and an award for 415 weeks on account thereof. During this period the workman secured employment at a higher rate of pay than before the injury, but the court cited one of its own decisions construing the terms of the compensation act as to schedule benefits, holding that their receipt does not depend on earning capacity, but on the provision of the law as fixed by the legislature. Moreover, "the amount a workman is actually receiving as wages is not necessarily an accurate test of his absolute or comparative earning capacity." The continuance of the benefits was therefore upheld. (McKarnin *v.* Armour & Co. (1925), 236 Pac. 837.)

A like position was taken by the Supreme Court of Illinois in a case of compensated temporary total disability, followed by an award for permanent partial disability, with resumption of work. The injured man had been a coal loader at $8.99 per day. He got work after the injury as a trapper at $4, and later as a checkweighman for his union at $9.50. The court held that profitable employment at lighter work was not evidence of "decrease of the physical disability previously shown," and refused to sustain a motion for review. (Scranton & Big Muddy Coal & Mining Co. *v.* Industrial Commission (1925), 146 N. E. 442.)

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WORKMEN'S COMPENSATION—AWARD—BASIS—BONUS—*Moss* v. *Aluminum Co. of America, Supreme Court of Tennessee (October 19, 1925), 276 Southwestern Reporter, page 1052.*—B. J. Moss, employed by the Aluminum Co. of America, was killed in the course of his employment. A proceeding was brought by his widow for compensation for his death for the benefit of herself and children. The trial court entered a decree for $8.75 for 400 weeks, whereupon the claimant assigned error. The only question was as to the amount the widow was entitled to recover.

It appeared from the evidence that deceased's average weekly pay was $22.75, which included a metal bonus and an attendance bonus. The defendant insisted that the petitioner was not entitled to include the bonus items, but was entitled to recover only one-half the weekly wage of $17.50, or $8.75, for 400 weeks.

The supreme court, on reviewing the record, observed that the attendance bonus represented 25 cents per day paid to men who worked six days or more per week. It was a regular bonus and had been in effect from July, 1923, until the time of this action in 1924.

The deceased was employed in refining aluminum ore, and received in addition to the attendance bonus a metal bonus, which depended upon the collective effort of 12 or 18 men working on a certain section during any one particular week. The court further noticed that the men were paid in two envelopes, one containing wages and the other containing the two bonuses. It was the contention of the plaintiff that the bonuses should be considered as part of the wage in arriving at the basis for the award of compensation. The supreme court, speaking through Mr. Justice McKinney, said:

We are of the opinion that the facts and circumstances, shown by the record, are such as to justify us in presuming that the company contracted to pay deceased these bonuses as a part of his compensation. We base this finding upon the fact that the agreement of the parties was within the knowledge of the company, and it failed to disclose same; that the company paid these bonuses to deceased, and to its other 300 employees in the pot department, each week; that the sums so paid were fixed and uniform; that the employees knew they were to receive these bonuses each week; that the company had followed this uniform system of paying bonuses for several years; that a notice as to the payment of these bonuses was posted by the company in the pot room where deceased worked. In such circumstances, had deceased sued for such bonuses as he had earned, according to such schedule, the company would not be heard to say that it had no contract with him.

These weekly bonuses were not gifts, but were compensation for services.

Giving the act a liberal construction in favor of the employee, as it is our duty to do, and keeping in mind the spirit of the act, which is to pay to the dependents of a deceased employee, for a specified time, one-half of the average weekly sum which he had been receiving as a result of his employment, regardless of the source from which same came, we feel constrained to hold that the term "earnings" includes that character of bonuses paid by the defendant to its employees.

For the reasons stated the decree was modified to the extent of increasing the compensation to $11.375 a week for 400 weeks.

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WORKMEN'S COMPENSATION—AWARD—BASIS—METHOD OF COMPUTATION OF EARNINGS—*Testo* v. *Burden Iron Co. et al., Supreme Court of New York, Appellate Division (January 7, 1925), 207 New York Supplement, page 454.*—Charles Testo was employed as a puddler by the Burden Iron Co. He received an award of compensation in the sum of $17.18 a week for injuries received, and the employer and insurance carrier appealed, the only question on the appeal being as to the amount of the weekly compensation. Testo had not worked as a puddler substantially the whole of the year immediately preceding, as the mills were periodically closed, and there was no evidence submitted to show the "average daily wage which an

employee of the same class, working substantially the whole of the year immediately preceding in the same or similar employment, earned." It was agreed, and the evidence showed, that Testo had during the 117 weeks immediately preceding the accident earned $2,816.71 in his employment.

During this period he actually worked 77 weeks; 117 weeks are 2.25 years. He therefore worked an average of 34.22 weeks per year. Since he earned $2,816.71 in 77 weeks, he earned while actually working $36.58 per week. His average annual earnings, then, were $1,251.85; that is, 34.22 times $36.58. This sum, under the evidence in this case, reasonably represents the annual earning capacity of the claimant "in the employment in which he was working at the time of the accident."

One fifty-second part of that sum (compensation law, sec. 14, subd. 4) made the average weekly wage of $24.07, two-thirds of which was $16.05, the weekly compensation to which Testo was entitled.

The award was therefore modified by changing the award to $16.05, and as so modified it was affirmed.

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WORKMEN'S COMPENSATION—AWARD—BASIS—REFUSAL TO WORK—*Gillespie v. McClintic-Marshall Co., Supreme Court, Appellate Division (November 12, 1925), 212 New York Supplement, page 88.*—This is a proceeding under the workmen's compensation law by Murray Gillespie against the McClintic-Marshall Co. From an award of the State industrial board the employer appealed.

The supreme court in a per curiam decision reversed the award and remitted the matter to the State industrial board on the ground "that the average weekly wage of the claimant at the time of the accident was not correctly determined, and upon the further ground that the claimant, having since the accident refused work with the appellant at a higher wage than he has been receiving, for the reason that the appellant does not employ union labor, can not have his present earning capacity valued upon a lower basis."

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WORKMEN'S COMPENSATION—AWARD—BASIS—REVIEW—*Consolidated Coal Co. of St. Louis v. Industrial Commission, Supreme Court of Illinois (December 16, 1924), 145 Northeastern Reporter, page 675.*—Tony Schragal, employed by the Consolidated Coal Co., was injured by reason of an accident arising out of and in the course of his employment as a coal loader. He was granted an award of $14 a week for 12⅔ weeks for temporary total incapacity for work and $10.03 a week for 200 weeks and $9.27 for 197 weeks for partial incapacity. The company later filed a petition claiming

that the injury had diminished. The industrial commission denied the prayer of the petition, and the circuit court affirmed the commission. The record was taken to the supreme court on a writ of error. After reviewing the case the supreme court said:

Compensation is not based on physical or mental disability, except as it affects earning capacity, nor on opportunity to work, but is based on previous earnings and earning capacity and is measured by loss of such earning capacity due to the accident. While the evidence shows that defendant in error's opportunity to work has increased since the award, it was incumbent upon the plaintiff in error to prove that his earning capacity had increased since that time, and this the evidence has failed to do. The evidence on the hearing having failed to show that the compensation awarded defendant in error was more than 50 per centum of the difference between the average amount which he earned before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident, the industrial commission and the circuit court properly refused to reduce the amount of the award.

The judgment of the circuit court was therefore affirmed.

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WORKMEN'S COMPENSATION—AWARD—BASIS—WAGES—INCLUSION OF TIPS—*Anderson* v. *Horling et al., Supreme Court of New York, Appellate Division (July 1, 1925), 211 New York Supplement, page 487.*—The State industrial board granted an award of compensation to John Anderson, and the employer appealed on the ground that the board had erroneously included in the weekly wage the amount received by Anderson as tips. On appeal, the supreme court, being of the opinion that it did not appear that the tips had been taken into consideration by the parties in making the contract of employment, reversed the award and remitted the claim to the industrial board.

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WORKMEN'S COMPENSATION—AWARD—BASIS—WAGES OF MINOR—ANTICIPATED INCREASE—*Szmuda* v. *Percy Kent Bag Co. et al, Supreme Court of New York, Appellate Division (November 12, 1925), 212 New York Supplement, page 139.*—Edward Szmuda, aged 18 years, was a press tender employed by the Percy Kent Bag Co. While engaged in his regular work his left hand was caught in the gears of the press and his third and fourth fingers were lost. He received a schedule award for the loss of use of 20 per cent of the left hand. There was a finding by the industrial board that the claimant's wages would be expected to increase under normal conditions, and the average weekly wage was determined at $25, though he was earning only $18.70 a week at the time of the injury.

The employer appealed on the grounds that neither the evidence nor the findings justified an award based on higher wages than the employee was actually earning.

The supreme court, on review, held that the question whether the wages would be expected to increase was one for the industrial board to decide, and that its determination would not be controlled by the minor's expressed intent to continue or not to continue in the same employment indefinitely. The employee's expectation of receiving higher wages should not "be limited to the period covered by the appropriate schedule award for his permanent partial disability," the court adding that the injury was permanent and that he must, during his manhood, "work and live under this handicap." Although the statute arbitrarily fixed the number of weeks that compensation would be paid for the specific injury, the supreme court was of the opinion that "it did not mean to limit the measure of this loss to his wages during the few remaining years of his minority; his loss of earning ability will continue during manhood."

Being satisfied that the award based on specific increase to $25 a week was authorized under the evidence, it was accordingly affirmed.

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WORKMEN'S COMPENSATION—AWARD—DEATH OF EMPLOYEE RECEIVING COMPENSATION—VESTED RIGHTS—*City of Milwaukee* v. *Roth et al., Supreme Court of Wisconsin (December 9, 1924), 201 Northwestern Reporter, page 251.*—On January 8, 1923, John Roth, sr., about 60 years of age, sustained an injury to his right shoulder while in the employ of the city of Milwaukee. The employer paid medical expenses and compensation to Roth up to the time of his death. On March 28 Roth had a stroke of apoplexy and died therefrom on April 8. His widow applied for compensation, and on September 19 the commission found that the injuries sustained January 8 "caused a permanent partial disability equal to 30 per cent of a loss of an arm at the shoulder and a total disability which would have extended for a period of 8 weeks and 4 days beyond the date of the said death provided he had lived; that the death was not the proximate result of the said accident, and provided for the payment to the widow of a further sum made up of compensation for such permanent disability, with reduction on account of his age and of the balance on account of the total temporary disability." The city brought an action to review the award. The circuit court affirmed the order of the commission and the plaintiff appealed.

The court pointed out that compensation for death of an employee was distinct and separate from compensation for an injury, and that under the statute where the employee suffered temporary total dis-

ability and permanent partial disability there arose in his favor right to compensation for both, and death not resulting from the injury during disability did not extinguish his right to compensation.

The award does not fix the right to, only determines the amount of, the compensation for the injury. The right to the compensation is fixed by the statute, the amount is merely the administrative detail. If the provision here in question had not been in the statute the fund here awarded might have properly become a part of his estate to be so administered, but as to funds of this nature the legislature may well provide, as we deem it they here have, that such funds shall go directly to dependents without the necessity of other procedure.

It was urged that the award was the taking of public money for a private use, and therefore violative of constitutional provisions, on the ground that the death did not result from any injury sustained under the employment. The court, however, said that under the view they took of the statute "there is no such independent gift to the dependents. It is no more than a necessary disposition of a balance due to the injured employee himself at the time of his death."

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WORKMEN'S COMPENSATION — AWARD — FAILURE TO PAY — PENALTY—CONSTITUTIONALITY OF STATUTE—NONCOMPLYING EMPLOYER—*State ex rel. Dushek* v. *Watland et al., Supreme Court of North Dakota (November 15, 1924), 201 Northwestern Reporter, page 680.*—A. J. Dushek was employed by the manager of the defendants' elevator, the defendants being engaged in the elevator and grain business at Knox, N. Dak. He had been employed on previous occasions to assist in and about such elevator. Dushek first loaded a car of grain, and after this work was completed a customer brought a load of grain to be ground into feed, and Dushek sustained an injury to his hand while this grain was being ground. There was a difference of opinion as to the employment, the employer contending that Dushek was employed "for the specific purpose of loading a certain car of grain," and that he had "nothing whatever to do with the operation of the feed mill," while the employee testified that his employment was not limited but was for the purpose "of assisting generally in and about the business there being carried on," and that the manager of the elevator "specifically directed him to operate the feed mill and grind the load of grain." The jury found for the plaintiff on this question of employment, and also on the question of whether the injury was received in the course of the employment. The defendants had wholly failed to comply with the workmen's compensation act, so that the injured man could either sue or claim compensation. The latter course was followed, and a hearing was ordered.

Compensation in the sum of $2,543 was granted and notice served upon the defendants. They failed to make payment within 30 days, and the relator claimed that under the terms of the act he was entitled to recover the amount plus 50 per cent extra as an added penalty imposed by the statute, and interest from the date of the award.

The trial court entered judgment in favor of the plaintiff for the full amount demanded, that is, the sum of the award plus the penalty of 50 per cent and interest on the sums. The defendants appealed from the judgment and from the denial of a motion for judgment notwithstanding the verdict, securing a modification.

It was contended on appeal that the trial court erred in awarding the 50 per cent penalty, on the ground that that part of the compensation act is "violative of the constitutional guaranties of due process and equal protection of the laws." As to this Mr. Justice Christianson, speaking for the court, said:

The Federal Supreme Court has ruled that the legislature may provide penalties for the violation of regulatory measures, and thus promote enforcement thereof. It has also ruled that the constitutional guaranties of due process and equal protection of the laws are not violated by a statute which imposes a penalty, not exceeding 25 per cent of the amount of the policy, upon an insurance company which in bad faith refuses to pay a claim for loss under the policy (Supreme Ruling of the F. M. C. *v.* Snyder, 227 U. S. 497, 33 Sup. Ct. 292). On the other hand, the Federal Supreme Court has said in no uncertain terms that the requirements of due process and of equal protection of the laws are not met where the right of judicial review is granted only on conditions so harsh and oppressive as to be tantamount to a denial of the right so purported to be granted.

The act made no provision for an appeal by the employer, but the award was enforceable only by a civil action, and in such action the employer could interpose any defense affecting the "fundamental or jurisdictional questions involved in the answer." While the right of judicial review was thus granted, the court found the condition to be attached "that if he is unsuccessful in his defense, he is to be penalized." The penalty was imposed on all employers, whether contesting the claim in good or bad faith. The result of the statute as interpreted by the trial court was held to be "that the 50 per cent penalty is automatically imposed upon every employer who is unsuccessful in establishing a defense against the award." In the opinion of the court the provision was in effect "a denial of that right to judicial review to which an employer is entitled under our constitution." In conclusion the court said:

Here there had been no final judicial determination, and the record clearly shows that there was a reasonable controversy upon fundamental and jurisdictional questions, and that the defendants inter-

posed their defense in good faith. It follows from what has been said that the trial court was in error in awarding the judgment in favor of the plaintiff for the 50 per cent penalty, and the judgment must be modified accordingly.

The allowance of the penalty, however, does not invalidate the judgment, nor does the invalidity of the penalty provision affect the validity of the workmen's compensation act as a whole, or even the other provisions of section 11, as this penalty provision may be stricken from the law without in any manner affecting such other provisions.

The judgment was therefore modified by eliminating the penalty allowance, and as modified it was affirmed.

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WORKMEN'S COMPENSATION—AWARD—JUDGMENT ON UNPAID INSTALLMENTS—CONSTRUCTION OF STATUTE—*Rosandich* v. *Chicago, N. S. & M. Ry. Co., Supreme Court of Wisconsin (December 9, 1924), 201 Northwestern Reporter, page 391.*—John Rosandich, employed by the named defendant as a section hand, while returning from work on August 13, 1921, was injured in the foot when the motor hand car on which he was riding was derailed. He spent 63 days in the hospital and did not return to work. Upon filing a claim, the industrial commission awarded him $407.16 accrued benefits, and $14.14 a week until further ordered by the commission. The defendant railway paid the installments until March 20, 1923. On November 21, 1923, the plaintiff took a judgment in the circuit court for the amount of the unpaid installments. The defendant moved to vacate the judgment, and, upon refusal of the court to grant the motion, appealed.

It was claimed by the defendants that there was no statutory provision for entering a judgment upon an interlocutory award. The supreme court was of the opinion that judgment for unpaid installments, entered on testimony as to the amount due under the award of the commission under statutes of 1923, section 102.18, "is in accordance with award, as required by section 102.20, which does not require that judgment correspond with recitals on face of award." The court also said:

It is also claimed that, since the plaintiff made a number of applications to the commission to modify and increase the interlocutory award, therefore no award existed, because such applications nullified and set aside the award. This is obviously unsound. Under the theory of appellant, all a person has to do to nullify an award is to make an application to modify it. This is neither law nor sense.

A stipulation that the parties were within the compensation act was held by the court to show that employee was injured while he

was engaged in intrastate work, of which the commission had jurisdiction.

The contention that section 102.20, above mentioned, was unconstitutional was considered by the court as met in the case of Booth Fisheries Co. *v.* Industrial Commission (200 N. W. 775), "which holds in effect that since the act is purely elective, the parties, by electing to come under it, agree and have the power to agree that its provisions shall apply to them and be followed."

The order was accordingly affirmed.

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WORKMEN'S COMPENSATION—AWARD—MODIFICATION FOR INADEQUACY—*Albertsen* v. *Swift & Co., Supreme Court of Kansas (December 6, 1924), 230 Pacific Reporter, page 1057.*—Chris Albertsen was injured while in the employ of Swift & Co., and it was conceded by the defendant that he was entitled to some compensation. The parties agreed to settle the matter by arbitration, and the agreement provided that Charles A. Blair should have the power to fix the amount of compensation and also find the character and quality of the disability, if any. Upon the testimony taken the arbitrator found that Albertsen had sustained injuries "which totally incapacitated him from performing work for a period of 14 weeks, ending June 12, 1923," and further that he should be allowed compensation "at the maximum rate of $15 per week." It was also found that he was not entitled to anything for partial disability. The district court sustained the findings of the arbitrator and the plaintiff appealed.

The plaintiff contended that a review of the award was not barred by the finding of the arbitrator, and that the award should have been set aside in this case for "gross inadequacy." The supreme court said:

Gross inadequacy is one of the few statutory grounds for a review and modification of an award, and when this element is shown the court has ample authority to modify or set it aside. To warrant a review, however, more than mere inadequacy must appear. A gross inadequacy is one which is beyond reason, one which shocks the sense of justice, and evinces a lack of fair and intelligent consideration.

There was a conflict in the testimony, and as to the decision of the arbitrator as to the facts the court said:

Where the arbitrator has in good faith made a finding of fact based upon conflicting testimony, the court is not warranted in setting the award aside even if it might have come to a different conclusion than was reached by the arbitrator upon such evidence.

The judgment was therefore affirmed, no flagrant inadequacy having been shown.

WORKMEN'S COMPENSATION — AWARD — PARTIAL DISABILITY — TERM — HERNIA—*O'Gara Coal Co.* v. *Industrial Commission, Supreme Court of Illinois (February 17, 1925), 146 Northeastern Reporter, page 546.*—Ervin Jones, employed by the defendant coal company, was injured in the course of his employment, suffering a hernia, for which an award of $17 a week for 14 weeks was made by an arbitrator. The commission made a further award for temporary total disability of $9.98 a week for 402 weeks, the maximum permissible under the workmen's compensation act. The circuit court set aside the order of the commission as erroneous and excessive, and entered an award for temporary total incapacity for 14 weeks at $17 a week, and for permanent partial incapacity for 300 weeks at $9.98 a week. The cause was taken to the supreme court by the coal company on a writ of error.

The claimant testified that he had not been able to work since the injury and that it hurt him all the time. A Doctor McSparin, who examined the claimant soon after the injury, testified that the claimant had a varicocele and that whether or not it was caused by the hernia was a question that he (the doctor) would not answer. Doctor Magnuson testified that he operated on the claimant on January 26, 1923, and that on March 27 the hernia was healed. Doctor Magnuson had no record of a varicocele. It was admitted that the claimant suffered the injury which temporarily totally disabled him from work, and an award for that disability was not complained of. The main question before the supreme court was as to the ability or authority of the authorities to speculate as to the probable length of partial incapacity. Speaking through Mr. Justice Dunn, the court said in part:

> This latter finding is without authority of law or basis in the evidence. Neither the commission nor the courts are authorized to speculate as to the probable length of partial incapacity. That can only be determined when the period ends. It is no more possible in cases of temporary partial incapacity to determine when the period of disability will end than the period of total incapacity.

Jones contended that the injury resulted in varicocele, but the doctors would not take a positive stand on that question. The testimony of the physicians tends to show that there was a complete recovery from the effects of the injury, and does not indicate that the varicocele, if it existed, was permanent. The only thing that connected the injury with the varicocele was that it followed the injury. The court concluded:

> The finding that the varicocele is the result of the injury can not rest upon conjecture or surmise, but must be based on facts proved.
>
> The finding of permanent partial incapacity is not sustained by the evidence, and the court was justified in setting aside the award

for permanent partial incapacity, but not in making the award for 300 weeks of temporary partial incapacity.

The judgment was accordingly reversed and the cause remanded for further hearing.

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WORKMEN'S COMPENSATION—AWARD—REHEARING ON MERITS—PROCEDURE—*Jayson* v. *Pennsylvania R. Co., Court of Errors and Appeals of New Jersey (January 19, 1925), 127 Atlantic Reporter, page 169.*—Fred E. Jayson, employed by the Pennsylvania Railroad Co., on May 23, 1923, was engaged in repairing a platform of a car when the head of a spike he was driving flew off and struck him in the left eye. He continued to work until June 20, 1923. A petition was filed for compensation under the workmen's compensation law, and upon an informal hearing the deputy commissioner dismissed the petition on a motion by the defendant that the claimant had produced no evidence to prove that at the time of the accident Jayson was engaged in intrastate commerce. The defendant had introduced testimony to the effect that all kinds of "freight cars were repaired at the Kearney shops, including cars from foreign roads, loaded cars, and cars destined for points outside of New Jersey." In the formal determination the dismissal was affirmed. Jayson appealed the ruling of the compensation bureau on the authority of Herzog *v.* Hines, Director General (95 N. J. Law, 98, 112 Atl. 315), in which case it was held "that a car repairer, injured while working on a car which is out of use for the purpose of having the repairs made, is not engaged in interstate commerce." The court proceeded to determine the compensation it considered due the claimant "instead of sending the case back to the compensation bureau for a hearing upon the merits, as the railroad company contended should be done." Jayson was allowed a temporary compensation of $102, and also 80 per cent disability of the left eye, amounting to the further sum of $960, and judgment for these sums was entered. The supreme court affirmed the judgment of the county court of common pleas, and the company appealed to the court of errors and appeals.

It was contended that the evidence showed Jayson to be engaged in interstate commerce at the time of the injury, but it was further contended, and with more force and importance, that the court of common pleas and the supreme court erred in not remanding the case to be heard upon the merits.

The railroad company maintained that "no opportunity was ever afforded to it to be heard upon the merits," that is, "the nature and extent of the injury, whether temporary or permanent, when and how it occurred, and whether it arose in the course of and out

of the employment of the respondent." The court of errors and appeals, speaking through Mr. Justice Katzenbach, said:

We think the court of common pleas and the supreme court decided the question of the character of the commerce in which the respondent in this court was engaged at the time of his injury properly. We feel, however, that the course of procedure taken by the court of common pleas and affirmed by the supreme court in determining in the state of the record before the court of common pleas the compensation, both temporary and permanent, to which Jayson was entitled was erroneous.

Under the circumstances of the case it should, in our opinion, have been sent back to the workmen's compensation bureau to have had the compensation of the respondent determined, with leave to the parties to take testimony with reference thereto.

The court of common pleas is not forbidden by the act to remand the case to the compensation bureau for a rehearing upon the merits, and "the supreme court clearly had in its inherent power the right to remand the case to the compensation bureau for a hearing upon the merits."

The judgment of the supreme court was accordingly reversed and the case remitted to the compensation bureau to be heard upon the merits.

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WORKMEN'S COMPENSATION—AWARD—REMARRIAGE OF WIDOW—ADJUSTMENT OF BENEFITS—*Carlin* v. *Lockport Paper Co., New York Supreme Court, Appellate Division (November 12, 1925), 212 New York Supplement, page 65.*—William Carlin was fatally injured under circumstances entitling his beneficiaries to compensation. He was survived by a widow and four children under 18 years of age. The award made allowed the widow 30 per cent, and each of the four children 9⅙ per cent of Carlin's wages, a total of 66⅔ per cent. On April 5, 1923, the widow remarried, and a subsequent award of two years' compensation in one sum was made to her, as provided by law. The amount allowed each child was thereupon increased to 10 per cent of the father's earnings, to begin from the date of the remarriage. The employer contested the award, claiming that it was in excess of the maximum amount, 66⅔ per cent of the average wage, allowed by law. The court found that the increase, making the total amount payable to the four children 40 per cent of the wages, was in violation of the statutory provision. Awarding the widow two years' benefits in a lump sum was an advance payment, "and for the two years so covered must be considered in determining benefits to surviving children, so as to keep the total benefits within the statutory limitation of 66⅔ per cent." The increase to 10 per

cent, the maximum for each child under the law, must therefore be deferred until two years from the date of the remarriage, when the effect of the lump-sum payment to the widow would be exhausted.

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WORKMEN'S COMPENSATION—AWARD—REMARRIAGE OF WIDOW—ADJUSTMENT OF BENEFITS—DEPENDENCY—*McCormick* v. *Central Coal & Coke Co., Supreme Court of Kansas (February 7, 1925), 232 Pacific Reporter, page 1071.*—H. E. McCormick, employed by the defendant company, was accidentally killed in the course of his employment on May 25, 1920. His widow and two minor children were entitled to the maximum compensation of $3,800, and by agreement between the employer and the dependents payments were made at the rate of $15 a week, no court proceedings being had. Payments were made until October 17, 1922, when the employer learned that the widow had been remarried since April, 1921, and stopped payments. In June, 1923, the children, by their guardian, filed an application for an adjustment of their claim for compensation. An arbitrator found that each dependent was entitled to one-third of the compensation, that the widow's share ceased upon her remarriage, and that the balance due her should not be paid to anyone. On review the district court held that the company should receive credit for all money paid to the widow and children, and that the balance of the $3,800 should be paid at the same rate, namely, $15 per week, to the children, the widow not being entitled to any further share. The employer appealed from the judgment of the circuit court, contending that the widow's share should not be paid to anyone.

The supreme court defined "wholly dependent" and "partial dependence":

Wholly dependent means full, complete dependence—that the individual has no consequential source or means of maintenance other than the earnings of the workman. Partial dependence may vary in degree from wholly dependent on the one hand to wholly independent on the other, and may apply to any individual "member of the family" of the workman who has some substantial source of maintenance other than the wages of the workman. The question of the degree of dependency, naturally, is a question of fact in each case.

The court held that the compensation to dependents under the compensation act is not controlled by the law of descent and distribution, but according to dependency; and further that, though the obligation to pay those to whom it is to be paid and the amount are fixed generally as of the time of the injury, yet they may be changed by changing conditions. A change in dependency within the period between the accident and the death, or the birth of a posthumous child, would result in such change.

In the instant case there were two minor children who were wholly dependent upon the deceased at the time of his accidental death. As to their rights to compensation under the law the supreme court said:

> They were, and still are, members of that class of persons entitled to receive under the law the full amount of compensation, and they were entitled to receive the full compensation, if they were the only persons wholly dependent. That right is not affected by the marriage of some other dependent, or, at any rate, not injuriously affected. It still remains notwithstanding the marriage of another dependent. The result is the marriage of a dependent causes that person to cease to be a dependent within the meaning of the law; to step out of the class of persons designated by the statute as dependents of a deceased workman, but it does not change the amount of compensation to be paid nor the right of other persons, dependents of the deceased workman, and within the class of those wholly dependent, to receive it.

The supreme court being of the opinion that the district court had the power to modify the findings of the arbitrator, the judgment of the district court was affirmed.

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WORKMEN'S COMPENSATION—AWARD—REMARRIAGE OF WIDOW—POSTHUMOUS CHILD—BENEFICIARY REACHING NONCOMPENSABLE AGE—*Ex parte Central Iron & Coal Co., Supreme Court of Alabama (January 15, 1925), 102 Southern Reporter, page 797.*—Henry Criss was killed on July 14, 1922, by an accident arising out of and in the course of his employment. He left as dependents a widow and five minor children under 18 years of age. Compensation was fixed on September 9, 1922, at the maximum of $15 a week not to to exceed 300 weeks, in accordance with the provisions of the 1923 Code, sections 7558 and 7562. The latter section provided for a maximum of "fifteen dollars in case the deceased employee leaves three or more totally dependent children under 18 years of age." The compensation was apportioned among the children and the widow. On March 16, 1923, Henry Criss, a posthumous child, was born, and on June 15, 1924, the widow remarried. On August 22, 1924, one of the dependent minors reached the age of 18 and was self-supporting. A petition was filed in behalf of the dependent minors seeking a revision of the payments—to give the widow's share and the share of the child who reached 18 years of age to the other minors, it being insisted that the posthumous child should share also. The trial court decreed according to the petition and a petition for certiorari was granted to review the judgment.

