U. S. DEPARTMENT OF LABOR
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BUREAU OF LABOR STATISTICS
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DECISIONS OF COURTS AND OPINIONS AFFECTING LABOR 1926

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CONTENTS

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INTRODUCTION

Beginning with the year 1912 the Bureau of Labor Statistics has published annual bulletins presenting decisions of courts and opinions affecting labor, with the exception of the years 1919–1920 and 1923–1924 when the bulletins were biennial. Prior to 1912 this material had appeared in the bimonthly bulletins of the bureau and its predecessors.

As the title indicates, the subject matter is such decisions by the State and Federal courts as are adjudged to be of definite interest to students of the relations of employer and employee and the conditions of industry, including opinions of the Attorney General of the United States construing and applying the Federal labor laws. It would be neither practicable nor desirable, from any standpoint, to reproduce all the decisions, or to present those selected in all their details. Abridged statements of the facts, attempting particularly to bring out such items as are of special interest from the standpoints indicated, are followed by the conclusions reached by the courts, expressed either in the language of the courts or in that of the editors.

For the most part decisions appearing in the sources used—i. e., the National Reporter System and the Washington Law Reporter—for the calendar year 1926 are reproduced, though in a few cases later decisions have been noted on account of their application to points involved in cases presented, or for other reasons.

Workmen's compensation continues to afford the most fruitful source of material, the courts being still called upon in numerous instances to give construction to this recently adopted form of legislation That employers' liability is not entirely superseded thereby is evident from the considerable number of cases that still arise under this system, though many of them relate to railroad employments to which the compensation laws do not, in the main, apply. An outstanding decision in admiralty completely reverses the previously accepted position as to the status of longshoremen under the seamen's acts; however, the effect of this decision is greatly minified, if not destroyed entirely, by reason of the enactment of the longshoremen's compensation act of March 4, 1927. The development of a

harmonious and intelligible body of laws with regard to labor organizations continues, even though the line can not be regarded as a straight one nor the progress steady. Nevertheless, it is only from a study of such decisions as are presented in this bulletin and in preceding bulletins that the student of the legal aspects of the labor problem (in so far as judicial activities are concerned) can discover the trends of growth and the tendencies toward a recognition of legal personality that seems to be manifested.

The sources from which the material of this bulletin has been obtained are as follows:

Supreme Court Reporter, volume 46, page 108, to volume 47, page 217.
Federal Reporter, volume 8 (2d), page 321, to volume 15, page 608.
Northeastern Reporter, volume 149, page 657, to volume 154, page 192.
Northwestern Reporter, volume 206, page 1, to volume 210, page 1007.
Pacific Reporter, volume 241, page 1, to volume 250, page 992.
Atlantic Reporter, volume 131, page 145, to volume 135, page 240.
Southwestern Reporter, volume 277, page 1, to volume 287, page 1119.
Southeastern Reporter, volume 130, page 305, to volume 135, page 608.
Southern Reporter, volume 106, page 81, to volume 110, page 368.
New York Supplement, volume 212, page 353, to volume 218, page 400.
Washington Law Reporter, volume 54.
Opinions of the Attorney General, volume 35, pages 1–158.

OPINIONS OF THE ATTORNEY GENERAL

HOURS OF LABOR—EIGHT-HOUR LAW—PILOTS—PANAMA CANAL—*Opinions of Attorney General, volume 35, page 73 (June 11, 1926).*—The President requested an opinion of the Attorney General as to whether or not the eight-hour law provided for by an act of Congress of August 1, 1892, as amended by the act of March 3, 1913, applied to pilots employed aboard ships in the Panama Canal and adjacent waters. The acts referred to provide that eight hours shall constitute a day's work for all laborers and mechanics employed by the Government or by a contractor for the Government. The acts, however, do not apply to persons employed in connection with dredging or rock excavating in any river or harbor of the United States or the District of Columbia while not directly operating machinery or tools.

Pilotage through the Panama Canal was made compulsory by Executive Order of February 2, 1914, that order requiring all vessels to take Government pilots. The time required to pass through the canal varies from 6½ to 14 hours.

Rule 30 of Executive Order No. 4314, dated October 27, 1925, defines the pilot's responsibilities, in part, as follows: "The pilot is to be considered on board solely in an advisory capacity, but the master of a vessel must obey all the rules and regulations of the canal as interpreted by the pilot."

The Attorney General held that the act in question by its terms is limited to "laborers and mechanics"; that a pilot is neither a laborer nor a mechanic, nor are his duties similar thereto; that the duties of a pilot are supervisory and directory and are solely maritime in nature. He then said that the act of March 3, 1913, chapter 118, (37 Stat. 732), relating to officers of vessels subject to the inspection laws of the United States, has no application to pilots.

I am of the opinion, therefore, that Panama Canal pilots are not laborers or mechanics within the meaning of the act of August 1, 1892, as amended, and are not subject to the eight-hour limitation on hours of service.

WORKMEN'S COMPENSATION—UNITED STATES EMPLOYEES' COMPENSATION COMMISSION—POWERS—MEDICAL AND SURGICAL AID—*Opinions of Attorney General, volume 35, page 36 (February 4, 1926).*—Congress passed an act in 1916 (39 Stat. 742) providing 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 the necessary rules and regulations for its enforcement, and with power to decide all questions arising under the act. Section 9 provides that when an employee is injured within the provisions of the act, the United States shall furnish him reasonable medical, surgical, and hospital services and supplies, unless he refuses to accept them, and if necessary for the securing of proper medical, surgical, etc., treatment, the employee, in the discretion of the commission, may be furnished transportation at the expense of the employees' compensation fund. The question submitted by the President to the Attorney General was whether the language of section 9 includes authority to furnish artificial limbs, artificial eyes, and other prosthetic appliances which in the opinion of the commission are necessary for the rehabilitation of such injured employee.

In the course of his opinion the Attorney General pointed out and dwelt somewhat at length on the intent and purposes of Congress in enacting the Federal compensation act, holding that the fundamental purpose of the act was a humanitarian one and that it should be administered with regard to its purpose. The case of Olmstead *v.* Lamphier (104 Atl. 488), decided by the Supreme Court of Connecticut, was cited and the opinion quoted from, in part, as follows:

> Our act contemplates the furnishing of all the medical and surgical aid that is reasonable and necessary. The purpose of this provision is to restore the injured employee to a place in our industrial life as soon as possible by the use of all medical and surgical aid and hospital service which the ordinary usages of the modern science of medicine and surgery furnish. Humanity and economic necessity in this instance are in harmony in working for the accomplishment of the individual and of the public welfare.

It was held that the quoted paragraph admirably stated the purpose of the workmen's compensation act of Connecticut and was fully applicable to the Federal employees' compensation act. In concluding his opinion, the Attorney General said:

> Keeping in mind the humanitarian purpose of said act, and giving due weight to the opinion of the Supreme Court of Connecticut in construing language of similar import, the conclusion reached inevitably must be that the purpose and intent of section 9 is to include within its scope artificial limbs and other prosthetic appliances which, in the opinion of the commission, are reasonable and necessary to the treatment and rehabilitation of injured and disabled Federal employees.

I have the honor to advise you, therefore, that section 9 of the Federal employees' compensation act contemplates the furnishing to injured and disabled employees, at the expense of the United States, artificial limbs, artificial eyes, and other prosthetic appliances, deemed reasonable and necessary for the treatment and rehabilitation of such employees by the United States Compensation Commission.

DECISIONS OF THE COURTS

ALIENS—SEAMEN—NATURALIZATION—RESIDENCE—*In re Jansson, Supreme Court of the District of Columbia (January 4, 1926), 54 Washington Law Reporter, page 41.*—Bror Alfons Jansson, a Swede, having followed the occupation of a seaman for many years, and as such having served on American merchant vessels for the requisite number of years, on June 3, 1922, while in an American port, declared his intention to become an American citizen. This gave him the status and protection of a citizen of the United States, under section 4, subdivision 8, of the act of June 20, 1906, which provides in part that an alien shall "be deemed a citizen of the United States for the purpose of serving on board any such merchant or fishing vessels of the United States, anything to the contrary in any act of Congress notwithstanding." Jansson continued to serve on American vessels until September, 1925, and while in an American port on February 24, 1924, he was admitted to the United States as an immigrant for permanent residence. Almost immediately thereafter, however, he renewed his occupation as a seaman on American vessels and continued in that work for more than a year and a half thereafter.

The Government contended that Jansson could not make a valid declaration of his intention until he had been admitted as an immigrant for permanent residence and then "only in the district in which such alien resides," under section 4, subsection 1, of the law. Mr. Justice Siddons construed this to mean that such a seaman "must first secure admission as an immigrant for permanent residence, establish a residence somewhere in the United States, and make his declaration in the district in which he has thus established his residence."

The question arose as to what was meant by "residence" in the case of an alien seaman in the class under consideration. Under the terms of section 4, subsection 7, the supreme court was of the opinion that such an alien seaman could be admitted to citizenship without proof of residence in this country for five years, or, apparently, at all, if "such residence can not be established."

Mr. Justice Siddons, speaking for the court, in conclusion said:

In the court's opinion the intention of Congress in such cases, is to confer citizenship on alien seamen, not on admitted immigrants for permanent residence. And to give such seamen the status and protection afforded by the quoted provision of the act, and finally full citizenship, it does not require residence in the United States as a necessary prerequisite in all cases.

In the pending case we have an applicant who has been a seaman on United States merchant vessels for the required period of time, who has declared his intention to become a citizen of the United States, who has been, in addition, though unnecessarily, a resident of the United States for nearly two years, and who now asks that he be admitted to citizenship.

The court is of the opinion that he is legally entitled to be admitted and an order will be signed to this effect.

CONTRACT OF EMPLOYMENT—BONUS—EMPLOYMENT AT WILL—*Andrews* v. *Belleman, Supreme Court of South Dakota (April 5, 1926), 208 Northwestern Reporter, page 175.*—Action was brought by Gladys Andrews to recover $100 from the defendant, which she alleged he promised her as a bonus. The plaintiff alleged in her petition that she entered the employment of the defendant in March, 1919, at an agreed wage of $3.50 per day for candling eggs and $4 per day for picking chickens; that the defendant promised to raise her pay to $5 per day when she became proficient; that in October, 1920, the defendant made a further promise that instead of an increase in wages to $5 per day he would give her a bonus of $100 at the termination of her employment. She terminated her employment April 9, 1923, and asked for but was denied the bonus.

There was judgment for the plaintiff, and from an order denying a motion for a new trial the defendant appealed. He contended that the evidence was insufficient to support a verdict for the plaintiff. The court held that the case came squarely within the rule announced in Russell *v.* H. W. Johns-Manville Co. (53 Cal. App. 572, 200 Pac. 668; see Bul. No. 309, p. 213). In that case the decision was that the promise of a bonus was in the nature of a gratuity; that it did not in any way change the status of the employee who was suing, and therefore judgment in his favor could not be sustained.

Judge Polley, speaking for the court, said in part:

> The contract shown by plaintiff lacks the essential element of a valid consideration. The most that can be said for it is that it is an unexecuted promise of a gift or gratuity, and cannot be the basis of an enforceable right.

The judgment and order appealed from were therefore reversed, one judge dissenting, holding that, as the jury had found evidence to support the claim, the judgment should not have been disturbed.

CONTRACT OF EMPLOYMENT—BONUS—RIGHTS OF DISCHARGED EMPLOYEE—*Pontius Shoe Co.* v. *Lamberton, Supreme Court of Colorado (October 26, 1925), 241 Pacific Reporter, page 542.*—William J. Lamberton was employed by the Pontius Shoe Co. as a salesman

under a contract at a fixed rate per week, the employer "reserving the right to discharge the second party at any time it might see fit." Below the signatures to the contract was a statement signed by the company setting forth a bonus plan, payable semimonthly, based on sales in excess of an allotted quota value. This statement contained a provision that:

In the event that any salesman shall voluntarily leave the employ of the company, or in the event that any salesman shall be discharged or dismissed for any cause whatever within the sole judgment of the company, then any bonus which shall otherwise be payable to any salesman shall be forfeited to the company for its own use and benefit and such salesman shall have no claim whatever upon the company for such bonus.

Lamberton and two others were discharged in the autumn of 1923, he becoming the assignee of the claims of his fellow employees. A bonus was due at the time of the discharge, but no payments were made thereon and action was brought to secure such payment. The court below found in favor of the plaintiff, but on a writ of error the case was taken to the supreme court, where the judgment was reversed and directions given to dismiss the action. The contract was said by the court to be "nothing more than an announcement of the policy of the defendant. Its forfeiture provisions seem harsh but we can act only upon the contract which the parties have made." The company announced that the bonus was given "only as a gratuity," and the court found no case among those brought to its attention "which gave an employer such latitude as that given by the contract here involved." No ground for the plaintiff's suit appearing, the case was dismissed.

In a case before the Supreme Court of Arizona it was held that a promise of a bonus made by one member of a partnership, over the protest of the other member, was not binding on the latter in the event of the death of the former before the promise was fulfilled. (Warren *v.* Mosher (1926), 250 Pac. 354.)

CONTRACT OF EMPLOYMENT—"BREACH"—DISSOLUTION BY DEATH OF PARTNER—*Shumate* v. *Sohon et al., Court of Appeals of District of Columbia (May 3, 1926,) 12 Federal Reporter (2d), page 825.*—Bernard M. Bridget and Samuel Rosenthal, doing business under the firm name of Bridget & Rosenthal, had for a number of years employed Bailey Shumate as assistant manager of their business. On June 1, 1915, the partnership agreement expired, and the partners by a written instrument renewed it for a period of eight years. One of the provisions of the new contract was that, in the event of the death of either of the partners, the survivor should continue the business in the firm name for a period of 90 days, during which period the interest of the deceased partner was to be ascertained, and if the survivor elected

to take over the assets and continue the business he could do so by paying to the estate of the deceased the amount of his interest in the business; otherwise the business was to be closed out and the liquidated assets divided ratably between the survivor and the deceased's estate. There was also a stipulation in the contract that Bailey Shumate was to be continued in the employ of the firm for a period of five years at a specified compensation, and a written contract to that effect was entered into between Shumate and the firm. Rosenthal died on December 16, 1917, and Bridget continued the business for about 90 days, during which time Shumate continued to render the same service as before. At the expiration of the 90 days Bridget took over the assets of the firm and almost immediately sold out to a stranger without making any provisions for the employment of Shumate, who thereupon brought suit for breach of contract and claimed judgment against Bridget in the sum of $49,171.44. From a judgment for defendant, plaintiff appealed. The court of appeals, on review of the case, said in part:

The death of Rosenthal on December 16, 1917, caused a dissolution of the copartnership then existing between the two partners as fully as if both partners had died upon that day. Moreover, in the instant case the partnership business as such was not continued beyond the period permitted by the partnership agreement, but was in effect closed out and terminated comformably with that agreement.

If the employee dies the employer has no remedy against his estate. His death puts an end to the contract. It is but just that the same results shall follow from the death of the employer. The principle is still more obvious in the case of a copartnership, which is dissolved by operation of law when one of the partners dies.

The court then cited a number of cases wherein the holdings have been in accordance with its view. The opinion concluded:

It is true that the authorities are not uniform upon this subject [citing cases]; but the foregoing doctrine is sustained by the greater weight of authority and by the better reasoning. It distinctly applies to the facts in this case. Accordingly we conclude that the contract of July 2, 1915, was not breached by Bridget, and that the ruling of the lower court was correct.

The judgment of the lower court was affirmed with costs.

A similar conclusion was reached in a case where the plaintiff was induced to purchase a truck under a promise to employ him for a period of one year to haul lumber for the defendant. After some weeks the defendant sold its business, and gave notice that it would have no more hauling, whereupon the plaintiff sued for breach of contract. The California district court of appeal found no violation of the contract, as there was no covenant not to sell the business, in the absence of which there was no obligation. No implication of this effect appearing in the contract, there was no liability. (Langenberg *v.* Guy (1926), 247 Pac. 621.)

CONTRACT OF EMPLOYMENT—COLLECTIVE AGREEMENT—RECOVERY FOR WRONGFUL DISCHARGE—*St. Louis, B. & M. Ry. Co.* v. *Booker, Court of Civil Appeals of Texas (June 20, 1926), 287 Southwestern Reporter, page 130.*—T. F. Booker entered the employment of the defendant railroad company on September 20, 1919, as a car inspector, under a contract of employment entered into with the Brotherhood of Railway Carmen, which contained the following provisions:

RULE No. 37. An employee who has been in the service of the railroad 30 days shall not be dismissed for incompetency, neither shall an employee be discharged for any cause without first being given an investigation.

RULE No. 38. If it is found that an employee has been unjustly discharged or dealt with, such employee shall be reinstated with full pay for all lost time.

Booker was discharged on November 30, 1920, and the defendant refused to reinstate him upon his application to the proper officials. The matter was submitted to the Railroad Labor Board, which found that the plaintiff had been wrongly discharged and ordered that he be immediately restored to his former position, and that he make out a statement showing the time lost by him because of the wrongful discharge and the amount earned by him in other employment.

The plaintiff returned to work and in due time rendered his account of wages due him under the contract of employment, the amount being $1,712.74, which the defendant refused to pay. The plaintiff thereupon brought suit in the district court to recover that amount, with interest and costs. There was a directed verdict for the defendant company, and the plaintiff appealed and a new trial was granted. From the order granting a new trial the defendant appealed.

The court of appeals, in affirming the order appealed from, said in part:

We think it clear that the evidence was sufficient to sustain a finding by the jury that the contract of employment between plaintiff and defendant existing at the time of his discharge contained the provision that if he was wrongfully discharged he would be entitled to recover from defendant the wages due him for the time lost by his wrongful suspension from the service, less any amount he might have earned during that time. The testimony of plaintiff that he was wrongfully discharged and subsequently reinstated, and as to the amount lost by him by reason of his discharge, is not contradicted.

As we construe the pleadings and understand the evidence, the motion for new trial was properly granted, and the judgment should be affirmed.

The judgment was therefore affirmed.

CONTRACT OF EMPLOYMENT—DISCHARGE FOR INCOMPETENCY—TERM—IMPLIED CONDITIONS—*Robertson et al.* v. *Wolfe, Court of Appeals of Kentucky (June 8, 1926), 283 Southwestern Reporter, page 428.*—R. D. Wolfe sued the defendants for damages in the amount of $700, less a credit of $150. He alleged that he was hired by the defendant in November, 1923, as a bookkeeper at a monthly salary of $175, the employment to continue until May 1, 1924; that he was wrongfully discharged at the end of the month of December; and that he made diligent effort to procure other work but was able to earn only $150. The defendants contended that the plaintiff was employed only for a part of November and for the month of December, with the understanding that his employment was to cease if his services were not satisfactory, or the defendants sold out. Evidence was offered which showed that a substantial part of the plaintiff's work was incorrect, and therefore liable to cause the defendants considerable loss. Judgment was in his favor in the trial court, from which the defendants appealed. The Court of Appeals of Kentucky, speaking through Judge Clay, said in part:

There is an implied condition in every contract of service that the employee is competent to discharge the duties for which he is employed, and an employer may refuse to continue in his employ any person who has shown himself to be incompetent or inefficient. Under this rule the discharge of a bookkeeper before the time fixed by the contract of employment will not render his employer liable in damages, where his incompetency is such as to subject his employer to the danger of repeated losses and seriously affect his standing in the business world.

Judgment was reversed and the cause remanded for a new trial in conformity with this opinion.

Where a railroad conductor was discharged under imputations of dishonesty, he being notified of the discharge while on a run, so that he was compelled to ride as a passenger while in uniform, causing alleged humiliation and mental suffering, a judgment for damages was reversed by the Supreme Court of North Carolina on the ground that there was no slander, assault, or trespass of any sort, the discharge having taken place in the office to which he was ordered to report. "Under these conditions, the law imposes on the defendant no liability for the remote and collateral consequences resulting from inferences or deductions that may have been drawn by the public from the situation of the plaintiff." (Elmore *v.* Atlantic Coast Line R. Co. (1926), 131 S. E. 633.)

CONTRACT OF EMPLOYMENT—EMPLOYEE'S INVENTION—RIGHTS OF EMPLOYER—*Toledo Machine & Tool Co.* v. *Byerlein, United States Circuit Court of Appeals (December 11, 1925), 9 Federal Reporter (2d), page 279.*—Arthur A. Byerlein entered into a contract of employment in writing with the Toledo Machine & Tool Co. on March 1, 1918, for a period of five years. His duties were to be those of a chief

engineer, and he agreed to assign to the machine company any ideas, patents, or patentable features developed or invented by him pertaining to their line of product during the life of the contract. He continued to work for the company for some 20 days after the expiration of the contract, and then made an oral contract with Mr. Hinde, president of the company, the terms and conditions of which were the same as in the prior contract, except as to salary, which was increased, and the duration of the employment. He continued to work under the latter agreement for about six and one-half months, and during this period of his employment he conceived and developed the patentable idea or invention which was the subject of the suit. He then quit the machine company's employ and accepted a similar position with a competing company, and shortly thereafter the Toledo Machine & Tool Co. made demand on him to assign to it the application for the patent. On his refusal to do so a bill in equity was filed to enjoin him from selling or assigning the invention or the use thereof to others, and also for an injunction requiring its assignment to the machine company. Byerlein denied the extension of the original contract or that he entered into a new contract with the machine company. The bill was dismissed by the district court and the machine company appealed. On the appeal the decree was reversed and the court said in part:

From the evidence of both Hinde and Byerlein it is conclusive that some agreement was made by which Byerlein was to continue in the employ of the company at an increased salary for either a definite or indefinite term of service. The only question is as to the terms and conditions of the contract under which he continued in its employ.

There is no theory consistent with honesty and fair dealing upon which Byerlein could reasonably have believed that his employer was offering him an increase in salary for the performance of less service than he agreed to perform in the original contract. When Hinde said to him that his salary would be increased, either $50 a month or to $6,000 a year, he knew that Hinde was offering to him the proposition to pay this increased salary for the performance of the same service, and when he said, "Thank you, sir," and continued in plaintiff's employ, he accepted this proposition as clearly as if Hinde had stated to him in detail the services that would be required of him, word for word as it was written in the original contract, and he had replied, "I accept your proposition."

We do not consider the claim made by Byerlein that he developed this patentable idea at nights as of the slightest importance. Certainly under the written contract it would make no difference what time in the day or night such ideas were developed, and in the opinion of this court the terms of the oral contract under which Byerlein continued in the company's employ are exactly the same, except as to the duration of the employment and the salary to be paid.

The decree was therefore reversed and the cause remanded, with instructions to enter a decree in accordance with the opinion.

Quite similar circumstances existed in another case, Conway *v.* White (C. C. A. 1926, 9 Fed. (2d) 863), where a mechanical engineer, under contract to convey to the employing company all right, title, and interest in his inventions and discoveries, used or capable of being used in its business, was held bound to convey to an assignee of a trustee of the company, which had become bankrupt, a useful invention for which patents had been obtained. The court here said that: "It is, of course, well-settled law that a contract to sell or transfer a patented right, like a contract to sell real estate, may be specifically enforced."

The contracts in the foregoing cases were entered into at the time of entrance upon employment, and retained in force during the employment. In a case before the New York Court of Appeals (National Cash Register Co. *v.* Remington Arms Co. (1926), 151 N. E. 144), a contract made at the beginning of the employment was found to contain such a term, but on renewal this provision was held to have been omitted, so that no assignment of a patented invention could be enforced. Much more, in the absence of any agreement, the courts will protect the employee, even though employed as a foreman of the manufacturing department of his employer's plant, from any attempt to compel a transfer of the patent to the employer, no right accruing to the employer other than a license or shop right for the use of the patented invention in his own plant, which right "the employee may be estopped to deny, by the fact of his employment and his conduct in relation to the use of the inventions by his employer." (Manton-Gaulin Mfg. Co. *v.* Colony (Mass., 1926), 151 N. E. 71.) Nor will it suffice to procure of an employee under a general contract an agreement to assign an invention after he has entered upon the employment, no added consideration being offered, either by way of salary or term of employment. "The contract is unilateral in the truest sense, * * * so vague, uncertain, indefinite, unequal, unilateral, and deficient in fairness and justice as to require that its specific performance be denied." (Goodyear Tire & Rubber Co. *v.* Miller (U. S. D. C., 1926), 14 Fed. (2d) 776.)

CONTRACT OF EMPLOYMENT—ENFORCEMENT—INJUNCTION TO PREVENT DISCHARGE—*Hewitt* v. *Magic City Furniture & Mfg. Co., Supreme Court of Alabama (March 18, 1926), 107 Southern Reporter, page 745.*—On March 16, 1925, R. D. Hewitt entered into a contract with the defendant company whereby he was to be given $60 per week drawing account, and at the end of 12 months was to be given 10 shares of stock of the par value of $1,000. There was a provision that in the event the parties severed their connections the plaintiff was to be paid $1,000 in cash for his stock within 30 days. In consideration of the foregoing the plaintiff was to be superintendent and take charge of the production at the defendant's factory. On December 9, 1925, plaintiff was discharged, and he filed a bill in equity praying for an injunction to restrain defendant from discharging him. He set forth in his petition that, by the performance of his part of the contract, he would have the opportunity to make a reputation in the business world that could not be estimated in dollars and cents, and therefore he had no adequate remedy at law. From a decree for defendant, plaintiff appealed. The court, in affirming the decree of the lower court, held that there was a lack of mutuality

of an equitable remedy in that the plaintiff owed no obligation to the defendant that he might not abandon at his pleasure and the defendant would be remediless. In its opinion the court referred to the class of cases, some of which it cited, in which it was held that where the services to be rendered were of a peculiar kind and were not to be obtained from anyone else, the courts had granted relief. The opinion delivered by Judge Sayre was in part as follows:

Whether as superintendent, employee, or servant, his services are merely personal, no matter how dignified or responsible they may be, and the court of equity can not undertake to enforce the performance of such services.

For the reasons indicated, we are clear to the conclusion stated above that there is no equity in appellant's bill, and that the temporary injunction prayed was properly denied.

The decree was therefore affirmed.

CONTRACT OF EMPLOYMENT—ENFORCEMENT—POWER OVER SUBCONTRACTOR—SPECIFIC PERFORMANCE—*Dahlstrom Metallic Door Co.* v. *Evatt Construction Co.; Evatt Construction Co.* v. *Dahlstrom Metallic Door Co.; Eliot* v. *Dahlstrom Metallic Door Co. Supreme Judicial Court of Massachusetts (June 14, 1926), 152 Northeastern Reporter, page 715.*—In October, 1922, the trustees of the Boston Chamber of Commerce Realty Trust, so called, entered into a contract with the Evatt Construction Co. for the erection of the new chamber of commerce building in Boston, which contained the following provision:

The architect may from time to time, by an instrument in writing signed by him and approved by the owner in writing, order the contractor to make any changes in the work; but shall otherwise have no power to make any change in this contract. In case the changes thus ordered make the work less expensive to the contractor, a proportional deduction shall be made from the contract price above specified; and, in case said changes make the work more expensive, a proportional addition shall be made to said contract price.

The contract among other things called for installation of elevators essential to the building. The work of fabricating and installing the elevator inclosures and doors was let to the Dahlstrom Metallic Door Co., herein called the defendant, and it agreed to be bound by the same terms, requirements, liabilities, and conditions that the contractor was subject to; and in addition agreed that should it at any time refuse or neglect to supply a sufficient number of properly skilled men or sufficient proper material or fail in any of its agreements, the contractor was to have the right to terminate the contract, enter upon the premises, and take possession, for the purpose of completing the work, of all materials, tools, etc., and to employ any other person or persons to finish the work and to provide material therefor. The

defendants also agreed to discontinue the employment on the work of any of its employees that were not satisfactory to the contractor. The ironworkers on the building threatened a strike unless allowed to install the elevator fronts and doors. The contractor thereupon notified the defendant that it would expect the work to be done by the ironworkers. That notice was disregarded by the defendant, who appeared with carpenters to do the work, and upon being refused permission to proceed with the work, withdrew and refused to deliver the material that had been specially fabricated for the job. The contractor replevined the material and the defendant re-replevined it and brought a bill to compel the contractor to allow it to be installed by carpenters. A cross bill was brought to enjoin further interference, and to compel the defendant to deliver the balance of the materia . From a decree dismissing the bill and a decree on the cross bill for the contractor, the defendant appealed.

Of the several assignments of error made, only one, that dealing with specific performance, is important for the purpose here used, and in speaking of this the court said in part:

> The subcontractor under his contract was bound by the change in the principal contract for the reason that he specifically agreed to be bound by it, and was required to supply the material with a proper adjustment of the contract price. It is plain that on the finding of the court the contractor under its cross bill is entitled to specific performance. The materials were designed and made for use in the chamber of commerce building; they were limited in number and could not readily be used in any other building; they could not have been purchased in the open market. To have had them manufactured elsewhere would have caused serious delay in the construction of the building to the great damage of the contractor as well as of the owners. The contractor would not have an adequate remedy at law. Equity will specifically enforce a contract relating to chattels, if the remedy at law for damages would be inadequate, and grant relief for delivery of a thing wrongfully withheld.

A final decree, with some modifications, was rendered for the contractor.

CONTRACT OF EMPLOYMENT—ENGAGING IN SIMILAR BUSINESS—INJUNCTION—TRADE SECRETS—*Ice Delivery Co. of Spokane* v. *Davis, Supreme Court of Washington (March 4, 1926), 243 Pacific Reporter, page 842.*—The Ice Delivery Co. of Spokane, engaged in manufacturing and selling ice, had in its employ as iceman and driver of a delivery wagon one Newell S. Davis. Davis, who delivered ice to customers on what was known as Rockwood route, was, with the exception of a short period in 1920, employed continuously from June 1, 1919, to October 2, 1924, when he quit. On March 10, 1925, he commenced work for

a competitor of the plaintiff company. The company brought suit for an injunction to restrain Davis from serving or attempting to serve the same route formerly covered by him, or a part of it, or from soliciting the patronage of those whom he had formerly served while in its employ. An emergency restraining order was issued, but subsequently dissolved and the action was dismissed, whereupon the plaintiff appealed.

The plaintiff cited and relied on the case of John Davis & Co. *v.* Miller (177 Pac. 323, 104 Wash. 444). In that case Vincent D. Miller had been employed by John Davis & Co., engaged in a loan, real estate, and insurance agency, for sixteen years, in the last eight of which he stood in a confidential relation to the head of the business, by virtue of which all the secrets, prospects, and plans of the company were confided to him. Upon leaving the employment of the Davis company, he induced two other employees of the company to become employees of a company he organized to compete with John Davis & Co. The court said of that case that it was one "of being bent on mischief in the nature of a positive fraud against John Davis & Co." against which equity would give protection, but held that there was no parallel between the Davis case and the one under consideration. In that respect Judge Mitchell, speaking for the court, said in part:

> Not so in the present case, where there was no scheme, plan, fraud, or expression on the part of the respondent, who, months after concluding the employment of the appellant, took employment in an orderly fashion with another. * * * For him to be compelled to give up all the friends and business acquaintances made during his previous employment would tend to destroy the freedom of employees and reduce them to a condition of industrial servitude. Customers are not necessarily trade secrets, nor are they property. In this case the customers were fixed and settled in a known district, and the fact of their being patrons of the appellant was in no way covered up, but capable of ascertainment on behalf of the respondent's new employer, or anyone else, by an independent canvass at small expense and in a very limited period of time. To hold that the Davis case is decisive of this one would be, in our opinion, an unwarranted extension of the doctrine of that case.
>
> The complaint in this action does not state facts sufficient to entitle the appellant to equitable relief.
>
> The decision of the court below was affirmed.

The decision in the foregoing case was arrived at after a very general discussion of principles and cases, and was set forth as conclusive in a later case. (City Ice & Cold Storage Co. *v.* Kinnee (October 4, 1926), 249 Pac. 782.) Here, the suggestion that a knowledge of the trade routes of an ice dealer was a trade secret and entitled to protection was rejected by the court, reversing the superior court, which had awarded an injunction and damages. The information sought to be protected was said to be in no sense like a trade secret, since it could be obtained by anyone by observation and with little trouble.

CONTRACT OF EMPLOYMENT—ENTICING LABORERS—CONSTRUCTION OF STATUTE—*Shilling* v. *State, Supreme Court of Mississippi (October 11, 1926), 109 Southern Reporter, page 737.*—J. R. Shilling was convicted before a justice of the peace of violating that provision of the Code of 1906, section 1146, as amended by chapter 160, Laws of 1924, which prohibits the willful interference with, enticing away, or knowingly employing a laborer of another employer or landlord who has contracted for a specific period of time. The conviction was affirmed by the circuit court of Bolivar County, and the defendant appealed.

There was no proof that the defendant knew or that he had any intimation that the laborer whom he had hired was under contract to work for the plaintiff, and in fact the laborer told him that he was free to go where he pleased. The plaintiff, however, contended that it was immaterial under the statute whether or not the defendant knew of the contract, and that if he did anything to induce the laborer to leave his employment he was guilty.

It was held by the court to be extremely doubtful whether the construction of the statute as contended for by the plaintiff could be upheld under the fourteenth amendment, since it would tend to abridge the right of contract, by making one contract at his peril in his business, by imposing liabilities and criminal prosecution that might be utterly destructive of his liberty and his business. The judgment below was therefore reversed, and the defendant discharged.

Judge Ethridge, speaking for the court, said in part:

> We do not think the legislature intended to penalize a person for making a contract where he acts innocently. In our opinion the inducement must be consciously made—that is, it must be made with the knowledge of the existence of the preceding contract and before it is amended by the laborer.

CONTRACT OF EMPLOYMENT—LIFE EMPLOYMENT—LIABILITY OF PROMOTERS—CONSIDERATION—BREACH—*Mt. Pleasant Coal Co. et al.* v. *Watts, Appellate Court of Indiana (March 11, 1926), 151 Northeastern Reporter, page 7.*—The plaintiff, Francis M. Watts, owned a 30-year lease on 80 acres of coal land in Vigo County, Ind., which he assigned to the Mt. Pleasant Coal Co. through the promoters of that corporation. It was agreed that if he would assign the lease they would form a corporation with a paid-up capital stock of $25,000; that in consideration of his assigning the lease they would set aside for him one-sixth of the capital stock, allow him a credit of $2,000 on it, and loan him the money without interest, for the balance on the condition that he repay it out of dividends accruing on all his stock

and $2 per day out of his salary as mine boss and superintendent of the mine proposed to be opened. It was further agreed that the plaintiff was to be employed by the corporation as mine boss and superintendent at $8 per day steady employment during the remainder of his natural life.

Watts brought suit for damages for breach of the contract, alleging that the defendants constructed a mine on the land covered by the lease and had been operating thereunder ever since the assignment; that they refused to issue to him the stock promised or to loan him the money with which to purchase it as agreed, and that he was discharged as mine boss and superintendent after two months' service, without cause. There was a general denial by each of the defendants. There was a trial by jury which resulted in a verdict for the plaintiff for $10,000, from which the defendants appealed. Of the several assignments of error, the court considered mainly the question of whether or not the contract of the promoters was binding on the corporation, and whether the evidence sustained the verdict.

Judge Nichols, who delivered the opinion of the court affirming the judgment, said in part:

It may be conceded that if the promoter's contract was not made primarily for the benefit of the corporation, and if the corporation does not adopt it or promise to perform it, there would be no liability on the part of the corporation to perform. But where as here the promoters of a corporation make a contract in the interest of the contemplated corporation, if such corporation, when organized recognizes and adopts it, it then becomes the contract of the corporation.

It will hardly be questioned that in this case the contract was primarily made for the benefit of the corporation, and that it knowingly received the benefits thereof.

We have carefully examined the evidence as set out in appellant's brief, and have to say that, while we might not have reached the same conclusion as to its preponderance as the jury reached, there is evidence to sustain the verdict, and it is not for this court to weigh the same. It is altogether probable that the jury, in determining the preponderance of evidence, considered the circumstance that at the beginning of the negotiation between appellee and appellants appellee had a valuable coal lease on 80 acres of land, and that when he was discharged appellants had the lease and he had received nothing therefor except compensation for services which he had theretofore rendered for the company. The verdict cannot be disturbed for insufficiency of the evidence.

The judgment was therefore affirmed.

CONTRACT OF EMPLOYMENT—PROMISE TO MEET FUTURE WAGE INCREASE—EVIDENCE—*Golden* v. *Salkeld Coal Co.*, *Supreme Court of Appeals of West Virginia* (*April 6, 1926*), *132 Southeastern Reporter, page 751.*—Dewey Golden was employed by the Salkeld Coal Co. as a motorman. The mine was nonunion, but on March 31, 1922, the

day before a strike was called in all union mines in the neighborhood, its employees called on the manager demanding the union rate of pay. He told them that he would call the main office and ascertain its attitude. On the following day he told the men that if they would continue working they would be paid any excess if wages were advanced; but if not, there would be no deduction.

The union rate went into effect August 1, 1922, being higher than the former rate. Golden had quit work on June 2, and filed a claim for the difference between what he had received while employed and the new scale. He assigned his claim to George Ensminger, who brought action on it before a justice of the peace. Judgment was for the plaintiff and the defendant appealed to the circuit court, which affirmed the judgment. The case came before the supreme court of appeals on a writ of error and the judgment of the lower court was affirmed.

The two issues raised by the record were: (1) What were the terms of the contract? and (2) Did the manager of the company have authority to make it? The court, after reviewing the evidence pertaining to the contract, found it to be in conflict, and held that in view of such conflict the matter was properly left to the jury for its determination. As to the question of the authority of the manager to make the contract, the court found that, after taking the demands of the miners up with the company, he had informed the men that if they would not quit work they would receive back pay in accordance with the scale fixed by the United Mine Workers, and that the company had paid claims of other employees, all of which the court held tended to show that the manager had authority to make the contract. The conclusion of the court was that the case had been fairly tried and properly submitted to a jury, and the verdict would not be disturbed by the court of appeals.

CONTRACT OF EMPLOYMENT—TERM—MONTHLY CONTRACT—DISCHARGE—SUIT TO RECOVER WAGES—*Crater Oil Co.* v. *Voorhies, Court of Civil Appeals of Texas (February 5, 1926), 280 Southwestern Reporter, page 849.*—T. J. Voorhies was employed by the Crater Oil Co. as an oil-well driller at a salary of $300 per month. He began work on June 15, was paid at the end of the month, and continued to work until July 3, when he was discharged and paid up to and including July 4. He protested his discharge and insisted that he should be permitted to work and be paid for the remainder of July. This being refused, he brought suit against the company for $260, as balance of wages claimed to be due him for the month, and recovered judgment for that amount in the county court. Defendant appealed on the ground that the plaintiff was not employed for any definite length of time,

and that even though he was employed by the month his month's services ended on July 15, and it would therefore owe him for only 11 days or $110.

The court, speaking through Judge O'Quinn, said in part:

It appears that appellant paid him for the remainder of the month at the end of the month. There is nothing in the record to indicate that appellant paid its employees weekly or semimonthly, so that we think that appellant's paying appellee at the end of June for the services performed in June indicated that it thus recognized that a new month of service would and did begin on the 1st of July. While there is a sharp conflict in the authorities, the rule as established by the weight of authority, and which is followed in Texas, is that a contract of employment from month to month is a contract for a definite period of time, and can be terminated only at the end of a month, except by consent of the parties.

The judgment was therefore affirmed.

EMPLOYERS' LIABILITY—ADMIRALTY—STEVEDORE—NEGLIGENCE OF FELLOW SERVANT—FEDERAL STATUTE—*International Stevedoring Co.* v. *Haverty, Supreme Court of the United States (October 18, 1926), 47 Supreme Court Reporter, page 19.*—R. Haverty, an employee of the International Stevedoring Co., was engaged in stowing freight in the hold of a vessel at dock in the harbor of Seattle. Through the negligence of the hatch tender, also employed by the defendant, in not warning the plaintiff that a load of freight was about to be lowered it came down upon Haverty and he was badly hurt. He brought action in the State court, seeking a common-law remedy. There was judgment for the plaintiff, which was affirmed by the supreme court of the State, and the defendant brought a writ of certiorari for review by the United States Supreme Court.

The defendant pleaded the defense of fellow service and cited a number of cases, among which were *The Hoquiam* (253 Fed. 627, 165 C. C. A. 253) and Cassil *v.* United States Emergency Fleet Corporation (C. C. A., 289 Fed. 774; see Bul. No. 391, p. 46). It contended that the ruling of the courts in the instant case was contrary to the established doctrine, and referred to an intimation of the United States Supreme Court that whether the established doctrine be good or bad it is not open to the courts to do away with it upon their personal notions of what is expedient.

The court held that Congress had changed the rule by the act of June 5, 1920, chapter 250, paragraph 20 (41 Stat. 988, 1007; Comp. St., sec. 8337a), which reads as follows:

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.

Mr. Justice Holmes, who wrote the opinion of the court, said in part:

It is not disputed that the statutes do away with the fellow-servant rule in the case of personal injuries to railway employees. The question therefore is how far the act of 1920 should be taken to extend.

It is true that for most purposes, as the word is commonly used, stevedores are not "seamen." But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. If they should be protected in the one case they should be in the other. In view of the broad field [in] which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of opinion that a wider scope should be given to the words of the act, and that in this statute "seamen" is to be taken to include stevedores engaged as the plaintiff was, whatever it might mean in laws of a different kind.

The judgment was therefore affirmed.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—TUBERCULOSIS CAUSED BY WORKING IN UNHEALTHFUL PLACE—*Wager* v. *White Star Candy Co. (Inc.), Supreme Court of New York, Appellate Division, (July 2, 1926), 217 New York Supplement, page 173.*—Frances E. Wager, employed by the White Star Candy Co. (Inc.), developed tuberculosis as a result of her surroundings during her working hours. She brought an action against her employer for damages and recovered judgment for $2,000. From an order denying defendant's motion to set aside the verdict and to direct a new trial, the defendant appealed. The plaintiff alleged in her complaint that she was required to work in a damp, unsanitary cellar from June, 1924, to October, 1924, and from October, 1924, to December, 1924, she was required to work on the first floor in a room which was not properly heated; that she was subjected to drafts; that she contracted a hacking cough and became incapacitated. Physicians swore that the plaintiff was suffering from tuberculosis in December, 1924, and that the development of the tubercular condition was directly attributable to her surroundings during her working hours.

The defendant urged that the plaintiff's sole remedy lay in her filing a claim under the workmen's compensation law (Laws 1922, ch. 615, sec. 10), which provides as follows:

Every employer subject to this chapter shall in accordance with this chapter secure compensation to his employees and pay or pro-

vide compensation for their disability or death from injury arising out of and in the course of the employment, without regard to fault as a cause of the injury.

The court, after reviewing that portion of the workmen's compensation act defining "injury" and "personal injury" and applying the definitions to the facts in the instant case, said in part:

If there is no accident, there is no liability, and no remedy under the law. In such case the law is not exclusive, and the common-law remedy, if any there be, may be employed. This plaintiff sustained no accidental injury, since there was no sudden occurrence referable to a definite time or place. We think, therefore, that the plaintiff was not debarred, by the provisions of the workmen's compensation law, from bringing this action.

Nevertheless, we think she must fail in her action. The plaintiff was fully aware of the conditions under which she worked and continued in the employment from June to December in spite of such knowledge. It is from her testimony that we learn that the walls of the cellar were wet to the touch; that the cesspool backed up liquids which wet the floor; that the cellar was devoid of windows to light or air it; that dead rats were left about; that the odors were vile; that the plaintiff worked in a drafty place; that the upstairs room was damp. It is common knowledge that such conditions are deleterious to health.[1] The plaintiff was chargeable with such knowledge. We think that the plaintiff, as a matter of law, assumed the risk attendant upon her remaining in the employment, and that the recovery may not stand.

The order and judgment were reversed on the law. with costs, and the complaint dismissed.

EMPLOYERS' LIABILITY—COMPETENT FELLOW SERVANTS—EMPLOYMENT OF FOREIGNERS—SAFE PLACE TO WORK—NEGLIGENCE—*Courtois* v. *American Car & Foundry Co., Court of Appeals, Missouri (April 6, 1926), 282 Southwestern Reporter, page 484.*—Francis Courtois was employed by the American Car & Foundry Co. as a common laborer and was engaged, along with two Americans, Gibson and Mosby, and three Mexicans, in assorting some steel rails. The Mexicans were unable to understand or comprehend the English language and were guided in a great measure in their work by the movements of the Americans. When a rail was carried to the

[1] In connection with this decision, it may be noted that the laws of New York direct that all factories and other workplaces "be so constructed, equipped, arranged, operated, and conducted as to provide reasonable and adequate protection to the lives, health, and safety of all persons employed therein" (Con. L., ch. 31, sec. 200); that "every part of a factory building and of the premises thereof and plumbing therein, shall at all times be kept in a safe and sanitary condition and in proper repair" (Idem, sec. 291); that "every workroom in a factory shall be provided with proper and sufficient means of ventilation, natural or mechanical, or both, as may be necessary, and there shall be maintained therein a proper and sufficient ventilation and proper degrees of temperature and humidity at all times during working hours" (Idem, sec. 299). Furthermore, an employee assumes only the necessary risks of the occupation or employment, "including those risks, and those only, inherent in the nature of the business which remain after the employer has exercised due care in providing for the safety of the employees, and has complied with the laws affecting or regulating such business or occupation for the greater safety of such employees." (Sec. 4, ch. 74, Con. L., added 1921, ch. 121.)

designated place the foreman would say "Drop it," whereupon the Americans would let loose their hold, and the Mexicans, observing their conduct, would let go also. At the time in question a rail some 23 feet in length and weighing 600 to 700 pounds was being carried. The ground over which the plaintiff was obliged to walk was covered with pig iron, and the foreman observing that he was walking with difficulty, said "Be careful," whereupon the Mexicans, although they had not reached the designated place, released their hold on the rail and a second or two later Gibson and Mosby dropped it, causing the plaintiff to stumble over the pig iron and fall. He was struck upon his right side by the rail as it rebounded, injuring him. He brought an action for damages for his injuries and alleged that the defendant was negligent in employing foreigners who did not understand the English language and in not furnishing a safe place to work. He recovered judgment in the sum of $1,700 in the circuit court of St. Louis County, from which the defendant appealed. It was argued that the employment of foreigners who could not understand the English language for use in common labor was not negligence. Judge Bennick, speaking for the court of appeals said in regard to this:

In so far as we have been able to determine, this precise question is a matter of first impression in Missouri. We concede, however, as a general rule of law, that defendant's argument is well taken. To hold that an employer might not employ men of foreign birth who are unable to understand and speak the English language would be discriminatory and unjust and contrary to a public policy which has invited such labor to our shores. That the mere employment of such persons is not negligence has been held by eminent and respectable courts. However, this rule, as in the case of all others, has its exceptions. The real issue involved concerns the competency of the employees for the particular tasks to which they are assigned, upon which question our own courts have often spoken. It has been properly held in this State that the master must use ordinary care in employing and retaining competent and suitable servants, that this is a personal duty resting upon him, and that he is liable for a failure to perform such duty when the failure results in an injury to a fellow servant.

Extending the rule, therefore, to its logical conclusion, we are of the opinion that, where laborers are engaged in work (as in the case at bar) which requires cooperation, coordination, and action in response to spoken orders, and which is unsafe in the absence of such elements, as defendant's own evidence tended to show, it is negligence for the master to employ servants who do not understand the language used by the foreman.

The defendant pointed out that the proximate cause of the plaintiff's injury was the action of Gibson and Mosby in dropping the rail, and also that it was not proven that the place of employment was unsafe, but the court held that these were matters for the jury. The judgment of the circuit court was affirmed.

EMPLOYERS' LIABILITY—COMPETENT FELLOW SERVANTS—INTOXICATED EMPLOYEE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—*Reed* v. *Koch, Court of Appeals, Missouri (March 2, 1926), 282 Southwestern Reporter, page 515.*—Inez Reed brought suit to recover damages for personal injuries received about October 25, 1923, while in the employ of the defendant. At the time of his injuries the plaintiff was engaged in driving a team of three horses which were being used to aid in pulling and loading a wheel scraper. The team was attached to the scraper by means of a hook put through the end of the tongue on the scraper. A second team driven by another employee, Archie Wilkerson, was attached to the scraper. When it was filled the teams were stopped and the plaintiff stepped in front of the rear team to unhook his team and drive it aside, when Wilkerson slapped his team and yelled "Get up." The horses moved forward and one of them stepped on the plaintiff's foot causing him to throw up his hand, striking his thumb over the hame and mashing and bruising it. Blood poisoning set in as a result of the injury to the thumb. The plaintiff alleged that Wilkerson was addicted to the use of intoxicants, which the defendant knew, or by reasonable exercise of ordinary care should have known; that he was drinking at the time of the accident; and that the defendant negligently retained him in his employment.

The defendant set up a general denial and also a plea of contributory negligence. The cause was tried twice in the circuit court before a jury, finally resulting in a verdict and judgment for the plaintiff in the sum of $2,500, from which judgment defendant appealed. It was argued that the fact that the plaintiff continued to work with and around Wilkerson after having knowledge of his drinking was sufficient to charge him with contributory negligence.

The court, after reviewing and quoting from the opinions of numerous cases decided in the courts of Missouri in which the question of contributory negligence was in issue, said in part:

It follows as a corollary to this proposition that in considering the question of a servant's contributory negligence, his conduct in continuing to work with a fellow servant whom he knows to be incompetent is to be judged according to the danger he should reasonably apprehend would result from such incompetency in view of the particular kind or character of work in which the servants may be engaged. For instance, a servant would be expected to apprehend greater danger in constructing a paved road, when working in front of a cement-mixing machine carrying on the end of its boom a heavy load of cement if it were operated by an incompetent engineer, than he would if the incompetent servant with whom he had to work was simply a teamster whose work required no great degree of skill or care.

Applying the rules of law above set forth to the facts of this case, we are unable to declare as a matter of law that plaintiff was guilty of such contributory negligence as to bar his recovery.

The judgment was accordingly affirmed.

EMPLOYERS' LIABILITY—DETENTION OF EMPLOYEE IN OFFICE—FALSE IMPRISONMENT—*Weiler* v. *Herzfeld-Phillipson Co., Supreme Court of Wisconsin (April 6, 1926), 208 Northwestern Reporter, page 599.*—Adeline Weiler was employed by the defendant company as a clerk in its department store. It appeared that certain facts and circumstances had cast some doubt on her fidelity to her employer, and on December 14, 1922, she was called into the office of the assistant manager and there confronted by him with certain articles of merchandise that he alleged she had sold and appropriated the money received therefor to her own use. She was detained for approximately three hours behind closed, but not locked, doors and all the while was being urged by the manager to confess to the charges and was told by him that unless she did confess he would call the patrol and send her to jail. Upon her continued refusal to confess, the manager dictated a confession which she signed. She brought action against the company charging it with false imprisonment, slander, and assault and robbery. The jury found for the plaintiff on the charges of false imprisonment and slander. The court set aside the verdict in so far as it applied to the cause of action for slander and rendered judgment against the defendant for $500. From that judgment the defendant appealed.

The question considered by the supreme court was whether or not the evidence given in the trial court was sufficient to sustain a charge of false imprisonment. The court defined false imprisonment to be "the unlawful restraint by one person of the physical liberty of another," and said that "the true test seems to be not the extent of the restraint but the lawfulness thereof." Of this Judge Owen, speaking for the court, said in part:

While employers should be admonished that their dealings with their employees under such circumstances must be reasonable and humane, we can not adopt a rule putting an employer in jeopardy of a charge of false imprisonment when he summons to his office for an interview an employee whose conduct is unsatisfactory, or whose fidelity is under suspicion, especially where the office is one in which the employer customarily does his business, and the period of the interview is within the time for which the employee is being compensated by the employer. We conclude that the record discloses no evidence sustaining the finding of false imprisonment.

The judgment was reversed and the cause remanded, with directions to dismiss the plaintiff's complaint.

EMPLOYERS' LIABILITY—DUTY OF EMPLOYER TO GUARD AGAINST STRIKERS—NEGLIGENCE—*St Louis-San Francisco Ry. Co.* v. *Mills, United States Supreme Court (May 24, 1926), 46 Supreme Court Reporter, page 520.*—Odell Mills, administratrix of Ira S. Mills, deceased,

brought action in the Circuit Court of Jefferson County, Alabama, under the Federal employers' liability act against the St. Louis-San Francisco Railway Co. to recover damages on account of his death. The cause was removed to the United States District Court of Alabama, where the judgment was for the plaintiff. This was affirmed on appeal, and the defendant then brought certiorari to have the case reviewed.

It appeared that the deceased was employed at the time of his death by the defendant company as a car inspector in its railroad yards at Birmingham, Ala. There was a strike of the railroad shopmen going on at the time, and guards were employed by the company in the yard where the decedent worked, who accompanied decedent and some others to and from their homes. On August 3, 1922, while returning home from work, accompanied by a fellow workman and a guard, Mills was shot to death by strikers. The trial judge withdrew from the jury the question of negligence on the part of the guard, but left it for them to say whether upon the evidence the defendant was employed in interstate commerce at the time and place of the shooting; whether there was a duty of due care on the part of the defendant to protect the decedent from violence by strikers while going from his place of employment to his home; and whether the failure to send more than a single guard for protection was negligence causing the death. The defendant argued that the evidence did not warrant the submission of any of these questions to the jury and contended, among other objections, that there was no evidence of a breach of duty owing by it to the deceased. Mr. Justice Stone delivered the opinion of the court, reversing the judgment and said in part:

There was some evidence that, during decedent's employment, guards had been provided for employees while at work during the day, and to accompany decedent and some others to and from their homes. There was no evidence that petitioner had ever furnished decedent or any other employee with more than one guard in going to or from work, or any other evidence from which it could be inferred that petitioner had undertaken, or held itself out as undertaking, to furnish more protection to the decedent or its other workmen than it actually did furnish.

The respondent here asserts that the defendant, having assumed to do something, should have done more. But the bare fact that the employer voluntarily provided some protection against an apprehended danger, by undertaking to do something which involved no special knowledge or skill, can give rise to no inference that it undertook to do more. Respondent therefore relies on the breach of a duty which does not exist at common law, and of whose genesis in fact it offers no evidence.

There is a similar absence of evidence of negligent failure by petitioners to fulfill this supposed duty of protection. The burden of proving negligence rested on the respondent.

We need not inquire whether decedent was employed in interstate commerce at the time of his death * * * as the court below held, so as to support the judgment of the district court.

The judgment of the circuit court of appeals was reversed and the cause remanded for further proceedings not inconsistent with this opinion.

EMPLOYERS' LIABILITY—"EMPLOYEE"—NIGHT WATCHMAN FURNISHED BY THIRD PARTY—*Tilling* v. *Indemnity Ins. Co. of North America, Court of Civil Appeals of Texas (April 8, 1926), 283 Southwestern Reporter, page 565.*—Addie L. Tilling brought proceedings under a so-called employers' liability act, in the District Court of Texas, for compensation on account of the death of her husband, William A. Tilling, who was killed by an automobile on the night of December 31, 1924, at a point between the two parts of the plant of Horton & Horton (Inc.), in the city of Houston. The deceased was a night watchman for the firm named, and in the performance of his duties it was necessary for him to cross the street from one part of the plant to the other. At the time he was killed he had with him a watchman's clock furnished by the firm. The suit was opposed by the Indemnity Ins. Co. of North America, insurers of Horton & Horton, on the ground that the deceased was not their employee within the terms of the compensation law.

It appeared from the evidence given at the trial that Horton & Horton (Inc.) had an arrangement with the McCane Detective Agency whereby that agency furnished the watchman service for their plant. The agency employed the deceased, had control over and directed his movements, told him where to go and what to do, paid him for his service, etc. Horton & Horton had nothing whatsoever to do with these matters, and if they had occasion to make complaint about the watchman it was made to the detective agency and not to the watchman himself.

The trial court entered judgment for the defendant and plaintiff appealed. She contended that the trial court erred in holding: (1) that the deceased was not an employee of Horton & Horton (Inc.); (2) that the relationship of employer and employee did not exist between them; and (3) that the deceased was not killed in the course of his employment with the firm. The civil court of appeals, in affirming the judgment of the trial court, said in part:

The controlling question the appeal presents is, we think, whether or not at the time of the accident Tilling was an employee of the firm of Horton & Horton (Inc.) within the meaning of our compensation law (section 1, pt. 4, Vernon's Ann. Civ. St. Supp. 1918, art. 5246—82), providing:

"'Employee' shall mean every person in the service of another under any contract of hire, expressed or implied, oral or written, except * * * one whose employment is not in the usual course of trade, business, profession or occupation of his employer."

"'Employer' shall mean any person, firm * * * or corporation * * * that makes contract of hire."

There was no sort of privity of contract between Tilling and the Horton firm; it neither exercised any control over nor knew him as an individual in the transaction at all, not only dealing exclusively for the services it desired with an independent agency engaged in that business generally, but also depending wholly upon it for proper doing of the work so agreed upon. In such circumstances, no reason occurs to us under our Texas authorities for not holding Tilling to have been an employee of the McCane Agency, and that the latter, in turn, in so using him simply furnished the watchman's service to Horton & Horton as a turnkey job.

The conclusion that Tilling was not an employee of Horton & Horton requires an affirmance of the trial court's judgment, irrespective of the further question of whether or not he was killed while in the course of his employment. Were we called upon to determine that matter, we should hold that he was.

The judgment was accordingly affirmed.

EMPLOYERS' LIABILITY—EMPLOYEE—STATUS—SUBSTITUTE EMPLOYEE—AUTHORITY TO HIRE—*Mathis* v. *Western & A. R. R., Court of Appeals of Georgia (July 20, 1926), 134 Southeastern Reporter, page 793.*—This suit was brought by M. C. Mathis, administratrix of the estate of Clyde Otis Mathis, deceased, under the Federal employers' liability act (U. S. Comp. St., secs. 8657–8665) against the Western & Atlantic Railroad to recover for his death, alleged to have been caused by the negligence of the defendant's agents and servants. It was averred that at the time the decedent was injured he was an employee of the defendant railroad, and that he and the defendant were engaged in interstate commerce. The trial resulted in a nonsuit, and the case came to this court for review. The evidence showed that the decedent, at the time of receiving the injury which resulted in his death, was working as a substitute for one Boseman, an employee of the defendant, at Boseman's insistence, and that while in the act of delivering orders to the enginemen and conductor of the defendant's train he was attacked with a spell of epilepsy, and fell upon the track and the train ran over his body and killed him. There was no evidence that tended to show that the defendant or any of its agents or employees having authority to do so had anything whatsoever to do with employing the deceased.

The court, holding that the evidence failed to show that the decedent was the defendant's employee, affirmed the judgment of the trial court. Judge Bell, who delivered the opinion of the court, said in part:

The burden was on the plaintiff to prove that the relation of master and servant existed between the decedent and the railroad company on the occasion in question. The plaintiff insists (among other things) that, since the evidence shows that the arrangement between Boseman and Mathis was made with the knowledge of Baldwin, the station agent, Mathis became in law a servant of the company, entitled to the same protection as the regular servant for whom he was substituting. This is to treat Baldwin as having the authority to consent to the arrangement on behalf of the company. This he could not have done in the absence of authority to employ labor. There is nothing in the evidence to show that any such authority had been conferred upon him by the railroad company, or that his duties were of such scope that the authority could be implied. If it had appeared that he employed Boseman, whom the company had undoubtedly treated as its servant, then it might have been inferred that he was empowered to employ Mathis. The evidence as a whole failed, as a matter of law, to show that Boseman's contract of employment was made with the company through its agent Baldwin.

Under the evidence, it does not appear that Baldwin ever undertook to employ Mathis as a servant of the company; the most that is shown by the evidence being that he consented for Boseman to employ anyone that could do the work. Assuming, then, that the authority to employ, under given conditions, was conferred upon the station agent, Baldwin, he could not delegate this authority to the inferior agent, Boseman, since it involved discretion and judgment, the exercise of which the company might never have been willing to intrust to Boseman.

The judgment was affirmed.

Quite similar to the foregoing were the questions involved in the case of Bernhardt *v.* American Ry. Express Co. (1926, 218 N. Y. Supp. 123), in which the Supreme Court of New York, appellate division, reversed a judgment against the defendant for damages incurred by a bystander who responded to the request of a driver of the company's truck engaged in delivering trunks. The trunks weighed 100 to 125 pounds, said to be not heavy enough to create an emergency authorizing the driver to employ an assistant to unload them. Being without this authority, the helper was in the position of a volunteer, and in the absence of willful injury no liability would accrue.

EMPLOYERS' LIABILITY—EMPLOYER SENDING SICK EMPLOYEE HOME—NEGLIGENCE—DAMAGES FOR DEATH—*Tullgren* v. *Amoskeag Mfg. Co., Supreme Court of New Hampshire (March 2, 1926), 133 Atlantic Reporter, page 4.*—Edwin Tullgren, as administrator and personally, brought two actions in the superior court against the defendant company. One was for negligence in causing the death of his wife, and the other for damages on that account. Both actions were transferred to the supreme court on exceptions by the plaintiff to the granting of motions for a directed verdict for the defendant and on the latter's exceptions to the admission of evidence.

It appeared that the plaintiff's intestate was employed by the defendant company at its factory, and on the day of her death became

so sick while in the performance of her employment that the overseer had her sent home by one of the employees in an automobile owned by the defendant. When the driver got within about 700 feet of the decedent's home he found the road covered with water and let her out of the automobile and left her on the road. She went by foot the rest of the way and died soon after reaching home.

The defendant contended that as both the driver and the deceased were its employees the negligence, if any, was that of the driver and that the act of sending the sick employee home was gratuitous and required care only in furnishing a suitable vehicle and driver. The court, in passing on the defendant's liability for the negligence, speaking through Judge Allen, said in part:

Liability for negligence is imposed by law, regardless of and despite the terms of the contract and the understanding of the parties.

The service being assumed, the plaintiff was entitled to receive due care in being taken home, not only in means, but in manner as well. It was important that she should be taken home in safety, and care in her travel included the conduct of the travel as well as the arrangements for it. Responsibility for actual performance of the service was as much called for as responsibility for its preparation. The duty of preparation, in furnishing a suitable vehicle and competent driver, may or may not be performed by servants.

There remains to be considered the sufficiency of the evidence to show that the driver was negligent, and that, if he was, his negligence bore causal relation to the decedent's death. If the driver was negligent, it was in leaving the decedent to go home unattended. The situation did not readily disclose that a safe passage through the water obtained. But if the water made an apparent barrier to travel by automobile, the duty to use care in getting the decedent to some suitable place was not thereby released. It was for the jury to say whether the decedent discharged further prosecution of the undertaking when the travel by automobile ended, and, if not, whether care was then exercised.

The defendant's right to a verdict does not follow merely because its negligence may have been ineffective in consequences, but, so far as consequences capable of inference from the evidence are found, it is liable.

The court held, therefore, that the plaintiff was entitled to an allowance of the exceptions claimed as to the first action, that for negligence, but that as to the second, the claim for damages, the exception would not be sustained, since "at common law the death of a human being can not be complained of as an injury."