The supreme court first observed that the statute, being remedial in its nature, "will be liberally construed to accomplish the pur-

pose of the enactment." As to the compensation, it was conceded though not decided that the amount once having been fixed, "it could only be subsequently changed as provided by the statute." As to the question of the power of the court to enter orders or decrees, however, in the matter of administration of the funds or distribution thereof "made necessary by changed circumstances," the supreme court held that the courts were "always open for such purposes." The supreme court said further:

There was no error in decreeing the payment of the widow's compensation to the dependent minors. She had remarried, and in such event it is provided that the "unpaid balance of compensation, which would otherwise become due her, shall be paid to such children."

Nor do we think the posthumous child was barred from participation in the fund. Settlement had already been made, the parties had their day in court, and payments of compensation continued to be made.

The participation of this child in these payments had no effect upon the matter of fixing the amount of compensation or upon the question of liability.

It was insisted that the share of the child who had reached 18 years of age should be deducted and the amount reduced accordingly, but the supreme court refused to recognize the contention, saying:

The compensation was based upon the number of dependent children, three or more, and we are of the opinion that so long as there remains the number of dependent children this amount is authorized. So long as the dependent children remain within the number provided by statute for their compensation, then the employer can not complain. The compensation to be paid remains the same, but its apportionment differs only.

We are persuaded it was not the legislative intent, under the circumstances, that the amount of compensation be reduced thereby, while the number of dependent children coincides with the maximum compensation fixed and ordered paid by the court, under section 7562 of the 1923 Code. A construction to the contrary, would, in our opinion, not be a liberal one "to accomplish the purpose of the enactment."

The judgment of the circuit court was therefore affirmed.

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WORKMEN'S COMPENSATION—AWARD—REVIEW—DISEASE AS RESULT OF INJURY—*United States Casualty Co.* v. *Smith, Court of Appeals of Georgia (September 14, 1925), 129 Southeastern Reporter, page 880.*—C. L. Smith, employed by the International Vegetable Oil Co., was repairing a pipe in June or July, 1921, when water leaking out of a drainpipe fell upon the back of his neck, caused a blister, the blister later bursting and becoming a sore. A month or two later the wound was exposed to ammonia gas, which enveloped him as he was repairing a pipe from which the gas was escaping. His neck commenced to give him considerable trouble and he was forced to

remain away from work about a week, after which he returned and continued to work for about two months. He then quit on the advice of a physician and was never able to work again. A short time thereafter he made application for compensation, testifying that he was injured by "being burned on the back of his neck by steam and poisoned by ammonia gas." At this time the trouble was confined to his neck, except that he was not able to be around gas or to be in a warm room. Before a decision was reached an agreement was entered into with the insurance carrier for a period of compensation of 9 weeks at the rate of $12 per week, the agreement being approved by the commission and the case apparently closed by an order of approval dated December 30, 1921. In 1923 the claimant moved for a review and modification on the ground of a change in his condition. The application was granted and it was developed by the evidence that sores similar to the one upon his neck had appeared soon afterwards upon different parts of his person. His general system appeared to be diseased, and one of his arms had become so infected that it was necessary to amputate it in 1922. The disease was diagnosed by certain physicians as blastomycosis. An award of compensation was granted for 350 weeks (less the 9 weeks covered by the settlement) at $12 a week. An appeal was denied by the commission and the insurance carrier excepted.

The court of appeals, on reviewing the record, held that the compensation settlement approved by the industrial commission precluded the insurer from raising the question whether or not the injury arose out of and in the course of the employment. However, the court further held that this settlement did not bar the employee's application for review, nor did it preclude an award thereon contrary to the stipulation. The provisions of section 25 of the compensation act to the effect that the right to benefits should be forever barred unless a claim be filed within one year after the accident was held to have no application where the employee is seeking a review of an award or a settlement under section 45, providing for review "at any time" on account of change of condition. The evidence was considered as authorizing the finding that the disease resulted unavoidably from the original injury, thus bringing it within the act. The award was therefore affirmed.

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WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—FARMER TEMPORARILY OPERATING SAWMILL—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—*Durrin* v. *Meehl*, *Supreme Court of Minnesota* (*May 22, 1925*), *204 Northwestern Reporter*, *page 22.*—John Meehl owned, resided upon, and operated a farm of about 80 acres. Aside from the farm he owned a sawmill, which he oper-

ated for five or six days each spring sawing logs for himself and others residing in the vicinity. The sawmill required five or six men to operate and was located within a couple of blocks from the village water tank.

Walter Durrin, aged about 74 years, had been employed about the mill for a long period of years, but on account of his age and failing condition Meehl hesitated as to giving him work in the spring of 1924. He was finally given employment to haul water from the village tank for the engine, and in addition he did other work about the mill, such as carrying slabs to the engine and helping at times in handling lumber. At the time of the injury he was assisting in handling a piece of lumber when he slipped and the carriage struck him and broke his leg, causing injury from which he subsequently died. Meehl carried no liability insurance.

A proceeding under the workmen's compensation act was brought by the employee's widow for compensation for the death of her husband. The referee found that Durrin sustained an accidental injury consisting of fractures of his leg, which immediately disabled him and required medical care and treatment, for which $100 was the reasonable value; that the accident arose out of and in the course of his employment; that said injury was the direct cause of his death on May 26, 1924; and that such employment was not casual in its nature. It was further found by the referee that the widow was entitled to compensation at the rate of $8 per week during her dependency, not exceeding $7,500, and in addition to that $150 for burial expenses and $100 for medical care and attention.

The award was resisted on two counts: (1) That the employment was casual and not in the usual course of the employer's occupation; and (2) that the accident did not arise out of and in the course of the employment, but was the result of the employee's departing from the scope and limits of his employment, in violation of express orders. It was insisted that the occupation of Meehl within the purview of the act was that of farming, that the sawmill activity constituted "a mere casual occupation," and that the employment of Durrin "was casual and not in the usual course of the employer's regular business."

Under the provisions of the Minnesota compensation act the employment must be "not only casual, but also not in the usual course of the business of the employer, in order to exclude it from the benefit of the act." (Laws 1921, ch. 82, sec. 8.)

Mr. Justice Quinn, speaking for the court as to the contentions of the defendant, said:

It has been held by this court, as well as by other courts, that one may have more than one occupation, one of which may be subject

to the compensation law while the other is not [citing cases]. The question then arises whether the operation of this sawmill was in the usual course of the employer's occupation. It appears that he had been engaged in this business at a fixed place for a number of years, sufficiently long to complete the work available in that locality, and that it was in no way incident to or a part of his occupation as a farmer. It was found by the referee, and affirmed by the commission, correctly, we think, that said sawmill business was separate and distinct from that of farming, and that the accident occurred in the usual course of such separate business, and therefore the question whether the employment was casual is not important.

The supreme court being of the opinion that there was a sufficient evidence to make the finding conclusive, accordingly sustained the award.

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WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—OCCASIONAL SERVICES AS LINEMAN—*Pfister* v. *Doon Electric Co. et al., Supreme Court of Iowa (February 19, 1925), 202 Northwestern Reporter, page 371.*—Pfister was employed by a telephone company as lineman, and as such he received about $97 a month. His contract of employment with the telephone company did not bind him to give the company his full time. The defendant electric company employed the claimant as their sole lineman at 65 cents per hour whenever he should be called upon, but recognized the priority of call for his service in favor of the telephone company. Pfister did all the line work of the defendant company; in August, 1921, the first month of his employment, he worked a few hours in one day, and the same in September and October. In November he worked a few hours on each of six days, and so on until June, 1922, when he worked two days, the last being the date of his death, making about 160 to 170 hours in all. Pfister was killed in an accident arising out of and in the course of the employment, and if he were considered a regular employee he would be entitled to compensation, but the defendant company contended that his employment was but casual. Compensation was allowed by the arbitration committee, by the industrial commissioner, and by the district court. The employer appealed.

The main question to decide was what is a casual employment. It was the contention of the company that the claimant came under the provision of section 10 of chapter 270, Acts of 1917, which excluded from the scope of the compensation act "a person whose employment is purely casual or not for the purpose of the employer's trade or business."

The supreme court in discussing this point said:

On the other hand, where the employer is engaged in a labor-employing trade or business, where the employee is employed for

the purpose of such trade or business, and is specialized for such work, and meets the hazards incidental to such trade or business; and where his injuries result from such hazards, and while he is doing such work, the "casual" quality can not readily and does not ordinarily attach.

It was because he was called on to do the very work for which he was employed, and because he was doing it, that the hazard of his occupation struck the mortal blow. The fact that the service was intermittent as to time did not, we think, destroy its essential character as regular employment in the line of the business of his employer.

Formality is not essential to a contract of employment.

Pfister was working, at the time of the accident, in taking up the slack in the wires caused by a storm, and it was argued that the circumstance of a storm causing the trouble rendered the employment casual.

The storm, though unusual and severe, was yet only a feature of the weather. The weather is a factor which must always be reckoned with in the maintenance of outdoor equipment. A change of weather ought not to be deemed effective to change the character of the employment, nor should weather conditions be deemed a factor in determining the nature of the employment undertaken. It was fairly within the scope of defendant's business to meet appropriately all the contingencies of weather, and to adapt itself thereto to the extent of its ability.

The court added, however, that an emergency could be so brief as to be "casual." The judgment was therefore affirmed.

The same court applied the principles above enounced in a case in which the employee likewise a lineman, and on emergency work sued for damages, claiming that his employment for but 30 days, in the interval of waiting for another job, was casual in its nature, so that an action for damages would lie, instead of a claim for compensation. The lower court accepted this contention, but the supreme court reversed the judgment, saying that "the rule is broader than the exception," and that "doubts and implications should be resolved in favor of the rule rather than of the exception." Though the lineman was an "extra," employed on account of a storm and but for a limited period, he was none the less "subjected to the hazards of his employer's trade or business, and suffered injury therefrom while so engaged, in the due course of his employment;" and the construction of the statute should be made so as not to enlarge the proviso as to "casual" employment. (Eddington *v.* Northwestern Bell Telephone Co. (1925), 202 N. W. 374.)

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WORKMEN'S COMPENSATION—CONTRACT OF EMPLOYMENT—FARMERS' EXCHANGING WORK—*Smith* v. *Jones*, *Supreme Court of Errors of Connecticut* (*May 12, 1925*), *129 Atlantic Reporter, page 50.*—Irving F. Smith and Simeon M. Jones were dairy farmers on adjoining farms, and both used silos to store food for their cattle. Mr. Smith used a 27-horsepower engine and Jones used an 8-horsepower

engine. By mutual agreement they assisted each other in filling silos and ice houses. In the season of 1923 Jones's ensilage corn was farther advanced and more matured than that of Smith, and it was arranged that Jones's silo should be filled first. On September 6, 1923, Smith brought over his tractor, so that when an extra gang of men were put on there would be power sufficient to cut the corn rapidly and keep them all busy. The work continued from Thursday until Tuesday the 11th, when, while Smith was feeding the cutter, his hand accidentally got into the machinery and was seriously mangled.

It was found by the trial court that the combination ensilage cutter and blower with a gasoline engine attached "constituted a complex piece of mechanism, which neither the ordinary mechanic nor ordinary laborer would be competent to manage." It further found that such services were customarily worth in excess of $36 per week. As a result of the injury Smith was totally disabled from September 12 to December 20, and "lost the equivalent of 75 per cent of the use of his left hand, and incurred certain expenses * * * which are not disputed." Smith received an award of compensation from the commissioner, which was affirmed by the judgment of the supreme court, the employer and insurance carrier appealing.

The question presented was whether the finding as to the mutual agreement was "a basis for a logical and legal conclusion that there was a contract of service and employment between them when the injury occurred." To this question the supreme court of errors said:

> They had agreed to assist each other to fill their respective silos, their compensation for working one for the other was work to be done by the other. These were mutual agreements creating a valid contract for service, and enforceable at law in case of a breach. The fact that the services were to be compensated for by labor and not money does not make the agreement any the less a contract for service.
>
> The agreement between Smith and Jones was not in the nature of a partnership or one made for social diversion. It was an agreement for employing service, compensation to be made by similar service.

Finding no error, the court affirmed the judgment.

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WORKMEN'S COMPENSATION—COVERAGE—COUNTY AS EMPLOYER—PUBLIC EMPLOYEES—*Forsythe* v. *Pendleton County, Court of Appeals of Kentucky (November 28, 1924), 266 Southwestern Reporter, page 639.*—William L. Forsythe was employed by one Galloway, the

county superintendent, to shovel rock and assist in and about the operation of a rock crusher belonging to Pendleton County, and was injured while so employed. The county demurred to an action for compensation, and from an order sustaining the demurrer the plaintiff appealed.

The court of appeals pointed out that the counties "are subordinate political divisions of the State," and that they are "no more liable to be sued for injury or tort of its officers than the State." The common law "gives no such right, and it therefore can exist only by statute."

Plaintiff claimed that the common-law rule no longer existed because of the workmen's compensation act (Stat., sec. 4881), and that the county was not one of the employers exempt from the application of the law. The court could not agree, saying:

The maintenance of the public roads of the county is one of the most important governmental functions with which the governing authorities of Pendleton County are charged. The maintenance of the public highways was not a matter which Pendleton County could lay aside. It had to maintain those highways. It did not descend from its sovereignty to engage in their maintenance, but that duty was thrust upon the county by the very fact of its sovereignty.

Counties are different from cities and towns. The latter are corporations created by statute. They have authority to enact local laws, commonly called ordinances, whereas the county has no such authority. County officers derive all of their power from the State laws, and while there are some cases where counties have been held liable for acts of commission, we have been unable to find even one case where a county has been held liable for an omission.

It was insisted that Galloway, the superintendent of the work, was responsible, but the court said that he was "only doing for the county what it was the county's duty to do as an incident to its sovereignty, hence is not liable for the same reason that the county is not liable."

The judgment was therefore affirmed.

Prior to its amendment in 1923, which specifically includes drainage districts, the compensation law of Wisconsin was applicable to employees of the State and of counties, cities, towns, and school districts. A workman employed by a drainage district procured an award from the State industrial commission in case of an accident occurring before the enactment of the above amendment, but the supreme court of the State ruled that in the absence of specific enumeration "a drainage district is a governmental agency, and is not liable for the negligence of its officers"—directly in line with the ruling in the Kentucky case above. It would be an act of "judicial legislation" to include such municipalities in the absence of action by the legislature, so that the award was reversed. (Rusk Farm Drainage District *v.* Industrial Commission (1925), 202 N. W. 204.)

WORKMEN'S COMPENSATION—COVERAGE—EMPLOYEE EARNING IN EXCESS OF $2,000—*E. H. Koester Bakery* v. *Ihrie*, *Court of Appeals of Maryland* (*January 15, 1925*), *127 Atlantic Reporter, page 492.*—Paul Ihrie, an employee of the E. H. Koester Bakery, was seriously injured, while engaged in the course of his employment, in a collision between a bread truck which he was driving and a fire engine. An award of compensation was granted on February 18, 1922, at the rate of $18 per week for temporary incapacity. After further examination the insurance carrier was notified by the industrial commission on July 5, 1923, that if no objection were raised the order would be modified, allowing for three-fourths loss of the use of leg, subject to credit for payments on previous order. A protest was filed formally denying the jurisdiction of the commission "because the record discloses that the average compensation of the employee is in excess of $2,000 a year." At the conclusion of the hearing the commission found for the claimant, and that the claimant sustained permanent partial disability occasioned by three-fourths loss of the use of the left leg. It rescinded its order of February 18, 1922, and ordered "that the employer and insurer pay compensation at the rate of $18 per week, payable weekly for the period of 131¼ weeks, said compensation to begin as of the 28th day of January, 1922, and that final settlement receipt be filed with the commission in due time, subject, however, to a credit for such amount as may have been paid on account of the previous order passed in this case."

From a verdict and judgment in the Baltimore city court affirming the award of the commission the employer and insurance carrier appealed.

The court of appeals considered the sole question for determination to be the meaning of the word "salary" as used in section 63 of article 101 of the A. C. of M. This section provides:

> This act shall not apply to * * * any employee whose salary is in excess of $2,000 a year.

The court of appeals, speaking through Mr. Justice Adkins, said, as to the use of the term "salary" as contrasted with the word "wages":

> It seems to us not without significance that in section 63, in describing persons who were to be excluded from the benefit of the act by reason of the size of their compensation, the legislature used a term having a restricted rather than one having an inclusive meaning, in defining compensation. If, in section 63, it had been intended to include all employees who earned more than $2,000 a year, "compensation" would have been apt in referring to earnings. Or the word "wages" might have been used, as it was in section 36, to indicate the general application of the sections.

The court quoted with approval a construction by the industrial accident commission in 1918 in the case of David Drummer, employee, *v.* Bethlehem Steel Co., employer, and self-insurer, claim No. 16496, in which it was held that:

When the legislature exempted from the benefits of the compensation act those employees receiving a salary in excess of $2,000, it gave expression to an evident intention to exclude from the benefits of the act those persons whose employment involved permanency and who were at the same time receiving a substantial income from said employment, and it did not exclude from the benefits of the act those who are receiving only temporarily a substantial income.

In conclusion Mr. Justice Adkins stated that the above expression was adopted as that of the court, and that to hold otherwise "would be contrary to the spirit of the entire act."

The judgment was therefore affirmed.

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WORKMEN'S COMPENSATION—COVERAGE—HAULING LOGS—EXEMPT OCCUPATION—*Cormier's Case, Supreme Judicial Court of Maine (February 6, 1925), 127 Atlantic Reporter, page 434.*—Bruno Cormier, employed by Allen Quimby Co., was hauling timber cut into lengths 6 feet long into the mill yard of the company, when upon a return trip he accidentally received an injury for which he applied for compensation. From an award of compensation the employer appealed.

The supreme judicial court considered that without doubt Cormier was "an employee engaged 'in the work of cutting, hauling, rafting, or driving logs,' within section 4 of the workmen's compensation act (Laws 1919, ch. 238)." A log being defined as "a cut of timber of any size or length suitable for sawing into lumber."

Under the compensation act it was optional with the employers of loggers and drivers to avail themselves of the act if they so chose. The company here did not avail itself of the option and did not include loggers and drivers as employees insured under the act. The policy of insurance stated in part:

This policy does not cover woods operations. The line drawn between woods operations and the mill operations shall be that when a car or team is placed in the mill yard, or at a point where the loads are to be unloaded from the car or team, this feature of the operations, including the unloading of cars and teams, shall be applied as part of the mill or yard operations.

The supreme court said:

It follows that the employer did not assent to the act as to its employees engaged in hauling logs. The award did not in terms find, but presupposes, such assent, and being without support in that particular, is erroneous.

The decree was reversed and the compensation denied.

WORKMEN'S COMPENSATION — COVERAGE — HAZARDOUS OCCUPATION—CONDUCTING HOTEL—TIPS AS BASIS FOR COMPENSATION—DEATH OF BELL BOY BY SHOOTING—*Byas* v. *Hotel Bentley (Inc.)*, *In re Byas, Supreme Court of Louisiana (December 1, 1924, 103 Southern Reporter, page 303.*—One Byas, employed as chief bell boy in the hotel operated by the defendant, in an altercation with a taxicab driver arising out of a dispute over the carrying of baggage, was shot and killed. Bessie Byas, widow of deceased, brought a proceeding under the workmen's compensation law, contending that her husband was killed as a result of an accident arising out of and in the course of his employment. It appeared from the evidence that the duties of the deceased were to supervise the other bell boys; to assist in handling baggage; to operate elevators, freight and passenger, to instruct new operators, to make repairs to the electric switch controlling the elevator, and to do various errands in the engine room of the hotel. The defendant claimed it was not engaged in a hazardous occupation within the meaning of the statute. From a judgment in the district court for the plaintiff the defendant appealed. The court of appeal annulled and set aside the judgment of the lower court, and the plaintiff secured a writ of certiorari, or writ of review, to the supreme court.

The court of appeal found that the deceased was engaged in part in hazardous occupations and in part in nonhazardous occupations in the performance of his duties. The supreme court considered this finding as correct, but the court of appeal stated further that if the plaintiff's husband "had been killed while he was engaged in one of his duties of a hazardous nature she would be entitled to compensation, but in view of the fact that the major portion of the deceased's duties were nonhazardous, and that it was while in the discharge of duties in the nonhazardous line of his employment he met his death, plaintiff was not entitled to relief." The supreme court took the position that the court of appeal took a "narrow and technical, rather than a liberal, construction intended and contemplated by the lawmaker, and as expressed in numerous decisions of this court." Speaking through Mr. Justice Rogers, the court said:

In the present case plaintiff's husband was admittedly engaged in both hazardous and nonhazardous branches of his employer's business. It was all one employment, for which he received but one compensation. Therefore, it is immaterial whether his nonhazardous duties constituted his major employment, to which his hazardous duties were merely incidental, or vice versa.

The shooting and subsequent death of plaintiff's husband grew out of a dispute which arose over the carrying of baggage, which was a specific part of his duties. It was therefore an accident caused by the tort of a third person, which, under section 7, is contemplated by the statute.

The defense that deceased's death was due to a willful intention on his part to injure another was not sustained by the evidence.

The supreme court, being of the opinion that the claimant was entitled to compensation, held that:

It is our conclusion that the judgment of the district court, which awarded plaintiff 30 per cent of the wages of her deceased husband, based on a remuneration of $57 per month, excluding tips, and an allowance of $200 for medical and funeral services, is correct and should be reinstated and affirmed.

Pretermitting the legal question of whether or not tips may be considered as a part of an employee's wages in awarding compensation, we are unable to consider them as a basis for an allowance in this case, for the reason that the plaintiff has not satisfactorily established the amount of the tips received by her deceased husband, the testimony on that point consisting entirely of hearsay.

The judgment of the court of appeal was therefore annulled and set aside and the judgment of the district ordered reinstated and affirmed.

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WORKMEN'S COMPENSATION—COVERAGE—MAIL CARRIER HIRED BY GOVERNMENT CONTRACTOR—*Comstock* v. *Bivens, Supreme Court of Colorado (October 5, 1925), 239 Pacific Reporter, page 869.*—Allen B. Comstock was employed by Bivens & Nelson, a copartnership, to carry mails over the route from Naturita to Paradox and to post offices between these two towns. The employers were operating a stage route in southwestern Colorado, and in connection therewith carried the mails of the United States Government. By the terms of the contract Comstock was to furnish his own services and an auto truck in which to carry the mails, and was to receive $225 a month. Additional amounts were allowed for parcel-post packages, and he could take passengers and freight as he saw fit. On his last trip, after Comstock reached the post office at Paradox and had delivered the mail to the postmistress, and after receipting for a parcel-post package which was to be delivered the next morning, on the return trip to Naturita he drove his truck from the post office to his home and stopped in front of the house. While taking his rifle out of the truck, in some manner not disclosed by the evidence, there being no eyewitnesses, the weapon was discharged and Comstock died in a few minutes as a result of the wound. The industrial commission found that Comstock was one of four or more employees of employers engaged in like service, and that the accident arose out of and in the course of the employment. The commission granted an award in favor of Hazel B. Comstock and others as claimants for the death of the employee. The district court held that there was little evidence to sustain the finding that Comstock at the

time of the accident was serving his employer, and set aside the award; from this judgment the claimants appealed.

The supreme court, in reviewing the record, first observed that apparently the district court conceded or assumed that both the employers and the employee were subject to the provisions of the compensation act, and rested its decision solely upon the ground that there was no evidence to sustain the findings of the commission.

It was held that as a general rule an employee who is injured while on his way to or from work is not entitled to compensation, in the absence of special circumstances bringing the accident within the scope of the employment. However, the supreme court was of opinion that the instant case came within the exception to this general rule, and under previous decisions it held that Comstock's death by accidental discharge of his rifle, carried for protection, "arose out of and in the course of his employment."

Whether Comstock was killed by accidental discharge of his rifle was considered a question for the industrial commission and not for the court, and the supreme court refused to go into it.

It was contended by the employers that the employee was delivering United States mail, and as this was a public function the contractor and employee did not come under the compensation law. The supreme court held that the employee performing a public function does not destroy the relation of employer and employee because of such fact of holding a contract with the Government. The carrier of mail hired by one having a star-route contract with the United States Government is held not an employee of the Government but of the contractor, and is a servant of the United States in carrying the mail. In conclusion, the supreme court decided that such a contractor, who holds a contract to deliver mail along a star route and who hires employees to deliver the same, is subject to the State workmen's compensation law, notwithstanding the fact that the employee while delivering such mail is engaged in a public function.

The judgment of the district court was therefore reversed and the case remanded with instructions to affirm the award of the commission.

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WORKMEN'S COMPENSATION—COVERAGE—MUNICIPAL EMPLOYEES—CONSTITUTIONAL AUTHORITY—POWERS OF CITY—*City of Sacramento* v. *Industrial Accident Commission, California District Court of Appeal (September 17, 1925), 240 Pacific Reporter, page 792.*—An award of compensation to Eva Streepy in the sum of $5,000 for the death of her husband, an electrician in the employ of the city of Sacramento, was made by the industrial accident commission. No contention was made as to the award if justification to enter the

same existed. The authority of the commission was contested on the grounds that "the compensation of all officers and employees of a city is a matter purely within the jurisdiction and control of the city," and that making all provisions for a sum of money to be paid either to an injured employee or to his widow or family is a purely municipal affair. In arriving at a decision provisions of the State constitution were considered which conferred upon the city of Sacramento authority to provide compensation for its employees or their dependents; but this was held to refer to wages and not to workmen's compensation or indemnification payable to dependents under article 20, section 21, of the State constitution, authorizing the enactment of a workmen's compensation act. The definition of the word "compensation" as used was considered to be synonymous with wages. Counties and municipalities are held to be departments of the State within the meaning of the California constitution, and the word "person" as used in article 20, section 21, authorizing the legislature to provide a system of workmen's compensation and to enforce this liability upon all persons, includes municipalities.

The court being of the opinion "that the making of compensation to the dependents of employees is a matter of public policy of the State, as contradistinguished from municipal affairs," the award was affirmed.

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WORKMEN'S COMPENSATION — COVERAGE — PARTNERS RECEIVING FIXED WAGES—*Wilcox* v. *Wilcox Bros.*, *Supreme Court of Michigan* (*October 1, 1925*), *205 Northwestern Reporter*, *page 90.*—A copartnership of the three Wilcox brothers had been engaged in road building for three years. Frank and Volney Wilcox were the active partners, the third brother being a silent partner. In 1923 the Southern Surety Co. issued a policy insuring the Wilcox Bros. against the liability imposed upon them by the workmen's compensation law in connection with their road work. The standard form of policy, which had been approved by the department of labor and industry, was issued. On November 29, 1923, Volney Wilcox was caught in a gravel slide while in the performance of his duties as superintendent on a road-construction contract of the partnership, and was killed.

A proceeding under the compensation act was brought by his widow, and from an award of compensation the insurance carrier brought certiorari.

It appeared that the three brothers could draw for their services $50 a week while a contract was being performed. If either drew more than that amount it would be charged against him as an overdraft, and if he drew less he would receive credit when the profits

were divided, but at the time of the injury there had been no profits. It was found as a fact that Volney was receiving a salary irrespective of profits. The insurer contended that a letter sent to Volney Wilcox by them on November 1 took him out of the insurance policy. The letter stated that the company was under the impression that he wished to cover the employees only, and an inclosure with the letter read as follows:

Indorsement effective October 12, 1923. Not valid unless indorsed by duly authorized agent. It is hereby understood and agreed that the copartners named in below-mentioned policy are excluded from the coverage thereunder, subject otherwise to all conditions, agreements, and limitations of the policy as written, except as herein specifically provided.

The court found no evidence that the indorsement here included was ever in fact attached to the policy, and the mere fact that he received the letter was no indication that he had elected not to come under the provisions of the act. The retroactive indorsement upon which the insurer relies in excluding all copartnerships from coverage was held, while not a total determination or cancellation of the policy, to have "canceled and terminated all rights of working partners for unconditional wages, materially altering the contract." The commission found that the indorsement was purely an attempt on the part of the insurer "to have the employer attempt to waive and abridge a portion of the law which it had accepted, and under the indorsement last above quoted becomes clearly null and void; said policy agreeing, as above stated, to cover all employees."

The award of compensation was therefore affirmed.

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WORKMEN'S COMPENSATION—COVERAGE—PUBLIC OFFICER—POLICEMAN—*Hall* v. *City of Shreveport, in re Judges of Court of Appeals, Second Circuit, Supreme Court of Louisiana (January 5, 1925), 102 Southern Reporter, page 680.*—Policeman Hall, of the city of Shreveport, was killed while in the discharge of his duty, and his widow, Mrs. Tranna Hall, and others brought an action under the workmen's compensation law for compensation for his death. The claim was rejected by the district court and an appeal was taken to the court of appeal of the second circuit, which court certified the question of law involved to the supreme court, where right to compensation was denied.