EMPLOYERS' LIABILITY—INTERSTATE COMMERCE—EFFECT OF WORKMEN'S COMPENSATION ACT—ELECTION—*Adams* v. *Kentucky & West Virginia Power Co., Supreme Court of Appeals of West Virginia (June 8, 1926), 135 Southeastern Reporter, page 662.*—Aris Adams was employed by the Kentucky & West Virginia Power Co.,

a corporation engaged in producing electricity in West Virginia, which it distributes over high voltage wires through parts of West Virginia and into Pike County, Ky. The plaintiff, a lineman, was on June 10, 1923, engaged in painting the company's substation at Falls Branch, W. Va., when he came in contact with a high tension wire and sustained serious injuries. He applied for and was paid compensation under the workmen's compensation act, but later brought suit in the circuit court for damages and was awarded a verdict for $20,000. The defendant brought error. The paramount question presented to the court was whether the defendant was protected by the workmen's compensation act.

Section 52 of the workmen's compensation act provides that the employer and employee engaged in intrastate and also interstate and foreign commerce may, if such intrastate work is clearly separable and distinguishable from interstate or foreign commerce, and such action is not forbidden by any act of Congress, voluntarily accept the provisions of the act by filing written acceptances with the commission, and such acceptances when accepted by the commission shall subject the acceptors to the provisions of the act.

The court held that the jury was justified in finding that the defendant was engaged in interstate commerce and that the substation on which the plaintiff was working at the time of his injury was part of its interstate system. It then said in part:

As the plaintiff was engaged in general work over the interstate system of defendant, the joint election or acceptance of the parties under section 52 was necessary to bring them within the provisions of the act, and to determine how much the defendant should have paid into the compensation fund, based upon "the pay roll of the employees who accept as aforesaid, for work done in this State only." We are therefore of opinion that plaintiff is not estopped by applying for and accepting current benefits under the compensation act from prosecuting his common-law remedy for damages against the defendant.

The cases relied on by counsel for the defendant as sustaining the defense of estoppel are from States in which the injured employee is given the right of election to claim the benefits under the compensation act, or sue the employer at law for damages. These cases, therefore, properly hold that the election of the employee to pursue the remedy afforded by the act constitutes a waiver of his right to sue.

As the plaintiff at the time of the injury was entitled to pursue only his remedy for damages at common law, the doctrine of estoppel by election of remedies is inapplicable.

The judgment of the circuit court was therefore affirmed.

EMPLOYERS' LIABILITY—MINOR UNLAWFULLY EMPLOYED—MISREPRESENTATION OF AGE—WORKMEN'S COMPENSATION—*Knoxville News Co.* v. *Spitzer, Supreme Court of Tennessee (January 19, 1926), 279 Southwestern Reporter page 1043.*—A statute of Tennessee, Public Acts of 1911, ch. 37, provides that no child under the age of 16 shall be employed, permitted, or suffered to operate or assist in operating job or cylinder printing presses operated by power other than foot power, and makes a misdemeanor to violate the act. Chapter 77, section 3, of the Acts of 1917, provides for an employment certificate to be issued by a proper person and kept on file by the employer.

Paul H. Spitzer, a boy under 16 years of age, was employed by the Knoxville News Co., and while engaged in helping change the plates on the cylinder printing press, which was operated by electricity, he suffered a crushed foot when the foreman let a section of the plate he was taking off fall on it. He brought suit for damages in the circuit court, and the jury returned a verdict for $2,000 which was reduced to $1,500 by the judge. On appeal to the appellate court the judgment of the circuit court was reversed and the plaintiff brought certiorari for reveiw.

The evidence showed that the plaintiff weighed about 145 pounds, was 6 feet tall and wore a number 8 or 9 shoe, that he had been shaving, and that he represented himself to be 16 years old at the time of his employment. The defendant alleged that it believed that falsehood and on that ground contended that the question of unlawful employment should be eliminated.

The court, in the course of its opinion, cited a number of cases in which questions similar to the one here involved had been in issue and quoted from many of them. Among the cases cited was that of Secklich *v.* Harris Emery Co. (184 Iowa, 1025, 169 N. W. 325), from which it quoted as follows:

"The prohibition declared by the statute is absolute and unconditional; and one who employs a young person to perform a service thus regulated or forbidden cannot be heard to say in excuse that he was misinformed * * * or * * * deceived by apparent maturity of the person employed. To hold otherwise would be to open the door to wholesale violation of the statute" and would further insert the word "knowingly" into the statute.

It was held by the court that under the facts of this case and by the great weight of authority and in sound reason the defendant could not plead as a defense in the case that the plaintiff was estopped by his misrepresentation of his age. It is not a question of whether or not the employer thought the child was over the prohibited age, but whether or not he was. (De Soto Coal Mining & Development Co. *v.* Hill, 179 Ala. 192, 60 So. 583.)

The decree of the court of appeals was reversed and the judgment of the circuit court affirmed with costs.

The question of the applicability of the State workmen's compensation act to the case was disposed of by the court saying that "it has been settled in this State that, where a minor is employed in violation of the statutes involved in this suit, the workmen's compensation act is not applicable to bar an action for damages as a result of injuries suffered by the minor in the unlawful employment."

EMPLOYERS' LIABILITY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—BURDEN OF PROOF—*Hussey* v. *Boston & M. R. R.*, *Supreme Court of New Hampshire* (*February 2, 1926*), *133 Atlantic Reporter, page 9.*—Edwin C. Hussey, an employee of the Boston & Maine Railroad as a lineman, was killed by an electric shock while in the act of making repairs in the company's power house. His administratrix brought suit against the defendant for damages. The cause of the decedent's death was not disputed, but the manner in which it occurred was the main issue.

There were no eye witnesses to the accident, and it was more or less a matter of conjecture based upon the surrounding circumstances which were substantially as follows: The transformer which the decedent was required to repair was located under a balcony, which was supported by iron posts. Two ordinary electric light sockets were attached to the under side of the balcony at the rear of two of these posts and another socket and the switch controlling the current to all the light sockets were located on a southerly post. High tension wires ran from other appliances across the aisle in front of the transformers and were attached to the bottom of the balcony. One of these wires was southerly of the post carrying the switches and not under the balcony. All of the wires were slightly above the socket on the post, and the socket could not be reached by a man standing on the floor. After procuring the necessary tools, an extension light, and a stepladder, and placing the ladder near the southerly post, the decedent placed the lamp near where the work was to be done, and laid the cord alongside the aisle to the post. Shortly thereafter there was an electrical discharge and Hussey was found lying dead near the post. His hat, his head, and the palms of his hands were burned and the light cord was lying across his body. The dust was missing from the bottom of the high tension wire southerly of the post, and an insulator at that point was freshly chipped, indicating that the discharge had been at that place. On this statement of facts the jury found for the plaintiff. On the defendant's exceptions to the denial of its motions for nonsuit and for a

directed verdict and to the admission of evidence the case was transferred to the supreme court.

The court, after considering at some length the evidence in the case and arguments advanced by the defendant in support of its position, said in part:

There is abundant evidence of the defendant's fault. The location of the light socket in close proximity to the high-tension wires, when it might well have been placed two feet lower, and within easy reach of a man standing on the floor, is sufficient upon this issue.

It must be concluded that the decedent's death was caused by his head, covered by his hat, coming in contact with or close to the charged wire. It must also be found that the work he was doing could have been done without his getting any part of his person within the danger zone. The question thus presented is whether a workman employed in a dangerous situation can be thought to be acting with ordinary prudence when he fails to avoid a known and avoidable danger. It is manifest that no dogmatic rule of law can answer this query in all cases. Under some circumstances, failure to avoid must be found to be negligent.

In the present case there is no direct evidence to show how or why the decedent came within the danger zone. Cause for the contact is not established. Burns upon the decedent's hat, head, and hands end to prove that his hands were on the metal post, presumably in he act of attaching the lamp to the socket, and that his hat touched r came near the charged wire. Why his head was within the dan-er zone is a matter left to conjecture. The evidence of the decedent's habitual care in the presence of charged wires tends to negative the idea of negligent contact. Any of the other suggested causes would, or might, negative the imputation of his negligence. None of these propositions is conclusively disproved by the evidence. It may be conceded that none of them is proved, and still the decision on the motion to direct a verdict must be against the defendant.

Since there was some evidence that the defendant's conduct was unreasonable, and the proof was not conclusive that the decedent's conduct was not reasonable, the case was one for the jury, and the defendant's motions were rightly denied.

The exception to expert evidence, upon the ground that there was no evidence of the existence of the conditions assumed, is unavailing, "since the jury were expressly instructed that a verdict for the plaintiff must be based upon the evidence and not upon conjecture."

The exceptions were overruled, and on a rehearing on the exceptions to the evidence, the court affirmed the former result.

EMPLOYERS' LIABILITY—NEGLIGENCE—FAILURE TO USE WAY PROVIDED—*Bennett* v. *Powers, Supreme Court of North Carolina (November 24, 1926), 135 Southeastern Reporter, page 535.*—This was an action for damages in which one Bennett had secured judgment in the Superior Court of Wake County. The verdict found by the jury sustained the charge of negligence on the part of defendant

Powers without contributory negligence on the part of Bennett, and a judgment of $12,500 was awarded. The defendant, Powers, employer of Bennett, moved for a judgment as of nonsuit, which was overruled, whereupon this appeal was taken.

It appears that Bennett, a plumber, was installing a heating system in a building under construction, the floors not yet being laid. A walkway had been provided from the entrance of the building to the work place, but on leaving for dinner Bennett walked diagonally across the room stepping from sleeper to sleeper. These were about 13 inches apart and had been placed so that there was some vibration. While so proceeding Bennett fell, suffering serious injury.

The supreme court reversed the judgment on the ground that a reasonably safe means of entrance and exit had been provided, which the employee had followed in the morning, but which he departed from in his attempt to leave the building by a shorter route. On this point the court said:

Plaintiff was not injured at the place at which he was at work. Conceding that it was the duty of defendant to use due care, not only to provide for plaintiff a reasonably safe place at which to work but also reasonably safe ways by which plaintiff might pass into and out of the building, in which he was required by the terms of his employment to work, it appears from the evidence that defendant had performed this duty. Plaintiff undertook to leave the place at which he had been at work by a way which had not been provided by defendant. There is no evidence that he had been instructed by defendant or by his foreman to walk diagonally across sleepers, which were shaky or insecure, in order to get to the south door, and thence leave the building. If he had undertaken to leave the building by the same way he had entered that morning, he would not, so far as the evidence discloses, have been injured. Defendant, having exercised due care to provide a reasonably safe way for plaintiff to pass into and out of the building and thence to and from his work, had fully performed the duty which was imposed upon him by law. Plaintiff voluntarily chose another way, which he knew was hazardous. Defendant can not be held liable for damages sustained by plaintiff while leaving the building by a way not provided by defendant.

EMPLOYERS' LIABILITY—NEGLIGENCE—PROXIMATE CAUSE—USE OF PAINT GUN—*Atlantic Coast Line R. Co.* v. *Wheeler, Supreme Court of Appeals of Virginia (March 18, 1926), 132 Southeastern Reporter, page 517.*—This action was brought by J. L. Wheeler against the Atlantic Coast Line Railroad Co. for injury to his eyes alleged to have been due to lead poisoning caused by the negligence of the company while he was in its employ. The facts in the case were substantially these: Plaintiff, a man in splendid health and with eyesight unimpaired, was employed by the company as a carpenter,

and on August 11, 1922, against his wishes, was put to work as a painter. He informed his boss that he was not a painter; that he knew nothing about paints; and that he could not read. He was first ordered to paint cars with a brush, but later to paint them with a paint blowgun which forced the paint against the car in the form of a fine spray. The paint used contained 36.68 per cent white lead and 33.16 per cent zinc oxide. The defendant knew the paint was poisonous, and had previously purchased face masks and goggles for the protection of the operators of the blowgun. The plaintiff had never seen a blowgun or face mask and did not know that there was danger of being poisoned by the spray. The defendant did not warn him of the danger or instruct him to use the mask and goggles, and consequently the plaintiff inhaled the spray, thereby getting lead poisoning, which resulted in the loss of his eyesight. From a judgment for plaintiff the defendant appealed, on the ground that the verdict of the jury was contrary to the evidence. Judge West delivered the opinion of the court sustaining the judgment, and said in part:

When defendant's primary negligence has been established, plaintiff's right to recover does not depend upon defendant's ability to foresee or anticipate that the particular injury might result from such negligence. Under such circumstances, the defendant is liable for the natural or probable consequences of the act.

It is obvious that there was ample evidence introduced in the instant case tending to prove a different state of facts, which, if believed by the jury, would have justified a different conclusion upon the question of the defendant's primary negligence. But this was a question for the jury, and their finding against the defendant is conclusive here.

The questions of primary negligence and proximate cause having been decided by the jury in favor of the plaintiff, we can not upon the record say the verdict is contrary to the evidence or without evidence to support it.

Had the verdict been for the defendant, we could not have disturbed it, and we find nothing in the record to warrant us in reversing the judgment in favor of the plaintiff.

The judgment was therefore affirmed.

The same court had before it at a little earlier date a case in which the question of proximate cause was likewise involved, the conclusion being reached that the negligence of the employee was responsible for the injury. A gasoline torch was furnished the workman, who found it necessary to make repairs in a way familiar to him, and capable of accomplishment in a safe manner. Failure to use proper care in this respect left the torch dangerous, with fatal results. As it was found to be the decedent's duty to make the repairs, a judgment denying the employer's liability was affirmed. (Farmer's Admx. *v.* Chesapeake & O. R. Co. (1926), 131 S. E. 334.)

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EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISKS—*Looney* v. *Norfolk & W. Ry. Co., Supreme Court of Appeals of West Virginia (June 1, 1926), 135 Southeastern Reporter, page 262.*—George Oscar Looney, an experienced engineer, had been employed by the defendant company many years, most of the time in operating loaded and empty coal cars on its main line from Williamson to Cedar, thence on a branch line to the coal plant of the Majestic Collieries Co. The coal company had a tipple built over four railroad tracks numbered 1, 2, 3, and 4. Tracks Nos. 1 and 4 were used for the delivery of empty cars, which were pushed under and then stored above the tipple, from there being dropped down for loading. Above the tipple the coal company had a car retarder used for dropping down the cars for loading as required, and under which the engines and cars used in this operation were required to pass. On January 23, 1924, when Looney, operating his engine, attempted to go under the tipple, his cab caught the pulley of the retarder and was torn from the boiler, to which it was fastened by iron bolts leaving holes in the boiler through which the steam and hot water escaped into the cab where Looney was, burning him so badly that he died as a result thereof in about two weeks. His widow brought suit for the wrongful death of her husband under section 8069, Barnes' Federal Code, (35 Stat. 65; U. S. Comp. St., sec. 8657) for the benefit of herself and their two infant children, laying the damages at $100,000. A trial of the cause in the circuit court of Mingo County resulted in a verdict for the plaintiff in the sum of $53,750. On the court's refusal to set aside the verdict and award a new trial, the defendant brought error.

The main proposition relied on by the defendant was that because of the long service of the deceased and his knowledge of the car retarder, and the dangers incident thereto, he must be held as a matter of law to have assumed the risk, precluding recovery in an action based on the Federal employers' liability act. In answer to that proposition, the court said in part:

It is true defendant had been employed on this branch line for several years, and we may assume, if it is not proven, that he knew of the existence of the car retarder. It does not follow from this knowledge that he knew and appreciated the danger of running his engine under the tipple. The evidence shows that another engineer, on the same day of the accident, had driven an engine of the same model and class safely under the retarder, and he and other engineers had negotiated similar train movements there many times before that. A number of enginemen and firemen who had worked with Looney on the same branch for several years testified that they had never during all the years of their employment come in contact with the retarder.

It occurs to us that if the dangers of the car retarder were so open and patent as to charge Looney with notice and appreciation thereof, why was it that some of the numerous other trainmen using the tracks had not observed it and made complaint, and why some superintendent or inspector of the railway company had not done so, and rectified the condition? And is it not fair to assume that if Looney had observed and appreciated the dangers, he would have complained? He had the absolute right to assume, without knowledge to the contrary, that the defendant was furnishing him with a reasonably safe place to work.

The law as declared here and elsewhere is that an employee of a railway company assumes all the ordinary risks of his employment, but not the extraordinary risks and hazards to which the negligence of the railway company may from time to time subject him and to which he has the right to assume his employer will not expose him, and that he may act on this assumption unless the dangers are so open and apparent as to cause a man of ordinary prudence to see and appreciate them.

We are of opinion, based on the decisions cited, that the question of Looney's knowledge and assumption of risk due to the presence of the car retarder was properly submitted to the jury, and that a peremptory instruction to find for the defendant would have been erroneous. It is only where the danger is so open and obvious, and the opportunity or knowledge on the part of the employee is so complete as to leave no doubt that he knew, or should have known all about it, that the question becomes one of law for the court.

It was contended by the defendant that the verdict was excessive and that the jury should have been directed to apportion the amount allowed among the beneficiaries, but the court, after reviewing the evidence submitted as to the age, earning capacity, etc., of the deceased and the fact that he appropriated two-thirds of his earnings to the maintenance and support of his wife and children, held that it was possible to calculate by reference to mortality tables with some degree of certainty the amount of the pecuniary loss and that the amount was not so grossly excessive as to call for a reversal. It also held that the court could not assume that the jury included a greater amount for the infant children than they were entitled to under the law applicable and the facts in evidence.

Judge Miller, in concluding the opinion of the court, said in part:

The recovery here is in a lump sum, and as to how it shall be apportioned between the children will be determined no doubt hereafter by the proper tribunal.

Any doubt we may maintain on any of the questions involved, we must resolve in favor of the judgment below, for it is our duty to affirm unless the judgment is plainly wrong.

The judgment was accordingly affirmed.

In line with the reasoning in the above case, and reaching a like conclusion is a case before the United States Circuit Court of Appeals (Davis *v.* Crane (1926), 12 Fed. (2d) 355.) Here a brakeman riding on top of a long train of cars was

struck by a low bridge, one of several in the place of employment, without tell-tale warnings, and killed while riding backwards, watching for signals from the rear. Judge Kenyon gave the opinion holding the company liable, saying that the defense of assumed risks was properly submitted to the jury, the law not covering extraordinary risks resulting from the employer's negligence.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—CONTRIBUTORY NEGLIGENCE—*Talbert* v. *Chicago, R. I. & P. Ry. Co., Supreme Court of Missouri (May 21, 1926), 284 Southwestern Reporter, page 499.*—Rollin E. Talbert brought action as administrator under the Federal employers' liability act for the death of Clyde N. Lillard, who was employed as brakeman by the above-named railroad company, an interstate commerce carrier. At the time he was killed the deceased was engaged in coupling cars which were equipped with automatic couplers operated by a lever. When the car that ran over and killed him was about 25 feet from the car to which it was to be coupled, decedent stepped between the rails and took hold of the drawbar with his hands in the position of opening the knuckle, and while walking with the car his foot went down into the earth and he stumbled and fell under the car on the rail.

The plaintiff in his declaration predicated the right of action on the defective condition of the railroad's roadbed, but, after the defendant's plea, this was amended so as to charge the railroad with defective couplers on the car in question. At the close of the evidence, the court instructed the jury that if it found the facts to be as predicated in the petition, its verdict should be for the plaintiff. The jury returned a verdict for the plaintiff for $10,000 damages on account of the death of the deceased employee, and $2,000 for his conscious suffering, whereupon the defendant appealed. The Supreme Court of Missouri in reversing the judgment of the lower court held that there could be no recovery under the Federal employers' liability act (U. S. Comp. St., secs. 8657–8665), since the railroad's liability was based on the defective roadbed and the petitition could not by reply be amended so as to predicate liability on the railroad's failure to comply with the requirements of the Federal safety appliance act, section 2 (U. S. Comp. St., sec. 8606), by reason of defective condition of couplers.

The opinion of the majority of the court was in part as follows:

As the petition fails to charge that the car was not equipped with automatic couplers in compliance with the act of Congress, it necessarily results that a recovery can not be had under the pleadings by evidence tending to prove that the coupler was defective. It must be taken as conceded by the petition, for the purpose of this action, that the car was equipped with automatic couplers; hence Lillard's conduct in going between the rails in front of a moving car to effect the coupling was violative of the safety appliance act.

If we read the safety appliance act into the petition, it must be held that the company owed Lillard no duty to maintain the passing track in a reasonably safe condition for him to walk upon. His presence upon the track in dangerous proximity to the moving car was not to have been anticipated. Lillard's violation of the act, and not the condition of the roadbed, was the proximate cause of his injury.

The couplers were of standard construction. The testimony of plaintiff's own witness, that the coupler was in perfect order, as well as the testimony of the company's witnesses to the same effect, is uncontradicted. The testimony offered by plaintiff's witness in rebuttal was that, under the conditions shown by the evidence, the drawbar might have had so much lateral play as to require adjustment by hand, is merely speculative; in fact, from the evidence, there can be little doubt that Lillard's unfortunate action in going in front of the moving car was prompted by the common practice of brakemen in disregard of the positive rule of the company. The company may have waived the rule, but the act of Congress, enacted for the express purpose of guarding employees from the danger incurred in coupling cars with the old style of couplers, stands on a different footing; the mandate of the law can not be waived or disregarded.

The judgment was therefore reversed, and the cause remanded.

In line with the foregoing was a decision by the Court of Appeals of Kentucky. (Neal's Admr. *v.* Louisville & N. R. Co. (1926), 284 S. W. 429.) Here the employee was engaged in doing repair work in the defendant's yards when a claw bar he was using in lifting a heavy car with a 40-ton jack flew out and hit him inflicting injuries which caused his death. The evidence disclosed that the railroad company kept 50-ton jacks in its yards to be used in lifting heavy cars, and that it kept on hand wooden handles made to fit in and use in operating both the 40 and 50 ton jacks. It was also shown that the deceased had been twice ordered and directed by his superiors not to use a 40-ton jack on that job. From a directed verdict for the defendant in the circuit court the plaintiff appealed. The judgment was affirmed, the court holding that "under any interpretation of the evidence the injury to the decedent was brought about solely by his own negligence, and the lower court properly directed the verdict."

EMPLOYER'S LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—DEATH OF CAR INSPECTOR—MEASURE OF DAMAGES—*Louisville & N. R. Co.* v. *Wingo's Admx., Court of Appeals of Kentucky (March 2, 1926), 281 Southwestern Reporter, page 170.*—Dewitt Wingo, an employee of the Louisville & Nashville Railroad Co., was killed while in the performance of his duties as a car inspector. His widow brought an action against the defendant for damages on account of the decedent's death.

There was no material dispute about the facts. The defendant ran its passenger trains into the passenger station of the Pennsylvania Railroad Co. in Cincinnati on the tracks of the latter company's road under lease. A sleeping car which Wingo was inspecting at the

time in question was on a side track within 2 or 2½ feet of the bumping post, and while he was between the end of the car and the bumping post making some adjustments of the steam hose, the switching crew approached with a dining car which they attached to the sleeping car. No signal of approach was given, and the coupling was made with such force as to move the sleeper against the post. Immediately thereafter Wingo was found with his head crushed and in a dying condition.

At the close of the trial the court directed a verdict for the plaintiff and submitted to the jury only the question of damages. The jury awarded $12,500 to the widow, $6,000 each to two of the infant children, and $2,000 to the other one. The defendant appealed and set up as a defense its nonliability; assumption of risk; that the facts of the case were matters for the jury; and that the award was excessive.

The court held that in the absence of proof that the switching crew was under the control of the Pennsylvania Railroad Co., it must be held that at the time of the accident it was in the employ of the defendant. Taking up the other questions presented, the court said in part:

Wingo had the right to act on the assumption that the members of a crew, in approaching with another car, would perform their duty, and there is nothing in the evidence to justify the inference that he knew of the diner's approach and voluntarily placed himself in a position of danger.

There is no evidence of contributory negligence. It follows that the case is one where the facts are undisputed, and the only reasonable conclusion that may be drawn therefrom by ordinarily fair and sensible men is that Wingo, while in the performance of his duties, was killed by the negligence of appellant. Therefore the question of negligence and proximate cause was for the court and not for the jury, and the court did not err in directing the jury to find for appellee.

The size of the verdict presents a more serious question. As before stated, the damages were fixed at $26,500, of which sum $12,500 was apportioned to the widow, $6,000 to Thelma Raines Wingo, age 3, $6,000 to William Thomas Wingo, age 5, and $2,000 to Deroda Wingo, age 17. Wingo at the time of his death was 42 years of age, and had an expectancy of 26 years. His wages were $5.60 a day. On the basis of six working days in a week, he received $1,747.20. On the other hand, if he worked every day in the year, he received $2,044. Allowing him, as the head of the family, a reasonable amount for his own support, it is apparent that whether we adopt the one figure or the other the interest at the usual and ordinary rate on the amount awarded each of the beneficiaries is only slightly less than, if not equal to, the actual pecuniary benefits which such beneficiary would have received had the decedent continued to live. The result is that the beneficiaries will not only enjoy all the benefits that they would have received from the decedent had he continued to live, but at the end of their expectancy will have on hand a sum almost, if not quite, equal

to the aggregate benefits they would have received. In view of those circumstances, we are constrained to the opinion that the verdict is excessive.

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

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—EFFECT OF JUDGMENT UNDER STATE STATUTE—*Chicago, R. I. & P. Ry. Co.* v. *Schendel, Same* v. *Elder, Supreme Court of the United States (April 12, 1926), 46 Supreme Court Reporter, page 420.*—These cases grew out of an accident on the line of the railway company in Iowa in which Clarence Y. Hope was killed and Fred A. Elder injured under circumstances which established the negligence of the railway company and its consequent liability for damages. Separate actions were brought against the company.

In the Hope case the action was brought in the Minnesota District Court, by a special administrator of the deceased's estate, on February 21, 1923, under the Federal employers' liability law (Comp. St., secs. 8657–8665), for the sole benefit of the surviving widow. Thereafter, on March 2, 1923, the railway company instituted a proceeding before the Iowa Industrial Commission under the Iowa workmen's compensation act, and joined the widow as a party as sole beneficiary under the act. It asked for an arbitration as provided in the Code of Iowa of 1924, section 1361 et seq. The arbitrators found that the deceased was engaged in intrastate commerce at the time of the accident; that the case was governed by the compensation act and awarded compensation to the widow, who thereupon filed application for review with the commissioner. That officer, on review of the facts, specifically found that the deceased was engaged in intrastate commerce and approved the award. An appeal to the district court of Lucas County resulted in a final judgment being entered on June 2, 1923, affirming the award. That judgment was pleaded as a bar to the plaintiff's action in the Minnesota court. The court, however, held that the plea was bad for two reasons: (1) because the Federal act was supreme and superseded all State laws in respect of employers' liability in interstate commerce; and (2) that there was a lack of identity of parties. It then rendered a verdict for the plaintiff on March 4, 1924, some eight months after the judgment above referred to was rendered, and the defendant petitioned for a writ of certiorari for review.

Mr. Justice Sutherland delivered the opinion of the court and said in part:

Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the

application of the principles of res judicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.

The Iowa proceeding was brought and determined upon the theory that Hope was engaged in intrastate commerce; the Minnesota action was brought and determined upon the opposite theory that he was engaged in interstate commerce. The point in issue was the same. That the Iowa court had jurisdiction to entertain the proceeding and decide the question under the State statute, can not be doubted. Under the Federal act, the Minnesota court had equal authority; but the Iowa judgment was first rendered. And, upon familiar principles, irrespective of which action or proceeding was first brought, it is the first final judgment rendered in one of the courts which becomes conclusive in the other as res judicata.

The Iowa court, under the compensation law, in the due exercise of its jurisdiction, having adjudicated the character of the commerce in which the deceased was engaged, that matter, whether rightly decided or not, must be taken as conclusively established, so long as the judgment remains unmodified.

Hope's death as the result of the negligence of the railroad company gave rise to a single cause of action, to be enforced directly by the widow, under the State law, or in the name of the personal representative, for the sole benefit of the widow, under the Federal law, depending upon the character of the commerce in which the deceased and the company were engaged at the time of the accident. In either case, the controlling question is precisely the same, namely: Was the deceased engaged in intrastate or interstate commerce? And the right to be enforced is precisely the same, namely, the right of the widow, as sole beneficiary, to be compensated in damages for her loss. The fact that the party impleaded under the State law, was the widow, and under the Federal law was the personal representative, does not settle the question of identity of parties. That must be determined as a matter of substance and not of mere form. The essential consideration is that it is the right of the widow, and of no one else, which was presented and adjudicated in both courts. If a judgment in the Minnesota action in favor of the administrator had been first rendered, it does not admit of doubt that it would have been conclusive against the right of the widow to recover under the Iowa compensation law. And it follows, as a necessary corollary, that the Iowa judgment, being first, is equally conclusive against the administrator in the Minnesota action; for if, in legal contemplation, there is identity of parties in the one situation, there must be like identity in the other.

Then turning his attention to the Elder case, the Justice said:

In the Elder case, as in the case just considered, the railway company began a proceeding before the industrial commissioner. Elder answered, averring that he was engaged in interstate commerce at the time of the injury. The parties stipulated that the commissioner or his deputy should take the place of the arbitration committee; and

the deputy commissioner, pursuant to the stipulation, heard the matter and filed his decision. Thereupon Elder applied for a review by the commissioner, under the statute, but no action had been taken upon that application by the commissioner at the time the judgment was rendered in the Minnesota court. Under the Iowa statute, therefore, the decision had not ripened into an enforceable award, and we are not called upon to determine what, in that event, would have been its effect as an estoppel. The proceeding being still in fieri when the Minnesota case was tried and determined, the doctrine of res judicata is not applicable. There must be a final judgment.

The judgment in the Hope case was reversed and the case remanded for further proceedings not inconsistent with the opinion, and the judgment in the Elder case was affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—EMPLOYEE KILLED BY SPECIAL OFFICER OF THE COMPANY—NEGLIGENCE—*Southwell* v. *Atlantic Coast Line R. Co., Supreme Court of North Carolina (February 17, 1926), 131 Southeastern Reporter, page 670.*—Ida Mae Southwell sued the Atlantic Coast Line Railroad Co. to recover damages for the death of her husband, an engineer on that railroad, who was shot and killed by E. H. Dallas while Southwell was passing through the company's station on his way home after coming off his run. Plaintiff had judgment in the superior court, but was nonsuited on defendant's appeal. The supreme court set aside the judgment of nonsuit and ordered a new trial on the issue of whether or not the death of the deceased was due to the negligence of the railroad company, to be determined under the Federal employers' liability act (127 S. E. 361). From a second judgment for plaintiff defendant also appealed.

It appeared from the evidence in the record that E. H. Dallas was employed by the railroad company as assistant yardmaster, and that he also did other kinds of work such as inspecting and repairing cars at the company's terminal at Wilmington, N. C., and was subject to the orders of one Fonville, who was general yardmaster at that terminal. At the time of the killing there was a strike on among the shopmen, and Dallas, at the request of the defendant, had been sworn in by the mayor as a special officer ostensibly to assist A. L. Kelley, a lieutenant of the police department for the railroad whose office was in the station near where the shooting occurred. It was also shown by the evidence that bad feeling existed between Dallas and the deceased to the knowledge of the general yardmaster and the superintendent; that the yardmaster knew that Dallas was carrying a pistol on the premises of the company, and had, only a few minutes before the shooting, walked through the train shed with him and saw a 38 caliber blue steel pistol in his pocket, and that they were talking

about the difference between Dallas and the deceased, Dallas saying, "Cap, all I want to do is to ask Southwell to lay off me and let me alone." This was repeated a few minutes later. The yardmaster then left him near the gate where they both knew Southwell would soon be coming through, and went toward his office. On looking back he saw the men approaching each other and turned back for the purpose of separating them but had advanced only about three steps when the gun was fired.

The defendant introduced no evidence in the trial court, but made numerous exceptions and assignments of error to admission and exclusion of evidence, to refusal to grant its prayers for instructions, and to certain excerpts from charge as given.

The court reviewed at length the history and purpose of the Federal employers' liability act, and cited numerous cases that had been adjudicated by the United States Supreme Court and by the highest courts of several of the States where that act had been in question, saying that, "under the act, the alleged negligence must be the proximate cause of the injury." A principal point of the defendant's appeal was that the killing was a wanton and willful act, outside the scope of Dallas's authority, and that there was not sufficient evidence to be submitted to the jury as to actionable negligence. In disposing of the case the supreme court, speaking through Judge Clarkson, said in part:

Under all the facts and circumstances of the case, both the direct and circumstantial evidence, we think that there was sufficient evidence to warrant the jury in finding that defendant was guilty of actionable negligence under the Federal employers' liability act. The general yardmaster at the Wilmington terminus knew, or in the excercise of reasonable care ought to have known, that the plaintiff's intestate, an engineer, had to pass out of the gate near his office about the time he approached the gate and was shot by defendant's employee, Dallas. The yardmaster knew Dallas, the employee under him, had a pistol. The word "yardmaster" ex vi termini indicates one in authority. The yardmaster had the authority to stop Dallas. The engineer, to go to and from his work, passed in and out of the gate near the yardmaster's office. The yardmaster did nothing to restrain or stop his subordinate, with knowledge that Dallas was going to upbraid him, but allowed him, on the company's yard as the engineer approached the gate exit, to shoot the engineer, who was unarmed and on his way home. The engineer was "on duty" in the defendant's inclosed yard. The employer is not an insurer, and the care and diligence required in a particular case, the failure to exercise which is actionable negligence, is that of an ordinarily prudent man under the same or similar circumstances.

We have carefully gone over the record and examined the assignments of error and see no prejudicial or reversible error. We examined defendant's able brief. The whole case is founded on whether there was sufficient evidence to be submitted to the jury as to action-

able negligence. In the former case we thought there was (facts substantially the same) and we think the same in the present case. We can find no error.

The judgment was therefore affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INDUSTRIAL POLICE—*Feaster* v. *Southern Ry. Co., United States Circuit Court of Appeals (October 19, 1926), 15 Federal Reporter (2d), page 540.*—The question involved in this suit was as to the status of an employee hired as a night watchman during the shopmen's strike of 1922. Mrs. Kate Feaster, administratrix of the estate of the deceased workman, sued in the court of common pleas of Aiken County, S. C., to recover damages for the death of her intestate. The company moved for a transfer of the case to the District Court of the United States on grounds of diversity of citizenship, claiming that the plaintiff had joined a local defendant simply for the purpose of defeating the railway's right of removal. The court held that the case was properly transferred to the Federal court. In opposition to this ruling Mrs. Feaster urged that the employee was by the nature of his employment engaged in interstate commerce so as to come within the terms of the Federal employers' liability act. On the point of status in this aspect, the court found that "although he was employed and paid by the railroad company, Feaster was actually engaged in local police duty." He had been deputized as a deputy sheriff of the county in which the yards and shops were located. The railroad company's rolling stock used in interstate commerce was here repaired and interstate trains moved constantly through the yards. The court compared the situation to the movement of trains through the Pennsylvania Station in New York City; "yet we should not be prepared to hold that the municipal policemen on duty there were employed in interstate commerce."

One Britt was joined as defendant on the ground that it was due to his negligence while foreman of the yards that the fatal assault occurred. The death was due to the acts of unknown parties who shot, beat, and killed the watchman. The negligence charged was failure to provide a safe place to work, to provide proper appliances, and enough fellow guards to enable him to perform his duties without extreme danger, and the admission of hostile employees to the locality. It was found that Feaster was furnished with a first-class pistol in good working order and cautioned that he must be "mighty careful" or "those fellows will get you." It was further found that Britt had nothing to do with the employment or retention of shop or yard employees, and that there was no proper joinder of him as defendant. It was found that the alleged inadequacy of guards,

weapons, and warnings could not be sustained as acts of neglect because there was nothing in the facts alleged to show that "Feaster would not have come to his untimely end, even though the defendants had in these respects exercised all reasonable diligence. Had any negligence of the defendants contributed in a remote degree to his death it might have been necessary, as under the circumstances it is not, to consider whether his deliberate murder by persons altogether unconnected with the defendants was not the interposition of such an independent act of others as made it impossible for such negligence to have been in legal contemplation a proximate cause of his taking off."

Various charges made were characterized as "merely conclusions of the pleader and do not state facts." No "negligent acts" were properly charged, and the court below was held to have acted without error in sustaining the demurrer. The judgment for the defendants was accordingly affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—LIMITATIONS—APPOINTMENT OF ADMINISTRATOR—*Reading Co. v. Koons, United States Supreme Court (April 12, 1926), 46 Supreme Court Reporter, page 405.*—This action was brought by John L. Koons, administrator of Lester M. Koons, against the Reading Co., successor of the Philadelphia & Reading Railway Co., for causing the death of the decedent while in its employ nearly seven years before. The defendant pleaded the statute of limitations as provided in section 6 of the Federal employers' liability act, which is as follows:

That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

The plaintiff contended that since the cause of action for death is created by statute, and is given exclusively to the administrator of the decedent, no cause of action can arise or accrue until there is an administrator.

It appeared that the decedent died on April 23, 1915, as a result of injuries received while employed by the defendant, and on September 23, 1921, more than six years afterward, letters of administration were granted to the plaintiff who, on February 6, 1922, brought his action. From judgment for plaintiff the defendant appealed to the Supreme Court of Pennsylvania, which affirmed the udgment of the lower court, and the defendant sued out a writ of certiorari to have the case reviewed by the Supreme Court of the United States, where the decision below was reversed.

Mr. Justice Stone delivered the opinion of the court, saying in part:

The application of this statute turns on the question whether the cause of action created by the act may be deemed to have "accrued," within the meaning of the act, at the time of death or on the appointment of the administrator, who is the only person authorized by the statute to maintain the action.

Many cases were cited in which the holdings of the courts were in conflict on the construction of the word "accrued" used in the statute, some of the courts holding that the limitation begins to run from the appointment of an administrator, while others held that it began to run from the death of the decedent.

The opinion continued:

This diversity of view arises principally from the attempt made to find in the word "accrued," used in the statute, some definite technical meaning which will in itself enable courts to say at what point of time the cause of action has come into existence, and consequently at what point of time the statute of limitations begins to run.

At the time of death there are identified persons for whose benefit the liability exists and who can start the machinery of the law in motion to enforce it by applying for the appointment of an administrator. This court has repeatedly held that a suit brought by such persons in their individual capacity is not a nullity within the provisions of the act, and that if by amendment the plaintiff is properly described as executor or administrator of the decedent, even though the amendment is had after the expiration of the statutory period, the suit may be maintained and a recovery had under the statute.

The language of the statute evidences an intention to set a definite limit to the period within which an action may be brought under it without reference to the exigencies which arise from the administration of a decedent's estate.

The very purpose of a period of limitation is that there may be, at some definitely ascertained period, an end to litigation. If the persons who are the designated beneficiaries of the right of action created may choose their own time for applying for the appointment of an administrator and consequently for setting the statute running, the two-year period of limitation so far as it applies to actions for wrongful death might as well have been omitted from the statute. There is nothing in the language of the statute to require, or indeed to support, such an interpretation.

The judgment of the Supreme Court of Pennsylvania was therefore reversed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—MAKING REPAIRS—ASSUMPTION OF RISK—PROXIMATE CAUSE—*Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Goneau, United States Supreme Court (January 4, 1926), 46 Supreme Court Reporter, page 129.*—Ernest J. Goneau was employed by the railroad company as rear brakeman on one of its freight trains which broke in two between stations in the nighttime;

the two sections of the train stopped a few feet apart on a narrow wooden bridge with open ties. The breaking of the train resulted from a defective coupler, made so by the carrier iron which held it in place becoming loose and letting the coupler drop down so that it did not interlock with the opposite car. When Goneau discovered the trouble he undertook to get the train coupled up again so that it could proceed. To make the coupling it was necessary to get the carrier iron back in place so as to hold the coupler. In attempting to do this and while pulling hard on the carrier iron, it suddenly gave away, causing him to lose his balance and fall over the side of the bridge to the ground below, thereby sustaining serious injuries. He brought suit in a Minnesota court to recover damages under section 2 of the safety appliance act of 1903 and section 4 of the employers' liability act. The safety appliance act makes it unlawful for a carrier to haul cars not properly equipped with automatic couplers, while section 4 of the employers' liability act provides that an employee shall not be held to have assumed the risks of his employment in any case where the violation by the carrier of any statute enacted for the safety of employees contributes to his injury or death. The company defended under section 4 of the supplemental safety appliance act of 1910 (36 Stat. 298, ch. 160), which provides that where a car that has been properly equipped by a carrier becomes defective upon its line of railroad, it may be hauled from the point of discovery of the defect to the nearest point where it can be repaired without liability for penalties, but without releasing the carrier from liability for the injury of any employee caused by or in connection with the hauling of the car with such defective equipment. The railroad company argued that "the evidence did not bring the case within the act and should not have been submitted to the jury; that the car being motionless was not then in use; that Goneau was doing repair work which was permitted by the act and whose risk he assumed; and that the defective condition of the carrier iron was merely a condition presenting the occasion for making the repairs, and not a proximate cause of the accident."

Judgment was rendered in favor of the plaintiff, and the defendant company brought a writ of certiorari to the Supreme Court.

Mr. Justice Sanford delivered the opinion of the court, saying in part:

Under the circumstances indicated it is clear that the use of the defective car had not ended at the time of the accident, although it was then motionless. A defective car is still in use when it has been moved with the train from the main line to a siding, to be cut out and left so that the other cars may proceed on their journey. (Chicago Railroad *v.* Schendel, 267 U. S. 287, 291, 45 Sup. Ct. 303.) And so it is while still in a section of the train on the main line, to be coupled up and proceed on its journey as a part of the train.

Nor can it be said that Goneau was engaged in doing repair work. He was not a repair man, but a brakeman, and was not repairing the carrier iron, but attempting to move it into place to support the coupler, so that the coupling could be made and the train proceed. And although Goneau, in testifying, stated that when he found the coupler in such a condition that he could not couple up the train unless he fixed it, it became his duty to "repair it and get the train going," his use of the word "repair," upon which the railway company lays great stress, does not change the situation in the eyes of the law or transform the coupling operation into repair work.

Since he was injured as a result of the defect in the coupler while attempting to adjust it for the purpose of making an immediate coupling, the defective coupler was clearly a proximate cause of the accident as distinguished from a condition creating the situation in which it occurred. And under the employers' liability act he can not be held to have assumed the risk.

The act of 1910, obviously, has no application.

As there was substantial evidence tending to show that the defective coupler was a proximate cause of the accident resulting in the injury to Goneau while he was engaged in making a coupling in the discharge of his duty, the case was rightly submitted to the jury under the safety appliance act; and the issues having been determined by the jury in his favor, the judgment of the trial court was properly affirmed.

The judgment was therefore affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—NEGLIGENCE—EVIDENCE—*Chicago, M. &. St. P. Ry. Co. v. Coogan, United States Supreme Court (June 1, 1926), 46 Supreme Court Reporter, page 564.*—Willie Coogan was employed as rear brakeman on a freight train of the Ch icago, Milwaukee & St. Paul Railway Co., and was killed July 14, 1923, by an accident in the railroad yards at Farmington, Minn. His body was found by a fellow workman lying parallel to the railroad track. His left leg and left arm had been crushed between the car wheels and the rail and h is body had been dragged about 15 feet. His widow brought suit for damages under the Federal employers' liability act, as the deceased was engaged in interstate commerce at the time he was killed.

At the trial circumstantial evidence was offered to prove the cause of death. It was shown that when the deceased was last seen alive he was standing beside the caboose of a train that was being made up in the railroad yards at Farmingtion, apparently waiting for all the cars to be attached so that he could couple the air hose between the rear and the caboose.

The negligence charged to the railroad company was that an air line which it had fastened to the ties some 12 inches from and parallel to the rail had some time prior to t he accident been loosened

and bent 3 or 4 inches toward the rail and upward, leaving a space of from 3½ to 4 inches between it and the ties. It was the plaintiff's theory that when the deceased went to couple the air hose, he stepped his right foot inside the rail, leaving his left foot between the rail and the pipe line; that before he could make the coupling the train started back, and that in attempting to straighten up his left foot he was caught under the pipe, forced backward, run over, and killed. The shoes worn by the deceased at the time he was killed were received in evidence. The outside of the counter of the left shoe was scratched and showed a marked rounding depression parallel with the sole and just above the heel. From judgment for the plaintiff, the defendant appealed.

The Supreme Court of Minnesota affirmed the judgment of the lower court, and defendant brought the case to the Supreme Court of the United States on a writ of certiorari. The Supreme Court, in reversing the judgment, held that there was sufficient evidence to warrant a finding that there was a breach of duty respecting the condition of the pipe, but that the precise question was whether the condition of the pipe contributed to cause the death of the deceased. Mr. Justice Butler, delivering the opinion of the court, said in part:

It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line the judgment can not be sustained. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and not themselves presumed.

The "rounding depression" on the counter of the shoe is not sufficient to bridge the hiatus in the evidence. A number of days elapsed before it was noticed, and it is not shown that in the meantime care was taken to keep it in the same condition or that the depression was not made after the accident. And, assuming that the depression on the shoe counter was made by contact with the bent pipe, there is nothing to indicate whether it was made at the time deceased was knocked down or later while he was being dragged. The fact that deceased was run over and killed at the time and place disclosed has no tendency to show that his foot was caught. A finding that his foot was not caught under the pipe is quite as consistent with the evidence as a finding that it was.

When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. That is not enough.

The judgment was therefore reversed.

The United States Circuit Court of Appeals found it necessary to reverse a judgment given for the death of a brakeman engaged in an undertaking outside his ordinary line of duty, where evidence was lacking as to any order directing him to enter thereon, and where "the evidence does not show how the employee

met his death, whether through fault of the master or fault of his own." (Philadelphia & R. Ry. Co. *v.* Thirouin (1925), 9 Fed. (2d) 856.)

Judge Wooley concluded the opinion with the remark that such a decision "some day may be made less harsh by the presence of a Federal workmen's compensation act."

The Supreme Court of Pennsylvania likewise denied a right to recovery where the injury complained of was due to the catching of the workman's raincoat on a projecting bolt the use and location of which were prescribed by the Interstate Commerce Commission. There was no evidence that the manner of fastening the bolt was unusual, while the defect complained of "was of a condition obvious to all." (Pursglove *v.* Monongahela Ry. Co. (1925), 131 Atl. 477.)

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—RELEASE BY INJURED WORKMAN—EFFECT ON CLAIM OF SURVIVOR—*Goodyear* v. *Davis, Supreme Court of Kansas (July 10, 1926), 247 Pacific Reporter, page 446.*—Louisa Goodyear, as administratrix of the estate of Lewis Goodyear sued under the Federal employers' liability act (35 Stat. 65) to recover damages for his death. The case was before the Supreme Court of Kansas for the third time, the first trial having resulted in a verdict and judgment for the defendant. This judgment was reversed on appeal, and on the second trial there was a general verdict for the plaintiff in the amount of $5,000.

The single point of interest noted in the present decision is as to the effect of a release made by the injured workman prior to his death from the injury. The court ruled that the act in question gives to the injured workman a right of action for his injuries, and a distinct right for the benefit of designated dependents in the event of death. This rule was more fully expressed in an earlier decision in the same case (Goodyear *v.* Davis, 114 Kans. 557, 220 Pac. 282), as follows:

The Federal employers' liability act (35 U. S. Stat., ch. 149, as amended by 36 U. S. Stat., ch. 143) creates a right of action in the injured employee for his suffering and loss resulting from the injury, and also creates a distinct and independent right of action in the personal representative of the deceased employee in the event death results from the injury, for the benefit of certain designated dependents.

A settlement made by the injured employee after the injury and prior to his death, for his suffering and loss, is not a bar to the action by the personal representative for the benefit of dependents for the death, if it resulted from the injury.

In an action under the Federal employers' liability act by the personal representative for damages to the injured employee and for the death, the widow of the employee having been appointed administratrix, the fact that as the wife of the injured employee she was present at the time an agent of defendant made a settlement with him

for his injuries would not estop her, as personal representative of his estate, from seeking to set aside the release because of his mental incapacity to execute it.

Another contention related to a question of mutual mistake, but this was resolved in favor of the plaintiff, and the judgment below was affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—INJURY—PROXIMATE CAUSE—*Weigand* v. *Chicago, R. I. & P. Ry. Co., Supreme Court of Kansas (October 9, 1926), 249 Pacific Reporter, page 615.*—F. A. Weigand was employed by the defendant railroad company to make light repairs on freight cars. On September 28, 1922, he was directed to go to the defendant's railway stations at Galva and McPherson to repair certain freight cars which had been sidetracked at those points. After finishing his work at Galva, the plaintiff was permitted by the station agent at Galva and the conductor of one of the company's freight trains to ride on the freight train to McPherson. The conductor assisted him to the top of a car loaded with coal and on which he was riding, when some "hoboes," who were also riding on the same train, came over the tops of the cars, seized the plaintiff, and threw him off on the ground. He was severely injured, and brought suit against the railroad company for damages.

He alleged, among other things, that the company was responsible for his injuries on the ground that its station agent and conductor refused to let him ride in the caboose, that he was compelled to ride upon the freight car in order to do the business of his employer, and that these persons had purposely allowed the "hoboes" who threw him off the car to ride on the train.

A demurrer was sustained to the plaintiff's evidence, the trial court ruling:

Weigand being forced to ride on the car of coal was not either the direct or proximate cause of the injury.

The plaintiff appealed.

The court, in affirming the judgment of the trial court, said in part:

His injury was caused by his being assaulted and flung off the train by three or four unknown strangers. If it be urged that it was the duty of the defendant not to permit "hoboes" to ride its freight trains, still it could not reasonably have been anticipated that, as a consequence of defendant's failure to perform that duty, the "hoboes" would assault an employee of defendant and fling him from the train.

It is thoroughly settled law that, when an employee departs even temporarily from his employment on some prank or project of his

own, of which his employer has no notice, and which the employer has neither authorized nor countenanced, the employer is not responsible.

On no rational theory can this court discover a basis for subjecting the defendant railway company to liability for the injuries sustained by plaintiff. The unknown miscreants who assaulted him are clearly responsible. Less clearly, but perhaps sufficiently susceptible of proof to justify its submission to a jury, if plaintiff had been so inclined, was the question of the personal and individual responsibility of members of the train crew, and possibly the station agent; but the record discloses no evidence, and suggests no rule of law, on which a liability can be fastened upon the defendant railway company, and the judgment of the trial court must be affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—NEGLIGENCE—HOSPITAL TREATMENT—DAMAGES—*Baker* v. *Adkins, Court of Civil Appeals of Texas* (*November 4, 1925*), *278 Southwestern Reporter, page 272*.—G. B. Adkins, employed by the International and Great Northern Railroad Co. as a member of a bridge gang, was employed between San Antonio and Laredo when he was taken down with smallpox. He was placed in the car which had been provided for and used by the employees as sleeping quarters and he remained there from the time of his illness until his death on April 23, 1916. It appeared from the evidence that the company, which was in the hands of a receiver at the time, failed to notify the family or anyone else of the condition of the employee, and assumed absolute and exclusive control of him. It also showed that it suffered him to lie in filth, exposed to the vilest insects and vermin, unwashed, with dirty bedclothing, without proper nursing and medical treatment, and in addition on several occasions ran cars or locomotives against the car in which the deceased was helplessly lying, adding to his discomfort and nervousness and hastening his death. In the opinion of the court of civil appeals: "No such negligence has ever been excused, or condoned through any technicalities, by any decision brought to our notice."

Jessie B. Adkins, as an individual and as administratrix in behalf of her children, brought an action for damages arising from the death of her husband. The verdict was for the plaintiffs and the court rendered judgment awarding $8,000 to the widow, $5,000 to the minor Mildred Adkins, $3,000 to the minor Bert Adkins, $2,500 to Birdie Thomas, $2,000 to Maude Wolff, $1,500 to Metal Bentley and $500 to Virgil Adkins, an adult male, $22,500 in all. The defendant appealed.

On reviewing the record the court of civil appeals found that negligence in caring for Adkins was the proximate cause of the death,

and it was considered not necessary that these acts of negligence should be the "sole cause of the death of the deceased, but if together with smallpox, brought about the death, appellants are liable." It was held not to matter who had provided the physician, in view of the fact that the defendants, being guilty of the negligence, had contributed to the death, that being sufficient to fix liability.

The court of appeals held that the awards should be viewed as though each plaintiff had sued alone. Five of the children were minors when the father died, Virgil, however, becoming 21 years of age on the date of the burial of his father. The verdict in the aggregate was not considered excessive.

In construing the statute, the court held that the language of it did not "exclude the adult child, male or female, who made his or her home under the family rooftree and received any maintenance or support from the parents," from recovering with the minors. Although it appeared that the interpretation of the court of civil appeals would sustain such a verdict as was given to Virgil Adkins, in view of the fact that the trial court charged that damages with respect to the children might include maintenance, education, and care "during minority," and no objections were made to the verdict on that ground, the court of civil appeals denied the recovery of $500 by Virgil Adkins because the verdict was not in response to the charge.

On condition that a remittitur be entered within 10 days from the filing of the opinion for the $500 in favor of Virgil Adkins, the judgment was affirmed for $22,000.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—STRIKE BREAKER INJURED BY ASSAULT—FAILURE OF EMPLOYER TO GIVE NOTICE OF STRIKE—NEGLIGENCE—*Dell* v. *Lancaster, Court of Civil Appeals of Texas (June 9, 1926), 285 Southwestern Reporter, page 685.*—Frank Dell sued J. L. Lancaster and Charles L. Wallace, receivers of the Texas & Pacific Railway Co., and the company itself, for damages sustained while in its employ. He alleged in his petition that he was employed by the defendants to go from his home in Cleveland, Ohio, to Dallas, Tex., to paint railroad coaches; that when he arrived at Dallas he was sent to Marshall where, as the defendants knew, there was a strike of railroad employees under way but of which he was utterly ignorant, and that while he and his wife were quietly walking on the street in Marshall they were set upon by the strikers, who abused, cursed, assaulted, beat, and injured them. He also claimed the sum of $38.37 for excess freight and storage on household goods and $150 hotel expenses for the week he worked in Mar-

shall. From a judgment sustaining the defendant's demurrer, the plaintiff appealed. The judgment of the lower court was affirmed, the court saying in part as follows:

The whole claim is based on the charge that appellees were negligent in not informing appellant that a strike was on before they sent him to Marshall. The cause of the attack is not given, and it is not alleged that appellant was a strike breaker, or what is known as a "scab," and that he was attacked on that ground. There is no allegation that in any manner connects the assault upon appellant with his service for appellees. There is no allegation that appellees failed to furnish a safe place in which he could work, or that the assault had any connection with his employment by appellees. He was, for some reason not disclosed, attacked while on the street by lawless characters for whose acts appellees were not responsible. The petition fails to show that, if there were any danger in going to or remaining in Marshall, it was so because of the employment in which appellant was engaged. The attack was not made on the property of appellees or by any person in its employ or for whom it could be liable. There is no allegation tending to show any causal connection between a failure to disclose the existence of a strike and the attack made by the ruffians on appellant in Marshall.

Appellees were not liable for the safety of appellant, except while he was on a way to his work, which way was prepared for him by his employer, or while engaged in the prosecution of such work. The petition fails to show that any negligence upon the part of appellees was the proximate cause of the assault on him.

The judgment was therefore affirmed.

EMPLOYERS' LIABILITY—SAFETY LAWS—COVENANT NOT TO SUE—RELEASE OF ONE TORT FEASOR—*Pacific States Lumber Co.* v. *Bargar, United States Circuit Court of Appeals (January 18, 1926), 10 Federal Reporter (2d), page 335.*—This suit involved the Coos Bay Stevedoring Co., the Pacific States Lumber Co., and R. J. Barger, an employee of the stevedoring company, who was injured July 6, 1923, while loading lumber on a vessel at defendant's wharf. It appeared from the evidence that there was an agreement between the lumber company and the stevedoring company whereby the lumber company was to deliver lumber on its docks within reach of the ship's tackles for the stevedoring company to load on vessels. This it did by means of small four-wheeled cars pulled by horses. The plaintiff was required to work in and about the dock in assisting in loading lumber and with carloads of lumber. At the time of his injury he was engaged in trying to stop a car that had been pulled by defendant's employee to the proper place for loading into the vessel. To do this he put a board on the track; this did not stop the car, but rendered the load unstable and part of it fell on him. On March 11, 1924, he accepted $2,000 from the stevedoring company and executed a release to it

and its insurer that he would forever refrain from bringing any suit against either of them on account of said injury. He then brought suit against the lumber company and recovered judgment. The defendant brought error, and contended that the release of the stevedoring company should be treated as full satisfaction of plaintiff's claim and as a bar to the action. The court, speaking through Judge McCamant, stated the purpose of the Oregon employers' liability act, and said in part:

Every employer whose work involves risk or danger is required by the statute to take the required precautions, not only for the protection of his own employees, but also for the protection of employees of others whose duties bring them within reach of the dangers and risks of such work. The Supreme Court of Oregon has so construed the statute, and this construction is binding on the Federal courts. [Cases cited.]

The court in considering defendant's contention that a release of one joint tort feasor will release the others agreed that it was committed to that proposition, but held that in the instant case the instrument executed by plaintiff did not operate as a release, and pointed out the distinction between a release and a covenant not to sue in the following language:

Releases of, and covenants not to sue, a wrongdoer have from early times been considered distinct. A covenant not to sue one of several joint obligors or joint tort feasors did not at common law operate to discharge others from liability, since it was said not to have the effect, technically, of extinguishing any part of the cause of action. * * *

Indicia of a covenant not to sue may be said to be: No intention on the part of the injured person to give a discharge of the cause of action, or any part thereof, but merely to treat in respect of not suing thereon (and this seems to be the prime differentiating attribute); full compensation for his injuries not received, but only partial satisfaction; and a reservation of the right to sue the other wrongdoer.

The opinion continued:

By all the tests the instrument executed by plaintiff is a covenant not to sue. The $2,000 was not accepted in satisfaction of plaintiff's claim, and the transaction is not a defense to this action.

The jury assessed plaintiff's damages at $4,500. Under the court's instructions they credited thereon the $2,000 paid by the stevedoring company. This was all that the defendant was entitled to.

There were no other errors assigned, and the judgment was affirmed.

EMPLOYERS' LIABILITY—SEAMAN—FEDERAL STATUTE—LIMITATION—WHAT STATUTE GOVERNS—*Engel* v. *Davenport, United States Supreme Court (April 12, 1926), 46 Supreme Court Reporter, page 410.*—E. B. Engel, a seaman employed on a vessel owned by the respondent Davenport and others, sought to recover damages for injuries

received while placing a chain lashing around part of a cargo of lumber. He brought an action at law to recover damages. The complaint alleged that the vessel was unseaworthy and the appliances defective in that a pelican hook, a necessary part of the chain lashing, had in it a flaw observable by ordinary inspection, and that this hook broke by reason of the flaw, causing the injury. Davenport demurred to the complaint, his contention being that the action was barred by section 340, subdivision 3, of the California Code of Civil Procedure, which required an action for a personal injury caused by wrongful act or negligence to be commenced within one year. This demurrer was sustained without leave to amend and judgment was entered in favor of Davenport, which was affirmed on appeal by the supreme court of the State. Engel then brought a writ of certiorari to have the case reviewed by the United States Supreme Court.

The petitioner contended that the suit was founded on section 33 of the merchant marine act, of which State courts have jurisdiction concurrently with the Federal courts, and that by virtue of section 6 of the employers' liability act, 35 Stat. 65, ch. 149 (Comp. St., sec. 8662), incorporated in the provisions of the merchant marine act, it might be commenced within two years after the cause of action accrued. The defendant denied that the suit was founded on the merchant marine act, and therefore its provisions were not applicable; and that section 6 (containing the limiting provision) of the employers' liability act was not incorporated in the merchant marine act, and did not determine the limitation in which an action might be brought in a State court.

Mr. Justice Sanford, delivering the opinion of the court, said in part:

Section 6 of the employers' liability act provides that "no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued." This provision is one of substantive right, setting a limit to the existence of the obligation which the act creates. And it necessarily implies that the action may be maintained, as a substantive right, if commenced within the two years.

We conclude that the provision of section 6 of the employers' liability act, relating to the time of commencing the action, is a material provision of the statutes "modifying or extending the common-law right or remedy in cases of personal injuries to railway employees" which was adopted by and incorporated in the merchant marine act. And, as a provision affecting the substantive right created by Congress in the exercise of its paramount authority in reference to the maritime law, it must control in an action brought in a State court under the merchant marine act, regardless of any statute of limitations of the State.

The judgment of the Supreme Court of California was reversed, and the case remanded for further proceedings not inconsistent with the opinion.

EMPLOYERS' LIABILITY—SEAMEN—SAFE PLACE—ASSUMPTION OF RISK—CONSTRUCTION OF STATUTE—*Zinnel* v. *United States Shipping Board Emergency Fleet Corporation, United States Circuit Court of Appeals (December 7, 1925), 10 Federal Reporter (2d), page 47.*—Charles J. Zinnel was employed as one of the crew of the defendant's ship, *Eastern Sailor,* on a voyage from New York to Yokohama. The ship carried a deck load of lumber on the "well deck" made fast by chain lashings. Heavy weather and rough seas loosened some of the lashings, and the master directed the intestate and other members of the crew to go forward and add new lashings under the direction of the boatswain. While they were so employed the vessel shipped a sea over her bow which carried the intestate overboard, and he was drowned. Action was brought by his administrator to recover compensation under the Jones act of 1920 (41 Stat. 1007), alleging that the defendant did not provide the intestate with a safe place to work in that there was no guard rope from the rail on the forecastle head leading aft on the port side to the shelter deck. He offered to prove this by the testimony of a member of the crew corroborated by a photograph taken three or four days earlier showing the port side without any rope. The trial court refused to receive the photograph in evidence on the ground that it did not show the condition at the time of the accident, and dismissed the complaint. The plaintiff brought error. The court of appeals in reversing the judgment said in part:

The refusal of the court to allow the photograph in evidence for the purpose offered was erroneous. If it represented the truth in the morning, a few hours before, and at once after the accident, the jury was entitled to assume that there had been no change in the interim. It was, moreover, admissible to contradict the testimony of the master and the mate that the lines were kept standing through the whole voyage, which it very effectually did. Not only was the plaintiff entitled to go to the jury upon the question whether the lines were standing at the time, assuming that to be relevant, but it is very hard to see how the jury could have reached a verdict for the defendant upon that issue. The learned judge was certainly in error in taking the case from the jury.

The question of law remains, whether the absence of the line was a default in the defendant's duty to exercise reasonable care to furnish the decedent with a reasonably safe place to work. Without some guard line we need no expert to show us that a case was presented, which a jury must decide, as to the safety of the place where the intestate was ordered to work.

The cause arises in substance under the employers' liability act (Comp. St., secs. 8657–8665), since that is incorporated by reference. It is therefore quite unnecessary to say that the ship was unseaworthy, at least in the ordinary sense, which makes the commencement of the voyage the test. All we need, and do, hold is that under the law of master and servant, as now in force by statute, the circumstances

were such as would allow the jury to find that there was no rope, and that its absence made the intestate's place of work unsafe.

As to the assumption of risk, on which we all agree, we need do no more than refer to our own decisions in Cricket S. S. Co. *v.* Parry ((C. C. A.) 263 Fed. 523), and Panama R. R. Co. *v.* Johnson ((C. C. A.) 289 Fed. 964, see Bul. No. 391, p. 43).

In these cases the court held that as to seamen under orders on board ship there is not that freedom of action as to obedience or disobedience of orders that would make it possible to say that in obeying any given order the workman voluntarily assumes the risk.

Judgment was therefore reversed and a new trial ordered.

EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION—ACCIDENTAL INJURY—POISONOUS GASES—EVIDENCE—*Midland Coal Co.* v. *Rucker's Administrator, Court of Appeals of Kentucky (December 1, 1925), 277 Southwestern Reporter, page 838.*—The deceased, Bert Rucker, an inexperienced coal miner, was employed by the Midland Coal Co. and put to work with his brother, also inexperienced, in a room of the mine into which unwholesome gases came from an abandoned mine near by. At the end of about two weeks of work in the mine and while pushing a car of coal from the mine, deceased sank down, and died as he was being carried from the mine. Evidence was introduced at the trial to show that the coal was mined by and shot with powder and dynamite which produced smoke; that the mine was not properly ventilated; that the deceased had been sick on different days during his employment; that other employees engaged in like service in the mine were also made sick during the same period, and that on the morning of his death the air in the mine where he worked was bad. Judgment was rendered in favor of the plaintiff in the circuit court, and the company appealed on the ground that, since both the employer and the employee had accepted the terms of the workmen's compensation act (Ky. Stat. 4880–4987), there could be no action at common law; that death, being instantaneous, came within the terms of the act; that the lower court had no jurisdiction of the cause, and that the proof failed to show the cause of death, or the proximate cause thereof. The company further contended that the instructions to the jury were not in accordance with the proof. The court in affirming the judgment of the lower court cited the case of Jellico Coal Co. *v.* Adkins (197 Ky. 684, 247 S. W. 972; see Bul. No. 391, p. 324) and that of Elkhorn Coal Co. *v.* Kerr (203 Ky. 804, 263 S. W. 342), in both of which cases it was decided that an action at common law would lie for injury or death arising out of and resulting from inhalation of poisonous gases, but that the compensation act does not apply.

The court continued:

Appellant's chief contention is * * * that the evidence in this case shows only the sudden death of Rucker, and does not show that he died from an occupational disease or from a gradual poisoning of his system. The evidence upon this subject, recited in outline above, indicates the deceased had been suffering more or less from poisonous mine gases ever since he became an employee of appellant company and entered its mines, but that he was so inexperienced in the business of coal mining as not to know the dangerous effects of such gases. This question was submitted to the jury by instructions, of which there is no serious complaint, save that the case should not have been submitted at all.

The verdict and judgment can not therefore be disturbed.

The judgment was accordingly affirmed.

EMPLOYERS' LIABILITY FOR ACTS OF EMPLOYEES—INDUSTRIAL POLICE—COURSE OF EMPLOYMENT—NEGLIGENCE—*Wiley* v. *Pere Marquette Ry. Co., Supreme Court of Michigan (June 7, 1926), 209 Northwestern Reporter, page 59.*—Samuel Spaulding was employed by the defendant company and designated a patrolman. He was armed with a revolver carried under a permit obtained by the company. At the time in question he went to the home of the plaintiff and asked permission to search the house. Receiving no reply from the plaintiff he knocked a block from the hand of a small child standing in the doorway, and while stooping, ostensibly to pick up the block, but in reality to look under the couch, his revolver fell from its holster and struck the floor, discharging a shot which hit the plaintiff in the thigh, causing a painful wound which it was claimed would cause her permanent discomfort. She was awarded a verdict of $2,500. The defendant moved for judgment notwithstanding the verdict, and also for a new trial. The court entered judgment for the defendant on the ground that the patrolman was not at the time of the accident acting within the scope of his employment. Plaintiff brought a writ of error for review.

The court, in reversing the judgment of the trial court, said in part:

We think the trial judge was in error in entering judgment for defendant. Spaulding's testimony was to the effect that he was about the business of defendant company intrusted to him, and had reason for looking in this home for stolen goods, and was there on such errand. Without further stating his testimony, we think it carried to the jury the question of whether, at the time of the accident, he was acting within the scope of his employment. The learned trial judge left this question to the jury, and the verdict, supported by evidence, fixed the fact that Spaulding was acting within the scope of his employment. The question was one of fact, and not one of law.

The employee was carrying the revolver under permit obtained by defendant. There was a positive duty resting upon defendant to supervise the carrying of this dangerous instrumentality by its employee, for the firearm was in the service of defendant, and carried by its servant under permit obtained for that purpose. This duty to protect third persons from injury, by reason of careless carrying of an unsafe revolver, was not performed by defendant, and plaintiff, having been injured because this duty was not performed, is entitled to recover damages, irrespective of whether the act was or was not within the scope of the servant's employment.

Upon this record plaintiff is entitled to judgment on the verdict.

The judgment was therefore reversed, with costs to plaintiff, and the case remanded to the circuit court, with direction to enter judgment on the verdict.

EMPLOYERS' LIABILITY FOR ACTS OF EMPLOYEES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—MINOR—*D'Allesandro et al.* v. *Benivoglia et al., Supreme Court of Pennsylvania (January 4, 1926), 131 Atlantic Reporter, page 592.*—The plaintiff, a boy over 14 years of age, was asked by the driver of defendant's truck to guide him to his next stop, and in doing so plaintiff took a position on the running board of the truck, from which he was thrown to the street and injured. Action was brought for damages, and the defendants obtained a judgment of nonsuit, and from a refusal to remove the nonsuit, the plaintiff appealed.

The supreme court in affirming the judgment of the court below said:

We agree with the court below that an "employer is liable only for the acts of his servant done in the scope of his employment and the employment in this case did not include taking the minor plaintiff for a ride" either as "a passenger," which the statement of claim alleges he was, or as an assistant.

As no emergency was shown, where the servant was unable alone to perform the work which he was engaged to do, the authority to engage an assistant was not proved.

The judgment was therefore affirmed.

EMPLOYERS' LIABILITY FOR ACTS OF EMPLOYEES—STATE POLICE ACTING AS STRIKE GUARD—STATUS AS EMPLOYEES—*St. Louis Southwestern Ry. Co. of Texas* v. *Hudson, Court of Civil Appeals of Texas (1926), 286 Southwestern Reporter, page 766.*—A strike of the shopmen employed by the company named took place in connection with the general strike of 1922, a number of the workmen joining the strikers and some of them becoming pickets. Fearing violence and interference with its operations, the company applied to the Govenor of

Texas for a body of rangers to act as a guard for its property and employees. This request was complied with, but only on condition that the expenses be met by the company, no State funds being available. On agreement with this condition, a number of rangers came to the locality, Tyler, under the command of one Captain Brady. Among the rangers was one Pearce who, entirely without justification, shot and killed a picket, Clayton Hudson, son of the appellees in this case. The parents sued the company for damages for the death of their son, alleging that though Pearce was nominally a ranger he was in fact the company's employee; that he was a "violent and dangerous man, unfit for such duties; and that, notwithstanding this was known to the appellant, Pearce was continued in its service." The defense offered was that a guard was necessary for the protection of the property of the company and the continuance of its operations, and that the rangers had been applied for and secured in a lawful manner; that Pearce was legally appointed and was subject only to the authority of his captain; that he was not in any sense a private employee, nor at the time of the killing was he performing any service for the railway company. It was also averred that the killing was the result of a private difference between the parties, wholly unconnected with any legal duty which Pearce was engaged to perform. The jury found the company liable for the misconduct of Pearce and fixed damages in the sum of $9,500, whereupon the company appealed.

The court, Judge Hodges speaking, recited the provisions of law under which the governor had acted, and found that he "was within his legal authority, and that the conditions existed which called for such official action." It was in evidence that the rangers, in their attitude toward the strikers and particularly to the pickets, "generally understood that they were to handle them very roughly," but this testimony was held not to justify any inference that any representative of the company had directed acts of violence to be done, or that the pickets should be in any way molested so long as they were peacefully occupying their positions as pickets. Recognizing that the picket line harassed the shop employees more or less, the captain had advised them that no legal method existed for breaking up the picket line, so that no orders to that effect could be issued. Even if Pearce had been the employee of the company, therefore, even if he should have thought that he was acting in the interest of the company in acting in such a way as to terrorize the pickets and break up their line, that could not "have the legal effect of extending the limits of his master's responsibility"; for while indiscreet or disobedient conduct within the scope of a servant's employment may bind the master for resulting injuries, an enlargement of that scope by the mere act of

the employee can not make the master responsible for conduct outside the duties which he was employed to perform. "The doctrine of 'apparent authority' applies to the relation of principal and agent, not to that of master and servant."

However, the assumption of the relationship of master and servant is not valid if in fact Pearce was an official of the State rendering "service in line with the provisions of the law for the protection of property and the maintenance of order." It was said that "the courts may take judicial notice of the fact that a strike by employees of a railway company is a species of industrial warfare designed to compel concessions from the employer by impairing its ability to continue normal transportation operations." It was also known that violence frequently attended such strikes, an incident of assault upon two workmen and the killing of one having occurred shortly before the coming of the rangers to Tyler. The request by the company was merely an effort to call into action certain agencies of the State, and in complying the governor was acting within the terms of the law. No private right had been invaded and no personal privilege interfered with.

No person, except one desiring to engage in some unlawful form of interference with railway transportation or operation, had any occasion to complain of what the governor did or of the conduct of the appellant in applying for such guards.

The employees of the railway companies had a legal right to quit work in a body, as they did, and were still within their rights in doing what is called "picket service," and with such rights Pearce had no authority, from any source, to interfere. The killing of Hudson was done in the prosecution of a design purely personal to Pearce. To treat the State rangers, while doing legitimate guard duty, as the private employees of the railway company, would impose a legal responsibility which no common carrier should be required to assume when invoking the protection of the law. The public, as well as the carrier, is interested in keeping open the channels of commerce; and the public may suffer when the steps needed to that end are discouraged by the imposition of financial risks which prudent business men might hesitate to incur.

Taking up the question as to the effect of the company furnishing funds to compensate the rangers, the court held that this did not establish the relation of master and servant. Absence of State funds made it necessary for the company to choose between going without the protection desired or furnishing the funds for its payment. Acceptance of the latter alternative did not give the company the power to select the men or exercise control over them. "The captain of the force was in command, and he alone had authority to direct and control the rangers. He and his superiors only had the right to discharge Pearce from the service." The conclusion was "that under

the evidence Pearce must be treated as a public officer and not as the servant of appellant."

The judgment of the trial court was therefore reversed and judgment entered for the appellant.

EMPLOYMENT OFFICES—LICENSING AND REGULATION—POWERS OF COMMISSIONER OF LABOR—CONSTITUTIONALITY OF STATUTE—*Ribnik v. McBride, State Commissioner of Labor, Supreme Court of New Jersey (June 24, 1926), 133 Atlantic Reporter, page 870.*—Chapter 227, Public Laws of 1918 of New Jersey, entitled "an act to regulate the keeping of employment agencies," provides that every applicant shall file with the commissioner a schedule of fees proposed to be charged for the services rendered to employers seeking employees and persons seeking employment, and that the commissioner may refuse to issue any license for any good cause shown within the meaning of the act.

Rupert Ribnik made application for a license to operate an employment agency in compliance with the act. His application was refused by the commissioner on the ground that he could not approve, in its entirety, the proposed schedule of fees to be charged. The applicant sued out a writ of certiorari to have the action of the commissioner reviewed. He alleged that the act which purported to confer upon the commissioner power to fix, determine, regulate, etc., the fees to be charged by him for his services, was contrary to the constitution of New Jersey and to the Federal Constitution.

The court, in dismissing the writ, held that the questions raised and argued in the instant case were determined in substance and effect adversely to the applicant in the case of Brazee *v.* Michigan (241 U. S. 340, 36 Sup. Ct. 561; see Bul. No. 224, p. 130). In that case the judgment of the Supreme Court of Michigan, that a State may require licenses for employment agencies and prescribe reasonable regulations in respect to them to be enforced according to the legal discretion of the commissioner of labor, was upheld by the Supreme Court of the United States as not infringing the provisions of the Federal Constitution. The court was unanimous in its opinion that the present attack upon the statute was without substance and dismissed the writ with costs to the prosecutor.

EMPLOYMENT SERVICE—MONOPOLY—INTERFERENCE WITH INTERSTATE COMMERCE—SHIPPING OF SEAMEN—ANTITRUST ACT—*Anderson v. Shipowners' Association of the Pacific Coast, Supreme Court of the United States (November 22, 1926), 47 Supreme Court Reporter, page 125.*—Cornelius Anderson is a seaman, having followed that calling for more than 20 years on ships engaged in the carrying trade

on the Pacific coast and with foreign countries. He is a member of the Seamen's Union of America, which has a membership of about 10,000 seamen, and in whose behalf he sued as well as his own. The owners and operators of vessels engaged in interstate and foreign commerce on the coast had formed a combination to control the employment of all seamen on vessels in such commerce, requiring every seaman seeking employment to register, receive a number, and await his turn according to such number before employment could be obtained. Each seaman is given a certificate and cards reciting his capacity and stating that no employment must be given in any capacity unless an assignment card issued by the association and addressed to the vessel, "designating the position to which we have assigned him," is presented to the prospective employer.

The associations fix the wages which shall be paid the seamen. Under the regulations, when a seaman's turn comes, he must take the employment then offered or none, whether it is suited for his qualifications or whether he wishes to engage on the particular vessel or for the particular voyage; and the officers of the vessels are deprived of the right to select their own men or those deemed most suitable. Without a compliance with the foregoing requirements, no seaman can be employed on any of the vessels owned or operated by members of the associations.

Anderson recited his experience in attempting to secure employment, which was refused because he failed to produce a discharge book; later he was discharged by a mate who had agreed to take him on because of the requirement that he procure an assignment from the association, which was refused, and when subsequently he did report at the mate's instructions he was informed finally that he was not able to take him on except through the office of the association. Anderson then sued for an injunction against the association and its activities.

On the presentation of these facts to the district court, it was held that the complaint was insufficient and the defendant's motion to dismiss it was sustained. On appeal, the circuit court of appeals took the same view, saying that "if plaintiff has a cause of action, it is not cognizable in the Federal courts." (Anderson *v.* Shipowners' Association, 10 Fed. (2d) 96.)

The case then came to the Supreme Court on a writ of certiorari, where Mr. Justice Sutherland, speaking for the court, set forth the facts as above recited and continued as follows:

From these averments, the conclusion results that each of the shipowners and operators, by entering into this combination, has, in respect of the employment of seamen, surrendered himself completely to the control of the associations. If the restraint thus imposed had

related to the carriage of goods in interstate and foreign commerce—that is to say, if each shipowner had precluded himself from making any contract of transportation directly with the shipper and had put himself under an obligation to refuse to carry for any person without the previous approval of the associations—the unlawful restraint would be clear. But ships and those who operate them are instrumentalities of commerce and within the commerce clause no less than cargoes. (Second Employers' Liability Cases, 223 U. S. 1, 47–49, 32 Sup. Ct. 169.) And, as was said by this court in United States *v.* Colgate & Co. (250 U. S. 300, 307, 39 Sup. Ct. 465, 468.) "The purpose of the Sherman Act is to prohibit monopolies, contracts, and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade." That the effect of the combination now under consideration, both as to the seamen and the owners, is precisely what this language condemns, is made plain by the allegations of the bill which we have just summarized. The absence of an allegation that such was the specific intent is not important, since that is the necessary and direct consequence of the combination and the acts of the associations under it, and they can not be heard to say the contrary.

It was said not to be important whether the object was merely to regulate the employment of the men and not to restrain commerce. The purpose to secure benefits to themselves did not justify conduct that might have been unobjectionable in the absence of restraint. The cases cited by the respondents, in which it had been held that local matters only were affected so that the antitrust law did not apply, were held not in point. Even though the mining of coal and the manufacture of goods are not commerce, although a large part is intended to be shipped therein, the conditions in the instant case present a different situation.

Here, the combination and the acts complained of did not spend their intended and direct force upon a local situation. On the contrary, they related to the employment of seamen for service on ships, both of them instrumentalities of, and intended to be used in, interstate and foreign commerce, and the immediate force of the combination, both in purpose and execution, was directed toward affecting such commerce. The interference with commerce, therefore, was direct and primary, and not, as in the cases cited, incidental, indirect, and secondary.

Taking the allegations of the bill at their face value, as we must do, in the absence of countervailing facts or explanations, it appears that each shipowner and operator in this widespread combination has surrendered his freedom of action in the matter of employing seamen and agreed to abide by the will of the associations. Such is the fair interpretation of the combination and of the various requirements under it, and this is borne out by the actual experience of the petitioner in his efforts to secure employment. These shipowners and operators having thus put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce

according to their own choice and discretion, it follows, as the case now stands, that the combination is in violation of the antitrust act.

The decree was accordingly reversed and the cause remanded to the district court for further proceedings in conformity with this opinion.

EXAMINATION, LICENSING, ETC., OF OCCUPATIONS—RESTRICTION OF EMPLOYMENT—ACCOUNTANTS—CONSTITUTIONALITY OF STATUTE—*Frazer et al.* v. *Shelton, Supreme Court of Illinois (February 18, 1926), 150 Northeastern Reporter, page 696.*—The Legislature of Illinois, at its legislative session of the year 1925, passed an act known as the "accountancy act," by which it undertook to regulate the practice of accountancy within the State. The act provided, among other things, that only those persons who held certificates as certified public accountants prior to October 1, 1925, and those holding such certificates from an outside State should be allowed to assume such title or to use the abbreviation "C. P. A." No provision was made for licensing any citizen of Illinois as a certified public accountant who was not such at the time the act went into effect. There was, however, a provision for licensing persons who met the educational requirements as public accountants, and a further provision that a person not having a certificate from the proper authority could not practice accountancy for more than one person.

George E. Frazer and others attacked the constitutionality of the act, and filed a bill against A. M. Shelton as director of the Department of Registration and Education of Illinois to enjoin the enforcement of the act. It was contended that the act violated section 22 of article 4 of the State constitution prohibiting special privileges, and the fourteenth amendment of the Federal Constitution in that it denied equal protection of the laws and was an unwarranted exercise of the police power of the State.

Defendants demurred to the bill. The demurrer was sustained in the court below, and the bill dismissed. Plaintiff appealed. The supreme court reversed the trial court and in its opinion said in part:

By this act one who on June 30, 1925, commences practicing as a public accountant on his own account may register as such on or before October 1, 1925, because he was practicing as a public accountant on his own account on July 1, 1925, and this though he shall have had no previous experience, while one who has had 4 years and 11 months' experience in the employ of either a certified public accountant or a public accountant can not receive a certificate as public accountant without examination. There is no reasonable basis for the discrimination between such two persons. While a statute intended to be prospective may provide that it shall not apply to

those already in the occupation to be licensed, under conditions named, such exemption must be made to apply equally to all similarly situated.

A statute can not be sustained which applies to some persons or cases and does not apply to all persons and cases not essentially different in kind.

The term "police power" comprehends the power to make and enforce all wholesome and reasonable laws and regulations necessary to maintain the public health, comfort, safety, and welfare. Section 1 of article 2 of the Constitution provides: "All men are by nature free and independent, and have certain inherent and inalienable rights—among these are life, liberty, and the pursuit of happiness."

The right of a citizen to pursue ordinary trades or callings upon equal terms with all other persons similarly situated is a part of his right to liberty and property. Whether or not the regulation of an occupation has in it the elements of protection to the public health, comfort, safety, or welfare is a matter not always easy to determine. The question is here presented, Does the business of accounting affect the public health, comfort, safety, or welfare? It is readily seen that an incompetent accountant may render an inaccurate report and cause his employer to make a business error. This creates no effect upon the public, however, unless the relationship existing between the public welfare and the private business so affected is so close as to establish that influence. In order to say that private business must, in the interest of public welfare, employ one certified by the State, it must appear that the effect of an audit of that business is a matter of public welfare and not of private concern. If it is the latter the audit has no element of public welfare in it, and a law prohibiting or licensing the business of one who makes such audit is but an unwarranted regulation of private business and the right to contract.

We do not say that it is beyond the power of the general assembly to enact a statute requiring that no one shall use the term "certified public accountant" or the term "public accountant" without having met the requirements of such an act. Such a provision may well be within the power of the legislature on the ground that it is to the public interest that no one shall use a term indicating that he has been examined and certified as an accountant when such is not the fact. Such is a misrepresentation which the legislature may prevent by statute. There is, as we view it, however, a wide difference between acts of such character and one which provides that no one who has not received a certificate as public accountant from the department of registration and education shall be allowed to work at the business or occupation of accountancy for more than one person. Such an act does not spring from a demand for the protection of the public welfare, but is an unwarranted regulation of private business and the right of the citizen to pursue the ordinary occupations of life. For these reasons it was error to sustain the demurrer and dismiss the bill.

The decree of the circuit court was reversed and remanded with directions to overrule the demurrer.

HOURS OF LABOR OF WOMEN—BOOKKEEPER IN BANK—NINE-HOUR DAY—CONSTRUCTION OF STATUTE—*Ex parte Carson, Criminal Court of Appeals of Oklahoma (February 6, 1926), 243 Pacific Reporter, page 260.*—Section 7222, as amended (Comp. St. 1921), reads as follows:

That no females shall be employed or permitted to work in any manufacturing, mechanical or mercantile establishment, laundry, bakery, hotel or restaurant, office building or warehouse, telegraph or telephone establishment or office or printing establishment, or bookbindery, or any theater, show house, or place of amusement or any other establishment employing any female, more than 9 hours in any one day, nor more than 54 hours in any one week.

H. B. Carson was convicted under the provisions of that statute before a justice of the peace, fined $50 and costs, and committed to the custody of the sheriff of the county until the same should be paid. He was charged with violating the statute by permitting Mollie Whitman, a bookkeeper in his bank, to work in excess of nine hours on November 24, 1925. He petitioned the court for a writ of habeas corpus.

The court, on reviewing the statute, said in part:

Under this rule the phrase, "any other establishment employing any female," is restricted and explained by the particular employments named to employees in establishments of like character where the work is similar. Since banks are neither expressly named nor are of the character of business specifically named, they are not within the purview of the statute.

Apparently the legislature was attempting to reach those lines of business that require physical labor, as laundries, bakeries, restaurants, or that operate continuously or for long hours, as hotels and telegraph and telephone establishments, and it took cognizance of the well-known fact that the work done by the employees of a bank is largely mental labor, and the working hours are generally shorter than in other lines of business.

The terms of the statute in question can not be extended to apply to banks. It follows that the conviction of the petitioner is illegal and he should be discharged.

The writ was therefore awarded.

HOURS OF SERVICE—RAILROADS—YARDMASTERS—FEDERAL STATUTE—*Atchison, T. & S. F. Ry. Co.* v. *United States, Supreme Court of the United States (November 30, 1925), 46 Supreme Court Reporter, p. 109.*—Action was brought by the United States to recover penalties for alleged violation of the hours of service act of March 4, 1907, chapter 2939, section 2 (34 Stat. 1415 [Comp. St., sec. 8678]), two yardmasters being employed for 12 hours on a certain day. The facts not being in dispute, a jury was waived, and the decision turned on the trial

judge's view of the law (298 Fed. 549). His judgment, assessing a penalty, was sustained by the circuit court of appeals (3 Fed. (2d) 138). The material part of the statute is:

That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than 9 hours in any 24-hour period in all towers, offices, places, and stations continuously operated night and day.

It was under the provisions of this statute that the judge in the instant case held that the duty of yardmasters fell within the act. The defendant railroad company brought a writ of certiorari to the United States Circuit Court of Appeals.

Mr. Justice Holmes, delivering the opinion of the Supreme Court, said in part:

"The purpose of the statute is to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task." (Chicago & Alton R. R. Co. *v.* United States, 247 U. S. 197, 199, 200, 38 Sup. Ct. 442, 443.)

The yardmaster's duties extend to the breaking up and making up of trains, the prompt movement of cars, and general charge of the yard. The telephoning, although a part of them, was an incidental part only, and a small one. Twenty-four calls a day seems a too liberal estimate. The office hardly could be described as "continuously operated," when the yardmaster was not in it much more than half the time, but was about the yard attending to other things. Taking all the facts into account we are of opinion that the employment of the yardmaster for more than nine hours was not within the evil at which the statute was aimed and that the ruling to the contrary was wrong.

The judgment was therefore reversed.

LABOR ORGANIZATIONS—COLLECTIVE AGREEMENT—REFUSAL TO USE NONUNION MILLWORK—BOYCOTT—MONOPOLY—INTERFERENCE WITH INTERSTATE COMMERCE—*United States* v. *Brims, Supreme Court of the United States (November 23, 1926), 47 Supreme Court Reporter, page 169.*—William F. Brims and others associated with him had entered into an agreement between contractors and union labor organizations in the city of Chicago regulating the conditions of employment in the building trades. From 1900 to 1918 the only restriction on material had been against the use of prison-made products. In 1918 the section of the agreement was made to read "except nonunion and prison made," certain products being excepted. Up to that time a large amount of the material known as millwork used in Chicago was shipped from Wisconsin, notably Oshkosh, and some

Southern States, nonunion labor being employed in the production of such material.

The Government proceeded against Brims and others on the ground of a violation of the Sherman Antitrust Act, the agreement having resulted in a great diminution in interstate shipments. For instance, a single firm in Oshkosh which had for 9 years shipped an average of $250,000 worth of millwork to Chicago, sent but $61,000 worth in 1919 and $50,000 worth in 1920. Conviction was had in the District Court of the United States, whereupon error was brought to the circuit court of appeals. Here the judgment below was reversed and the case remanded. However, the United States procured a writ of certiorari from the Supreme Court, where the case was argued and the judgment of the circuit court of appeals was reversed.

It was the contention of the defendants that their objection was not to millwork made outside the State but merely to nonunion made millwork, and that inasmuch as the industry was largely unionized in the city of Chicago, it was to the advantage of the Chicago plants and in line with the policy of the workers that nonunion products from whatever source be excluded. The indictment charged a combination and conspiracy "to prevent manufacturing plants located outside of the city of Chicago and in other States from selling and delivering their building material in and shipping the same to said city of Chicago." The circuit court of appeals held that the Government had "failed to show that the real agreement was not to eliminate 'nonunion-made material, but materials made outside of Chicago.'" It accordingly regarded the restriction "not against the shipment of millwork into Illinois. It was against nonunion-made millwork produced in or out of Illinois," and the judgment below, as already stated, was reversed. (Brims *v.* United States, 6 Fed. (2d) 98.)

The Supreme Court found as a fact that the local manufacturers were at a disadvantage in competition with the cheaper products from outside the State; while as to the workmen the effect of importing millwork was a diminution of local employment. As to the general attitude and the results, Mr. Justice McReynolds, speaking for the court, said:

They wished to eliminate the competition of Wisconsin and other nonunion mills which were paying lower wages and consequently could undersell them. Obviously, it would tend to bring about the desired result if a general combination could be secured under which the manufacturers and contractors would employ only union carpenters with the understanding that the latter would refuse to install nonunion-made millwork. And we think there is evidence reasonably tending to show that such a combination was brought about, and that, as intended by all the parties, the so-called outside competition was cut down and thereby interstate commerce directly and materially impeded. The local manufacturers, relieved from the competition that came through interstate commerce, increased their output

and profits; they gave special discounts to local contractors; more union carpenters secured employment in Chicago and their wages were increased. These were the incentives which brought about the combination. The nonunion mills outside of the city found their Chicago market greatly circumscribed or destroyed; the price of buildings was increased; and, as usual under such circumstances, the public paid excessive prices.

The allegations of the bill were sufficient to cover a combination like the one which some of the evidence tended to show. It is a matter of no consequence that the purpose was to shut out nonunion millwork made within Illinois as well as that made without. The crime of restraining interstate commerce through combination is not condoned by the inclusion of intrastate commerce as well.

It was accordingly ruled that the decision below must be reversed; and inasmuch as other assignments of error had been presented to the circuit court of appeals, which it had ignored in view of its finding based on the point of a monopoly interfering with interstate commerce, the case was remanded to this court for further proceedings in order that the Supreme Court might have the view of that court in respect of these other assignments of error.

LABOR ORGANIZATIONS—COLLECTIVE AGREEMENT—SEAMEN—CONTRACT OF ARBITRATION—*The Howick Hall, United States District Court of Louisiana (May 30, 1925), 10 Federal Reporter (2d), page 162.*—Patrick Monahan and two others brought libel against the steamship *Howick Hall* to recover the difference between wages stipulated in the shipping articles and the rates at which they were paid. The facts, which were undisputed, were that the libelants shipped on the steamship above mentioned at New Orleans and signed articles on April 19, 1921, for a voyage to Yokohama, Japan, and from there back to a port in the United States. The wages were to be $100, $95, and $85, respectively, which were in accordance with the schedule agreed to by the American Steamship Owners' Association and the seamen's union. The articles also provided that any change in the working rules and wages should be retroactive and apply to the articles, and that any question whatsoever between the master, consignee, agent, or owner of the *Howick Hall* and the libelants should be heard by the shipping commissioner or consul appointed by the United States, whose action should be binding upon all the parties and conclusive in any court of justice.

The agreement as to wages, etc., between the steamship association and the seamen's union expired on May 1, 1921, and no new schedule had been agreed upon up to August, 1921, when the association adopted a scale of wages, without agreement with the seamen's union, and declared it to be retroactive to May 1. According to the new

scale, libelants would receive from $12.50 to $15 per month less than was stipulated in their contract. The master of the ship took up the matter of paying off the crew under the new scale with the deputy shipping commissioner, who ruled that in accordance with the articles agreed to by the seamen they were obliged to accept payment under the terms of the new schedule, which they did under protest, signing the usual release.

Judge Foster, in delivering the opinion of the court, said in part:

It is evident to my mind that the master and the shipping commissioner wrongly construed the clause in question. This clearly had reference to an agreement changing the wages or working conditions to which libelants were actually or constructively parties. I have no doubt that had the officers of the seamen's unions and the shipowners' association reached an agreement both sides would have been bound by it, and the clause could have been given effect; but to allow the shipowner or the captain to arbitrarily reduce wages would be going too far.

Respondent replies, also, on the clause making the shipping commissioner an arbitrator in any dispute that might arise between the crew and the master. It is well settled that contracts providing, before the dispute arises, for arbitration, and making the award of the arbitrator conclusive, are void. When applied to a contract of seamen's wages, the rule is all the more to be enforced. Sailors are wards of the admiralty, and the courts jealously protect their rights. It is notorious that sailors, when about to sign up for a new voyage, are usually destitute, and will agree to any stipulation in the shipping articles, without giving its probable effect the slighest consideration.

The judge referred to section 4554, Revised Statutes (Comp. St., sec. 8343), which vests authority in the shipping commissioner to decide questions between the master and the crew which both parties agree to submit in writing. The opinion continued:

This section has application only to such controversies as are actually submitted in writing to the commissioner. It can not be said that the clause in the contract above referred to had the effect of a submission in writing of the particular controversy here developed.

The captain merely stated his case verbally, and the commissioner and deputy commissioner agreed with him, and required the seamen to accept their wages at the rates fixed by the captain. There were none of the elements of an arbitration in this proceeding.

It was held that the libelants were entitled to recover the amounts claimed with interest from the date they were paid off, with costs.

LABOR ORGANIZATIONS—CONSPIRACY—EXTORTION OF MONEY FROM CONTRACTORS—*People* v. *Walsh, et al., Supreme Court of Illinois (June 16, 1926), 153 Northeastern Reporter, page 357.*—Thomas Walsh, Frank Hayes, Roy Shields, and Patrick Kane were convicted in the criminal court of Cook County on a charge of conspiracy, and were

sentenced to one year in jail. Judgment was affirmed in the appellate court, and the defendants brought error to the supreme court to review the record, where the judgment was again affirmed.

Walsh and Hayes were business agents of the sheet metal workers' union, Shields was agent of the painters' union and Kane was the business agent of the plumbers' union. The charges on which they were convicted grew out of their dealings with contractors and others who were interested in the construction of certain buildings in the city of Chicago.

The facts were substantially as follows: In January, 1920, there was a threatened strike on the Stratford Theater building, which was being constructed by the Chicago United Theaters (Inc.) in charge of William Krieg and Walter Ahschlager. Krieg met with Hayes, Kane, and Shields, and was told by one of them that there was a grievance regarding metal windows, electric work, carpentry, seats, and some other parts of the construction work that would lead to a strike. Kane met a representative of the Chicago Union Theaters (Inc.) at Ahschlager's office on the following day and agreed to settle the matter for $3,000, to be paid in installments of $500 each. Five hundred dollars was paid to Kane at the time, $500 some two weeks later, and $1,000 was paid to him in March, 1920. Sometime between the middle of July and September 10, 1920, there was some trouble threatened by the painters, and Shields, on being asked by Krieg what the trouble was, said that the painting of the seats should have been done by local union members and not by out of town men. Shields stated that the trouble would be settled if Krieg paid him the other $1,000 that was promised to Kane. Thereupon he was paid the $1,000 and there was no further trouble.

In March, 1920, the painters on the Drumm Building that was being constructed by Harold A. Drumm were called out on strike on account of the painting of some doors, and soon thereafter the plumbers also quit for no stated reason. Drumm was informed by Shields that the trouble could be settled by removing all the stain from the doors and by contracting with one Rood to finish the paint work on the building. Drumm was told by Rood that the matter could be settled by paying Shields $1,000. Drumm met Shields and Kane and paid Shields the $1,000 and thereafter the painters went back to work, although the stain was not removed from the doors.

In October, 1920, Hayes told Mark Solomon, of the firm of Solomon & Reger, which was having a hotel erected, that certain metal work had been installed by the wrong union and insisted that the work be taken out and be put in by the members of his union. Solomon refused and a strike of the metal workers was called by Hayes. Solomon took the matter up with Walsh but was told that not a thing could be done except to take the metal work out and have it set by

his (Walsh's) men. Four days later Hayes agreed with Solomon that the trouble could be settled by the payment of $500. This amount was paid to Hayes and the strike was called off, but the metal frames were never taken out and no more complaint was heard from either Hayes or Walsh.

The court disposed of the technical questions raised by the defendants as insufficient grounds for a reversal of the judgment. It then held that the evidence clearly established that the defendants were guilty under some one or more of the charges of conspiracy against the builders named, and accordingly affirmed the judgments of the appellate and of the criminal court of Cook County.

LABOR ORGANIZATIONS—INTERFERENCE WITH EMPLOYMENT—DISCRIMINATION AGAINST OUTSIDE CONTRACTORS—INJUNCTION—*Barker Painting Co.* v. *Brotherhood of Painters, etc., United States Circuit Court of Appeals (October 2, 1926), 15 Fed. (2d), page 16.*—This was an action by the Barker Painting Co. against the Brotherhood of Painters, which had adopted a rule requiring that where an employer of union labor is residing in one locality and doing work in another he shall select not less than 50 per cent of his men from members of the union in the locality where the work is being done. Another rule requires that the length of the workday and the rate of wage shall be the shorter day and the higher wage prevailing in either locality. In the instant case the complainant is a New York corporation doing painting under contract throughout the United States. A foreman is sent to the place and local workmen hired, always members of the union. The contract under consideration was for work in Philadelphia, the intention being to comply with local requirements. The Philadelphia wage scale was $1 per hour for 8 hours with a 5½-day week. In New York the scale was $1.31 for an 8-hour day and a 5-day week. "The complainant's employees resident in Philadelphia, acting under pressure from their union, refused to work in Philadelphia at the Philadelphia scale of wages and hours and demanded the New York scale as to both." The company then sued for injunction, which was denied in the District Court of the United States. From this ruling an appeal was taken, resulting, however, in an affirmance.

Opposite conclusions by various courts were cited in the opinion, one by the Court of Errors and Appeals of New Jersey (New Jersey Painting Co. *v.* Local No. 26 (1924), 96 N.J.Eq. 632, 126 Atl. 399; see Bul. No. 391, p. 206), with two others by the Superior Court of Rhode Island and the Court of Common Pleas of Philadelphia County, opposed to the issue of an injunction. The opinions in the two latter cases were not reported, though they were before the court. In favor

of the issue of such an injunction as was prayed for three cases were cited: Hass *v.* Local Union No. 17 (U. S. District Court, District of Connecticut, 1924, 300 Fed. 894; See Bul. No. 391, p. 205); Barker Painting Co. *v.* Brotherhood of Painters (Supreme Court of the District of Columbia, not reported); and Barker Painting Co. *v.* Local No. 734 (U. S. District Court, District of New Jersey, not reported).

Circuit Judge Woolley, who delivered the opinion of the court, Judge Buffington dissenting, after stating the above facts, said:

All the cited State decisions are against injunctions; all the Federal decisions favor injunctions.[1] The learned trial court was inclined to the reasoning of the State decisions; and so are we, not because the respondents have shown that the rules are lawful, but, rather, because the complainant has failed to show that they are unlawful.

The theory on which the Federal decisions were rendered is that the rules impose on the outside contractor an unjust discrimination and, in consequence, inflict an injury on the public in that they operate unfairly to restrain trade. The theory on which the State cases were decided initially, and necessarily, includes an admission that the rules work discrimination in some degree against the outside contractor, but it recognizes that it is not every discrimination that is unlawful. The courts in the latter cases restate what is now settled law, that employers have no vested interest in the labor or workers and that their workers have a right, individually and collectively, to lay down terms on which they will sell their labor for the highest return they can obtain, and when not satisfied, they have a right to strike. So long as they do this in their own interest, not with the purpose of assailing others, and do it in a manner not in itself unlawful, the courts will not interfere. [Cases cited.]

Discrimination and injury to the public were points urged against the rule, but the court found that the purpose of avoiding conflicts within the groups on the same job, paid at different rates, was the apparent purpose of the rule. Other plausible arguments were suggested, "certainly not to express our views, nor to intimate sympathy with the rules—for assuredly we have none—nor to suggest arguments in their support or reasons justifying their promulgation, but merely to show that many variable and intangible factors inevitably enter into the situation, making the injunctive process of doubtful propriety and legality."

Continuing, Judge Woolley said:

Because of many unknown factors and the uncertainty of what would be the consequences to both employers and employees of a ruling of the nature sought by the complainant, the case is far from clear. Without doubt a distant employer may be confronted by a practical difficulty when, away from home, he comes against the respondent's rules, and, concededly, the difficulty, when occuring, amounts to discrimination against him in some degree. Yet the

[1] Subsequent to the writing of this opinion, the United States District Court, District of New Jersey, dissolved the preliminary injunction granted in the case here cited. See account at conclusion of this case.

complainant has not convinced us that such discrimination, in kind and degree, is so unreasonable that it is unlawful and that, in consequence, it calls for relief by injunction. Nor has the complainant persuaded us that the offending rules operate to injure the public in the legal sense of that term. Any action that arbitrarily or artificially raises the cost of a thing might be regarded as an injury to the consuming public; yet, when (as here) the injury to the public is too remote to follow and weigh, the law is not concerned with it.

These views—the result of a cold consideration of the cited authorities—are decisive of the suit and sustain the decree below.

Judge Buffington dissented in a brief opinion, expressing his view that the rules in effect stifle competition, are unfair, "and in common parlance not a square deal between two competitors generally." Added cost was an unfair burden to the public—private citizens as well as States and municipalities—on account of added cost to the construction of buildings.

Special attention is called to the case of Barker Painting Co. *v.* Local No. 734, decided by the United States District Court, District of New Jersey, April 13, 1926 (12 Feb. (2d) 945), reversing the decision in the same case, cited above. The facts in the case were identical with those in the case above, the action being brought by the same company. In the case against Local No. 734, Judge Runyon quoted at length from the opinion of the New Jersey Court of Errors and Appeals in the case of New Jersey Painting Co. *v.* Local No. 26, cited in the above opinion, and concluded that no injunction should have issued, the rule adopted being for the purpose of increasing wages of the members of the union under certain conditions, which they might lawfully do. No illegal method was found, and no unlawful discrimination or improper classification, the opinion concluding: "I am of the opinion that in this case the defendants have acted altogether within their legal right, and that the injunctive restraint heretofore granted should be dissolved."

LABOR ORGANIZATIONS—PENALTY FOR CALLING STRIKE—CONSTITUTIONALITY OF STATUTE—*Dorchy* v. *State of Kansas, United States Supreme Court (Oct. 25, 1926), 47 Supreme Court Reporter, page 86.*—Section 17 of the court of industrial relations act of Kansas (Laws 1920, ch. 29), while reserving to the individual employee the right to quit his employment at any time, makes it unlawful to conspire to induce others to quit their employment for the purpose and with the intent to hinder, delay, limit, or suspend the operation of mining. Section 19 makes it a felony for an officer of a labor union willfully to use the power or influence incident to his office to induce another person to violate any provisions of the act.

August Dorchy was prosecuted criminally for violating section 19, and sentenced to pay a fine and serve a term in prison. This judgment was affirmed by the supreme court of the State. (Kansas *v.* Howat, 112 Kans. 235, 210 Pac. 352.) Dorchy appealed to the United States Supreme Court on the ground that section 19 as

applied was void because it prohibited strikes and was therefore in violation of the fourteenth amendment to the Constitution of the United States.

It appeared that Dorchy was vice president of District No. 14, United Mine Workers of America, whose members were employed by the George H. Mackie Fuel Co., and as such officer had been instrumental in calling the strike of the employees for no other purpose than to compel the fuel company to pay a claim of a former employee amounting to $180. This case had once before been before the United States Supreme Court (Dorchy *v.* Kansas, 44 Sup. Ct. 323; see Bul. No. 391, p. 165), at which time there was no occasion to pass on section 19, now under consideration.

The Supreme Court, in affirming the judgment of the State court, speaking through Mr. Justice Brandeis, said in part:

> The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court. To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise. And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law nor the fourteenth amendment confers the absolute right to strike.

LABOR ORGANIZATIONS—PICKETING—COERCION—INJUNCTION—*Jefferson & Indiana Coal Co.* v. *Marks, Supreme Court of Pennsylvania (June 26, 1926), 134 Atlantic Reporter, page 430.*—The Rochester & Pittsburgh Coal & Iron Co., owners of a mining plant located at Adrian, Pa., entered into an agreement, known as the Jacksonville agreement, with the United Mine Workers of District No. 2. Shortly thereafter the Adrian plant was closed down. It was later leased to the plaintiff, who started operations on what was known as the 1917 scale. A number of its former employees returned to work at wages provided by that scale. The members and officers of the United Mine Workers of that district resented that action and called a general strike, when, because of conditions then existing, a bill was filed to enjoin the strikers from unlawful interference with the men at work. It was charged that forcible interference with the men to induce them to leave their employment took place; marches and parades with bands of music on the public highways were of almost

daily occurrence; picketing of a greater or less magnitude was engaged in; there was a dynamite explosion by unknown persons; threatening letters were sent; and other acts were committed unlawfully tending to persuade the men to leave work. Defendants denied responsibility for all the acts, but insisted that they were making an effort to sustain the Jacksonville agreement as a standard of wages. From a decree for the plaintiff the defendant appealed. The decree appealed from was modified and as modified it was affirmed. The court in its opinion said:

Without considering the direct conduct of the strikers toward the workmen, as they passed along the highway, did such marching under all the circumstances, have an aspect of hostility and intimidation; or did it, through fear, exert a moral coercion on those on whom it was intended to operate? To accomplish this result it is not necessary that there should be force of arms or a threatening manner or attitude. Coercion may be accomplished without threats or violence.

Though the organization may use every fair means of persuasion to accomplish their purpose, when they undertake day after day, or less frequently, to parade on the public highway, at the time and place where the men employed pass to and from their work, this is not peaceful persuasion, but an annoyance, an intimidation, and through fear, a moral coercion which the law will not tolerate. The highways may be used by a large body of men for parades within reasonable limits, but a parade which has lurking within it a spirit of terror, a commandment of fear, assumes an aspect and coloring far different from a peaceful assemblage of men on the public highways. The purpose might have been perfectly legitimate, but the means employed was illegitimate.

We therefore conclude that the picketing here carried on was unlawful and the placing of pickets in and upon the highways leading to these works may be enjoined. The qualifications to the decree should be omitted. The word "peaceful" should be eliminated. As modified, the decree should read to restrain picketing on or near the premises of the complainant, or on the highways leading thereto; that is, in any manner with the purpose and for the effect of intimidating, annoying, embarrassing, or through fear, exercising moral coercion over those lawfully employed by the appellee, whether actual force or violence be used or not.

A similar conclusion was reached by the Supreme Court of Kansas (Bull *v.* International Alliance (1925), 241 Pac. 459), where the proprietor of two moving picture theaters had been granted an injunction against obstructive and intimidating picketing, following threats that he would be turned over "to the tender mercies of organized labor" if he refused to comply with a demand of the union to pay higher wages to his operators. The State law against the issue of injunctions in case of disputes between employers and employees was said not to be applicable because "the defendants were not employed by plaintiff or seeking to be employed, but were outsiders seeking to compel plaintiff to pay higher wages to those he had employed or might employ." There was found to be a conspiracy to inflict injury to the plaintiff's business, which was a tort, besides the unlawful threats, so that an injunction would properly issue.

LABOR ORGANIZATIONS—PICKETING—INJUNCTION—*Public Baking Co. (Inc.)* v. *Stern, Supreme Court of New York, Special Term (April 21, 1926), 215 New York Supplement, page 537.*—This was an action to continue an injunction against the defendant union, of which Jacob Stern was treasurer, for alleged illegal interference with the plaintiff's business. It appeared that the plaintiff at one time employed members of the defendant union, but upon the expiration of its contract it discharged the members of the union and employed other laborers. The union then caused its representatives to parade for about two hours each day in front of places of business of the plaintiff and some of its customers, bearing placards upon which was printed the label of the union, with the legend:

This union label means shorter hours, sanitary shops, and safety to the customers. Workers and sympathizers demand bread and rolls with the union label.

There was also some public appeal in front of these places of business in the form of street meetings and addresses.

The court refused to grant a continuation of the restraining order for the reason below set forth:

There is no evidence whatever here that the defendant resorted to the threat, coercion, intimidation, or fraud which it is forbidden to use. It advertised to the buying public, before plaintiff's places of business and of some of its customers, the merits of the bread made by union bakers; it accosted no customers; it interfered neither directly nor indirectly with any person attempting to enter any place of business; it made no threat of sympathetic strike. Defendant's action was calculated merely to advance its own cause and procure employment for its own members. So long as it kept its conduct within these bounds of the law, the fact that the plaintiff was incidentally damaged thereby entitled it to no legal redress. (Gill Engraving Co. *v.* Doerr, 214 Fed. 111; see Bul. No. 169, p. 301.)

Judgment was accordingly rendered for the defendant.

In a somewhat earlier case the same judge granted an injunction against picketing on the ground that there was no strike by the workmen of the employer, its employees continuing at work, content with the conditions. As the picketing was said to be merely for the purposes of the union, it had no right thus to interfere with the employer's business. (Bolivian Panama Hat Co. *v.* Finkelstein (1926), 215 N. Y. Supp. 399.)

This last opinion was cited by a coordinate judge in a case of picketing and the distribution of literature denouncing the plaintiff, where there was an attempt to unionize a nonunion shop in which there was no strike, an injunction being granted. (Cushman's Sons *v.* Amalgamated Food Workers, etc. (1926), 215 N. Y. Supp. 401.)

The same court, appellate division, ruled in favor of the plaintiff where a small private corporation engaged in a small business, employing only members of one family and personal friends, was picketed to compel the employment of union members. None had ever been employed, and the refusal of the court below to grant an injunction was disapproved, costs and disbursements were allowed, and the injunction granted, the court saying "There being no strike,

there is no legal justification for the acts of the defendants." (L. Daitch & Co. (Inc.) *v.* Cohen et al. (1926), 217 N. Y. Supp. 817.)

Not the fact of no strike, but the riotous conduct of persons engaged in mass picketing and provocatory articles in the organ of the union were given as reasons for the issue of an injunction by the appellate division in the case of Rentner *v.* Sigman et al. (1926), 215 N. Y. Supp. 323).

And so of the Supreme Court of Appeals of West Virginia, where a collective agreement had been terminated on the happening of one of the contingencies provided for termination, followed by picketing "with intimidation, threats, coercion and force"; such conduct, being unlawful, will be enjoined regardless of former employment relations. (National Woolen Mills *v.* Local No. 350 (1926), 131 S. E. 357.)

The Court of Chancery of New Jersey likewise supported the granting of an injunction where both the above conditions existed, i. e., there was no striking on the part of the plaintiff's employees, and there were allegations of abusive and indecent language and threats of violence against both employees and patrons. Denials were met by the suggestion that "back of the present demonstration is the full force and power of the American Federation of Labor, of which the pickets are mere sentinels or scouts." It was further said that "Picketing, the object of which is unlawful, irrespective of its militant or intimidating character, may be restrained whether peaceable in fact or not. Even peaceable acts, if unlawful and resulting in irreparable injury, may be enjoined." (Gevas *v.* Greek Restaurant Workers' Club et al. (1926), 134 Atl. 309.)

LABOR ORGANIZATIONS—PICKETING—INJURY TO BUSINESS—INJUNCTION—*F. C. Church Shoe Co.* v. *Turner et al., Court of Appeals, Missouri (January 5, 1926), 279 Southwestern Reporter, page 232.*—This was an action for a temporary restraining order and a permanent injunction against the United Shoe Workers of America, together with various locals of that union and certain members of the union. The plaintiffs were shoe manufacturers in St, Louis, Mo., and the defendants were former employees of the company.

It appeared that up to February 1, 1922, the plantiffs had in their employ approximately 200 operatives, some of whom were members of unions and others who were nonunion. The most of those who belonged to any union were members of the United Shoe Workers of America. On February 1, 1922, the factory was closed down indefinitely but was soon thereafter reopened. In the meantime, however, a contract had been made by the company with the Boot and Shoe Workers Union, a rival to the United Shoe Workers, that in the future only members of the former union would be hired. On the opening of the factory on February 9, notices were inserted in the public press that members of the Boot and Shoe Workers' Union would be employed and preference would be given to former employees, but the hiring was limited to members of the union or to those who were willing to become members thereof.

The plaintiffs alleged that as soon as the factory was reopened the defendants combined and confederated together to terrorize their

employees and persons desirous of entering into their employ; that they stationed themselves in close proximity to the factory; used vile and opprobrious epithets in an attempt to coerce plaintiffs to break their contract with the Boot and Shoe Workers' Union; and that their conduct constituted a private nuisance. A temporary restraining order was issued by the court after plaintiff had given bond in the sum of $3,000. The defendant union afterward filed a plea of abatement and asked for damages on the bond. This plea was sustained, and plaintiffs appealed.

The case was considered by a commissoner in an opinion which the court adopted as its own.

The commissioner dismissed all of the errors assigned as not being well taken, and addressed himself to a determination of the questions on which relief was sought in the circuit court. The first of these was that the defendants were unlawfully seeking to compel the plaintiffs to break and abrogate their contract with the Boot and Shoe Workers' Union, and in support of this contention they cited the case of Hughes *v.* Motion Picture Operators (221 S. W. 95), also Hitchman Coal & Coke Co. *v.* Mitchell (245 U. S. 229; see Bul. No. 246, p. 145). The commissioner held that these cases were not in point, in that in neither of them had the relation of employer and employee ever existed between the parties. He then referred to the case of American Steel Foundries *v.* Tri-City Central Trades Council (257 U. S. 184, 27 A. L. R. 360; see Bul. No. 309, p. 181), as being more in harmony with the instant case. In that case the United States Supreme Court held that it was clear that Congress wished to forbid the use of the Federal courts to prevent peacable persuasion by employees, discharged or expectant, in promotion of their side of the dispute. It was therefore held that the former employees, members of the United Shoe Workers, and defendants in this case "were within their rights in so far as they attempted peaceably to persuade plaintiff's employees, actual or expectant, either to leave or not to enter its employ, even though the ultimate effect of such conduct should be the breaking of the contract entered into between plaintiff and the Boot and Shoe Workers' Union, and that, in so far as this part of its case was concerned, plaintiff was clearly not entitled to the relief sought."

Of the remaining complaint, that of the use of profane language by one of the defendants, the commissioner said in part:

> The scene of this occurrence was two blocks from the factory. This act was reprehensible, and must not be condoned, but, of itself, it was not sufficient to create a nuisance in such close proximity to plaintiff's factory as to greatly destroy or injure its value. At most it was but a breach of the peace, and certainly not the proper subject of relief by injunction which presupposes acts designed to create a nuisance and calculated to work irreparable injury.

Accordingly the commissioner recommends that the judgment of the circuit court be affirmed and the cause remanded for disposition of the motion filed May 29, 1922, by defendant United Shoe Workers of America, Local No. 10, for the assessment of damages on the injunction bond.

As stated, the conclusions of the commissioner were made the decision of the court, and the judgment below was accordingly affirmed, and the case remanded for an assessment of damages.

LABOR ORGANIZATIONS—PICKETING—SERVICE OF PROCESS—JURISDICTION—CONSTRUCTION OF STATUTE—*Salitra et al.* v. *Borson et al., Supreme Court of New York, Special Term, (March, 1926), 215 New York Supplement, page 332.*—John B. Salitra and another sought an injunction against Abraham Borson, president of the Delicatessen Clerks' Union of Greater New York, and another to enjoin them from picketing in front of the premises occupied by the plaintiffs. The process server made affidavit that he served the papers in the case by leaving them personally with a person in the office of the defendant, who stated that he was an officer of the association. One of the plaintiff's attorneys made affidavit that he served a copy of the papers on a person who was picketing in front of plaintiff's premises. On return of the order to show cause the defendants appeared specially and objected to the jurisdiction of the court, on the ground that the papers were not served in accordance with the provisions of section 13, article 3, of the general associations law (added by Laws 1920, ch. 915, sec. 6). Application for an injunction was denied by the court without prejudice, however, to the plaintiff's right to renew the application. Judge Biggs, who delivered the opinion of the court, said in part:

Section 13 of the general associations law permits an action to be brought against the president or treasurer of such an association. It is elementary that suit is begun by the service of the summons or by the general appearance of the defendant. The order and the papers upon which order was granted must be served on the defendant association in the manner prescribed by law. (Sections 225 and 883 of the civil practice act; rule 21, Rules of Civil Practice.)

It is conceded that the papers herein were served on neither Borson, alleged to be president, nor his successor. The affidavit of service merely alleges that they were served on a person who said he was an officer. Such service, in my opinoin, is not sufficient to confer jurisdiction.

I am not persuaded that compliance with the direction in the order to show cause that service thereof be made upon any officer of the defendant union is sufficient to cure the defect. Accordingly I conclude that this court has no jurisdiction over the person of the defendant.

The application for injunction was denied, without prejudice to the plaintiff's right to renew the application.

LABOR ORGANIZATIONS—REFUSAL TO WORK ON NONUNION PRODUCTS—INJUNCTION—*Bedford Cut Stone Co.* v. *Journeymen Stonecutters Assn. of North America, United States Circuit Court of Appeals, Seventh Circuit (October 28, 1925), 9 Federal Reporter (2d), page 40.*—The Bedford Cut Stone Co. and others, quarriers and fabricators of Indiana limestone, a building stone found in large quantities in the district about Bedford and Bloomington, Ind., are the appellants. The defendants are the Journeymen Stonecutters Association of North America, a labor union, which for many years prior to 1921 had contracts with the plaintiffs whereunder only members of the union wei employed for cutting the stone after it was quarried. Failing to reach an understanding in 1921, the plaintiffs employed nonunion stonecutters, forming them into an association, membership in which was required to obtain employment as stonecutters with these employers. The defendants have local organizations in most of the States, and the plaintiffs' product is sent to nearly all parts of the United States for use in buildings. Some is shipped in the rough, but most of it is partly cut for use in different buildings and the cutting is completed at the place of building. Considerable stone is fully shaped and cut at the quarries, but even this frequently requires some cutting at the building for exact fitting.

After long negotiations the union officers ordered its members to cease cutting stone which had already been partly cut by nonunion labor, and the result was that the completion of buildings was more or less hindered in several States, the manifest object of the order being to induce the plaintiffs to employ only union stonecutters in the Indiana district. The evidence did not disclose that the quarrying of stone, the transportation of it, or setting it in the buildings was sought to be interfered with, and no actual or threatened violence appeared. There was no picketing and no boycotting. Both parties to the action resided in Indiana, and the sole ground for Federal jurisdiction was that the defendants were conspiring to restrain interstate commerce.

The District Court of the United States for the District of Indiana denied the plaintiffs' prayer for a temporary injunction, and an appeal was taken.

The circuit court of appeals was of opinion that under the facts of the case the defendants were "within their rights in thus undertaking to induce members of their craft to refrain from further cutting upon stone which had before been partly cut by nonunion labor, notwithstanding such refusal might have tended in some degree to discourage

builders from specifying appellants' stone, and thus to reduce the quantity of their product which would enter interstate commerce." The tendency to restrain interstate commerce was conceded, but it was held that as long as it did not appear that the defendants "resorted or threatened to resort to unlawful acts or means to accomplish their lawful purpose," there was no error in the refusal of the district court to grant an injunction.

It was contended for the plaintiffs that the holding of the Supreme Court in United Mine Workers of America *v.* Coronado Coal Co. (259 U. S. 344, 45 Sup. Ct. 551) "requires the conclusion here that this asserted conspiracy is in restraint of interstate commerce." Judge Alschuler, speaking for the circuit court of appeals, pointed out that in the Coronado case the court found new evidence on the second trial tending to show that one of the purposes of the extensive destruction of mines and other property and of the killing of persons was to prevent the large capacity of the mines destroyed, and other mines there, from entering into competition with the product of union-operated mines in neighboring States. No such evidence appeared in this case, and the judgment was affirmed.

This case came to the Supreme Court on a writ of certiorari, the hearing resulting in a reversal of the court below, the opinion being delivered April 11, 1927 (47 Sup. Ct. 522). It was held, two Justices dissenting, that the local activities, undertaken at the behest of the stonecutters' association, were for the purpose of destroying the market for the product of the complainant companies, thus constituting an interference with interstate commerce in violation of the Federal antitrust law. Mr. Justice Sutherland, speaking for the court, after reviewing certain testimony, said:

> The evidence makes plain that neither the general union nor the locals had any grievance against any of the builders—local purchasers of the stone—or any other local grievance; and that the strikes were ordered and conducted for the sole purpose of preventing the use and, consequently, the sale and shipment in interstate commerce, of petitioners' product, in order, by threatening the loss or serious curtailment of their interstate market, to force petitioners to the alternative of coming to undesired terms with the members of these unions. * * *
>
> * * * And indeed, on the argument, in answer to a question from the bench, counsel for respondents very frankly said that, unless petitioners' interstate trade in the so-called unfair stone were injuriously affected, the strikes would accomplish nothing.

Much reliance was placed on the rule laid down by this court in Duplex Printing Press Co. *v.* Deering (254 U. S. 443, 41 Sup. Ct. 172; see Bul. No. 290, p. 174). In this case the market for the products of the company named was to be destroyed by local efforts interfering with the use, setting up, operation, etc., of its presses.

A distinction was drawn between the instant case and the Coronado Case, relied on by the court of appeals, also the case United Leather Workers *v.* Herkert & Meisel (265 U. S. 457, 44 Sup. Ct. 622; see Bul. No. 391, p. 212), where an interference with manufacture was held not an offense against the antitrust act, although the products were chiefly shipped in interstate commerce, the interruption of interstate commerce being incidental to other objectives.

Where the "strikes were directed against the use of petitioners' product in other States, with the plain design of suppressing or narrowing the interstate market, it is no answer to say that the ultimate object to be accomplished was to bring about a change of conduct on the part of petitioners in respect of the employment of union members in Indiana. A restraint of interstate commerce can not be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint." Other cases were cited, some in support and some by way of distinction, the conclusion being reached that "the acts and conduct of respondents fall within the terms of the antitrust act; and petitioners are entitled to relief by injunction under section 16 of the Clayton Act."

Mr. Justice Sanford concurred "upon the controlling authority of Duplex Co. *v.* Deering, which, as applied to the ultimate question in this case, I am unable to distinguish." Mr. Justice Stone wrote a brief separate opinion in which he cited cases in view of which "I should not have thought that such action as is now complained of was to be regarded as an unreasonable and therefore prohibited restraint of trade." However, the views of the majority in the Duplex Printing Press Co. case, again applied in the instant case, were found to be in opposition to such conclusion. "These views, which I should not have hesitated to apply here, have been rejected again largely on the authority of the Duplex case. For that reason alone, I concur with the majority."

Mr. Justice Brandeis, Mr. Justice Holmes concurring, wrote a vigorous dissenting opinion, closely in line with the reasoning of the circuit court of appeals indicated above. The situation in the Duplex Printing Press Co. case was held to be clearly distinguishable. There was here simply an effort to enforce the provision of the constitution of the association which provides: "No member of this association shall cut, carve, or fit any material that has been cut by men working in opposition to this association." The mere refusal to work on this material was "confessedly legal." There was no trespass or breach of contract, no picketing, violence, intimidation, fraud, or threats. There was no boycott against any of the plaintiffs or against builders who used the plaintiff's product, no attempt by the unions to procure a sympathetic strike or the aid of members of any other craft. "The

association, its locals, and officers were clearly innocent of wrongdoing, unless Congress has declared that for union officials to urge members to refrain from working on stone 'cut by men working in opposition' to it is necessarily illegal if thereby the interstate trade of another is restrained." The opinion concludes:

The Sherman law was held in United States *v.* United Shoe Machinery Co. (247 U. S. 32), to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe manufacturing in America. It would, indeed, be strange if Congress had by the same act willed to deny to members of a small craft of workingmen the right to cooperate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I can not believe that Congress did so.

LABOR ORGANIZATIONS—REVOCATION OF CHARTER—PROPERTY RIGHTS—*Centralia Labor Temple Assn.* v. *O'Day et al., Supreme Court of Washington (June 16, 1926), 246 Pacific Reporter, page 930.*—The Central Labor Council of Lewis County, Wash., was organized in 1918 and was chartered by the American Federation of Labor. During the existence of this council, referred to herein as the old council, a fund was raised with which to build a labor temple. This fund was held by W. F. O'Day, treasurer of the council, and was carried on the books of the council as a temple fund separate and apart from the general fund. In the early part of 1923 the council ceased to function and its charter was revoked by authority of Samuel Gompers, head of the American Federation of Labor. In March, 1923, a new council was organized under the name of the Twin City Central Labor Union of Chehalis and Centralia and was chartered by the American Federation of Labor. In April, 1923, a corporation known as the Central Labor Temple Association was formed, and in May, 1923, the old council, which had only two labor unions in good standing (five being necessary to constitute a quorum for the transaction of business) held a meeting and passed a resolution ratifying the turning over of the fund which had been raised for temple purposes to the Labor Temple Association. That association then made demand on O'Day to pay over to it the funds in his hands. This he refused to do because the new council had demanded that the funds be delivered to it. Action was then commenced by the Labor Temple Association to require O'Day to turn over the funds to it. The action was opposed by the new council. After hearing the evidence, the trial court held that the fund in question was a trust fund to be used for labor temple purposes; that when the old council's charter was revoked and the new council formed with the approval of and under

the charter of the American Federation of Labor, it became entitled to the possession of the trust fund to be used for trust purposes, for which it was contributed. From this judgment the Labor Temple Association appealed. The court, after considering the numerous errors assigned, affirmed the judgment of the lower court, and the conclusion of its opinion said:

We find no error in the holding of the trial court that the fund in question should be delivered to the new council, and its judgment is therefore affirmed.