It was contended by claimants that Hall was a servant or employee of the city at the time of his death, but the defendant contended that Hall was an official of the city and under the statute (sec. 1) was expressly excepted from its benefits.

The supreme court, in considering the question of whether the plaintiffs were entitled to compensation, first observed that:

The cases are numerous that an appointment to a pubilc office does not create a contract. And there is no end of authority that a policeman is a public officer, holding his office not under a contract between himself and the municipality, but as a trust from the State.

Section 1 of the statute (act 20, Acts of 1914) provides for the inclusion of:

Every person in the service of the State, or of any parish, township, incorporated village or city, or other political subdivision * * * under any appointment or contract of hire, express or implied, oral or written, except an official of the State, or of any parish, township, incorporated village or city.

The powers of municipal corporations are twofold, those of a public nature and those of a private nature. The supreme court said as to these powers:

In its public character, as the agent of the State, it becomes the representative of sovereignty, and is not answerable for the nonfeasance or malfeasance of its public agents. In its private or proprietary functions it is held to the same responsibility as is a private corporation.

The primary purpose of the compensation act is to " provide compensation for workmen injured while employed in certain hazardous trades, businesses, and occupations." Where an electric light or waterworks corporation is in business for profit many reasons may be advanced for including their employees within the compensation law. The added cost can be placed upon the consumer, the public at large.

The same reasons were not considered by the supreme court as applicable to the case where a municipality acts in a public character, exercising only its governmental functions, and hence held that the employees so engaged could not be brought within the scope or purpose of the compensation law.

The claimants contended that there was a difference between the word " official " and the word " officer," and that the compensation law excepted from its terms only " officials." The supreme court did not think " any such finespun distinction was in the minds of the lawmakers when they enacted the compensation statute," and the statute " must be interpreted and applied in accordance with the general and popular understanding of the terms."

Being satisfied that " a policeman is an appointive officer (official) under the provisions of the charter of the city of Shreveport," the court held that Hall fell within the exception of the law and that the claimants were not entitled to compensation.

The compensation law of Virginia covers "officers and employees" of municipalities other than elective. The State constitution exempts counties from liability for the acts of a sheriff. Under these conditions, a deputy sheriff enforcing a criminal statute of the State was held not to be an officer or employee of the county so as to be entitled to compensation for injury received in the performance of his duty as an officer of the State, which fact was held to be conclusive against the existence of any "causal relationship," as of employer and employee, so far as the county was concerned. A compensation award was therefore reversed. (Board of Supervisors of Rockingham Co. *v.* Lucas (1925), 128 S. E. 574.)

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WORKMEN'S COMPENSATION—DEPENDENCY—ABANDONED WIFE NOT SUPPORTED BY HUSBAND—*Johnson* v. *Republic Iron & Steel Co., Supreme Court of Alabama (October 20, 1924), 120 Southern Reporter, page 44.*—Curtis Johnson abandoned his wife about 10 years before his death, and had entered into a bigamous marriage with one Georgia, who upon his death claimed to be his widow. The evidence showed that the plaintiff, Ellen Johnson, and her husband, Curtis Johnson, lived apart during the 10 years, and that he contributed nothing toward her support. Compensation was denied the plaintiff by the circuit court, and an appeal was taken by certiorari, with a bill of exceptions. The claim of the plaintiff was that a widow "who has been wrongfully deserted by her deceased husband, and who was involuntarily living separate and apart from him at the time of his death, is entitled to receive compensation from his employer under the provisions of the act, even though he was not contributing to her support in any way at the time of his death." The supreme court said as to this contention:

We regret our inability to construe the statute as it must be construed to make appellant's claim of compensation effectual, or rather, we will say, the statute has been so framed as, very plainly, to exclude appellant in her circumstances from its benefits.

The only question presented is, What did the legislature intend when it adopted its concluding alternative, "unless it be shown that the husband was not in any way contributing to her support"?

Here, unfortunately for appellant's contention, words could hardly make it clearer that the legislature intended to make the fact that the husband, at the time of his injury or death, was not contributing to his wife's support a sufficient reason for denying to her any compensation under the act, and this without regard to whether at that time they were living together or apart.

The cases from other jurisdictions have contributed nothing to our consideration of the case in hand, for nowhere else, so far as we are informed, is there a statute like that of this State in the particular in question.

The judgment of the trial court denying compensation was therefore affirmed.

WORKMEN'S COMPENSATION—DEPENDENCY—ANNULMENT OF REMARRIAGE OF WIDOW—*Eureka Block Coal Co.* v. *Wells, Appellate Court of Indiana (May 21, 1925), 147 Northeastern Reporter, page 811.*—On January 30, 1922, Letitia Wells was awarded compensation as widow and sole dependent of James E. Wells, who lost his life as the result of an accident arising out of and in the course of his employment by the Eureka Block Coal Co. Compensation in the sum of $13.20 per week was paid until November 7, 1923. On November 9, 1923, plaintiff married one Charles McCormick. On December 12 she formally notified the company of her marriage, and on December 13 she commenced suit for the annulment of her marriage on the ground of fraud, the marriage being annulled on January 4, 1924. In the meantime plaintiff received the sum of $3.77 from employer for the two days from November 7 to the day of her marriage, and she on that day receipted for that sum and made settlement in final form.

After the annulment of the marriage plaintiff filed a petition with the industrial board, asking that she be reinstated as the dependent widow of James E. Wells, as of November 10, 1923. The board made an order restoring her to compensation as of that day, and the employer appealed.

Clause (e) of section 38 of the compensation act provides, among other things, that "the dependency of a widow * * * shall terminate with * * * her marriage subsequent to the death of the employee," and the employer contended that by reason of this provision the marriage, though voidable, "nevertheless was a marriage which terminated absolutely and permanently the dependency." The appellate court declined to concur in this view stating:

> Giving the provision referred to a broad and liberal construction, as we must, a marriage, within the meaning of the statute, is not a void or voidable marriage which may at once be annulled, but a valid and subsisting marriage.

The next question arising was whether or not the decree of annulment necessarily related back to the time of the marriage contract, and as to this the court on review was of the opinion that there existed respectable authority that judgments and decrees directly determining the status of parties are in that respect judgments in rem and "are evidence of the status which they determine, as to all persons, whether parties thereto or not," so that the question should be answered in the affirmative.

Defendants urgently contended that the receipt for compensation, as signed by the widow on December 12, constituted a defense to the action, but the court held that:

> It can not be said by appellant that by the alleged settlement with appellee it was misled to its disadvantage. Appellant merely paid

to appellee the balance due her under the original award to the date of the marriage. The reinstatement adds nothing to appellant's liability as fixed by the original award. Appellee's receipt, under the circumstances, was not conclusive of the facts recited therein.

Being of the further opinion that the industrial board had jurisdiction to hear the cause, the award was affirmed.

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WORKMEN'S COMPENSATION — DEPENDENCY — BENEFICIARY ADJUDGED INSANE—*Ex parte Gude & Co., Maddox* v. *Gude & Co., Supreme Court of Alabama (June 11, 1925), 105 Southern Reporter, page 657.*—The only question presented in this case was whether or not the right of the dependent wife of a deceased employee to compensation under the compensation law ceases upon her being adjudged insane and becoming an inmate of the State hospital for the insane subsequent to the death of her husband. The compensation act declares a wife "conclusively presumed" dependent. The legal dependency so declared is based upon status at the time of the injury or death, and compensation to a widow was held as continuing until the happening of some event specified in this statute, i. e., marriage or death.

Compensation to the widow was held by the supreme court as not ceasing upon her being committed to a public institution for the insane, section 7551 (d), Code of 1923, terminating compensation to a permanently disabled employee on his becoming an inmate of a public institution, being held to apply only to an injured employee without dependents.

It was further stated by the court as a general rule that "as a matter of public policy statutes will not be so construed, unless clearly so written, as to make continued payment of compensation dependent upon indigence after the right to compensation has attached. Such a rule would tend to encourage thriftlessness and pauperism." In conclusion the supreme court held that "continued compensation during the statutory period is not conditioned upon continued dependency," and "ceases only upon the events named in this statute."

The judgment of the lower court in favor of Minnie Maddox, suing by next friend, was therefore affirmed and writ of certiorari denied the defendant.

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WORKMEN'S COMPENSATION—DEPENDENCY—CHILD LIVING WITH ABANDONED OR SEPARATED WIFE—ERRONEOUS AWARD—REVIEW—*Johnson.* v. *Hardy-Burlingham Mining Co., Court of Appeals of Kentucky (November 28, 1924), 266 Southwestern Reporter, page 635.*—Lewis P. Johnson, employed as a workman in defendant's

coal mine, was injured on May 8, 1919, when a piece of slate fell upon him while at work in the mine, dying shortly thereafter. In 1912 Johnson had married the claimant, Bertha Johnson, and two years later there was a child. Johnson had then abandoned his wife and child, and about two years before his death he had married again, without securing a divorce from his first wife. The woman, known as Cora Johnson, filed an application for compensation, which was granted. About eight or nine months after the death Bertha Johnson heard of it, and for some months tried to collect "some small amounts of industrial insurance on the life of her deceased husband." More than a year later she made formal application to the workmen's compensation board for an allowance to her and her infant child as the sole dependents. The board discontinued the payments to Cora, dismissed the petition of Bertha on the ground that it was barred by the limitation of one year, and dismissed the claim of the infant child upon the additional ground that he was not a dependent minor under the act because he was not living with his deceased parent, "nor was he or had he ever been actually supported by the deceased." An appeal was taken by Bertha Johnson on behalf of herself and child.

The court of appeals on review expressed the views that the policy of the court was to construe the compensation act liberally, and that steps taken under the act would be upheld "if in substantial compliance with terms of the statute and effectual to fully protect interests of adverse parties."

The court referred to the statute, and decided that the provisions—

of section 4896 furnish the right of a true dependent under the act to obtain by substitution the unpaid compensation that may have been originally awarded to a supposed one, and that the provisions of section 4902 furnish the remedy for such a dependent to obtain the relief of substitution; and, since there is no limitation upon such remedy (except that it must be resorted to before the entire compensation is paid to the supposed dependent in the award as originally made), it may be adopted by the true and correct dependent at any time before full satisfaction.

Cora Johnson, not being the lawful wife, was not under the provisions of the act a lawful dependent, and the board had the right to suspend or end payments to her. It was also held clear that the board had the right to change its award by substituting the beneficiary entitled to compensation under the law, "nor can there be any doubt in our minds that such right to substitution is clearly provided for, provided the true dependent gives the written notice."

The formal written application to the board, with proper and due notice to the employer and the insurance carrier, by Bertha Johnson for substitution as the proper beneficiary, was held a substan-

tial application and sufficient to comply with the requirements of the statute as to notice.

Where there had been a divorce, the wife securing the custody of the children of the marriage, the Appellate Court of Indiana held that "if the assignment of the custody [of the children] to the wife extends to depriving the father of his claim to their services, then he can not be compelled to maintain them otherwise than in pursuance of some statutory regulation." It followed that an award of compensation to the children was reversed where the deceased father had been thus divorced, even though he had a short time before his death worked on his former wife's farm and made some small gifts to the children. (Western Indiana Gravel Co. *v.* Erwin (1925), 149 N. E. 185.)

In a Wisconsin case the divorce decree had been accompanied by an order permitting the father to visit his child at reasonable and proper times, with the obligation to pay $6 weekly for its support. On his death by compensable accident, the industrial commission made an award in the child's behalf as for total dependency. On appeal the circuit court modified the award, allowing for partial dependency only, and this was affirmed by the supreme court of the State, construing together the terms of the act and the provisions of the divorce decree. (Rohan Motor Co. *v.* Industrial Commission of Wisconsin (1925), 205 N. W. 930.)

See McGarry *v.* Industrial Commission, below.

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WORKMEN'S COMPENSATION—DEPENDENCY—CHILD LIVING WITH DIVORCED WIFE—REVIEW—POWERS OF INDUSTRIAL COMMISSION—*McGarry et al.* v. *Industrial Commission of Utah (January 21, 1925), 232 Pacific Reporter, page 1090.*—John Calvin Bradley, a minor, was awarded compensation as a dependent of his father, Delos Bradley, who died as a result of an accidental injury in the course of his employment at Park City, Utah, with the Kopp & McGarry Co. Alice Baker Bradley, mother of the minor, secured a divorce from Delos Bradley in November, 1919, the child being 4 years of age at that time, and shortly thereafter the father left their home in Idaho for parts unknown to his divorced wife. He assumed the name of Jack Wilson and was not heard of by his wife until his death. The commission, upon application for compensation, found the child wholly dependent and made an award accordingly. An appeal was taken and the supreme court in Same *v.* Same (63 Utah 81; 222 Pac. 592; see Bul. No. 391, p. 404) found the facts were insufficient to justify an award for total dependency, the commission being considered as having made the award upon the theory that dependency was conclusively presumed. The supreme court nullified the award and set it aside, suggesting, however, that "further evidence might establish a dependency under the last provision of the section referred to, which reads:

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.

After the decision of the supreme court the commission by resolution reopened the case with notice to the parties and proceeded to take further evidence. Plaintiff objected but was overruled, and evidence was heard in the State of Idaho, to which proceeding plaintiffs also objected. Upon a judgment again for claimant the company appealed for the second time. The supreme court in reviewing the record observed that—

The evidence so taken, among other things, tended to show that the minor was and had been in more or less destitute circumstances; that its mother had been unable to support herself and the child and that she had been compelled to obtain substantial assistance from the county for the child's support. Upon this evidence, which was not contradicted, together with the evidence taken at the former hearing, the commission again found that the minor was wholly dependent and awarded compensation accordingly.

The employer and insurance carrier contended that the industrial commission was without jurisdiction to reopen the case, and, further, had no jurisdiction to take testimony in Idaho. The supreme court held the commission to have jurisdiction to reopen the case, even though the statute provided that upon the hearing by the court "the court shall enter judgment either affirming or setting aside the award." The court said that if the plaintiff's contentions were upheld it would lead to lamentable results; that is, the commission "would be powerless to hear further evidence, even within the State of Utah, in which it has undoubted jurisdiction. It might be a case of unquestioned dependency and extreme hardship, but justice would fail because the commission made an honest mistake as to the extent of its jurisdiction." It was considered not the intention of the legislature to prevent the commission from reopening a case even after a supreme court decision as to a prior award..

However, the court ruled that the commission was without power to hear the evidence in Idaho against the plaintiff's objection.

Compiled Laws 1917, sections 7163–7177, inclusive, prescribed the method in civil actions and is exclusive as far as the authority of the commission is concerned. The taking of testimony in the State of Idaho in the manner complained of was beyond the jurisdiction of the commission, and there being no other evidence sufficient to sustain the award, it follows that the award should be annulled and set aside.

The court, in considering other questions, held that where a "mere infant, incapable of supporting himself and not competent either to claim or waive a right under the law, is abandoned by its father, whose duty under the law during his life was to support the child, such child, upon his father's death, within the purview of the Utah industrial act, becomes an actual dependent without regard to the question as to whether he has received or had the promise of support."

A further question was also considered by the court. The mother was given custody of the child by the divorce decree, and the duty of maintaining the child was in that way placed upon her. She was unable to do so completely, so that the county had helped her with contributions. The court said:

It can not be contended that such contribution by the county was a primary duty. The primary duty rested upon the parents, and to the extent that the mother was unable to support the child, after providing herself with adequate support, the child sustained a distinct loss in the death of its father. The amount of the loss, being dependent upon the amount the mother is able to contribute, is a matter within the jurisdiction of the commission to determine in accordance with the facts. The court is of opinion that this feature of the case should have been given consideration by the commission in determining the nature and extent of the dependency.

For the reason that the commission exceeded its jurisdiction in taking and hearing "evidence in the State of Idaho" the award was annulled and set aside.

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WORKMEN'S COMPENSATION — DEPENDENCY — DEGREE — SEASONAL EMPLOYMENT—*Lincoln Gas & Electric Light Co.* v. *Watkins, Supreme Court of Nebraska (June 12, 1925), 204 Northwestern Reporter, page 391.*—Kenneth Watkins, aged 20 years, employed by the Lincoln Gas & Electric Light Co., came in contact with an electric current August 1, 1924, as a result of which he was instantly killed. An award of compensation was granted to Mrs. Winnie Watkins, mother of deceased, from which award employer, insurance carrier, and claimant appealed.

Mrs. Watkins contended that she was within the class designated as "wholly dependent" (sec. 3045, Comp. St. 1922), and that she was entitled to $15 a week for 350 weeks instead of $8 a week as granted by the commissioner. The defendants conceded that deceased was killed by reason of an accident arising out of and in the scope of his employment, and that his mother was entitled to an award of some amount, but that she was but partially dependent, and entitled to only $2.88 a week for 350 weeks.

It appeared from the evidence that Mrs. Watkins and her son constituted the entire family, the husband and father having deserted Mrs. Watkins some 10 years before. Kenneth was her sole support, according to her testimony, though it appeared that in 1924 he had attended the State university, borrowing money to do so. At the summer vacation his employment with the defendant company began, and at the time of his death he had been working two months at a wage of $36 a week. It was the contention of the defendant that he intended to return to the university in the fall, but there was no

proof introduced on that issue. Defendants also contended that Kenneth's occupation was seasonal and came under section 3049, Compiled Statutes of 1922, which provides that in seasonal occupations the employee's weekly wages shall be taken to be one-fiftieth of the total wages which he earned from all occupations during the year.

The supreme court considered the argument ingenious, but held that the legislature did not intend to place on the word "seasonal" the construction for which the defendants contended. As applied to occupations and as used in section 3049 it was considered as referring to occupations which are governed by and ordinarily performed only in certain seasons of the year.

The compensation law provided that compensation should be based on the wages "at the time of the accident." The court, taking this fact into consideration, and reviewing the financial resources of the mother, found her wholly dependent within the terms of the compensation act, and, speaking through Mr. Justice Dean, said:

> We conclude that, in view of the record, Mrs. Watkins is entitled to compensation at the rate of $15 a week for 350 weeks from the date of the accident causing the injury. A review of the record discloses that, in respect of the defendants' privileged duty under the law, reasonable grounds for controversy at no time existed. It therefore follows that the defendants are also [liable] for "waiting time" as provided in section 3048, Compiled Statutes 1922. [Provides penalty for delinquent payments.]

The judgment of the district court was therefore reversed and remanded with directions.

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WORKMEN'S COMPENSATION—DEPENDENCY—MINOR CONTRIBUTING TO FAMILY FUND—EARNINGS—DUAL EMPLOYMENTS—*Standard Varnish Works et al.* v. *Industrial Accident Commission, Supreme Court of California (September 28, 1925), 239 Pacific Reporter, page 1067.*—Richard Minderman was a minor, 16 years of age, employed by the company named in its shipping department. About three weeks after his employment began he was killed in an elevator accident. There was no question that the accident arose out of and in the course of the employment. There was a conflict as to the basis of computation of earnings. During the previous year the boy had been working after school hours as a messenger for a telephone and telegraph company, receiving wages and a small additional amount by way of tips. The present employment was at the rate of $15 a week, about twice the amount of his former earnings. All his earnings were turned over to his mother, and, with other income, went into a fund for family expenses. The other members were the mother, a brother, and a sister, all contributing to the family income.

On a claim for partial dependency, the industrial accident commission found such dependency to exist and made an award. This was opposed on the ground that the "average annual earnings" contemplated by the statute were not properly computed. It was claimed that the present employment was for the vacation only, and would terminate with the opening of school. There was testimony, however, that this was not a settled matter, and the commission's conclusion that there was permanent employment at $15 a week was said by the court to be conclusive. It is an established rule that the earnings as of the time of the death of the deceased furnish the proper basis for an award. (Great Western Power Co. *v.* Industrial Accident Commission, 238 Pac. 662.)

Another question was as to the relation between the boy's contributions and the expense of his support. "It is settled that the deduction of an amount equivalent to the sum used in the minor's own support is proper and necessary." Such deduction having been made, "the result was to properly measure the amount of the average annual earnings devoted by the deceased to the support of his mother."

In making the deduction regard was had for contributions during the period of employment as a messenger, as well as for the present employment for the varnish works. It was objected that two such dissimilar employments could not be jointly considered in determining the contribution. An earlier decision in which the total amount received from coemployers was held to be the basis of a compensation award was referred to. (Western Metal Supply Co. *v.* Pillsbury, 172 Cal. 407, 156 Pac. 491; see Bull. No. 224, p. 237.) It was said to be readily apparent from the construction of the statute in the case cited that the statute "makes the amount devoted to the dependent the measure of the award and imposes the full burden on the death-causing employment."

All objections failing, the award was affirmed.

A district court of appeal of the same State affirmed an award made on account of the death of "an unmarried man," evidently not a minor, who made his home with his mother, though he was absent on account of his employment at the time of his death. He forwarded regular monthly sums to his mother in the amount of $50, which was also the sum paid monthly on a mortgage on the home. The father was also earning and contributing to the family support. It was held that the sum might properly be considered as rent for the home; though the court was of the opinion that a reasonable amount used for the purchase of "a home or permanent place of abode for the dependents is well within the purpose and intent" of the law. The industrial commission's finding of dependency was therefore sustained, and the award affirmed. (International Indemnity Co. *v.* Industrial Accident Commission (1925), 238 Pac. 1056.)

Quite similar conditions were involved in a Texas case in which a minor son, 19 years of age, was giving his father $50 monthly, which was applied

to the purchase of the family home, the father being in the receipt of $400 monthly as his earnings. The court held that "the purchase of a home was reasonably necessary to the support of the parents," and that "one is not rendered less a dependent by the fact that he is able to maintain himself without the assistance of the deceased workman." On a liberal construction partial dependence was indicated, and the trial court had erred in instructing to the contrary. (Jones *v.* Texas Employers' Insurance Assn. (1925), 268 S. W. 1004.)

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WORKMEN'S COMPENSATION—DEPENDENCY—MOTHER NOT ACTUALLY DEPENDENT—PRESUMPTIONS—TERM OF PAYMENTS—*Double* v. *Iowa-Nebraska Coal Co., Supreme Court of Iowa (December 11, 1924), 201 Northwestern Reporter, page 97.*—Harold Lager, minor son of the plaintiff Clara Double, sustained a personal injury on January 12, 1923, arising out of and in the course of his employment with the Iowa-Nebraska Coal Co., which resulted in his death on June 23, 1923. The employer paid the full amount of compensation to Lager from the time of his injury to his death. On September 20, 1924, Clara Double filed a petition for arbitration, alleging that she was the only dependent and sole survivor of the deceased employee. The arbitration committee found that she was not actually dependent upon her minor son at the time of the injury, but that under "the statutory conclusive presumption of dependency she was entitled as a parent to workmen's compensation at $10 per week from the date of the death of her son until December 21, 1924, at which time had he survived he would have attained his majority." The industrial commissioner confirmed the award and findings, and the district court on appeal entered a judgment affirming the commissioner. The plaintiff appealed, securing a reversal on the ground of an improper limitation of the award.

The supreme court, speaking through Mr. Justice De Graff, observed that:

The workmen's compensation act, within the scope of its operation, is exclusive. No rights are conferred and no benefits are derived therefrom, except as therein provided.

The question is squarely presented: Is the claimant, as mother of the decedent, entitled to compensation beyond the period of minority of the decedent? The statute does not expressly provide for the termination of such payment. Does the presumptive dependency of the mother control? The statute recognizes two kinds of dependency, actual and presumptive. We are not dealing with actual dependency, which is a question of fact. The dependency in the instant case is conclusively presumed, and arises by virtue of the statute.

Our legislature had the power to terminate the parent's compensation when a deceased minor son attained the age of 21. It did not so provide.

It is immaterial that the parent was not actually and in fact dependent upon the minor. The statute declares that the parent shall be conclusively presumed to be wholly dependent upon said minor at the time of the injury which caused his death.

The court did not view the right of compensation "as a vested right in the sense that upon death it passes to his heirs or personal representative." It was held, however, to be such a right that if accrued "could not be legally abridged by subsequent legislation."

The question in the case was not what the legislature "in its wisdom should have provided," but what it "has provided." It was not considered by the court to be a judicial function to question the legislative policy.

The claimant was held entitled to compensation at two-thirds of $15 per week for 300 weeks, less the 22 weeks' compensation paid the employee during his lifetime.

The judgment entered limiting the payment to the period of minority was reversed.

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WORKMEN'S COMPENSATION—DEPENDENCY—ORPHAN LIVING WITH GRANDFATHER—*Ex parte Cline, McCoy* v. *Cline, Supreme Court of Alabama (June 11, 1925), 105 Southern Reporter, page 686.*—Lennie Ross McCoy, jr., a child 6 years of age, was the grandson of R. J. McCoy, the deceased employee. The father of the child, and son of the deceased, died when the child was about 18 months of age. His mother entered into a contract in writing with the deceased employee and his wife by which they agreed to take, support, and educate him as their own child, and allow him to inherit "with their own children equally their estate." Thereafter the child was wholly dependent upon them for support until the grandfather's death. The question in the case was whether the child was a "child" or an "orphan" within the meaning of the compensation act, and can he take as an adopted child? From a judgment in favor of the infant the defendant petitioned it for certiorari.

The court went fully into the definition of the words "child" and "orphan" in its attempt to decide the actual status of the claimant in this case, and reached the conclusion that in view of the Code, sections 7553, 7554, 7559, 7596 (c), when a grandchild, made an orphan by the death of his father, becomes a member of the family of the grandfather, to be supported as one of his children and is entitled to inherit, he is within the listed dependents, having the status of actual dependent. "Orphan" was considered as applying to fatherless children. The court said:

A grandchild made an orphan by the loss of the parent of the blood of the ancestor is entitled to inherit directly from the ancestor upon

his decease. The term "child" is used in one of our statutes of distribution to include the orphaned grandchild.

We can scarcely conceive that legislators would include stepchildren, members of the family, while the orphaned grandchild, likewise a wholly dependent member of the family, is turned empty away. The humanities of the case, the causes giving birth to our compensation laws, forbid such construction.

Finding no error, the writ was denied and the judgment was affirmed.

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WORKMEN'S COMPENSATION—DEPENDENCY—WIFE BY VOID MARRIAGE—*Sanders* v. *Industrial Commission, Supreme Court of Utah (November 26, 1924), 230 Pacific Reporter, page 1026.*—O. R. Sanders, employed by the Utah Fuel Co., was killed in March, 1924, by reason of an accidental explosion arising out of or in the course of his employment. Ruby Clark Sanders applied for compensation as widow of O. R. Sanders. The commission denied compensation, and upon a request for a rehearing being refused, the plaintiff appealed for a review. It appeared that the claimant and a former husband had been divorced, the decree to become absolute six months after the date of granting on April 25, 1923. On June 16, 1923, according to a marriage certificate issued at Evanston, Wyo., the claimant and Sanders were married. They lived together thereafter at Castlegate, Utah, where Sanders worked. The supreme court pointed out that the marriage having taken place within the six months' period, the marriage was void in Utah.

Sanders was under neither legal nor moral obligation to support his alleged wife. Their relationship was adulterous, and this the parties were presumed to know when they contracted the void marriage. The workmen's compensation act does not create a right or impose a liability growing out of such illegal relationship.

The order of the commission denying compensation was therefore affirmed.

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WORKMEN'S COMPENSATION—DISABILITY—ANKYLOSIS OF INDEX FINGER—EARNING CAPACITY—*High* v. *Liberty Coal & Coke Co., Court of Appeals of Kentucky (December 16, 1924), 268 Southwestern Reporter, page 1095.*—W. H. High, employed by the defendant coal company, received an injury which produced a stiffness in the third joint of his index finger and for which he sought compensation. The workmen's compensation board found the finger to be 75 per cent stiff, and that claimant had not laid off because of the injury nor had he been disabled. The evidence showed that he earned as much after as before the accident. A Doctor Nuckols testified that claimant had ankylosis of the joint, and that he estimated his disability at 10

weeks. The board awarded compensation in the sum of $12 a week for 11 weeks and the employer appealed. The circuit court set aside the award and the claimant appealed.

Section 4899, Kentucky Statutes, provided:

For ankylosis (total stiffness of) or contractures (due to sears or injuries), which makes the fingers more than useless, the same number of weeks apply to such finger or fingers (not thumb) as given above.

As the evidence did not place the case within this provision, the circuit court held claimant not entitled to compensation; but, as the court of appeals held, "the statute does not stop with the specific injuries," but provides:

In all other cases of permanent partial disability, including any disfigurement which will impair the future usefulness or occupational opportunities of the injured employee, compensation shall be determined according to the percentage of disability, taking into account, among other things, any previous disability, the nature of the physical injury or disfigurement, the occupation of the injured employee, and age at the time of injury; the compensation paid shall be 65 per cent of the average weekly earnings * * *.