LABOR ORGANIZATIONS—RULES—REFUSAL TO PAY STRIKE BENEFITS—POWERS OF OFFICIALS OF UNIONS—*Brotherhood of Railroad Trainmen* v. *Barnhill, Supreme Court of Alabama (April 8, 1926), 108 Southern Reporter, page 456.*—T. L. Barnhill sued the Brotherhood of Railroad Trainmen for strike benefits from September 5, 1923, to July 5, 1924. He alleged in his complaint that he was a member of the defendant's order; that the defendant contracted with him at the time he became a member to pay him strike benefits; that he was called out on a strike inaugurated by the brotherhood on March 5, 1921; that the strike had not been officially terminated and that he continued to strike. He asked judgment in the amount of $100 per month from September 5, 1923, to July 5, 1924. From judgment for the plaintiff the defendant appealed. It contended that under the provisions of its constitution and by-laws its officers were empowered to take such action as they deemed necessary to protect the funds of the order.

The court, after reviewing and citing a number of cases involving questions similar to that here presented, upheld the defendant's contention in the following language:

After a due consideration of the authorities, the power through the provisions of the brotherhood law to make the decision of their own officials and tribunals conclusive in respect to the extraordinary protective fund and all its strike benefits under its law, we are of opinion are conclusive on the members, no fraud being charged. These institutions, operating for their members or a reasonable classification thereof for reasons of policy and that of its welfare, may adopt laws for their government, to be administered by themselves to its members, and require for the general benefit the surrender of no right that an individual may not waive. And he is bound by that authority and law only so long as he chooses to recognize that authority. Any other rule would impair the usefulness of such institutions and render the duly constituted tribunals of such order practically useless. If the constitution and by-laws be considered under the general issue, the several requested affirmative instructions for defendant should have been given.

The judgment was therefore reversed and the case remanded.

LABOR ORGANIZATIONS—STRIKES—MONOPOLIES—INTERFERENCE WITH INTERSTATE COMMERCE—*Coronado Coal Co. v. United Mine Workers of America, United States Supreme Court (May 25, 1925), 45 Supreme Court Reporter, page 551, 263 U. S. 295.*—This case was before the court in a protracted series of actions involving the labor conflict between the parties named. There was an action for damages brought under the Federal antitrust act, charging conspiracy to restrain and prevent the company's interstate trade in coal. There was in reality a group of plaintiffs operating mines in Sebastian County, Ark. In the course of the effort of the union to secure unionization, valuable mining properties of the plaintiff were destroyed in 1914. Earlier proceedings were reported under Dowd *v.* United Mine Workers of America (235 Fed. 1, 148 C. C. A. 495; see Bul. No. 224, p. 168); United Mine Workers of America *v.* Coronado Coal Co. (258 Fed. 829, 169 C. C. A. 549; see Bul. No. 290, p. 192); same case (259 U. S. 344, 42 Sup. Ct. 570; see Bul. No. 344, p. 157); Finley *v.* United Mine Workers of America (300 Fed. 972; see Bul. 391, p. 263).

In the latest case, Finley, receiver for the Coronado Coal Co., was denied recovery under the antitrust act on the ground that there was not sufficient evidence of a direct purpose to interfere with or monopolize interstate commerce, the alleged conspiracy being "for the purpose of unionizing the mines and of preventing Mr. Bache from working his mines nonunion." A verdict was therefore directed for the defendants and affirmed by the circuit court of appeals. The case came before the Supreme Court on a writ of error from this decision.

Mr. Chief Justice Taft, speaking for the court, having stated briefly the facts, said:

In our previous opinion we held that the International Union known as the International Mine Workers of America, the union known as United Mine Workers, District No. 21, and the subordinate local unions which were made defendants, were, though unincorporated associations, subject to suit under the antitrust act, but that there was not sufficient evidence to go to the jury to show participation by the International Union in the conspiracy and the wrongs done. We found evidence tending to show that District No. 21 and other defendants were engaged in the conspiracy and the destruction of the property, but not enough to show an intentional restraint of interstate trade and a violation of the antitrust act. The plaintiffs contend that they have now supplied the links lacking at the first trial against each of the principal defendants.

Details were then given as to methods of attack and defense, the purchase of guns and ammunition, the battle between the parties, after which "two of the employees of the mine, after capture, were deliberately murdered," and the use of gunfire, bullets, dynamite, and the torch to destroy the property of various of the plaintiffs.

An essential question was as to the inclusion of the International Union as participant in the strike with the district and local unions. After considering the provisions of the constitution of the union with regard to the authorization of strikes and the acts of the international board and officials, the Chief Justice concluded: "We thought at the first hearing and we think now that none of this evidence tends to establish the participation of the International in the Prairie Creek strike and disturbances."

As to the question of purpose to restrain interstate commerce, evidence was examined tending to show a basis for such a claim. One of the union officials was reported to have said that the nonunion coal must be kept off the market, "because if Bache coal, scab dug coal, got into the market it would only be a matter of time until every union operator in that country would have to close down his mine, or scab it, because the union operators could not meet Bache competition." District union officials were shown to have received large numbers of guns and to have guaranteed the miners' pay "for every day you are in this trouble." In the course of this evidence it was further brought out that the International was not to be involved because "we have West Virginia and Colorado on our hands, and we can not bear any more fights."

The Chief Justice had reviewed certain positions taken at the earlier hearing before the Supreme Court as to the situation of unincorporated associations. It was found that the evidence was "so clear that it does not need further discussion" to the effect that the district officials and agents, with subordinate local unions, organized and carried through the attacks and activities complained of. The only remaining question was as to whether they "were intentionally directed toward a restraint of interstate commerce." On the first trial, this was held not to be shown; but since that time evidence had been introduced indicating the necessity of barring nonunion mined coal from interstate commerce if the union mines were to be kept in operation and union conditions maintained. There was also found to be a discrepancy between the previous understanding as to the output of the mines and the existing facts. Thus it was said in the earlier case that merely to eliminate a product of 5,000 tons a week from interstate commerce would be insignificant as affecting the total tonnage of the country or State. It now appeared that the potential output was 5,000 tons a day. While this difference would not in and of itself affect the conclusion then reached, a different significance is given the situation, "in view of the direct testimony as to the moving purpose of District No. 21 to restrain and prevent plaintiffs' competition." The amount capable of being mined would become "relevant evidence for the jury to consider and weigh as a circumstance with the rest of the new testimony in proof of intent of the

leaders of District No. 21 to prevent shipments to neighboring States of such an amount of nonunion coal at nonunion cost." Continuing, the opinion concludes:

The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the antitrust act. We think there was substantial evidence at the second trial in this case tending to show that the purpose of the destruction of the mines was to stop the production of nonunion coal and prevent its shipment to markets of other States than Arkansas, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines, and that the direction of the district judge to return a verdict for the defendents other than the International Union was erroneous.

The judgment of the lower courts in favor of the International Union was therefore affirmed, but that in favor of District No. 21 and the other local unions and individual defendants was reversed, and the cause remanded for a new trial.

LABOR ORGANIZATIONS — STRIKES — PICKETING — INJUNCTION — "CLEAN HANDS" — *Forstmann & Huffman Co.* v. *United Front Committee of Textile Workers, Court of Chancery of New Jersey (May 12, 1926), 133 Atlantic Reporter, page 202.*—The complaint in the above case arose out of conditions attendant upon the strike beginning in January, 1926, among the textile workers of Passaic, N. J., and vicinity. The company named employed about 3,000 hands, and claimed that no strike existed among its workers. On the basis of a sworn statement to this effect, "and further proof of illegal interference with such employees by those of the other mills who had gone on strike, a most drastic and sweeping ad interim restraint was imposed upon the strikers, and they were ordered to show cause why a preliminary injunction should not issue."

Vice Chancellor Bentley, who delivered the opinion of the court, found that by far the greater number of the complainant's employees were on strike, that no acts of violence or intimidation had been proved to have been committed by the strikers, and that picketing had been carried on by as many as 2,000 persons at one time. Quoting at some length from the opinion of Mr. Chief Justice Taft in his decision in the American Steel Foundries case (257 U. S. 184, 42 Sup. Ct. 72; see Bul. No. 309, p. 181), the court announced the conclusion that "picketing in itself, for all its militant name, may be legal

or illegal in a dispute between employer and employee, according to the manner in which it is carried on." No question exists as to the right of workmen to associate for bettering their living or working conditions, or as to the right to strike as an inducement to secure from the employer the desired concessions. Workmen unable to picket in a labor market such as existed in the locality would be reduced to a futile and absurd condition.

Under these circumstances, and so long as they do not resort to interdicted conduct, every dictate of reason and fair play requires that they be given an opportunity to lawfully discuss their grievance, or supposed grievance, with either their fellow employees or others who offer themselves to take their places, unless, indeed, labor is to be returned to that state of bondage that succeeded legal serfdom in England.

However, the mass picketing indulged in could not be permitted to continue, so that while "there should be a material modification of the terms of the restraining order," an injunction would nevertheless be allowed to limit picketing in accordance with the theory of persuasion and imparting information, but without intimidation, even by mere numbers.

The injunction was opposed by the defendants on the theory of an adequate remedy at law, but—

It can not be said that an irresponsible committee not even affiliated with any regular labor organization and a horde of employees attempting to support families on wages of $15 or $20 a week could possibly respond to a judgment in an action at law.

The defendants also set out that the complainants had not "come into court with clean hands," in that they had themselves formed an association virtually establishing an employment system embodying a blacklist for workers for any reason objectionable to any member of the employers' association. It was also charged that this association had sent out spies among the employees, to bring back confidential reports about various individuals. The court was unable to see in this anything that offended the maxim of equity referred to.

Certainly the employers have exactly the same right to organize and protect their interests that the law affords to the employees. In the minds of the defendants this appears to have been aggravated by the fact that the complainant had organized among its employees a sort of governing and welfare body, at the same time retaining in its hands control of the affairs thereof, and that this was done for the purpose of forestalling any combination or affiliation with organized labor upon the part of the employees. I do not understand that it is illegal or in any other way offensive for an employer of labor to attempt to operate a shop with workmen who are not members of a trade union, and any such action upon the part of this complainant can have no bearing upon a determination of its right to be free

from illegal actions upon the part of its employees who have refused to continue at their work.

I will advise an order in accordance with the views herein above set forth, but will require that notice thereof be given.

LABOR ORGANIZATIONS—VIOLATION OF INJUNCTION—LIABILITY FOR INJURIES—RECEIVER—SERVICE—WRIT OF PROHIBITION—*District No. 21, United Mine Workers of America,* v. *Bourland, Chancellor, Supreme Court of Arkansas (November 9, 1925), 277 Southwestern Reporter, page 546.*—A temporary restraining order was granted enjoining certain named individuals and all other members of District No. 21, United Mine Workers of America, from destroying or going upon any of the property and from interfering in any manner with the agents of the Greenwood Coal Co., Mammoth Vein Colliery Co., and the Backbone Coal Co. On August 31, 1925, an amendment to the complaint was filed by the coal companies, alleging that the restraining order had been violated by the defendants who had destroyed property in the value of several thousand dollars, and praying that the court appoint a receiver to take charge of all the district funds on hand or in banks, and any dues thereafter collected by or for it. The companies also prayed that upon final hearing judgment for damages be given in certain amounts as claimed by them individually, and that the sums in the hands of the receiver be applied in payment of the judgment and cost of the action. A receiver was appointed by the chancellor and directed to take charge of the funds as prayed for, and hold them until further orders of the court, and also to take charge of the property belonging to the district and the locals, and to preserve same until further orders of the court. The defendants filed a motion in the chancery court to vacate and set aside the order of the chancellor, but this was overruled An application for writ of prohibition was filed and the chancellor given due notice thereof. The court, in granting the writ and ordering the receivership vacated, said in part:

The case not being here on appeal, but upon prohibition, our consideration must be confined to the question of the power of the chancery court to appoint a receiver in a case of this sort.

The writ of prohibition is an appropriate remedy to restrain the exercise of jurisdiction by an inferior court over a subject matter when it has none, and over parties where it can acquire none.

It is a principle of elementary law that the pendency of a suit is an absolute prerequisite to the appointment of a receiver, and unless made in a suit pending the court is without jurisdiction, and the order appointing the receiver is void.

A court of equity may appoint a receiver before service of summons upon the defendant and without notice to him. (Excelsior White

Lime Co. *v.* Rieff, 107 Ark. 554, 155 S. W. 921.) This is done on the same principle that an injunction will sometimes be issued before actual service and before actual notice of the application is given. In such case it must appear that the relief and protection can be given in no other way. Since equity acts on the person, and since the appointment of a receiver is an equitable proceeding, and since equity does not act directly against the property, the court cannot appoint a receiver where there can be no legal service of summons against the defendant.

In the case at bar an attempt was made to sue District No. 21, United Mine Workers of America, and the locals which are unincorporated associations by their society or company names. This court has held, however, that an unincorporated or voluntary association of persons has no legal entity, and cannot be sued by its society name. (Baskins *v.* United Mine Workers of America, 150 Ark. 398, 234 S. W. 464.) We are asked to overrule the case last cited under the authority of United Mine Workers of America *v.* Coronado Coal Co. (259 U. S. 344, 42 Sup. Ct. 570; see Bul. No. 344, p. 157).

There is no Federal question involved in the matter and consequently no reason why we should overrule our own opinion, except that it is wrong.

An attempt was also made to obtain service on the defendant under section 1098 of Crawford & Moses Digest. That section provides that where the question is one of common or general interest of many persons, or where the parties are numerous and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all. It will be remembered that this suit originated as an equity proceeding, and it may be here stated that the section of the statute just referred to is, so far as equity is concerned, an adoption by the legislature of the doctrine of virtual representation, which was in accordance with the existing practice of courts of equity at the time of the adoption of our Constitution.

This suit was brought in equity by certain coal operators to recover unliquidated damages for personal injuries to their property. Equity will not by an original action take jurisdiction of a case involving a question of unliquidated damages arising from a tort.

It follows as a consequence that no service was had or could be had upon the members of District No. 21, United Mine Workers of America, and the local union, and the appointment of a receiver in an action against them was a nullity.

The writ of prohibition asked for was granted, and the receivership ordered by the chancellor vacated.

LICENSING BUSINESS — RESTAURANT KEEPER — REVOCATION OF LICENSE WITHOUT HEARING — CITY ORDINANCE — DUE PROCESS OF LAW—*Angelopoulos* v. *Bottorff, City Manager, District Court of Appeal of California (February 24, 1926), 245 Pacific Reporter, page 447.*—John Angelopoulos sought an injunction against H. C. Bottorff, as city manager, and others to enjoin them from enforcing ordinance

No. 18 against him as a keeper of a restaurant in the city of Sacramento, Calif.

The ordinance complained of gave the city council wide powers in the matter of issuing and canceling licenses in the city of Sacramento, and provided among other things for the cancellation of licenses without notice to the licensee upon evidence satisfactory to it that any of the provisions of the ordinance had been violated. It was complained by the plaintiff that the ordinance was in violation of the constitution of California, article 1, sections 1 and 13, and the fourteenth amendment to the Constitution of the United States.

Defendants demurred to the plaintiff's complaint. The demurrer was sustained and the plaintiff appealed.

The court in the course of its opinion pointed out the difference between the right to do business and a privilege to engage in certain occupations which might be inimical to the public welfare. It held that to engage in the restaurant business was a fundamental right of the plaintiff and that he was surrounded with certain constitutional safeguards such as notice and the right to be heard in his own defense, which rights the city council had no power to deprive him of.

In concluding its opinion the court, speaking through Judge Plummer, said in part:

> The violation of law alleged in this case does not appear to have been in connection with the business licensed, but, whether such be or be not the case, the fact that the revocation was had without notice or hearing renders the purported order of cancellation void, and, as that is the only question necessary to be decided in this case, we limit our ruling to the failure to give notice and afford an opportunity for a hearing.

The judgment of the lower court sustaining defendant's demurrer was reversed with directions to overrule the demurrer and permit defendant to answer the plaintiff's complaint, and it was so ordered.

LICENSING OCCUPATIONS—ARCHITECT—TAXATION—CONTRACTS—*Wolpa et al.* v. *Hambly, Court of Appeals of Ohio (July 9, 1923), 153 Northeastern Reporter, page 135.*—Action was brought by George Hambly against Louis Wolpa and another in the municipal court of Cincinnati to recover the value of his services as an architect. The suit was contested by the defendants on the ground that the defendant had not at the time he entered into the contract paid an occupational tax in compliance with city ordinance No. 347. From a directed verdict for the defendants the plaintiff appealed. The court of common pleas reversed the judgment of the municipal court, and the defendants brought error. The main question for the court was whether or not the tax in question was an excise or a license tax. If

an excise tax for the purpose of raising revenue, the contract in question would not be void, but if it was a license tax granted by competent authority to do an act which without such authority would be illegal then such contract would be void.

The court, after reviewing the purposes for which the ordinance above referred to was passed, and examining several authorities on the question of taxation and contracts, reached the conclusion that the ordinance could not be classed with ordinances that have for their purpose the benefit and protection of the public.

In concluding, the court said:

We therefore hold that the tax under consideration was a valid excise tax for revenue only, and the failure to pay it did not invalidate a contract for services entered into between the parties herein.

The judgment of the court of common pleas reversing the judgment of the municipal court was therefore affirmed.

LICENSING OCCUPATIONS—ELECTRICAL CONTRACTORS—CONSTITUTIONALITY OF STATUTE—*Berry et al.* v. *City of Chicago et al., Supreme Court of Illinois (April 23, 1926), 151 Northeastern Reporter, page 581.*—The Legislature of Illinois at its 1925 session reenacted section 1 of article 5 of the cities and villages act with a new clause providing for the registration of electrical contractors, which it defined to be any person or firm engaged in the business of installing by contract electrical equipment for the utilization of electricity supplied for light, heat, or power, but exempted from the provisions of the act public utility companies firms of which one member or a representative thereof had had two years' practical experience in installing and altering such electrical equipment, and persons bearing the relation of employee to the person for whom the work was to be done. At the same session of the legislature an act was passed purporting to give to cities and villages the power to regulate the installation, alteration, and use of all electrical equipment within its limits and to provide for the establishment of an inspection commission to see that the terms of the law were carried out.

The city council of Chicago passed two ordinances in strict compliance with the terms of the acts.

Suit was brought by F. S. Berry and others against the city of Chicago and certain of its officers to enjoin them from enforcing the ordinances, on the ground that they and the statutes under which they were passed were unconstitutional, in that the legislature had undertaken to invoke the police power arbitrarily without reference to the object sought—namely, the protection of the public generally against the results of defective electrical work and incompetent workmanship. From a decree dismissing the bill, plaintiffs appealed.

The court held that in view of the plenary powers of the legislature, in the absence of constitutional restrictions, to enact laws and its power to confer upon subordinate agencies all the power it possesses for carrying out such laws, the question for consideration in the instant case was whether the legislature had the authority to confer upon the city council the power to pass the ordinances complained of.

In the course of its opinion the court cited a number of cases in which the question of the constitutionality of similar legislation had been considered, and quoted with approval from the decision in the case of Jones *v.* Chicago, R. I. & P. Ry. Co. (83 N. E. 215, 231 Ill. 302) as follows:

When a law is made applicable to one class of individuals, there must be some actual, substantial difference between the individual so classified and other individuals in the State or community, when considered with reference to the purpose of the legislation.

It also quoted from the decision in the case of Bagdonas *v.* Liberty Land Co. (140 N. E. 49, 309 Ill. 103);

There must be a sound basis in reason and principle for regarding the class of individuals as a distinct and separate class. A class can not be created by arbitrary declaration of the law-making power and endowed with special legislative favors.

Judge Heard, speaking for the court, then said in part:

The legislative purpose for the exercise of the power of regulation of the installation and alteration of electrical epuipment is to protect the public from injury to persons from exposed wires and to property from resultant fires from defective electrical workmanship and construction.

After referring to the classes exempted he continued:

A good reason can be seen why they might be separately classified with reference to equipment to be installed for them in their operation as public utilities or common carriers, but that reason does not obtain where they seek to enter into the field of contracting for the installation and alteration of electrical equipment for others.

The act of 1925, in relation to the regulation or installation of electrical equipment, contains the same classifications with reference to public utilities and common carriers and employees of the person for whom the work is done. When the two acts of the legislature are tested by the rules laid down by the authorities above cited, we must hold that they are unconstitutional and invalid.

The decree of the circuit court was therefore reversed.

MECHANIC'S LIENS—CHATTEL MORTGAGE—RANK—*Hockaday Auto Supply Co.* v. *Huff* (*Valley Securities Co., Intervener*), *Supreme Court of Kansas* (*May 8, 1926*), *245 Pacific Reporter, page 1013.*—The Valley Securities Co., referred to herein as intervener, owned by

assignment a chattel mortgage for the purchase price of an automobile. The mortgage had been executed by F. J. Huff and duly filed and recorded. By its terms the mortgagor was allowed to possess and use the automobile. Some time later Huff took the car to the Hockaday Auto Supply Co. and contracted with it for certain repairs and renewals at an agreed price of $80. The bill for the work done and materials furnished was not paid, and the plaintiff filed a lien for labor and materials against the car. The intervener claimed that the chattel mortgage, being first in time, should be regarded as superior to that of the mechanic for labor and material. From judgment for the plantiff the intervener appealed on the ground that Revised Statutes 58–201, under which the mechanic's lien was filed, was not enacted by the legislature, but was the creation of the revision commission, and that the judgment of the court would deprive it of its property without due process of law.

In disposing of the case the supreme court said in part:

While the commission reported the revision to the legislature it was in fact constitutionally enacted by that body, and is as much the law of the State as if it had been initiated by the legislature without the report of the commission. Prior to 1913 liens of mechanics or artisans were not given priority over other liens, but in that year the legislature passed a statute providing that certain mechanics should have a first and prior lien upon vehicles, including automobiles, which came into their possession to have work done or repairs or improvements made thereon. (Laws 1913, ch. 218; Gen. Stat. 1915, sec. 6092.) The priority thus provided has been in force since that time.

The court cited several cases wherein the decisions of the courts had upheld the principles of the statute now attacked, and quoted from the opinion of Justice Brewer in the case of Case *v.* Allen (21 Kans. 217, 30 Am. Rep. 425) as follows:

The principle seems to be that where the mortgagee does not take the possession, but leaves it with the mortgagor, he thereby assents to the creation of a statutory lien for any expenditure reasonably necessary for the preservation or ordinary repair of the thing mortgaged. Such indebtedness really inures to his benefit. * * * The work or material enhances or continues the value of that upon which the work is done or to which the material is furnished; and the mortgagee can always protect himself against such liens, or, at least, any accumulation of debt thereon, by taking possession of the chattel mortgaged.

Other cases were cited in which the principles of that case were followed and approved. The opinion continued:

We see no reason to depart from a rule established about 50 years ago and which has been consistently followed since that time. By intrusting the possession of the car to the mortgagor the mortgagee in a sense made him its agent to keep it in a going condition for the

benefit, not only of the mortgagor, but also for the benefit of the mortgagee and in that way preserve the value of its security.

Following these decisions it must be held that the statute giving a lien for labor and material on the automobile and making it superior to that of a prior mortgage does not violate the constitutional provision mentioned, and therefore the judgment of the district court will be affirmed.

PUBLIC CONTROL OF BUSINESS—SALE OF OIL AND GASOLINE BY CITY—CONSTITUTIONALITY OF ORDINANCE—*Mutual Oil Co.* v. *Zehrung et al., United States District Court, Nebraska (April 7, 1925), 11 Federal Reporter (2d), page 887.*—An ordinance was adopted by the city of Lincoln, Nebr., in pursuance to an amendment to the city charter, creating a department to sell oil and gasoline to the inhabitants of the city, and a fund was provided with which to carry on the business. The gasoline and oil were to be sold at cost plus handling and some contingencies. The plaintiff, who was engaged in the business of selling gasoline and oil in Lincoln, filed a bill praying for an injunction permanently to restrain the officers of the city from carrying out the terms of the ordinance, and alleged that such an ordinance was in violation of the Constitution of the United States, of the constitution of Nebraska, and also of the provisions of the city charter. The defendants moved to dismiss the bill, the motion being overruled.

The court first took up the claim that the establishment of the municipal plant deprived the plaintiff of property without due process of law, in violation of the fourteenth amendment to the Constitution; but the hazard of loss by competition was said to be one that existed when the business was entered upon, so that there was no deprivation of property in any legal sense, neither will implications against public rights be indulged in; citing Helena Water Works Co. *v.* Helena (195 U. S. 383, 25 Sup. Ct. 40), and other cases.

More strongly urged was the claim that there was here a use of public money for private purposes. Courts differ as to the point.

Some have condemned the operation of enterprises such as moving-picture exhibitions, the manufacture and sale of ice, the sale of coal and wood, and the sale of goods in ordinary mercantile establishments. (State *v.* Lynch, 88 Ohio St. 71, 102 N. E. 670; Opinion of the Justices, 155 Mass. 598, 30 N. E. 1142; In re Municipal Fuel Plants, 182 Mass. 605, 66 N. E. 25; State *v.* Orear, 277 Mo. 303, 210 S. W. 392; Union Ice & Coal Co. *v.* Town of Ruston, 135 La. 898, 66 So. 262.) Others of such courts have declared it a proper public purpose for such municipal corporations to engage in the sale of coal and wood, and to manufacture and sell ice, to the inhabitants of the municipality. (Laughlin *v.* City of Portland, 111 Me. 486, 90 Atl. 318; Jones *v.* City of Portland, 113 Me. 123, 93 Atl.

41; Central Lumber Co. *v.* City of Waseca, 152 Minn. 201, 188 N. W. 275; Holton *v.* City of Camilla, 134 Ga. 560, 68 S. E. 472.)[3]

The Supreme Court of Nebraska, upon a consideration of this division of decisions, has held that a tax for the support of a municipal fuel yard is for a public purpose, and that such a tax is not contrary to any limitations of the taxing power. (Consumers' Coal Co. *v.* City of Lincoln, 109 Nebr. 51, 189 N. W. 643.) The validity of the Maine statute, authorizing the operation of a municipal yard for the sale of wood, coal, and other fuel without financial profit, was sustained by the Supreme Court of the United States against the claim that such a use of the public money was not for a public purpose, and was a violation of the fourteenth amendment. (Jones *v.* City of Portland, 245 U. S. 217, 224, 225, 38 Sup. Ct. 112.)

Other cases were cited, including that of Green *v.* Frazier (253 U. S. 233, 40 Sup. Ct. 499), in which the court sustained the validity of acts of the Legislature of North Dakota providing for the establishment of a system of warehouses, elevators, flour mills, factories, etc. Comparing the purposes and effects of these acts with those of the ordinance under consideration, the court found itself "unable to declare" the latter unconstitutional.

RAILROAD COMPANIES—STRIKE AS CAUSE OF DELAY IN TRANSPORTATION—LIABILITY—*Ritchie* v. *Oregon Short Line R. Co., Supreme Court of Idaho (February 24, 1926), 244 Pacific Reporter, page 589.*—Ben T. Ritchie sued the Oregon Short Line Railroad Co. to recover damages for losses which he alleged were due to delay and negligence in handling a shipment of eight carloads of sheep from Adrian, Oreg., to Idaho Falls, Idaho. It appeared that the train carrying the sheep arrived in Pocatello, Idaho, 24 hours after loading, but could proceed no further on account of a sudden strike of some 100 switchmen in the employ of the company.

At the close of the trial the company moved for a directed verdict on the grounds of insufficient evidence to establish negligence on its part, etc. The motion was denied and the jury returned a verdict in favor of the plaintiff. From judgment on the verdict the defendant appealed. Numerous errors were assigned, but the question primarily of interest here was whether under the circumstances and the facts as affected by the strike the defendant could be held liable for the loss complained of. The court examined a number of authorities on the question of the liability of carriers in circumstances similar to those in the instant case. The principle applied in Indianapolis & St. Louis R. R. Co. *v.* Juntgen (10 Ill. App. 295), was held applicable here. From this case the court quoted as follows:

[3] The court included in this list Baker *v.* City of Grand Rapids (146 Mich. 687, 106 N. W. 208), but the court in that case decided against the power of the city to operate municipal fuel plants as an improper use of public money, but denied the petitioner the right to an injunction restraining the operation of the plant, as he had not come into the court with clean hands, and furthermore, the operation had ceased.—Editor.

In this respect the common carrier stands on the same ground as other bailees, and may excuse delay in the delivery of goods, by accident or misfortune, although not inevitable, or produced by the act of God. All that can be required of him in such an emergency is that he shall exercise due care and diligence to guard against delay, and that, if it occur without his fault or negligence, he shall omit no reasonable effort to secure the safety of the goods.

Another case which was held to be in point was that of Panhandle & S. F. Ry. Co. *v.* Thompson (Tex. Civ. App., 235 S. W. 913) in which it was held that—

Where the employees suddenly abandon a carrier's service, and, while offering no violence and causing no forcible obstruction to its business, simply refuse to work or further discharge their duties, for any delay in shipment of cattle consequent thereon the carrier is liable if it fails to use reasonable diligence in supplying the places of the striking employees, and that the question of whether the carrier has used reasonable diligence is a question of fact for the jury.

In other cases, a strike of violence was held to be an excuse.

Judge Givens, speaking of the instant case, then said in part:

The question of whether it was a passive strike or a strike of violence would have a bearing upon the diligence to be exercised by the carrier, but would make no difference in principle. In other words, it could not be said as a matter of law that a passive strike was no excuse while a strike of violence would be an excuse. If there were physical interruptions in the transportation of the freight, due to wrecks or any other physical causes, not amounting to an act of God or superinduced by acts of the public enemy, whereby delay ensued, it would be a question of fact as to whether there was negligence, hence an unreasonable delay; or whether there was no negligence, and hence not an unreasonable delay. Practically all the authorities hold that a strike of violence is a valid excuse for a delayed shipment, and their justification in so holding must be that the diligence shown to have been exercised by the carrier in the face of such violence was reasonable; if then in a passive strike the carrier, without fault on its part, and after the exercise of every reasonable effort to secure others to take the place of the strikers, is unable to secure men, there is no difference in principle.

The defendant was liable, if there was a strike, and due diligence had not been exercised by the carrier to overcome the strike; but, if it had exercised such due diligence, the delay would not have been unreasonable. In other words, the court improperly said that, if the unreasonable delay was occasioned by the strike, the defendant was liable. Delay may be excused and therefore not amount to an unreasonable delay, because of acts which do not reach to the dignity of or fall within any of the classes enumerated in instruction No. 17.

The instruction noted advised the jury that the delay was unreasonable unless caused by an act of God, public enemy, authority of law, or inherent tendency of the sheep themselves.

The judgment was ordered reversed and the cause remanded to the lower court with instructions to grant a new trial. Costs allowed to appellant.

RAILROADS—EQUIPMENT—STATE AND FEDERAL REGULATIONS—*Napier* v. *Atlantic Coast Line R. Co., Supreme Court of the United States (November 29, 1926), 47 Supreme Court Reporter, page 207.*—The opinion in this case disposed of three actions to determine the validity of State regulations affecting the equipment of locomotive engines used on highways of interstate commerce. The titling case was a suit by the attorney general of Georgia against the company named which had procured an injunction against the enforcement of a statute (acts of 1924, p. 173) prescribing the installation of automatic doors to the fire boxes of certain locomotives. (2 Fed. (2d) 891.) The other cases were from Wisconsin, where the supreme court had upheld an act of 1923 (ch. 139) prescribing cab curtains to be installed on locomotives as a protection to the engineer and fireman (188 Wis. 232, 205 N. W. 932).

The main question was as to the construction of the Federal statute known as the boiler inspection act—i. e., whether it "has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude State legislation."

All parties conceded the power of Congress so to act in regard to safety as to prevent State interference; also that the Federal safety appliance and boiler inspection acts apply to locomotives used on a highway of interstate commerce even if engaged only in intrastate service. Mr. Justice Brandeis, speaking for the court, recounted prior enactments as to equipment, relating to power brakes, automatic couplers, grab irons, drawbars, safety ash pans, and sill steps. These specific requirements were held as obviously not covering the field, since they are limited to the particular points named; the same is true as to the original boiler inspection act, "but the power delegated to the [interstate commerce] commission by the boiler inspection act as amended is a general one. It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." It was held that the requirements prescribed by the State laws were "within the scope of the authority delegated to the commission." The preservation of the health of engineers and firemen, like preventing excessive fatigue through limited hours of work, is a promotion of comfort and indirectly of safety. Various orders had been issued by the commission in line with its authority relating to sundry items of equipment, which its power to inspect enables it to enforce. The claim that Congress intended "solely to prevent accidental injury" while the State regulations endeavor "to prevent sickness and disease due to excessive and unnecessary exposure," was held inadequate.

The Federal and the State statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the commission

has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the commission has power to prescribe an automatic fire box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the State legislation. This, also, if true, is without legal significance. The fact that the commission has not seen fit to exercise its authority to the full extent conferred has no bearing upon the construction of the act delegating the power. We hold that State legislation is precluded, because the boiler inspection act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. Because the standard set by the commission must prevail, requirements by the States are precluded, however commendable or however different their purpose.

If the requirements now existing are deemed inadequate, the commission has ample power to afford relief, and to it recourse must be had. The decree of the district court forbidding enforcement of the Georgia law was affirmed and the judgment of the Supreme Court of Wisconsin sustaining the law of that State was reversed.

WAGES—ASSIGNMENT—CONTRACTOR'S BOND—*Hartford Accident & Indemnity Co.* v. *Board of Education, United States Circuit Court of Appeals (October 19, 1926), 15 Federal Reporter (2d), page 317.*—Suit was instituted by the board of education in the district of Beaver Pond, Mercer County, W. Va., as assignee of the claims of certain laborers and material men, to recover on a contractor's bond executed by the Hartford Accident & Indemnity Co. as surety to guarantee the performance of a contract between the plaintiff and the Harrison Construction Co., by the terms of which the latter agreed to erect a school building. The defendant challenged the plaintiff's right to recovery on the ground that the bond did not guarantee the payment of claims of laborers and material men, but merely indemnified the plaintiff against any loss which it might sustain from breach of contract on the part of the contractor, and that the plaintiff had sustained no loss; that with respect to the claims sued on, the plaintiff was in no better position than the laborers and material men who assigned their claims; and that, as these could not have recovered on the bond, the plaintiff could not recover on it. From judgment for the plaintiff the defendant brought error.

The contract in question, among other things, provided that the contractor should provide and pay for all labor and materials necessary for the execution of the work and that it should furnish a guaranty company's bond to "guarantee the faithful performance of the contract and the payment of all subcontractors and labor and material bills." The bond was required, not only by the terms of the contract, but also by the statutes of West Virginia.

The court held that there was no error and affirmed the judgment of the trial court. The opinion was delivered by Judge Parker and was in part as follows:

We quite agree with the proposition that the right of plaintiff to recover on the claims sued on is no greater than that of the laborers and material men whose claims were assigned; but we think that it is clear that these laborers and material men would have been entitled to recover if the action had been instituted by them prior to the assignment. When the bond is read in connection with the contract, which is expressly made a part of it, we have not a mere indemnity agreement guaranteeing plaintiff against loss from breach of contract on the part of the contractor, but a contract of suretyship, in which defendant undertakes that the contractor will faithfully perform his contract and will pay all subcontractors and labor and material bills. The bond itself provides that it shall be construed as one of suretyship; and the contract (by reference made a part of the bond) provides not only that the contractor shall provide and pay for all labor and materials, but also that the bond to be furnished shall "guarantee the faithful performance of the contract and the payment of all subcontractors, and labor and material bills."

Under the law of West Virginia a public building is not subject to liens created under the mechanic's lien statute (Code W. Va., ch. 75, sec. 2, et seq.). And section 12 of chapter 75 of the Code of West Virginia * * * was manifestly intended to require a bond for the protection of those furnishing labor and materials on pubic buildings, in lieu of the protection afforded by the lien statute in other cases. The bond must be construed in the light of this statute, and * * * there can be no doubt that the bond should be liberally construed to effect the purpose of the statute. When the bond is so construed, and the provisions of the contract are read into it, it is clear that it guarantees the payment of the claims of laborers and material men. To hold otherwise would deny all force and effect to the provision of the contract incorporated in the bond, that it should "guarantee the faithful performance of the contract and the payment of all subcontractors and labor and material bills," would convict the plaintiff of violating the statute above quoted, and would place the defendant in the absurd position of executing a bond in violation of the terms of a contract and at the same time incorporating the contract in the bond.

WAGES—ASSIGNMENT—FRAUD—PAROL EVIDENCE—*Flood* v. *Empire Investment Co., Court of Appeals of Georgia (April 20, 1926), 133 Southeastern Reporter, page 60.*—The Empire Investment Co. sued H. T. Flood for damages for conversion of a certain sum of money which it claimed by reason of an alleged assignment of salary. It offered in evidence a writing dated May 1, 1924, purporting to have been made by the defendant, by the terms of which he agreed to sell and transfer to the plaintiff all of his salary ($105) for the period from April 15 to May 1, 1924, already earned. The defendant, in his plea, alleged that the paper was not in fact an assignment but

was "a false and fraudulent writing, couched in its present text and language for the sole and express purpose of evading the usury statutes of this State and to obtain usury of this defendant"; that on the date of the instrument he had drawn his wages for the period named and this the plaintiff knew. He also alleged that he obtained no money from the plaintiff at the time the instrument was executed, but that he did, prior thereto, borrow $100 from it and had paid usurious charges for the use of same to the amount of $160. Parol evidence offered to prove these allegations was excluded by the court.

There was a directed verdict for the company, and the defendant brought certiorari, assigning error on the exclusion of certain evidence by the court, and on the direction of the verdict and judgment thereon. The superior court overruled the certiorari and affirmed the judgment of the lower court, and the defendant brought error to the court of appeals.

The court, in reversing the judgment, said in part:

We have not set out the evidence and will not discuss it, because the principal difference between counsel seems to be on whether, in view of the stipulations of the writing, parol evidence was admissible to establish the defendant's claim of a usurious loan, and because the case appears to have turned on this question both in the municipal court and in the superior court, each of them seemingly having agreed with counsel for the plaintiff that the answer to the question should be in the negative.

It is a well-settled rule that, in the absence of fraud, accident, or mistake, parol evidence is ordinarily inadmissible to vary the terms, of a written contract. This, however, is not true where the contract out of which the suit arises is tainted with usury, and that fact is sought to be shown.

The defense in the present case was to impeach the bona fides of the transaction and was meritorious, if the jury believed it. We are not to be understood as holding that an assignment of salary even to secure a usurious debt would not be valid as to the principal. That question is not involved. The contention here is that the entire debt has been paid.

The superior court erred in not sustaining the certiorari.

WAGES—ASSIGNMENT OF FUTURE EARNINGS—EFFECT ON JUDGMENT—"PUBLIC OFFICER"—*Walker* v. *Rich, District Court of Appeal of California (1926), 249 Pacific Reporter, page 56.*—D. M. Walker had secured a judgment against one D. B. Smith and his wife for groceries furnished, the judgment being for the sum of $299.99. This judgment was rendered on November 7, 1923, and on June 19, 1924, an execution was issued, but returned unsatisfied.

Smith was employed from time to time by the county of Colusa to work with his teams, wagons, and scrapers upon the county roads

of said county, his earnings approximating $150 per month, payable on or about the first day of the month. In accordance with the provisions of section 710 of the Code of Civil Procedure of the State, Walker, on June 30, filed with John F. Rich, the auditor of the county, a transcript of the judgment and demanded the issue of a warrant for the sum of money then due Smith. The auditor refused, whereupon proceedings were instituted to secure a writ of mandate requiring the issue of such warrant to satisfy the judgment. The Superior Court of Colusa County denied the application, whereupon appeal was taken to the district court of appeal.

It appeared that on June 15, some two weeks prior to the application of Walker, Smith had assigned his claim to the amount of $135 for wages earned between June 2 and June 14, the assignment being to a corporation which furnished "the necessities of life" to the judgment debtor. Walker made similar efforts by filing transcripts of judgment at different times, but in every instance it appeared that a prior assignment had been made to this corporation. Such assignments were found to be within the terms of the statute authorizing the assignment of wages for necessaries, the effect being the establishment of a prior claim over the transcripts of the judgment later presented. As expressed by the court, on the making of assignment the earnings involved became the property of the College City Rochdale Co. and were not within the control of the auditor for a different application.

In at least two instances the assignments involved not only the transfer of money already earned, but also future earnings. It was contended that such attempt to transfer future earnings was invalid because they were in contravention of established public policy as to compensation payable "in the future to an officer of the Government for services yet to be performed." The court considered the point, and reached the conclusion that a public officer is "an individual invested with some portion of the sovereign functions of the Government, to be exercised by him for the benefit of the public." Smith was found to be "merely engaged to perform labor upon the public highway by the use of mechanical and other equipments," without discharging any duty as a public officer. This objection following, the assignments must be held valid under the provisions of the Civil Code as to the transfer of property. Though this could not be extended to cover a case "where an employment does not exist but a party may be employed by another in the future, such situation presents a case of a mere possibility not coupled with an interest, and hence the element of negotiability is wanting, but where the employment already exists, the wages yet to be earned from such employment by the party employed, then, although we have a case

of mere possibility, it is a possibility coupled with an interest, which is assignable under our code and according to the authorities."

The judgment of the court below sustaining the right of Smith to execute the assignments based on an existing contract of employment between him and the county, the assignment to pay for necessaries of life to the parties furnishing them directly, was said to rest "upon an impregnable foundation," and was accordingly affirmed.

WAGES—CONTRACT OF EMPLOYMENT—EMPLOYEE ABSENT ON OWN BUSINESS—*Archer Lumber Co.* v. *Hall, Supreme Court of Arkansas (March 8, 1926), 280 Southwestern Reporter, page 662.*—W. L. Hall was employed by the defendant as log inspector and log buyer on February 10, 1919, at a salary of $2,100 per year. In January, 1923, he told the president of the company that he wished to put some timber of his own on the market and was told by the president to go ahead under his present contract, and the president made a trade with the plaintiff to purchase his logs. Plaintiff began delivering the logs in February, 1923, devoting part of his time to his own business and working for the defendant when notified of anything he wanted done. He was paid his salary up to and including July of that year. He performed various services for the defendant at his request during the months of August, September, and October, but did not receive any pay, and when, on November 1, he called for his salary he was told that his employment with the company had ceased on the first day of August. He brought suit to recover for three months' salary in the amount of $525, and recovered judgment. Defendant appealed on the ground that the court erred in not instructing the jury that if plaintiff absented himself from his place of employment to attend to his own business he could not recover. Judge Hart delivered the opinion of the court and said in part:

The court did not err in refusing to give this instruction. It will be noted that it does not take into account at all the testimony of the plaintiff to the effect that during the period of time in question he was to give a part of his time to his own business and was only to perform services for the defendant when requested to do so.

The respective theories of the plaintiff and of the defendant were submitted to the jury, and the evidence of the plaintiff was sufficient to warrant the jury in returning a verdict in his favor. According to his testimony, it was a part of the contract between himself and the defendant that he should devote a part of his time to his own business, and that he should only be required to perform services for the defendant when requested to do so. He testified further that he held himself in readiness during the three months in question to perform his customary services for the defendant, and that he did whatever work the defendant requested him to do.

There is no prejudicial error in the record.

The judgment was therefore affirmed.

WAGES—GARNISHMENT—EXEMPTIONS—PROOF—SUBROGATION—*Gulf, M. & N. R. Co.* v. *Sanders, Supreme Court of Mississippi* (*May 10, 1926*), *103 Southern Reporter, page 184.*—T. J. Sanders, an employee of the company named, sued it for $133.86 due him for wages. The defendant tendered $35.56, conceding that amount to be due, and stated that the balance, $88.50 and costs, was garnisheed in its hands to satisfy a judgment against the plaintiff, given by a justice of the peace in favor of one H. E. Whitten, which it had satisfied and paid.

The cause was submitted to the circuit judge on an agreed statement of facts, and judgment thereon was rendered against the railroad company for the full amount sued for, from which judgment an appeal was prosecuted to the supreme court.

The plaintiff conceded that the judgment given by the justice of the peace was valid, but contended that he was entitled to judgment against the railroad company because it did not answer the writ of garnishment in the statutory period, and that it should not therefore be permitted to set off the amount of such judgment against its payment, and, even so, his being the head of a family would exempt his wages from garnishment. The case as submitted did not indicate that Sanders was the head of a family and entitled to exemptions as such.

The court held that, although the defendant did not answer the writ of garnishment in the time required by law, and had to satisfy the plaintiff on that judgment date by virtue of the garnishment proceedings, having satisfied Whitten's demand by virtue of such proceeding it was entitled to be subrogated to the rights of the judgment creditor in that judgment.

Judge Ethridge, speaking of the plaintiff's claim of exemption, said:

> It was the duty of the plaintiff in the present case, if he was the head of the family and entitled to the exemption, to have made that claim in the court below and sustained it by appropriate proof. We cannot here take cognizance of that fact, if it be a fact, but must render judgment upon the record before us.

The judgment of the lower court was therefore reversed and judgment rendered here for the railroad company.

WAGES—PAYMENT—CONSTITUTIONALITY OF STATUTE—IMPRISONMENT FOR DEBT—*Ex parte Oswald, District Court of Appeal, California* (*February 1, 1926*), *244 Pacific Reporter, page 940.*—Section 6, chapter 202, Statutes of 1919 of California, provides for the regulation of the payment of wages and makes it a misdemeanor for an employer, having the ability to pay, willfully to refuse to pay an employee wages that are due under circumstances which show an intent to oppress and defraud. George H. Oswald was convicted

under the terms of this statute and put in prison. He petitioned the court of appeal for a writ of habeas corpus to secure his release. He contended that the statute under which he was held was unconstitutional in that it violated the provisions of article 1, section 15, of the constitution of California, which reads as follows:

No person shall be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud, nor in civil actions for torts, except in cases of willful injury to person or property; and no person shall be imprisoned for a militia fine in time of peace.

The court, in the course of its opinion, referred to chapter 663 of the Statutes of 1911, which was held to be unconstitutional in that it in effect permitted imprisonment on mesne process for debt. Then, speaking of the statute in question, it said in part:

The statute of 1919 apparently is the result of a legislative effort to substitute for the act of 1911 a law which would not result in imprisonment for mere nonpayment of debt, but would only impose that penalty where the employer or his agent, having the ability to pay, willfully refuses payment with a certain wrongful intent, described as follows:

"With intent to secure for himself, his employer, or other person any discount upon such indebtedness, or with intent to annoy, harass, or oppress, or hinder, or delay, or defraud, the person to whom such indebtedness is due. * * *" (Section 6.)

The court held that in the instant case the imprisonment of the petitioner for the misdemeanor described in the statute was not imprisonment merely for his failure to pay a debt but for the willful failure to do so, under circumstances which showed an intent to oppress and otherwise defraud the employee.

The petitioner was remanded to custody.

WAGES—PAYMENT—SUIT AFTER STATUTORY DEMAND—ATTORNEY'S FEES—*Nirschl* v. *Nirschl, Supreme Court of Oregon (October 19, 1926), 249 Pacific Reporter, page 1099.*—Albert Nirschl brought an action for the recovery of wages alleged to be due and owing him for labor performed for the defendant, Andrew Nirschl, in the sum of $410, and an attorney's fee in the amount of $100. He recovered judgment for the amounts claimed, together with costs of the suit, and the defendant appealed. It was contended by the defendant that the court erred in allowing any amount as attorney's fee on the ground that such recovery was barred by section 3 of chapter 163, Laws of Oregon of 1907, as construed by the court in Olson *v.* Heisen (90 Oreg. 176, 175 Pac. 859).

The court affirmed the judgment of the trial court, saying in part:

He [the defendant] ignores the fact that the portion of the statute involved in that decision was later amended by our legislative assembly. (See Laws of Oregon 1919, ch. 54, codified as sec. 6799, Oregon

Laws.) Among other things, that section provides for the allowance of attorney's fees in the prosecution of an action to recover wages for labor, unless the employee has willfully violated his contract of employment, and that, in case the employee voluntarily quits his employment, he shall give not less than three days' notice of his intention to quit such employment. However, it is not claimed that the plaintiff violated his contract of employment. Manifestly the statute does not require the specified three days' notice of intention to quit the employment when the employee remains on the job until its completion. The plaintiff was entitled to recover his attorney's fees in accordance with the findings of the court.

WAGES—PAYMENT IN SCRIP—REDEMPTION IN CASH—CONSTRUCTION OF STATUTE—*Holliday* v. *Elkhorn-Piney Coal Mining Co., Supreme Court of Appeals of West Virginia (April 21, 1926), 134 Southeastern Reporter, page 736.*—The Elkhorn-Piney Coal Mining Co. had in use a system of credit consisting of brass scrip representing various denominations from one dollar down. The obverse side of the scrip bore the following inscription, "Payable in cash on pay days when due to employee to whom issued," and immediately thereunder, "In merchandise only—nontransferable." On the reverse side was the name of the company. The scrip was issued to the employees at their request. The company redeemed it at face value in merchandise at its store or in cash on pay days when presented by any employee to whom issued. There was no reasonable way of identifying any specific piece or part of said scrip and it did not bear the name of the employee to whom issued.

W. D. Holliday, in the course of his business as a merchant, became possessed of certain of the aforesaid scrip in the amount of $299.50, which he presented to the company on a regular pay day after same became due and requested that the company redeem it in lawful money of the United States of America. Upon the company's refusal to redeem the scrip, Holliday instituted an action before a justice of the peace and obtained judgment for the amount represented. That judgment was reversed by the circuit court of Raleigh County, and the plaintiff brought a writ of error. Judge Wood delivered the opinion of the supreme court, reversing the circuit court, saying in part:

The "scrip law" as it stood before the addition of two provisos by the last legislature (Acts 1925, c. 87), forbade, under penalty of fine and imprisonment, "any corporation, company, firm or person, engaged in any trade or business, either directly or indirectly, to issue, sell, give or deliver, to any person employed by such corporation, company, firm, or person, in payment of wages due such laborer, or as advances for labor not due, any scrip, token, draft, check, or other evidence of indebtedness, payable or redeemable otherwise than in lawful money,"

and provided that such "scrip, token, draft, check, or other evidence of indebtedness * * * shall be construed, taken, and held in all courts and places, to be a promise to pay the sum specified therein in lawful money by the corporation, company, firm, or person issuing, selling, giving, or delivering the same to the person named therein, or to the holder thereof."

The defendant contended that under the proviso enacted by the legislature in 1925 it was within its rights in refusing to honor its scrip in the hands of another than an employee to whom it was issued. The court, however, held it unnecessary to consider the provisos in the present statute, since it came within the prohibition of the body of the statute, providing that such scrip shall be construed, taken, and held in all courts to be a promise to pay the sum specified therein in lawful money to the person to whom issued, or to the holder thereof.

The judgment of the circuit court was reversed, and judgment rendered for the plaintiff, trial by jury having been waived, the facts being agreed upon.

WAGES—PREFERENCE—PRECEDENCE OVER PRIOR LIENS—CONSTRUCTION OF STATUTE—*Turner* v. *Randolph, Court of Appeals of Kentucky (February 12, 1926), 280 Southwestern Reporter, page 462.*—Kentucky has a law which provides that when the property or effects of any mine shall in anywise come to be distributed among creditors, whether by operation of law or by the act of such company, owner, or operator in such business, the employees of such owner or operator shall have a lien for wages coming due within six months prior thereto, which shall be superior to the lien of any mortgage or other encumbrance theretofore or thereafter created.

In the instant case the appellant R. W. Turner, in July, 1921, conveyed a coal mine to the Diamond Coal Co. for the consideration of $125,000; $55,000 of the consideration was paid at the time by issuing to him that amount of stock in the coal company and the remainder of the consideration was secured by notes payable in the future and for which a vendor's lien was retained in the conveyance. The company ceased operations in May, 1923, leaving unpaid considerable sums to its employees which had become due six months before the suspension. In July, 1923, the employees filed suit against the company for labor and services, asserting that their statutory lien was superior to the appellant's purchase-money lien. From a judgment adjudging the employees' lien superior to that of the vendor, the latter appealed. In affirming the judgment, the court said in part:

The sole question presented on this appeal is whether the statutory lien given to employees of mining or other similar corporations for wages coming due to such employees within six months before the

property or effects of the mining corporation shall come to be distributed among its creditors, as set forth in the statute, is superior to a vendor's lien on the real property of the mining corporation.

The appellant did not question the interpretation of the statute, but argued that the opinion rendered by the court in three cases, viz, Northern Bank *v.* Deckebach (83 Ky. 154), Cooley *v.* Black (105 Ky. 267), and Sandy Land & Development Co. *v.* Brown (175 Ky. 219), wherein it was held that vendor's liens were superior to employee's wage liens, should govern in the present case. The court briefly reviewed the facts in the cases named and pointed out wherein the facts in those cases differed from the facts under consideration.

The opinion concluded:

It is clear that none of the three cases cited, when analyzed and understood, are inconsistent with giving to the employees the preference in this case over the vendor's lien.

The policy of the statute is well recognized, its wisdom is not called in question, and its interpretation is not in doubt.

The judgment was therefore affirmed.

WAGES—PREVAILING RATE IN LOCALITY—CONSTITUTIONALITY OF STATUTE—*Campbell* v. *City of New York, Municipal Court of City of New York* (*May 15, 1926*), *216 New York Supplement, page 141.*—Section 220 of the labor law of New York State (Laws 1921, ch. 50) provides that workmen and mechanics employed on public works shall be paid not less than the prevailing rate in the same trade or occupation in the locality, etc.

Frank Campbell was employed by the city of New York as a painter in the department of plant and structures at a wage of $9 a day. He brought action against the city to recover the sum of $595 claimed to be due him as the difference between the wages paid him and the prevailing rate between May 21, 1923, and January 7, 1925. He established that the prevailing rate of wages for painters in New York City was $10 a day between May 21, 1923, and January 10, 1924, and between January 21, 1924, and January 7, 1925, that it was $10.50 a day, and that he worked 193¾ days during the first period named and 277¾ days during the latter period.

The defendant contended that the statute relied on for recovery by the plaintiff was unconstitutional, and cited as authority therefor the recent decision of the Supreme Court of the United States in the case of Connally *v.* General Construction Co. (46 Sup. Ct. 126, 127; see Bul. No. 417, p. 139) holding a similar statute of Oklahoma to be invalid and in contravention of the fourteenth amendment to the Constitution of the United States.

The court cited with approval the case of Ryan *v.* City of New York (177 N. Y. 271, 69 N. E. 599). In that case the court of

appeals held a similar provision of the then existing labor law to be constitutional. It was pointed out by the court that some time after that decision the constitution of the State of New York was amended and a specific provision was added authorizing the legislature to pass an act fixing wages, etc., of all persons, contractors, and subcontractors employed by the State or a subdivision thereof; that after the amendment was adopted the present labor law was enacted and that various questions had arisen under the statute with reference to the payment of the "prevailing rate of wages" etc., which had been decided by the court of appeals and the constitutionality thereof sustained (cases cited).

The court then said:

In view of the foregoing decisions of the court of appeals, this court feels constrained to follow them and to hold the statutory provisions of the labor law, in so far as they provide for the payment of the "prevailing rate of wages," to be valid, for the purposes of the present litigation, and to deny the motion of the defendant to dismiss the action.

Judgment was ordered for the plaintiff for the difference in wages claimed together with interest from the date of filing the claim, with 10 days' stay.

An appeal was taken from the above decision to the appellate division, where the judgment was affirmed (219 N. Y. Supp. 131). The requirement of law that cities and municipalities pay the prevailing rate of wages was said not to be abrogated by the decision in the Connally case. It was further pointed out that that was a criminal proceeding, requiring a degree of exactness and certainty not essential in civil cases; also that a showing that from 75 to 90 per cent of the total number of painters in the locality received the rate named was sufficient evidence that this was the prevailing rate of wages.

Reference was also made to the case of Morse *v.* Delany (1926, 218 N. Y. Supp. 571, affirmed, 218 N. Y. Supp. 826), where the principles involved and the decisions rendered in the various tests of the law are considered at length. Assuming that the law might not afford an adequate basis for criminal prosecutions, "it does not necessarily follow that the policy of the State, maintained for nearly 30 years, followed by department heads and contractors, and sanctioned in principle by constitutional enactments, should be entirely disregarded." Assuming that the "prevailing rate" means the market rate, it is the same standard that would be used in a quantum meruit action at common law. Both the differences in circumstances between a sparsely settled community and the city of New York, and the differences in the nature of the proceedings tended to the conclusion that the Connally case need not be regarded as compelling a setting aside of the long-standing law in the present instance, and it is sustained.

The Campbell and Morse cases, noted above, were taken to the court of appeals of the State on appeal, the judgments below being affirmed in both cases. (244 N. Y. 317, 155 N. E. 628.) The court found an established public policy of the State, followed throughout some thirty years, established by law, decision, and custom, with a sufficiently definite meaning to be capable of understanding by all

parties in interest. No obligation rests on any contractor to undertake any work proposed by the State, but if he does, it will be presumably after a consideration of all the circumstances, after which he will be bound by the terms prescribed by the State, impliedly accepted by him in submitting his contract, and definitely accepted in making the final agreements. The difference between a civil law relative to contracts and a criminal prosecution as proposed in the Connally case, decided by the Supreme Court, was sufficient to relieve the court in the instant case from any obligation to regard that decision as binding.

There was no indication in the law or its application of any tendency to dissipate the funds of the city or lay improper burdens upon its taxpayers. The matter before the court was "merely a question of the regulation of a form of contract." No illegality being found in the provisions of the statute, the attacks upon it must fail.

WAGES—REDUCTION BY EMPLOYERS—RAILROAD LABOR BOARD—*Schuppan* v. *Peoria Ry. Terminal Co., United States District Court, District of Illinois, (November 8, 1924), 9 Federal Reporter (2d), page 448.*—The plaintiffs, former employees of the Peoria Railway Terminal Co., brought action against the owners to recover wages alleged to be due them under authority of decision No. 2 of the Railroad Labor Board. The railroad was taken over by the Federal Government during the war and was, therefore, subject to all orders affecting wage scales and working conditions issued by the Railroad Labor Board. When the railroad was turned back to its owners (the defendants) they found that they could not operate it under the conditions established by the Railroad Labor Board. The plaintiffs were advised of the financial straits of the railroad and were given a choice of two propositions: (1) The defendants would furnish the track and all its equipment and, as pay for doing the work, would give them all the income earned less the necessary current supply bills; (2) if they refused to work on those terms they could quit. Plaintiffs did not accept the offer and refused to quit. They contended that the defendants were without authority in the matter of fixing the rate of wages, but that it was in the power of the Labor Board to make them pay what it thought was a just and reasonable wage. At the next and succeeding pay days the plaintiffs were paid according to defendant's proposal, each receiving his pro rata share of the income according to the amount he would have received under the old scale and which amounted to from 75 to 82 per cent of the former pay. The master before whom the hearing was had found that the action of the Labor Board was controlling, and allowed the claims. The defendant appealed, securing a disallowance of the

claims. District Judge Fitzhenry, who delivered the opinion of the court, said in part:

The United States Supreme Court has settled the controversy involved here in a case arising in this circuit by holding that the findings and the awards of the Labor Board are not binding, but are purely advisory. In other words, the Labor Board has said what rates of pay are reasonable; but the Labor Board can do no more, and it did no more. It was not the purpose of Congress to take away from employing masters in this country the right to employ railway employees and fix the rate of pay. (Pennsylvania R. R. Co. *v.* U. S. Railroad Labor Board (Dist. Court, Judge Page, presiding), 282 Fed. 693.)

To require a railroad company to continue in business at a loss is beyond the powers of Congress or a State. Apart from statute or express contract, people who put their money into a railroad are not bound to go on with it at a loss, if there is no reasonable prospect of profitable operation in the future. (Bullock *v.* Florida, 254 U. S. 513, 41 Sup. Ct. 193.) Under our constitutional system of government, there is no power, in or out of Congress, in a State, or in a judiciary, to compel those who devote their property to the use of the public to operate the same at rates of wages which occasion loss. In good morals, neither the public nor the employees should demand such sacrifice. (Coffee et al. *v.* Gray et al., 158 Ga. 218, 122 S. E. 687; see Bul. No. 391, p. 320.)

To the question of whether or not the defendants had a legal right to take such action as they did to prevent the railroad property being consumed by excess operating expenses without first procuring the consent of the Labor Board, the court said:

It did. Of course, it could not do so without giving the employees full, fair, clear, and positive notice of the proposed change in their relations. This was done. Those who continued in the service after receiving that notice must be held, as a matter of law, to have accepted the terms of the proposed change.

The fact that the claimants here misinterpreted their rights under the Transportation Act would not warrant a court in ordering the receivers to make payment of the several claims involved. Furthermore, the opinion of Judge Page in Pennsylvania R. R. Co. *v.* United States Railroad Labor Board, supra, was published May 4, 1921, and was notice that the courts could find in the provisions of that act nothing making the decisions of the board final, or giving them the binding force of decrees to be performed.

The exceptions to the master's report will be sustained, and a decree may be prepared, disallowing and dismissing the claims allowed by the master herein.

WAGES — SEAMEN — ADMIRALTY — CONTRACTS — APPLICATION OF STATUTE TO FOREIGN SEAMEN—*The Strathlorne, Van Der Liet* v. *Burrell & Sons, United States District Court, District of Oregon (August 9, 1926), 15 Federal Reporter (2d), page 210.*—Judge Wolverton in sustaining an exception to the plaintiff's bill said:

This is a libel whereby four seamen, who are foreign to this country are seeking to establish a breach of their contracts as able seamen with their vessel, which is also a foreign vessel, on the ground that the vessel is unseaworthy, and to recover the balance of wages due thereunder. Respondent excepts to the libel on the ground that the suit is between foreigners, and the court should not exercise jurisdiction in the case. The action is brought under section 8322, United States Compiled Statutes, which relates to the time and manner of payment of seamen's wages, and which provides, among other things, that the section shall apply to seamen on foreign vessels while in harbors of the United States, and that the courts of the United States shall be open to such seamen for its enforcement.

This statute is exclusively a wage statute, and is not intended to extend to foreign seamen other relief than as a means of enforcing payment of their stipulated wages, in accordance with the provisions of the act. The very matter here presented has been decided against libelants in Transportes Maritimos do Estado *v.* Almeido (C. C. A.) (5 Fed. (2d) 151), wherein it is held that a suit upon a broken contract instituted by one alien against another has no place on the docket of the district court, but, as a wage claim, belongs to a class of demands which can be promoted only by seamen on a foreign vessel while their vessel is in a harbor of the United States.

Here it is sought, not to show merely a failure to pay wages, as the statute requires, but a breach in the contracts on the ground that the ship is unseaworthy, and the contracts are between foreigners. This, it would seem, is outside of the purview of section 8322.

The exception was sustained and the libel dismissed.

WAGES—SEAMEN—DISCHARGE WITHOUT CAUSE—ACTION FOR BREACH OF CONTRACT—*United States Steel Products Co. et al.* v. *Adams; The Steel Trader, United States Circuit Court of Appeals, Fifth Circuit (May 13, 1926), 13 Federal Reporter (2d), page 614.*—On November 29, 1921, Donald J. Adams signed shipping articles agreeing to ship from the port of New Orleans, La., as oiler on the steamship *Steel Trader*, at a wage of $80 per month for a period not to exceed 12 months. The vessel was to make ports in Europe and Asia and such other ports as the master might direct, and return to a final port of discharge and/or loading port on the Atlantic or Gulf coast of the United States. After the articles were signed, a typewritten sheet of paper was pasted on the front of page 1 of the articles which provided that the owners and crew of the vessel would be bound by any change in the scale of wages made by the American Steamship Owners' Association after the departure of the vessel. The employee, Adams, would not agree to this provision and for that reason was discharged on December 12, 1921, at Port Arthur, Tex., to which place the ship went on leaving New Orleans. He was paid wages at the contract rate for the time served and an extra month's wages of $80, for which he gave his receipt, but did not sign a release of demand for wages.