As to whether the case came under this last provision the court said:

It was the purpose of that provision to provide compensation in all cases other than those specified, for any permanent partial disability that would impair the future usefulness or occupational opportunities of the injured employee. Therefore, the fact that an injured workman is employed at the same work and the same wages after the injury as before will not disentitle him to compensation if his physical efficiency has been substantially impaired. There being some evidence tending to show that appellant's future usefulness or occupational opportunities were impaired, the question of compensation was for the workmen's compensation board, and its finding should be affirmed by the circuit court.

The judgment was therefore reversed and the case remanded.

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WORKMEN'S COMPENSATION—EMPLOYEE—CHIEF STOCKHOLDER OF CORPORATION—*Leigh Aitchison (Inc.)* v. *Industrial Commission, Supreme Court of Wisconsin (November 17, 1925), 205 Northwestern Reporter, page 806.*—Leigh Aitchison organized Leigh Aitchison (Inc.) in the year 1919, with authorized capital of 250 shares, of which 127 were issued to Leigh Aitchison, 2 shares to her sister, 1 to a Miss Sanborn, and 1 to a Miss Orgeich. Mrs. Aitchison was the president and manager of the business, determining its policy, doing the buying, hiring and discharging the employees, and fully controlling the business. Her sister was vice president, without duties or profits, and Miss Orgeich was secretary and employed as stenographer, bookkeeper, and office assistant. Mrs. Aitchison's salary was fixed at $3,600, and later increased to $5,000.

The company had never paid any dividends, and the balance of the stock was never issued. While on an errand in connection with the business, Mrs. Aitchison was injured by slipping upon the sidewalk. She applied for compensation and the industrial commission found she was an employee of Leigh Aitchison (Inc.), and made a temporary award from which the insurance carrier appealed.

The supreme court considered first whether Leigh Aitchison was at the time of her injury an employee of Leigh Aitchison (Inc.), and held that a party owning practically all the stock and entitled to practically all its earnings, who has complete authority over her own employment, does not sustain the relation of "employee" with the company so as to come within the purview of the workmen's compensation act. It was contended that as the situation stood the question was one of fact and not of law, and therefore the finding of the commission was conclusive. The supreme court observed that although the facts were undisputed, it was only by the application of "established legal principles to those facts that a conclusion can be reached as to whether or not Mrs. Aitchison sustained the relation of employee."

It being considered clearly a question of law the judgment was reversed, with directions to enter a judgment setting aside the award of the industrial commission.

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WORKMEN'S COMPENSATION—"EMPLOYEE"—PARTNER—*Ardmore Paint & Oil Products Co.* v. *State Industrial Commission, Supreme Court of Oklahoma (March 17, 1925), 234 Pacific Reporter, page 582.*—Willis J. Stoneburner, employed by the company named, a partnership, was engaged in a hazardous occupation, within the meaning of the statute, and while so employed sustained an accidental injury. The industrial commission awarded compensation for temporary total disability at the rate of $11.54 per week from October 4, 1922, to April 1, 1923, being a period of 25 weeks and 4 days, and the sum of $560 reimbursement for medical expenses. The commission further ordered that the cause should be continued to determine the extent of permanent disability and disfigurement. The employer and insurance carrier appealed on the ground that "there was not such employment here as contemplated by the workmen's compensation law, and that the act in question was not designed for the purpose of protecting an individual situated as was Mr. Stoneburner." It appeared that Stoneburner was practically, if not absolutely, in charge of a small business owned by himself and wife, and where the wife had nothing to do with the operation and management of the business.

The supreme court, on reviewing the record, referred to the case of Ohio Drilling Co. *v.* State Industrial Commission et al. (86 Okla.

139, 207 Pac. 312, 25 A. L. R. 367), decided by the same court, in which it was held that a partner injured in partnership business was entitled to compensation as an "employee." On the authority of this case the order of the industrial commission granting compensation was affirmed.

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WORKMEN'S COMPENSATION—"EMPLOYEE"—STATUS OF BENEFICIARY—*United States* v. *Griffith, Court of Appeals of the District of Columbia (December 1, 1924), Washington Law Reporter, page 34.*—George H. Van Kirk had been, for some years prior to July 28, 1920, a resident of the District of Columbia and an employee of the War Department. On that date, because of disabilities, he filed with the United States Employees' Compensation Commission an application for disability compensation under the act of 1916 (39 Stat. 742). He was awarded, on October 22, 1920, disability compensation at the rate of $66.67 per month, being a rate based upon the salary which he was receiving at the time of his disability.

Van Kirk, after being awarded compensation, was selected to serve as a grand juror in this District. The defendants in this case were not aware of the fact that Van Kirk was a Government employee until May 12, 1921, and on May 16, 1921, they filed a plea in abatement alleging that he was not competent or qualified to act as a grand juror in the case, under sections 215 and 217, District Code. The Supreme Court of the District of Columbia, holding the criminal court, sustained a plea in abatement and quashed the indictment, from which the United States appealed. The Court of Appeals of the District of Columbia, in reviewing the record, observed that the compensation act provides that the United States shall pay compensation for the disability of an employee resulting from a personal injury sustained in the performance of duty, and that the compensation commission retains a certain measure of control as to the conduct of the employee. In the course of the opinion, speaking through Mr. Chief Justice Martin, the court said:

> It thus appears that at the time in question the Government was paying the juror a monthly stipend as employee's compensation, reserving the authority to control his conduct in certain particulars and with power to increase, diminish, or terminate the compensation at discretion. In our opinion that relationship, whatever be the technical name which may most narrowly describe it, did in effect constitute the juror an employee of the United States within the sense in which that term is here used.

The decision in the case of Block *v.* State, 100 Ind. 357, 362, was quoted by the court as authority for the conclusion that a United States employee is not qualified to serve as a member of the petit

jury in the trial of criminal cases in the District of Columbia, and that a challenge seasonably made by the accused upon that ground will be sustained. The question then arises whether such an employee is likewise disqualified to serve as a grand juror in the District. In answer to this the court of appeals held that the term "juror" is held to include alike both petit and grand jurors, and that objections to the qualifications of grand jurors under circumstances such as these may be made by a plea in abatement, citing cases.

The judgment of the trial court in sustaining the plea in abatement was therefore affirmed.

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WORKMEN'S COMPENSATION—EMPLOYEE—"USUAL COURSE OF TRADE"—*Olsen's Case, Supreme Judicial Court of Massachusetts (April 17, 1925), 147 Northeastern Reporter, page 350.*—George Olsen was employed September 11, 1923, by the T. E. Reed Co., a corporation engaged in the business of stevedoring, teaming, lightering, and operating barges. From September 11 to September 20 he worked about the premises of the company. From September 20 to October 8 he worked most of the time painting the residence of T. E. Reed, and while so engaged received an injury for which he sought compensation. From a decree of the industrial accident board awarding compensation the insurance carrier appealed. The only question in the case was whether or not the employment was in the usual course of the trade or business of the T. E. Reed Co. The definition of an employee under the compensation act includes every person in the service of another, under any contract of hire, expressed or implied, "except one whose employment is not in the usual course of the trade, business profession, or occupation of his employer." The court observed that an employee may be in the employment of the insured, but he is not entitled to compensation if at the time of the injury he was not engaged in the usual trade, business, or occupation of the employer. The house upon which the employee was working when injured was the property and residence of T. E. Reed, the president and general manager of the company. The T. E. Reed Co. "was not engaged in the business of painting houses."

The supreme judicial court was of the opinion that the evidence failed to show that Olsen was employed in the usual and ordinary business of the company as distinguished from occasional and incidental work, and for this reason denied him a recovery.

The decree was therefore reversed and a decree entered for the insurance carrier.

WORKMEN'S COMPENSATION—EMPLOYEE—WORKMEN'S ASSOCIATIONS—*Dixon Casing Crew* v. *State Industrial Commission, Supreme Court of Oklahoma (April 21, 1925), 235 Pacific Reporter, page 605.*—W. A. Dixon and four others, styling themselves the Dixon Casing Crew, were engaged in running and pulling casing for the Gruver Drilling Co., being paid $55 a day for their joint labor. The men divided the proceeds equally among themselves, except that Dixon was paid 10 per cent for collecting and keeping the time book. On the 16th day of June, 1924, Dixon suffered an injury for which he claimed compensation. The commission made its findings that Dixon was an employee of the Dixon Casing Crew, that the casing crew and its insurance carrier, the Federal Surety Co., were liable for the compensation, and further that Dixon was not an employee of the Gruver Drilling Co. An appeal was taken to the supreme court.

Paragraph 4, section 2, chapter 61, provided in part:

Employee means * * * and shall include workmen associating themselves together under an agreement for performance of a particular piece of work, in which event such persons so associating themselves together shall be deemed employees of the person having the work executed.

The supreme court was of the opinion that the legislature had in mind "who was liable when several individuals associated themselves" under such an agreement as this one, and whether such an association was a partnership, and, if such, "could a copartner recover for an injury against the association while engaged in such employment." The Gruver Drilling Co. employed the Dixon Casing Crew, paid a certain wage to it, and the work was done for the Gruver Co. In conclusion the supreme court stated:

Under the evidence, this case involves the construction of a statute only, and, it being clear that Dixon was one of the associate members who undertook, together with his other associates, to perform work and labor for the Gruver Drilling Co. for hire, it therefore created the relation of employer and employee between the Gruver Drilling Co. and the associate members of the Dixon Casing Crew. Dixon clearly was performing work and labor within the definition of the statute for the Gruver Drilling Co., and was not within the definition of an employer and employee as between the Dixon Casing Crew and himself, as defined by the said act.

The order and judgment was therefore reversed and cause remanded for further proceedings.

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WORKMEN'S COMPENSATION—EMPLOYER—LESSOR—FAILURE TO INSURE—CONTRACTOR—*Industrial Commission et al.* v. *Hammond, Supreme Court of Colorado (June 1, 1925), 236 Pacific Reporter, page 1006.*—Walter J. May was employed by one Rathbun to haul logs

at $4 per thousand and to haul lumber from a sawmill to the railroad cars, using his own team and wagon. B. J. Hammond owned the sawmill, which he leased to Rathbun, including machinery, tools, and equipment, on August 15, 1922. The lease was for one year, and by its terms Rathbun agreed to produce 300,000 feet of lumber from the mill and Hammond agreed to pay charges due the Government, and was to receive as rent one-sixth of the finished product or one-sixth of the net proceeds. On November 2, 1922, May met with an accident while engaged in the course of his employment, receiving injuries from which he died. Neither Rathbun nor Hammond carried industrial insurance. Proceedings were instituted against them by the deceased employee's widow on behalf of herself and children, and an award obtained. Hammond took the cause to the district court, where the findings and award were set aside as to him, and a writ of error was prosecuted by the commission to the supreme court.

The compensation act (sec. 16) provides that every employer of four or more employees engaged in a common employment should be conclusively presumed to have accepted the provisions of the act unless he should have filed a notice to the contrary, or had rejected the act in conformity with the provisions for so doing. Section 27 provides that if an employer subject to the act carries no insurance and one of his employees who has not rejected the act is killed or injured compensation may be claimed, and in such case "the amounts of compensation or benefits provided in this act shall be increased 50 per cent." This same section further provides the payment of the present value of the award to a trustee or that a bond to secure payment be given, and that on failure of the employer to do so the award is to have the same effect as a judgment of the district court if filed in the office of the clerk in the district court and recorded in the judgment book and judgment docket.

Section 49 of the act provides that a lessor shall be construed to be an employer as defined in the act, irrespective of the number of employees, and shall be entitled to recover the cost of such insurance from the lessee, sublessee, or contractor.

The commission found that May was employed by Rathbun; that his death was caused by an accident arising out of and in the course of his employment; that the widow and children were sole dependents; that Rathbun was lessee; that neither lessee nor lessor carried insurance, and that Rathbun legally came under the provisions of the act. The compensation allowed by the commission was increased 50 per cent on account of the failure of the lessor and lessee to carry insurance, and the medical, surgical, hospital, and undertaker's claims were likewise increased 50 per cent. It was further ordered that the lessor and lessee execute a bond for compliance with the

order or pay to the trustee the present value of the compensation award.

It was contended that sections 16, 27, and 49 of the act were unconstitutional, and it was perhaps on this view that Hammond was released from payment. The supreme court, however, disagreed, saying:

As similar statutes have repeatedly been declared constitutional, and as counsel for defendant in error seems to attach little importance to this contention, and presents no new reason for his position, we feel it unnecessary to examine it in detail. We find nothing in said sections in conflict with the constitution.

It was next contended that the evidence did not support the finding, but the supreme court held otherwise, observing that, "in view of the fact that Hammond's liability, if any, is fixed by said section 49, irrespective of the number of employees, the question is immaterial."

That part of the findings directly requiring employers to give bond under section 27 was held not objectionable because the amendment authorizing the bond was not passed until after the claim accrued, such provisions relating to remedies only, and merely providing a way to escape immediate payment if the employer so chooses.

The defendant claimed that under section 16 the act was applied to him because of his failure to file notice of his election not to accept, to which the court said: "The legislature might have made the statute mandatory. Defendant in error is merely given the privilege of escaping its provision by filing a notice."

The act of leasing a sawmill and the equipment for one-sixth of the finished product or net proceeds was considered by the court as constituting "operating" or "conducting" the business within the compensation act.

The principal contention of the defendant was that May was not an employee but an independent contractor, and as such was not subject to the terms of the compensation act. The several tests of the relation of master and servant were discussed by the court, which concluded that "where the employment is general, as opposed to one for the completion of a given task according to plan, price, and terms agreed upon, the relation of master and servant is presumed, in the absence of proof to the contrary."

The supreme court considered it fair to conclude that as May gave all his time to the work that it was general, and that the contract merely contemplated labor on the job, not its completion, with payment by the piece, and not a lump sum for the task. "May was then a servant, not a contractor, and the statute covers that service."

The supreme court reversed the judgment of the district court and remanded the cause with directions to affirm the award of the commission except as to the 50 per cent added by it to the medical, surgical, hospital, and undertaker's claims, which portion of the award was set aside as not being "compensation or benefits" subject to increase by the terms of the act.

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WORKMEN'S COMPENSATION—EMPLOYERS' LIABILITY—EXCLUSIVE REMEDY—CASUAL EMPLOYMENT—*Workman* v. *Endriss, Supreme Court of Minnesota (July 10, 1925), 204 Northwestern Reporter, page 641.*—Herman Endriss was engaged in business under the name of Peerless Scale Co., and in the course thereof had on numerous occasions employed one Carter to do repair work. The business was the placing and operating of automatic machines, such as weighing machines and gum and other vending machines. Frequent repairs were necessary to keep these machines in proper working order, and defendant had employed the plaintiff, Frank Workman, to do this, as Carter was unable to go. On January 20, 1922, plaintiff and defendant started on a trip in defendant's automobile, the defendant driving. They visited some machines in Minneapolis and other places, the plaintiff repairing those needing attention. While traveling toward Minneapolis over an icy and rutty road the automobile was overturned, causing injuries for which the plaintiff sought compensation. From a directed verdict and judgment for the defendant in a suit at law for damages plaintiff appealed from an order denying a new trial.

The trial court had held that the sole relief was under the compensation act, and the supreme court stated that it "clearly appears that the injuries arose out of and in the course of the employment within the meaning of the compensation act." As to the question whether or not the plaintiff's employment was casual, the supreme court held that:

Although plaintiff's employment may have been casual, it was in the usual course of the business of his employer, and he was therefore within the compensation act.

The order denying new trial was therefore affirmed.

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WORKMEN'S COMPENSATION—EMPLOYERS' LIABILITY—JURISDICTION—ACCIDENTAL INJURY—DISEASE—PHOSPHORUS POISONING—*Victory Sparkler & Specialty Co.* v. *Francks, Court of Appeals of Maryland (February 12, 1925), 128 Atlantic Reporter, page 635.*—Catherine R. Francks, employed by the Victory Sparkler & Specialty Co. in the making of fireworks at its plant at Elkton, Md., contracted

phosphorus poisoning, resulting in various surgical operations and serious physical injury and disfigurement. She brought an action by her father as next friend for damages. The defendant's demurrer, claiming operation under the State compensation act, was overruled, and after verdict and judgment for the plaintiff in the amount of $22,500, defendant appealed from the adverse ruling on the demurrer.

On appeal the company contended that it was an employer engaged in extrahazardous occupation within the State compensation law and that it was insured under this act, by reason of which no other liability attached than that provided thereby.

The pleadings raised two legal questions, one as to whether the employer was liable at common law if the injury was not compensable under the terms of the compensation act, and the other as to whether or not the disease of phosphorus poisoning was an injury outside of the purview of the act. The lower court answered both of these inquiries in the affirmative.

In the appeal attention was called to the provision that the employments covered by the act "are hereby withdrawn from private controversy," giving benefits under the compensation act without question of fault "to the exclusion of every other remedy, except as provided in this act." The employer was found to have fulfilled all its obligations, and the girl was its employee, accepting the compensation act "as a statutory term of her employment when she became the servant of the appellant."

The question was considered as to whether or not the act is restricted "to that distinct and separate class of injuries arising from accidents," and whether with respect to other injuries from any other cause the common-law remedies exist against the employer; but "this theory of the statute is at once confronted by the salient purpose of the act to put an end to private controversy and to litigation. It splits apart the field of negligence in hazardous employments, and makes futile the law's pronouncement that it is the exclusive remedy for every phase of extrahazardous employment, except as by its own terms specified." As the term "injury" is used it is said to cover "every injury which could be suffered by any worker in the course and arising out of the employment for which there was then a subsisting right of action."

The question was a new one before the court of appeals, and taking up the subject of the nature of the injury, the court said:

An occupation or industry disease is one which arises from causes incident to the profession or labor of the party's occupation or calling. It has its origin in the inherent nature or mode of work of the profession or industry, and it is the usual result of concomitant. If, therefore, a disease is not a customary or natural result of the pro-

fession or industry per se, but is the consequence of some extrinsic condition or independent agency, the disease or injury can not be imputed to the occupation or industry, and is in no accurate sense an occupation or industry disease. In this case the occupation of the girl as an employee in a department of a manufactory of fireworks was simply a condition of her injury, whose cause was the definite negligence charged against the employer. The most that is warranted to be inferred from the allegations of fact in the declaration is that the phosphorus poisoning alleged was the gradual result of the negligence of the employer. As this negligence was a breach of duty to her, it was not to be foreseen or expected by the worker as something which would occur in the course of her employment. The fact that she continued at her place of labor, in the doing of her common and regular task, makes it clear that the phosphorus poisoning happened without her design or expectation, and so her injury was accidental. It was by chance that employer did not use due care, and by chance that the vapor of phosphorus was where its noxious foreign particles could be inhaled by the girl. It was by chance that the inspired air carried these particles into her system, sickening her, and causing a necrosis of the jaw after fortuitously finding a lesion. The injury thus inflicted upon her body was accidental by every test of the word, and its accidental nature is not lost by calling the consequential results a disease.

Neither the gradual development of the disability nor the length of time intervening between the reception of the poisonous substance and its first manifestation were held to change the nature of the injury.

The phosphorous poisoning of the employee as described in the declaration was therefore not a disease incident to the industry, but was an injury in causal connection with her employment, within the meaning of the act defining injury to "mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally result therefrom."

It was noted that the use of the terms "injury," "accident," "personal injury," "injury by accident," and "occurrence of the injury" militates against special restriction being implied by the law.

It will be observed that the statutory definition of a compensable injury under the Maryland act is not that it is an "accident," or that it is an injury "by accident," but that it must be "accidental injuries." The difference is important, as it marks the divergence between the thing or the event (i. e., accident) and a quality or a condition (i. e., accidental) of that thing or event.

The judgment for damages was accordingly reversed, but on a motion for a modification of this judgment, in view of the newly alleged fact that at the time of the employment Miss Francks was under 18 years, the question arose as to the exemption of the case from the operation of the compensation act, it being argued that

the case should be remanded "with leave to amend her declaration, so as to avail herself of any other different cause of action which she may have."

The court of appeals remanded the case with costs to the appellant and with leave to the appellee to amend her declaration and have a new trial thereupon, but the case was afterwards compromised.

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WORKMEN'S COMPENSATION—EMPLOYER'S LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—OILER IN YARD—*Stone* v. *New York Central Railroad, Supreme Court of New York, Appellate Division (January 7, 1925), 207 New York Supplement, page 353.*—Michael Stone employed by the defendant railroad company, was engaged in the work of greasing or lubricating engines as they were about to start on their trips. His duty applied to both interstate and intrastate engines. One morning, before actually beginning to grease an engine, his hands becoming soiled by the grease he took a quantity of waste to clean them. The waste had a piece of wire in it which cut one of his fingers. He continued work and later his finger became infected, resulting in a more serious injury than at the time seemed apparent. He brought an action under the workmen's compensation law of the State for compensation for personal injuries received, and from an award of compensation the employer appealed.

The question arising was whether the employee was engaged in interstate or intrastate commerce. If he was engaged in interstate commerce he could not recover, as his remedy would be under the Federal employers' liability act. The supreme court said:

In the present case claimant had not yet applied the dope to any particular engine, but that ground of distinction seems unimportant. He was engaged in the preparatory work, which had reference to both classes of commerce. It is not possible to separate these necessary acts of preparation with reference to the two kinds of commerce. Part of the dope in the pails could not be apportioned to one commerce and part to another. It was for use, and was to be used, in both commerces.

Where the work being done is so closely related to interstate commerce as to be practically a part of it, it is deemed to be work in that kind of commerce. (Pedersen *v.* D. L. & W. R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648.)

The court quoted with approval from the United States Supreme Court in the case of Philadelphia & Reading Ry. Co. *v.* Polk (256 U. S. 332, 41 Sup. Ct. 518), in which the court said, "It is the declaration of the cases that, if there is an element of interstate commerce in a traffic or employment, it determines the remedy of the employee."

The court considering the character of the work of the plaintiff as being such, it accordingly reversed the award and dismissed the claim.

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WORKMEN'S COMPENSATION—INDEPENDENT CONTRACTOR—FAILURE TO INSURE—VIOLATION OF STATUTORY DUTY—*Sherlock* v. *Sherlock*, *Supreme Court of Nebraska* (*December 31, 1924*), *201 Northwestern Reporter*, *page 645*.—Peter W. Sherlock, jr., brought an action against Peter W. Sherlock, sr., and the Richardson Drug Co. for compensation for injuries received out of and in the course of his employment as a painter. The defendant Sherlock agreed to paint the exterior of the corporation's building for $135, and "to hold it harmless in the event of an accident to himself or to any of his employees." As a consequence of the agreement the corporation took out no insurance and did not require the defendant Sherlock to do so. The latter did not procure any insurance, but employed the plaintiff as painter at $29.70 a week. While the plaintiff was engaged in his work on the exterior of the building the scaffolding gave way, and in the resulting fall he was severely injured. The compensation commissioner awarded the plaintiff $15 a week and an attorney's fee of $250, from which award only the corporation appealed.

The supreme court construed the statute to create a liability for compensation for a failure to procure insurance for the protection of workmen. The statute provided in part:

Any person, firm, or corporation creating or carrying into operation any scheme, artifice, or device to enable him, them, or it to execute work without being responsible to the workmen for the provisions of this article, shall be included in the term "employer," and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for.

The court in discussing this provision said:

The terms "any scheme, artifice, or device," as they are thus used, do not necessarily imply active fraud or evil design. Anyone resorting to such means under the circumstances described in the legislation on this subject may be included within the term "employer."

The following obligation was entered into by the defendant Sherlock:

I agree to hold the Richardson Drug Co. harmless in case of any accident to myself or employees.

The supreme court was of the opinion that this could reasonably and fairly be considered a "device" within the statute, "if the corporation disregarded a statutory duty to require its independent contractor to procure compensation insurance." The corporation

was considered as an employer subject to the compensation law despite the contentions of the defendant corporation that work such as painting was not in the usual course of the trade. The court said:

Under a liberal construction of the workmen's compensation law the work in which the plaintiff was engaged when injured was performed "in the usual course of the trade, business, profession, or occupation" of the corporation. In that situation it failed to require defendant Sherlock to procure insurance for plaintiff's protection, and joined the independent contractor in a device to escape liability for compensation of the injured workman. Within the meaning of the law both defendants are liable to plaintiff for compensation.

The judgment was accordingly affirmed.

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WORKMEN'S COMPENSATION—INJURY—MENTAL DISEASE—"NATURAL RESULT"—*Bramble* v. *Shields*, *Court of Appeals of Maryland* (*December 14, 1924*), *127 Atlantic Reporter*, *page 44*.—William S. Shields, employed by John T. Bramble, was injured on June 27, 1922, when a trench in which he was working caved in. The attending physician reported that "both bones of his right leg were fractured, and that there were lacerations upon the entire body, including laceration at left groin about 7 inches long, and a fracture of the fifth lumbar vertebra." After four weeks in the hospital he was removed to his home, where his leg was in a cast for four weeks longer. Shields worried about his condition, and according to Doctor Jamison, his attending physician, "his mind began to get bad six weeks after he returned home," and "it continued to get worse all the time until he was taken to Mt. Hope, on February 28, 1923." Shortly after his return home from the hospital he began to "insist that his spinal cord was decaying." Although apparently recovering fully, Shields did no work after the accident. The X ray disclosed no injury to the back, and the doctors assumed that the pains he complained of were "delusions, and that his fear that his spinal cord was decaying was an obsession."

The industrial accident commission found him temporarily totally incapacitated, and awarded compensation at the rate of $8 per week from July 1, 1922. In November, 1922, two doctors reported to the employer that they had examined Shields and did not find any results in his back from the injury sustained in the accident, and that "he is suffering from neurasthenia, due to constantly thinking that he will not get well." On January 3, 1923, a final settlement receipt was filed with the commission, according to law, signed by Shields and dated December 29, 1922.

On April 28, 1923, Mrs. William S. Shields, dependent wife of the injured employee, filed a petition claiming that Shields was

mentally incapacitated when he signed the settlement receipt and that his mental condition "was a direct result of the injury." She asked for a further hearing and that the receipt be set aside.

The hearing being granted and evidence being submitted, the commission passed an order declaring "the settlement receipt null and void, and directing a further hearing on the question of an award." At this hearing the commission ordered "that payment of compensation * * * cease as of December 22, 1922." Claimant appealed, and on the trial by jury found that the mental disease was the natural result of the injuries received and that Shields was permanently totally disabled. A judgment was entered upon the verdict, reversing the order of the commission and remanding the case to the commission "to the end that it pass an order or orders awarding the claimant such sum per week as is provided by law during permanent total disability, but not to exceed in the aggregate the sum of $5,000." The defendant appealed.

The contention of the defendant was that the word "naturally" must be held "to mean 'according to the usual course of things,' in the sense of something to be contemplated or expected," and several cases were cited in support of the contention. The court of appeals, speaking through Mr. Justice Adkins, said:

But in cases arising under the workmen's compensation law the question of negligence is excluded, and with it the rule as to reasonable and probable consequence would also be excluded, if such rule were applicable here. The only test is: Did the accidental injury arise out of and in the course of employment? If it did, it makes no difference whether it was a normal or abnormal occurrence, and so with "any such disease or infection as may naturally result therefrom." It can make no difference whether the results are usual or unusual, if there is a direct causal connection between the injury and the disease, so that the disease is directly attributable to the injury.

Other exceptions being overruled or otherwise disposed of, the court of appeals affirmed the judgment.

The Supreme Court of Oklahoma held that where a neurasthenic state resulted from industrial accident, it would be compensable; but where there was an actual earning capacity, demonstrated by employment in another vocation, compensation as for total disability should not be awarded, but an amount reflecting the wage loss. (Rialto Lead & Zinc Co. *v.* State Industrial Com. (1925), 240 Pac. 96.)

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WORKMEN'S COMPENSATION—INJURY—PREEXISTING DISEASE—APPORTIONMENT OF AWARD—*B. F. Avery & Sons* v. *Carter, Court of Appeals of Kentucky (November 14, 1924), 266 Southwestern Reporter, page 50.*—C. Harvey Carter, employee of B. F. Avery & Sons, was injured on May 27, 1921, by some molten iron accidentally falling upon his foot and burning the top of the left great toe. The acci-

dent arose out of and in the course of his employment, and its proximate results were conceded to be compensable under the compensation act. A nurse rendered first-aid treatment, but after that time Carter took care of the burn, with the help of his sister. The wound did not heal, and on January 7, 1922, Carter went to a physician, who discovered that infection had set in. The toe was treated by the physician, but a gangrenous condition developed, and on March 10, 1922, Carter died. It was shown by the evidence that Carter had sustained a great number of such accidents and had treated them at home by applying the usual remedies of salves, etc. Carter's sister made application for compensation, but was opposed by the employer, who contended that Carter's death was due to his neglect and failure to submit to proper medical treatment, that the infection of the parts was not the proximate result of the burn, and that Carter died from a preexisting disease, namely, diabetes. Compensation was awarded and the employer appealed.