After the return of the vessel to New Orleans on May 19, 1922, the employee filed a libel against it for wages up to and including the signing off of the crew. His claim was resisted by the owners of the vessel on the ground that when he was discharged he was paid off in accordance with the provisions of section 4527 of the United States Revised Statutes (Comp. St., sec. 8318), which reads as follows:

Any seamen who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, recover such compensation as if it were wages duly earned.

The plaintiff was awarded the amount of his wages for the voyage less a credit of $80 paid as above stated, with 6 per cent interest from May 19, 1922, and the defendant appealed. It was argued that the plaintiff's rights under the contract evidenced by the shipping articles are governed by the ordinary rules of contract except where modified by statute, and that under section 4527, Revised Statutes, the payment made to him satisfied all liability incurred by the wrongful discharge.

The court in affirming the decree of the district court said in part:

To say the least, the language of the provision in question does not clearly manifest a purpose to give to the payment to a seaman wrongfully discharged within the time mentioned of the amount of any wages he may have earned, and in addition a sum equal to one month's wages, the effect of satisfying all liability incurred by wrongfully discharging him.

The language of Revised Statutes, section 4527, is consistent with an intention to treat the amount required to be paid to the wrongfully discharged seaman as compensation for the service already rendered by him. Certainly that language falls far short of expressly absolving the vessel, on the payment of such amount, from her liability for damages for breaching the contract evidenced by the shipping articles. That provision determines what is payable to the wrongfully discharged seaman at the time of his discharge.

In the absence of a statute requiring a different result, after the entering upon the voyage provided for in the shipping articles the ship is pledged to the complete execution of the contract, and may be proceeded against for nonperformance, and if a seaman is discharged without justifiable cause before the termination of the voyage he is entitled to full indemnity, which may be measured by the stipulated wages for the entire voyage and the amount of expenses in returning to the port of discharge, deducting what he earned, or reasonably could have earned, in other employment during the period of his engagement.

If the statute in question has the meaning attributed to it by counsel for the appellant, it has the effect of making it possible to discharge a seaman engaged for a long voyage, without his consent and without fault on his part, at whatever place, other than a foreign port, where the ship may be before one month's wages are earned, without incurring any liability, except to pay any wages he may have earned and in addition a sum equal in amount to one month's wages, though what is so paid is greatly less than enough to indemnify the seaman for the loss resulting from the violation of his contract rights. Plain language would be required to justify the imputation to Congress of an intention to permit seamen to be subjected to such treatment and to be deprived of adequate redress therefor.

We conclude that the provision in question did not give to the payment made to the appellee the effect of destroying his right to full redress for the alleged wrong to him, and that the only ground on which the decree was complained of is not a tenable one.

The decree was affirmed.

WAGES—SEAMEN—DOUBLE WAGES FOR DEFERRED PAYMENT—LIBEL—*Mandelin et al.* v. *Kenneally et al., The Charles Whittemore, United States Circuit Court of Appeals (February 27, 1926), 11 Federal Reporter (2d), page 344.*—Felix Mandelin and three others, seamen on the defendant's schooner, shipped from Norfolk, Va., for a round trip to Dutch Guiana, at the rate of $60 per month each. On completion of the voyage on November 15, 1924, the plaintiffs were called into the defendant's cabin and he read to them the log showing certain fines and penalties he had imposed upon them. They protested against these fines and penalties being deducted from their wages, but defendant insisted that they were proper, and after deducting the same he paid over to the United States Shipping Commissioner the sum of $452.02 as the aggregate amount due, with instructions to pay the amount to plaintiffs in a manner indicated by him if they should severally accept the same in full of their accounts. This they refused to do and brought a libel to recover the full amount of their wages, exclusive of the fines legally assessed against them, together with the penalties provided by law for the retention of same.

Sections 4529 and 4530 of the Revised Statutes (as amended by the seamen's act of March 4, 1915) provides a penalty of two days' pay for each day of delay in payment.

The action of the defendant was sustained by the district court and plaintiffs brought error. Judge Waddill, who delivered the opinion of the court modifying and affirming the judgment below, said in part:

Assignments 4 and 5 present the question of the right of the respondent to withhold the amounts admittedly due libelants at the end of their voyage on the 15th of November, 1924, at Newport News, Va., unless libelants would accept the same upon the conditions imposed

by respondent. This the respondent could not do, as it constituted neither a payment of the wages nor a lawful tender of the amount due, but, on the contrary, a proffer of a future lawsuit respecting the same.

Under the law libelants were entitled to have paid them, within two days after the termination of the voyage, the amount of wages due them, and, in default of such payment, * * * a penalty of two days' pay for each day of delay in payment.

The libelants are entitled to recover double wages at the rate of $60 per month for each day their wages were withheld—that is, from the 17th of November, 1924, to the 1st of January, 1925, inclusive—aggregating $720, the same to be distributed equally between libelants, with costs. The judgment of the lower court will be accordingly modified and affirmed.

The judgment was accordingly modified.

WAGES—SEAMEN—"STRIKERS"—DESERTERS—FORFEITURE OF WAGES—*United States* v. *Smith et al., United States Circuit Court of Appeals (March 8, 1926), 12 Federal Reporter (2d), page 267.*—N. H. Smith and others of the crew of the Steamship *Hahira* brought a libel suit against the United States to recover full wages earned by them up to the time they left the service of the ship. In April, 1921, the libelants signed shipping articles for a voyage from Baltimore to Mexico and one or more ports in the Gulf of Mexico, and such other ports as the master of the ship might direct, and back to a final port of discharge at a point north of Cape Hatteras, for a term not to exceed six calendar months. The vessel proceeded to Mexico, took on a cargo of crude oil, and unloaded it at Baton Rouge on April 27. It then proceeded to New Orleans, where it put into port for repairs. A seamen's strike began on May 1, and as a result the vessel remained at New Orleans until May 16 waiting for repairs. On May 10 the libelants left the service of the vessel, taking their belongings with them, and on the following day they returned and demanded full wages, less advances they had received. They alleged that the master had failed to comply with a demand for half wages at the port of New Orleans, and that thereupon they became entitled to the balance of wages earned and remaining unpaid. The defendant contended that the cargo had not been loaded or delivered at New Orleans; that nevertheless the master had paid or offered to pay one-half of any amount earned by any member of the crew; that the crew deserted and thereby forfeited all claims to wages which had been earned. There was a decree for the libelants, the district judge holding that they left the service of the ship through fear of personal violence at the hands of members of the seamen's union, and therefore they ought not to be classed as deserters. The

court, speaking of the grounds on which recovery was allowed by the district judge, said in part:

It was not even suggested in the libel that there was any such danger. Aside from that, it is not claimed in the testimony that the crew would have been in any danger whatever if they had remained on board, nor that the ship was unable or unwilling to afford them full protection against violence. We are therefore of opinion that the crew must be held to be deserters, under Revised Statutes, section 4596, as amended (Comp. St., sec. 8380).

The decree was therefore reversed with directions to dismiss the libel.

WAGES—SEAMEN—"WATCHES"—CONSTRUCTION OF STATUTE—*O'Hara et al.* v. *Luckenbach S. S. Co., Supreme Court of the United States (January 4, 1926), 46 Supreme Court Reporter, page 157.*—William O'Hara and Sven Tjersland brought a libel against the Luckenbach Steamship Co. to recover their earned wages, on the ground of a violation of section 2 of the seamen's act of March 4, 1915. The pertinent requirement of that section is:

The sailors shall, while at sea, be divided into at least two, and the firemen, oilers, and water tenders into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel.

The libelants alleged that the provisions of this section were not complied with in that there were 13 sailors on the voyage, and while at sea these sailors were not equally divided into watches, but instead only two men, one quartermaster and one able-bodied seaman, were on each of the three watches, while the remaining seven sailors were kept at daywork only. The district court dismissed the libel, and this decision was affirmed by the circuit court of appeals (1 Fed. (2d) 923), both the courts being of the opinion that it was the intention of Congress to regulate the hours of work, and the circuit court of appeals holding that the quality of the men selected rather than the equality of the watches met the requirement of the statute. The case was brought to the Supreme Court on a writ of certiorari.

Mr. Justice Sutherland, delivering the opinion of the court, said in part:

The general purpose of the seaman's act is not only to safeguard the welfare of the seamen as workmen, but, as set forth in the title, also "to promote safety at sea." It is significant that it does not apply to the entire crew, but requires a division into watches only of the sailors and the firemen, oilers, and water tenders. It is natural to suppose that, if the purpose of Congress was chiefly to regulate hours of work, something would have been said about the service, while at sea, of those employed in the steward's department as well. The evident purpose was to compel a division of the men for duty on deck and in the fireroom, and continuity of service, to the end that

in those departments the ship should at all times be actively manned with equal efficiency.

Sections of the act which show that Congress evidently intended the regulations as to "watches" on vessels to be a precautionary measure of safety to the crew, passengers, etc., were noted, and the opinion continued:

It is not unreasonable to conclude that Congress determined that each of the watches, like the crew as a whole, should be "adequate in number," competent and in a state of readiness "for any exigency that is likely to happen," * * * and to this end meant to provide for successive and continuous watches to be constituted in numbers as nearly equal as the sum of the whole number would permit.

In this conclusion we are fortified by the consideration that the legislation deals with seamen and the merchant marine and, consequently, the phrase "divided into * * * watches" is to be given the meaning which it had acquired in the language and usages of the trade in which the act relates.

With nothing in the context and no evidential circumstances to suggest the contrary, we fairly may assume that the use of the technical terms of the trade to which the statute relates imports their technical meaning.

The decree was therefore reversed.

Following the foregoing decision, the case was again before the district court on the question of the amount recoverable—i. e., whether only the wages earned up to the time of demand, or whether the penalty of two days' pay for each day of delay allowed where the master or owner "refuses or neglects to make payment * * * without sufficient cause" accrued. The court had eliminated from the decree presented to it the provision for payment of the penalty, and the libelants appealed. The circuit court of appeals affirmed this judgment, holding that the question of liability for the payment was sufficiently doubtful to justify the employer in withholding payment until a determination. The mere fact that the Supreme Court had held that the payment was due was said not to be of itself sufficient reason for determining that there was no "sufficient cause," as otherwise no disputed question could be litigated without incurring the risk of heavy penalties. (Same case (December 13, 1926), 16 Fed. (2d) 681.)

A quite similar case was before the United States District Court for the Southern District Court of Texas at a somewhat later date than the Supreme Court decision above. A steamship with a certified requirement of but six seamen carried a crew of additional men who were employed in painting, cleaning, etc., and were not divided into watches as the law prescribes. At settlement they were offered half wages, but demanded full wages, for which they brought libel, as well as the penalty for delayed payment. The employer contended they were employed, not as seamen, but as general workers, and were not within the terms of the seamen's act, while they cited the O'Hara case as sustaining their contention. The court sustained their viewpoint, saying that they were entitled to the protection of the law as to work time and wages, and that the procuring of a certificate could not be availed of as a means of avoiding its provisions. Even if the employer had been mistaken as to the law, he must abide by the consequences of his mistake. The recovery of wages and penalty was therefore awarded. (*El Estero* (1926), 14 Fed. (2d) 349.)

WAGES—TIME OF PAYMENT—AMOUNT—ACTION FOR NONPAYMENT—PENALTY—CONSTITUTIONALTY OF STATUTE—*Deardorf v. Hunter, Supreme Court of Louisiana (January 4, 1926), 106 Southern Reporter, page 831.*—Louisiana has a law (act No. 150 of 1920) which provides that any employer of labor who fails to pay discharged employees within 24 hours after demand at the usual place of payment shall be liable for the wages from the time of such demand until they are paid or tendered.

C. A. Deardorf and four other persons were employed by the defendant to work at his sawmill at a wage of $5 per day. After working seven days the men were discharged on account of being unable to get logs. The defendant, a resident of Illinois, had visited the mill a few weeks prior to its closing, and at that time requested the manager to submit the pay roll so that he could remit promptly.

This was done, but Spears, the manager, used the money for some other purpose. Suits were brought to collect the wages due and penalty under the provisions of the statute. Judgment was rendered for plaintiffs for wages claimed and costs of the suits except curator's fee, but not for the penalty claimed. Deardorf alone appealed, and at the second hearing was awarded the amount claimed by him and penalty amounting to approximately $3,200, which judgment the judge refrained from signing. Defendant did not know that the men had not been paid until notified by the curator appointed by the court to represent him in the suits. Upon that notice, he went immediately to Louisiana and "tried faithfully" to settle with them. Being unable to do this, he moved the court for a reopening of the cases, which was granted. He then tendered in open court $55.10, the amount of wages and costs claimed by Deardorf. The tender was refused and the amount deposited with the court. Evidence was then introduced by defendant to show that it was through no fault of his that the plaintiff had not been paid or an attorney employed to defend the suit. The court in affirming the action taken by the judge in the lower court, said in part:

The judge refused to hold the defendant responsible for the laches of Spears, to the extent of condemning the defendant for the severe penalty allowed by the act 150 of 1920. We approve the ruling. The judge gave judgment in favor of the plaintiff, for $35, with legal interest from the day he was discharged, and for all court costs, including $10 for the curator's fee, all subject to credit for the $55.10 deposited in the registry of the court. The court sustained the writ of attachment which had been levied upon the property of the nonresident defendant. Our conclusion is that the judgment is correct. The language of the act 150 of 1920 is not so peremptory as to forbid an equitable defence against the penalty.

A plea was made alleging the unconstitutionality of the penal provision. As to this, the court said:

The judge's conclusion that the defendant was not liable for the penalty made it unnecessary to decide the question of constitutionality. The defendant answered the appeal, but asked merely that the judgment should be affirmed. Therefore the question of constitutionality of the law is not now an issue in the case.

For a sufficient reason, the attorney employed to represent the defendant in the district court declined to argue the case on appeal, or to file a brief.

The judgment was therefore affirmed.

WAGES—TRADE CHECKS—RIGHTS OF THIRD PARTY—*Moss Federal Coal Co. et al.* v. *Rhea, Court of Appeals of Kentucky (June 4, 1926), 284 Southwestern Reporter, page 100.*—The Moss Federal Coal Co. operated a coal mine in Bell County, Ky. Another corporation, the Moss Stores Corporation, not identified with the coal company, operated a store in the vicinity of the mines from which the miners bought merchandise. This company issued a lot of metal disks, on one side of which was "Moss Stores Company, Inc., Pineville, Ky.," and on the reverse side of which was stamped "Good for $1.00 (or other value) in merchandise." These were delivered to the coal company and it issued them to the miners up to the extent of the wages earned by them and charged the amount of such disks to their accounts. Such of the disks as were used in buying merchandise at the Moss Stores Corporation were at stated times presented to the coal company, which would redeem them in cash less an agreed discount. E. T. Rhea, the plaintiff in the case, had a store near that of the Moss Stores Corporation, and in the course of his trade with the miners he took in payment the metal disks issued by it and distributed by the coal company. He presented the disks to the coal company and to the Moss Stores Corporation and demanded that they redeem them in cash. Upon their refusal he brought suit for the amount represented by the disks, joining both companies in the action, and recovered judgment. Defendants appealed and urged two grounds for reversal: (1) That the disks were not transferable by delivery only and that the assignors were necessary parties to the action; and (2) That the companies could not be sued jointly.

The court, in affirming the judgment of the lower court, held that since no objection was raised to the defect of parties in the court below, such objection was not available on appeal. Judge Dietzman, who delivered the opinion of the court, speaking of the joint liability of the defendants, said in part:

The evidence shows that the coal company issued these disks to its miners in the intervals between pay days, charging the same against the time the miner had theretofore put in. It is thus obvious that the coal company was issuing scrip to miners in proportion to the

amount of time the miners had put in and the wages they earned. Therefore, under the holding of this court in Pond Creek Coal Co. *v.* Riley Lester & Co. (171 Ky. 811; 188 S. W. 907; see Bul. No. 224, p. 221), it would have been the duty of the coal company to redeem this scrip if it had been presented to it for redemption by the original holders thereof on or after the pay days of the wages against which the scrip had been issued, and Rhea stands in the shoes of such original holders. It follows, then, that the coal company was clearly liable in this action.

The judgment of the lower court was affirmed.

WEEKLY DAY OF REST—CONSTITUTIONALITY OF STATUTE—*State* v. *Pocock, Supreme Court of Minnesota (January 2, 1925), 201 Northwestern Reporter, page 610.*—Chapter 298 of the acts of the Minnesota Legislature of 1923 prescribed a weekly day of rest in specified employments, including employees in the power plant, or stationary boiler or engine room of certain establishments, but excluding persons engaged in like employments in other establishments.

Walter A. Pocock, proprietor of a hotel, was charged with a violation of the statute by employing a workman in the power plant, boiler, or engine room of the hotel more than six days in one week. The case came to the supreme court on certified questions, the constitutionality of the statute being challenged on account of alleged violations of the constitution in respect of classification. The court held the statute unconstitutional on grounds that appear in the following quotations from its opinion:

That the legislature may enact laws which apply only to a specified class is beyond question. But under the equality provisions of both the State and Federal Constitutions all similarly situated must be brought within the class and all within the class must be treated alike.

If it selects particular employees of the class, and gives to them privileges which it withholds from other employees of the same class, or if it selects particular employers of the class and imposes upon them burdens and restrictions from which it exempts other employers of the same class, it denies the equal protection of the laws to those discriminated against and thereby violates the constitutional mandate.

An examination of this statute shows that any one who employs men in a power plant or boiler or engine room is within the law if the heat or power generated is used in a hotel, a shoe factory, a bakery or a restaurant, but is outside the law if it is used in a newspaper plant, a place of public amusement, a cannery, a flour mill, an automobile garage or repair shop, or a creamery or cheese factory located in a city of the third or fourth class. The need for a day of rest is the same whether the employee is generating heat and power for use in one or another of the lines of business mentioned, and the excluded employees are as clearly within the class which the law sought to benefit as are those brought within it.

By reason of the discriminations indicated, the court found it necessary to pronounce judgment against the constitutionality of the act in question.

WORKMEN'S COMPENSATION—ACCIDENT—BRUISE—FREEZING—INFECTION—*Mauch* v. *Bennett & Brown Lumber Co., Supreme Court of Michigan (July 1, 1926), 209 Northwestern Reporter, page 586.*—John Mauch was employed by the defendants as a logger. On or about January 1, 1924, while in the performance of his duties, a canthook fell on his foot, bruising a great toe, which soon thereafter was frozen. No other part of the body was frozen. Gangrene set in as a result of the injuries, and it became necessary to have the toe amputated. A physician testified:

He would not have frozen the toe in all probability if he had not received the injury and disturbed the normal circulation.

A letter dated March 25, 1924, written by the plaintiff to the defendant was put in the evidence. In the letter he set out the facts above stated and asked them to see what they could do about his compensation. He later made claim to the department of labor and industry for compensation. From an award for compensation the employer appealed on the ground that there was no accident within the meaning of the workmen's compensation act; that claim was not made within six months as provided by the statute; and that the amount of the award was excessive.

Judge Clark, speaking for the court after saying that "the mere freezing was not an accident," added:

Doubtless the gangrene, the operation, and the disability resulted directly from the freezing, but, there being evidence that the freezing was a consequence of the prior accidental personal injury arising out of and in the course of the employment, the department might and did find as a fact that the disability was due to the accident. The finding has some evidence to support it, and therefore is conclusive on this court.

The court held that the employer's report on January 12, 1924, of compensable accident, which spoke of the freezing of the plaintiff's foot, and the letter written on March 25, 1924, by the plaintiff also referring to that fact, both omitting reference to the bruise, while inaccurate were sufficient notice to meet the requirements of the statute. It also held that the award of $14 per week was excessive in view of the fact that the plaintiff's weekly wages were only $19.86 per week, and that the maximum allowance therefor is $11.92 per week.

The cause was remanded to the department for correction of the weekly allowance and was otherwise affirmed.

WORKMEN'S COMPENSATION—ACCIDENT—CUMULATIVE EFFECT OF REPEATED ACTS—*Aldrich* v. *Dole, Supreme Court of Idaho (1926), 249 Pacific Reporter, page 87.*—Elmer Aldrich was employed by F. A. Dole to drive a truck which was so worn that "in order to travel at high speed it was necessary for him to press the shift lever with his right knee. In so doing the cogs would frequently slip out of mesh and cause the lever to strike the knee; and the pressing of the knee against the lever and the striking of the knee by the lever caused the knee to become bruised to such an extent claimant became disabled."

The industrial accident board found as a matter of law that the injury was not sustained by accident arising out of and in the course of the employment and compensation was denied. The employment continued from September 12 to October 17, 1923, and on appeal to the district court it was found that "on or about the 17th day of October, 1923, claimant had incurred a personal injury by accident" and was entitled to compensation.

On appeal to the supreme court this judgment was affirmed, the court saying in part:

Had there been a single occasion when the knee pressed the lever and was struck by it, and injury had resulted therefrom, there would be no difficulty in concluding that the injury was received by accident. In such cases it would be said that in the discharge of his duties, the workman placed his knee against the lever, the lever struck the knee, the injury resulted; and it would not be said that the injury was usual, was expected, or was designed. Now, if the single pressing of the knee against the lever and the single striking of the knee by the lever would result in an injury by accident, can we say that the injury actually received was not caused by accident merely because there was a conjunction of the causes that brought on the injury? The injury results from a single event, and there would seem to be no sound reason for holding that an injury occasioned by a number or series of events is not within the act. The continuous pressing of the lever and the repeated striking of the knee had a cumulative effect so that the injury came on gradually; and claimant received the unexpected and unintentional injury during the time of the operation of the causes that produced this injury.

WORKMEN'S COMPENSATION—ACCIDENT—DISEASE—ANTHRACOSIS—*St. Louis Mining & Smelting Co.* v. *State Industrial Commission, Supreme Court of Oklahoma (September 15, 1925), 241 Pacific Reporter, page 170.*—R. J. Turner was employed by the St. Louis Mining & Smelting Co. in its lead and zinc mine. On October 2, 1923, Turner, after working in a shaft for about 30 minutes, became dizzy from the effects of carbon monoxide gas, and with a fellow workman moved to another section and continued their labor for the

day. The gas had been caused by the explosion of dynamite earlier in the morning and the night before. Turner returned to work the following day with some ill effects, but on the second day he was completely incapacitated and continued in such condition until the time of the hearing on his petition for compensation.

Turner was 50 years of age and had been employed in various kinds of mines since he was about 12 years old. He testified that the effects complained of in this action had not come upon him suddenly but by degrees. From an order of the State industrial commission granting compensation, the employer and the insurance carrier appealed.

Dr. Fred A. Glass, the only medical man who testified for either party, diagnosed the ailment as anthracosis or coal miner's disease contracted by inhaling foreign particles over a long period of time. He testified that exposure to gas under such conditions as existed in the instant case would not produce the result had in the ailment under consideration here, but that it would only have been temporary and transitory in its nature.

It was the contention of the defendants that the commission erred in finding an accidental personal injury arising out of the employment, that it erred in finding the disability resulted from accidental injury, and that it erred in awarding compensation for a disability resulting from an occupational disease in no way relating to or growing out of the employment.

The supreme court considered the facts in this case in conjunction with section 7283 of the Compiled Oklahoma Statutes of 1921, as amended by chapter 61, Session Laws of 1923, in which it is provided that compensation shall be payable for injuries sustained by employees engaged in hazardous occupations, and paragraph 7 of section 7284, which defines "injury" and "personal injury" to mean only accidental injuries arising out of and in the course of the employment and such diseases and infections as may result therefrom. The court's interpretation of these sections excluded an occupational disease from being compensable.

In reviewing the evidence and testimony the supreme court held that if a personal injury is of such a character as to require professional or scientific men to determine the cause and extent, that question must then be proven by the testimony of such persons. It appeared that in the trial of this case there was no testimony by a person skilled in scientific knowledge that the fact of the claimant being slightly gassed caused his disability. There was also no testimony showing or attempting to show that the fact of the claimant being gassed accelerated his disease.

Under the Oklahoma rule, as stated by the supreme court, the findings of the commission are conclusive unless there is an absence

of competent evidence to support the findings and in such a situation the question becomes a pure question of law for the determination of the court.

In conclusion the supreme court was of the opinion that "the claimant failed to produce any competent evidence to form a basis for the finding by the commission that the 'accident' as claimed, resulted in the disability."

The order was therefore reversed and the cause remanded to the State industrial commission with directions to dismiss.

WORKMEN'S COMPENSATION — ACCIDENT — DISEASE — PNEUMONIA—*Jones* v. *Philadelphia & Reading Coal & Iron Co., Supreme Court of Pennsylvania (February 1, 1926), 132 Atlantic Reporter, page 122.*— George R. Jones, the deceased, was an employee of the Pennsylvania & Reading Coal & Iron Co. On January 25, 1923, his father, also an employee of the company, was buried by the slide of a culm bank. Jones and other employees made a desperate effort, lasting about two and a half hours, to rescue his father, but succeeded only in recovering his lifeless body. A large quantity of water was used in the rescue and deceased was drenched from the knees down. Following the exposure, excitement, and exertion he had a severe cold, but attended the funeral of his father on January 29, and, returning home, went to bed and called a doctor, who gave him some temporary relief. On February 7, other physicians were summoned, who found him suffering with pneumonia, which resulted in his death on February 11, 17 days after the exposure. His widow was awarded compensation, which was reversed by the court of common pleas for lack of sufficient medical evidence connecting the pneumonia with the exposure. Additional testimony was taken, and a second award made to the claimant, which was affirmed by the court of common pleas. The company appealed on the ground that the proof did not sustain the award.

In affirming the award the court said in part:

A specialist in internal diseases (Doctor Collins), not called at the first hearing, on a consideration of all the facts, testified, "I think the wetting was the cause of his trouble which eventually terminated in pneumonia and caused his death," and further, "pneumonia was the condition resulting from fever and chills operating for several days." The conclusion of an expert, given as "I think," is equivalent to saying, "I believe," and amounts to an assertion of his professional opinion, at least as strong as the assertion of his opinion that, under all the attending data, the result in question most probably came from the assigned cause, which is sufficient. The testimony of the three attending physicians is consistent with that of Doctor Collins, although they leave the cause of the pneumonia somewhat in doubt; but no other probable cause therefor was

pointed out. If the exposure on January 25 was the superinducing cause of death, it matters not that it may have been aggravated by some other cause, such as attending his father's funeral when ill, or going out improperly clad. Injury following an extraordinary exposure to wet and cold, suffered in the course of employment, may be compensable under the workmen's compensation statutes (Pa. St., 1920, sec. 21916 et seq.), on the same principle as a prostration resulting from the heat. (Lane *v.* Horn & Hardart Baking Co., 261 Pa. 329, 104 Atl. 615; see Bul. No. 258, p. 156.) So may death from pneumonia caused by an injury or unusual exertion and exposure (citing cases).

The judgment was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT—DISEASE—PROXIMATE CAUSE—*New River Coal Co.* v. *Files, Supreme Court of Alabama (June 30, 1926), 109 Southern Reporter, page 360.*—This case came up on the defendant's application for a writ of certiorari to review the judgment of the circuit court of Walker County awarding compensation to Jasper Files for alleged injuries received while he was employed as a miner in the defendant's coal mine.

The evidence for the plaintiff tended to show that while engaged in coal mining he was overcome and for a time rendered unconscious from breathing carbon dioxide or carbon monoxide or both; that the bad air was due to insufficient ventilation; that the immediate cause of his suffocation was a current of such air passing through an opening he was making into a room where other workmen had been shooting, the gases from the shots not having disappeared. There was also evidence that before the accident the plaintiff was in apparent good health and able to work regularly, and that at the time of the trial he was disabled on account of an abnormal condition of the heart.

The court, in denying the writ, said in part:

We have no difficulty in holding that whatever injury and disability resulted proximately from this event was due to accident within the meaning of the act. A disease "results proximately from the accident" if the disease is induced by lowered resistance proximately caused by the accident, or if it is aggravated or accelerated by the accident so that the disabling injury results proximately from the accident—would not have developed but for the accident. The benefits of the compensation law are not limited to those in perfect health.

Giving full effect to the opinion evidence that persons in good health quickly and fully revive from the effects of carbon dioxide without lasting injury, this must be viewed in the light of all the evidence. It can not be said with certainty that carbon dioxide alone caused the suffocation.

This court does not review the weight of the evidence on certiorari.

True, the burden of proof in the trial court is on the claimant to prove the conditions upon which his right to compensation depends. The issue should be determined fairly upon the legal evidence as in other cases; but the law places that responsibility on the trial judge.

It can not be declared on this record that there was no evidence of injury from accident within the workmen's compensation law.

WORKMEN'S COMPENSATION — ACCIDENT — INTOXICATION AS CAUSE—BURDEN OF PROOF—*Shearer* v. *Niagara Falls Power Co., Court of Appeals of New York (January 19, 1926), 150 Northeastern Reporter, page 604.*—William A. Shearer was employed by the defendant company in taking down a bridge at its plant at Niagara Falls, N. Y. In the course of his employment he lost his balance while walking along a girder of the bridge and fell, striking a scaffolding, and then falling into the water. He sustained injuries from which he died almost instantly. The industrial board made an award to Lenora Shearer and others, claimants, which was affirmed by the appellate division of the supreme court. The defendant appealed on the ground that no specific finding was made by the industrial board on the evidence offered at the hearing that deceased was intoxicated at the time of the accident. The award was reversed and proceedings remitted to the State industrial board. Judge Pound, speaking for the court, said in part:

The issues in compensation cases, although informally joined, should, however, be disposed of by the board by a determination on all material controverted questions.

Evidence was offered that Shearer was intoxicated at the time of the accident. The question of intoxication as the sole cause of injury was therefore material, but the board made no specific finding on the point. New York constitution (art. 1, 19), excepts from the general grant of power to the legislature to pass workmen's compensation laws all cases "where the injury results solely from the intoxication of the injured employee while on duty." The workmen's compensation law (sec. 10) contains the same exception.

If the employer seeks to establish that intoxication was the sole cause of the accident, the burden is upon him to offer substantial evidence from which reasonable persons would reasonably draw the inference (*a*) that the employee was drunk at the time of the accident; (*b*) that he fell owing to his drunkenness and was injured or killed. The ultimate burden is on the employer to establish his defense. The board should make a specific finding whenever the question becomes material.

Here death was due to the fall from the bridge girder, but if the fall was due solely to the intoxication of the employee the case does not come under the act. If the board reaches the conclusion on the evidence that Shearer was drunk at a place where if he fell he would probably be killed, and that he fell owing to his drunkenness, compensation should be denied.

The award of the State industrial board and order of the appellate division should be reversed, with costs to abide event, and proceeding remitted to the State industrial board to make a finding on the question, Did the death of Shearer result solely from his intoxication while on duty?

Ordered accordingly.

WORKMEN'S COMPENSATION—ACCIDENT—NOTICE—BENEFITS UNPAID AT TIME OF DEATH—VESTED RIGHTS—*Roney* v. *Griffith Piano Co., Court of Common Pleas of New Jersey (December 30, 1925), 131 Atlantic Reporter, page 686.*—Roney was employed by defendant company as a piano mover. On December 23, 1923, while Roney was moving a piano, it fell, knocking him down and injuring his neck. The accident was witnessed by Penn, the man in charge of the work. Roney continued to work for five or six weeks, when he became wholly disabled from further labor. A diagnosis made on May 19, 1924, showed that cancer had developed as a result of the injuries, from which he subsequently died. Some time before his death Roney submitted a claim, on which compensation was awarded by the workmen's compensation bureau but no payments were made thereon. The employer appealed on the ground that Roney did not report his injury within 90 days as required by the statute, and that there was no person to whom any compensation was properly payable. In affirming the award the court said in part:

Penn was in charge of the work. He was a witness to the accident, saw Roney knocked down when the piano fell, and heard him complain of his neck having been hurt. This notice to Penn, whether or not he reported it to those in authority, was a compliance with section 2, paragraph 15, of the statute (act of April 4, 1911; P. L., p. 140).

The diagnosis as to cancer was made five months after the injury. The court stated that an award for temporary disability should be made up to the date of the diagnosis, followed by an award for permanent disability until the date of death. Continuing, the court said:

It seems that no compensation has been paid in this case, and it is urged by respondent appellant that, as the petitioner has died, there is now no person to whom compensation is properly payable. The authorities cited in support of this view do not sustain that contention. The law is settled that the personal representative of the deceased is entitled to the compensation which accrued up to the date of death of the petitioner. (Erie Railroad Co. *v.* Clara Callaway, Executrix, 91 N. J. L. 32, 102 Atl. 6.)

Let the petitioner respondent submit a determination in accordance with these views.

The rights of the widow as dependent and entitled to a death benefit were not before the court, and it declined to comment thereon.

WORKMEN'S COMPENSATION—"ACCIDENT"—OCCUPATIONAL DISEASE—ANILINE POISONING—CONSTRUCTION OF STATUTE—*Sokol* v. *Stein Fur Dyeing Co. et al., Supreme Court of New York, Appellate Division (May 5, 1926), 216 New York Supplement, page 167.*—Harry Sokol was employed by the defendant to handle and brush dry furs after the process of dyeing was complete. He contracted a disease known as dermatitis, which disabled him in respect to the use of his hands. He made a claim for compensation under the provisions of section 3, group 19, subdivision 2, of the workmen's compensation law (Laws 1922, ch. 615), alleging that his disease was caused by aniline poisoning. From an award by the State industrial board the defendant appealed.

In reversing the award and dismissing the claim the court said:

We think that "any process involving the use" of aniline is descriptive of a chemical process, and in the fur-dyeing trade involves the application of the chemical to the furs. The claimant, not having been engaged in making application of the dyes, was not, we think, within the coverage of the subdivision, and was not suffering from an occupational disease.

WORKMEN'S COMPENSATION—"ACCIDENT"—OCCUPATIONAL DISEASE—TUBERCULOSIS—*Ætna Life Ins. Co.* v. *Graham et al., Commission of Appeals of Texas (June 9, 1926), 284 Southwestern Reporter, page 931.*—Artie Graham was employed by the Thomsen Co., of Waco, manufacturers of shoe polish. It was her duty to stir and boil various chemicals used in the manufacture of shoe polish, from which arose certain gases, fumes, and powders, all more or less poisonous and irritating. She had been working for this employer for two years prior to May, 1922, when she resigned on account of ill health. She died on January 31, 1924, of tuberculosis. Carrie Graham and another made claim for compensation on account of her death, which was denied by the industrial accident board and the claimants appealed. Upon a trial in the district court a jury awarded compensation. The insurer appealed to the court of civil appeals, and the judgment was reversed and the cause remanded for a new trial. A writ of error was then sued out to bring the case before the supreme court.

The question for the consideration of the court was whether or not a disease that is gradual in its development due to the natural surroundings of the employment is compensable under the Texas statute.

The commission of appeals in disposing of the question said in part:

Considered most favorably from the standpoint of defendants in error, it is conclusively shown that Miss Artie was exposed to the natural surroundings of her employment; that such exposure gradually developed a disease known as tuberculosis, from which she died

in about two years after her employment ceased. In other words, her death was due to what is called an industrial or occupational disease, and not to an accidental injury.

It was held by the commission that while the workmen's compensation act did not expressly include or exclude diseases as compensable, the trend of the decisions of the Supreme Court of Texas had construed the act to intend industrial accidents apart from occupational diseases. It quoted with approval from the opinion delivered by Judge Bishop in Texas Employers' Insurance Association *v.* Jackson (1924, 265 S. W. 1027; see Bul. No. 391, p. 460), where it was held that the employee who, while making a long trip with his employer's truck, was exposed to rain which wetted him several different times, resulting in pneumonia, was not the victim of an accident within the meaning of the act.

The opinion continued:

> It is clear to us that, so far as our supreme court has spoken, it has shown its approval of the rule, well-nigh universal elsewhere, that recovery cannot be had for what is termed an occupational or industrial disease. We think the industrial accident board correctly decided the case at bar.

The commission recommended that the judgments of the district court and court of civil appeals be reversed and judgment rendered by the supreme court in favor of plaintiff in error.

WORKMEN'S COMPENSATION—"ACCIDENT"—VIOLATION OF STATUTE—TIMBERMAN OPERATING MINE CAR—*Pokis* v. *Buck Coal Co., Supreme Court of Pennsylvania (March 15, 1926), 132 Atlantic Reporter, page 795.*—John Pokis was employed by the defendant as a timberman in its mines. It was the custom of the employees when leaving the mine either to walk or to ride down the plane to the bottom and from there to be hoisted to the surface. At the time in question, when the deceased and another had reached the top of the plane, the employee who usually operated the hoisting machine had quit work, and the deceased started the engine and hoisted the car to the top of the plane. He then manipulated the switch that started the car downward and jumped on it to ride down. He was later found dead at the bottom of the plane by his fellow employee. His widow was granted an award by the compensation authorities, but this was reversed by the court below and came to this court on appeal.

The facts were not in dispute. The court considered only the question of whether or not the action of the deceased was a violation of rules 25 and 48 of article 12 of mine laws enacted June 2, 1891. Rule 25 provides in effect that any persons handling or disturbing machinery or cars in or about a mine without proper authority,

whereby the lives and health of persons or the security of the property in or about the mine is endangered, shall be guilty of an offense against the act. Rule 48 provides that no miner or laborer shall run cars on any gravity road unless employed by the mine foreman for that particular work. The court below found that the deceased had violated both of the foregoing rules and therefore his widow should not be allowed compensation. The judgment of the lower court was therefore affirmed.

The Court of Appeals of Maryland reached a like conclusion in a case where death followed the disobedience of workmen instructed by their foreman not to reenter a ditch which they were digging until shoring had been placed. The foreman was not present at the time, but one of the workmen refused to go into the ditch, reminding the others of the orders given. Disregard was held to be "willful misconduct" by the commission, which the courts supported. (Harris *v.* Harris et al. (1926), 132 Atl. 374.)

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF EMPLOYMENT—EMANCIPATION OF MINOR—DEPENDENTS—EVIDENCE—*Smith* v. *Leslie, Appellate Court of Indiana (March 10, 1926), 151 Northeastern Reporter, page 17.*—Kahel Leslie, 20 years of age, an employee of J. P. Smith, was killed while hauling lumber from defendant's lumber yard to a garage in the same town. It appeared that there was a muddy stretch of road near where the lumber was to be unloaded, and at the time in question decedent's truck became mired. He procured a tractor from a garage, attached the tractor to the truck by means of a rope, and pulled the truck out of the mire to the place where it was to be unloaded. He stopped the tractor, but the truck had been given such momentum that it did not stop simultaneously with the tractor, but ran forward against it, the collision resulting in the fatal injury to the decedent. The evidence given at the hearing showed that the decedent was receiving $15 per week from his employer, and that after paying for his own clothes and furnishing his own spending money he gave his mother from $5 to $7 per week, the greater part of which was used for buying clothes and school books for his sisters. The industrial board made an award to his mother and sisters, and defendant appealed on the ground that since the use of the tractor to pull the truck had been strictly forbidden the accident did not arise out of his employment, and that he had been emancipated by his parents, and therefore they should not be considered dependent upon him. The court, in affirming the findings of the board, said in part:

An accident is said to arise "out of the employment, when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the

work was required to be performed and the resulting injury." [Cases cited.]

In the case at bar the decedent at the time of his injury was engaged in operating the tractor in an endeavor to accomplish the work to which he was assigned. Clearly there is some evidence to support the finding of the board that the death of the employee was the result of an accident which arose out of his employment.

The question of the boy's emancipation becomes important. Emancipation will not be presumed. It must be established by competent evidence.

In the case at bar there is evidence from which the industrial board might have found that the emancipation of Kahel Leslie was but partial; that there had been no emancipation from parental custody and control; and that the boy was merely permitted to collect and spend his own wages. If such was the finding, there was, of course, no legal liability on his part to pay for his board and lodging, the cost of which the industrial board was not required to deduct from his wages in determining the question of dependency.

We hold that there is sufficient evidence to sustain the finding of the industrial board that the mother and sisters of the employee were his dependents at the time of his death.

The award was therefore affirmed.

WORKMEN'S COMPENSATION—ADMIRALTY—JURISDICTION—AGREEMENT UNDER STATE LAW—STATUS OF DIVER—*Millers' Indemnity Underwriters* v. *Braud et al., United States Supreme Court (February 1, 1926), 46 Supreme Court Reporter, page 194.*—O. O. Boudreaux, employed by the National Ship Building Co. as a diver, died of suffocation when his air supply failed while under water in the course of his employment. The employer carried insurance in compliance with the Texas workmen's compensation law. In an action by the sister of the deceased, an award of compensation was granted by the State industrial board. The court of civil appeals affirmed the award, as did likewise the Supreme Court of Texas, whereupon error was brought to the United States Supreme Court.

It was the contention of the insurance carrier that the claim arose out of a maritime tort; that the rights and obligations of the parties were fixed by maritime law, and that therefore the State had no power to change them by statute or otherwise. In reviewing the record, the Supreme Court of the United States observed that the Texas compensation law as applied to employees engaged in removing obstructions to navigation in waters within the State works no material prejudice to rules of maritime law; and where the employer, as in this case, elected to come within the act, and the employee did not give statutory notice rejecting it, the remedy provided was therefore exclusive and the right of either party to sue in admiralty was eliminated. It appeared from the evidence that Boudreaux at the

time of his death was engaged in sawing off the timbers of an "abandoned set of ways, once used for launching ships, which had become an obstruction to navigation."

Mr. Justice McReynolds, delivering the opinion of the court, said in conclusion:

The record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the State compensation act; but the matter is of mere local concern and its regulation by the State will work no material prejudice to any characteristic feature of the general maritime law. The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist.

The judgment was therefore affirmed.

WORKMEN'S COMPENSATION—ADMIRALTY—JURISDICTION—"MARITIME CONTRACT"—UPHOLSTERER ON RIVER BOAT—*Johnson* v. *Swonder, Appellate Court of Indiana (January 28, 1926), 150 Northeastern Reporter, page 615.*—John Johnson, who was employed by the defendant as an upholsterer's helper in a mattress factory, was sent by his employer to help upholster a motor boat that was tied up to the Indiana bank of the Ohio River, and while in the course of his employment met with an accident which caused his death. His widow made application to the Indiana Industrial Board for compensation on account of his death. The application was dismissed for want of jurisdiction, and claimant appealed. The court, in reversing the action of the board, said in part:

There is but one question for our consideration, and that is as to whether the industrial board had jurisdiction over the subject matter of the contract of employment, and to determine this we are called upon to determine whether the contract of employment was a maritime contract, or such a maritime contract that it can only be recognized in an admiralty court.

The court, after examining a number of authorities on the question of maritime contracts, cited several cases in which the question had been adjudicated and said: "We see nothing in the employment here involved that would bring it within the scope of these definitions of a maritime contract."

The opinion concludes:

It is well established that generally Federal courts have exclusive jurisdiction of admiralty matters, but where, as here, the enforcement of the State statute works no material prejudice to the characteristic features of the general maritime law, nor interferes with the proper harmony or uniformity of that law in its international or interstate relations, the general rule does not apply.

That appellee had contracted with appellants' decedent with reference to the compensation law of Indiana is evidenced by the fact that

he promptly reported the accident to the industrial board in due form. We hold that the industrial board erred in holding that it did not have jurisdiction of the matter here involved.

The order of dismissal was therefore reversed, with instructions to hear and determine the action on its merits.

WORKMEN'S COMPENSATION — ADMIRALTY — JURISDICTION — WAIVER OF RIGHTS UNDER ADMIRALTY LAW—CONSTITUTIONALITY OF STATUTE—*Christensen* v. *Morse Dry Dock & Repair Co., Supreme Court of New York, Appellate Division (March 19, 1926), 214 New York Supplement, page 732.*—Fred Christensen was employed by the defendant in making repairs on the steamship *President Arthur*, lying at the plant of the defendant in the navigable waters of New York Harbor, and while in the performance of his work he was dragged from the ship by a repair tackle into the waters of the harbor and thereby injured. He brought action in the supreme court of Kings County, N. Y., to recover for his injuries under maritime law. From a judgment dismissing the complaint, plaintiff appealed to the appellate division of the supreme court. The question presented was whether or not the supreme court had jurisdiction of the cause of action because of a contract entered into by the plaintiff and the defendant. The contract was signed by both of the contracting parties before the plaintiff entered into the employ of the defendant. By the terms of the contract the plaintiff agreed to waive any rights to himself, his heirs, etc., that he or they might have in any admiralty court or State court, limiting such rights to those granted by the provisions of the workmen's compensation law.

The court referred to Article III, section 2, of the Constitution of the United States, which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. Judge Kapper, who delivered the opinion of the court, after citing a number of cases, said in part:

As we have seen, the cases in the United States Supreme Court disclose the zealousness with which that court clings to the jurisdiction of the Federal courts over maritime torts, and the tenaciousness with which they seek to preserve the essential and characteristic features and the uniform operation of the maritime law. That this jurisdiction may be encroached upon, or the essential features of the maritime law changed or modified, any more effectively through the medium of optional rather than compulsory legislation, does not seem to me possible. The fact of usurpation and encroachment, not the medium of its accomplishment, is the vital consideration.

The optional provision in section 113 (of the compensation act, authorizing waivers of the admiralty law and acceptance of compensation by agreement), if utilized by employer and employee, is effective to divest the Federal courts of jurisdiction by substituting therefor

the jurisdiction of a State tribunal exercising functions unknown to the common law, and is effective also to work a material change in the maritime law by substituting for the rights and remedies there recognized and administered new rights and remedies unknown to the common law, and not embraced within the scope of the maritime law. And the jurisdiction of which the Federal courts are thus divested is jurisdiction of subject matter—i. e., jurisdiction over a maritime tort. It seems to me that this may not be done, either directly by compulsory legislation or indirectly through the medium of optional provisions.

It is suggested that the plaintiff could have given a general release, and therefore the parties could effectuate the agreement now involved. The distinction between a release of a right of action, either before or after suit brought, and the agreement before us, seems marked. In the case of a release, the parties put an end to litigation by steps that are sanctioned by the common law and are in harmony with the principles of the maritime law. In the case of the agreement to submit their maritime rights, obligations, and liabilities to the State industrial board, the parties are consenting to confer jurisdiction of subject matter upon a tribunal in which such jurisdiction can not be lodged. That such board is a judicial tribunal (created by the legislature), in view of its determining powers and the right of review of its findings by our appellate courts, seems to me to admit of no question.

The discussion in which I have indulged leads me to the conclusion that, where a suitor claiming a personal injury to have resulted from what is known as a maritime tort resorts to a State court for the purpose of having his right of action determined pursuant to the rules of law fixed by maritime jurisprudence, he can not be ousted because of an agreement voluntarily entered into by him to substitute a State workmen's compensation law in the place and stead of his common-law remedy saved to him by the Federal statute.

If the views expressed are correct, it follows that the dismissal of the complaint was error, and that the judgment should be reversed upon the law and a new trial granted, costs to abide the event.

The judgment was therefore reversed and a new trial granted.

In Argentino *v.* F. Jarka Co. (Inc.) (1925, 214 N. Y. Supp. 218), the Supreme Court of New York, special term, ruled against a plea that a rule of the industrial board of the State provided for an acceptance by the parties, making the compensation act the exclusive remedy. Citing Southern Pacific Co. *v.* Jensen (244 U. S. 205, 37 Sup. Ct. 524), the court pointed out the impossibility of the State assuming jurisdiction by act of legislature, adding that surely the industrial board could not do so.

WORKMEN'S COMPENSATION—ADMIRALTY—LONGSHOREMEN—INJURY ON DOCK—*Shea* v. *State Industrial Accident Commission, Supreme Court of Oregon (July 13, 1926), 247 Pacific Reporter, page 770.*—James W. Shea was employed by the Nelson Steamship Co., a corporation duly licensed to do business within the State of Oregon, and was on November 19, 1925, engaged in unloading freight from the steamship *Griffdu* onto one of the docks in the city of Portland, when a load of

freight he was trucking on the dock fell and caught and severely injured his hand. His claim for compensation was rejected by the State industrial accident commission. He then proceeded under the workmen's compensation law in the district court and recovered judgment. From that judgment the commission appealed. It was contended that the plaintiff was not entitled to compensation under the workmen's compensation law, but that his case was governed by the maritime law.

The court, speaking of the provisions of Oregon's workmen's compensation act, said in part:

All persons, firms, and corporations engaged as employers in the hazardous occupations specified in the act may accept or reject the benefits thereof. All workmen in the employ of such persons, firms, or corporations subject to the act, may likewise elect to accept or reject its benefits. Stevedoring and longshoring are defined as hazardous occupations within the meaning of the act. At the time the plaintiff suffered his injuries, the Nelson Steamship Co. was an employer, and plaintiff was an employee, as these terms are defined by the act. The provisions of this act, when applied to the facts in the case at bar, are not in conflict with any superior law. Therefore, we conclude that, both the employer and the employee having accepted the terms of the workmen's compensation law of the State of Oregon, its protective features embrace the injury sustained by the plaintiff. Both the agreed statement of facts and the findings of the court locate the site of the longshoreman's injury upon the land.

The case of State Industrial Commission *v.* Nordenholt Corp. (259 U. S. 263, 42 Sup. Ct. 473; see Bul. No. 344, p. 285) was cited by the court, and the opinion of Mr. Justice McReynolds quoted from with approval as follows:

When an employee, working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land.

The commission claimed that its rejection of the claim of Shea was supported by the supreme court's decision in Spitzer *v. Annette Rolfe* (110 Oreg. 461, 218 Pac. 748, 223 Pac. 253). The court pointed out, however, that here the owner was a foreign corporation which had never complied with the corporation laws of Oregon nor taken steps to come under the State compensation law, but sought protection under the automatic features of that law when proceeded against

under another statute, though "it had never contributed, nor sought to contribute, a dollar to the industrial accident fund of the State."

While the workmen's compensation law, being remedial in its nature, is to be liberally construed, yet, when it becomes our duty to apply the act to a given set of facts, we must keep in mind that it was not the intention of the lawmakers, in providing for the creation of an industrial accident fund, to compensate workmen injured abroad, but that the act is essentially an Oregon act, designed to accumulate a fund to compensate Oregon workmen sustaining accidental injuries in Oregon industries.

In the instant case, the parties being under the act and the injury being received on the land, the compensation law was applicable, and the judgment of the circuit court so holding was affirmed.

WORKMEN'S COMPENSATION—AGREEMENT—WAIVER OF PROVISIONS OF LAW—REVIEW—*Hartford Accident & Indemnity Co.* v. *Industrial Commission, Supreme Court of Illinois (April 23, 1926), 151 Northeastern Reporter, page 495.*—John Wahlstrom was injured while in the employ of A. Knight. Knight and Wahlstrom, together with the insurance company, plaintiff in the instant case, entered into an agreement in settlement of Wahlstrom's claim for compensation, whereby he was to be paid $1,650 for injuries received, at the rate of $12 per week for 291 weeks and $8 for one week, with a pension of $23.33 per month for life, neither of the parties to seek to diminish or increase the agreed amounts. The agreement was approved by the industrial commission, and payments were made under the agreement until the death of Wahlstrom. Subsequent to the death of Wahlstrom, Knight died, and the insurer stopped payment and filed a petition with the industrial commission praying relief from further payments, its contention being that under section 21 of the workmen's compensation act its liability ceased on the death of Wahlstrom. The commission found that, under the terms of the agreement, the right to compensation was not extinguished by the death of Wahlstrom, and this finding was approved by the circuit court of Cook County. The company brought error, and the supreme court reversed the finding and approval, remanding the case with directions.

The law provides that the death of a beneficiary extinguishes his right to receive compensation; also that any agreement or award may be reviewed by the commission at any time within 18 months after it is made. Here, the agreement was made in April preceding the death of Wahlstrom in September of the same year. The court held that the rule as to termination of benefits controlled in spite of the agreement, and that the power of the commisson to review was

not subject to waiver by the agreement, so that "the circuit court erred in confirming the finding of the industrial commission" to the contrary. The jurisdiction of the commission was said to continue in the case of an agreement the same as in case of an award, and could not be waived. The judgment below was therefore reversed and the case remanded.

WORKMEN'S COMPENSATION—ALIEN BENEFICIARIES—APPEAL TO COURTS—CONSTITUTIONALITY OF STATUTE—*Liimatainen* v. *State Industrial Accident Commission et al., Supreme Court of Oregon (June 1, 1926), 246 Pacific Reporter, page 741.*—The deceased, known as Herman Alto, while in the employ of the Murphy Timber Co., sustained an injury in an accident arising out of and in the course of his employment on June 19, 1922, which resulted in his death two days thereafter. Wilhelmiina Liimatainen, alleged widow of the deceased, made a claim for compensation under the workmen's compensation law. Her claim was rejected by the commission, from whose order she appealed to the circuit court of Marion County, Oreg. That court found and determined that inasmuch as the claimant was not and never had been a resident of Marion County or of the State of Oregon, no appeal was authorized by law, and on that account dismissed the appeal. An appeal was then brought to the Supreme Court of Oregon.

The supreme court in affirming the judgment of the circuit court said in part:

There is no question but that in proper cases compensation may be awarded to the widow of a deceased employee who is subject to the workmen's compensation act, although the widow may be a nonresident. The question is as to the extent of her remedy in case the commission refuses her claim.

The laws of this State are made primarily for the benefit of its own people, and the present law under its terms relating to industrial accidents is avowedly made with that end in view. The State is under no obligation to provide largess for nonresident aliens, and may limit their access to its courts to narrower bounds than those accorded to residents.

The claimant contended that to deny her the right of appeal was forbidden by sections 20 and 31 of article 1 of the State constitution. The sections invoked in support of that contention read thus:

SECTION 20. No law shall be passed granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

SEC. 31. White 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 court held that section 20 referred only to citizens of the State, while section 31 applied alone to white foreigners who were residents of the State, and that neither section applied to the claimant since she was neither a citizen of the State nor a white foreigner residing therein. It was also held that the action of the court below in dismissing the appeal did not violate the due process of law provision of the Constitution of the United States. Judge Burnett, speaking of this, said in part:

In a due process of law devised by the industrial accident commission statute she applied to the commission for an allowance. She had a hearing before that legally constituted tribunal, and by it her claim was denied.

The claimant was at all times a resident and inhabitant of a foreign country, seeking to take advantage of the law, and must take it not only with its benefits, but with its restrictions. She had her day in court, so to speak, before the commission, which is vested with the authority to determine such things in the first instance. She had her hearing before that tribunal, and if she would appeal she must bring herself clearly within the terms of the statute by appeal to the circuit court of the county in which she resides. There being no "county in which she resides," she does not come within the category of those who can appeal.

Operating, as she has attempted to do, solely under the workmen's compensation law, the claimant is bound by all its conditions, one of which is that if she desires to appeal she must appeal to the circuit court of the county in which she resides.

The circuit court had no jurisdiction over the subject matter because that was vested primarily in the industrial accident commission. Jurisdiction on appeal could not be conferred upon the circuit court by stipulation, and it made a correct disposition of the case by dismissing the appeal.

The judgment was therefore affirmed.

WORKMEN'S COMPENSATION—ALIEN BENEFICIARIES—TREATY RIGHTS—CONSTITUTIONALITY OF STATUTE—*Liberato* v. *Royer* (*April 12, 1926*), *46 Supreme Court Reporter, page 373*.—This case came up to the Supreme Court of the United States on a writ of error. Plaintiffs, who were natives and residents of Italy, were by a decision of the Court of Common Pleas of Pennsylvania awarded $820 for the death of their son while he was employed by the defendants S. A. Royer and Albert Herr, trading as Royer & Herr. The award was reversed by the superior court on the ground that the statute expressly provided that "alien * * * parents * * * not residents of the United States, shall not be entitled to any compensation" (Pa. Stat. 1920, sec. 22007), and that the treaty of 1913 with Italy did not cover the case. The judgment was affirmed by the supreme court of the State. (See Bul. No. 391, p. 358.)

The question before the Supreme Court was whether or not the treaty with Italy invalidated the above clause of the statute law and gave the plaintiffs a right to recover. That portion of article 3 of the treaty, as amended in 1913, relied on for recovery is in substance as follows:

The citizens of the contracting countries shall receive constant security and protection for their persons and property and shall be granted the same civil responsibility for injuries or death caused by negligence or fault as is granted to nationals, provided they submit themselves to the conditions imposed on the latter.

Mr. Justice Holmes, delivering the opinion of the court, said in part:

The words of the amendment, if taken literally, deal only with death caused by negligence or fault. The statutes of Pennsylvania accord with this view of the treaty. They give to alien nonresident dependent parents the same right to recover damages for death due to fault that they give to citizens and residents. Then the compensation act offers a plan different from the common law and the workman is free not to come in under it. If he does, of course all benefits dependent on the new arrangement are matters of agreement and statutory consequences of agreement and cannot be carried further than the contract and statute go.

We are of the opinion that the treaty was construed rightly by the courts below.

The judgment was therefore affirmed

The Court of Appeals of Kentucky cited the Liberato decision in a case before it involving a like provision of law, the compensation board having assumed that such provision was in conflict with the treaty. The award made was reversed by the circuit court, this ruling being sustained by the court of appeals, where it was said that not only did the reasoning in the Liberato case accord with the views of the court, but the Supreme Court's interpretation of the treaty was binding. (Norella *v.* Maryland Casualty Co. (1926), 287 S. W. 18.)

The law of New York allows payments to certain alien dependents, but permits commutation of "future installments" at a rate of one-half their commuted value. This was held by the court of appeals of the State not to permit any revision of past payments or those already due, but "only such installments as might accrue periodically thereafter." An order of the industrial commission, affirmed by the appellate division, modifying a previous award, was therefore reversed and the case remanded. (Perino *v.* Lackawanna Steel Co. (1925), 150 N. E. 127.)

The Utah compensation act gives nonresident aliens one-half benefits. Where an alien was killed, his family being at the time residents of the State, and an award made as to residents, the family afterward leaving the United States, it was held by the Supreme Court of the State that the status of the beneficiaries was changed by their removal, so that the award should be reduced to the amount provided by law for nonresidents. (Continental Casualty Co. *v.* Industrial Commission (1926), 250 Pac. 145.) One judge dissented, saying that he did not think that the amount to be awarded should be based on any inquiry as to a contemplated change of residence of the dependent during the period of the award.

WORKMEN'S COMPENSATION—AWARD—ADDITIONAL AWARD FOR RETRAINING—*Tibbitts* v. *E. G. Staude Mfg. Co. et al., Supreme Court of Minnesota (February 5, 1926), 207 Northwestern Reporter, page 202.*—Minnesota has a law which provides for an additional award for reeducating or retraining those persons whose capacity to earn a living has been destroyed or impaired through industrial accident or otherwise, so as to restore their capacity to earn a livelihood, if the industrial commission shall find such retraining is necessary.

Millard Tibbitts, employed as a lathe worker by the E. G. Staude Manufacturing Co., received an accidental injury which resulted in the loss of one of his eyes, for which he was awarded full compensation. Some time after that he made application for an additional award in order that he might receive training as a trombone player. The application was approved by the board of vocational education, but was not approved by the industrial commission, for the reason that the evidence was not sufficient to show that the retraining sought would materially aid in earning a livelihood. Claimant brought a writ of certiorari to the supreme court. The action of the industrial commission was affirmed. The court held that in determining whether or not an employee who has accidentally suffered the loss of a member of his body is entitled to additional compensation for retraining under the provisions of the statute, the word "necessary" should not be construed as "indispensable," but such compensation should be found necessary if it appears that the training sought would materially assist the employee in restoring his impaired capacity to earn a livelihood. Judge Holt, speaking for the court, said in part:

> Notwithstanding the persuasive arguments presented by the division in its support of Mr. Tibbitts' application, the record is not such as to demand a finding that retraining is necessary. This court can not reverse unless the evidence submitted by the parties requires a finding contrary to the one made, or reveals the decision to be arbitrary or arrived at by misconception of the law, or upon an erroneous theory of the proofs required.
>
> In this instance the memorandum accompanying the decision indicates the chief reason for denying the compensation asked for was that retraining as a trombone player was not shown likely to amount to a restoring of an impaired capacity to earn a livelihood, but rather to the acquisition of an accomplishment.
>
> There should be some evidence that the retraining sought will probably result in at least aiding the applicant to earn a living or improving his impaired earning capacity. It ought not to be required to show that the occupation to which a training is sought will give a better living, or that it alone will furnish an adequate living, but it should be shown that it will substantially aid the workman in gaining a livelihood.
>
> We think the evidence is not such as to compel a finding that the retraining asked for and approved by the division was necessary.

The decision was therefore affirmed.

WORKMEN'S COMPENSATION—AWARD—BASIS—CONCURRENT EMPLOYMENT—AVERAGE WEEKLY EARNINGS—*Juan's Case, Supreme Judicial Court of Maine (July 28, 1926), 134 Atlantic Reporter, page 161.*—Walter H. Juan, concurrently employed by several employers, was killed on November 7, 1922, while serving the Pejepscot Paper Co. His widow was granted an award of $16 a week for the statutory period, and this was confirmed by a single justice sitting in equity. The paper company appealed. The question presented to the court was, Could the weekly earnings of the deceased in his several employments be combined as a basis on which to compute the award? The facts in the case were substantially as follows: The deceased had been employed for the full year preceding his death as a caretaker by the Pejepscot Paper Co. at $10 a week, as janitor for a fuel company at $1.50 a week, and as a member of the Belfast Fire Department at $2.58 a week, and for over 16 weeks just prior to his death he had been employed by Forgione & Romano Co., contractors, as mason's tender, etc., at a weekly wage of $31.50. The case was before the court for the second time.

It was the contention of the paper company that the $31.50 earned as mason's tender should not be considered in computing the amount of the award.

The court, in its opinion, said:

The case is of novel impression in this court, and industry of counsel has failed to suggest a decision by another court in a like case.

It then held that under the provisions of section 12, chapter 50, of the Revised Statutes, a duty was placed upon the industrial accident commission of finding the artificial average of weekly earnings under the conditions prevailing in the employment of the workman, before and up to the time of the accident, if concurrent employment is proved.

In concluding its opinion the court said in part:

It remains only to be considered whether the chairman erred as a matter of law when he included employment by the Forgione & Romano Co. with other concurrent employment, in determining the average weekly earnings.

Led by the decision after the former hearing in this case, and with the additional light obtained from facts elicited in accordance with the previous mandate of this court, the commissioner found that the employment as mason's tender, in which this workman had been regularly employed for more than three months before the accident, was employment concurrent with that by him rendered to the appellant. Then, in compliance with the provision of the statute last quoted, the commissioner apparently found that of his earnings as mason's tender so great a sum was to be considered "average weekly earnings" as would bring the earnings from all concurrent employments above the sum of $24 per week.

Hence he awarded compensation in the amount of $16 weekly, and we can not say this finding is contrary to law.

The appeal was dismissed and the decree below accordingly affirmed.

In a case before the Supreme Court of Kansas involving concurrent employments the court held that only such wages should be considered as were earned in employments under the compensation act. In this case one of the employers was an electric company and the other a city not operating under the act. On the death of the workman from an accident in the course of employment with the electric company it was held that the amount awarded the widow could be based on the earnings with that company alone, for the reason stated. (Walton *v.* Electric Service Co. (1926), 247 Pac. 846.)

The Illinois Supreme Court found the employment of a night watchman by two companies whose properties adjoined to be joint and not concurrent, so that they were jointly liable for the payment of compensation due for his death caused by accident on the property of one, the wage basis being his annual earnings. The workman was employed under a single contract, and was paid an equal wage by each employer, taking his orders from the foreman of each, so that an arbitrator's finding of liability of but one employer was held to have been properly modified to apply to both. (Page Engineering Co. *v.* Industrial Commission (1926), 152 N. E. 483.)

Where the death of a watchman employed by two persons was caused by an explosion while he was attempting to protect from fire the property of both his employers, it would follow that this court would sustain an award against the two employers jointly. (Frederick *v.* Stresenreuter (Inc.), (1926), 152 N. E. 548.)

WORKMEN'S COMPENSATION—AWARD—BASIS—MULTIPLE INJURIES—PERCENTAGE OF DISABILITY—PERMANENT PARTIAL FOLLOWING TEMPORARY TOTAL DISABILITY—*Mills* v. *Mills & Connelly, Court of Appeals of Kentucky (May 21, 1926), 283 Southwestern Reporter, page 1010.*—Charles C. Mills was employed by Mills & Connelly, and on November 8, 1923, while operating a concrete mixer, he sustained an injury for which he made a claim for compensation. A hearing was had before the compensation board on the following agreed statement of facts:

(1) Foot cut off by cable of concrete mixer, necessitating immediate amputation of right leg 9 inches below knee, leg measure 16½ to 17 inches from knee to ankle.

(2) First and second fingers of left hand torn off between knuckle and first joint.

(3) Fracture of middle third of radius of left arm.

The agreed statement also showed that the plaintiff was confined to a hospital for a period of 30 days and after his release was under the care of a doctor until March 23, 1924; that on July 4, 1924, he was able to put on an artificial leg for the first time, and that during the first 60 days thereafter he was able to wear it only occasionally due to the tender and unhealed condition of the stump, since which time he had been able to wear it approximately two-thirds of the time.

The compensation board awarded the claimant $15 per week for total disability from November 15, 1923, to September 8, 1924, and in addition $12 per week for 145 weeks for the amputation and loss of his right leg, and further $12 per week for the loss of an index finger of his left hand and $12 per week for 30 weeks for the loss of a second finger of his left hand. Medical services not to exceed $100 were also allowed. The circuit court on review modified the award and allowed the claimant $12 per week for 125 weeks for the loss of his right foot and set aside the award of $15 per week from November 15, 1923, to September 8, 1924. From that judgment the claimant appealed.

The question for the court was whether claimant's disability was caused by the loss of a leg as was found by the board or by the loss of a foot as adjudged by the circuit court, or whether it should be determined under section 4899, the concluding clause of which provides that all other cases of permanent partial disability not specifically set out in the section shall be determined by the percentage of such disability.

It was held by the court that the claimant's rights should be determined under the concluding clause of the section above referred to, the court saying, in part, as follows:

Our conclusion is that the injury in this case is more than the loss of a foot and less than the loss of a leg, and seems to be necessarily embraced in that class of "all other cases of permanent partial disability" provided for in the concluding clause of section 4899.

It results on this branch of the case that neither the award of the board for the loss of a leg nor the judgment of the circuit court for the loss of a foot only can be sustained; but the circuit court should have remanded the case to the board, with directions to fix the compensation according to the provisions of the concluding clause of that section, but to so fix it that the compensation for such injury in the aggregate would be less than for the loss of a leg, and greater than that for the loss of a foot, according to the percentage of disability and the other considerations mentioned in that clause.

It was also held by the court that, under the ruling in the Nelson case, the circuit court erred in striking out the allowance made by the board for temporary total disability.

The judgment of the circuit court was reversed with directions for it to enter a judgment upholding the award of the board except as to the award for the loss of a leg.

Where a miner was injured by a fall of slate, fracturing a femur and injuring his hip and back, causing permanent partial disability, an award to this effect was sustained by the Supreme Court of Tennessee over the contention that the injury to the leg, for which the act provided a specific benefit, being the one causing the longest disability, was the only basis for an award. The court held

that there was not a question of distinct, concurrent disabilities, the minor merging into the major, but a single injury affecting the use of the body, causing a permanent partial disability, to be compensated on the ground of reduced earning capacity. (Bon Air Coal & Iron Corp. *v.* Johnson (1926), 283 S. W. 447.)

WORKMEN'S COMPENSATION—AWARD—BASIS—PERMANENT PARTIAL DISABILITY—MULTIPLE INJURIES—CONSECUTIVE AWARDS—*Hinley* v. *Brooklyn Heights R. Co., New York Supreme Court, Appellate Division (January 15, 1926), 213 New York Supplement, page 321.*—Florence Hinley, an employee of the Brooklyn Heights R. Co., received injuries to her legs which made it necessary to have the left leg amputated. The State industrial board awarded her compensation for permanent partial disability for the loss of her left leg, which amounted to more than $3,500; it also awarded compensation for temporary disability for injury to the right leg, to run consecutively with the first award. The company appealed from this last award. In reversing the award and dismissing the claim, the court said in part:

The injury to the claimant's right leg was not proven or found to be other than a temporary disability; that this disability was present during the period when claimant was being paid compensation for the loss of her left leg; that an award for the right leg can not be appended to an award for the left leg, the former to begin when the latter ended; that the two injuries constituted but one disability to work; that the award for the left leg was for more than $3,500; that the sum so awarded and paid must be considered in connection with the injury to the right leg; that, so considered, the claimant may not receive further compensation on account of such temporary disability; that the case of Marhoffer *v.* Marhoffer (220 N. Y. 543, 116 N. E. 379 [see Bul. No. 246, p. 289]), precludes the claimant from receiving compensation for the injury to her right leg.

WORKMEN'S COMPENSATION—AWARD—BASIS—PERMANENT TOTAL DISABILITY—COMMUTATION OF BENEFITS TO DISEASED WORKMAN—LIFE EXPECTANCY—*Pettinelli* v. *Degnon Contracting Co., Supreme Court of New York, Appellate Division (1926), 217 New York Supplement, page 679.*—The claimant in this case had suffered an injury to his head in October, 1916, resulting in mental derangement. He was committed to an asylum for the insane in September, 1917, as he was then suffering from dementia præcox. Compensation was paid until a final determination in February, 1926, that the claimant was totally and permanently disabled. A commutation was made at that time, covering future payments and a proportionate amount of the administrative expenses, in accordance with the terms of the law, the amount being $13,662.55. Under the terms of the law this sum would go into an aggregate trust fund, the employer, a self-insurer, being discharged from further liability on the payment thereof.

From the award thus made an appeal was taken on the ground of the use of an improper basis for determining the amount. The commutation had been made in accordance with the testimony of an actuary, who employed the Danish survivorship annuitants' tables of mortality in making his calculations. The actuary admitted that the figures used were based on the life of a normal man, without reference to the actual condition of the individual claimant in this case. Judge Henry T. Kellogg, speaking for the court, stated that:

The superintendent of the asylum in which the claimant was confined testified that the average length of life of a dementia præcox patient was 16 years from the date of his admission to an insane hospital; that he considered that 16 years from such time was a fair and reasonable estimate of the life expectancy of the claimant. As the claimant was admitted to an insane hospital in September, 1917, his expectancy at the time of the order of commutation, according to experience among dementia præcox patients, was less than eight years. We are not told what his expectancy under the Danish tables might have been, for the proof was excluded by the presiding commissioner. We may take judicial notice, however, that it was far greater than eight years. The question to be determined is whether or not the facts of the case justified the commutation made.

Attention was called to the fact that moneys paid in as directed in this case went into an "aggregate and indivisible fund," from which payments for the specific object were to be made; but if a beneficiary outlived his expectancy payments would continue from this fund, while, on the other hand, if death occurred at an earlier date, no reimbursement would be made to the contributor. In other words, this is a special insurance fund for general distribution to all cases coming within its purview.

While the law requires all commutations made by the board to be upon the basis of the survivorship annuitants' table of mortality, it is not required to make commutation in any case. Supposing a case of imminent death and commutation notwithstanding, an unjust and oppressive result would follow. The present case was said to present a situation comparable to that in the assumed case.

This claimant, under the expert proof given, will not live more than eight years. Yet the award in his favor has been commuted on a basis of a life expectancy which is perhaps more than double that number of years. We think that the industrial board did not properly exercise its discretion herein, and that the award should not be permitted to stand.

The award was reversed and the claim remitted.

WORKMEN'S COMPENSATION—AWARD—COMMUTATION—JURISDICTION OF COURTS—CONSTRUCTION OF STATUTE—*Edwards* v. *Doster-Northington Drug Co., Supreme Court of Alabama (May 27, 1926), 108*

Southern Reporter, page 862.—Fannie Edwards brought a writ of certiorari to have the judgment of the circuit court of Jefferson County reviewed. Under the provisions of the workmen's compensation act, she had been awarded compensation for the death of her husband by the circuit court, which the defendant offered to pay in installments, but she demanded that the award be paid in a lump sum. The trial court refused to accede to the plaintiff's demand, holding that, in the absence of an agreement between the parties, it had no jurisdiction to order a lump-sum payment in lieu of installments to fall due.

Section 7573 of the Code of 1923 provides for lump-sum settlements under the workmen's compensation act substantially as follows: The amounts of compensation payable periodically thereunder, either by agreement of the parties approved by the court or by decisions of the court, may be commuted to one or more lump-sum payments, except compensation due for death, etc. This may be commuted only with the consent of the circuit court. Of this the circuit court said:

> The act permits commutation only when the court consents. The use of the word "consent" implies the presentation of an agreed stipulation or order. It negatives the idea of * * * initiatory action on the part of the court.

Numerous cases were cited holding in general that the act should be liberally construed. It was insisted that the circumstances in this case were unusual in that the plaintiff was more than 60 years of age, infirm, and somewhat melancholy; that the weekly payments would be suggestions of her sorrow and would serve greatly to depress her and work harm to her physically; and that a lump-sum payment would enable her to make an investment that would be more valuable in a financial way than periodical payments.

The supreme court, on review of the case, held that the statute was liberally construed to effectuate its general purpose and design, and quoted from the language used in the workmen's compensation act of New Jersey, as being applicable here, as follows:

> It is the intention of this act that the compensation payments are in lieu of wages, and are to be received by the injured employee or his dependents in the same manner in which wages are ordinarily paid.

The court concluded its opinion by saying:

> The idea seems to be to provide for the continuance for a time of the ordinary means of support and to protect the rights of dependents who are inexperienced in business matters and unable to protect themselves. At any rate, the statute in plain language requires that compensation in cases like this may be commuted only upon the agreement of the parties, which agreement must have the approval of the court. So then, whatever impression the peculiar

merits of appellant's claim for compensation may have made upon the trial court, that court correctly ruled that it had no jurisdiction to order a lump-sum settlement in the absence of agreement by the defendant.

The judgment was therefore affirmed.

WORKMEN'S COMPENSATION—AWARD—DEATH OF BENEFICIARY—SUBSEQUENT AND VESTED RIGHTS—*Sea Gull Specialty Co. et al.* v. *Snyder, Court of Appeals of Maryland (June 11, 1926), 134 Atlantic Reporter, page 133.*—The construction of the compensation law of Maryland was involved in a case where an injured workman died as a result of injuries after having received compensation for 87 weeks in the sum of $1,566.

The law provides that a widow, who is the sole dependent of an injured employee whose death occurred within three years from the date of his injury, shall be entitled to 66⅔ per cent of his average weekly wages, not to exceed $18 per week nor to be less than $8 per week, said compensation to continue for the remainder of the period between the death of the injured employee and 416 weeks from the date of the injury, but in no event to exceed $5,000 nor to be less than $1,000. Following the death of the workman, his widow filed her claim with the industrial accident commission, which ordered that she be paid compensation at the rate of $18 per week for a period of 277⅞ weeks, amounting to a total of $5,000, in addition to the usual allowances for funeral expenses. The employer and insurer appealed from the order to the superior court of Baltimore City, praying that the court modify the order of the commission by limiting the period of compensation payments to 190⅞ weeks. The prayer was refused and the order appealed from affirmed. From that decision the defendants again appealed, contending that the $1,566 awarded and paid to the deceased in his lifetime should be deducted from the maximum amount that might be awarded to his widow. The court held that it was clear that the legislature created two separate and distinct classes of persons to whom compensation might be awarded: (1) The injured employee, and (2), in case of his death within three years, his dependents. The court held that the second of these classes is in no wise made dependent upon compensation having already been awarded to the injured party.

Judge Diggs, speaking for the court, then said in part:

After a careful examination of the entire statute, we are unable to find language which could lead us to the conclusion that the legislative intent was to make the limit of liability for one injury $5,000, and require us to deduct from what under the law would otherwise be awarded to the widow such an amount as had been paid to the injured party before his death.

Entertaining the views herein expressed, we find no error in the action of the lower court in refusing the prayer of the appellants, and the judgment must be affirmed.

In line with the foregoing is a decision by the Supreme Judicial Court of Maine in a case in which a workman died as the result of an injury which caused total disability, for which he had received compensation for some 15 months before his death. The insurer contended that the payments to the deceased should be deducted from those made the widow under the then existing limitation of $3,500 for a death benefit. The court held that the two benefits were independent and that payments made to the employee could not be deducted from the award to the widow, and affirmed the finding below. (Nickerson's Case (1926), 133 Atl. 161.)

The Court of Civil Appeals of Texas held that where parents had been awarded benefits under the compensation law of that State, the death of the father during litigation to set aside the award did not disturb the mother's right to one-half the benefits, and that the father had an interest which vested on his death, passing in this instance to the widow by will of the deceased husband and father. (Texas Employers' Insurance Assn. *v.* McDonnell (1925), 278 S. W. 294.)

Under the law of Rhode Island, death benefits continue 300 weeks after the date of the fatal injury. Where a widow was awarded benefits and died during the term of 300 weeks, the award was transferred to her two dependent sons. One of them died before the period expired, and payment as to him was terminated, the survivor continuing to receive the portion allotted to him on his mother's death. He subsequently made claim to the full portion, including the allowance to the deceased brother. This the supreme court of the State sustained, saying that the amount to be paid dependents was fixed by the statute, and was the same whether they be many or one, so that the lapse of the right of one for whatever reason would increase the amount payable to survivors during the compensation period. (Gallagher *v.* United Electric Rys. Co. (1926), 134 Atl. 8.)

Where a workman suffered an injury for which compensation was awarded on the basis of a permanent partial disability, the Supreme Court of Wisconsin held that his death from a later compensable accident occurring during the benefit term left to the widow a right to the unpaid portions of the disability award. (Klug & Smith Co. *v.* Kreiner (1925), 206 N. W. 53.) No question of the death benefit was involved in this proceeding, but the employer contested the widow's claim on the ground that Kreiner had been guilty of perjury and fraudulent concealment of facts in applying for the disability benefit. The court held that the question of Kreiner's disability or otherwise was not before the court, but only the disposition under the law of the unpaid balance of the award, which properly belonged to the widow.

WORKMEN'S COMPENSATION—AWARD—FACTORY REGULATIONS—VIOLATION—PENALTY—*Cream City Foundry Co.* v. *Industrial Commission, Supreme Court of Wisconsin (January 12, 1926), 206 Northwestern Reporter, page 875.*—The State of Wisconsin has a law which provides that the State industrial commission may grant 15 per cent increase in an award where the death of an employee is proximately caused by failure of the employer to comply with the provisions of that law. In the instant case an award was made to the widow of one Felix Czajkowska, who met his death while in the employ of the Cream City Foundry Co. as a fireman, presumably from electric

shock from a brass shell socket on an electric-light extension cord which was in his hand when his body was found. The award was paid, and thereafter the commission found that the death of Czajkowska was proximately caused by the failure of the company to comply with certain orders promulgated under the statute and made an award of 15 per cent increase in the death benefit, which was affirmed by the circuit court of Dane County. The company appealed. Justice Owen, speaking for the supreme court, in reversing the judgment, said in part:

It appears without dispute that every department of the employer's plant was equipped with a portable electric light complying in every respect with the order under consideration. A portable electric light was provided for the boiler room. Modlinski [the engineer] had instructed Czajkowska that whenever he had occasion to use a portable light, to use the one which was kept in the compressor room. Some time prior to the date of Czajkowska's death Modlinski had had occasion to use an electric drill requiring an extension cord of about 30 feet. The drill had an extension cord of only 5 feet. He rigged up a temporary cord for use on this particular job, and after he was through using the cord he put it in a tool box and locked it up. It appears that Czajkowska had access to this tool box and was privileged to use tools therein contained as necessity therefor arose in the prosecution of his duties. Having occasion to use an extension light, he evidently took this cord from the box, attached thereto an electric light bulb, and was using the same at the time of his death.

The cord locked in the tool box was not intended to be used in connection with the portable light, and it is not reasonable to lay upon an employer the duty of specifically instructing employees with respect to every conceivable device which their ingenuity may enable them to rig up and use for purposes for which the same is not intended. To require the employer to negative the use of every other device is to demand an anticipation as fertile and prolific as human ingenuity, and lays upon the employer a well-nigh impossible burden.

The judgment was therefore reversed, and the award directed set aside.

WORKMEN'S COMPENSATION—AWARD—PENALTY FOR NONPAYMENT—ENFORCEMENT—CONSTITUTIONALITY OF STATUTE—*Robinson* v. *State ex rel. Taylor, Supreme Court of Oklahoma (December 22, 1925), 244 Pacific Reporter, page 44.*—The Industrial Commission of Oklahoma granted an award to one Basil D. McClain for injuries received by him on or about February 18, 1920, while employed by E. L. Robinson. The award was affirmed on appeal to the supreme court of the State. At the same time awards were made to Dr. Ralph V. Smith and the Oklahoma hospital for treatment and care of McClain in the amounts of $5.40 and $311.95, respectively. The employer and his insurance carrier failed and refused to pay the amounts so awarded, and on October 2, 1922, the State industrial

commission commenced an action, in the name of the State of Oklahoma, in the district court of Tulsa County to enforce payment of the items of the award, and for 50 per cent thereof in addition, as is provided in section 7300 of the Compiled Statutes of 1921.

The defendants demurred to the plaintiff's petition upon the following grounds: (1) That the court had no jurisdiction of the defendants or of the subject matter; (2) that the plaintiff had no legal capacity to sue upon the subject matter; (3) that there was a defect of parties plaintiff; (4) that several causes of action were improperly joined; and (5) that the petition did not state facts sufficient to constitute a cause of action against the defendant. The demurrer was overruled and defendants excepted and stood upon the demurrer. From judgment for the plaintiff the defendants appealed to the Supreme Court of Oklahoma for review. The court, after discussing at some length the points taken in the defendants' demurrer, said in part:

> Since the legislature of 1923 saw fit to amend section 7300, supra [Laws of 1923, ch. 61, sec. 9], so as to entirely change the procedure for enforcing awards of the State industrial commission, we think it unnecessary to discuss at any great length the effect of striking down the said section, or striking down the penalty clause therein contained, further than to say that, without the provisions of the said section, including the penalty clause, as the act existed prior to the amendment, there was no effective means of enforcing the award in a case where the employer and insurance carrier ignored it, or refused to comply with it.
>
> The penalty clause was the very teeth of the act, and no doubt went far in getting prompt compliance with the orders of the commission, or prompt prosecution of an original action for review. We think that, unless the penalty clause invaded some constitutional right of the defendants, it should be held valid.

In support of the foregoing the court cited the case of DeWitt *v.* State (108 Ohio St. 513, 141 N. E. 551; see Bul. No. 391, p. 434), and numerous other cases in various States wherein the penalty provisions of workmen's compensation laws have been upheld.

The opinion continued:

> A study of the cases cited leads to the conclusion that the penalty clause in section 7300, supra, did not contravene any constitutional right of the defendants. The enforcement of the penalty clause in a proper case constituted due process of law. Its enforcement tends to give, rather than take from, the parties, equal protection of the law. We unhesitatingly say that the act in its entirety, or section 7300, supra, in particular, before the amendment, was not special or local legislation. It seems to have been most general in its character and coextensive with the State. The penalty clause is constitutional and valid, and should be given effect in a proper case.

The judgment of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION—AWARD—PENALTY FOR WILLFUL MISCONDUCT OF EMPLOYER—REPRESENTATION—CONSTRUCTION OF STATUTE—*Gordon* v. *Industrial Accident Commission, Supreme Court of California (September 30, 1926), 249 Pacific Reporter, page 849.*—A workman by the name of Findley was employed by Thomas Gordon and others, doing business as Gordon & Harrison, to work in their gravel pit. While in the course of his employment the bank where he was working caved in on him and injured him to such an extent that he died soon thereafter. The industrial accident commission made an award in favor of the deceased employee's widow and minor children and against the insurer in the total sum of $5,000 and a further award in favor of said dependents and against the individual members of the copartnership in a total sum of $2,500 for the willful misconduct of a managing representative of the firm. The authority of the commission to award additional compensation is contained in section (b) of the Statutes of 1917, as amended by Statutes of 1919, and Statutes of 1923, as follows:

* * * Where the employee is injured by reason of the serious and willful misconduct of the employer, or his managing representative, or if the employer be a partnership, on the part of one of the partners (or a managing representative or general superintendent thereof), or if a corporation, on the part of an executive or managing officer or general superintendent thereof, the amount of compensation otherwise recoverable for injury or death, as hereinafter provided, shall be increas d one-half, any of the provisions of this act as to maximum payments or otherwise to the contrary notwithstanding; provided, however, that said increase of award shall in no event exceed $2,500.

The defendants, Gordon, Harrison, and Russell, brought proceedings to review the order of the commission. The principal objection raised to the award was that the commission acted in excess of its powers when it made the award of $2,500 against the individual members of the copartnership.

It appeared from the evidence that Russell, one of the partners, had charge of the production end of the business and that a Mr. Cobb was managing representative. Walter J. Schienle, appointed foreman by Cobb, had complete charge of the gravel pit where Findley was killed. The district court held that under the terms of the statute the serious and willful misconduct of the foreman did not bind the individual members of the firm, as he was neither managing representative nor general superintendent. It therefore annulled the award of $2,500 and affirmed that of $5,000 (249 Pac. 844). The case came up to the supreme court by transfer, on petition of the commission. The court, after reviewing all phases of the case before it, said in part:

Schienle had full charge of the work of excavating the gravel out of the pit where the accident occurred. At times he was visited by

both Russell and Cobb, who came to see how the work was getting along and often gave him instructions or suggestions as to the manner of operation of the plant. At all other times, however, he was in full charge and control of the operations, exercising his own discretionary powers as to the operation of the cable and the bucket and as to the time, place, and circumstances under which the work of blasting the rock and sides of the pit was carried on. On the morning of the accident neither of his superior officers had been at the pit, and Schienle had been in full charge and control of the work, and he alone gave the orders to the workmen which resulted in the accident. Under such circumstances, we are satisfied the evidence fully justifies the finding of the respondent commission that Schienle was a "managing representative," as that term is used in the workmen's compensation act.

The order of the commission granting the increased award was therefore affirmed.

WORKMEN'S COMPENSATION—AWARD—PERMANENT PARTIAL DISABILITY—ABILITY TO WORK—EVIDENCE—*St. Louis & O'Fallon Coal Co.* v. *Industrial Commission, Supreme Court of Illinois (April 23, 1926), 151 Northeastern Reporter, page 606.*—James McManemy proceeded under the workmen's compensation act for an award for injuries he was alleged to have suffered while in the employ of the St. Louis & O'Fallon Coal Co. on October 27, 1922. He testified before the arbitrator that on the day in question he was engaged in lifting an electric cutting machine when the bar he was using for a lever slipped and let the weight of the machine down suddenly upon it, and consequently upon his hands and arms, and caused a shooting pain in the lower part of his back; that he went home and consulted a physician who gave him first-aid treatment; that he was under treatment for about four months; that he had his tonsils removed in August, 1923, and seven teeth extracted in January following; and that he did not return to work because he could not lift anything. The arbitrator awarded him $17 per week for 250 weeks and a pension of $28.83 per month for life.

On review by the industrial commission additional testimony was heard. Dr. A. B. McQuillan, a specialist in orthopedic surgery, who examined McManemy on January 23, 1923, and again on September 3, 1923, testified that on the first examination he had bad teeth and gums and bad tonsils, but that pressure disclosed no tenderness in the spine or vertebrae and there were no muscular spasms and no evidence of injury which would account for the pain complained of. He exhibited X-ray pictures taken by Doctor Young, a Röntgenologist, which showed that a small linear fracture of the lamina of the fifth lumbar vertebra had perfectly healed. On cross-examination McManemy admitted that he had worked at several physical labor jobs subsequent to his alleged injury. On this hearing the industrial

commission set aside the award of the arbitrator and ordered the employer to pay McManemy $17 per week for 49 weeks and thereafter $7.05 for 368 weeks. The circuit court affirmed that award and the company brought a writ of error. It was argued that the evidence did not establish permanent partial disability, and that it furnished no proper or legitimate basis for the amount of the award made by the commission. The court, on review of the evidence, said in part:

The applicant claims that his disability is permanent. His only complaint is that he suffers from pain in his back. No evidence of any character other than his own testimony was adduced in his behalf. The only expert testimony was offered by the plaintiff in error, and it was to the effect that the small linear fracture of the lamina of the fifth lumbar vertebra shown by the X-ray pictures had healed; that there was no evidence of any injury to which the pain of which the applicant complained could be ascribed; that it was not the result of the strain, caused by the slipping of the bar, but of focal infection, and that the pain would gradually disappear after the infection had been removed. Moreover, on cross-examination the applicant reluctantly admitted that immediately prior to the hearing before the commission he had leveled a place with a rake, had handled empty chicken crates for a commission house, had loaded and hauled lumber, and had shoveled dirt, and assisted in operating an air machine for a public utility company in laying underground cables in a street. These employments, though brief, show that the applicant was able to perform physical labor, and that his statement, on direct examination before the commission, that he had been unable to work and had not worked since the arbitrator's hearing is entitled to little credence. The evidence fails to sustain applicant's claim that the accident permanently disabled him to perform his usual and customary work. Before a claimant can recover compensation he must prove by a preponderance of competent evidence all the facts necessary to justify an award.

The judgment was reversed and the cause remanded to the circuit court of St. Clair County, with directions to set aside the award and to remand the cause to the industrial commission for a further hearing on any competent testimony offered by either party.

The same court, on the same day, rendered another opinion involving similar facts and results. An employee of a coal company had been awarded benefits as for permanent total disability, but subsequently took employment at which he earned from $21 to $25 per week, as against an average of $32.22 weekly while working for the coal company. The industrial commission held that the disability had not decreased, and refused to modify the award made, the circuit court sustaining this position. The supreme court of the State found that there was a change as shown by the employment, even though at a reduced rate, and reversed the court and commission with directions to the latter to review its award. (Superior Coal Co. *v.* Industrial Commission (1926), 151 N. E. 890.)

In a case before the Court of Civil Appeals of Texas the question was raised as to compensating permanent partial disability where the injured man was given lighter employment by his employer, but at the same wages as before the injury.

The point was said to be a novel one in the State, and the conclusion was reached that the law intended compensation for the injury, regardless of the amount of wages paid on return to work. "The fact that the injured employee may obtain temporary employment at the same or greater wages is not conclusive that his disability has ceased or that he is not disabled." (Dohman *v.* Texas Employers' Insurance Assn. (1926), 285 S. W. 848.)

WORKMEN'S COMPENSATION—AWARD—PERMANENT PARTIAL DISABILITY—DEGREE OF IMPAIRMENT—*Gross* v. *Hudson Reade Corporation, Supreme Court of New York, Appellate Division (March 3, 1926), 214 New York Supplement, page 449.*—This action was for a review of an award of the State industrial commission on the ground that it was excessive. Philip J. Gross, an employee of the Hudson Reade Corporation, while in the course of his employment had his left hand crushed and mangled, resulting in the amputation of the thumb at the distal joint, almost complete loss of the use of the thumb and index finger, partial loss of the middle finger, and impairment of the grasping power. Doctor Doyle expressed the opinion that the injuries were permanent and that the loss was equivalent to the loss of one-half of the hand. On this basis the commissioner made the award for 50 per cent loss of the hand. The defendants appealed from the award and contended that under section 15, subdivision 3, of the workmen's compensation law the award was excessive, in that under that section there must be a loss of two or more digits or one or more phalanges of two or more digits before an award for a proportionate loss of a hand can be made. The award was affirmed, the court saying in part:

We do not think this provision describes the only condition under which an award for a proportionate loss of use of the hand may be allowed. It refers to cases where the injury is limited to the fingers or thumb, and where portions thereof have been taken off by the accident or by amputation. In this case the hand itself was considerably lacerated. Not only has there been amputation of the distal phalanx of the thumb, but there is ankylosis of joints of the thumb and index finger. While the doctor does not describe particularly to what the loss of grasping power is due, a description of the injury discloses that it is not solely due to the loss of part of the thumb. There is an almost complete loss of use of the thumb and of the index finger, together with a partial loss of use of the middle finger. Section 15, subdivision 3–s, provides:

"Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member."

The hand is a member, and there has been a partial loss of use of the hand. The only evidence as to the percentage of loss of use is that given by Doctor Doyle.

The award was therefore affirmed, with costs to the State industrial board.

WORKMEN'S COMPENSATION—AWARD—RELEASE—REVIEW—CONSTRUCTION OF STATUTE—*United States Casualty Co. et al.* v. *Smith, Supreme Court of Georgia (April 15, 1926), 133 Southeastern Reporter, page 851.*—C. L. Smith, while in the course of his employment, suffered burns on the back of his neck by steam and was poisoned by ammonia gas. He made a claim for compensation for temporary total disability, and while his claim was pending he entered into a written agreement with his employer whereby the employer was to pay him $12 per week beginning September 5, 1921, and to continue such payments during his disability. The agreement was in accordance with the compensation law. There was a further stipulation that such other amounts as might be determined from the nature, extent, and result of the injury therein described would be paid. On December 29, 1921, the employee signed a settlement receipt, which was approved by the commission. On August 18, 1923, he applied to the commission to review its former award and to grant him additional compensation for the loss of an arm which was amputated on July 4, 1922, and which he alleged was brought about by the disease of blastomycosis caused by a vegetable germ entering his body through a break in the skin due to the burns. A review of the case was opposed by the employer and the insurer, who set up as a defense the release signed by the employee. They also contended that a review was barred by section 25 of the workmen's compensation act.

The commission on review found for the employee, and its finding was affirmed by the court of appeals. The employer and insurer brought certiorari for a review of the order of the commission and the judgment of the appellate court.

Section 25 of the act relied upon by the defendants declares that—

> The right to compensation under this act shall be forever barred, unless a claim be filed with the industrial commission within one year after the accident and if death results from the accident, unless a claim therefor is filed with the commission within one year thereafter.

The court of appeals in its opinion held that a proceeding for review brought by an employee to review an award or settlement under section 45 of that act was not limited by section 25.

Section 45 of the act provides that—

> Upon its own motion before judicial determination or upon the application of any party in interest on the ground of a change in condition, the industrial commission may at any time review any award or any settlement made between the parties and filed with the commission, and, on such review, may make an award ending, diminishing, or increasing the compensation previously awarded or agreed upon, subject to the maximum or minimum provided in this act. * * * No such review shall affect such award as regards any moneys paid.

The court in affirming the judgment of the court of appeals said in part:

Section 45 of this act expressly provides for compensation in a case where there has been a change in the condition of the employee, and this necessarily extends the jurisdiction of the commission to review a settlement agreement or its original award. In the settlement agreement between the employer and the employee the parties agreed to receive and to pay compensation and such other amounts as might be determined to be due the employees by the nature, extent, duration, and result of the injury described in the original claim, and this agreement was approved by the commission and merged in its award. In reviewing its original award the commission was proceeding strictly in compliance with the lines left open by express reservation in the original award.

In concluding its opinion the court said:

The question which has given us most trouble is whether the above finding of the court of appeals is supported by the evidence. The commissioner, the full commission, the judge of the superior court, and the court of appeals have all found that there was evidence authorizing the finding that the employee suffered from blastomycosis, which resulted naturally and unavoidably from the original injury sustained by the employee, and after a careful examination of the evidence we cannot say that this finding of these tribunals, who are specially charged by law with the ascertainment of the facts in cases of this kind, is wholly without evidence to support it.

The judgment was therefore affirmed.

Where a workman fell, suffering injuries for which he signed a release for the sum of $120, but afterward developed serious disability from the same cause, an award was affirmed by the Supreme Court of Kansas, the court saying: "The evidence is ample to show a mutual mistake by plaintiff and physicians of the defendant, and it is not contended but that $120 was a grossly inadequate amount for such an injury." (Brown *v.* Kansas Buff Brick & Mfg. Co. (1926), 243 Pac. 304.)

WORKMEN'S COMPENSATION—AWARD—REMARRIAGE OF WIDOW—EFFECT OF VOID MARRIAGE—*Gulf States Steel Co.* v. *Witherspoon, Supreme Court of Alabama (May 27, 1926), 108 Southern Reporter, page 573.*—Cornelia Witherspoon brought an action under the workmen's compensation act of the State in the circuit court of Jefferson County, and recovered judgment for the death of her husband. From that judgment the defendants brought certiorari to have the proceedings reviewed by the Supreme Court of Alabama. It was alleged by the defendants that since the award to the plaintiff she had married one Rowe, and that under section 7564 of the code her compensation should cease. The court on review of the case found that her marriage to Rowe was void because he was under disability to contract marriage, and that her relation with him had been discontinued. It held that as she had no one on whom she could

lawfully depend for support, the decree to continue in the receipt of the compensation allowed by the court was proper.

The judgment was therefore affirmed.

WORKMEN'S COMPENSATION—AWARD—REMARRIAGE OF WIDOW—EFFECT ON RIGHT OF CHILD—*Sumner Sollitt Co. v. Sheely, Appellate Court of Indiana (November 18, 1926), 153 Northeastern Reporter, page 894.*—Guy Sheely died July 6, 1920, as the result of an injury received while in the employ of the Sumner Sollit Co. He was survived by a wife and a daughter under 18 years of age.

Mrs. Sheely in her individual capacity and as guardian and the employer entered into an agreement whereby it was agreed that the widow and daughter should each receive $6.60 per week during dependency, not to exceed 300 weeks. This agreement was approved by the industrial board. On July 20, 1921, the widow remarried, and soon thereafter the board ordered that payments to her cease. The employer thereafter continued to pay compensation at the rate of $6.60 to the minor child. In July, 1925, and before the minor child reached the age of 18, her guardian filed an application with the industrial board asking that the defendant be ordered to pay the whole of the $13.20 per week to the said child from and after the date when the mother remarried. The application was opposed by the defendant. It set up the fact that no appeal was taken from the order of the board terminating the award to the widow, and alleged that the present application was barred by the time limitation fixed in the workmen's compensation act. (Burns' Ann. St. 1926, secs. 9446–9524.)

The board ordered the defendant to pay compensation to the guardian of the minor child at the rate of $13.20 per week from and after the marriage of the mother until the child became 18, credit to be given for the $6.60 theretofore paid. Defendant appealed.

The court, in affirming the award, said in part:

Neither the guardian nor the minor child was before the industrial board when the order was made terminating payment of compensation to the widow. That order was a matter affecting the widow in her individual capacity. Neither the guardian nor the minor child was required to appeal, from the order terminating payment of compensation to the widow, in order not to release appellants from their liability to pay the whole of the compensation to such child. Neither were they required to file an application for a modification of the order within a year from the marriage of the widow. The fact that a guardian had been appointed for the minor did not affect the right of the child to have the whole of the compensation paid to her under the application filed herein by the guardian.

Another phase of the question of the rights of beneficiaries remaining after the marriage of the widow arose under the law of New York, passed upon by the supreme court, appellate division. The compensation law of New York gives

to a widow on remarriage a lump sum equal to two years' benefits. Payment of this allowance was made, her allowance being 30 per cent of her deceased husband's earnings. Two children were then allowed 15 per cent each, and a dependent mother 25 per cent, making a total of 85 per cent. This award was protested as exceeding the 66⅔ per cent maximum fixed by the law. The award was reversed, the computation of benefits being reduced for the two years affected by the widow's lump-sum payment, the mother receiving but 6⅔ per cent, her rights being subsequent to those of the widow and children. (Ziegler *v.* Pictorial Review Co. (1926), 215 N. Y. Supp. 513.)

WORKMEN'S COMPENSATION — AWARD — REVIEW — CONCLUSIVENESS OF COMMISSION'S FINDINGS — CONSTITUTIONALITY OF STATUTE — *Booth Fisheries Co.* v. *Industrial Commission of Wisconsin, United States Supreme Court (May 24, 1926), 46 Supreme Court Reporter, page 491.*—The Industrial Commission of Wisconsin made an award to Mary McLaughlin for the death of her husband, alleged to have been due to personal injuries sustained while in the employ of the Booth Fisheries Co. On appeal, both the circuit and the supreme court of the State affirmed the findings of the commission. The case came up to the Supreme Court of the United States on the constitutionality of the workmen's compensation act of Wisconsin in its limitation of the judicial review of the findings of fact of the industrial commission to cases in which the findings of fact by the commission do not support the order or award. The plaintiff in error contended that under the act he was entitled under the fourteenth amendment to submit to a court the question of the preponderance of evidence on the issues raised. Mr. Chief Justice Taft, who delivered the opinion of the court, said in part:

A complete answer to this claim is found in the elective or voluntary character of the Wisconsin compensation act. That act provides that every employer who has elected to do so shall become subject to the act, that such election shall be made by filing a written statement with the commission, which shall subject him to the terms of the law for a year until July 1st following and to successive terms of one year unless he withdraws. If the employer elects not to accept the provisions of the compensation act, he is not bound to respond in a proceeding before the industrial commission under the act, but may await a suit for damages for injuries or wrongful death by the person claiming recovery therefor, and make his defense at law before a court in which the issues of fact and law are to be tried by jury. In view of such an opportunity for choice, the employer who elects to accept the law may not complain that in the plan for assessing the employer's compensation for injury sustained, there is no particular form of judicial review. This is clearly settled by the decision of this court in Hawkins *v.* Bleakly (243 U. S. 210, 216, 37 Sup. Ct. 255 [Bul. No. 224, p. 243]).

Plaintiff in error relied chiefly on the case of Ohio Valley Water Co. *v.* Ben Avon Borough (253 U. S. 287, 40 Sup. Ct. 257). The court stated the facts in that case and the opinion continued:

But in that case the water company was denied opportunity to resort to a court to test the question of the confiscatory character of its rates and of its right to earn an adequate income. Here the employer was given an election to defend against a full court proceeding but accepted the alternative of the compensation act.

The judgment was therefore affirmed.

WORKMEN'S COMPENSATION—AWARD—REVIEW—JURISDICTION OF COMMISSION—RES JUDICATA—*Klum* v. *Lutes-Sinclair Co., Supreme Court of Michigan (October 4, 1926), 210 Northwestern Reporter, page 251.*—Philip Klum, a carpenter employed by the Lutes-Sinclair Co., was seriously injured by a fall on October 12, 1918. The commissioner awarded him compensation for temporary total disability for a period of 45 weeks and 4 days. He thereafter filed a petition for further compensation, and an award was made granting him payment for partial disability at the rate of $5 per week from August 28, 1919, to July 4, 1924. On October 31, 1924, he petitioned for additional compensation, alleging that his disability had become total. The commissioner found that there had been a change for the worse in the plantiff's condition and awarded him compensation for total disabilty from July 18, 1924, "the end of 300 weeks," at the rate of $10 per week during a period not to exceed the limit fixed by statute (500 weeks).

The defendants brought certiorari. Their claim was that the commission was without jurisdiction to award compensation beyond the expiration of the 300 weeks awarded by a previous order not appealed from and therefore res judicata; that there was no testimony to support the finding of the commission that the plaintiff had on July 18, 1924, been totally disabled as a result of the accident, and that the evidence did not support its finding that there was a physical change in the plantiff's condition for the worse since that date.

The award was affirmed by the court, which, speaking through Judge Steere, said in part:

Conceding that the deputy commissioner's unappealed-from order of July 14, 1923, was res judicata as to all the essentials leading up to that award, plaintiff's physical condition yet remained open to subsequent inquiry under the provisions of the act (2 Comp. Laws 1915, sec. 5467) authorizing the industrial accident board (now commission of the department of labor and industry) on application of either party to review any weekly payment, "and on such review it may be ended, diminished, or increased, subject to the maximum and minimum amounts above provided, if the board finds that the facts warrant such action."

As heretofore more than once pointed out by this court, at a hearing by the commission of a petition for review of an award under section 5467, all essentials leading up to that award are to be taken as res

judicata, except the physical condition of the injured petitioner imputable to the accident. If there is no competent proof that it has changed since the award, the commission is powerless to act. If there is evidence of a change either for better or worse, the commission may then increase, decrease, or end the award as it finds the facts to be. This court can only review and reverse its findings of fact if the record is destitute of any evidence to support them.

The res judicata award of July 14, 1923, found plantiff but partially incapacitated, and fixed his compensation accordingly to the exclusion of further inquiry up to that time. The commission in this inquiry had ample evidence of a change from that condition and to support its finding of total incapacity traceable to the accident.

WORKMEN'S COMPENSATION—AWARD—TEMPORARY TOTAL DISABILITY—PERMANENT PARTIAL DISABILITY—*Texas Employers' Ins. Assn.* v. *Moreno, Commission of Appeals of Texas (November 4, 1925), 277 Southwestern Reporter, page 84.*—Bartelo Moreno received an injury in an accident arising out of his employment. He presented a claim to the industrial accident board, but, being dissatisfied with the award, filed a suit to set it aside and recover adequate judgment. The district court awarded the plaintiff a judgment for the lump-sum value of 200 weeks at $8.65 and a like value of 200 weeks at $4.32 a week. The jury found that Moreno was totally disabled for 200 weeks and that he suffered a permanent 50 per cent disability in the use of his arm. The court of civil appeals, upon appeal, reformed the judgment and provided that Moreno should recover "compensation for 200 weeks at $8.65 a week and for 200 weeks thereafter at the rate of $4.32 a week." Against this change in the judgment Moreno did not complain. The insurance association, however, applied for a writ of error and obtained it upon the statement that the sole basis for the verdict of the jury was an injury to Moreno's arm, and that the court had allowed a larger recovery for a partial injury than the employee could have recovered for the complete loss of his arm.

The commission of appeals on reviewing the record observed that the findings of fact of the district court and the court of civil appeals as to the conflicting testimony were binding upon the supreme court. If there be any evidence to sustain the finding, the function of the jury is to decide the facts and the supreme court will not overrule its finding.

Judge Powell, speaking for the commission of appeals, said:

The main purpose of legislation of this kind is to compensate a man while unable to work. Sections 10 and 11 were written for that purpose. But certain injuries were so serious and their permanency so easily established that the lawmakers decided to allow definite recovery for those injuries, regardless of other circumstances. At

the same time they clearly showed their intention not to permit that action to deprive an employee of his rights under sections 10 and 11.

We have a judgment under section 10 for 200 weeks because of total inability to work, due to other injuries. Then we have also a recovery for 200 weeks under the last paragraph of section 12 for partial loss of usefulness of the arm. Under the verdict of the jury this latter recovery could have been for 300 weeks instead of 200 weeks. But the court evidently limited it to 200 weeks so that the entire recovery for both kinds of incapacity would not be more than 401 weeks, as provided at the end of section 11.

We think this recovery proper and within the statute. There has been no effort here to recover for partial incapacity for work under section 11. It is not necessary for us to decide whether or not one could recover under that section and also for partial incapacity under the last paragraph of section 12. But we think they could not.

Section 10 of the employers' liability act provides compensation for total disability resulting from injuries not specified in section 12, which provides compensation for specific injuries, and it was held by the commission of appeals that allowance of compensation under section 10, and not specified in section 12, did not preclude an allowance under the last section for the partial incapacity due to partial loss of usefulness of the arm. Section 12 contains no provision that recovery should be "in lieu of" any other recovery. Under this construction of the act, it was thought that no double recovery was anywhere allowed.

It was recommended that the judgment of the court of civil appeals be affirmed and the judgment was so affirmed and entered by the supreme court.

The construction of the compensation act of Tennessee was before the supreme court of that State in respect to quite a similar case. Here, a workman suffered injuries to his leg and ankle, causing total disability, followed by permanent partial disability. From an award for the two successive injuries the employer appealed, but the court sustained the award, saying that the injuries were not concurrent, though having a common cause, "at first total and reduced through healing to a permanent partial disability," for which distinct provisions are made by the statute. An award of $12 per week for 36 weeks, followed by one for $3.90 for 139 weeks was therefore affirmed. (Cherokee Sand Co. *v.* Green (1925), 277 S. W. 905.)

WORKMEN'S COMPENSATION—AWARD—UNCOORDINATED VISION—LOSS OF SIGHT—*Suggs* v. *Ternstedt Mfg. Co., Supreme Court of Michigan (December 22, 1925), 206 Northwestern Reporter, page 490.*—Andrew Suggs was employed by the Ternstedt Manufacturing Co., and while in the course of his employment received an injury to his right eye which resulted in reducing its vision to one-sixtieth of the former power, though with lenses the injured eye was normal as to visual capacity, but would not coordinate with the uninjured eye. Doctor Campbell, an eye specialist, stated that the vision of the eye

could not be utilized in correlation with the uninjured eye and that industrially he had lost the vision of it. An award for the loss of an eye was granted by the commission, and the defendant brought certiorari to have the facts reviewed. In affirming the action of the commission, the court cited decisions of the Illinois and New York courts, and concluded:

The weight of authority sustains the findings of the commission, and we are persuaded that the reasoning of the majority cases is fundamentally sound.

Quite similar circumstances were involved in a case before the Superior Court of Delaware in which the workman lost 80 per cent of the vision of an eye, but with the use of a corrective lens only 10 per cent was found to be lost. From an award for the 80 per cent loss the employer appealed. The court held that the matter to be compensated for was the loss of vision due to the injury which it declared to be 80 per cent. The use of mechanisms might "allow a member to function with entire normality, yet it can not obliterate the effect of the accident causing the injury." (Alessandro Petrillo Co. *v.* Marioni (1925), 131 Atl. 164.)

Another aspect of the question of loss of vision was before the Supreme Judicial Court of Maine in a case in which there was a destruction of all effective vision in an eye that had been, prior to the injury, but 64 per cent normal. From an award as for the loss of an eye the insurance carrier appealed, the appeal resulting in a finding that the workman had lost a serviceable member, even though impaired, and that he was entitled to compensation as awarded by the commission. (Borello's Case (1926), 134 Atl. 374.)

WORKMEN'S COMPENSATION—AWARD TO MINOR—JURISDICTION OF INDUSTRIAL ACCIDENT BOARD—ACCORD AND SATISFACTION—SUIT BY FATHER—CONSTITUTIONALITY OF STATUTE—*Keller* v. *Texas Employers' Ins. Assn., Court of Civil Appeals of Texas (January 12, 1926), 279 Southwestern Reporter, page 1113.*—J. M. Keller, a minor, aged 19, while employed by the River Oil Co. on or about June 14, 1922, received an injury to his right leg which necessitated its amputation. Liability was admitted by the insurance carrier. It was agreed by and between Keller and the insurance carrier that it would pay him in a lump sum in full settlement of his claim the sum of $1,789.73, which was approved by the industrial accident board under authority of article 5246–31, Compiled Texas Statutes, 1920. The money was paid and receipted for. No notice was given by Keller nor by anyone acting for him that he would not abide by the award and the decree of the board, nor was there any suit brought to set same aside; neither was there any motion made to the board for a review of the order or to reopen the same for any purpose. The settlement was approved October 10, 1922, and on June 27, 1923, R. O. Keller, father of J. M. Keller, filed suit as next friend of J. M. Keller, to recover the sum awarded to J. M. Keller

by the board together with 12 per cent penalty and attorneys' fees in the sum of $500. He alleged that the defendant had not paid the amount of the award to any person authorized by law to receive it. There was judgment for the defendant and the plaintiff brought error. It was contended that the industrial accident board was without power to authorize a settlement of compensation due Keller by authorizing the money to be paid direct to him, and therefore the payment of compensation as made did not discharge the obligation of the insurance company, and that such action on the part of the board was in violation of article 3, section 56, of the constitution, forbidding the legislature to pass any special law affecting the estates of minors, etc., and article 5, section 16, providing what courts shall have jurisdiction of such estates.

The court, in affirming the judgment of the lower court, said in part:

While the industrial board is not a court, yet it is an administrative board, created by the State to administer the workmen's compensation act in the first instance, and is clothed with all necessary powers to hear and determine the matters coming before it; therefore it has authority to investigate matters for determination and has jurisdiction over the persons and subject matter involved. Its decrees are in the nature of judgments, and therefore the board, in the investigations and decisions it is called upon to make, exercises both administrative and judicial functions. This being true, its orders and judgments, when not appealed from, or rather which have not been set aside in the manner provided in said act (art. 8307, sec. 5, Revised Civil Statutes, 1925, old art. 5246–44), become final and binding upon all parties thereto, and can not be collaterally attacked.

We do not think that plaintiff in error's contention in either instance should be sustained. (1) The statute (art. 8306, par. 13, Revised Civil Statutes, 1925, old art. 5246–31) is in no sense a special law. Technically, a special law is a law which applies to an individual or individuals, or to some individuals of a class, and not to all of a class. The statute in question relates to a class of persons, minors, and not to individuals of that class. (2) The statute (art. 5235–31) was not enacted for the purpose of affecting the estates of minors in the sense in which they are mentioned in article 5, section 16, of the constitution, but was enacted for the purpose of giving minors entitled to compensation under the law the right, by and with the approval of the industrial accident board, to receive directly the compensation due them for an injury, and therefore is not in conflict with section 16 of article 5 of the constitution. The award of compensation to the minor, J. M. Keller, and its payment made to him direct, under authority and sanction of the board, was not a probate proceeding, nor the transaction of any business growing out of an administration of his estate, within the meaning of article 5, section 16, of the constitution.

The judgment of the court below was accordingly affirmed.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—AVERAGE WEEKLY WAGE—*Flynn* v. *Carson et al., Supreme Court of Idaho (February 2, 1926), 243 Pacific Reporter, page 818.*—Dorothy Flynn proceeded under the workmen's compensation law of Idaho for compensation on account of the death of her husband, who was killed February 2, 1924, while in the employ of the defendants, who operated a motor-bus line from Mullan to Wallace. The evidence showed that the deceased had been employed by the defendants as a regular driver of their busses up to and including January 27, 1924, and from that date until his death he was employed by them as an extra driver to make one or more trips each week, for which he was paid $1 per round trip. At the time he was killed he was on his way from Mullan to Wallace to bring back a bus for the defendants, when the one he was riding on left the road and he was instantly killed. The industrial accident board found that the average weekly wage of the deceased was $35, and awarded the plaintiff $12 per week for herself and infant daughter for a period of 400 weeks, with a proviso that should she remarry or die during such period the daughter should be entitled to 25 per cent of the average weekly earnings of the deceased, the sum of $8.75 per week, until she reached the age of 18 years.

The defendants appealed. Of the several assignments of error, only two are considered here: (1) It was contended that the employment of the deceased was casual and therefore excepted from the workmen's compensation law; and (2) that the evidence was insufficient to sustain the findings that the deceased's average wage was $35 per week or anything in excess of $1 per week.

The court, in granting a rehearing of the cause, said in part:

Appellants in their brief confuse the statute when they say that the exclusion is of those "who are casually employed." The exclusion is of the "casual employment," not necessarily the casual "employee"; not those "persons" but those "employments" are necessarily excluded which are "casual." C. S., sections 6213, 6216, 6217, 6221, and 6225, may be paraphrased thus: If a workman receives personal injury by accident arising out of and in the course of any employment in a trade or occupation which is carried on by the employer for the sake of pecuniary gain, and such employment is not casual employment, his employer or the surety shall pay compensation. C. S., section 6216, does not exclude persons, but employments.

The board was in error in its finding that the average weekly wages or earnings of the deceased during the year next preceding the injury were $35 per week. There is no proof of what his earnings were, with the exception that, for the time between December 16 and January 27 his pay seems to have been evidenced in two $50 checks. Counsel for respondent are in error when they contend that the claimant pleaded, and appellants admitted, that her deceased husband was earning $150 per month. The pleading was that he earned, from December 16 to February 2, $150, which was not proven.

It might not be grievous error if the award were simply $12 per week to the widow, on a basis of the maximum under C. S., section 6228; but the award goes further, and in case of the death or marriage of the widow, allows the infant child 25 per cent of a weekly wage of $35, $8.75, until she arrives at the age of 18 years. This, a substantial part of the award which might become vital and material, is based upon the wrong premise. What limited accounts of the defendant employers are in evidence show that neither the deceased nor regular or special drivers worked from December 16 on every day, which would be necessary to show an earning of $35 a week at $5 a day. In fact, $35 a week was the maximum that could have been earned, and to average this for a year the deceased would have had to work every day, which the proof discloses he did not, nor did others, either extra or regular drivers.

The judgment was reversed, and the cause remanded to the district court with directions to remit the cause to the industrial accident board for further proceedings to ascertain and determine the average weekly wages of deceased and enter an award accordingly. No costs were allowed.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—COURSE OF EMPLOYMENT—CONSTRUCTION OF INSURANCE POLICY—*Oilmen's Reciprocal Assn.* v. *Gilleland, Court of Civil Appeals of Texas (April 21, 1926), 285 Southwestern Reporter, page 648.*—Ed Gilleland was employed by the City Laundry Co. of Wichita Falls Tex., to wall with brick a pit 16 feet deep, which it intended to use in supplying water to its laundry plant, and on December 23, 1924, while he was so engaged, the side of the pit caved in, causing his immediate death. His father made application to the industrial accident board for compensation, which was denied. Appeal was taken to the district court of Wichita County, where judgment was rendered for the plaintiff at the rate of $20 per week for 360 weeks, and the insurer appealed. It was contended that the deceased was not an employee within the meaning of the law governing workmen's compensation cases.

This defines an employee in part as follows:

"Employee" shall mean every person in the service of another under any contract of hire, express or implied, oral or written, * * * except one whose employment is not in the usual course of trade, business, profession or occupation of his employer.

It appeared that the company held a policy of insurance insuring and indemnifying it against liability for injuries to its employees arising in the course of their employment.

The judgment of the district court was affirmed, the court speaking of the terms of the policy saying in part:

It will be observed that the terms of the policy did not limit the liability of the appellant to injuries suffered by an employee while he was working "in the usual course of trade, business, profession or

occupation of his employer," as is provided by the statute, but the liability arises under its terms if the injured party is an employee of the assured and is injured in the course of the workmen's employment.

The condition of the policy as set out in the above quotation from the statement of facts extends the liability of the insurer beyond that contemplated by the statute. The general rule seems to be that the subscriber and the insurer are not permitted to enter into such a contract of indemnity as will restrict the rights of an employee as they are declared by the compensation act. (In re Cox, 225 Mass. 220, 114 N. E. 281; see Bul. No. 224, p. 266.) But there is nothing in the Texas statute which forbids the indemnity company and the subscriber from broadening the scope of the contract so as to cover liabilities and parties not within the compensation act of Texas.

Since the terms of the policy clearly included all employees while in the performance of their duties without regard to whether they were employed in the usual course of the company's business, we deem it unnecessary to discuss the phase of the case presented by the statute.[1]

Quite similar circumstances, so far as the nature of the work was concerned, were involved in a case before the Appellate Court of Indiana, in which the claimant was engaged in constructing a toilet at a public garage. Over the representation by the employers that the work was casual within the meaning of that term as used in the law of Indiana, the industrial board allowed compensation, which action the court affirmed. Inasmuch as the toilet was for the use of the employer's employees and customers, and was reasonably necessary in the operation of a public garage, the employment was properly held to be in the "usual course" of the employer's business as the law intended. (Wagner et al. *v.* Wooley (1926), 152 N. E. 856.)

In a case decided by the Supreme Court of Wyoming the question was raised as to the status of a single act as constituting an occupation or business, as well as the nature of the employment. One Ocenas, a plasterer and mason, agreed to move a building under contract, and employed Frank Karos to assist. In the performance of the work Karos was injured and sought compensation.

Ocenas contended that the single act did not constitute an occupation but the courts held that the work was undertaken for gain, was an independent undertaking, not incidental to some other business, and that the employer was therefore under the act. Even if the employee's services were casual, they were none the less for the purpose of the employer's trade or business, which sufficed to give the law control of the case. The award was accordingly affirmed. (Karos *v.* Ocenas (1926), 243 Pac. 593.)

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—LOANED EMPLOYEE—*Lecker* v. *Valentine et al., Supreme Court of Pennsylvania (May 26, 1926), 133 Atlantic Reporter, page 792.*—Louis Lecker was a regular employee of Stanley M. Stader. T. J. Valentine had a contract to excavate for a foundation. He was using a piece of machinery called a "crab," which Stader wished to borrow. He agreed to furnish Valentine with a man and a horse to take its place and transferred Lecker to Valentine. Lecker while working for Valentine,

[1] Judgment reversed and compensation denied: Same case (1927), 291 S. W. 197.

sustained an injury and brought a claim against both Stader and Valentine. The referee made an award against the latter, finding that—

Louis Lecker was injured on July 25, 1923, while at work in the employ of T. J. Valentine. * * * Stanley M. Stader * * * hired the claimant * * * and loaned him to defendant [Valentine]. * * * The claimant was placed upon the pay roll of * * * Stader, [but] his work was under the direct control of the defendant [Valentine], and at the time of the accident he was furthering the business and affairs of the said defendant.

Valentine appealed from the finding to the compensation board on the ground that under the terms of the employment the relation of employer and employee did not exist between the claimant and himself. The board reversed the finding of the referee and made an award against Stader. On appeal to the court of common pleas the finding of the board was reversed and the award against Valentine reinstated. From that judgment the State workmen's insurance fund appealed to the Supreme Court of Pennsylvania.

The court in affirming the judgment of the lower court quoted with approval from the opinion in the case of Tarr *v.* Hecla Coal & Coke Co. (265 Pa. 519, 522, 109 Atl. 224, 225; see Bul. No. 290, p. 322), as follows:

A master may loan his servant, with the latter's consent, to another under such circumstances as to create for the time a new relation of master and servant; the regular servant of one may thus for the time being become the special servant of another, and that was done here. "Where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him. The test is whether, in the particular service which he is engaged to perform, he continued subject to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired."

The court held that in the instant case the law was correctly applied by the referee, and since the court below had properly sustained the award, it was not necessary for it to review the theory on which that tribunal acted.

The judgment was therefore affirmed.

The same court sustained an award on the authority of the Tarr case, above cited, where the private chauffeur of the president of a corporation was at times called on to assist in the business of his employer's establishment. On an occasion of such service the employee was fatally injured and the workmen's compensation board allowed the widow's claim against the company. The company appealed, claiming that the decedent was the employee of the president individually and that the company was not liable as an employer.

The court overruled this contention, holding that there was evidence of temporary employment by the company, although there was at the same time a general employment by the president. The law defining an employee as one

who performs services for another "for a valuable consideration" does not specify who shall pay such consideration; "and its language is not to be construed as conditioning liability to meet a claim for compensation on payment of wages by the person against whom the claim is made, or on the existence of an obligation to so pay wages." (Atherholt *v.* William Stoddart Co. (1926), 133 Atl. 504.)

Conversely to the foregoing, the Supreme Court of Minnesota found a corporation liable for the death of its employee who was directed by the president of the employing corporation to go to his farm and dig up a number of cedar trees for an undesignated purpose. The injured man had frequently gone to the president's farm for other purposes, and the court found no evidence that the deceased had any reason to believe that the farm was not operated as a part of the business of the corporation. A referee had found the president individually liable and made an award. The latter appealed to the board, which reversed this finding and dismissed the claim on the ground that the employment in which deceased met his death was not covered by the act. The supreme court, on review, admitted that, in the absence of election and notice, a farm laborer would be outside the act; but in view of the circumstances in the case, there was an apparent compliance with the orders of the person to whom he had been accustomed to render service, and in whose customary employment he was under the compensation act. The case was remanded to the commission with directions to make the proper award against the employing corporation and not against the president as an individual, since the orders obeyed had been those of the usual director of the workman's actions. (O'Rourke *v.* Percy Vittum Co. et al. (1926), 207 N. W. 636.)

WORKMEN'S COMPENSATION—CLAIM—LIMITATION—DEATH OF BENEFICIARY—RIGHTS OF DEPENDENTS—*Moss* v. *Standridge, Supreme Court of Alabama (June 17, 1926), 110 Southern Reporter, page 17.*—Jane Standridge filed a claim in the circuit court of Jefferson County for compensation on account of the death of her husband, who died on March 25, 1925, as the result of injuries he received on January 12, 1921, while in the employ of C. L. Moss and G. B. McCormack. He was paid all compensation due him from the date of his injury to and including the date of his death. The facts in the case were undisputed, and upon a hearing thereof the court granted a decree allowing the petitioner compensation, deducting therefrom the amounts theretofore paid to the deceased. The defendants petitioned the supreme court for a writ of certiorari to review the judgment and finding of the circuit court. Their claim was that the plaintiff was barred in her action by the provisions of section 7554, Code of 1923. That portion of said section relied upon reads as follows:

In death cases, where the death results proximately from the accident within three years, compensation payable to dependents shall be computed on the following basis, and shall be paid to the persons entitled thereto without administration.

The court cited section 7570 of the Code of 1923 which deals specifically with the question of limitations, and quoted that portion which is here pertinent:

In case of death, all claims for compensation shall be forever barred unless within one year after death, when the death results proximately from the accident within three years, the parties shall have agreed upon the compensation under articles 1 and 2 of this chapter, or unless within one year after such death one of the parties shall have filed a verified complaint, as provided in section 7578 hereof. Where, however, payments of compensation have been made in any case, said limitations shall not take effect until the expiration of one year from the time of making the last payment.

Judge Gardner, who delivered the opinion of the court, then said in part:

Here payment of compensation had been made to the employee extending over a period of more than three years, and continuing to the time of his death. The above-cited statute expressly states that, when payments of compensation have been made in any case, the limitations referred to shall not take effect until the expiration of one year from the time of making the last payment. The words "any case" refer to cases of death, as well as those in which the injuries do not prove fatal.

Therefore the statute has provided that in such cases, where payments of compensation have been made and liability thus acknowledged, the further period of one year from the last payment is provided. Nor does this work any injustice to the employer as, under subdivision (*f*) of section 7551, Code of 1923, all payments made to the employee, while disabled, are to be deducted from the compensation due on account of his death which was done in the instant case.

The writ was therefore denied and the judgment affirmed.

WORKMEN'S COMPENSATION—CLAIM—LIMITATION—DISEASE—*Campbell* v. *Industrial Commission of Ohio, Court of Appeals of Ohio (June 7, 1926), 153 Northeastern Reporter, page 276.*—William A. Campbell, who had been employed by the Allis Chalmers Manufacturing Co. and its predecessor for a period of 15 years prior to April 12, 1922, made a claim for compensation based on the date of May 1, 1925, for injuries alleged to have been sustained on April 12, 1922. His claim was denied by the industrial commission, and on appeal to the court of common pleas judgment was rendered in favor of the commission and the claimant brought error. In his petition he alleged that he was gassed on the date above named by the fumes from a solution of nitric and sulphuric acid, used by his employer in its business, by the carelessness of a fellow employee in opening a window and allowing the fumes to blow toward him. He further alleged that at various times after the accident he suffered what

appeared to be a slight cold, but did not know he was injured as a result of gassing until about May 1, 1925, when his medical examiner discovered and informed him for the first time that pulmonary tuberculosis had set in as a result thereof.