The court of appeals held that under the workmen's compensation act neither the circuit court nor the court of appeals could reverse the finding of the industrial board on the issue of proximate cause of injury and ensuing death, if the finding was supported by substantial evidence. The finding of the commission that Carter was not so unreasonable in not consulting a physician that the claim could be barred on that ground was held warranted by the evidence. It was in evidence that both the preexisting disease and the accident caused the death, and as to the computation of the compensation the court of appeals stated that it "should be apportioned according to contribution of each, as in the case of a mere disability of employee."

Carter had suffered at various times with the disease and had been placed upon a diet on each occasion, and some time just after the accident the same conditions appeared, and "a short while before his death he had the symptoms of a fatal stage of that disease." The court said:

> The board found that his death was the result of the injury and did not find that the preexisting disease contributed to it, and therefore under the rule supra that finding should be accepted as conclusive. However, we are not inclined to adopt that contention for two reasons: The first being that the finding itself does not exclude the prior existing disease as a proximate causal factor in producing the death, and secondly, such a finding, if it had been made was unsupported by any evidence, since we have seen that all the evidence upon the subject was that the death was proximately contributed to by both the prior existing disease and the accident.

The court of appeals, being of the opinion that the compensation should have been apportioned, reversed the judgment with directions to make a new award.

In contrast with the above is the attitude of the Court of Appeals of Maryland, in affirming a judgment sustaining a judgment for the payment of continued benefits in the case of a man whose disability was said to be abnormally prolonged on account of his diseased condition. The court said that "it has been established that, when disease or infection is so set in motion or aggravated by an injury that disabilities result which would not otherwise have occurred, such disabilities are to be treated as results of the injury." To the insistence that a prolongation of disability beyond the natural results of the injury itself should be regarded as "the result of the infection rather than of the injury," it was said that: "This, it seems to us, could never be a valid argument in a case in which there is evidence sufficient for a finding of fact that the disease or infection was previously inactive, and was made disabling only by the intervention of the injury. * * * It must follow that the prolongation of disability by that activity is within the results of the injury." (Dickson Construction & Repair Co. *v.* Beasley (1924), 126 Atl. 907.)

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WORKMEN'S COMPENSATION—INJURY—RECURRENCE IN SUBSEQUENT EMPLOYMENT—*Geary's Case, Supreme Judicial Court of Massachusetts (June 27, 1925), 148 Northeastern Reporter, page 440.*—Joseph W. Geary, while working for Chester H. Norwood, on October 23, 1922, received a sacroiliac strain from lifting lumber. He was totally incapacitated from November 18, 1922, to January 11, 1923, compensation for that time being duly awarded by a single member of the industrial accident board, and paid by the insurance carrier. On January 11, 1923, Geary commenced working for Edward S. Griffin, and after working three days at intervals between January 11 and January 20, 1923, he felt the same kink at the same place in his back when he reached down to pick up a heavy stick, as a result of which he ceased work and made claim against both insurance carriers. An award of compensation was affirmed by the superior court and the Globe Indemnity Co., insurer of the first employer, appealed. The member of the industrial board found that "the occurrence of January 20, 1923, was not a new injury, but merely a recurrence of the injury of October 23, 1922," and that the Globe Indemnity Co. was liable for compensation at the rate of $16 per week. The supreme judicial court was of the opinion that the evidence warranted a finding "that there was a causal connection between the employee's condition on and after January 20, 1923, and the original injury," and that the finding of the board was conclusive. In conclusion the court held that:

The insurer of the first employer is liable for a recurrence of the condition caused by the original injury, even though the employee at the time was working for another employer.

The decree was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—ACCIDENT—BLINDNESS BY ACTION OF ULTRA-VIOLET RAYS—*Industrial Commission of Ohio* v. *Russell, Supreme Court of Ohio (December 23, 1924), 146 Northeastern Reporter, page 305.*—Charles M. Russell was employed by the Strand Theater in Cincinnati as an operator of moving-picture machines. The machines were operated by electric light throwing the most powerful ultra-violet light rays, at and through which Russell was compelled at all times to look. In 1918 he noticed his eyesight was becoming affected, and after January 25, 1919, he left his employment and took treatments. About January 28, 1920, he lost the sight of both eyes, the diagnosis being that the disease was optic atrophy, "which it was claimed was an incurable disease and a distraction of the optic nerve." The ultra-violet light coming from a silver-tipped carbon point used in the machines, and at which Russell had to look almost constantly, was claimed to be the cause of the injury.

The industrial commission rejected his claim for compensation on the ground that the disability was not the result of an injury sustained in the course of or arising out of his employment, within the meaning of the compensation act. The court of common pleas affirmed the commission, but the court of appeals reversed it and the commission brought error.

The injury occurred before the enactment of the statute providing for compensation for occupational diseases, and it had already been held by the court in Industrial Commission *v.* Cross (104 Ohio St. 561, 136 N. E. 283) that "diseases contracted in the course of employment not occasioned by, or the result of, physicial injury are not compensable as injuries under section 1465–68, General Code."

In Renkel *v.* Industrial Commission (109 Ohio St. 152, 141 N. E 834) it was held that "diseases contracted in the course of employment, and not occasioned by or the result of a physical injury, are not compensable as 'injuries' under section 1465–68, General Code."

The supreme court, after reviewing the above two decisions, stated:

A majority of the court are of opinion that, construing the petition most favorably to the pleader, there are not facts sufficiently set forth therein to bring the case within the terms of the compensation act; that no "injury," as contained in the statute and construed by this court, is shown to have taken place. There seems not to have been an accidental occupational disease, and it is conceded that there was no traumatic injury, or any accident, which caused this unfortunate condition, but rather the prolonged action of ultra-violet rays coming from a silver-tipped carbon point, which by slow, but sure, process injured the optic nerve and resulted in optic atrophy.

In the state of the law at the time of the commission of these acts, sufficient was not contained within the statutory enactment to enable the commission to grant this relief, though we reach this determination most reluctantly.

The judgment of the court of appeals in reversing the court of common pleas was therefore reversed.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—APOPLEXY—PREEXISTING DISEASE—APPORTIONMENT OF AWARD—*Kingston-Pocahontas Coal Co.* v. *Maynard, Court of Appeals of Kentucky (May 29, 1925), 273 Southwestern Reporter, page 34.*—While W. S. Maynard, employed by the Kingston-Pocahontas Coal Co., was engaged in building a buttress wall in his employer's mines, a rock weighing 15 to 20 pounds that he had just placed in the wall fell upon him, struck him a glancing blow on the head, and rolled down his right side, but left no mark or bruise on his body. Maynard notified the assistant mining foreman, then left his work and went home. The next morning he suffered a stroke of paralysis. Compensation was applied for, and from an award affirmed by the circuit court the employer appealed.

Both parties were under the compensation act, and there was no claim of fraud, in view of which it was held that the findings of the compensation board were conclusive unless there was an entire absence of evidence to support them. The notice of injury given to the assistant mining foreman was held sufficient under the compensation act; it was also held that the evidence sustained the finding of the board that the injury arose out of and in the course of employment.

The plaintiff stated that prior to the injury he was an able-bodied man, in good health, and capable of earning his living by manual labor. He did not introduce any medical testimony. The employer, by three physicians who qualified as experts, proved that the paralysis was due to apoplexy, which "could not have resulted solely from the injury received," in view of the fact that "there was no fracture of the skull, and the paralysis did not develop until about 20 hours after the injury." On examination it was noted that plaintiff's blood pressure was "dangerously high," and that his arteries were "hardened and very brittle." They testified that these conditions usually developed slowly, that in their opinion "it could not have been caused by the accident described," and that this stroke of apoplexy was "the result of his physical condition and natural causes rather than an accident." They admitted that the strain of lifting the rock or its striking the plaintiff as it fell from the wall "might have been a contributing cause."

The court of appeals noted that there was some evidence that the plaintiff's disability "resulted proximately from the injury," but "no evidence whatever that it resulted solely therefrom." The court was of the opinion therefore that there was "no evidence to support the board's finding of fact that appellee's total disability 'was brought about entirely from an injury suffered by him in an accident that arose out of and in the course of his employment in the mines of the defendant, and not from a preexisting disease.'"

It followed therefore that the court of appeals could not sustain the findings of the board that the disability was caused solely by the injury, and that it was the duty of the board "to have apportioned the award."

The fact that the employee applied for compensation without any reference to the cause thereof was held not a fatal variance where both the application and the proof referred to the same occurrence. It was pointed out by the court of appeals that the sufficiency of an application, even though it is the basis of a claim to be heard and tried, "is not to be determined by strict rules of pleading."

The judgment of the circuit court was accordingly reversed and the cause referred to the board with directions to determine the extent to which the employee's injury and his preexisting disease contributed to the disability, and to apportion the award accordingly.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—DEPENDENCY—CONCURRENT OR CONSECUTIVE BENEFITS FOR DIFFERENT CLASSES—*Ex parte Todd Shipbuilding & Dry Docks Co., Supreme Court of Alabama (March 19, 1925), 103 Southern Reporter, page 447.*—J. T. De Witt, employed by the Todd Shipbuilding & Dry Docks Co., was a healthy, vigorous man, who had had no recent illness and never had had any serious illness. On the day of his death he was in good health and spirits, but during the course of his work he took into his hands an electric drill charged with electricity, and was seen immediately thereafter falling from a standing position at the workbench with the drill still in his hands, and when he fell it lay on his chest, gripped in his hand. A negro helper cut off the current, but all efforts to revive De Witt were futile. There were no burns on the body, and medical testimony conflicted as to the cause of the death and whether one could die by electricity without having burns on the body. His wages averaged $40 per week. Alma De Witt and Carrie Holt, mother and grandmother of deceased employee, applied for compensation, and from an award of $10 a week to the mother and $2 a week to the grandmother, each for 300 weeks, the employer appealed.

The trial court found that the deceased workman came to his death by an accident arising out of and in the course of his employment, and the supreme court considered the finding supported by the evidence. The court said:

It is true that there is no evidence directly showing that the electrical appliance being used by the deceased was in such a condition as to permit the short-circuiting of the current; but the appliance was owned and operated by the defendant, and the circumstances of the workman's death at least imposed upon defendant the duty of showing that it was properly constructed and insulated, and incapable of communicating a current of deadly force to the workman's body.

The defendant took exception to the allowance of $2 a week to the grandmother, on the theory that "a postponed class of dependents can not have compensation concurrently with a preferred class, even though the allowance to the preferred dependent does not exhaust the entire compensation for which the employer is liable." The award also allowed $10 a week to the grandmother in case the mother should die before the lapse of the 300 weeks, and to this the defendant also excepted.

Section 7553 of the Code of 1923 provides:

Wife, child, husband, mother, father, grandmother, grandfather, sister, brother, mother-in-law, and father-in-law who were wholly supported * * * shall be considered his total dependents, and payment of compensation shall be made to them in the order named.

Section 7556 provided for the percentage of the deceased workman's wages to be paid to each class of the dependents named in the above-quoted section, namely:

If the deceased employee leave no widow * * *, but should leave a parent or parents, either or both of whom are wholly dependent on the deceased, there shall be paid, if only one parent, 25 per cent of the average weekly earnings of the deceased, and if both parents, 35 per cent [of such earnings]. If the deceased * * * leaves a grandparent, brother, sister, mother-in-law, [or] father-in-law * * * there shall be paid such dependent, if but one, 20 per cent of the average weekly earnings of the deceased, or if more than one, 25 per cent.

The supreme court thought it reasonably clear that "these statutes do not intend that compensation shall be payable concurrently to more than one of the classes or grades of relatives provided for in section 7556, and that the allowance to the grandmother in addition to the allowance to the mother was erroneous."

So far as the instant case is concerned, by the express provision of section 7556 a dependent grandmother or grandfather is entitled to compensation only in case the deceased workman has left no dependent widow, child, husband, or parent, thus plainly negativing

the idea of concurrent compensation to the grandparent. It follows from the considerations above stated that the trial court erred in ordering compensation of $2 per week paid to the grandmother, Carrie Holt.

The defendant employer contended that the effect of the law in its provision for the termination of payments on the death or remarriage of a beneficiary was not merely to stop the payment of compensation to the deceased dependent's personal representative or heirs, "but to stop its payment altogether, thereby operating as a discharge of the employer from further liability to other dependents surviving." This theory was considered by the supreme court as "wholly inconsistent with the general structure, design, and language of our compensation law."

We think it is clear that compensation must be paid * * * so long as any named dependent survives, throughout the entire period of 300 weeks. But manifestly the percentage payable will vary with the class receiving the compensation, as specified by section 7556. If, in this case, the grandmother should survive the mother, she would be entitled to 20 per cent of $40, equal to $8 per week, and not to $10 per week as declared by the trial court. In this respect the judgment is erroneous, and it will be corrected accordingly.

The judgment was therefore corrected, allowing the mother $10 a week for 300 weeks, and if she should die within that period, then $8 a week to the grandmother for the remainder of the period, and as corrected it was affirmed.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—DISEASE—INFLUENZA AND PNEUMONIA—*De La Pena* v. *Jackson Stone Co.*, *Supreme Court of Errors of Connecticut* (*July 30, 1925*), *130 Atlantic Reporter, page 89.*—One De La Pena was employed by the Jackson Stone Co. as a marble setter. During the month of April, 1924, he was working in a room the floor of which was wet all of the time. The building was heated part of the time, but the doors were always open. The job was finished on the 17th of April, and the employee complained of not feeling well. The next day he was at home suffering with a cough and cold, but the employer sent an open truck for him, persuading him to return in it and to work in the shop. From April 19 to 23 he worked in an unheated building, and his work required the use of considerable water. During this period he complained of feeling sick with headaches and pains all over his body, etc. He was taken ill the last of the month and a doctor was called, who found him suffering from influenza with bronchitis, and on May 6 lobar pneumonia developed, causing his death on May 7, whereupon

a proceeding was instituted under the compensation act. From an order of the commissioner granting an award, confirmed by the superior court, the employer again appealed.

The defendant contended that the facts "do not show a personal injury within our compensation act" (G. S. 1918, secs. 5339–5414). As to this the supreme court of errors said in part, in regarding the inclusion of diseases:

A compensable personal injury is an abnormal condition of a living body which arises out of and in the course of the employment and produces an incapacity to work for the requisite statutory period. It need not be traced to a definite happening or event. It may be caused by accident or disease, and includes diseases peculiar to an occupation, except those of a "contagious, communicable, or mental nature." The happening or event includes the entire transaction to which the injury is traced, not only the operative causes, but their effect on the body of the injured person.

The commissioner found that the influenza arose out of and in the course of the employment, which was supplemented by the medical testimony that the exposure might be the cause of this disease, from which also the pneumonia developed. The court accordingly held that, no error appearing, the judgment should be affirmed.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—DISOBEDIENCE OF ORDERS—*Ex parte Little Cahaba Coal Co., Ellis* v. *Little Cahaba Coal Co., Supreme Court of Alabama (April 16, 1925), 104 Southern Reporter, page 422.*—Wiley B. Ellis was employed by the Little Cahaba Coal Co. in the capacity of boss driver in its mines. A fire occurred in one of the headings, and while engaged in the performance of his duties under his employment, Ellis was killed by an explosion. Compensation was awarded his widow in the sum of $15 a week for 300 weeks. The employer petitioned for a writ of certiorari to review the proceedings.

It appeared from the evidence that the general duty of Ellis was to aid in extinguishing fires. The fire on September 13, 1923, occurred at the face of a heading, and the deceased undertook to go through a "cut through" or "slant" leading from the main slope to the return air course to close the valve in a water pipe located in said air course. The foreman had told him specifically to stay out of there, but he ignored the order, and upon opening the door a gas explosion occurred, causing his immediate death.

It was contended by the defendant that the death of Ellis was not in the course of his employment because of disobedience to the

orders of the foreman. The supreme court, however, sustained the findings of the circuit court that Ellis was in the course of his employment at the time of the accident, saying:

In the absence of some conditions withdrawing the case from the general rule, closing the valve in the water pipe was within the course of employment of one of the men engaged in extinguishing the fire.

It is in evidence that, in case the siphon had run empty, it would have been the duty of deceased, within working hours, to refill it. This supports an inference that a part of his general duty was to keep this equipment in operating condition. Such circumstance is to be considered in dealing with the alleged orders of the foreman as limiting the scope of employment, or the violation of such orders as willful misconduct cutting off the claim of dependents under our workmen's compensation law.

The award was therefore affirmed.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—DISOBEDIENCE OF ORDERS—DEATH FROM BURNING OF SHOP—*McQuivey* v. *International R. Co., Supreme Court of New York, Appellate Division (November 13, 1924), 206 New York Supplement, page 851.*—On or about July 1, 1922, the trainmen and mechanics of the defendant railway went out on strike. Edward McQuivey was employed on September 16 as a strike breaker, and was engaged in painting certain railway cars which were housed in the paint shop. McQuivey was permitted, with others, but not required to sleep in the shop. This permission was withdrawn in October, 1922, and orders were issued stating that employees must sleep elsewhere than on the premises of the employer, unless "they chose to take up their quarters in a building of the employer known as the bunk house." McQuivey was warned several times to move out, and each time he would say that he would move out "right away." At 5 o'clock in the morning of December 13, 1922, a fire broke out in the paint shop and McQuivey was burned to death. An award of compensation was granted by the State industrial board to the wife of the deceased employee, and the employer appealed. The supreme court said in reversing the award:

It is undisputed that claimant slept in the paint shop in violation of his employer's orders. That being so, he could not have been in the course of his employment when the accident occurred. Moreover, sleeping in the paint shop, whether permitted or not, was a mere privilege extended, and did not involve a service to the employer.

The award was accordingly reversed and the claim dismissed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—DISOBEDIENCE OF RULES—*Lumaghi Coal Co.* v. *Industrial Commission, Supreme Court of Illinois (June 18, 1925), 149 Northeastern Reporter, page 11.*—Alfred Sudbring was employed by the Lumaghi Coal Co. in the capacity of mine examiner. His duties were to examine the mine at night and to do such repair work as would make the mine a safe place in which to work. There were two other examiners employed at the same work. The examiners used a mule and a coal car when their work required it, the use of electric motors being forbidden by the rules of the company. These motors, which were used only in the daytime, were operated by skilled motormen employed for that particular purpose. On the night of December 19, 1922, Sudbring, after finishing his work, was to assist the other two examiners in putting up a regulator, used to regulate the air in the entries. This work was being done about a mile from the bottom of the shaft, and Sudbring, upon completing his work, went to the place where the motors were stored, about 600 feet from the bottom of the shaft, and took out a motor for the purpose of riding on it to the place where he was to help the other examiners. In starting it up the motor ran over him and cut off his leg. The arbitrator and commission granted him an award of compensation, which was confirmed by the circuit court. The employer was granted a writ of error on the ground that when Sudbring undertook to operate the motor for his own purposes, which he was forbidden to operate, "he stepped outside the duties for which he was employed, and voluntarily incurred a danger which was not an incident to any of the duties of the employment, and the accident was therefore not an incident of his employment." The plaintiff contended that at most he violated a rule of the company, which would not take him out of his employment, but constituted only contributory negligence.

The supreme court admitted that contributory negligence is no defense to a claim under the workmen's compensation law. On reviewing the record the court noted that Sudbring did more than simply violate a rule of the company; that is, he left the place where his duties required him to go and went to the motor shed, where he was not supposed to go, and in addition undertook to operate a dangerous machine, which both the rules of the employer and the instructions given him forbade him to use or to attempt to operate. In doing so "he voluntarily went outside of the reasonable sphere of his employment and put himself beyond the protection of the master's implied undertaking."

It was recognized as a general rule that to entitle the employee to compensation the injury must occur in the course of and arise out of the employment and that where an employee incurs a danger of his

own choosing, "outside of any reasonable exercise of his employment, the act is not an incident to the employment. The employer is not liable for every accidental injury which may happen to an employee during his employment. The employer is not liable where the employee exposes himself to a danger which is not one arising from the employee's employment."

The claimant relied on the decision in Sesser Coal Co. *v.* Industrial Commission (296 Ill. 11, 129 N. E. 536). In that case there was a rule forbidding anyone but motormen and truck drivers to ride on the motors. The court said, however, that the evidence showed it was a mere paper rule, never enforced. In the instant case Sudbring had been told he must not use the motors and had been threatened with discharge if he disobeyed instructions. It was quite clear from the evidence that no duty of his employment required the use of motors, and that it was for his own convenience and "outside of any duty expected or required of him." Being of the opinion that in doing so he placed himself beyond his employer's implied undertaking, the supreme court held that the accident did not arise out of the employment.

The judgment was accordingly reversed and the award set aside.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—EMPLOYER—SALE OF BUSINESS—*Palmer* v. *Main, Court of Appeals of Kentucky (May 26, 1925), 272 Southwestern Reporter, page 736.*—W. T. Main was employed as a janitor by Earl Palmer, the owner of the building in which Main was employed. Both had accepted the provisions of the workmen's compensation act (Ky. Stat., secs. 4880–4987). Palmer sold the building to E. A. and Eustace Hail, who continued to conduct the property as an office building. W. S. Adams, the manager of the building, was retained to act in the same capacity for the purchasers. A few days after the sale, Adams being absent, the acting manager sent Main out into the city to ascertain why a certain employee had not reported for duty. While on this errand Main was struck by an automobile, receiving injuries from which he died four days later.

The widow filed claim for compensation against both Palmer and the Hails, and was granted an award against Palmer but refused against the Hails. On appeal the circuit court affirmed the action of the board. Palmer appealed from the judgment against him, and the widow prosecuted a separate appeal from the judgment in so far as it disallowed compensation against the Hails.

It was contended as to the award against Palmer, that "the relation of master and servant is essential to liability under the workmen's compensation act, and that at the time of the accident Main

was not in Palmer's employ." The court of appeals was of the opinion that, though the relation of master and servant in some instance may end "by the sale of the business," if there is no actual change in the management of the business, and servants are in no way informed of the transfer and change of proprietors, "the relator [relation] is presumed to continue for a reasonable time, and the master remains liable to them to the same extent as though no sale or transfer had taken place, and the burden of showing knowledge on the part of the servant is upon the master."

The board found that Main continued to work without notice of the sale, and as Palmer had not withdrawn from the compensation act, the court held that "it follows that he continues liable under the provisions of that act."

To the contention that the accident did not arise out of the employment it was said that "it is at once apparent that if all accidents due to risks to which the general public are subjected are to be excluded, many employees will be deprived of the benefits of the act."

In conclusion the court of appeals held:

Since the service which Main was required to perform necessarily exposed him to the danger of being struck by an automobile while on the street, it follows that the injury was the direct and natural result of a risk reasonably incident to the employment, and that neither the workmen's compensation board nor the circuit court erred in holding that the accident arose out of the employment.

On the appeal of Elizabeth Main against the Hails it is sufficient to say that our workmen's compensation act is elective, and at the time of Main's injuries neither he nor the Hails had elected to operate under its provisions. It follows that compensation against the Hails was properly denied.

The judgment in each case was therefore affirmed.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—GOING FROM WORK—*Pearce* v. *Michigan Home and Training School, Supreme Court of Michigan (July 16, 1925), 204 Northwestern Reporter, page 699.*—Blanche Burke, employed by the Michigan Home and Training School, a State institution, ceased work Saturday, July 26, 1924, at noon, the laundry in which she was employed closing at that time. In the afternoon of the same day her dead body was discovered by the side of the highway, and a few days afterward one of the inmates of the institution confessed to the murder. Application was made for compensation and an award was granted for her accidental death. A writ of certiorari was brought by defendant to review the proceedings before the department of labor and industry. The supreme court, in reviewing, followed and quoted with approval the rule laid down by the Supreme Court of Massachusetts in

McNicol's case (215 Mass. 497, 102 N. E. 697), in which it was said that:

It is sufficient to say that an injury is received in "the course of" the employment when it comes while the workman is doing the duty which he is employed to perform. It "arises out of" the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.

Mr. Justice Fellows, in speaking for the supreme court, observed that:

The death of Mrs. Burke occurred under deplorable circumstances, but did not occur in the course of her employment, and unless it so occurred her employer is not liable under the workmen's compensation act (Comp. Laws 1915, secs. 5423–5495).

The award was accordingly vacated.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—HORSEPLAY—TIME FOR REVIEW—*Western Union Telegraph Co.* v. *Owens, Appellate Court of Indiana (February 5, 1925), 146 Northeastern Reporter, page 427.*—Ellis Owens, aged 17 years, was in the employ of the defendant telegraph company as a messenger. At the rear of the building in which the office of the company was located there was a room used for storage and for the use of the messengers. A door in the rear of the room opened into a small passageway, which in turn led into a larger passageway alongside of a new building known as the La Plante Building. An adjustable, or sliding, ladder was attached to the lower part of the fire escape of the La Plante Building, the lower part of the ladder being about even with the lower part of the permanent structure and about 10 feet above the paved passageway. Three of the messenger boys, including the plaintiff, were playing in this larger passageway between the two buildings, and while so playing one of them suggested, banteringly, that they try to climb the fire escape. One of the boys climbed into a window some 3 or 4 feet from the ground and managed to get onto the fire escape. The plaintiff then tried but was unable to reach the structure from the window, so gave "a leap" and tried to reach it, but instead of catching the permanent structure he caught the lower part of the ladder, which became detached and he fell to the ground and was injured. A claim was made for compensation, and from an award in his favor the employer appealed on the ground that the accident did not arise out of and in the course of the employment.

The accident occurred on December 14, 1923. On December 17 the employer reported the accident to the industrial board, but dis-

claimed liability therefor. Plaintiff filed application for an award on April 3, 1924. This was allowed by a single member, and on May 19 the employer filed application for a review; this was granted, and as a result the compensation was again awarded, this appeal following. The plaintiff claimed that the court had no jurisdiction of the appeal, as "there was no application for a review" within seven days, as provided for in the law.

It appeared from the evidence that the case was handled by a firm of attorneys of Washington, Ind., on behalf of the employer, and that the industrial board notified the employer at its office in New York City of the award but did not notify the attorneys, and for that reason no appeal or petition for review had been made within the seven days allowed by statute. The appellate court considered that under these circumstances the board had authority, and "was fully justified in sustaining said application for review."

The only question left for the court to consider was whether or not the accident arose out of the plaintiff's employment. The plaintiff filed no brief on the merits of the case, and though the court could have reversed the case on that ground it preferred to go into the material facts of the case.

Section 8 of the compensation act (as amended by Acts 1919, ch. 57), provides:

No compensation shall be allowed for an injury or death due to the employee's * * * willful failure or refusal to obey a reasonable written or printed rule of the employer. * * *

The appellate court considered that the legislature had in mind in enacting the above provision that employers would and could protect themselves against hazards of the employment by the adoption of rules and regulations. The court said:

The employer knows that men and boys, when associated together, will, under natural impulse, engage in frolic, in "horseplay," and that injury may result therefrom. It is within the power of the employer to prevent these things, or at least save himself harmless from the consequences thereof, by adopting rules according to the statute, and then enforcing such rule or rules.

In the main case the fire escape was on another building, and the question arose, "Was the employer in this case reasonably bound to anticipate that the messenger boys, which it employed, would leave the premises of the employer, become trespassers, and attempt to get upon and climb said fire escape?" The court held that:

The employer was not bound reasonably to anticipate such conduct on the part of its employees, that such play was in no way connected with their work, and that, under the undisputed facts in this case, the said accident did not arise out of appellee's employment.

The award was therefore reversed and the cause remanded to the industrial board for further proceedings.

In line with the foregoing was a decision by the Supreme Court of Michigan. (Derhammer *v.* Detroit News Co. (1925), 202 N. W. 958.) Here a driver of an electric truck was the object of a presumably playful attack by fellow workmen squirting and throwing water on him. He was not the agressor, but retaliated, and pursued his persecutors, finally being pushed over in a surprise attack, and cutting his fingers on a bottle held in his hand. This bottle was of no use in his work, and was apparently a weapon of defense, or perhaps attack. The foreman of the men was aware of the fooling, but did not check it, and the State department of labor and industry made an award, from which the employer appealed. The supreme court reversed the claim on the ground that there was no connection between the injury and the injured man's usual work, that what was done to him could not in itself have caused the injury, and that he participated in the conduct, voluntarily leaving his truck for the purpose. Though the foreman might properly have put a stop to the acts, "there is a limit to the restraint which can well be placed upon the activities in the way of sport which employees may desire to indulge in when not at work." As stated, the award was denied.

The United States Circuit Court of Appeals, construing the Kansas statute in accordance with the State construction, found a workman entitled to the benefits allowed where the work was not interrupted, but acts of interference were indulged in by a fellow worker, resulting in the loss of the injured man's balance and the thrust of his fingers into a machine which cut them off. One judge dissenting, the court took the view that:

If an employer places boys as coworkers with others in hazardous employment he is charged under these workmen's compensation acts with what may happen from the curiosity, zeal, vigor, and boyishness of said boys; that such is a risk reasonably incident to the employment, and if injury result to an employee therefrom during the progress of the work in which he is employed, through the curiosity or pranks such as boys of immature age are wont to indulge in, and which the employer must be held to know of when he employs them, the injury is one "arising out of the employment." (Kansas City Box Co. *v.* Connell (Mar. 25, 1925), 5 Fed. (2d) 398.)

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—PEACE OFFICER—DUAL EMPLOYMENT—NUMERICAL EXEMPTION—*Reliance Coal & Coke Co.* v. *Smith, Court of Appeals of Kentucky (December 19, 1924), 266 Southwestern Reporter, page 1094.*—Will Smith was employed as a coal loader in the mine of the defendant company, but his work in that capacity for some time prior to the accident causing his death was negligible, his main work being as preserver of the peace and as watchman in the coal camp; for this he was paid a substantial salary by the company. Smith was appointed a deputy sheriff by the county sheriff, but not as a deputy for the coal company. On December 24, 1923, he was shot and killed when he entered a company house and told the occupants that they must keep quiet. Malvary Smith brought a proceeding under the compensation act for compensation

for the death of her husband, claiming that he was killed while working for the coal company and by an accident arising out of and in the course of his employment. The employer appealed from the decision of the workmen's compensation board awarding compensation.

The findings by the board were considered final as to disputed questions of fact, and only reviewable to determine whether there was an entire absence of evidence to support them. The appellant company insisted that Smith was not, at the time of his death, an employee of the company, but was a deputy sheriff of the county. The court of appeals, however, considered the evidence sufficient to support the finding of the board that the deceased was an employee, even though deputized by the sheriff.

His work for appellant was a sort of a cross between that of a peace officer and that of a social-service agent. That Smith might when occasion required it, have a power of arrest, which as a private citizen he might not otherwise have, he was appointed, no doubt at appellant's instance, a deputy sheriff; but his public character did not remove him from the employment of appellant.

At the time of his death he, as stated, went to one of the houses of appellant's to quiet an incipient breach of the peace.

The finding of the board to the effect that he did so as appellant's employee hired for the purpose of restoring peace to troubled souls and to straighten out a quarrel before it reached the dignity of a public offense, is justified by the evidence, and we can not, under the law, question such finding.

The appellant further contended that if it be held that Smith was an employee, inasmuch as the company did not have three employees engaged in identically the same kind of work the compensation act would not apply. The business of the company was the production of coal. The court said:

If it had three or more employees all engaged in the business of "producing coal," in the broad sense of that term, the act applied. The maintenance of peace and good will about the camp was as essential to the production of the coal as was the work of the blacksmith in sharpening tools.

The evidence being considered by the court of appeals as sufficient to show that the accident arose in the course of the employment, the court affirmed the award of the compensation board.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—TAKING BATH AFTER WORK—DEATH FROM BURNS—*Associated Employers' Reciprocal* v. *Simmons, Court of Civil Appeals of Texas (May 14, 1925), 273 Southwestern Reporter, page 686.*—Oliver L. Simmons, employed by the Standard Tank & Steel Works, was engaged in setting tanks for the com-

pany and any other work that was necessary in the setting of the tanks. He was a single man and lived in the "bunk house" of his employer, used for sleeping purposes by some of the employees. This bunk house was furnished by the employer, was located in the employer's yard, and Simmons paid nothing for its use. The company bathroom adjoining the bunk house was used by employees in cleaning up after the day's work. The employees were subject to call at any time, day or night, although they were not required to be at the bunk house or any particular place to be available for special call, and further, they were not subject to go unless they elected to do so of their own free will.

On May 20, 1922, Simmons, upon returning from his work about 5 o'clock, went to the bathroom for the purpose of taking a bath and cleaning up, and at his request one of the men handed him a pan of gasoline for use in taking off the grease and dirt. Shortly afterward witnesses heard a report of the gasoline igniting, and the deceased was observed with his body in flames. He died shortly thereafter as a result of the burns. An action for compensation was instituted by Simmons' parents for the death of their son, and from a judgment in the lump sum of $4,577.42 the insurance carrier appealed.

The evidence clearly showed that the plaintiffs were dependent in part at least upon the deceased son, and that he contributed to their support. It was the contention of the defendants that the deceased's act in removing dirt and grease from his person after finishing his day's work was not an act in the employer's service, while the plaintiffs insisted that "as a natural result of the kind of work deceased was required to do it was necessary that he use some method of cleansing himself * * * in case he should be called on a rush job," and for that reason he was not only in the "course of his employment" while removing the dirt and grease, but "doing so was a part of his duty to his employer."

The court of civil appeals observed that if the act of taking a bath was an act in performance of the employee's task of setting tanks, "we think the injury to deceased in the ignition of the gasoline had to do with and originated in the work of the employer, while engaged in or about the furtherance of the affairs of the employer in setting the tanks."

Speaking through Mr. Justice Walthall, the court stated:

We are of the opinion that after the deceased employee had finished his work of setting the tanks for the day, and had gone from the locality of his work to the bunk house, the act of removing the dirt and grease from his person would not under the facts disclosed by the record be an act in the service of the employer, and did not have to do with and originate in the work of the employer.

After considering several cases, the court concluded:

In the case at bar the unit of service was a day; the day's work had been performed; the employee had gone to his place for the night; he had not been called out for a continuous or extra service; so far as the record shows the employee would owe the employer no further duty, nor did the employer owe the employee further duty until the relation of employee and employer had been resumed in the work of another day.

The judgment was accordingly reversed and rendered for the defendant.

Falling within the same rule was a decision by the New York Court of Appeals (Davidson *v.* Pansy Waist Co. (1925), 148 N. E. 714), in which a traveling salesman had received an award for injuries inflicted while preparing to take a morning bath. He slipped and caught at a lever which released hot water from a shower, burning him severely. The appellate division of the supreme court affirmed the award, but the court of appeals found nothing in such preparation for the day that was connected with his employment. "It does not appear that he might not have prepared himself in exactly the same way if engaged in any other employment or vocation." The claim was therefore dismissed.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—TEACHER ATTENDING INSTITUTE—*Stockley v. School Dist. No. 1 of Portage Tp., Supreme Court of Michigan (July 16, 1925), 204 Northwestern Reporter, page 715.*—Mrs. Eva Harmon, employed as a teacher in the high school at Houghton, Mich., received instructions from the superintendent of school district that the schools of the township would be closed Monday, November 5, 1923, to allow teachers to attend the county institute. All teachers were expected to attend. The superintendent, John E. Erickson, testified that he instructed all the teachers under him to attend the institute, and attended it himself. They were all required to go and were paid for so doing as though teaching. Refusal to go would reflect on the teacher's personal standing; she would receive no pay for that day, and personally Erickson "would not feel right recommending her for a position the following year." It appeared that the superintendent of the Hancock School, across the lake, gave like instructions to the teachers under him.

Attendance involved a journey of 1½ miles by private conveyance, the road crossing an electric railway. At this point Mrs. Harmon and another teacher were killed, and for the accidental death of the former a claim was made for compensation and an award allowed. In opposition it was contended that the accident did not arise out of and in the course of the deceased teacher's employment, and that in any case she was not injured while in attendance at the institute, but on the highway journeying thereto.

The court found that the law required such attendance and that the accident occurred during the usual working hours as a teacher, on a day and at a time when "but for the schools being closed, and the teachers required to attend the institute, she would have been on duty at the high-school building of her employer at Houghton." The accident was said to have occurred during her working hours, but while she was away from there in obedience to her employer's instructions, in performance of a special service incidental to the nature of her contract. "She was not going to or returning from her customary place of employment before or after working hours, but by authority of her employer was going away from her home and place of regular employment, * * * not free to go where she pleased at her own convenience or pleasure, but to a specified place on a special mission in the line of her employment."

Under the circumstances on record the supreme court stated that they were not prepared to hold the finding of the commission destitute of evidential support, and therefore affirmed the award.

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WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—CONSTITUTIONALITY OF STATUTE—DUE PROCESS OF LAW—STATUS OF INDUSTRIAL COMMISSION—*Nega* v. *Chicago Rys. Co., Supreme Court of Illinois (June 18, 1925), 148 Northeastern Reporter, page 250.*—Frank Nega, employed by the Boyda Dairy Co., was driving a horse-drawn wagon on a stormy night in June, 1920, when one of the Chicago Railways Co. street cars ran into and injured him. The employer paid him the sum of $50 for medical services and the further sum of $1,225 as compensation. Nega brought suit later in his own name to recover damages from the street railway company for the injuries received. From a verdict and judgment in the sum of $10,000 the defendants appealed.

It was conceded that the employer, the employee, and the defendant company were all under the workmen's compensation act, if the act was valid. It was the contention of the defense that sections 6 and 29 of the compensation act (Smith-Hurd Rev. Stat. 1923, ch. 48, secs. 143, 166) precluded the maintenance of any action against a third party causing the injury where, as here, all parties were under the act. Section 6 makes the remedy under the compensation act exclusive as against an employer; section 29 subrogates an employer paying compensation to any right of action against a third party causing the injury, and, if such third party was under the compensation law, recovery against him is limited to the amount of compensation payable under the act.

An amendment of 1919 of section 19 of the act provided that the circuit court should have the power to review by writ of certiorari

all questions of law presented by the records of the industrial commission, with certain exceptions. It is conceded by the plaintiff that if the act as thus amended was constitutional it constituted a complete bar to this action. He contended, however, that the entire act as it stood after the amendment of 1919 was unconstitutional as denying due process of law. The trial court took that view, and for that reason held that the act formed no bar to the action at law for the personal injuries received.

The supreme court discussed the matter at length, sustaining the constitutionality of the law and reversing the judgment for damages allowed to the injured workman. The contention was chiefly that, by limiting review by the courts to questions of law, the guaranty of due process was violated. It was pointed out by the court that "the Supreme Court of the United States has upheld, as not denying due process of law, numerous compensation acts, in none of which was there a provision for judicial review of conflicting evidence." (Hawkins *v.* Bleakly, 243 U. S. 210, 37 Sup. Ct. 255, and other cases.) In the case cited the Iowa compensation law was attacked in part for the same reason as in the instant case, i. e., that it did not allow an appeal on questions of fact. The Iowa courts had held this provision valid, and the Supreme Court referred to these decisions, and, as stated by Judge Stone, who delivered the opinion of the court—

held that the act, in prescribing the measure of compensation and the circumstances under which it is to be made, and in establishing administrative machinery for applying the statutory measure to the facts of each particular case, and in granting appeals as to questions of law, thereby provided for a hearing before an administrative tribunal as to the facts, and for judicial review upon all fundamental and jurisdictional questions.

This was said to dispose "of the contention that the administrative body is clothed with an arbitrary and unbridled discretion, inconsistent with a proper conception of due process of law."

Judge Stone, considering the status of the industrial commission, further said:

We are cited to no case, and we have been able to find none, holding that a statute which permits judicial review of questions of law only, arising on the decisions of an administrative body, where its act is in its nature judicial rather than legislative, violates the due process clause of the Federal Constitution. The industrial commission is a nonjudicial body. Its proceedings and findings, though administrative, partake somewhat of the nature of judicial proceedings. (Mississippi River Power Co. *v.* Industrial Com., 289 Ill. 353, 124 N. E. 552.) It has authority to summon witnesses, administer oaths, take testimony, hold hearings, examine and weigh evidence, make rulings of law and findings of fact, and render decisions enforceable by proper proceedings in court. Though not held strictly to the rules of evidence, its consideration of incompetent evidence is subject to

review. Such functions are clearly not legislative, as that term is defined in the cases cited, but are judicial in character, and the findings of fact of the commission are in no way lacking in analogy to the verdict of a jury. The purpose of the workmen's compensation act is to avoid litigation, as far as possible. It establishes an administrative body, to which is given, subject to the limitations of the act prescribing the compensation and the circumstances under which it is to be awarded, the duty of applying the statute to the facts of each case.

That such procedure was subject to review by the courts, in addition to "the guidance and direction of the statute" in its deliberations, made it impossible to say that the industrial commission "possesses unbridled or arbitrary power in deciding controverted issues of fact." This being the point of attack, and the plaintiff having failed therein, the constitutionality of the act as a whole was undisturbed and the restrictive provisions of recovery against a third party operating under the act were held to constitute a complete bar to the suit under review.

The judgment was therefore reversed.

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WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ELECTION—BASIS OF AWARDS—*Athens Railway & Electric Co.* v. *Kinney, Supreme Court of Georgia (February 28, 1925), 127 Southeastern Reporter, page 290.*—One Kinney, employed by the James White Cotton Mill, was killed while in the performance of his duties without any fault or negligence or want of care or diligence on his part, but by reason of the negligence of the defendant electric company. Compensation was granted in the sum of $12.50 a week for 300 weeks, a total of $3,750. Mrs. Rosa M. Kinney also brought an action against the defendant company for damages for the death of her husband, claiming $33,750, of which sum $3,750 was for the use of the Maryland Casualty Co., insurance carrier of the employer. The defendant demurred to the petition, and upon the demurrer being overruled, excepted.

Section 12 of the Georgia workmen's compensation act of 1920 provides:

The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise on account of such injury, loss of service, or death.

The defendant contended that under the provisions of the above section, the plaintiff having made a complete settlement with the

employer as to compensation, the settlement became conclusive as to the plaintiff. To this contention the supreme court said:

With regard to the purposes of the act, we have reached the conclusion that that provision, while it excludes "all other rights and remedies of such employee, his personal representative," etc., and while the expression "all other rights" is general and unqualified by the immediate context, it is applicable only to such rights or remedies as the plaintiff would have had against the employer of her husband, independently of the law embraced in the workmen's compensation act and the provisions of that law. But we can find no reason in that law for holding that as to a third party, who was a tort-feasor and whose negligence resulted in the death of the husband of the plaintiff, she should be deprived of her right under the law allowing her, under the circumstances set forth in this case, to sue for and recover the full value of her husband's life.

The court further pointed out that had the widow recovered under the compensation act the full value of the life of her husband, she then would be barred from recovery against any person. It was noted that the compensation act "does not make provision for the recovery of the full value of a life destroyed by negligence or otherwise." A limit is put upon the amount that may be recovered, "that may be far less than the actual value of the life destroyed." But the court considered no reason existing for holding that:

If another corporation or person other than the employer is guilty of negligence which results in injury or death, such corporation or person should have the benefit of the act which establishes the rate of compensation for injury to an employee as against an employer, where the employer and employee have accepted the provisions of the workmen's compensation act.

The decision of the superior court in overruling the demurrer was therefore affirmed.

The statute of Oregon contemplates the payment of compensation from a State insurance fund, which is bound primarily to contribute the award made by the industrial commission of the State. Where a third party is responsible for the injury, election must be made in advance of any proceeding for settlement; and if remedy is claimed under the compensation law, the cause of action against the third party inures to the State for the benefit of the accident fund. Where a workman had received an injury for which compensation payments had been accepted he was held to be barred from any action against a third party, since the two remedies were inconsistent, and "any decisive act by him, done with the knowledge of his rights and of the facts, determines his election of this remedy." (Holmes *v.* Henry Jenning & Sons (1925), 7 Fed. (2d) 231.)

A second factor was involved in a case before the Supreme Court of Colorado. (C. W. Kettering Mercantile Co. *v.* Fox (1925), 234 Pac. 464.) Here an employee of the company named was injured by a railroad train at a crossing. He decided to make claim against his employer, filing the papers 10 days after the six months' period fixed by law had expired. It was in evidence that before this period had expired the employer and its insurer had given

notice of their purpose to contest any liability under the act, and the commission had held a hearing at which the claimant appeared. The case was ordered continued "until such time as the claimant notifies referee as to whether or not he intends to bring suit against" the railroad company. The employer made no objection to this order, and within 15 days the election was filed, claiming compensation. The commission and the court held the election valid, the employer being estopped from pleading the limitation by reason of its conduct leading the claimant to believe that he had no other duty to perform than to make his election in writing. This he had done, "and he in no way caused plaintiffs in error to change their position." The judgment was accordingly affirmed.

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WORKMEN'S COMPENSATION--INJURY BY THIRD PARTY—ELECTION—RECOVERY—GIFT—*Pittsburgh, C., C. & St. L. R. Co.* v. *Keith, Appellate Court of Indiana (March 11, 1925), 146 Northeastern Reporter, page 872.*—Thomas Keith, employed by the Allen A. Wilkinson Lumber Co., received a personal injury on August 11, 1920, arising out of and in the course of his employment, and alleged to have been caused through the negligence of the defendant railroad company. On September 22, 1920, the lumber company, through its insurance carrier, paid the medical expenses of the injury, amounting to $12. The plaintiff on September 13, 1920, signed a compensation agreement with his employer and received a check for $20.76 in settlement thereof, but with the understanding and belief that it would not interfere with his suit against the railroad company. A Mr. Carter, who gave plaintiff the check, said it would be considered as a gift on plaintiff's wages, but neither Keith nor Carter knew whether such payment would or would not interfere with the suit against the railroad. On October 25 plaintiff gave Carter a check in the same amount, $20.76, and Carter promised to send it to the insurance carrier. Plaintiff also tried to pay the doctor, who had already been paid by the insurance carrier, but the doctor did not accept the money. From a judgment in the sum of $100 in favor of the plaintiff the defendant appealed. The appellate court observed that:

Ordinarily, when an employer pays an injured employee the amount due under a compensation agreement which has been approved by the industrial board the employee can not prosecute an action against a third person for damages, but the employer may maintain an action against the wrongdoer to recover the amount he was required to pay the injured employee.

The court had no doubt that "an employer may make a gift to an injured employee of the amount which he might be entitled to as compensation under the act, and that the employee may accept such gift without in any wise affecting his right to maintain an action against some other person whose negligence caused the in-

jury." It was admitted that the plaintiff and the employer had a right to enter into the agreement and to have it approved by the board, "without affecting appellee's right to sue for and collect damages."

Under the compensation act of England the workman could take proceedings both against the third person and against the employer, the one for damages and the other for compensation, but he must elect before there is a recovery. Under the Indiana law, as pointed out by the court, "the workman may prosecute his action for damages to judgment, and he may also have his claim for compensation allowed, but he is prohibited from collecting both from the wrongdoer and from the employer. He must elect from which one he will collect. If he collects compensation he can not collect damages."

The evidence was held to sustain the finding of the lower court that the amount paid under the compensation agreement was a gift of compensation not affecting the third party's liability to the employee.

It was pointed out by the appellate court that it was the purpose of the statute only to protect the negligent third party from double liability. Under the facts in this case, the payment to plaintiff of $20.76 by the lumber company being a gift, "there is no right of action by the lumber company or its insurance carrier for indemnity."

The verdict being considered sustained by the evidence, the appellate court affirmed the judgment.

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WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—SUBROGATION—EXTRATERRITORIAL EFFECT OF PROVISION OF INSURANCE CONTRACT—*Reutenik* v. *Gibson Packing Co., Supreme Court of Washington (December 26, 1924), 231 Pacific Reporter, page 773.*—Fred H. Hartje, employed by the Atlantic Produce Co. of California as a potato buyer, was engaged in such work in Yakima County, State of Washington, when he received injuries in an automobile collision in Yakima County from which he died. The automobile causing the injuries was owned by the Gibson Packing Co. and was driven by its agent. W. P. Reutenik, as administrator of the estate of Hartje, brought an action against the defendant company for the benefit of the widow of Hartje. The company set up as a defense contributory negligence on the part of the deceased, and also that as the widow had recovered compensation in California the complaint should be dismissed or the Hartford Accident & Indemnity Co. (insurance company paying the award in California) be made a party to the action. The award granted in California against the employer of the deceased and its insurance carrier was $5,000 in deferred pay-

ments of $20.83 per week. The latter defense was moved against by the plaintiff, the motion was denied, and the plaintiff replied that neither the employer nor the insurance carrier had brought any action against the Yakima Meat Co. (apparently same as Gibson Packing Co.), but that the plaintiff had complied with all laws and could maintain the suit.

By permission of the court the Hartford Accident & Indemnity Co. later filed a complaint in intervention, admitting all the allegations except that Fred H. Hartje was a resident of California, and averred that it was entitled to have "a first and prior lien upon any recovery" by the plaintiff in the sum of $5,000. The plaintiff consented to the intervention. There was a verdict for $9,000, and the defendant moved for a judgment notwithstanding the verdict, on the ground that "the files and records in the case, and the evidence introduced thereon, affirmatively show that the action was maintained by the respondent as administrator of the estate of Hartje, deceased, for the joint benefit of Mrs. Hartje, the widow of deceased, and the Hartford Accident & Indemnity Co., a corporation, as assignee of Mrs. Hartje, contrary to the laws and statutes in such cases." The motion was overruled by the trial court and judgment entered on the verdict. A lien was awarded against the interest of Mrs. Hartje, to the extent "which the Hartford Accident & Indemnity Co. shall have paid Mrs. Hartje" under the compensation award in California.

The only error claimed by the defendant was in the overruling of its motion for judgment non obstante veredicto, and the only question considered by the supreme court was "whether, under the laws of the State, respondent as administrator has the right to institute and press to judgment an action, according to appellant, 'for the joint benefit of the beneficiary and the Accident Insurance Co., which claims subrogation to the rights of the beneficiary as to part of the judgment recovered.'"

The defendant claimed that the cause of action was vested in the widow, but the supreme court held this error, saying that "the cause of action is not vested in the widow, but in the personal representative of the deceased, although it is for the benefit of the widow."

Section 26 of the compensation law of California, which becomes a part of the insurance contract, provides that "the court shall, on application, allow as a first lien against any judgment recovered by the employee the amount of the employer's expenditures for compensation." The supreme court, speaking through Mr. Justice Holcomb, said:

The trial court merely enforced that provision of the contract. It is unquestioned law that, where one carries an accident policy and receives an injury from a third person, the personal accident insur-

ance he carries has nothing to do with his recovery from the wrongdoer. He or his representatives or beneficiaries may recover both upon the policy of insurance and compensation from the wrongdoer. What Mrs. Hartje was awarded and accepted under the accident policy was the insurance provided in that policy and regulated by the laws of California, and in no wise constituted any bar to her recovery of compensation for the injuries caused by the wrongdoer.

The contention of the defendant that the employer or the insurance company "might seek to recover for the sums paid by it from the wrongdoer, regardless of whether the statutory survivors exist," was considered devoid of merit.

None but the personal representative of a decedent suing on behalf of the spouse or next of kin surviving can have any right of action, and but one recovery can be had.

The defendant maintained that since the cause arose in Washington and the domicile of the wrongdoer is in Washington, and the statute requires actions in such cases to be brought by the administrator, "the lex fori governs the nature, extent, and character of the remedies," and further that the law defining the classes benefited "also limits the persons to whom it can be required to respond in damages." The supreme court answered:

Of course the lex fori determines who shall be proper parties to the suit, the mode of procedure, and the execution of the judgment. These matters are regulated wholly and exclusively by the law of the place where the action is instituted. The law of the forum does not, however, prevent the enforcement of a contract between parties interested in the cause of action, made pursuant to the law of another State, unless prohibited under the law of the forum, and the contract in this case provided that the insurance company should have a lien for all sums of money expended by it on the policy on any judgment that might be recovered against the wrongdoer. That provision is not prohibited by any law of this State, is enforceable, and is as much a part of the law of this State, since it is a part of the contract, as any other phase of the law.

The supreme court held that the "construction of the workmen's compensation law by the courts of last resort of California also is a part of the law of the contract, and therefore a part of the contract." In conclusion the supreme court said:

Furthermore, it seems to us appellant is not concerned as to whom the proceeds of the judgment go, and a satisfaction of the judgment in this case will certainly bar any further action for damages for the wrongful death by anybody against it.

The judgment was accordingly affirmed for the plaintiff, subject to the lien right of the insurance company.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—SUBROGATION—MEASURE OF DAMAGES—*Travelers Insurance Co.* v. *Brass Goods Mfg. Co., Court of Appeals of New York (January 21, 1925), 146 Northeastern Reporter, page 377.*—William J. Fitzgerald was killed through an accident arising out of and in the course of his employment with the National Packing Box Co. The Brass Goods Manufacturing Co., defendant, caused the accident by its negligence. Fitzgerald's widow and children elected to accept compensation, and assigned their cause of action against the above-named defendant to the insurance carrier of the employer. The insurance carrier brought suit and the question arose as to the rule of damages to be applied in such cases. From a judgment for the plaintiff, affirmed by the appellate division, the defendant appealed.

In the trial court it was held that the carrier could recover "precisely what might have been recovered by an administrator in an action brought by him for the benefit of the next of kin." The defendant contended that the theory of damages is based upon the idea "of exact compensation to the injured party for the loss sustained."

The court of appeals referred to the case of Casualty Co. of America *v.* A. L. Swett Electric Light & Power Co. (174 App. Div. 825, 162 N. Y. S. 107), in which it was said that "while the carrier might recover from the person causing the death the full damages therefor, still the recovery was impressed with a trust to in the first place reimburse itself for whatever it may be compelled to pay under the award as made, and then, if there be a surplus, to account therefor to the legal representatives of the deceased." But the court added:

> The statute contains no such provision. Indeed, the intention expressed by the legislature is clearly to the contrary. The purpose of the act was to secure to dependents the speedy, certain, and adequate provision for their support.

It was pointed out that in case of accidental injury the dependents must obtain an award from the employer, which is exclusive of all other rights except when the employer has neglected to secure insurance, and in that case "they may at their option elect to claim compensation under the act or maintain an action in the courts for damages. They can not do both, and such election, when made, is final." If the claim is assigned to the employer, it is assigned as a whole; and "there is no hint of any remaining right, either legal or equitable, surviving against the carrier, unless it be because of the use of the word 'subrogation' in the title of the section." In defining the word the court said:

> Ordinarily one subrogated to the rights of another may retain only sufficient to protect himself from loss. But the expression is also used with a more general meaning. Subrogation is substitution,

it has been said, of one person in the place of another so that he who is substituted succeeds to the rights of that other in relation to a debt or claim and to its rights, remedies, or securities.

The court, assuming that the widow had no rights in the damages which might be obtained from the third party, considered the question left to be as to the basis upon which to compute the damages. The court took the view that ordinarily the assignee of a cause of action "recovers in the right of his assignor and to the extent that the assignor might himself recover." The general rule with regard to confining damages to compensation applies "to the party originally injured, not to his assignee." Damages to the amount paid by the carrier up to the time of the action or time of the trial the court considered "would be manifestly unjust." Continuing, the appellate court said:

It would serve to relieve the wrongdoer of a part of the responsibility for his acts and at the same time would deprive the carrier who has suffered loss because of such wrongdoing of compensation for all future payments which it might be compelled to make. Nor would it be possible to fix with reasonable certainty by any method of computation the total amount of such future payments.

It may be more or it may be less than the award of damages which the carrier may receive. Very possibly the amount of such damages as nearly measures the amount of the carrier's loss as any other sum which could be named to-day.

A somewhat earlier decision (Zirpola *v.* T. & E. Casselman, 237 N. Y. 367, 143 N. E. 222) was cited, where the court said:

If dependents, electing to assign, are the only next of kin, the entire beneficial interest in the cause of action against the wrongdoer will pass by their assignment to the carrier, who may sue or compromise at will.

Finding no error of importance in the rulings of the trial court, the judgment was affirmed.

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WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—SUBROGATION—PARTY IN INTEREST—*City of Red Wing* v. *Eichinger*, *Supreme Court of Minnesota* (*April 24, 1925*), *203 Northwestern Reporter*, *page 622*.—The city of Red Wing carried compensation insurance with the Travelers Insurance Co. Ole Haga, employed as a street sweeper by the city, was injured by a collision between two automobiles while engaged in the course of his employment. An award of compensation was granted by the commission and paid by the insurance company.

The city brought an action against the operators of the automobiles, seeking to recover from them the amount of compensation received by the employee, alleging negligence as the cause of the

accident. Upon the dismissal of the action the city appealed from an order denying its motion for a new trial.

The workmen's compensation law, section 4291 (Gen. Stats. 1923, subd. (2)) provides for subrogation, and the insurance policy itself contained the provision that:

> K. The company shall be subrogated, in case of any payment under this policy, to the extent of such payment, to all rights of recovery therefor vested by law, either in this employer, or in any employee or his dependents claiming hereunder, against persons, corporations, associations, or estates.

The supreme court, in affirming the judgment below, observed first that the compensation act recognizes the insurer as such. It does not compel a municipality, as it does some employers, to carry insurance. The municipality, however, may carry such insurance if it so chooses. The injured employee had a common-law action, if the facts warranted it, against the defendants under the terms of the provision cited above. He also had his claim against his employer under the compensation act. He could pursue both. He claimed and received compensation, and under the statute his common-law action, at least in part, passed to the employer by virtue of subrogation. A statutory subrogation has the same characteristics as if it were a creature of equity. It was pointed out that when an employer has paid or obligated himself to pay an award, he is authorized by virtue of the act to bring an action against the third person whose negligence was the proximate cause of the injury and to recover a sum not in excess of the award. The payment or obligation to pay the award on the part of the employer "is a condition precedent to his right to prosecute such action."