The court, in disposing of the case, said in part:

If the date of the accident, which was April 12, 1922, was the date of the injury, the claim was barred under section 1465–72a, General Code, which requires that in all cases of injury or death claims for compensation shall be forever barred unless within two years after the injury or death application shall have been made to the industrial commission of Ohio; if the claim is based on the date of May 1, 1925, and is one for tuberculosis, the claim is not compensable.

The judgment of the court of common pleas was therefore affirmed.

WORKMEN'S COMPENSATION—CLAIM—LIMITATION—PROGRESSIVE INJURY—SETTLEMENT—*City of Hastings* v. *Saunders, Supreme Court of Nebraska (March 19, 1926), 208 Northwestern Reporter, page 122.*—William Saunders received an accidental injury while in the employ of the city of Hastings, Nebr. He brought action for compensation in the district court of Adams County, and from a judgment in his favor the defendant appealed. Recovery by the plaintiff was challenged on two grounds: (1) That the claimant did not file his claim within one year after the accident; and (2) that settlement of all damages was had between the parties prior to the filing of such claim.

The court found that the plaintiff's injury was of a progressive nature and did not fully culminate until within 11 months before the claim was filed with the commission; that the city, the insurance company, and the claimant recognized that compensation was due the claimant by reason of the accident; and that the city and insurance company so dealt with the claimant up until about five months before his claim was filed. The court then said in part:

Considering the above facts, together with others reflected by the record, to hold with the city that this claim was barred by reason of not having been filed with the commissioner within a year from the date of the accident would be a denial of justice, and would be to give the act a strict rather than a liberal construction, as the act provides, and as we have held, should be done.

As to the defendant's claim of settlement, the court held that the conflicting testimony would have warranted the court below in finding for or against such contention, and that as that court had found for the claimant the finding should not be disturbed. It accordingly affirmed the judgment of the lower court in all things.

WORKMEN'S COMPENSATION—CLAIM—"NEW AND FURTHER DISABILITY"—REPRESENTATIONS BY INSURER'S PHYSICIAN—*Hutchinson Lumber Co.* v. *Industrial Accident Commission of California, District Court of Appeal of California (March 18, 1926), 246 Pacific Reporter, page 118.*—John Bohan sustained a severe injury to his knee on October 23, 1923, while in the employ of the plaintiff company. He was furnished with medical and surgical treatment by the employer and its insurance carrier, and was also paid compensation up to April, 1924. He was under the care of the insurance company's physicians, who led him to believe that his injury was of a temporary nature and advised him not to go to the commission—that the insurance company would take care of him. When he was dismissed from the hospital on March 26, 1924, the doctor gave him an elastic band to wear on his knee, telling him that he would be all right and requested that Bohan write to him how he was getting along. In July Bohan accepted employment with another company, but after working a few days was forced to quit. He thereupon wrote the insurance company's physician that he was not getting well and asked for additional compensation. After waiting until December of that year and having received no reply he visited the commission and was there examined by the assistant medical director, who pronounced the injury to the knee permanent. He was given a new rating, which the insurance company refused to recognize, also refusing to pay further insurance. On May 12, 1925, formal application for further compensation was filed with the commission. The application was opposed by the employer and the insurance carrier, who at the hearing urged that Bohan's claim was barred by lapse of time, and cited section 11 of the workmen's compensation act, which provides that a claim based upon a new and further disability must be filed within six months after the date on which the new and further disability is ascertainable. They contended that Bohan knew in July, 1924, that he was no better, and could have ascertained the true character of his injury.

It was pointed out by the court that subdivision (*e*) of section 11 of the said act confers upon the commission continuing jurisdiction for a period of 224 weeks to grant additional compensation for a new and further disability, and that it contains no requirement that an application for compensation based upon that ground shall be filed within a period of six months after the nature of the disability is ascertainable.

Judge Knight, speaking for the court, then said, in part:

There is no contention made by petitioners that prior to December, 1924, Bohan knew that his injury was permanent; and obviously, in view of the statements made to him in March by the insurance company's doctor, the only reasonable impression Bohan could have

formed in regard to his condition in July was that his injury was still of a temporary nature, requiring only further medical treatment. This he endeavored to obtain by writing as directed to said doctor, but his letter, so far as the evidence discloses, was ignored, and after vainly waiting a reasonable length of time, in the apparent hope that the doctor's statement to him that he "would be all right" would prove true, went to San Francisco in December where he was told for the first time the true extent of his disability. The delay thereafter in filing the application was attributed by Bohan to the fact that he still depended upon the insurance company to carry out its promises made to him in November, 1923, that they would take complete care of him and pay him everything that was coming to him. Their refusal to do so did not take place until February, 1925, and, in any event, Bohan's application for further compensation was filed within six months after he learned of his condition.

In view of the foregoing facts, it is our opinion that the commission's conclusion that the situation presented was not a proper one for the application of the doctrine of laches must be sustained.

The award was therefore affirmed.

WORKMEN'S COMPENSATION — CLAIM — NOTICE — PAYMENT OF BURIAL EXPENSES—CONSTRUCTION OF STATUTE—*Barber* v. *Estey Organ Co., Supreme Court of Vermont (November 4, 1926), 135 Atlantic Reporter, page 1.*—Margaret C. Barber made claim for compensation on account of the death of George Cottrill, who was instantly killed while employed by the Estey Organ Co., and on whom she was partially dependent. On being denied compensation by the commissioner of industries, she appealed to the Supreme Court of Vermont. The case turned on the question whether the plaintiff was required to give the defendant written notice, as specified in General Laws, sections 5796, 5797.

It was argued that the payment of the $100 for burial expenses as required by General Laws, section 5777, amounted to a voluntary payment of compensation and therefore dispensed with the necessity of such notice.

The court, in affirming the order appealed from, said in part:

But we can not accept her theory that the payment of burial expenses is a payment of compensation. We recently held in Petraska *v.* National Acme Co. (95 Vt. 76, 113 Atl. 536; see Bul. No. 309, p. 246) that the payment of medical expenses, as required by G. L. 5784, was not a payment of compensation, and therefore did not excuse the failure to give the written notice required by the statute. The reasoning of that case applies here and controls our decision. The workmen's compensation statute, taken as a whole, divides the benefits to be received thereunder by those entitled into three distinct classes: Medical services, burial expenses, and compensation. Neither medical services nor burial expenses are compensation in a statutory sense. The fact that the former is covered by a separate section of the statute, while the latter is included in

the section providing for compensation, is not controlling against this construction. The structure and language of G. L. 5777, indicates that the legislature understood that "death benefits" and "compensation" were not the same thing.

WORKMEN'S COMPENSATION—CONTRACTOR—LIABILITY OF PRINCIPAL—"THIRD PARTY"—*Catalano* v. *George F. Watts Corporation, Supreme Judicial Court of Massachusetts (May 27, 1926), 152 Northeastern Reporter, page 46.*—A general contractor had sublet portions of the construction work on a building to the George F. Watts Corporation, a subcontractor. Joseph Catalano, an employee of the general contractor, was injured by reason of the negligence of an employee of the subcontractor, and was paid compensation by the Travelers' Insurance Co., the insurer of his employer. He brought this action against the defendant subcontractor for the benefit of the insurance company of his employer.

The defendant demurred to the plaintiff's declaration on the ground that, since the plaintiff had been paid compensation by the insurer of his employer, he could not, under chapter 152, section 15, of the General Laws of Massachusetts, maintain this action against him. The demurrer was sustained by the superior court, and the plaintiff appealed from the ruling. The supreme court, in the course of its opinion affirming the action below, cited the case of Bindbeutel *v.* L. D. Willcutt & Sons Co. (244 Mass. 195, 198, 138 N. E. 239, 240; see Bul. No. 391, p. 392). In that case it was held that where both contractors were insured under the workmen's compensation act the servant of a subcontractor could not recover against the general contractor when he has been paid compensation by the insurer of his employer. It was said in that case that all employees were to receive the same compensation "and no advantage was given the employees of the subcontractor over the employees of the general contractor." The court held that the ruling in that case applied equally to the employees of a general contractor under the act, and that the ruling in the instant case sustaining the demurrer was correct.

Judgment was therefore ordered for the defendant.

WORKMEN'S COMPENSATION—COVERAGE—EMPLOYMENT OF THREE OR MORE PERSONS—CONSTRUCTION OF STATUTE—*Guse* v. *Industrial Commission et al., Supreme Court of Wisconsin (April 6, 1926), 208 Northwestern Reporter, page 493.*—This was the second time that this case was before the supreme court of the State, first on an appeal from the circuit court when it reversed the judgment of that court, and now on a motion for rehearing on its own judgment.

The facts in the case were that Arthur Zuehlke, on February 13, 1923, while in the employ of Albert Guse, received certain injuries for which he was granted an award of compensation by the industrial commission. It appeared that the defendant ordinarily had but one employee, Zuehlke, and that he was not regularly employed throughout the year, other men being employed for very short times as occasion arose.

The plaintiff appealed from the order of the commission on the ground that he was not subject to the provisions of the statute which provided that:

> If any employer shall at any time after August 31, 1917, have three or more employees in a common employment he shall be deemed to have elected to accept the provisions of sections 2394-3 to 2394-31, inclusive, unless prior to that date such employer shall have filed with the industrial commission a notice in writing to the effect that he elects not to accept the provisions thereof.

The circuit court held that the statute applied to the defendant and affirmed the order of the commission on defendant's appeal. The supreme court held that the case of Kelley *v.* Haylock (163 Wis. 325, 157 N.W. 1094; see Bul. No. 224, p. 277) was controlling, and that it was not the intention of the law to bring employers having three or more persons in their employ for a brief period of time within the act. The judgment of the circuit court was accordingly reversed, but on rehearing the court reversed its former opinion and affirmed the judgment of the circuit court, holding that the statute in question should be construed literally as it reads. To hold otherwise "works a hardship to the employee if he is unable to ascertain whether or not his employer is within or without the act." The employer could claim to be within or without, as his interest might appear, "the proof in most cases being wholly in the possession of the employer."

WORKMEN'S COMPENSATION — COVERAGE — FARM LABORER — INSURANCE POLICY—*Hillman* v. *Eighmy, Supreme Court of Wisconsin (May 11, 1926), 208 Northwestern Reporter, page 928.*—Isaac Hillman was employed by Percy Eighmy and was injured while working as a member of a crew operating defendant's corn shredder. He made application for compensation. The industrial commission found that at the time of his injury he was engaged in farming labor and therefore not under the compensation act, and dismissed the application. On appeal the circuit court affirmed the order of the commission and the plaintiff appealed to the supreme court of the State, where the judgment below was reversed.

Judge Stevens delivered the opinion of that court, saying in part:

> It is not necessary for the court to determine whether applicant was engaged as a farm laborer at the time he sustained the injury in

question. Appellant's employer elected to accept the provisions of the workmen's compensation act when he entered into the contract of insurance with the defendant company. Such election brought appellant, a regular member of the shredding crew, under the act, even if it be held that he was a farm laborer at the time of injury, because the intent clearly appears from the terms of the policy to insure the members of the shredding crew.

The judgment was reversed and the cause remanded, with directions to render judgment in accordance with the opinion, the appellant to recover costs against defendants Eighmy and the Wisconsin Brotherhood of Threshermen Insurance Co.

WORKMEN'S COMPENSATION—COVERAGE—"HAZARDOUS OCCUPATION"—SAWING WOOD FOR FUEL—FARM LABOR—*Freeman* v. *State Industrial Accident Commission, Supreme Court of Oregon (December 15, 1925), 241 Pacific Reporter, page 385.*—The workmen's compensation law of Oregon applies to hazardous occupations, and classifies "farming and all work incidental thereto," excepting the construction of buildings, as nonhazardous. Farming is said to include wood sawing and wood cutting, whether carried on by the owner of the farm or commercially or under contract. However, the courts of the State reversed the action of the commission in interpreting the law so as to exclude therefrom a man injured while working with a crew, his immediate employer having a contract with the farm owner at an agreed rate per hour. It was found that "under the facts in the cause at issue the claimant, in helping to operate the wood saw, was not engaged in an employment incidental to the farming operations of Smith," the owner of the farm. The commission cited decisions in which the injured workman was a farm hand diverted from agricultural pursuits to the cutting of firewood or the filling of an ice house with ice. These cases were rejected as precedents, the opinion concluding:

The cases cited by appellants are clearly distinguishable from the case at bar, because the employees therein were farm laborers engaged in performing their duties as such. In the case at issue the employees of McCarthy were not engaged in farming or in labor incidental thereto. When they were sawing wood for John Jones, an attorney at law, and for John Brown, a physican, they were under the protection of the workmen's compensation act. The fact that they moved their operations down to farmer Smith does not change the hazardous nature of their employment.

The judgment of the trial court in reversing the action of the commission and directing an allowance of the claim was therefore affirmed.

WORKMEN'S COMPENSATION — COVERAGE — MUNICIPAL CORPORATION—CONSTRUCTION OF STATUTE—*Texas Employers' Ins. Assn. v. City of Tyler, Court of Civil Appeals of Texas (March 25, 1926), 283 Southwestern Reporter, page 929.*—Suit was brought by the Texas Employers' Insurance Association in the district court of Smith County against the city of Tyler to recover $634.98 claimed as unpaid premiums on an employer's policy of insurance issued to the city of Tyler and the further sum of $6,349.70 as penalties incurred by the city for misrepresenting its pay roll. The petition alleged that the policy was issued on November 19, 1919, and accepted by the city, which paid a cash deposit premium and agreed to pay additional premiums, that the contract was renewed from time to time by the parties, and that the contract remained in full force and effect from the date of its issuance until the 1st day of March, 1924, at which time it was canceled by the city. The defendant pleaded a general demurrer, which was sustained by the trial court, and, upon the plaintiff's refusal to amend, the suit was dismissed, that court holding that an incorporated city or town can not under the terms of the workman's compensation act (Acts of 1917, ch. 103) become a subscribing member of an employers' insurance association.

The particular question presented in the appeal was: Can an incorporated city or town become a subscribing member of an employers' insurance company? The court of appeals answered this question in the affirmative, reversing the judgment below, and remanding the case for a trial on its merits.

Among other arguments for its position, the following language was used:

> If any portion of the workmen's compensation law applies to or includes incorporated cities and towns, when exercising the functions of private corporations, then all of its provisions apply. It is unbelievable that the legislature would deprive those municipalities of valuable common-law defenses and at the same time withhold from them the benefits conferred by the act upon others who employ hired labor. There does not exist any reason why such a discrimination should have been made. Its manifest unfairness is sufficient to justify the inference that none was intended.

Following the rendition of the above opinion, the case was brought before the Commission of Appeals of Texas on a writ of error. This body examined the provisions of the law in the light, especially, of the provision of the State constitution which declares that the legislature shall have no power to authorize any city or town, etc., to become a stockholder in any corporation, association, or company. The plaintiff association was a creature of the compensation act, being a mutual insurance association made up of its subscribing members. Under the terms of the constitution quoted, it was held that no such membership could exist on the part of any city or town.

As to the loss of the common-law defenses, the commission held that, as to employers not eligible to the benefits of the act, it was inoperative as to all its terms. "The act simply has no application, one way or another, to any employer except one eligible to its burdens and benefits."

This determination of the commission was accepted, and the judgment of the court of civil appeals reversed, and that of the district court affirmed. (Same case (Nov. 17, 1926), 288 S. W. 409.)

WORKMEN'S COMPENSATION—DEATH FOLLOWING DISABILITY—PROXIMATE CAUSE—EVIDENCE—FAILURE TO FILE CLAIM—REASONABLE EXCUSE—LUMP SUM—*Georgia Casualty Co.* v. *Little, Court of Civil Appeals of Texas (February 17, 1926), 281 Southwestern Reporter, page 1092.*—Manuel (or Emanuel) Brown was employed by Metcalf & Son as a cement mixer, and while so employed he sustained injuries about the head and his right clavicle which totally incapacitated him from further labor, on account of which he was paid compensation in the sum of $12.11 per week and remained under the care of the casualty company's physician. Several weeks after the injury he developed a case of diabetes and died some eight months thereafter. The industrial accident board, after deducting the amount already paid to the deceased, awarded his widow a lump sum in the amount of $3,587.55, on the ground that the death was due to the injury. The Georgia Casualty Co. brought suit in the district court of Navarro County, Tex., to set aside the award. From a judgment sustaining the award the plaintiff appealed and alleged that the evidence was insufficient to show that the injuries received by the decedent were the proximate cause of his death, or that the defendant was the wife of the deceased, or to authorize a lump-sum judgment, and that the defendant by not bringing her claim within six months after the death of the deceased was barred from recovery.

The court on review found that the evidence relied upon to connect the disease and death of the decedent was that of the physician under whose care he was while receiving compensation, whose testimony was that an injury such as that received by the decedent might cause diabetes, and that it was his opinion that the injury in the instant case was so caused. It was the opinion of the court that the evidence, which was uncontradicted, was sufficient to show that the defendant was the wife of the deceased. As to the lump-sum judgment, the court found that the defendant was nearly 50 years old, in poor circumstances, depending upon her own labor to take care of her present ailing husband and a ten-year-old grandchild, and held that the payment of a lump sum is a matter addressed largely to the discretion of the trial court, and that there was no evidence

in the record that showed the abuse of such discretion. Of the remaining alleged error, that of failure to file claim within six months, the court found that the deceased and his wife were both typical ignorant negroes, not able to read or write; that he worked about from place to place where he could find employment; that the people with whom he was staying knew where his wife lived but failed to notify her of his death; and that she did not know of his death until about a month after it occurred. It was also found that several months had elapsed after the death of the decedent before his wife learned that he was insured.

In view of these facts and circumstances, the court held that it was not prepared to disturb the holding of the board and of the trial court.

The judgment of the trial court was therefore affirmed.

WORKMEN'S COMPENSATION—DEPENDENCY—RIGHTS OF WIDOW AND AFTER-DISCOVERED CHILD BY PRIOR MARRIAGE—REVIEW—RETROACTIVE AWARD—*Parker* v. *Industrial Commission, Supreme Court of Utah (December 1, 1925), 241 Pacific Reporter, page 362.*—A workman known as Albert Parker, was killed under circumstances entitling his widow to compensation. An award in her favor was made, including a lump-sum payment up to the time of the decision. Weekly payments continued until another woman claiming as widow applied for compensation. Payments were suspended in the first case until it was determined that the second claim was without foundation. In the meantime letters were filed supporting the view that a son by a former wife was entitled to benefits. The informality of the application and the elapsed time were offered as objections to the claim, but the commission overruled or disregarded these objections, and found that there had been a legitimate marriage, that a son was born, and a divorce followed, the wife receiving the custody of the child. She afterwards abandoned him, and the father placed him in the care of his own mother, contributing to his support.

The widow beneficiary knew nothing of the prior marriage or of the existence of such a child, but the commission decided that the award to her should be revised so as to make provision for the child, but not barring her claim as widow. The fact that she was wholly dependent was said by the court not to "prevent the commission from finding and deciding that he [the deceased] also left surviving him a minor child which was also dependent upon him for support." Compensation had been awarded, and by taking under consideration the rights of the minor child "nothing was invoked except the continuing jurisdiction of the commission which it has a right to exercise by virtue of the provisions of section 3144" of the compensation law.

In making its award the commission had undertaken to date the payments to the child back to the time of his father's death, requiring, indirectly at least, that the widow make restitution of a part of the compensation which had been paid to her. The court found the question "not wholly free from doubt or difficulty"; but, in the absence of any fraud or collusion on the part of the plaintiff, "we think, that where compensation has been lawfully paid to one justly entitled thereto, the commission is powerless to require the recipient to pay it back." That part of the award was therefore annulled, but from the date of the suspension the divided award was approved.

WORKMEN'S COMPENSATION—DEPENDENCY—SUSPENSION OF CONTRIBUTIONS TO WIFE—*American Smelting & Refining Co.* v. *Industrial Commission of Utah, Supreme Court of Utah (November 5, 1926), 250 Pacific Reporter, page 651.*—This action was brought by the American Smelting & Refining Co. to review an order of the industrial commission granting an award to the widow of Imazo Kawate, who was accidentally killed while in the employ of the company. The facts upon which the award was based were not in dispute and were substantially as follows: The deceased came to the United States in 1900, leaving his family, consisting of his wife, two small daughters, his mother, and a sister, in Japan. Soon after arriving in this country the deceased commenced sending money to his wife. He continued to send her money with regularity until 1916 or 1917, when for some unexplained reason the contributions ceased until January, 1922, when he sent $500, and after that, in 1924, he sent an additional sum of $135.

It was contended by the employer that in view of the fact that no contribution was made by the deceased from 1916 to 1922, the finding of the commission that the applicant was dependent upon the deceased for support was not supported by the evidence; that as a matter of law it should be held that contributions wholly failed; and that the applicant, within the purview of the industrial act, received no support whatever from the deceased. The award was affirmed with costs. Judge Frick, speaking for the court, said in part:

It seems to us, however, that the mere fact that contributions may cease for a time, and even for a considerable period of time, standing alone, is not conclusive that a man with a family in a foreign country has necessarily abandoned his family and left them to shift for themselves. The evidence is to the effect that the deceased frequently wrote to his wife, and especially during the last two years of his life, that he expected to return to Japan and in the near future. There is, therefore, nothing in the record from which it can be inferred that the deceased had abandoned or intended to abandon his family.

The inference is reasonably clear, therefore, that there must have been some cause or circumstances over which the deceased had no

control which caused the long interval between the regular remittances from 1900 to 1916 and the large one in January, 1922.

We are of the opinion that, in view of the facts and circumstances, it can not be said that the award made by the commission is not supported by some substantial evidence; nor can we hold as a matter of law that the award is contrary to law.

The same court had decided at a somewhat earlier date that a wife who had lived apart from her husband most of their wedded life, receiving no support from him at any time, without any communication with or from him for a period of nearly two years prior to his death, during which time he made substantial contribution toward the support of his mother, while the wife had supported herself by her own efforts, was entitled to no benefits, her claim of dependence being without evidence to support it. (Utah Apex Mining Co. *v.* Industrial Commission (1926), 244 Pac. 656.)

WORKMEN'S COMPENSATION—DEPENDENCY—"WHOLLY DEPENDENT"—CONSTRUCTION OF STATUTE—*London Guarantee & Accident Co. (Ltd.) et al.* v. *Industrial Commission, Supreme Court of Colorado (December 28, 1925), 242 Pacific Reporter, page 680.*—James K. Keys and his son, 16 years of age, were both killed in the same accident. The commission found that the widow and the surviving children were wholly dependent upon the deceased husband and father for their support and made an award accordingly. The widow then applied for compensation for the death of her son. The commission found that she was 20 per cent dependent upo him and made an award to that effect, which was affirmed by the district court. The defendant brought error. The court, in reversing the judgment of the district court, said in part:

The second award and the judgment of the district court were wrong, not only wrong, but logically impossible. The commission rightly found that the widow and children were wholly dependent on the father. They could not find otherwise, because the statute (C. L. sec. 4426) is that they "shall be conclusively presumed to be wholly dependent" on the father. "Wholly dependent" on him means that they are dependent on no one else; it has no other meaning.

The argument that claimants might thus lose an award for the greater part of their actual support, would be forceful if addressed to the legislature, as we hope it will be, but the statute is explicit, and we cannot add to it or take from it.

The court found itself unable to adopt a meaning that might be "more agreeable to us," since it could not ignore express terms, even though unforeseen, undesirable consequences might have ensued. It was said that "the English statute, with those of some States is wiser—i. e., that dependency is a question of fact"—citing an English case on this point, and concluding:

The ground of the decision was, quoting one of the opinions, that "the question of dependency was not a question of law at all; it is purely a question of fact." That proposition, as we have shown, is

not true in Colorado, but in case of widow and children the contrary is true. It is purely a question of law.

The judgment of the district court was reversed with directions to disaffirm the award of the commission.

WORKMEN'S COMPENSATION—DEPENDENTS—FAMILY STATUS—SUBSEQUENT MARRIAGE—*Casady* v. *State Industrial Accident Commission, Supreme Court of Oregon (January 15, 1926), 242 Pacific Reporter, page 598.*—George J. Casady was awarded compensation for permanent partial disability by the industrial accident commission and later was granted an increased allowance for permanent total disability. At the time of his injury he was a widower with one child under 16 years of age, but later remarried and by this marriage had two children. He brought mandamus proceedings against the industrial accident commission to compel it to grant him an additional allowance on account of his wife and children. The court, after quoting section 6626, Oregon Laws, as it stood at the time of the accident and citing adjudicated cases in point, stated in part:

The matter is judicable according to the family status of the claimant at the time the injury happened, which, by the section of the statute just quoted, is fixed for a man then unmarried at the sum of $30 per month, and for each child at that time under the age of 16 years the payment must be increased by $8 per month. The case of Crockett *v.* International Railway Co. (176 App. Div. 45, 162 N. Y. Supp. 357), cited by the claimant, has to do only with a surviving wife, and not with a dependent wife. It has no relation to a case where the claimant and his wife are both alive, whenever married. The present wife of the claimant is not a survivor.

The court held that though a child legally adopted prior to an injury and a posthumous child are considered as dependents under Oregon Laws, section 6619, neither the wife to whom the claimant was married subsequent to his injury nor the children of such a marriage are included within section 6626. The plaintiff relied upon Chebot *v.* State Industrial Accident Commission (106 Oreg. 660, 627, 212 Pac. 792, 795), in which it was said:

Such a construction, however, ignores the plain provisions of the statute which impose upon the commission a legal duty to regulate the compensation to be awarded the injured workman by the development of his disability or change in his family status.

Mr. Judge Burnett, speaking for the court, said:

In the first place, the language about "change in his family status" was not necessary to the decision in that case, because Chebot was not a married man, so far as the record discloses, and had no family; secondly, it might be referable in a proper case to the birth of a posthumous child, which would be a change in the family status between the time of the happening of the accident and the application for relief.

The writ was therefore dismissed.

WORKMEN'S COMPENSATION—ELECTION—NOTICE TO EMPLOYEES—*Holland* v. *Stuckey, Court of Civil Appeals of Texas (January 30, 1926), 282 Southwestern Reporter, page 951.*—T. Holland was employed by W. A. Stuckey & Son and was engaged in laying a pipe line in Wichita County, Tex. During the course of his employment he sustained personal injury, for which he brought an action in damages in the amount of $3,500. The defendants answered and contended, among other things, that they were subscribers under the workmen's compensation act, that they had given notice to the Industrial Accident Board of Texas of the fact, and that they had fully complied with the requirements of such law. The cause was tried before a jury on special issues. The jury found for the plaintiff on all the issues involved and returned a verdict in his favor in the amount sued for. The court, however, found that the defendants were subscribers under the workmen's compensation act, with which they had complied, and even though that fact was unknown to the plaintiff until after he had filed his suit it constituted a bar to his recovery. Judgment was accordingly rendered for the defendant and the plaintiff appealed.

The defendants were engaged at Wichita Falls in the "tank-car business" and in the "pipe-line business," operating as the Lone Star Tank Co. At their plant at Wichita Falls they had posted notices of their subscription under the workmen's compensation act. The evidence was uncontradicted that the plaintiff was hired in the town of Electra, some 30 miles from Wichita, and about 4 miles from where the accident occurred. There was no evidence that he had ever been informed that the defendants carried insurance under the compensation act. The question for the court was whether or not such notice as herein set out was sufficient, under the terms of the workmen's compensation act, to constitute notice in fact. The court in the course of its opinion cited the case of Producers' Oil Co. *v.* Daniels (244 S. W. 117, 112 Tex. 45; see Bul. No. 344, p. 327), in which it was held that "in order to relieve the employer of liability notice must be given the employee personally." The opinion continued:

One of the purposes of the law is to give an employee offering to work for an employer who is a subscriber an opportunity to determine whether or not such employee will rely, in case of accident, on the damages awarded under the workmen's compensation act, or whether he desires to retain his common-law right to sue for damages. We do not think that one doing a business of a particular kind at one place, and posting notices in his plant, informing his employees that he is a subscriber and has insurance to compensate such employee under the act in question, can carry on another business of a different kind, and under a different name, at a distant place, and employ laborers, and never inform such employees of the fact that he has insurance under

the act, may exempt himself from liability by reason of the posting of the notices in such distant plant.

We do not think that, under the facts shown, the defendants should be held to have given notice, either actual or constructive, to plaintiff of the fact that they were subscribers. The evidence shows that in payment for the labor done in laying pipe near Electra they gave checks signed by W. A. Stuckey & Son.

It was ordered that the judgment below be reversed and that judgment be rendered for the plaintiff in the sum of $3,500 with costs of suit and with interest at 6 per cent from date of judgment, and costs of appeal were adjudged against appellees.

WORKMEN'S COMPENSATION—EMPLOYEE—ASSISTING IN MAKING EMERGENCY REPAIRS TO HIGHWAY—*Yourzak* v. *Town of Platte, Supreme Court of Minnesota (July 16, 1926), 209 Northwestern Reporter, page 910.*—Joseph Yourzak was employed by the road overseer of the town of Platte, Minn., to assist in installing a culvert in the highway at a point that had become impassable. In doing the work Yourzak accidentally received an injury to his leg which resulted in blood poisoning and death. His widow and children were awarded compensation by the industrial commission for his death, and the defendant brought a writ of certiorari for review. The court, in affirming the order of the commission, said in part:

The right to compensation turns upon the authority of the overseer to employ help on this occasion. The decision of the industrial commission cannot stand unless the authority to employ Yourzak for the town is given its road overseer by the last paragraph of section 2575, G. S., 1923, reading:

"Whenever any public road in a town becomes obstructed or unsafe from any cause, the overseer shall immediately repair such road and render his account therefor to the town board, in case of a town or county road, and to the county board in case of a State aid road."

Only emergencies give the overseer authority to employ help, and to a certain extent he is the one to determine whether one has arisen. In this case he deemed it such. The chairman of the town board, though he claims that Yourzak was to aid without pay, thought speedy repairs necessary, for he furnished the culvert which the board allowed him to furnish for road purposes, the town board paid the overseer for his work in installing the culvert, and the industrial commission, in order to grant compensation, must have found that there was an obstruction or unsafe condition in the highway which required the overseer to act for the town under the provision mentioned, and that it was such repair that he could not well do it alone.

Within the above interpretation of the quoted provision of the statute, there is evidence supporting the decision of the industrial commission, and it must be affirmed, with attorney's fees of $75 to the respondents.

WORKMEN'S COMPENSATION—EMPLOYEE—COVERAGE—WORKING PARTNER—*Lyle* v. *H. P. Lyle Cider and Vinegar Co. et al., Court of Appeals of New York (July 9, 1926), 153 Northeastern Reporter, page 67.*—This is an action brought by Vinnie M. Lyle for the death of her husband. The evidence shows that claimant's husband was a member of a copartnership engaged in carrying on a business of limited proportions, and while engaged in performing labor incidental to his occupation he received an injury which resulted in his death. The State industrial board awarded compensation, but on appeal to the appellate division the award was reversed, and claimant and the board appealed.

Plaintiff contended that the policy of insurance covered the decedent both as an employer and employee, insuring him therefore against the accident suffered by him while engaged as an employer in the performance of work carried on by the copartnership.

The court held that under the provisions of section 54, subdivision 6, of the workmen's compensation law, a policy might be taken out which would cover employers performing work incidental to their employment, and that this provision should be construed liberally, but that all the facts in the present case tended to oppose rather than support the claim that decedent was insured as an employer. Furthermore, the court maintained that if a policy was intended to insure employers performing labor under the workmen's compensation law, that purpose should be indicated by its terms. The policy under consideration not only did not provide insurance for employers, but by its terms was unmistakably limited to employees. The findings of the industrial board in favor of claimant and binding upon her were to the effect that decedent was injured while engaged as an employee at work for his employer.

Thus we are compelled to decide against the claim on this theory of insurance for an employer and are relegated to the question whether under the circumstances an award can be sustained because of injuries received by the decedent while engaged as an employee. Carrying this question farther, it becomes the one whether a copartner can become the employee of himself and his partners as employers, and we think that a negative answer must be made to this question. The copartners, of course, are the principals and employers, and we do not think that it is within the contemplation of the workman's compensation act that one of them may become the employee of himself and his associates, and thus at the same time occupy the inconsistent attitudes of employer and employee.

It was the opinion of the court that the workmen's compensation law did not contemplate that a "partner should have a claim against himself and his copartners for an accident springing out of the work of the copartnership and for the conduct of which he is responsible." Many cases were cited in support of this contention, and the court

quoted with approval from the case of Matter of Skouitchi *v.* Chic Cloak & Suit Co. (230 N. Y. 296, 130 N. E. 299), where it was said, in discussing the effect of the provisions of subdivision 6 of section 54, that they were—

intended to cover the case of an employer who maintained his status as such, but who, nevertheless, did some work of the character usually performed by an employee. * * * He would remain an employer and obviously could not become an employee of himself as an employer.

The court in the instant case added that—

The obvious course to be pursued by persons like the decedent, who, although employers, are engaged in performing labor contemplated by the statute and desire insurance, is to secure a policy which by its terms properly insures them as such employers.

The order appealed from was therefore reversed with costs against the State industrial board.

An amendment to the compensation act of California, 1917, authorizes the payment of compensation to a working partner receiving wages irrespective of profits. This called for a reversal of the position taken by the supreme court of that State in Cooper *v.* Ind. Acc. Com. (1916, 177 Cal. 685, 171 Pac. 684; see Bul. No. 258, p. 184), where the contrary was held under the law as it then stood. The amendment was held constitutional, and an adverse finding by the commission was set aside where a member of a firm was working at a fixed rate monthly, plus one-half the profits, and the case remanded for proceedings in keeping with the conclusion announced. (Johnson *v.* Industrial Accident Commission (1926), 244 Pac. 321.)

The Supreme Court of Oklahoma was previously on record as supporting the view that a working partner was entitled to compensation for injury received in the employment of the partnership. (Ohio Drilling Co. *v.* State Ind. Com., 86 Okla. 139, 207 Pac. 314.) This position was reaffirmed in the recent case of Knox & Shouse *v.* Knox (1925, 250 Pac. 783), in which an award by the State commission was challenged by the firm of which the injured workman was a member. It may be noted that this position of the court is not dependent on special legislation, but on the construction put by the court on the law and facts, in direct opposition to the conclusions of the New York Court of Appeals.

WORKMEN'S COMPENSATION—EMPLOYEE—DEPUTY SHERIFF—CONSTRUCTION OF STATUTE—*Monterey County* v. *Rader, Supreme Court of California (August 13, 1926), 248 Pacific Reporter, page 912.*—The county of Monterey and the State compensation insurance fund petitioned the Supreme Court of California for a writ of review to annul an award of compensation by the industrial accident commission to Nellie Pearl Rader for the death of N. H. Rader, employee.

As N. H. Rader, father of Nellie Pearl Rader, was, on the night of July 6, 1925, returning to his home at about 11 o'clock p. m., he was commanded by the sheriff of Monterey County to assist him in arresting certain violators of the law, and while in the performance of this

duty he was fired upon by the persons whom he was attempting to arrest and instantly killed. The industrial accident commission awarded his daughter, 14 years old and wholly dependent, a death benefit of $4,900 and $100 burial expenses. The petitioners insisted that the commission exceeded its jurisdiction in making the award, for the reason that the deceased could not be regarded as an employee within the terms and meaning of the workmen's compensation act, but that he was commanded by the sheriff by virtue of the statutory law of the State to perform a duty which every citizen owes to his sovereign State.

Section 7 of the workmen's compensation insurance and safety act, statutes and amendments of 1917, defines an employer to mean the State, each county, city and county, etc., who has any person in service under any appointment or contract of hire, or apprenticeship, express or implied. Section 8 (a) defines the term "employee" to mean every person in the service of an employer as defined in section 7, under any appointment or contract of hire or apprenticeship, express or implied, oral or written. Persons holding an appointment under this provision of the law as deputy sheriff for the purpose of their own convenience are excluded from the benefits of compensation.

The court, in affirming the award, said in part:

The decedent in the instant case was compelled by the sheriff of the county of Monterey to perform the service of a deputy sheriff of that county (Pen. Code, sec. 150), and was charged with the performance of the same duty that would have rested upon a regularly appointed deputy sheriff under like circumstances, and, while so acting, he was killed. Under such circumstances he will be held to be within the protection of the law in assuming the risks incident to his office. We feel satisfied that, when killed, he was performing the service of a deputy sheriff within the contemplation of the workmen's compensation insurance and safety act of this State.

The Court of Appeals of Maryland had before it a case involving the status of a park policeman employed by the city of Baltimore who was killed by being struck by an automobile while crossing a road in the park. The accident commission had ruled that he was not a "workman" within the terms of the law, and denied his widow's claim for compensation. The court held that the "great weight of authority" sustained this view; that neither policemen, firemen, nor members of the State militia were "workmen for wages" in the sense that manual laborers in the industries are, and that it was for persons of these classes that the law was enacted, so that compensation was properly denied. (Harris *v.* Mayor, etc., of Baltimore (1926), 133 Atl. 888.)

WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR—CASUAL EMPLOYMENT—*Bosel* v. *Henderson Holding Co., Supreme Court of Minnesota (April 9, 1926), 208 Northwestern Reporter, page 421.*—August H. Bosel was granted an order of award by

the industrial commission for injuries received by him while in the employ of the Henderson Holding Co., and from that order the employer brought a writ of certiorari to have it reviewed. The employer alleged that at the time of his injury the plaintiff was an independent contractor and that in any event the employment was casual and not in the usual course of the trade or business of the employer. It appeared that at the time of his alleged injury the plaintiff was engaged in painting the roof of a factory building owned by the defendant; that he was furnishing his own brushes and doing all the work himself, but the paint was furnished by the defendant. It also appeared that there was no express contract as to compensation or duration of the work and no express undertaking on the part of the plaintiff to finish the job. He stated in his testimony that the defendant "could have told me to quit at any time."

The court on review of the record found that the plaintiff was under the control of the defendant, and in its opinion, speaking through Judge Stone, said in part:

> An important "test of the relationship [of an independent contractor] is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent." The case is clearly open to the view that respondent was under the control of relator. Therefore the finding that respondent was an employee rather than an independent contractor can not be disturbed.

The contention as to the nature of the employment was also resolved against the appellant. To be exempt, it must be both casual and not in the usual course of the trade or business of the employer. The company acquired and rented buildings, of which the one on which the plaintiff worked was one, so that the employment was not excluded.

The writ of review was therefore discharged, leaving the award undisturbed.

WORKMEN'S COMPENSATION—EMPLOYEE—LIABILITY OF PARTNERS—INJURY—EVIDENCE—*Klemmens* v. *North Dakota Workmen's Compensation Bureau, Supreme Court of North Dakota (July 27, 1926), 209 Northwestern Reporter, page 972.*—Anton Klemmens made claim to the workmen's compensation bureau for compensation for injuries he alleged that he received on January 9, 1924, while employed by the Farmers' Garage. His claim was dismissed by the bureau. On appeal to the district court of Ward County he was given judgment for the sum of $332.50 and $78 attorneys' fees and costs. From that judgment the bureau appealed. It relied upon two propositions for the reversal of the judgment:

(1) That the evidence fails to support the finding that claimant received any injury of sufficient severity, and suffered any disability in fact, of sufficient period of time to entitle him to compensation.

(2) That at the time of the alleged injury the claimant was not an employee of the Farmers' Garage.

It appeared that the Farmers' Garage, a copartnership, was owned by one Hanson and Birdie Klemmens, wife of the plaintiff; that she hired her husband to work at the garage to balance the work and time of Hanson, and that she paid him his salary out of her interest in the partnership earnings. It was shown by the evidence that the plaintiff after his alleged injury was treated at his home by Doctor Fisk from the date of his injury until January 21, when he was taken to a hospital where he was under the care of Doctor Peterson for 11 days. Both the physicians testified that they could not discover any injury or organic trouble, and it was the belief of Doctor Fisk that the plaintiff feigned injury.

The court, in disposing of the case, said in part:

While it is true that the doctors testified that they could find no injury or organic trouble, it is also true that Doctor Fisk called at the home of the claimant about every day and sometimes twice a day, until he was taken to Minot. On one occasion he called at four in the morning. It may be said that this was in response to a call from claimant's wife. Even so, it would seem exceedingly strange for a doctor to leave his bed at that hour of the morning to respond to a sick call when he knew that the patient was not sick or injured. The evidence also shows that both Doctors Fisk and Peterson advised claimant to rest.

The facts and circumstances in the case are of such a nature that the minds of reasonable men might readily differ thereon and draw different conclusions therefrom. This being so, under the well-established rule, this court is in no position to disturb the findings made by the trial court on the facts.

That claimant performed partnership work exclusively is admitted. Mr. Hanson, one of the partners, was in the actual charge of the business and directed the work. The tools and machinery used by claimant belonged to and were the property of the partnership. His work and duties were to further the interests of the partnership. Both partners profited by his labors. The earnings from his labor went into the common partnership fund. The profits were divided equally between the partners. The partnership was in control of the Farmers' Garage, where the claimant worked, and not Mrs. Klemmens. The claimant was actually controlled by the firm. It was the master. While in the course of its work and business, claimant was injured.

In Dale *v.* Saunders Bros. (171 App. Div. 528, 157 N. Y. Supp. 1062; see Bul. No. 224, p. 273), the court of the appellate division said:

"It is not a question of hiring, or of master and servant, but of using and putting the man in the hazardous employment which the act has in view. The name of the act, 'workmen's compensation law,' indicates that it is not to be limited to cases where the actual relation of master and servant exists, but to workmen and those employing or

using them in the manner stated. When it appears that a person is carrying on such hazardous employment for profit and that a person in his service who he is employing or using therein receives an injury, compensation follows."

The claimant was insured in the workmen's compensation fund, and the premium was paid. He was doing the work of the Farmers' Garage, for which he was employed, and in the course of that employment he was injured.

The judgment was therefore affirmed, with costs.

WORKMEN'S COMPENSATION—EMPLOYEE—VOLUNTEER—*Ross* v. *Independent School District No. 1 of Madison et al., Supreme Court of South Dakota (February 24, 1926), 207 Northwestern Reporter, page 446.*—One Ross, who was employed by the Madison high school as assistant janitor, was killed while in the act of assisting an independent contractor in the erection of a flagpole on the school grounds. It appeared that Nickle, superintendent of the school, by authority of the board of education, contracted with one Robertson to erect a flagpole on the school grounds and to have entire charge of the work of raising it. In placing the pole preparatory to raising some of the paint on it became marred, and Nickle, desiring to repaint the marred spots, called upon Ross to assist in holding up the pole so that he could paint the marred places. When the painting was finished, Ross started forward toward the base of the pole, apparently to assist in placing it in the hole, whereupon he was struck upon the head by a piece of timber that was being used by Robertson's men, which injury resulted in his death. His widow was awarded compensation, which was affirmed by the circuit court. The defendants appealed on the ground that the award was based upon a conclusion of law. In reversing the order appealed from, Judge Campbell, speaking for the court, said in part:

The raising of the flagpole and locating it securely in the excavation prepared was a matter with which the board of education and its employees had no concern. It had been given over entirely to the independent contractor Robertson. We are compelled to the conclusion that the injury suffered by decedent did not arise out of and in the course of employment, and that at the time the injury was received the decedent was not acting in the course of his employment, but solely as a volunteer, going to the assistance of the independent contractor, and that such action, on his part, was not connected with or incident to the performance of his duties.

The findings of the court recite that the decedent received the injury in question, arising out of and in the course of his employment, which is not a finding of fact at all, but a conclusion of law, and in our opinion, in this case, an erroneous conclusion of law. The facts found by the court, which are properly findings of fact, and not conclusions of law, will support only one judgment, a judgment of nonliability.

The order and judgment appealed from were therefore reversed, and the cause remanded, with directions to enter a judgment in favor of appellants and against respondent, reversing the order and award of the industrial commissioner and dismissing respondent's petition with prejudice.

WORKMEN'S COMPENSATION—EMPLOYERS' LIABILITY—INTERSTATE COMMERCE—TRAIN RIDER—*Michigan Central R. Co.* v. *Industrial Commission, Supreme Court of Illinois (June 16, 1926), 152 Northeastern Reporter, page 594.*—Nellie Rogers made claim for compensation under the workmen's compensation act for the death of her husband, Charles J. Rogers, who was killed on February 16, 1924, while in the employ of the Michigan Central Railroad Co. She was granted an award by an arbitrator, whose order was approved by the industrial commission and confirmed by the circuit court of Cook County. The employer brought error. The points involved were whether or not the injury arose out of and in the course of decedent's employment, and whether he was at the time employed in interstate commerce.

It appeared that for some time prior to his death the deceased had been employed by the railroad company as a train rider, whose duty it was to protect the train from car thieves. At the time in question, while he was on his way to the railroad yards to go out on the scheduled run of the train he was to ride, he was struck by an Illinois Central train, proceeding north on a track adjacent to the track his train was to pass over, and killed.

In reversing the judgment of the lower court, Judge Heard, delivering the opinion of the court, said in part:

On the first question the facts are not in dispute. Rogers was employed by the Michigan Central Railroad Co., and the place where he commenced performing his duties was in the railroad yard of that company about Monroe Street, just east of the Illinois Central right of way and immediately west of Lake Michigan, in the city of Chicago.

If the accident which resulted in the death of Rogers arose out of and in the course of his employment by plaintiff in error, then at the time of the accident he must have been engaged in interstate commerce, as the only duties which the evidence shows he had, as an employee of plaintiff in error, were duties pertaining to interstate commerce.

If an employee of a railroad, while engaged in interstate commerce, is killed in the course of his employment, his injuries arise out of the employment, and the case is within the scope of the Federal employers' liability act (U. S. Comp. St., secs. 8659-8665) and not the workmen's compensation act. [Cases cited.]

The order of the circuit court was therefore reversed.

WORKMEN'S COMPENSATION—EMPLOYERS' LIABILITY—OCCUPATIONAL DISEASE—*Gordon* v. *Travelers' Ins. Co., Court of Civil Appeals of Texas (October 27, 1926), 287 Southwestern Reporter, page 911.*—G. E. Gordan was employed by the Tidal Western Oil Corporation in various kinds of work. From time to time he used paints, oil, and gasoline of high specific gravity, stood in crude oil, and inhaled fumes of gasoline and refuse oil in poorly ventilated work places. He was made ill at times, and finally became affected with nephritis, suffering permanent impairment of health. He submitted a claim for compensation, or if this should be found not available, damages were sought in an action at law.

The industrial accident board construed the compensation law as limited to accidental injuries, citing cases decided by the courts of last resort. No compensation for a disease could therefore be allowed, as the disease "developed gradually, thus eliminating the accidental element necessary to make the injury received compensable."

As to the alternative claim for damages, the court said:

Under the facts set up in the petition, appellant's employer was a subscriber under our compensation law, and he, by his conduct, had waived his right of action at common law against such employer.

The appellant could not recover at common law against his employer, for the additional reason that no recovery was allowed at common law for occupational or industrial diseases.[4]

Judgment for the defendant insurer and employer was therefore affirmed, the plaintiff being found without redress.

This court in another district allowed compensation for death from anthrax in case of a workman employed at skinning cattle, saying that the weight of authority regarded such death as due to accidental contact with the anthrax germ, and compensable. (Houston Packing Co. *v.* Mason (1926), 286 S. W. 862.)

WORKMEN'S COMPENSATION—EMPLOYERS' LIABILITY—SUITS FOR DAMAGES—TRANSITORY ACTIONS—NONRESIDENT SUITOR—RIGHT OF ACTION—*Herrmann* v. *Franklin Ice Cream Co., Supreme Court of Nebraska (March 19, 1926), 208 Northwestern Reporter, page 141.*—This action was brought by Lewis H. Herrmann, a resident of Missouri, against the Franklin Ice Cream Co., a Nebraska corporation, having its principal place of business at Lincoln, Nebr., and also operating a plant at Kansas City, Mo. The plaintiff alleged that he

[4] This position does not accord with that taken by the courts of New York, Pennsylvania, Wisconsin, and others, either as respects the right to recover at common law for diseases due to occupation, or as to the surrender of all right to sue in case of a noncompensable injury. The statement by the Texas commission of appeals (p. 181) that "the act simply has no application, one way or another, to any employer except one eligible to its burdens and benefits" also seems to point to a different conclusion as to the withdrawal of one right without another being granted.

sustained injuries while working at the company's plant at Kansas City, and sought to recover damages therefor in a Nebraska court. Objection by the defendant to the jurisdiction of the court was sustained and the action dismissed with prejudice to a future action in that State. Plaintiff appealed.

It was contended by the defendant that the State of Nebraska, by enacting its workmen's compensation law, had abrogated common-law actions by an employee for personal injuries arising out of and in the course of his employment, and that they were therefore contrary to the public policy of the State; also that it was discretionary with the Nebraska courts as to whether or not they entertained such actions by nonresidents. The court held that since by the terms of the workmen's compensation act all employers and employees were not subject to its provisions, the right to a common-law action by an injured employee occasioned by negligence of the employer had not been abolished in the State. Judge Good, who delivered the opinion of the court, said in part:

It appears that, at the time plaintiff sustained the injuries of which he complains, Missouri had no workmen's compensation law, and that plaintiff could have maintained in the courts of that State such an action as in the instant case. He had a right of action which was enforceable in Missouri. Such action not being contrary to the laws of our State and not being contrary to public policy or good morals, it follows that the action may properly be maintained.

The question of the court's discretion to entertain transitory actions was then considered by the court and the opinion continued:

Whether the courts of this State, in their discretion, may entertain or refuse to entertain jurisdiction in a transitory action brought by a nonresident must be determined by statutory and constitutional provisions. Plaintiff is a resident and presumably a citizen of the State of Missouri. Section 2, article 4, of the Federal Constitution provides:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Section 1084, Comp. St. 1922, provides:

"The district courts shall have and exercise general, original, and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided."

The statute above quoted does not purport to vest any discretion in the court, and even if it did so we have no doubt that it would be invalid, as contravening the above-quoted provision of the Federal Constitution. The statute is mandatory that the district court shall exercise jurisdiction and it is not in its power to discriminate between residents and nonresidents.

The judgment of the district court was therefore reversed and the cause remanded for further proceedings.

WORKMEN'S COMPENSATION—EMPLOYMENT—PREMISES OF EMPLOYER—*Bristow* v. *Department of Labor and Industries of State of Washington, Supreme Court of Washington (June 1, 1926), 246 Pacific Reporter, page 573.*—Toby Bristow, prior to April 10, 1925, had been employed by the Mutual Lumber Co. His regular hours were from 8 to 12 a. m. and from 1 to 5 p. m. On the morning of April 10 he came to work in his automobile and punched the clock at 7.25 a. m. After punching the clock he passed through the plant where he worked and went to a dam some 400 feet away. The dam was owned by his employer and was used in connection with its plant. On his way he met two of his fellow employees, whom he told he was going fishing. He was never thereafter seen alive. His body was recovered some 75 feet below the dam and 30 or 40 feet out in the river. His pockets contained some fish line, a gaff hook, and his watch, which had stopped at 7.40 a. m. Compensation was denied to his widow by the department of labor and industries, and she appealed. The superior court reversed the action of the department and gave judgment in favor of the widow. The department then appealed and assigned as error two grounds: (1) That the decedent at the time of his death was not in the employment of an employer, and (2) that he was not upon the premises of any employer.

The court, on review, ruled that there was no error, holding that the arrival of the deceased at the employer's plant 35 minutes before time for commencing work was not so premature that he could not be considered as an employee as a matter of law. It found from the evidence that the deceased was killed on the premises of the employer, and that being true, recovery could not be denied under the provisions of the workmen's compensation act. "Our statute does not require that compensation for injury received on the employer's premises arise out of, or in the course of, his employment." (Rem. Comp. Stats. 7673–7796.)

The judgment of the court was therefore affirmed.

WORKMAN'S COMPENSATION — EXTRATERRITORIALITY — JURISDICTION—CONTRACT FOR SERVICE OUTSIDE STATE—*Krekelberg* v. *M. A. Floyd Co., Supreme Court of Minnesota (February 5, 1926), 207 Northwestern Reporter, page 193.*—William H. Krekelberg, a resident of Minneapolis, was employed by M. A. Floyd Co. of that city to work for it in Burlington, Iowa. In the course of his employment he sustained injuries for which he was awarded compensation under the Minnesota law. The company conceded liability for compensation, but insisted that its obligation should be governed by the Iowa law, and brought certiorari to the Supreme Court of Minnesota to have the action of the industrial commission reviewed.

In sustaining the action of the commission the court said in part:

The facts are admitted, and liability is conceded. The sole question in dispute is whether the claimant is entitled to compensation under the Minnesota compensation act or under the Iowa act (Laws, 1913, ch. 147). Under the Minnesota act he would receive $20 per week; under the Iowa act $15 per week.

The court held that although "there is authority for the claim that where a contract of employment is to be performed in another State the compensation law of that State applies," the facts in the instant case brought it within the doctrine applied in several cases that had been adjudicated in that State, holding that—

Where a business is localized in this State, an employee performing services pertaining to that business is within the protection of our compensation law, although his services may be performed outside the State.

The decision of the commission was therefore declared correct, and was affirmed.

WORKMAN'S COMPENSATION — EXTRATERRITORIALITY — JURISDICTION—PLACE OF MAKING CONTRACT AND OF SERVICE—*Norman* v. *Hartman Furniture & Carpet Co., Appellate Court of Indiana (February 4, 1926), 150 Northeastern Reporter, page 416*—Raleigh H. Norman, a resident of Chicago, whose contract of employment was made there, was employed as buyer by the Hartman Furniture & Carpet Co., a corporation organized under the laws of Illinois and having its principal place of business in Chicago. By the terms of his employment he was required to make trips to other States, and while on such a trip he was killed in an automobile accident in Indiana. His widow filed claim for compensation before the industrial board of Indiana. There was an agreed statement of facts, but the claim was disallowed for want of jurisdiction. The claimant appealed.

The court, after citing the case of Darsch *v.* Thearle Duffield etc. Co. (77 Ind. App. 357, 133 N. E. 525; see Bul. No. 344, p. 343), in which the facts were very similar to those in the instant case, said in part:

In the instant case the agreed statement of facts shows that appellant and appellee were residents of Chicago, Ill., and that the contract of employment was entered into in Illinois, that appellee had not localized in Indiana, and that Raleigh H. Norman, at the time of his injury and death, was in Indiana, temporarily engaged in his master's business.

We hold that the case does not come under the provisions of the workmen's compensation act of this State (Laws, 1915, ch. 106), and that the industrial board did not have jurisdiction.

The award was accordingly affirmed.

The same court reached a similar conclusion where an Indiana corporation engaged the services of a "freehold resident" of the State, at the time temporarily living in Illinois, to render services in Arkansas, in which State he was injured. Inasmuch as the contract was neither made in the State nor to be performed therein, the fact of citizenship and that the employer's principal place of business was in Indiana did not suffice to bring the injury within the Indiana law. (Bement Oil Corp. *v.* Cubbison (1925), 149 N. E. 919.)

Similarly, a salesman working in the State of Georgia under a contract with an Indiana corporation, concluded by correspondence while the employee was in South Carolina, was said to be under the law of the State in which the service was to be rendered, though it was within the power and right of the parties to have stipulated, when making the contract, that the law of Indiana would apply. In the absence of such action "the law presumes that the parties contracted with reference to the laws of Georgia, where said contract was to be performed." (Leader Specialty Co. *v.* Chapman (1926), 152 N. E. 872.)

WORKMEN'S COMPENSATION—EXTRATERRITORIALITY—JURISDICTION—PROCEEDINGS IN STATE WITHOUT COMPENSATION ACT—*Johnson* v. *Carolina, Clinchfield & Ohio Ry. Co., Supreme Court of North Carolina (January 27, 1926), 131 Southeastern Reporter, page 390.*—R. W. Johnson, a citizen of North Carolina, was employed by the Carolina, Clinchfield & Ohio Railway Co. in Tennessee under a contract of employment made in that State, and while in the course of his employment as carpenter in a repair yard he received injuries for which he brought action for damages in a court of North Carolina. Tennessee has a workmen's compensation law with which the employer had complied. North Carolina, however, has no such law, and actions for damages in that State are governed by the common-law rule. It was argued by counsel for plaintiff that the case should be tried under the common law or under the Federal employers' liability act. Counsel for the defendant contended that the case was not in interstate commerce, and should be tried under the Tennessee act, and if tried thereunder the plaintiff's cause of action was barred by the statute of limitations; he therefore moved for a nonsuit, which motion was overruled. The plaintiff, in his pleadings, tendered the following issue: "What damages, if any, is plaintiff entitled to recover of the defendant by reason of the negligence of the defendant, as alleged?" The case was tried on the theory that the Tennessee workmen's compensation act applied, and the issues were submitted to a jury to determine what the damages should be under that act. The jury found for the plaintiff in the amount of $4,300 and the defendant appealed.

The court held that in view of the fact that North Carolina had no workmen's compensation law and there was no provision in the State for the enforcement of an act similar to that in Tennessee which by its language could be enforced only in that State, there

could be no judicial comity. It also held that considering the conflict between the judicial decisions of the different States, such decisions could have but little controlling influence on the courts of North Carolina, and that the instant case should have been tried under the common law as administered in the courts of North Carolina. The verdict as rendered was said to be not sufficient to support a judgment for damages based on a common-law action for negligence. In this connection the court, said in part:

To hold that a citizen of this State, under such circumstances, had no remedy, except that provided by the Tennessee compensation act in force in the State in which he was injured, having been induced to go there to work in an emergency, would be a denial of any remedy in the courts of this State. This court can not so hold.

We have held in Farr *v.* Babcock Lumber Co. (182 N. C. 725, 109 S. E. 833), that, where the contract of employment was made in Tennessee and the employee was injured while working in North Carolina, the Tennessee compensation act did not interfere with the jurisdiction of the superior court in North Carolina.

For the reasons stated, a new trial was ordered.

WORKMEN'S COMPENSATION—FEDERAL STATUTE—INJURY OF FEDERAL EMPLOYEE—RIGHT OF ACTION AGAINST THIRD PARTY—EFFECT OF RECEIPT OF COMPENSATION—*Lassel* v. *City of Gloversville, Supreme Court of New York, Appellate Division (July 2, 1926), 217 New York Supplement, page 128.*—Hiram J. Lassel was employed by the Federal Government as a mail carrier, and while in the performance of his duties he was injured through the negligence of an agent of the defendant in operating an automobile. He was awarded and paid compensation under the Federal compensation act of September 7, 1916. He then brought action against the defendant to recover damages for personal injuries. The defendant denied the material allegations of the plaintiff and set up two affirmative defenses numbered second and third. In the second defense it was alleged that the plaintiff was injured while in the performance of his duties as a mail carrier and that he was compensated therefor under the Federal compensation act. The third defense reasserted the facts set up in the second defense and further asserted that the plaintiff, by accepting compensation under the Federal act, made an election of remedies inconsistent with the remedy now sought to be enforced. The plaintiff moved to strike out the second and third defenses, but the motion was overruled and the plaintiff appealed.

The court referred to the Federal compensation act of September 7, 1916, and quoted therefrom as follows:

If an injury * * * for which compensation is payable under this act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor,

the commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the commission may require said beneficiary to prosecute said action in his own name.

Then, speaking of the plaintiff's right to bring this suit, the court said, in part:

The plaintiff in this case was never ordered by the commission to assign, and has never in fact assigned, his right of action to the United States. Obviously the act contains no provision which would debar the plaintiff from maintaining this action. On the contrary, the act, by providing that the injured employee must, from moneys recovered from a third party as the result of a suit brought by him, reimburse the United States for compensation previously received, necessarily, by implication, sanctions the bringing of such an action by an employee upon his own initiative.

The defendant also contended that, independently of the statute, it was entitled to set up the payment of compensation to the plaintiff by the United States in reduction or mitigation of damages, but the court held that such an argument was not tenable, and in support of its position quoted from the opinion in the case of Drinkwater *v.* Dinsmore (80 N. Y. 390), as follows:

In such cases, proof of the insurance actually paid would not tend to show that the damage claimed was not actually occasioned by the wrongdoer; but it would simply show that compensation had been received by the injured party in whole or in part from some other person—not that the wrongdoer had made satisfaction, which alone could give him a defense.

The court then concluded:

We think that the matter set up in the second and third defenses constituted no defense and was wholly irrelevant.

The order was reversed, with $10 costs and disbursements, and the motion to strike out granted.

WORKMEN'S COMPENSATION—HAZARDS OF BUSINESS—INJURY TO CLERICAL EMPLOYEE—PROXIMATE CAUSE—*Kent* v. *Kent et al., Supreme Court of Iowa (April 6, 1926), 208 Northwestern Reporter, page 709.*—The plaintiff in this case was employed by the defendant in his grocery store as cashier and bookkeeper only. Her duties were performed on a platform some 8 feet above the main floor of the store, reached by a steep flight of steps with no risers between the steps. A platform scale was standing on the floor of the store beneath the stairway with its arm projecting through, partially covering one of the steps. At the time in question plaintiff, in coming down the steps to answer a telephone call, tripped on the arm of the

scale and was injured. Her claim for compensation under the workmen's compensation act was denied by the deputy commissioner, which order was affirmed by the commissioner. On appeal to the district court, the order was reversed and compensation awarded, from which judgment the defendant appealed. The court in affirming the award, speaking through Judge Vermillion, said in part:

Section 2477m16, Code Supplement of 1913, in force at the time of the injury, provided, in part, as follows:

"In this act unless the context otherwise requires: * * * 'Workman' is used synonymously with 'employee,' and means any person who has entered into the employment of, or works * * * for any employer except * * * those engaged in clerical work only, but clerical work shall not include one who may be subjected to the hazards of the business. * * *"

The statute is not happily worded; but its evident purpose was, and its effect is, to first exclude from the operation of the compensation law as a class employees engaged in clerical work only, and then to extend the benefits of the law to those of the excluded class who, notwithstanding their employment is clerical only, are, nevertheless, subjected to the hazards of the business of the employer.

The inquiry is, therefore, whether appellee's injury was proximately caused by a hazard of her employer's business of conducting a grocery store, as distinguished from a hazard incident merely to her clerical employment.

Appellee's injury was not caused by the stairway alone, but by the combination of the open steps in the stairway and the projecting arm of the platform scale. The scale was a thing in no matter connected with appellee's clerical employment. Obviously, its use was confined to the operation of the grocery business. If or when the scale, in combination with the stairway, constituted or became a hazard, it was a hazard, not of the appellee's clerical employment, but of the grocery business conducted by the employer.

The stairway afforded the only means of reaching or leaving the place where appellee was employed.

Her descent of the stairway with the obstructing scale arm subjected her to a hazard of the employer's business. The mere fact that the telephone call may have been for her personally had no causal connection with her injury.