In conclusion the supreme court noted that in the instant case "that fundamental element which supports the doctrine of subrogation, namely, the call for substantial justice, is absent." The city was protected by the insurance carrier and had paid nothing nor was it obliged to pay anything. The city suffered no damage by reason of the negligence of the defendants, and in the opinion of the court "can not maintain this action." The city was not considered the real party in interest, the court saying:

> The insurance company and not the city has suffered the loss to the extent of the amount of money paid. If anyone is entitled to prosecute the alleged cause of action it would be the insurance company. There is no law or reason to support the assertion that the city should profit by its employee's injury in a street tragedy. True, the city is entitled to credit for the existence of the insurance by virtue of its contract with the insurance company, but this insurance was taken out for its own protection and for just such an emergency as this. The insurance has protected it so completely that it has had

no loss. Such right of subrogation as the law gave the city it, by contract, assumed to pass to the insurance company.

The judgment below was therefore affirmed.

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WORKMEN'S COMPENSATION—LOSS OF DEFECTIVE EYE—AWARD—*Liimatta* v. *Calumet & Hecla Mining Co., Supreme Court of Michigan (December 10, 1924), 201 Northwestern Reporter, page 204.*—William Liimatta, employed by the Calumet & Hecla Mining Co., was working as a riveter in the defendant's machine shop when a piece of steel flying from a rivet struck him in the left eye, injuring the eye to such extent that it had to be removed. In 1906, prior to the enactment of the compensation law, the same eye had been injured by a similar accident, which seriously impaired the vision. The defendant furnished proper hospital care with surgical service for the second accident, reported the case, and later tendered full compensation for the period of disability, but denied liability for loss of an eye. This was apparently on the ground that "he had previously lost the useful vision of the eye and could not lose it again within the meaning of the act, his ability to earn full wages in the same employment being unaffected by that accident." The plaintiff pressed his claim for full compensation for the loss of an eye and the arbitration proceedings resulted in an award of full compensation, which award was affirmed by the commission. The defendant asked for review by certiorari and a reversal of the award of $14 a week for 100 weeks.

The supreme court, speaking through Mr. Justice Steere, and affirming the award, said in part:

The eye is an organ of the body which furnishes the mechanism by which the sense of sight or faculty of vision is exercised. When it ceases to function for that purpose it is in common understanding lost, although the organ may yet remain. Such unquestionably is the purport of our brief statutory provision which fixes compensation "for the loss of an eye" in an industrial accident. As the statute now stands, an employee who suffers the loss of a single eye in an accident is only entitled to the compensation fixed for the loss of an eye, even though by previous loss of the sight in the other eye he becomes totally incapacitated.

Unquestionably the loss of an eye within the meaning of the act may be tested by the permanent loss of all vision adequate for industrial pursuits. The previous injury to the defective eye which then impaired its vision antedated the law under which award was made for its loss in a subsequent industrial accident which necessitated its removal. The organ with some power of vision remained after the earlier accident. When the later industrial accident occurred there had not been any adjudication or official determination that the eye was lost.

The award was therefore affirmed.

A very similar case was before the Supreme Court of Minnesota, the victim of the accident calling for the removal of an eye which had been totally blind since childhood. It was admitted that "it seems illogical to award the same compensation whether the eye had the power of vision unimpaired or had always been stone blind"; but as the law provided compensation simply "for the loss of an eye," without reference to its condition, an award the same in amount as for a perfect eye was approved. (Mosgaard *v.* Minneapolis Street Railway Co. (1924), 201 N. W. 545.)

The same (Minnesota) court had before it, just a few days before, a case in which a compensable injury had been suffered, involving an award for the full amount allowable under the law for total loss of use of an eye. There was a measure of vision, so that the injured man could "see to read print when held at an angle from the eye but not when held in front." This was said to be a total loss of vision for industrial purposes, though still "he had an eye that was of some use to him." The employer admitted the responsibility for a certain degree of damage, but maintained that there should be a reckoning of the prior loss and diminished value of the injured organ. The court rejected this contention, holding that the schedule prescribed by the law was controlling, and that the commission and courts were not given authority "to award a compensation that will fix justice in each individual case. Here was an actual removal of a member of the body for which the schedule fixes a specific compensation. That it results in double compensation, in that a previous compensation has been paid by another employer, is the good fortune of the employee, for the statute has omitted to make provision for such cases." The award in favor of the plaintiff was therefore affirmed. (Wareheim *v.* Melrose Granite Co. (1924), 201 N. W. 543.)

Practically identical were the circumstances and the conclusions in a case before the Supreme Court of Illinois, where a second injury to an eye previously compensated for by the same employer on account of a 90 per cent reduction in visual capacity was compensated for at the full rate when enucleation was made necessary. The court said in part: "There is no requirement in the act that the eye be perfect. The reduced amount of vision is all the vision the individual has, and when it is destroyed the use of the eye is destroyed. The legislature has fixed an arbitrary amount to be paid as compensation in such cases, and that amount is due and payable whenever a functioning eye is lost, though the eye may be infirm. (Chicago Bridge & Iron Co. *v.* Industrial Com. (1925), 147 N. E. 375.)[4]

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WORKMEN'S COMPENSATION—LOSS OF DEFECTIVE EYE—DISFIGUREMENT—AWARD—*Rector* v. *Roxana Petroleum Corp. et al., Supreme Court of Oklahoma (March 3, 1925), 235 Pacific Reporter, page 183.*—C. W. Rector, employed by the Roxana Petroleum Corporation, on July 9, 1923, received an injury resulting in serious and permanent disfigurement of the face. He received, on August 15, 1924,

[4] In contrast with the rule here followed is that adopted by the courts of New York, in which the rule is followed that any prior reduction of vision should be considered in fixing the percentage of loss of eye due to an accident. (Di Carlo *v.* Elmwood Construction Co. (1926), 213 N. Y. Supp. 327. See also the case of Ladd *v.* Foster Bros. Mfg. Co.; Bul. No. 391, p. 517.) The rule is followed also in Lewis *v.* Lincoln Engineering Corp. (1925, 210 N. Y. Supp. 481), where, after an injury, a workman was found to have lost 65 per cent of the use of his foot, but as there was a 30 per cent prior disability he was allowed compensation for only the added 35 per cent due to the current injury. And see the cases next following.

an award of $438 for temporary total disability and $300 for facial disfigurement, from which award he appealed. Because of the injury it was necessary to remove the right eye, but the evidence disclosed that this eye had been injured when the claimant was 7 years old, which injury "caused almost a total loss of vision, and as a result thereof he could not use this eye for any practical purposes, but could detect light from darkness."

The compensation law of Oklahoma, 1923, page 124, provides in part:

*Eye*: For loss of an eye, one hundred weeks. Loss of use: Permanent loss of use of * * * eye, shall be considered as the equivalent of the loss of * * * eye.

From this section the supreme court held that:

It follows logically and naturally that, if the claimant had already lost the use of an eye before he entered the service of the respondent, he could not lose the use of it while in such service, and that, since he could not lose the use of an eye while in the service of the corporation, he could not be awarded compensation for its loss.

The legislature specifically provided that the loss of the use of an eye and the loss of an eye are equally the same thing. The workmen's compensation law in Oklahoma, in this regard, is unlike such law that has been called to our attention in any other State.

The court found that there were only two losses sustained by the claimant, "loss of the value of his services while disabled, and damages suffered because of a permanent disfigurement to the face." The commission made an award covering both these losses, and the question of extent of damages sustained by claimant "as definitely outlined by the industrial commission." There being evidence to support the findings of the commission, the supreme court held the award to be conclusive upon the courts.

The award was therefore affirmed.

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WORKMEN'S COMPENSATION—LOSS OF INJURED HAND—BASIS OF AWARD—*Klock* v. *William A. Rogers (Ltd.), Supreme Court of New York, Appellate Division (May 6, 1925), 209 New York Supplement, page 666.*—Edward S. Klock, employed by William A. Rogers (Ltd.), suffered the loss of his right index finger eight years prior to the accident arising in this case. He was awarded at that time and paid for permanent partial disability the schedule allowance of 46 weeks at $20 a week. On May 11, 1923, he sustained another injury, resulting in 100 per cent loss of the use of the middle finger of the same hand. The industrial board found that he "was entitled to 42 per cent loss of the use of his right hand, amounting to 102.48 weeks less 46 weeks which have been paid for the loss of the

index finger." The employer and insurance carrier appealed from the award of the industrial board.

The question presented on appeal was whether or not, having been awarded compensation for the loss of the use of the index finger, the subsequent injury, instead of being computed as a schedule percentage loss, can be considered as the loss of use of part of the whole hand.

Subdivision 6 of section 15 of the workmen's compensation law as amended by Acts of 1915, chapter 615, provides:

*Previous disability.*—The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury: *Provided, however*, That an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability.

The proviso was added by the 1915 legislature, and under this amendment the defendants claimed the award was illegal. Subdivision 3 of section 15 of the compensation law prescribes schedule awards in each of the cases of injury involved in this case. The first award was made according to schedule. The second award, if considered as a schedule loss, would have been 30 weeks instead of the 102.48 weeks as allowed by the industrial board. The amendment of 1915 made a material change in the law.

The supreme court held that there were two classes of cases to be considered:

(1) Those where two separate and individual members are successively injured, neither of which is a part of or included within the other, as in the case of injuring successively two hands or two arms.

(2) Where the second injury is to a member which included within its functions, and as a physical part thereof, that member which had been previously injured, as in the case of an injury to the right arm, following an injury to the right hand.

Continuing, the court said:

The two fingers which had been lost are a part of one member—the hand. The schedule awards (sec. 15, subd. 3) provide the number of weeks' compensation for the loss of digits, each digit being specifically enumerated. It also fixes the number of weeks' compensation for the loss of the whole hand.

The error made by the board consists in treating the loss of the second finger as a partial loss of the hand and not in confining itself to the schedule fixed; in other words, it has not considered this injury by itself but in conjunction with the previous disability.

The award was reversed, and as it appeared that a schedule award for 30 weeks had been paid for injury to the second finger, the claim for the further award was dismissed.

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WORKMEN'S COMPENSATION—LOSS OF SECOND EYE—TOTAL DISABILITY—CONGENITAL DEFECT AS PREVIOUS INJURY—*Combs* v. *Hazard Blue Grass Coal Corp., Court of Appeals of Kentucky (February 10, 1925), 268 Southwestern Reporter, page 1070.*—Sherman Combs, a coal miner in the mines of the defendant coal company, received an injury resulting in the loss of sight of his left eye to such an extent as rendered him totally disabled to perform manual labor. He applied for compensation, and the workman's compensation board awarded him the maximum, $15 a week, beginning one week after the date of the accident, not to exceed $6,000, subject to a credit of 100 weeks at $12 a week for loss of sight of right eye, blindness therein having always existed, being "probably congenital," which should be deducted from the final payments due; also medical bills not to exceed $100. The coal company filed a petition for review in the circuit court, and that court modified the award by allowing compensation at the rate of $12 a week for a period of 100 weeks, the schedule period for the loss of an eye. The claimant appealed.

The statute (sec. 4901) provides:

If a previously injured employee sustains a subsequent injury which results in a condition to which both injuries, or their effects, contribute, the employer in whose employment the subsequent injury is sustained shall be liable only for the compensation to which such resulting condition entitled the employee, less all compensation which the provisions of this law would have afforded on account of the prior injury or injuries had they been compensated for thereunder.

Had this employee, having an eye useless probably from birth, been "previously injured"? Another section of the law covers total disability. Reading the two sections together, the court ruled that:

A previous injury should be held to include any cause producing the result. The thing provided for is a condition—total disability. A case of total disability exists when the only good eye is put out. The statute was intended to provide for the employee who was in fact permanently disabled, in order that he would not become a charge on the public, or be without any means of support. It covers all cases of total permanent disability. But the maimed employee should not in case of total permanent disability be paid as much as one who was not maimed in any way, and so the statute allows a deduction for what would have been allowed for the previous injury, whether it occurred at one time or another.

This conclusion is in accord with the weight of authority under statutes like ours, and seems to us the reasonable and just rule.

The judgment was reversed and the cause remanded with directions to enter a judgment approving the award of the board.

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WORKMEN'S COMPENSATION—LUMP-SUM SETTLEMENT—MISTAKE AS TO MATERIAL FACTS—*Ostegaard* v. *Adams & Kelly Co.*, *Supreme Court of Nebraska* (*April 16, 1925*), *203 Northwestern Reporter, page 564.*—Peter Ostegaard, employed by the Adams & Kelly Co., sustained an accident arising out of his employment with the company on January 21, 1922, which resulted in the loss of his left eye, and as a further result of the injury it was alleged that he became and was afflicted with tuberculosis and was permanently and totally disabled thereby. He brought an action for compensation to recover as an employee, the company resisting on the ground of "a settlement and previous adjudication of all matters in dispute." From a finding in favor of claimant the company appealed, alleging that on May 5, 1922, a lump-sum settlement was made by which Ostegaard was paid $1,621.10. It was contended that this settlement also covered the entire injury and consequential damages.

Ostegaard admitted the settlement, but alleged that the injury caused him to be tubercular, and that neither he nor the company was at the time cognizant of the fact that he was so afflicted, nor could either of them have had such knowledge by the exercise of reasonable diligence. While the case was pending Ostegaard died, the action being revived in the name of his widow, Regine Ostegaard. The trial court entered a judgment for plaintiff for 225 weeks of compensation at $15 a week, and to reverse such judgment the company appealed.

The supreme court, on reviewing the record of the case, first held that "one who realizes on a lump-sum payment or settlement must bring himself clearly within the statute as to the facts entering into such adjustment as well as the law governing same." The evidence was held to sustain the trial court, and the record to warrant the conclusion that the settlement "was for the loss of the eye and the usual or reasonably to be expected consequence thereof, and no more." The court further held that the settlement as made and approved was "clearly as to both plaintiff and defendant buttressed on a mistake of fact; that neither party knew, or by reasonable diligence could have known, of such affliction, and that such tuberculosis was not for that reason taken into consideration at the time of settlement." As to this basis for claim their minds did not meet and could not have met, so that "they did not contract, and neither

was it covered by the settlement or judgments, and plaintiff has not received compensation."

The supreme court in conclusion stated that—

To avoid the harsh rules of law applied to such cases, courts of equity take cognizance of mistakes of this nature and apply the rule of conscience to the facts disclosed by the evidence. In this case neither party has parted with anything or been placed in a worse position by reason of the settlement. * * * In equity and good conscience, under the facts as well as the law, the mistake was mutual and one against which equity will relieve.

This is not enlarging the scope of the statute, for its provisions provide for a just compensation of the injured and not for a part thereof.

The judgment of the trial court sustaining the additional award was therefore affirmed.

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WORKMEN'S COMPENSATION—MEDICAL ATTENTION—DENTAL SERVICES—APPROVAL BY COMMISSION—*Farley* v. *H. T. Milling Co., Supreme Court of Oklahoma (September 15, 1925), 239 Pacific Reporter, page 451.*—Fred Abernathy, employed by the H. T. Milling Co., received an accidental injury to his mouth while in such employment. The foreman directed him to go to the Picher Hospital for treatment, and upon arriving he found a Doctor Dodson, who upon examining him told him the services of a dentist would be necessary, and took him to the office of the plaintiff, Dr. B. W. Farley, and requested that Doctor Farley render him such dental service as was necessary. The service was rendered and the bill was presented to the London Guarantee Co., insurance carrier for the employer. Payment, however, was refused, and Doctor Farley then brought suit against the employer, and from a demurrer sustained in favor of defendant the plaintiff appealed.

It was the contention of the employer that there was neither an expressed nor implied contract between plaintiff and defendant for the dental services involved, and that if plaintiff is entitled to recover he must do so by virtue of the workmen's compensation act (secs. 7282–7340, Comp. St. 1921).

The supreme court, in considering the question whether or not the employer hired plaintiff, decided that there was no contract which would bind the defendant for the payment for services rendered. It appeared that when the employee went to the hospital the doctor who took him to the dentist merely said to the dentist, "I have a patient for you, Mr. Abernathy," and "he's from the H. T. Milling Co."

The record disclosed also that the industrial commission found that the employee did not lose more than seven days, and that he suffered no serious permanent facial, head, or hand disfigurement.

The supreme court observed that the compensation act makes it the duty of the employer to furnish medical attention, and if the employer failed the injured employee may do so at the expense of the employer, but the act further provided that such charges and fees shall be subject to regulation by the commission and such claim shall not be enforceable unless approved by the commissioner. No application having been made in the manner provided by law for the payment of the services rendered it was held that the plaintiff was not entitled to recover under the compensation act.

The judgment of the lower court in sustaining the demurrer was therefore affirmed.

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WORKMEN'S COMPENSATION—MEDICAL EXAMINATION—FAILURE TO SUBMIT—DEPORTATION OF ALIEN—*Sauch* v. *Studebaker Corp., Supreme Court of Michigan (October 1, 1925), 205 Northwestern Reporter, page 120.*—Antonio Sauch, while employed by the Studebaker Corporation, suffered an injury arising out of and in the course of his employment. He applied to the commission for an award of compensation for an industrial accident, his claim being that the accident aggravated an existing condition of tuberculosis. Upon his hearing plaintiff was awarded compensation at the rate of $14 weekly during total disability, and the employer filed a claim for review before the full commission, which was disallowed because not received by it within 10 days from the decision of the deputy. Compensation was paid for several months, and on March 5, 1924, the employer made application to stop payment, giving as its reason that the employee was not at that time suffering from, or was not incapacitated as a result of, the injury sustained in the employ of the corporation. This application was denied. March 28, 1924, the company mailed Sauch a registered letter requesting him to appear in Detroit for physical examination at the company's expense, under the provisions of section 19, part 2, of the workmen's compensation act. Plaintiff did not appear nor directly make any answer to the letter, although about that time plaintiff's attorney told the company's attorney that he had been deported to Spain. On May 27, 1924, the defendant corporation applied for suspension of compensation based on plaintiff's failure to appear for examination. Hearing was had and the application was denied by a deputy commissioner, and the denial affirmed by the full commission. The commission in its return said:

That, had the applicant left the United States of his own volition, we would have placed the burden of proof upon him, but as appli-

cant was deported, we think the burden still rests upon the petitioner, and * * * that the agreement is in full force and effect until set aside or modified by competent proof.

It appeared, though there was no official proof, that Sauch was deported because of tuberculosis. It was admitted that his absence overseas and his failure to comply with the request to appear for medical examination were owing to his arrest and deportation by the said authorities, but as the court said, "nevertheless he did not submit himself to any examination as requested, and thereby necessarily obstructed and prevented the same." In construing the statute the court was of the opinion that as it reads it does not imply "that the obstruction must be willful," since the employer's rights under the statute "would be equally obstructed or defeated whether it was or not." Even conceding that he was willing and would have appeared for examination had it been possible, the court was of the opinion that the cause of his prevention was the fact that "his illegal immigration and residence in the country laid him liable to arrest and deportation by the Federal Government." The court was of the further opinion that the section of the statute involved suggested a limit of territorial jurisdiction—that is, the State itself—and that the examination by the physician or surgeon could not be held elsewhere. In this connection the court in conclusion stated that:

There is no machinery in our statute appropriate to the situation presented here, and nothing in its scope suggesting an intent to cover such a case. It gives the employer the right to a medical examination of the employee by a physician or surgeon authorized to practice medicine under the laws of this State, which require that he be examined and licensed by the State board of registration in Michigan. The act does not comprehend in any of its terms the possibility of the employee being absent in a foreign country. It confers upon the commission no extraterritorial powers, and neither the latter nor the courts have any authority to legislate on the subject. Beginning with plaintiff's unlawful entry into this country, circumstances developed where, by reason of his absence in Spain, it became impossible for the employer to have the medical examination the law entitled it to, amounting to contemplation of the statute to an obstruction of the same, and entitling defendant on the case as then presented to the order of suspension petitioned for.

The order of denial was therefore set aside and one of suspension granted.

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WORKMEN'S COMPENSATION—MEDICAL REPORTS—COMPLIANCE WITH STATUTE—*La Duca* v. *United States Light & Heat Corp. et al., Supreme Court of New York, Appellate Division (November 12, 1925), 212 New York Supplement, page 240.*—Dr. Joseph P. La Duca was awarded a fixed sum by the industrial accident board

for medical services rendered an injured employee. The United States Light & Heat Corporation and another opposed the award and appealed to the supreme court.

In a per curiam decision the supreme court held that where a physician rendered medical services for which an award was made, and did not comply with the statute as to filing report of such injury and treatment on a form prescribed by law, the award of the industrial board thereon would be reversed.

The award was accordingly reversed and the claim dismissed.

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WORKMEN'S COMPENSATION—MINOR UNLAWFULLY EMPLOYED—"EMPLOYEE"—*Mueller* v. *Eyman*, *Supreme Court of Ohio* (*April 14, 1925*), *147 Northeastern Reporter, page 342.*—Culver Eyman, a minor employed by the A. R. Mueller Printing Co., was engaged on November 28, 1920, in the operation of a certain folding machine. While so engaged he received an injury, for which he received an award of compensation of more than $500 for loss of time and loss of the second finger of his right hand. April 20, 1922, an action was brought for damages by a next friend in the minor's behalf, on the ground of negligence. On securing the employment Eyman, a minor 14 years and 7 months old, represented himself as being 17 years of age. The defendant company, in addition to denying charges of negligence, pleaded that the minor had applied for and received an award of compensation from the State industrial commission. In replying Eyman denied he had "consciously applied" for compensation, and alleged that any application that had been made was done in reliance of the false and misleading representations made to him by the defendant and its agent. Judgment for the defendant in a directed verdict in the trial court was reversed by the court of appeals, and defendant brought error.

The supreme court, on reviewing the record, noted a change in the workmen's compensation law made just prior to the happening of the accident in this case. By a 1919 enactment (108 O. L. 317, 324) the minor's status in relation to the workmen's compensation law was made similar to that of an adult person. This enactment (subds. 1 and 2, sec. 1465–61, G. C.) provides that every person in the service of another employing five or more workmen under "any contract of hire * * * including * * * minors," shall be construed an employee "as used in this act." The supreme court was of the opinion that "as it now stands, the workmen's compensation act is plain and explicit," and though the employment be illegal, that section makes "any contract of hire" efficacious to sustain the relation of employer and employee under the act. Section 1465–93 of the General Code, provides that "a minor shall be deemed sui juris under the act."

The plaintiff in this case represented himself to be 17 years of age, made an application for compensation, received an award, and more than a year afterwards brought an action for damages. The supreme court held that under an earlier decision " we are constrained to hold that the minor was an employee sui juris, and estopped from maintaining an action for damages against an employer who had complied with the workmen's compensation act."

The judgment of the court of appeals was reversed and that of the trial court affirmed.

Within the principle applied in the foregoing case was the decision of the Supreme Court of Tennessee in a case in which a minor 20 years of age sought to avoid the consequences of a failure to give notice of the injury within the time prescribed by the act, on the grounds of minority. The law gave to a minor of 18 years or over the status of an adult so far as his rights under the compensation law are concerned. The supreme court held such action to be within the power of the legislature, so that the dismissal of the suit by the court below was affirmed. (Campbell *v.* Bon Air Coal & Iron Corp. (1925), 268 S. W. 377.)

The law of New Jersey does not lend itself to such constructions as that of Ohio, noted above, but is held to be limited to lawful employments, illegal employment not being considered as employment under the compensation law. Thus, where a boy of 14 was employed at a dangerous machine, in violation of the child labor law of the State, " the workmen's compensation bureau had no jurisdiction to pass upon the question of the compensation to be paid to him for the injuries received, for it is only in those cases where the contract of hiring is valid that the workmen's compensation act is applicable." An award made on an application for compensation was therefore held to be no bar to an action for damages subsequently brought, and a contrary judgment of the trial court was reversed. (Boyle *v.* Van Splinter (1925), 127 Atl. 257.)

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WORKMEN'S COMPENSATION—NOTICE—FAILURE TO GIVE IN WRITING—*Levine* v. *General Electric Co., Supreme Court of New York, Appellate Division (November 12, 1925), 212 New York Supplement, page 88.*—In a proceeding under the compensation law by David Levine against the General Electric Co., the State industrial board granted an award from which the employer appealed.

In a per curiam decision the supreme court reversed the award and remitted the matter to the industrial board on the ground that verbal notice given to the employer was not one of the statutory grounds of excuse for failure to give written notice of the injury as provided by the compensation law (Laws 1922, ch. 615), and failure to give such written notice had not therefore been properly excused.

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WORKMEN'S COMPENSATION—PAYMENT OF GRATUITY—LIMITATION—CONSTRUCTION OF STATUTE—*Ashland Iron & Mining Co.* v. *Fowler, Court of Appeals of Kentucky (December 19, 1924), 271 Southwestern Reporter, page 589.*—Lewis Fowler, employed by the

Ashland Iron & Mining Co., sustained an accident arising out of and in the course of his employment, from the results of which he lost an eye. An award of compensation was granted in the sum of $12 per week for 120 weeks. The accident occurred on November 24, 1919; he returned the 1st of January, 1920, receiving the same wages, and worked until the 27th of May, when he quit because of sickness. He died on June 3, 1920, the family physician certifying that death was due to double pneumonia, "contributing or secondary causes, age, and overwork."

Only 26 weeks of the 120 weeks for which he was allowed compensation had been paid up to the time of his death, and the compensation board ruled that the "right to such compensation was personal to the employee, which ceased upon his death."

The plaintiff company maintained a fund which it called the "subscriptions and charities account," from which it would, in its discretion, donate or pension worthy employees or their dependents in case of death, and it continued to pay Fowler's dependents, who were his widow and children. The remainder of the award made by the board was paid to the widow until the expiration of the 120 weeks. Shortly after the ceasing of these payments made out of the "subscriptions and charities fund," the widow made application to the compensation board for death benefits under the statute. Plaintiff contested upon the grounds that Fowler's death did not result from the injury received, and it also relied upon the limitation of one year from the death within which application for death benefits should have been made. (Stats. 1922, sec. 4914.)

The compensation board allowed compensation in the maximum amount, but credited it with the sums paid by the employer out of the "subscriptions and charities fund." The finding was affirmed in the circuit court and a petition for review was dismissed, from which dismissal the company appealed.

Both the circuit court and the court of appeals were of the opinion that the finding that the death of Fowler was the result of the accident to his eye was against the great preponderance of the evidence, but as it was not within the province of the courts to encroach upon the findings of fact by the board they did not disturb the judgement on that ground.

The court of appeals in considering the question as to whether the payment of the gratuity was a voluntary payment of compensation under the meaning of the statute, with the effect of extending the period of limitation, said:

It is true that they were voluntarily made, but not in discharge of "compensation, as such," and clearly they were not so made by the employer, whose motive only in making them is, doubtless, the

one intended by the statute, and not the opinion or belief of the one receiving them.

To the further objection that the limitation would not begin to run until there was a "guardian or next friend" to act for the minor children, the court said:

It is the universal rule of long-continued application that in construing the terms of a statute all of its sections and subdivisions must be taken into consideration, so as to arrive at the intention of the legislature in the enactment of its various provisions.

And since the law specifically created "the dependent widow of the deceased employee, who is also head of a family of minor children, a statutory next friend for her minor children for the purpose of applying for and obtaining the death benefits provided by the act," no ground for suspending the limitation appeared.

The judgment was therefore reversed, and the board directed to dismiss the case.

On the point of the claim being barred by the limitation of one year, the law provides that "if payments of compensation as such have been made voluntarily" the time limit for making claim is postponed thereby.

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WORKMEN'S COMPENSATION—PERMANENT TOTAL DISABILITY—EARNINGS—REVIEW—*Perry County Coal Corp.* v. *Industrial Commission, Supreme Court of Illinois (February 17, 1925), 146 Northeastern Reporter, page 468.*—Walter Ayers, employed by the Perry County Coal Corporation, was injured on March 23, 1920, when he was squeezed between a car and the face of coal while he was trying to hold the car back. It was claimed that the injury was to the spine in the lumbar region, and that Ayers was unable to work thereafter. An award of compensation was granted in the sum of $14.40 for 277 weeks for permanent partial incapacity, and $11.20 for 1 week. The award was confirmed by the commission but set aside by the circuit court and the cause remanded for further hearing. On October 15, 1923, an award was made of $14 a week for 285 5/7 weeks and a pension for life of $26.66⅔ a month. This second award was confirmed by the circuit court and the defendant obtained a writ of error.

In reviewing the evidence the supreme court was of the opinion that it sustained the claim that Ayers had received an injury to his spine of such severity that he was rendered unable to do manual labor. The question in dispute was whether the continued disability "resulted from the injury or from some other cause—arthritis," as

the employer claimed. All were agreed that he was unable to perform manual labor. The supreme court said:

We have read the testimony, and are of the opinion it abundantly sustains the claim that Ayers' condition is due to the accident.

On advice of physicians Ayers attempted other kinds of employment. He tried the photographic business, but was unable to do the work and abandoned it.

He later bought a restaurant, which his wife ran; he was secretary for his local union at $30 a month, and his wife helped him and did much of the work. He was elected tax collector and hired others to do most of the work. The defendant contended that these things showed that Ayers was not wholly and permanently incapable of work and the award was not justified. The court held that:

The amount and character of the work Ayers has been able to do, as shown by the testimony, does not tend to show that he is not "permanently incapable of work."

There being no error of law and the testimony sustaining the award, the judgment of the circuit court was affirmed.

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WORKMEN'S COMPENSATION—PERMANENT TOTAL DISABILITY—ELECTRIC SHOCK—HYSTERIA—*Harrisburg Coal Mining Co.* v. *Industrial Commission, Supreme Court of Illinois (February 17, 1925), 146 Northeastern Reporter, page 543.*—Eddie Miller was employed on a machine undercutting coal and operated by an alternating current of electricity of 250 volts, and while so engaged on October 28, 1921, he received an electric shock because of a defect in the insulation of a cable. He was dazed at the time, though he worked a short time after the accident. The evidence as given by Miller was to the effect that his eyes, heart, and nervous system were affected to such an extent that he had not worked since the accident. An award of compensation was granted in the sum of $12 for one week and $16 a week for 265 weeks, aggregating $4,252. The arbitrator considered that the injury caused complete disability, rendering the claimant permanently incapable of work. The industrial commission sustained the award as made by the arbitrator, and the cause was removed to the circuit court by certiorari, where the award was set aside. In January, 1924, the industrial commission held a rehearing and made an award of $10.20 a week for 416 weeks, aggregating $4,243.50. The circuit court affirmed the award and the cause was taken to the supreme court on a writ of error.

The supreme court held that the evidence in the case warranted the conclusion that the employee was suffering from hysteria to

such an extent as to incapacitate him for work, and that the cause was the receiving of the electric shock in the course of his employment. The award was made for permanent partial disability, and the question then arose whether Miller was entitled to an award if he "is suffering from hysteria due to the electric shock, which incapacitates him from work."

It was not claimed that Miller received any other accidental injury than the electric shock. The supreme court said:

We are warranted in concluding from the evidence that, if the accident did not directly produce the effects complained of by Miller, the shock to his system produced in his mind the conviction that his health and physical vigor were destroyed, resulting in hysteroneurasthenia and incapacity to work.

The supreme court quoted with approval from the case of United States Fuel Co. *v.* Industrial Commission (313 Ill. 590, 145 N. E. 122), which case was considered exactly in point with the case under review. The court in that case said:

It is immaterial whether this condition is caused by a physical injury or a mental disorder resulting from the injury. Where an employee has an honest, fixed, definite, and continuing belief that he is suffering severe bodily pain, and that he is in such a disordered condition that he is unable to work and walks in a very stooped position, as does defendant in error, and all of the foregoing conditions have been brought about by a severe accidental injury, he is as much entitled to compensation as if he were in fact totally and permanently disabled by such accidental injury.

Miller was considered entitled to the award of compensation and the judgment was therefore affirmed.

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WORKMEN'S COMPENSATION—POWERS OF COMMISSION—DUE PROCESS—CONSTITUTIONALITY OF STATUTE—SEVERABILITY OF INVALID PROVISIONS—*Alabam's Freight Co.* v. *Hunt, Supreme Court of Arizona (January 7, 1926), 242 Pacific Reporter, page 658.*—The Arizona Legislature of 1925 proposed an amendment to the constitution of the State which would permit desired changes in the compensation system of the State. At the same time it drew up and enacted a measure to become operative in case of the adoption of the proposed amendment at an election to be held on September 29, 1925. The election was favorable to the proposition, but an action was immediately filed for an injunction against the appointment of the administrative commission, challenging the constitutionality of the act. G. W. P. Hunt, governor of the State, was made defendant, and from a judgment in his favor in the superior court of Maricopa County the plaintiff company appealed to the supreme court, the appeal resulting in an affirmation of the judgment below.

Some 24 objections were filed, but the majority of them received no consideration on account of their acknowledged triviality. Of the five points urged by the plaintiffs, one is technical under the provision of the State constitution as to referendum. No place was found for the application of this test, since the law provides that such petition may be filed only within 90 days after the close of a legislative session; and as the election did not take place until this time had expired, there was no possibility of a referendum petition being filed.

Another contention also related to procedure, the point being that it was not possible for the legislature to enact a valid law until after the adoption of the constitutional provision authorizing the new type of legislation. Precedents were cited to support "the opinion that the legislature may pass an act to take effect only upon the adoption of a constitutional amendment authorizing it, and that its constitutionality is to be tested by the constitution as it is at the time the law takes effect, and not as when it was passed."

The court then took up the question of a combination of executive and judicial powers in the commission and the unlawful delegation of judicial powers to it, contrary to provisions of the State constitution. It was recognized as obvious that "the commission has many and great administrative powers," some of which were enumerated. "In fact, the whole purpose of its existence is the administration of one of the most important laws of the State." The claim was made that if the court should hold the commission to be a court the performance of such administrative duties would be a violation of one provision of the constitution; while if it should be held not to be a court the alleged judicial powers conferred upon it would make it obnoxious to another provision of that instrument. The court admitted that if those were the only alternatives the law could not stand; but taking the definition of the word "court" as "a tribunal established for the public administration of justice" (Butts *v.* Armor, 164 Pa. 73, 30 Atl. 357), the powers and duties of the commission as enumerated by the act were so different from the functions of a court as to make the proposed characterization "the height of absurdity." The commission is, in fact, an administrative organization charged with enforcement of the entire body of labor laws, with the promotion of voluntary arbitration, the conduct of free employment agencies, the collection of industrial statistics, etc.

But granting that it was not a court, the question remains as to the exercise of "judicial power." An Ohio case (State *v.* Hawkins, 44 Ohio St. 98, 5 N. E. 228) was quoted from as follows:

What is judicial power can not be brought within ring fence of a definition. It is, undoubtedly, power to hear and determine; but this is not peculiar to the judicial office. Many of the acts of ad-

ministrative and executive officers involve the exercise of the same power.

The court added that:

The authority to ascertain facts and apply the law to the facts when ascertained appertains as well to the other departments of the government as to the judiciary. (State *v.* Harmon, 31 Ohio St. 250.)

The exact point in issue was before the Supreme Court of Wisconsin in considering the constitutionality of the workmen's compensation law of that State in the case of Borgnis *v.* Falk Co. (147 Wis. 327, 133 N. W. 209), in which that law was upheld. It was recognized that certain conclusions must necessarily be reached by the commission, as those of jurisdiction over a specific case, whether the parties are subject to the act, whether the injury was within the definition contained therein, etc.

The industrial commission must, of course, decide these questions in any case where they are raised, but it can not decide them conclusively, for they are jurisdictional questions on which its right to act at all depends. They must be open to review in some court of competent jurisdiction; otherwise the parties would be denied due process of law.

Such differences as existed between the Wisconsin statute and that of Arizona would not invalidate the reasoning in the former; and furthermore, "our statute goes far beyond the Wisconsin act in giving the courts a right of review. We conclude there is no improper delegation of judicial power."

The fundamental question of "due process" and the denial of equal protection of the law as provided by the fourteenth amendment of the Constitution of the United States was next taken up. The court found a full discussion of the law on this subject in the opinion of the Supreme Court of the United States in the case of Ward & Gow *v.* Krinsky (259 U. S. 503, 42 Sup. Ct. 529; see Bul. No. 344, p. 314), where the validity of the New York compensation law was up for consideration. As in the instant case, the question there raised was as to the inclusion of alleged nonhazardous occupations, the contention being made in the Krinsky case that "the validity of compulsory workmen's compensation acts depends on the inherent hazardous character of the occupations covered." The earlier New York statute, like the earlier Arizona law, had used the test of hazard, but in their present form both included employment generally, so that the language of the Supreme Court in the New York case was entirely apt in any discussion of the Arizona statute. The opinion was quoted from at great length, in the course of which it was said that "the New York compensation law by its terms is based upon the existence of actual, not hypothetical, inherent hazards

confronting employees in gainful occupations." The amendment including all employments in which four or more workmen or operatives are regularly employed in the same business, except farm and domestic servants, was said not to ignore "actual inherent hazard." Instead, "it was treated as virtually universal, but incapable of being precisely defined or classified by strict statutory rules in advance, and more easily treated in the light of experience."

The fact that the Arizona statute does not refer to "inherent hazards of the occupation," as does the New York statute, but covers "any accident arising out of and in the course of such employment," was said to be a distinction only in form and not in substance or meaning. The Arizona rule had been announced as holding the employer liable for "any accident arising from one of the conditions of the occupation," which was said to have the same meaning as the expression "inherent hazards" in the Krinsky case, enforcing the conclusion by the following quotation:

That there was inherent hazard in Krinsky's occupation is conclusively shown by the fact that, in the course of it, he received a serious and disabling personal injury arising out of it.

The court added:

So in our act, while the legislature did not use the words "inherent hazards of the occupation," yet it is plain that "any accident arising out of and in the course of an employment" must necessarily be caused by one of the "inherent hazards" of such occupation, as the phrase is construed by the Krinsky case.

We do not think our statute violates the fourteenth amendment of the Federal Constitution.

The final objection was as to a claimed conflict between the law as enacted and the constitutional amendment as framed by the legislature. Such conflict was found to exist, the constitution providing that "the right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation" (art. 18, sec. 6). This provision was not affected by the amendment, which proposed to retain the right of all employees in private employment to exercise an option as between recovery in a suit at law and under the compensation statute, but provided also that this option might be exercised "by failing to reject the provisions of such workmen's compensation law prior to the injury."

It may be noted that this was one of the prime objectives of the amendment to the constitution, the former law permitting choice at any time, even after the receipt of the injury, although the employer may have been insured under the compensation law. Under the new legislation acceptance of the compensation provisions is presumed and is binding in the absence of a rejection prior to the injury.

As enacted the new law gave the option of rejecting the compensation law to enumerated hazardous occupations, making it the exclusive remedy as to other employments not so enumerated. The court found this discrimination in such conflict with the constitution that it was impossible for it to stand. However, the elimination of the provision restricting election to specified hazardous employments was held not to invalidate the law as a whole. Three tests of severability were announced: First, that the remaining parts with the invalid portion eliminated must be effective and enforceable of themselves; second, that the invalid portion be not the consideration and inducement of the whole act; and third, that it could be presumed that the legislature would have passed the valid sections without the invalid portion. Applying these three tests, it was decided that the severability of the objectionable provision was entirely proper, since omitting the discrimination would grant the right of recovery on equal terms "to every employee covered by the act, and the constitutional guaranty is fully preserved. The act as it remains is just as effective and enforceable as before, and the first condition is complied with." Neither was the provision stricken out the inducement of the act as a whole. The object was "to broaden and not to narrow the principle of compensation to injured workmen, and to provide for an election of remedies in advance of, rather than after, injury," and this objective is fully accomplished without the provision which is stricken out. As to the third point it was stated that the people by their mandate inserted in the constitution directed the enactment of a compensation law. This mandate would remain in force even though the entire act were declared unconstitutional. Assuming that the legislature would obey such mandate, it would naturally follow that "it would enact precisely the law which it has already approved, eliminating only the part which the constitution forbids." The validity of the law with the invalid portion stricken out was therefore upheld, and the judgment of the court below affirmed.

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WORKMEN'S COMPENSATION—POWERS OF INDUSTRIAL COMMISSION—PROMULGATION OF ORDERS—REVIEW BY COURT—*Clemmer & Johnson Co.* v. *Industrial Commission, Supreme Court of Ohio (April 21, 1925), 147 Northeastern Reporter, page 518.*—Prior to January 1, 1924, the industrial commission had adopted an order containing requirements relating to building and construction work which the commission attempted to make effective as of January 1, 1924, notwithstanding the fact that the order was not published or promulgated as required by section 871-34, General Code, until after January 11, 1924. On this last date five employees of the Clemmer & Johnson Co. were injured while working upon a scaffold used in

connection with the erection of a school building. All of the injured employees received the ordinary compensation from the State fund to which they were found to be entitled. Shortly thereafter they made application to the commission for additional compensation in the nature of penalties under the authority of section 35, article 2, of the Ohio constitution, the applications being based upon the alleged violation by plaintiff company of the specific requirements referred to. On June 17, 1924, the defendant industrial commission found and determined that the company had violated the order, and found that "the injury was the result of failure on the part of the employer * * * and hereby orders compensation equal to 50 per cent of the amount heretofore paid on account of said injury, being assessed and paid in the manner and at the time the regular compensation is being paid."

An application for rehearing was denied, and the company petitioned the court for a review. The defendant commission demurred to this petition on the ground that the court had no jurisdiction over the subject matter of the action, and that the petition did not state facts sufficient to constitute a cause of action.

Section 871–26 of the General Code reads:

> All general orders [of the industrial commission] shall take effect within 30 days after their publication. Special orders shall take effect as therein directed.

The petition discloses that the accident happened less than 30 days from the date of the general order relative to scaffolds, and it was the claim of the commission that the above section 871–26 "shall take effect within 30 days," meaning any period of time fixed by the commission not over 30 days from the date of said order.

The supreme court doubted the correctness of this construction, "in view of the fact that the sentence following the provision as to general orders in that section, to wit, 'special orders shall take effect as therein directed,' gives to the commission in that species of orders the power to fix the time when they may become effective, while as to general orders this power in the commission seems to be withheld." The supreme court therefore reached the conclusion that the demurrer must be overruled and the petition in that regard be held good.

The second question involved was the right of the plaintiff company to maintain the action, it being the claim of the commission that the remedy of the plaintiff, if any, was by way of injunction and not by way of direct review by the supreme court. Section 871–38 of the General Code provides in part:

> Any employer * * * being dissatisfied with any order of the commission may commence an action in the Supreme Court of Ohio

against the commission as defendant to set aside, vacate, or amend any such order, on the ground that the order is unreasonable or unlawful, and the supreme court is hereby authorized and vested with exclusive jurisdiction to hear and determine such action.

Under this section the supreme court held that it had jurisdiction, upon the application of an employer or other person in interest, to set aside, vacate, or amend orders of the commission, on the ground that the order is unreasonable or unlawful, if it involves a violation of the industrial commission act.

The court held further that where the commission has issued a general order a claimed violation within less than 30 days can not be made the basis of the assessment of a penalty as a violation of a special requirement, and an order assessing a penalty based upon such violation is unlawful and subject to review.

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WORKMEN'S COMPENSATION—RELEASE—FRAUD AND MISREPRESENTATION—*Oresnik* v. *Cudahy Packing Co.*, *Supreme Court of Kansas* (*February 8, 1925*), *232 Pacific Reporter, page 1022.*—Cecilia Oresnik, employed as a worker in the defendant's packing plant, suffered an injury to her hand which resulted in partial incapacity and for which she asked compensation in the sum of $6 a week for 416 weeks. She was awarded $1,896, and the defendant appealed.

It appeared from the evidence that after the beginning of the action for compensation the defendant induced the plaintiff to sign a release and an order of dismissal of the action upon a payment of $600 by telling her she could get no more than $500 or $600 by suing. There was no dispute as to the nature and extent of the injury. The plaintiff replied to the defendant's defense of release that it was procured by misrepresentations and fraud, and therefore was of no effect. The defendant on appeal contended that the plaintiff could not "impeach a release or be relieved from its obligations upon the ground of false and fraudulent statements which she did not believe and by which she was not deceived."

It appeared on the trial and on the cross-examination that plaintiff made some statements that implied she did not believe the representations made and that she thought she could get more by bringing an action, but the court observed that she did not understand the English language, and that therefore the testimony "should be read with this condition in view." It also appeared that the agent of the company and insurance carrier told her she would lose her job at the Armour plant and that she would be barred from employment at all other packing plants if she did not accept the $600. She testified she was afraid of losing her position and was scared into signing.

The supreme court in concluding its opinion said:

There appears to be no substantial dispute as to the fraudulent misrepresentations and undue influence of which she complains, and upon the theory that fraud was established, and upon a consideration of all the circumstances shown, we are unable to say that the plaintiff is barred by the ambiguous statements made on cross-examination to the effect that she thought she could get more by a prosecution of her action.

The judgment of the district court awarding $1,896 as compensation was therefore affirmed.

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WORKMEN'S COMPENSATION—SCHEDULE INJURY—"PERMANENT TOTAL DISABILITY"—PENALTY FOR DELAYING PAYMENT BY FRIVOLOUS APPEAL—*Fern Gold Mining Co.* v. *Murphy, United States Circuit Court of Appeals, Ninth Circuit (August 24, 1925), 7 Federal Reporter (2d), page 613.*—This case was before the court of appeals on a writ of error to the District Court of Alaska. W. P. Murphy was employed by the company named in its mine, and suffered an injury to his left hip which resulted in total and permanent disability. The amounts payable under the law of Alaska are fixed sums depending upon marital status and number of dependents. Murphy being single, he claimed $3,600 for his alleged permanent total disability, while the employer insisted that he was entitled to but $1,800 as for the loss of a leg. The court rejected this contention, saying:

We find no merit in the contention. It is obvious that an injury to a leg may be such as to cause total and permanent disability. The Legislature of Alaska, in prescribing $1,800 for the loss of a leg, had in mind the case of the loss or amputation of a leg involving only partial disability, and the statute explicitly so states. Here there was evidence of an incurable and permanent injury, and the jury, under proper instructions from the court, found the disability to be total and permanent.

Citation was made of decisions of State courts bearing on the question and judgment was affirmed.

In addition to affirming the judgment below the court pointed out that the company employer "saved no exceptions to the evidence, made no motion for an instructed verdict, took no exception to instructions, and requested none." Neither had it introduced any evidence on the trial. In view of these facts, and "the question being so wholly without merit, and proceedings to collect the judgment having been delayed by the writ of error," it was held to be a proper case to apply the provisions of rule 30 governing the practice of circuit courts of appeals. This led not only to the addition of interest on the judgment for the period, but also an assessment of

damages of 10 per cent, this being the maximum under the rule where it appears that writs of error "have been sued out merely for delay."

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WORKMEN'S COMPENSATION—"TOTAL DISABILITY"—INCAPACITY FOR WORK—*Roller* v. *Warren, Supreme Court of Vermont (May 16, 1925), 129 Atlantic Reporter, page 168.*—Fred E. Roller suffered an accident on April 9, 1921, for which he was entitled to compensation under the law of the State. Agreement was entered into between the employee and the insurance carrier whereby Roller was paid $12.50 per week from April 16, 1921, during the period of total disability. In April, 1924, the parties disagreed as to the extent of Roller's disability and an application was made for rehearing, as a result of which compensation was ordered continued at the same rate until further ordered or until the parties should agree that the total disability had ceased. The defendant appealed from the commissioner's decision.

It appeared from the evidence that Roller suffered from a "strained knee," the commissioner finding that osteomyelitis developed in the injured leg, that seven or eight operations had been performed and more were probable, that his general health had been considerably impaired, and that in walking he had been obliged to hold his foot in an abnormal position. Starting about September 1, 1923, Roller had, whenever able, spent his time at a local cigar store and waited on trade, the proprietor paying him "what he considered his services worth," averaging about $7 a week. It was defendant's contention that because of these activities plaintiff was only entitled to compensation on a partial disability basis. The supreme court on review observed that the term "incapacity for work" appeared in practically all compensation statutes, and that it had come to have a definite meaning, namely:

> It means loss of earning power as a workman in consequence of the injury, whether the loss manifests itself in inability to perform such work as may be obtainable or inability to secure work to do. But the lack of opportunity to work must not be due, of course, to the servant's fault or to general business depression.

Whether the plaintiff was totally disabled for work within the purview of the compensation law ordinarily is a question of fact depending upon the circumstances in the particular case, and whether it exists in that case or not was considered a matter calling for judgment on the part of the commissioner of industry.

In view of the condition of the leg and the fact that constant medical supervision would be necessary, and that the employment was "a matter of grace through friendship," the supreme court ruled

that "it can not be said as a matter of law that the commissioner of industries erred in finding that the employee was totally disabled for work within the meaning of the statute."

The award was therefore affirmed.

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WORKMEN'S COMPENSATION—TOTAL DISABILITY—PARTIAL DISABILITY—CONSECUTIVE AWARDS—*Gobble* v. *Clinch Valley Lumber Co., Supreme Court of Appeals of Virginia (March 19, 1925), 127 Southeastern Reporter, page 175.*—H. S. Gobble, employed by the defendant lumber company, on August 4, 1922, jumped from a runaway log car and fractured the left leg just above the ankle. The hearing commissioner, whose findings were approved by the commission, found that "in October of 1922 an agreement was entered into to pay the injured $12 per week, beginning August 5, 1922, and continuing during his disability." He was paid the sum of $828, covering a period of 69 weeks, on account of the inability to work which followed the accident. The hearing was had to determine "the amount of loss of use of the foot that the claimant has suffered and the amount of compensation due on account of such loss of use." The permanent partial loss of the foot was found to be 60 per cent, and the commissioner applying the schedule of the act for partial disabilities, found claimant entitled to compensation "at the rate of $12 per week for a period of 75 weeks," amounting to $900, on account of the permanent injury. The sum of $828 having been paid, a balance of $72 was due the claimant. The commission approved this finding and the claimant appealed, contending that he was entitled to compensation for temporary total incapacity, and in addition compensation for the permanent partial incapacity.

The supreme court of appeals, speaking through Mr. Justice Burks, said:

The workmen's compensation act (Acts 1918, ch. 400, p. 637), although in derogation of the common law, is highly remedial and should be liberally construed in favor of the workman.

One of the misconceptions about the act is that section 32 fixes the amounts to be paid for the permanent total disability of the members therein mentioned, and that the amounts recoverable by the workman can never exceed the sums mentioned in that section.

Section 30 provides for total incapacity, whether temporary or permanent; section 31 applies to partial incapacity, temporary or permanent, resulting from injury to every member of the body except those mentioned in section 32; and section 32 was said to be an exception to section 31, "only as to members of the body mentioned in section 32"; and as "section 31 deals only with partial incapacity,

section 32 must be held applicable to partial incapacity only." The court then decided:

In cases of accident, usually the total incapacity comes first, that is, at the time of the accident, and the partial incapacity thereafter, but a fair construction of the act allows the workman compensation for both, subject to the qualification contained in section 30. The period fixed by section 32 (o) for the loss of a foot is 125 weeks. If this partial incapacity be ascertained to be 60 per cent it would be 60 per cent of $12 per week, or $7.20 per week for 125 weeks, or 60 per cent of 125 weeks, or 75 weeks at $12 per week. So that upon this basis the workman is entitled to $900 in addition to what he has already received. The credit allowed by the commission in effect allowed nothing for the total incapacity. In this there was error. He should have been allowed the amount paid him for total incapacity, and in addition thereto the amount stated above for permanent partial incapacity. It is immaterial that the two sums aggregate more than the sum mentioned in section 32 for loss of the use of a foot, as the latter only fixed the maximum amount to be allowed for permanent partial disability.

Reference was made to the Georgia statute, which is practically identical with the Virginia statute, and the statement was made by the court that the Court of Appeals of Georgia in Jones *v.* Georgia Casualty Co. (30 Ga. App. 207, 117 S. E. 467) reached the same conclusion that the court did in this case.

The decision of the industrial commission was accordingly reversed and the case remanded to the commission for further proceedings.

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WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—FAILURE TO USE SAFETY APPLIANCES—*Nashville, Chattanooga & St. Louis Ry.* v. *Coleman, Supreme Court of Tennessee (March 14, 1925), 269 Southwestern Reporter, page 919.*—J. W. Coleman, employed as a boiler maker by the defendant railway company, sought to recover compensation for injuries resulting in the loss of an eye, which he sustained in the course of his employment. On November 23, 1921, while engaged in cutting the head of a rivet, Coleman was working with only one helper, when he was allowed two. The second helper not having arrived, Coleman proceeded with his work and held a hex punch on the rivet head while the helper wielded the hammer, the duty of the second helper being to hold a broom over the rivet head to prevent it, or any pieces of it, from flying about the room. The rivet head flew off, hit a pipe nearby and rebounded, striking Coleman in the eye. The company, upon request of its employees, had made a rule requiring the use of a broom when the men were so engaged, and also had a further rule that:

Goggles must be worn by all workmen when chipping, using air motors, drilling, sledging of any kind, when using emery wheels, elec-

tric welders, or any work where their duties require that their eyes be protected from flying particles.

From a judgment awarding compensation the employer brought error, contending that it had provided brooms for use on the work and had provided Coleman with goggles, and that the injuries were due to his willful failure to make use of the safety appliances.

It appeared from the testimony that claimant knew of the rules mentioned and that brooms were to be had for the purpose of protection. As to excusing the claimant the supreme court said:

We do not think that the employee can be excused for failure to use a safety appliance at hand, when the nature of his work demands the use of such appliance and he knew it, even though such use of such appliance has not been required by any rule of the employer. The statute contains no such thought. The statute provides that there shall be no recovery if the injury is due to "willful failure or refusal to use a safety appliance."

The section of the statute referred to (sec. 10, ch. 123, Acts of 1919) provided:

That no compensation shall be allowed for an injury or death due to the employee's willful misconduct or intentional self-inflicted injury, or due to intoxication, or willful failure or refusal to use a safety appliance or perform a duty required by law.

The evidence was considered as sufficient to sustain the finding of the lower court that the claimant knew of the rules, and the only remaining question for the supreme court to determine was whether the failure to use the appliances was willful, so as to deprive claimant of compensation. On this point the supreme court said:

The effect of his testimony must be conceded to be that he used goggles when he thought it proper, and did not use them when he thought it was unnecessary. In other words, Coleman acted upon his own judgment customarily about the use of goggles and was not governed by the rule of the railway company. When he substituted his own judgment about the matter for his employer's rule and set aside that rule in favor of his own notions, we think this conduct was willful disobedience. It involved both intent and deliberation and was not a casual, although voluntary act. According to Coleman's testimony the cutting of this rivet without the use of safety appliances was not an isolated transaction, but was of a piece with his usual conduct. Such habitual violation of a rule, in our judgment, can not be anything else than willful, and this is the case before us.

The judgment of the circuit court affirming the award was accordingly reversed.

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WORKMEN'S COMPENSATION INSURANCE—RATES—POWER OF STATE TO REGULATE—*Employer's Liability Assurance Corp.* v. *Success–Uncle Sam Cone Co., City Court of New York, Trial Term (February 28, 1925), 208 New York Supplement, page 510.*—The defendant

was engaged in the business of manufacturing ice cream cones and was obliged by law to carry workmen's compensation insurance. About June 21, 1921, the plaintiff delivered an insurance policy for the year June 21, 1921, to June 21, 1922. The rate was $1.13 per $100 of wages expended. There being no such classification as manufacturing ice cream cones, the policy was placed under code No. 6504, covering food sundries manufacturing. The policy contained the following:

This policy is issued by the corporation and is accepted by this employer with the agreement that the rates of premium are subject to modification in accordance with the rate manual and rating plans established by the compensation inspection rating board and approved by the superintendent of insurance of the State of New York, such modification, if any, to be expressed by indorsement, naming the effective date thereof.

On March 25, 1921, before the policy was issued, the risk had been inspected as code No. 2000, bakeries, with a basic rate of $2.18 per $100, which rate was later reduced to $2.099, and had been approved by the State superintendent of insurance. On April 10, 1922, the compensation inspection rating board notified the insurance company that the policy was not in accordance with the established rate. On April 13, 1922, this company notified the defendant, and afterwards brought an action to recover the difference between the premium rates and for balance of premium due; from a judgment in its favor the defendant appealed.

The policy of the State was expressed as being to "remove the matter of rates, premiums, and classifications from the field of private bargaining and agreement," and "finally this policy was designed to guard against rebates, discriminations, and favoritism in rates, the effect of which would be harmful to employers as well as to injured workmen."

Having in mind the policy of the State, the court observed that if the rate of the policy was lower than the so-called official rate the insurance company should be entitled to recover the higher rate for the period of the policy, and if the rate was higher "the insured should be entitled to the difference from the date of the policy." The court continued:

Any other conclusion would nullify the whole theory under which the workmen's compensation insurance rates are regulated by the State. It would result in a practice of private rate fixing in conflict with the provisions of the State insurance law. It would render ineffective the language of the statute that classifications of risks and premiums relating thereto shall not take effect until they have been approved by the superintendent of insurance. It would encourage a system of rebates and discriminations that would tend to undermine the entire structure of rate making.

There is no question as to the power of the State to regulate and control insurance rates. Particularly is this true with respect to workmen's compensation insurance. The theory of the workmen's compensation law was that the burden of industrial accidents should be lifted from the shoulders of the injured workmen and their dependents, who are least able to bear it, and placed upon industry itself.

It was observed that it "is not only the right of the State, but its duty to see to it that the financial stability of insurance carriers is maintained, and that a just and adequate system of rates and premiums is established and adhered to." Judgment was accordingly directed in favor of the plaintiff insurance company in the sum of $462.98.

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