The judgment was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY—DEATH FROM INTERVENING CAUSE—*Schafer & Olson* v. *Varney, Supreme Court of Wisconsin (October 12, 1926), 210 Northwestern Reporter, page 359.*—A. F. Varney, a carpenter employed by Schafer & Olson, while in the course of his employment received injuries resulting in a broken leg. He was taken to a hospital, where defective setting necessitated rebreaking and continued treatment. After several weeks he developed smallpox. He was immediately taken home and cared for by his wife, but death from smallpox resulted a short time thereafter.

There was testimony of the physician in charge that the deceased's death was partially induced by his lowered vitality owing to his previous accident. The industrial commission awarded his widow compensation, and the defendants brought an action in the circuit court to review the award. The award was affirmed and the defendant appealed.

Six members of the the supreme court participated in the consideration of the appeal, one having been the circuit judge presiding in the trial below. The six were equally divided as to the conclusion to be reached. Under the established rule, this left the judgment below undisturbed, and it was accordingly held to be affirmed.

WORKMEN'S COMPENSATION—INJURY—GROSS NEGLIGENCE—EXEMPLARY DAMAGES—COMMON-LAW RIGHTS—*Castleberry* v. *Frost-Johnson Lumber Co., Commission of Appeals of Texas (April 28, 1926), 283 Southwestern Reporter, page 141.*—J. S. Castleberry sustained injuries while in the course of his employment with the Frost-Johnson Lumber Co., which resulted in the loss of his foot. In due course of administration he was awarded compensation, which he accepted, and thereafter instituted suit in the district court against his employer to recover exemplary damages for alleged negligence. There was judgment for the defendant in the district court, which was affirmed by the court of civil appeals. That court held that the right at common law of an injured employee to recover exemplary damages arising from gross negligence of his employer was by express legislation as well as necessary implication abrogated, and affirmed the judgment of the trial court. The plaintiff brought error. It was contended that the court erred in its holding, for such common-law right was saved to the plaintiff by the last clause of section 7 of article 5246, act of 1917, as follows:

> And in such suit brought by the employee or his legal heirs or representatives against such association or employer, such award, ruling, or finding shall neither be pleaded nor introduced in evidence.

The commission of appeals, in its opinion, pointed out that since the civil court of appeals wrote its opinion in the instant case the Legislature of Texas had construed the more or less indefinite and meaningless language of the statute through codifiers appointed by it to iron out such provisions, and as corrected the clause depended upon for recovery by the plaintiff is in part as follows: "Nothing in this law shall be taken or held to prohibit the recovery of exemplary damages by the surviving husband, wife, heirs of his or her body * * *." The word "employee" used in the act was eliminated.

The court referred to the compensation laws of many of the States and cited numerous cases that have arisen therein wherein the facts were similar to those here considered. It then said in part:

The courts of all the States, so far as we have been able to ascertain, seem to hold that all rights of action at common law are abrogated by these compensation acts except where expressly provided otherwise; that is to say, some of the States make definite exceptions in certain respects. But we have found none which authorizes the recovery of exemplary damages by an injured employee arising out of gross negligence.

Under our Texas law employees have all of their original rights when injured through willful acts or omissions. As in other States, when injured by negligence, either ordinary or gross, another plan of compensation has been substituted. We think this has been true under every act of this kind passed in Texas.

For the reason stated the judgments of the district court and court of civil appeals were affirmed.

WORKMEN'S COMPENSATION—"INJURY"—INJURY TO WOODEN LEG—*London Guarantee & Accident Co. (Ltd.)* v. *Industrial Commission, Supreme Court of Colorado (October 4, 1926), 249 Pacific Reporter, page 642.*—William Chambers, an employee of the Weicker Transfer & Storage Co., was awarded compensation for the accidental injury of his wooden leg. From that award the defendant appealed to the district court, which affirmed the award. The employer and insurer brought a writ of error.

The Supreme Court of Colorado reversed the judgment of the lower court with directions to disaffirm the award. Judge Denison said that "compensation can be awarded for personal injuries only, which means injury to the person. A wooden leg is a man's property, not part of his person, and no compensation can be awarded for its injuries."

Judgment reversed with directions to disaffirm the award.

WORKMEN'S COMPENSATION—INJURY—LOSS OF EYE—DISFIGUREMENT—INDEPENDENT AWARDS—*Sustar* v. *Penn Smokeless Coal Co., Supreme Court of Pennsylvania (February 8, 1926), 132 Atlantic Reporter, page 345.*—Clause (*c*) of section 306 of the workmen's compensation act of 1915, establishing a specific and exclusive schedule of compensation for all disabilities or permanent injuries resulting from the loss of certain members of the body, such as a hand, an arm, a foot, a leg or an eye, was amended by the act of May 20, 1921, section 1, so as to provide for serious and permanent disfigurement of the head and face of such a character as to produce an unsightly appearance, and such as is not usually incident to the employment, 60 per cent of the wages, for not to exceed 150 weeks.

Andy Sustar suffered an injury in the course of his employment on March 1, 1922, which resulted in the loss of his right eye and the serious disfigurement of his face, wholly apart from the injury to the eye. The referee awarded him compensation for 275 weeks—125 weeks for the loss of the eye and 150 weeks for the disfigurement. The board reduced the allowance for disfigurement to 75 weeks, and on appeal to the court of common pleas it was disallowed altogether. The plaintiff then appealed to the superior court. The question presented was whether or not the new paragraph above referred to applied to and provided for additional compensation for serious and permanent disfigurement when in the same accident which caused the loss of a body member.

The court held that the new paragraph did apply in such cases and in its opinion said in part:

Under our view of the law, the legislature classified certain permanent injuries under section 306 (*c*) and provided that for an injury included therein the employee should be paid compensation for either a specific number of weeks (as for the loss of a member), or a period to be determined by the board, according to the extent of the injury, not exceeding 150 weeks (as for permanent disfigurement); that each injury was thus valued, irrespective of the actual loss of earnings or incapacity to labor, and that for two or more such injuries occurring at the same accident the employee is entitled to be paid for the aggregate of the periods so specified or determined.

The judgment of the court of common pleas is reversed, and the record is remitted to said court with directions to enter judgment in favor of the claimant for $2,400, representing 125 weeks for the loss of the right eye and 75 weeks for permanent disfigurement, at $12 per week; payments heretofore made to apply thereon; costs to be paid by appellees.

The defendant appealed to the supreme court, which adopted the opinion of the superior court and affirmed the judgment rendered therein.

The fact that an eye is useless from an industrial standpoint is held by the Supreme Court of Minnesota to be no bar to an award under the compensation act of that State, which prescribes a fixed benefit for the loss of specified members. In the instant case the employers had paid full compensation for the loss of use of the eye, and contended that they could be required to make no further payments, but the court held the language of the to law be "plain," so that it was "constrained to give effect" thereto, and affirmed the award made by the industrial commission. (Shaughnessy *v.* Diamond Iron Works (1926), 208 N. W. 188.)

Where an eye was defective but of measurable usefulness in avoiding objects between the workman and the light, being rated as "of some considerable and practical use industrially," an injury causing its enucleation was compensable without modification on account of the previous condition of defective vision. In so holding, the Supreme Court of Michigan affirmed an award made by the department of labor and industry of the State. (Hayes *v.* Motor Wheel Corp. (1926), 208 N. W. 44.)

In connection with the foregoing case may be noted a decision of even date handed down by the same court. Here a workman suffered injury to an eye, causing 87 per cent loss, and was awarded compensation during disability. He returned to work at the same wages, and the employer asked to have payments stopped, while the employee asked to be compensated as for the loss of an eye. An award was made by a deputy but reversed by the department, and payment under the agreement was stopped. The supreme court affirmed the latter finding, saying that it would be "fallacious" to hold that the plaintiff had lost an eye, that it "still renders him service, and he still has vision to lose before it can be said he has lost his eye." (Crane *v.* Ætna Portland Cement Co. (1926), 208 N. W. 45.)

WORKMEN'S COMPENSATION—INJURY—LOSS OF ONE PHALANX OF FINGER—CONSTRUCTION OF STATUTE—*Bell* v. *Merchants' Cotton Oil Co., In re Bell, Supreme Court of Louisiana (February 1, 1926), 107 Southern Reporter, page 436.*—Fred Bell, an employee of the Merchants' Oil Co., suffered the loss of one phalanx of the third finger and recovered judgment under the workmen's compensation act. The judgment was reversed by the court of appeal and the suit dismissed. The claimant applied for certiorari or writ of review.

The question in the case was whether or not the act allowed compensation for the loss of only one phalanx of a finger. Subsection (*d*) of section 8 of the act provides for compensation for the loss of a finger or fingers and for the loss of two phalanges of any one finger. Subsection (*e*) of the same section makes provision for injuries not falling within any of the provisions already made, specifying that if an employee is seriously permanently disfigured about the face or head, or if the usefulness of a member or physical function is seriously permanently impaired, the court may allow such compensation as is reasonable in proportion to the compensation theretofore specifically provided for the disability specified, not to exceed 65 per cent of the weekly wages for 100 weeks. Subsection 3 of the same section declares that the maximum compensation shall be $20 and the minimum $3 per week, notwithstanding anything to the contrary in the statute.

It appears that the lower court undertook to allow under subsection (*e*) such compensation as was reasonable in proportion to the compensation specifically provided in cases of specific disability named in the act. This would have been proportionately less than $87.75 specifically provided for the loss of two phalanges of the finger.

The supreme court, in its opinion delivered by Judge O'Niell, held that the court could not under subsection (*e*) fix the compensation at less than $300, since according to subsection 3 the minimum allowance was $3 per week, and under subsection (*e*) the term of payment was fixed at 100 weeks. The court then said in part:

Our conclusion is that subsection (*e*) does not allow compensation for the loss of only one phalanx of a finger, even though compensation

for such injury is not provided for in any previous provision of the statute, and even though the case is one where the usefulness of a member, or a physical function, is seriously impaired. In a sense, the case is one "not falling within any of the provisions already made" in the statute. But the case is one in which, by necessary implication, the previous and specific provisions of the statute do not allow compensation. The provisions of subsection (*e*), which are general in character, were not intended to allow compensation for an injury for which other and specific provisions of the statute, by necessary implication, denied compensation. The language of subsection (*e*) is not peremptory, for it says:

"The court may allow such compensation as is reasonable in proportion to the compensation herein above specifically provided in cases of specific disability above named," etc.

If the court cannot allow such compensation as is reasonable in proportion to the compensation specifically provided for the disabilities named without violating other and mandatory provisions of the law, and without producing an anomalous result, the statute does not compel it.

Our conclusion is that the judgment of the court of appeal is correct.

The judgment was therefore affirmed, at relator's cost.

WORKMEN'S COMPENSATION—INJURY—NOTICE—LIMITATION—PREJUDICE—*Itzkowitz* v. *Finer & Bachrach, Supreme Court of New York, Appellate Division (November 28, 1926), 218 New York Supplement, page 272.*—Section 18 (as amended by ch. 634, Acts of 1918) of the workmen's compensation law of New York provides that notice in writing of an injury for which compensation is payable shall be given to the commission and to the employer within 30 days after the accident causing such injury. In the instant case the board excused the failure of the claimant to give the required notice as follows:

The employer was not prejudiced because, at a hearing held upon the claim for compensation filed by Abraham Itzkowitz, Jacob Finer, one of the employers in the copartnership that employed him, testified that the employer was not prejudiced by the failure to give written notice of injury and that he excused the failure to give written notice of injury.

From an order of the board in favor of the claimant the employer and insurance carrier appealed.

The court held that the somewhat prevalent practice of some referees of asking the employer or his agent if the employer has been prejudiced by the failure to give the statutory notice could not be sustained. Judge Cochrane, speaking for the court, said in part:

A further reason why such testimony is improper is because the question of prejudice depends on a determination of the facts in each particular case, and of the law applicable to such facts, and it is not

the province of a witness to determine either the facts or the law. It is for the board, and not the witness, to draw the inference of prejudice or want thereof.

The award was reversed and the claim remitted, with costs against the State industrial board to abide the event.

The Supreme Court of Tennessee excused a workman from the consequences of delay in giving notice where he had called his foreman's attention to a supposed trivial injury, and had been directed by the latter to the employee in charge of first aid, which he received. Serious conditions developed, requiring amputation of a finger, but compensation was denied in the trial court on account of failure to give notice. The law excuses failure if a reasonable excuse appears, and the supreme court of the State found such excuse in the circumstances stated above, and the ignorance, without apparent fault, of the seriousness of the injury. (Ware *v.* Illinois Central R. Co. (1926), 281 S. W. 927.)

Where the results of an injury to an eye became apparent only after several months, the Supreme Court of Washington held that the limitation for giving notice ran from the development of the injury and not from the date of the accident causing it, affirming the superior court's decision which reversed the industrial commission, which had held the claim to be barred by lapse of time since the accident. (Stolp *v.* Department of Labor and Industries (1926), 245 Pac. 20.)

WORKMEN'S COMPENSATION—INJURY—OCCUPATIONAL DISEASE—INHALING FOREIGN MATTER—PREEXISTING DISEASE—*Dumbrowski v. Jennings & Griffin Co., Supreme Court of Errors of Connecticut (January 28, 1926), 131 Atlantic Reporter, page 745.*—Carl Dumbrowski had been employed by the defendant company for 18 years, all of which time his work consisted of grinding steel implements upon a wet sandstone wheel. In the course of his employment, and arising out of it, the claimant inhaled particles of foreign matter flying from the wheel, and these became embedded in his lung tissue, causing a condition of pneumoconiosis, which was first discovered in October, 1923. As a result of the pneumoconiosis the resistance of the claimant to infection was lowered, and as a result of the lowered resistance pulmonary tuberculosis developed sometime between October, 1923, and April, 1924, totally incapacitating claimant. The commissioner awarded full compensation under the occupational disease amendment of chapter 142, Acts of 1919, as amended by chapter 306, Acts of 1921. Defendant appealed on the ground that the commissioner erred in so ruling as to place on it the burden of proving that the pneumoconiosis developed prior to July 1, 1919 (effective date of act); in not ruling that claimant, to get full compensation, must prove that the lowered resistance to infection from which the tuberculosis developed began to exist at a date on or after July 1, 1919; in allowing any compensation; in treating the act of 1919 as retroactive; and in denying defendant's motion to correct the finding.

In affirming the award the court said that under the workmen's compensation act of July 1, 1919, negligence and assumption of risk, etc., were abolished, and all that is required of the plaintiff to entitle him prima facie to full compensation is to establish the following facts: (1) An abnormal condition of his body arising after July 1, 1919, out of and in the course of his employment; (2) that this condition produced an incapacity to work for the requisite statutory period; (3) that this condition of incapacity to work was caused by accident or disease, which, however, need not be traced to a definite happening or event.

The finding and award disclosed that these essentials were established by plaintiff.

This ruling places the burden of proof upon the defendant, after a prima facie case has been established, to show such facts as will defeat or diminish recovery. It was said that this is in accord with reason and justice, is supported by the great weight of authority, and is in harmony with General Statutes, paragraph 5364, as to the conduct of compensation cases before a commissioner.

We hold, therefore, that the burden of proof rested upon the defendants to prove that a preexisting disease existed in the plaintiff prior to July 1, 1919, which barred him from the recovery of full compensation.

The superior court was advised to sustain the award of the commissioner.

WORKMEN'S COMPENSATION—INJURY—PREEXISTING CONDITION—CAUSAL CONNECTION—EVIDENCE—*Gausman* v. *R. T. Pearson Co., Supreme Court of Pennsylvania* (*November 23, 1925*), *131 Atlantic Reporter, page 247.*—David H. Gausman was awarded compensation for personal injuries alleged to have been sustained in the course of his employment. The award was affirmed by the court of common pleas of Allegheny County, and defendant appealed. Gausman, who was 74 years old and afflicted with chronic nephritis and arteriosclerosis, was engaged by the defendant in laying a floor on the morning of July 14, 1923, and about noon of that day was found wandering around outside of the building in an abnormal condition. He soon recovered sufficiently to care for his tools, and, it being quitting time (Saturday noon), he went home by street car. Later in the day, while returning home from the barber shop he was stricken with apoplexy, which it was claimed resulted from heat exhaustion suffered on the morning of the day in question. It appeared that the day was not excessively hot, that the plaintiff was working alone at light work and that he was not subjected to any unusual exertion. It also appeared that about five days previously he was found in a condition similar to that suffered on the day he was stricken. The court reversed the award, and in the course of its opinion said in part:

Before one ailment can be attributed to another, the existence of the latter must be shown. Here claimant's case fails, for the finding of heat exhaustion is not sustained by the proof. The evidence relied upon to support this finding is that of Doctor Frederick, and while he testified he diagnosed the case "as hemiphlegia [paralysis of one side], following a heat exhaustion," he did not see claimant until after the latter had been stricken in the evening, and knew nothing of his condition at noon except by report. The doctor further said, in effect, that claimant's entire affliction that day may have been of apoplectic origin. As to that, he testified:

"Q. In your opinion, was this a sunstroke, or heat exhaustion, or stroke of apoplexy? A. The apoplexy very suddenly followed it [the heat exhaustion] very promptly; or the apoplexy may have been right with it. It may have been the apoplexy instead of heat exhaustion, that produced it."

The doctor also mentioned the presence of certain symptoms as common to both, and said he discovered no paralysis until the next day (Sunday). From his evidence it is equally probable that the disability suffered by claimant at the noon hour was apoplectic as that it was heat exhaustion, and, from all the other evidence in the case, even much more so. Furthermore, the burden of proof is not met by the testimony of a witness when so conflicting as to render any inference drawn therefrom a mere guess.

Treating what happened to claimant that Saturday noon as the beginning of the apopletic disturbance and a part thereof, it was not shown to have been an accident within the meaning of the workmen's compensation law. To constitute an accident, there must be some untoward occurrence aside from the usual course of events. Such stroke will be treated as an accident when resulting from a shock, strain, or other injury to the physical structure of the body [citing cases].

The judgment was therefore reversed, and the award of the referee set aside.

A similar conclusion was reached by the Court of Appeals of Kentucky in a case (Wallins Creek Collieries Co. *v.* Williams (1925), 277 S. W. 234) where a mine superintendent assisted a blacksmith to shoe a recalcitrant mule, becoming quite warm in the effort. He soon complained of being sick, was taken home, and a physician called, who found him suffering from pains in his heart. He died that evening. The industrial board held that the death was the result of an accident arising out of and in the course of the employment, and the circuit court affirmed the award. The employer claimed that the death was due to angina pectoris, a well-defined and certain symptom of a diseased condition of the heart. The court of appeals found no evidence to support the claim of accidental injury, there certainly being nothing of a traumatic nature, and the judgment was reversed, with directions to dismiss the claim.

On the other hand, the Supreme Court of New York, appellate division affirmed an award allowed a school janitor who hastened to the schoolhouse, in his care on the occasion of an alarm of fire. Haste and excitement caused an acute dilation of the heart, already weakened by chronic myocarditis, death following. Over the contention that there was no accident, the court ruled in the claimant's favor, saying that the case presented the elements of an accidental injury—a mishap unlooked for, unexpected, and without design on the part of the deceased. "The excitement to which Thompson was subjected and

his activity undoutedly hastened his death, brought his diseased heart condition to the climax. The overexcitement and exertion were the real proximate cause of his death. The acute dilation of the heart was the accidental injury." (Thompson *v.* City of Binghamton (1926), 218 N. Y. Supp. 355.)

The Supreme Court of Utah sustained an award allowed in the case of a workman who struck his knee with a hammer, causing no visible abrasion, but followed by discoloration and swelling. An abscess later developed in the knee, and afterwards one in the hip, which incapacitated him. It was found that the hip contained the same kind of bacteria as found in the knee. Medical opinions as to the causal connection differed, one contention being that the claimant's condition was due to boils, from which he had suffered some months prior to the injury. However, the award was made as applied for, and affirmed by the court on the ground that the facts as to the infections and the expert opinion evidence furnished a substantial basis, a "satisfactory foundation," for the finding that the injury was the cause of the disability. (Denver & R. G. W. Ry. System *v.* Industrial Commission (1926), 243 Pac. 800.)

WORKMEN'S COMPENSATION—INJURY—PREEXISTING DISEASE—NOTICE—EVIDENCE—APPORTIONMENT OF AWARD—*Elkhorn Coal Co. v. Combs, Court of Appeals of Kentucky (May 21, 1926), 283 Southwestern Reporter, page 1007.*—Harlan Combs was employed by the Elkhorn Coal Co. On November 14, 1923, while engaged in snaking logs down the mountain side with a team, a large rock that had been dislodged by one of the logs came crashing down the hillside and struck him, knocking him down. His foreman, Town Hall, and also some of his colaborers, were present at the time and saw the accident. They went to where Combs was lying and assisted him to his feet. After a half hour or so he went ahead with his work. He worked the whole day following the accident and returned to work on the succeeding day, but quit before night and never returned to his labor. He was examined by the defendant's physician, who made a written report of the accident. In the latter part of December or the first part of January Combs became quite ill, his vision was much affected, and he suffered greatly with his back. He was examined jointly by his personal physician, Doctor Sumner, the company's doctor, Doctor Pigman, and a Doctor Bach. They recommended that Combs go to Louisville at once for an examination and treatment in a hospital. The examination made at the hospital showed that he was suffering from an acute stage of Bright's disease. He died in the early part of February following his injury. A post-mortem examination made by Dr. P. Y. Pursiful and Doctor Sumner showed the right kidney considerably discolored in its lower half and containing a lot of pus. They decided that these conditions brought about the death of Combs. The compensation board made an award to his widow and infant children, which was affirmed by the circuit court, and the defendant appealed. Two grounds were urged for

reversal: (1) That there was no evidence in the record to sustain the findings of the board that Combs' death was caused by the blow he received in November, and (2) that notice was not given to the company in accordance with sections 4914 and 4915 of the statutes.

It was also suggested by the defendant that if the court concluded that there was some evidence to support the board's finding then it should conclude that such evidence demonstrated that Combs' death was caused in part by the injury he received and partly by a preexisting disease and that the award be apportioned accordingly. The court in affirming the judgment of the lower court said in part:

As to the first contention, it is settled that, if there is any competent evidence to sustain the findings of fact by the compensation board, such findings are conclusive in the absence of a claim of fraud or mistake. There being no such claim here, the only question to determine is whether or not there was any competent evidence to sustain the board's findings.

After citing the facts as set forth above, the opinion continued:

Although appellant introduced a great deal of evidence to the contrary of what appellee had proved, yet there being some competent evidence, as shown, on which the board could rest its findings of fact, such finding is conclusive.

The evidence did not show that Combs' death was caused by a combination of a preexisting disease and a traumatic injury. Appellee's evidence established the sole cause as a traumatic injury. Appellant's evidence established the sole cause as a disease unaccompanied by traumatic injury. Under the proof it was either one or the other, but there was no proof that it was a combination of both. But, had there been, there was, as above shown, evidence to establish that the sole cause of Combs' death was the traumatic injury, and, the board so finding, its finding is conclusive.

So far as the notice of Combs' injury to his employer is concerned, the evidence shows that Town Hall, the foreman of Combs, witnessed the accident and gave him immediate help, and that on the succeeding day the superintendent learned of it. Dr. Owen Pigman made a written report of this accident for appellant on blanks furnished the compensation board. A copy of this report is in the record, and bears date December 3, 1923, just two weeks after the accident. The blank in this report headed, "Give an accurate description of the nature and extent of injury," is filled out: "Bruise in right lumbar region followed by acute nephritis."

In considering sections 4914 and 4915 of the Statutes of Kentucky relied upon by the defendants, the court cited Wilburn *v.* Auto Exchange (198 Ky. 29, 247 S. W. 1109) and Bates & Rogers Construction Co. *v.* Emmons (205 Ky. 21, 265 S. W. 447), wherein these sections were construed and held in effect to mean that any fact or circumstance which brings to the attention of the employer or his principal representative knowledge that the employee has received an injury will be sufficient notice.

The opinion concluded as follows:

All this being true, as appellant clearly had knowledge of the accident and injury, the want of immediate notice to it by Combs was not a bar to these proceedings.

It results, therefore, that the judgment of the lower court, affirming the award of the workmen's compensation board, is correct, and it is hereby affirmed.

A case involving the same principle was before the same court (Wallins Creek Collieries Co. *v.* Jones et al. (1926), 283 S. W. 1067), where the employee, Jones, was injured while lifting a heavy car. The evidence disclosed that he was "a well and able-bodied man before the accident," but that subsequent thereto he was found to be suffering with tuberculosis. The board found that he was suffering from a preexisting disease that had been lighted up by the accident, and granted an apportioned award based on the two causes, which was affirmed by the court.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—EMPLOYEE KILLED BY POLICEMAN—*Sure Pure Ice Co.* v. *Industrial Commission et al., Supreme Court of Illinois (February 18, 1926), 150 Northeastern Reporter, page 909.*—Frank Manthey was employed by the Sure Pure Ice Co. as chief engineer. His regular hours were from 8 o'clock a. m. to 4 o'clock p. m., but he also worked at any hour when called or when there was a breakdown of the machinery. He was frequently at the plant at night in the discharge of his duties. On the night of his death the regular night engineer was off duty, and along about 1 or 2 o'clock Manthey went to the plant to see if everything was all right. He went into the building and remained there until some time after 3 o'clock when he came out, and was standing on the sidewalk talking to a Mr. Fountain, who had come to the plant with him. About this time a squad of policemen drove up in an automobile, and Manthey started to walk away toward the plant; the officers called him to halt when he was about 10 feet away, but he kept on walking. One of the officers called on him to halt and fired into a pile of salt near him. Officer Kennedy then called on him to halt, but he walked on to the door of the plant. Kennedy then shot and killed him. His widow was granted an award by the industrial commission, which was affirmed by the circuit court of Cook County. The defendant appealed on the ground that the commission and the court erred in their findings that the deceased met his death by an accident arising out of his employment. Chief Justice Dunn delivered the opinion of the court and said in part:

The injury must be incidental to the nature of the employment, and it is not enough that the presence of the injured person at the place of the injury is because of his employment, unless the injury itself is the result of some risk of the employment. If the injury is sustained by reason of some cause having no relation to the nature of the employment, it does not arise out of the employment.

After citing the case of City of Chicago *v.* Industrial Commission (127 N. E. 49; 292 Ill. 406; see Bul. No. 309, p. 275), the court said:

In the case last cited we held that the injury there received at the hands of a fellow workman did not arise out of the work, but as the result of a quarrel over a private matter which was not connected with the employment, and therefore there could be no award of compensation.

The opinion continued:

There was no causal connection between the duties of Manthey and his shooting by the policeman. Manthey's duties required him to be at the place where he was at the time he was killed. The duties of the policemen required them to guard and protect from thieves, robbers, and burglars their section of the city, including the plant of the plaintiff in error. Their attention, as the evidence shows, had been particularly called to the plant of the Certified Ice Cream Co., adjoining the plant of the plaintiff in error, because of four complaints which had been received by the police of stealing from that company, but their duty extended to guarding the whole district. What happened to Manthey might as well have happened to any man employed at night anywhere in the section guarded by these policemen. The cause of his death arose from an agency which was entirely outside of his employment, and there was no causal connection between the agency and the employment. Had he walked away anywhere in this police district from these officers after they had ordered him to halt he would probably have been shot as he walked. He was only about 13 feet distant from the policeman who shot him, and was walking and not running. The officers were in sufficient force to overpower him, but such considerations have no place in this case.

The judgment was reversed and the award set aside.

The Supreme Court of Alabama affirmed an award in behalf of the widow of a truck driver who was killed while in the course of his employment by an accidental shot by a boy who was shooting at sparrows. To the contention that the injury did not arise out of the employment the court replied that, while the risk may have been external to the employment, still the employment caused the exposure to the risk, so that the award was justified. (Boris Const. Co. *v.* Haywood (1925), 106 So. 799.)

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—ERYSIPELAS—PROXIMATE CAUSE—*Bagley's Case, Supreme Judicial Court of Massachusetts (June 30, 1926), 152 Northeastern Reporter, page 882.*—Charles A. Bagley, 80 years of age, was employed as a night watchman by the Marine Hardware Co. It was his duty among other services to sweep the floors every night and deposit the sweepings in an old coal bin near the boiler room. The boiler room was dimly lighted and the bin was dark. On April 27, 1925, the sweeping having been completed and the refuse deposited, the decedent fell on the floor and suffered abrasions from which erysipelas

developed, causing his death May 2, 1925. Harry G. Bagley made claim for compensation under the workmen's compensation act for the death of his father. He was granted an award by the industrial accident board, which was affirmed by the superior court. The insurer appealed, contending that the accident did not arise out of the decedent's employment. The court, on review, quoted from the evidence adduced at the hearing before the board as follows:

The only medical evidence was presented by the claimant, and the doctor testified that he examined decedent's face and noticed that there were marked abrasions and that blebs had formed on his face. The deceased gave the doctor a history, saying "he fell or tripped over—or something—at the shop; he fell, striking on his face on the floor of the room." The doctor further testified that the decedent got the infection when he fell on the dirty floor and that that was a typical case of what would cause erysipelas. There was no direct evidence as to what caused the deceased to fall except his own statement before he died that he tripped and fell.

The question, whether the fall was entirely due to natural weakness because of age, as the insurer asserts, was on record one of fact, and the general finding in favor of the dependent must stand.

The decree was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT — PREEXISTING CONDITION — EPILEPSY — *Marion Machine Foundry & Supply Co.* v. *Redd, Supreme Court of Oklahoma (November 10, 1925), 241 Pacific Reporter, page 175.*—The claimant in this case was an employee of the company named, engaged at work near which a gas flame was burning for the comfort of the claimant and other workmen. "Being seized with an epileptic fit, to which he was subject, he fell in such way that his hand was burned by the flame before he could be removed by other workmen."

This was the finding of the commission, and it was held by the court to be sustained by the evidence. However, the commission had granted an award on account of the resultant disability, and the company brought proceedings to vacate the award. The court reversed the commission on the ground that the injury did not arise out of the employment. "But for the epileptic seizure there would have been no injury."

The commission was consequently directed to vacate the award and dismiss the proceedings.

The Supreme Court of New York, Appellate Division, had before it a case in which a workman receiving benefits for permanent total disability was killed by falling from a ladder which he was climbing as a matter of curiosity or interest in a building in course of construction, but with which he was in no way employed. It was held that the death was due to vertigo, and if this was due to his prior

injury it would be compensable. The denial of the widow's claim was accordingly reversed, and the case remanded to the industrial board for a determination of the matter of causal connection. (Colvin *v.* Emmons & Whitehead (1926), 215 N. Y. Supp. 562.)

(A memorandum furnished by the board stated that the causal connection was found to exist, and benefits were allowed accordingly.)

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—VISITING DURING LUNCH TIME—*Babineau's Case, Supreme Judicial Court of Massachusetts (January 5, 1926), 150 Northeastern Reporter, page 4.*—Antoine Babineau was employed by the New Bedford Spinning Co. as a sweeper in the spinning room located on the third floor of the building. The boiler room was located on the first floor of the building, and deceased and other employees were accustomed to congregate in that room during the lunch period. On March 6, 1923, the deceased, while sitting in the boiler room, was injured by the explosion of a boiler and died from the result of his injuries. His widow was awarded compensation and the superior court of Suffolk County affirmed the award, from which judgment the defendant appealed.

The court held that the deceased had no contract of employment whereby his presence was required in the boiler room, but that he was there during his lunch period, a time that he was free to go and come as he pleased, free from the control of his employer, and therefore the employer could have no reasonable cause to expect that he would meet with such an accident. The court, speaking through Judge Sanderson, said in part:

> The mere fact that the accident occurred on the employer's premises is not enough to establish liability. (Hallett's Case, 230 Mass. 326, 119 N. E. 673.) The employee voluntarily went to the boiler room for his own comfort or pleasure at a time when, so far as the evidence discloses, the employer had no control over him, and the employment cannot be said to be a proximate contributing cause of the injury [citing cases].

The decree awarding compensation was therefore reversed and a decree entered in favor of the insurer.

A salesman who used his own automobile in his business went hunting early one morning, and afterwards went about his daily duty. At lunch time he noticed the gun still in the car and started to remove it, when he shot himself, injuring his hand. The trial court denied compensation, but the court of civil appeals allowed it. The Commission of Appeals of Texas reversed this allowance, saying that the presence of the gun was in no way related to the employer's business, and the entire incident was disconnected therewith. (Ætna Life Ins. Co. *v.* Burnett (1926), 283 S. W. 783.)

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—ACCIDENT—DEATH FROM HEMORRHAGE—PREEXISTING CONDITION—*Frandila* v. *Department of Labor and Industries, Supreme Court of Washington (February 4, 1926), 243 Pacific Reporter, page 5.*—Gust Frandila who was 60 years old at the time of his death, had been a coal miner, but had been out of employment for some eight months, his only work during that period consisting of chopping firewood for his home. On the 2d day of June, 1924, he was employed in digging a ditch for a sewer in the streets of Hoquiam. He went to work at 1 o'clock in the afternoon and about three hours later was seen by the foreman to stop chopping on a root at the bottom of a ditch 4½ feet deep, lean against the side of the ditch, and collapse. He was assisted to the sidewalk, where he died in about 15 minutes. His widow made claim for compensation under the workmen's compensation act, which was disallowed by the department of labor and industries. Its decision was reversed by the superior court, and from that decision the department of labor and industries appealed on the ground that the death of the deceased was not the result of a fortuitous event but was occasioned by the hardening of the arteries sufficiently advanced to have caused death under ordinary exertion.

The court, in disposing of this case, said in part:

The question, then, is whether the testimony in this case shows a fortuitous event.

It is plain from the evidence that the hardened arteries, coupled with overexercise in the course of employment, caused either the hemorrhage or embolism. The chopping of the root was a definite and particular occurrence which was the contributing, proximate cause of the death. The question of whether an injury has been the result of an accident or an accident arising out of the employment, which are narrower terms than fortuitous event, has been considered by many courts, and the result of these decisions seems to be that an accident exists when a man undertaking work is unable to withstand the exertion required to do it, whatever may be the degree of exertion used or the condition of the workman's health.

It is not necessary in order for a person to recover compensation as an injured workman that he must have been in perfect health at the time he received the injury. That is not the intent of the act, and it cannot reasonably be given any such interpretation. Where a workman, not in perfect health, during the course of his employment makes an extra exertion, which, in addition to his infirmity, causes an injury, such injury is a fortuitous event and brings him within the operation of the compensation.

The judgment was affirmed.

On the same day the court had before it for review a similar case (Cole *v.* Department of Labor and Industries, 243 Pac. 7), involving the same principles, in which an award had been granted by the superior court. Here a man, "not conscious of being seriously afflicted physically," caused a rupture in the region of his heart by exerting himself to the utmost in pushing a piece of timber, permanent partial disability following. The award was contested mainly on the

grounds that the injury to Cole was not the result of an accident but was caused by a culmination of a progressive affliction consisting of a diseased heart and arteries, accompanied by high blood pressure. The court affirmed the judgment of the superior court that the disability was caused by accident, citing the case of Frandila *v.* Department of Labor and Industries, supra, as controlling.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—ACCIDENTAL DISCHARGE OF OFFICER'S REVOLVER—HEARSAY EVIDENCE—*McDaniel* v. *City of Benson et al., Supreme Court of Minnesota (May 28, 1926), 209 Northwestern Reporter, page 26.*—Leith H. McDaniel was a police officer of the city of Benson, Minn., and although designated as chief, he was in fact the only police officer of the city. At about 4 o'clock in the afternoon of May 26, 1925, he went to his home to get his revolver. He placed it in a shoulder holster and in stooping over for some purpose the revolver fell out of the holster to the floor and was discharged, the ball shattering the bones of his right leg between the knee and the ankle. He died three weeks later from blood poisoning resulting from the wound. His widow was awarded compensation by the referee, whose award was affirmed by the industrial commission. The defendant brought certiorari to have the findings of the referee and the board reviewed. It contended that it was error to admit testimony of statements made by the deceased as to the manner in which the accident happened. It also objected to the findings that the injuries of the deceased arose out of and in the course of his employment.

It appeared that McDaniel was alone at the time of the accident; that he dragged himself to the telephone and called a doctor and then called Mrs. Minikas, who lived two or three blocks away, and asked her to call his wife, saying that he had shot himself. She called Mrs. McDaniel and then ran to the McDaniel home. While the doctor dressed the wound and stopped the flow of blood McDaniel told them briefly how the accident happened. He also told attendants at the hospital how it happened. It was the testimony of these persons that was objected to.

The court, in affirming the findings of the referee as affirmed by the commission, said in part:

How much of this testimony offended the hearsay rule is not important, for the statements were all to the same general effect, and at least those made to the doctor and Mrs. Minikas immediately following the accident were properly received in evidence. Furthermore, there is nothing which would justify saying that the injuries were intentionally self-inflicted, and the presumption is to the contrary.

That the deceased sustained his injuries during the hours of service is beyond question. He was the sole police officer of the city, and his service required him to perform all the duties usually performed

by such officers. His field of service embraced the entire city. At times such officers have occasion to use weapons, and may properly carry them at any time. The deceased kept his weapons at his home when not carrying them. If, when on duty unarmed, he concluded that he ought to have his revolver, it cannot well be said that he was outside the line of duty in going to the place where it was kept to get it.

The award was therefore affirmed.

In a case before the Supreme Court of Utah, a compensation award was affirmed where an officer dropped his revolver into a ditch while on duty, and was cleaning it at home, during which operation it was accidentally discharged, injuring his knee. The city contended that the officer was not at the time on duty or acting as an officer. The court suggested that this contention would not be good if he had undertaken at once to clean the gun where he was, nor if he had gone to the town hall, if there was one, and there done the work. There being no other place convenient than the one chosen, "we thus do not see wherein, in cleaning the gun at his house, the officer was any less in the course of his employment than if he had undertaken to clean it at some other place." (Beaver City *v.* Industrial Commission (1926), 245 Pac. 378.)

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—ACT OF GOD—EMPLOYEE KILLED BY LIGHTNING—*United States Fidelity & Guaranty Co.* v. *Rochester et al., Court of Civil Appeals of Texas (February 20, 1926), 281 Southwestern Reporter, page 306.*—W. C. Rochester was employed by the Lone Star Gas Co. On July 30, 1924, while engaged along with several other employees of the company in excavating a pipe line, and while using a steel shovel, he was struck by lightning and instantly killed. The industrial accident board granted his widow and two minor children an award, and the insurance carrier appealed to the district court, which affirmed the findings of the board, and the insurer again appealed. It was not disputed that the employee's death was caused by being struck by lightning, but it was contended by the insurer that he was killed by an act of God and it was not therefore liable under the terms of article 5246-82 of the workmen's compensation act of the State of Texas, which, so far as is here pertinent, reads as follows:

The term "injury sustained in the course of employment," as used in this act, shall not include: (1) An injury caused by the act of God, unless the employee is at the time engaged in the performance of duties that subject him to a greater hazard from the act of God responsible for the injury than ordinarily applies to the general public.

It was testified that the place where the deceased was working was flat open country with the exception of a few trees 150 to 200 yards away; that the pipe line was 18 inches under ground; that it was dry, and that there was no warning evidence of lightning or rain, but that suddenly a bolt of lightning struck the deceased, splitting the handle of the shovel he was working with and causing his death. The testimony of J. L. Kelley, an expert witness, was to the effect that

one standing over a pipe line with a steel shovel in his hands, as was the deceased, would be in a more hazardous position and more liable to be struck by it than would others who were several feet away from him. The admission of Kelley's testimony was objected to, and the action of the court in overruling the objection was made the basis of this appeal.

The court, in affirming the judgment of the lower court, said in part:

Under the rules so indicated, we feel unable to say that the witness Kelley was incompetent and that the trial court erred in overruling appellant's objection to his want of qualification; and, if we are correct in this, we think we must further hold that the evidence and facts of which we may take judicial notice are sufficient to sustain the jury's finding and support the trial court's judgment following it.

It is to be observed that in the case before us there is a distinct finding by both the accident board and the jury to the effect that the deceased at the time of his injury "was engaged in the performance of duties that subjected him to a greater hazard from the act of God, responsible for the injury, than ordinarily applies to the general public." And this finding, under the authorities and under well-recognized rules that we must follow, cannot, we think, be said to be unsupported by the evidence, or set aside.

Where a workman painting buildings in an amusement park sought refuge from a storm in a building that was blown over and he received fatal injuries, the Supreme Court of Nebraska reversed an award in the widow's favor, saying that, in the absence of special hazard, risks to which the general public is exposed do not furnish grounds for compensation, and no special hazard appearing in the instant case compensation could not be allowed. (Gale *v.* Krug Park Amusement Co. (1926), 207 N. W. 677.)

In a case before the Court of Appeals of Kentucky in which claim was made for the death of a workman from heat stroke, a reversal of the board's award was affirmed, the court saying that even if it should concede that the heat stroke accidentally arose out of the employment, "it still follows that it is not compensable under our statute because it is a disease and not resultant from traumatic injury." (Smith *v.* Standard Sanitary Mfg. Co. (1925), 277 S. W. 806.)

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—ASPHYXIATION—EVIDENCE—INFERENCES—*Public Service Co. of Colorado* v. *Industrial Commission, Supreme Court of Colorado (October 11, 1926), 249 Pacific Reporter, page 1094.*—For two years prior to his death Ralph Clark was employed by the Public Service Co. of Colorado. His usual employment was digging and filling ditches for laying gas pipes; he would sometimes connect a pipe and put in a coupling or cap to keep the dirt out. On June 15, 1925, Clark was working with a gang on a job at No. 801 East Eighteenth Avenue, Denver. That night the work was completed (unless possibly the plug hereinafter mentioned was not placed), and on the next morning Clark assembled with the gang

at the tool box near No. 801 and tools were taken out to begin another job about a block away. It appeared from the testimony that Clark, after taking some material to the new location, was seen to go away again toward the tool box. About 15 minutes later the foreman went to the tool box and was there told by one Blumberg that there was a bad gas leak at No. 801. The foreman, on verifying that statement, called an employee to bring a plug, which he did, and in putting it in he stepped on Clark who was lying unconsious on the floor near the open pipe. A wrench and plug were on the floor, the wrench almost under Clark and the plug some 5 or 6 feet away. All efforts to revive him failed and he died of asphyxiation by gas. The industrial commission awarded his widow compensation, and the award was affirmed by the district court.

The case came up to the supreme court on a writ of review. It was contended by the defendants that the evidence did not justify the making of an award. The court, on considering the three conceivable explanations for the deceased's conduct which resulted in his death, rejected the theories of suicide and wanton mischief as lacking in evidence or probable cause, and held that the third explanation—that of attempting to mend a fault in the pipe—was the most likely. Of this the court said in part:

The most probable purpose with which he went to the house was for the toilet. He had leave the previous day to use it. Something diverted him, perhaps the smell of gas, which led him to the cellar, if he had not perhaps gone there to look for a water-closet. At all events, it is certain that something led him to go to the tool box (perhaps back from the cellar to the tool box as the foreman later did) and get a wrench and to go to the cellar and to do something with reference to the gas pipe. If it had been left with a rag only, he may have been overcome before he could put a plug in; he may have taken a plug from the tool box as well as the wrench, dropped it, and have been overcome before he could find it. All these suggestions are mere probabilities, it is true, but they or something more or less like them may be fairly inferred from the evidence, and if the deceased was in the cellar for the honest purpose of doing some such thing for his employer it was within the course of his employment, and if so, his accidental asphyxiation arose out of that employment.

We cannot say that the conclusion of the commission that the accident was in the course of and arose out of his employment had no evidence to justify it.

The judgment was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—CAUSAL CONNECTION—EVIDENCE—LIMITATION—*Smith* v. *Primrose Tapestry Co.* (*Maryland Casualty Co., intervener*), *Supreme Court of Pennsylvania* (*January 4, 1926*), *131 Atlantic Reporter, page 703.*—George Smith was employed by the

Primrose Tapestry Co. On December 9, 1921, while unloading a box from a truck it slipped and fell against him, bruising his side, causing the injury which, it was claimed, resulted in his death. On the day of his injury Smith was placed in the care of his family physician, who gave him such treatment as was believed necessary. Though previously in good health, Smith became progressively worse, and his incapacity to further labor became complete. He was treated at a hospital in April, 1923, and in August and September at a second institution in charge of another physician, but no improvement resulted. On October 1 his family physician resumed control, and remained in charge until his death, October 30, 1924. A post-mortem examination showed the existence of a sarcoma at a point below where the bruise occurred. No claim for compensation had been made by Smith, but within one year from his decease a petition was filed on behalf of his dependents and an award granted against the employer and the Maryland Casualty Co., the insurance carrier, which had intervened as a party defendant. From an award sustained by the board and the court of common pleas the Maryland Casualty Co. appealed.

To the contention of the defendants that Smith's death was not the result of the injury, the court held that there was a causal connection between the injury and death, as it had been proven that Smith was in good health prior to the accident and that no other intervening cause for his sudden breakdown appeared. The doctor who was in charge of the patient testified that he believed that "the cancer, as a result of which death ensued, arose from the injury. Of all persons he was best qualified to give a professional opinion."

It was further contended that the claim for compensation was not within the statutory limits and that the statute could not be extended to cover cases not within its words. The court held that there were no words in section 315 of Pennsylvania Statutes of 1920, paragraph 21984, which justified the construction contended for. Judge Sadler, speaking for the court, said:

> Whether the death is immediate, or follows later, so long as it occurs within 300 weeks of the injury, the right of the widow to make claim accrues, and continues for one year thereafter. There is no statutory bar to filing a petition within the limits mentioned. In so deciding, under the facts here presented, there was no error.

The judgment was affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—CITY EMPLOYEE BITTEN BY DOG—*Ryan* v. *City of Port Huron et al., Supreme Court of Michigan (June 7, 1926), 209 Northwestern Reporter, page 101.*—James Ryan was employed by the city of Port Huron as foreman of a gang of street

cleaners, and on August 4, 1924, while seeking shelter from a rainstorm in a near-by private garage he was attacked by a dog and bitten on the leg. He died from the effect of the injury on September 16, 1925. Catherine Ryan, widow of the deceased, was awarded compensation by a deputy commissioner, and defendant appealed to the board. A daughter, Helen, was subsequently granted an award by the deputy commissioner on the ground that she was wholly dependent upon the deceased, and the defendant also appealed to the board from that award. While the appeals were pending Catherine Ryan died.

On a hearing the board reversed both awards, holding—

(1) That the accident to the decedent, James H. Ryan, did not arise out of and in the course of his employment.

(2) That the plaintiff, Helen Ryan, was not a dependent upon the decedent, James H. Ryan, at the time of the happening of the accident.

The claimant brought certiorari. The only question considered by the court was whether the accident arose out of and in the course of the deceased's employment.

The court, in the course of its opinion, declared:

It is well settled that, to justify an award, the accident must have arisen out of as well as "in the course of" the employment, and the two are separate questions to be determined by different tests.

It then said in part:

So, in the instant case, if it may be said that the workman's act, in seeking shelter from the storm, did not break the employment, and that he was then still in the course of his employment, it does not follow that the accident arose out of the employment. To justify a finding that it arose out of the employment it must appear that the injury received was a risk to which he was exposed by the nature of his employment.

Being bitten by a dog can not be traceable to the nature of the employment in which Mr. Ryan was engaged. There was not the slightest causal connection between them. The risk of being bitten by a dog was not greater to him because of his employment than it was to any member of the public who chanced to be in the locality.

The order of the board was therefore affirmed, and the writ dismissed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—DISOBEDIENCE OF ORDERS—*Tiralongo* v. *Stanley Works, Supreme Court of Errors of Connecticut (April 8, 1926), 133 Atlantic Reporter, page 98.*—This was a claim for compensation arising out of the death of a workman employed by the Stanley Works. The decedent was a helper on a flat machine; it was an oily job and he used a burlap bag tied around his waist, apron fashion, to protect his clothing from the oil. On January 30, 1925, he left

his work and went into the toilet room. When he came out his clothes were on fire, and as a result of his burns and the shock he died that evening. The origin of the fire was not determined by the commissioner, but it was brought out at the hearing that the duties of decedent did not require him to use fire, and there was no flame or fire anywhere about the toilet room or the room where he worked. The decedent was seen to take a lighted cigarette from his mouth, crush it, and throw it on the floor while his clothes were burning. The rules of the factory forbade smoking during working hours, and notices to that effect were posted in the toilets and lavatory.

The commissioner concluded that the injuries sustained by the deceased did not arise out of his employment and refused an award to claimant, who thereupon appealed to the superior court, which affirmed the action of the commisioner. Plaintiff then appealed to the supreme court of errors on the ground that the court below had erred in holding that the decedent's injuries did not arise out of his employment.

The court held that the question raised by the plaintiff's appeal was to be determined by applying to the facts found the rule stated in Marchiatello *v.* Lynch Realty Co. (94 Conn. 260, 263; 108 Atl. 799):

An injury arises out of an employment when it occurs in the course of the employment and is the result of a risk involved in the employment or incident to it, or to the conditions under which it is required to be performed. The injury is thus a natural or necessary consequence or incident of the employment or of the conditions under which it is carried on. Sometimes the employment will be found to directly cause the injury, but more often it arises out of the conditions incident to the employment. But in every case there must be apparent some causal connection between the injury and the employment or the conditions under which it is required to be performed, before the injury can be found to arise out of the employment.

Judge Wheeler then said in part:

There is in the facts found no causal connection between the injury and the employment or the conditions under which it is required to be performed. The absence of fire or any means of setting the clothing of the decedent on fire, and the fact that the decedent was smoking in the toilet room, makes the conclusion from the facts found inevitable that it originated from his own act in smoking in the toilet. It was not a risk in the employment or incident to it, or to the conditions under which it was required to be performed and arising through decedent's negligence.

There is no error.

The question of disobedience to orders was raised in a case that came before the Supreme Court of New York, Appellate Division, but unsuccessfully for the employer. A boy about 4 feet 4 or 5 inches tall, was employed at washing cloths in a print works, using vats of almost equal height. The cloths became clogged in a vat, and he mounted the rim to stir them with a stick, when he fell in and

was fatally scalded. From an award to his mother an appeal was taken on the ground that the boy had been forbidden to climb upon the vats, so that he was outside the course of his employment in doing so. The court rejected this contention, saying that even if disobeying the order he was nevertheless doing the work at which he was set, at the proper place and time. "On account of his low stature, compared to the height of the tank, it was reasonably necessary for him to mount the tank in order to do his work." Such disobedience as might be charged against him in the circumstances "did not place the employee outside the sphere of his employment." (Erdberg *v.* United Textile Print Works (1926), 216 N. Y. Supp. 275.)

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—EMPLOYEE SHOT BY FELLOW WORKER—CAUSAL CONNECTION—*Franklin Coal & Coke Co.* v. *Industrial Commission, Supreme Court of Illinois (June 16, 1926), 152 Northeastern Reporter, page 498.*—Emitt Trott, an employee of the Franklin Coal & Coke Co., was shot on October 3, 1922, by Athern Beam, another employee of the same company, who had on that day terminated his employment with the company and collected all wages due him. It was brought out in the testimony at the hearing that Trott had accused Beam of not treating him fairly in the work they were doing for the company, and also that they had quarreled violently a few days before the shooting occurred. The board proceeded against the company under the workmen's compensation act for compensation. The arbitrator awarded Trott $15 per week for a period of 30 weeks for temporary total incapacity, $15 per week for 175 weeks for complete loss of the left leg, and $664 for medical, etc., treatment. That order was affirmed by the industrial commission and the company brought certiorari. The circuit court, on review, quashed the writ of certiorari and confirmed the award. Thereupon the company brought error. It contended that the injury on which the award was based did not arise out of Trott's employment; that there was no causal connection established between the shooting resulting in the injury and Trott's employment. Judge Duncan, rendering the opinion of the court, said in part:

We think the evidence shows clearly that the injury in question arose out of Trott's employment. It was the direct and final result of the quarrel that the two employees had over the question of whether or not Beam was treating Trott fairly in designating the hauls or trips that Trott should make for him and on his run as a driver. This appears from the last words that were passed between them as Beam stood, with his coat and all his clothes on, under the shower while looking at Trott. In this final meeting when he was shot, Trott was not the aggressor and had not done anything that would provoke a quarrel out of any reasonable man on that day and time. The whole evidence tends to show that Beam was still harboring malice against Trott that was engendered by reason of the quarrel over the question of the division of work a few days previous, and

that he had quit the employment and received his final pay with the expectation and intention of taking revenge on Trott, so that he could make his escape without having any further occasion to delay his flight by collecting what was due him.

This court held in Pekin Cooperage Co. *v.* Industrial Com. (285 Ill. 31, 120 N. E. 530 [see Bul. No. 258, p. 191]), that where one is injured by another employee because of a dispute about the manner of doing the work he was employed to do, the accident to the injured employee grows out of the employment and is compensable.

It is also a prerequisite in all the cases that the injured employee who seeks compensation, or whose representatives or wife and children seek compensation by reason of his death, shall not have been the aggressor in the fight or conflict in which he was injured, so that he may be said to be at fault or the cause of his injury at the time of the conflict. The case now in hand comes clearly within the rulings laid down in those cases and the court did not err in confirming the award.

The Court of Civil Appeals of Texas affirmed an award in behalf of a widow whose husband was shot while advancing in a threatening attitude, with a large, sharp knife in his hand, toward a fellow workman against whom he had a grievance on account of an incident for which he apparently held the fellow workman responsible, though mentioning no names. The offense complained of, if committed, constituted a gross insult, amounting in law to an aggravated assault and battery. The court held that, on the evidence, the aggrieved man was not chargeable with willful intention unlawfully to injure his fellow, and that the latter in shooting him, with fatal results, inflicted an injury which "had to do with and originated in the work," and was compensable. (Indemnity Ins. Co of North America *v.* Scott (1925), 278 S. W. 346.)

Where the decedent had been employed under a superintendent against whom he developed a grievance, and kicked at him, threw an open knife at him, and approached him with threats and menaces while armed with a deadly weapon, the Supreme Court of Pennsylvania held that the aggressor, by such conduct "voluntarily abandoned his status as an employee and became a criminal, obstructing and not furthering his master's business," so that there could be no compensation as for an injury in course of employment when the superintendent shot the man in self-defense. (Curran *v.* Vang Const. Co. (1926), 133 Atl. 261.)

The Supreme Court of Minnesota affirmed an award in the case of a workman fatally shot by an unknown man while the former was carrying a bag of money from the cash registers of the store in which he was employed to the cashier's office. There was evidence of an apparent attempt to rob, though unsuccessful. The court held that if the killing was from a personal motive no compensation was due; but as the commission found justifiable grounds for deciding that there was an attempt to rob, the conclusion that the killing arose out of the employment and was compensable was correct. (Davis *v.* S. S. Kresge & Co. (1926), 210 N. W. 1003.)

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—FREEZING—PROXIMATE CAUSE—*Brady* v. *Oregon Lumber Co., Supreme Court of Oregon (February 9, 1926), 243 Pacific Reporter, page 96.*—The defendant was engaged in logging and the manufacture of lumber. Its sawmill was at Dee, a station on the Hood River Valley Railroad, and its logging camp was

some 16 miles away, and between the camp and Dee it operated a logging railroad. On November 19, 1921, it closed its logging camp on account of heavy snows, notifying the plaintiff, Harry Elmer Brady, and the other employees that the camp was closed. The defendant's foreman, Charles Blanding, told the men that a train would come up and take them out of the camp that day and that their board had been reduced from $1.20 to 50 cents per day. The train failed to arrive at the camp as promised, so on the following day the plaintiff and four others started out to walk to the Hood River Valley Railroad. The snow was four feet deep. They failed to reach the "old camp," a point about half-way between the termini of the road which they had planned to make their first stop, and were forced to spend the night in the snow. During the night it became bitter cold. On the second day they reached a farmhouse some 2½ miles from the railway above referred to, where the plaintiff and some others found shelter. On reaching the farmhouse the plaintiff found that his feet were frozen. He was taken to a hospital at Hood River, where it was found necessary to amputate the toes of his right foot and his left leg below the knee. He brought action against the defendant to recover damages for injuries resulting from the freezing of his feet while wading through the snow. He averred that the company was negligent in failing to anticipate the storm and to take precautions to protect the employees and also in failing to operate the train from Dee to the logging camp. There was a judgment of nonsuit for the defendants and plaintiff appealed on the ground that the trial court erred in determining as a matter of law that the logging camp, on Sunday, November 20, 1921, was a safe place to remain.

The court examined a number of cases in which the question of "accidents arising out of and in the course of employment" had been decided. It quoted from the opinion given in the case of Coronado Beach Co. *v.* Pillsbury (172 Cal. 682, 158 Pac. 212; see Bul. No. 224, p. 308), as follows:

The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment.

Judge Brown, speaking for the court, said in part:

We have carefully read the evidence and the authorities cited by plaintiff in support of his various contentions. There came a time when the plaintiff ceased to be an employee of the Oregon Lumber Co. Had that time come before he sustained his personal injury? When his feet were frozen he was not in the woods engaged in

logging. He was neither going to nor returning from his labors, nor was he performing some act incidental to logging. To hold that he was injured in the course of his employment by an accident arising out of his employment as a logger would be to go beyond any case that we have been able to find in the books, and we have examined many decisions in addition to those cited by respective counsel. We are compelled to reject the contention that he was engaged in logging when injured, or in performing any service incidental thereto.

If it be conceded that the company's train could have made a run from Dee to the logging camp on Saturday, but that it neglected to do so, under the facts of record this, of itself, does not render the company liable to the plaintiff for an omission of duty as alleged. Notwithstanding the train was not run to the camp on that day, the plaintiff remained safe and uninjured. He does not pretend to offer any evidence that the camp where he was situate was without food, shelter, or warmth, and the learned judge granted the motion for a nonsuit upon the ground that plaintiff abandoned a place of safety and willfully plunged into a situation that proved to be dangerous.

We fully appreciate the fact that the plaintiff has suffered serious injuries, and that his cause has been presented to this court with much zeal and ability. But we can not follow counsel in the application of the law to the facts involved herein.

The judgment was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—GOING TO AND FROM WORK—*Thetford* v. *London Guarantee & Accident Co. (Ltd.), Court of Civil Appeals of Texas (June 16, 1926), 286 Southwestern Reporter, page 1113.*—N. J. Thetford, employed by the Mutual Oil Co., was killed on April 30, 1924, as a result of a collision between the automobile on which he was riding and one driven by R. D. Underwood. His widow instituted suit in the district court of Wichita County against the insurer of the company to recover under the State compensation act for the death of her husband. The case was tried before a jury, and at the conclusion of the testimony the trial judge directed a verdict in favor of the defendant. The plaintiff appealed. The evidence tended to show that the company named was operating on a lease some 25 miles from Wichita Falls, Tex., that it procured its supplies from the latter place and transported them to the lease on trucks and automobiles owned by it, and that some of its employees who stayed at Wichita Falls were permitted to ride to and from their work on such vehicles. There was also testimony which tended to show that the assistant superintendent of the company agreed with the deceased, who lived at Wichita Falls, that he might stay at home nights and ride to and from his work in some one of the company's machines, as he would be needed many times in loading and unloading tools into and out of the machines; that on the evening preceding the accident in question,

M. Marshall, the truck driver, not caring to drive the company's truck, took the deceased home in his own private car, and the next morning when they were returning to work in the said private car, the accident occurred which cost the deceased his life.

The court held that the evidence was sufficient to raise a question of fact and said in part:

If the transportation was a part of the contract of employment, the deceased was in the employ of the Mutual Oil Co. from the time he left Wichita Falls until he returned by the transportation provided.

If the contract to transport existed, whether express or implied, and as a part thereof the deceased was expected and it was his duty to assist in loading the machines of his employer at Wichita Falls, the fact that M. Marshall, the truck driver, and who had charge of his employer's truck, elected, on the occasion of the fatal accident, to use his own car with which to perform the service for the employer, instead of the truck furnished, would not, in our opinion, defeat a recovery.

Under the facts disclosed by this record, we are of the opinion that the trial court committed error in directing a verdict against appellants, for which reason the judgment is reversed and the cause remanded.

The Supreme Court of Massachusetts affirmed awards in a case in which it appeared that 11 workmen were being carried from a construction job to their homes on a truck owned by their employer and operated by his chauffeur, when the truck was struck by a car, three being killed and the others injured. Transportation to and from work was a part of the contract of the employment, and "receiving their injuries while being so carried, they were protected by the act." (Vogel's Case (1926), 153 N. E. 175.)

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—HERNIA—EVIDENCE—*Wilkins* v. *Ben's Home Oil Co., Supreme Court of Minnesota (January 22, 1926), 207 Northwestern Reporter, page 183.*—N. J. Wilkins was employed by Ben's Home Oil Co. as helper about its filling station, and while assisting a driver in unloading a barrel of oil which weighed about 450 pounds it slipped and fell, throwing the full weight of the barrel on him. He went about his work for a while after the accident, but when he attempted to move a barrel of oil he felt such a severe pain that he could work no more that day. On being examined by a doctor the next day he was found to be suffering from inguinal hernia, for which he was operated on two days later. The surgeon who operated on Wilkins and another doctor who was present at the operation testified at the hearing before the commissioner that the hernia was a recent one and that they believed it was caused by the accident. A surgeon and physician called by the company, but who made no examination of Wilkins, on being asked a hypothetical question as to whether or not in his opinion the accident caused the hernia, stated in effect, that in the absence of evidence of ecchymosis, a blow

to that particular point, vomiting or nausea, it did not. Award was denied, and the plaintiff brought a writ of certiorari to the supreme court of the State.

Judge Holt, who wrote the opinion of the court reversing the commission, said in part:

The triers of fact, who fail to find on such evidence as presented by this record that the accident to Wilkins did cause his hernia, must have proceeded upon an erroneous theory concerning the proof of such injury, in that they accept as an indisputable medical fact that it is impossible that an accident can produce an inguinal hernia unless there is inflicted an external blow sufficient to rupture the tissues, leaving some visible indications thereof, or else producing such immediate prostration and acute pain as to amount to objective symptoms.

Compensation claims are not to be determined on preconceived medical theories, but are to be considered on the evidence presented in the individual case, with a view to determine whether, under the definition of an accidental injury under the letter and spirit of the workmen's compensation act, the particular claim has been established by a fair preponderance of proof. There was nothing inherently improbable in the testimony of Mr. Wilkins or his witnesses, and we regard the employer's expert to rather support than otherwise a finding of a compensable injury under the law.

We therefore think the evidence in this case demanded findings in favor of the employee, and the decision to the contrary is reversed, and the case remitted to the industrial commission, with direction to make proper findings awarding compensation for the injury. An attorney's fee of $50 on this appeal is allowed.

The judgment was therefore reversed and the case remanded.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—PREEXISTING DISEASE—DEATH—STATUS OF WIDOW'S CLAIM—*Biederzycki* v. *Farrell Foundry & Machine Co., Supreme Court of Errors of Connecticut (January 8, 1926), 131 Atlantic Reporter, page 739.*—Chester Biederzycki, an employee of the defendant company, sustained an injury while in the course of his employment. "The injury so suffered was from a diseased condition of his heart, due in part to preexisting disease and in part to aggravation of a preexisting disease." The defendant company was adjudged, on June 19, 1923, to pay him an award, He died August 12, 1924, whereupon the widow submitted her claim for a death benefit; the commission ordered that the company pay her compensation for a period not to exceed 312 weeks from the date of his death. The company appealed from the award to the widow on the ground that the conclusion reached, that deceased received a compensable injury, was erroneous; that the case of the widow was separate and distinct from that of her husband; that it was entitled at its option (Gen. Stat., par. 5355) to retry de novo in whole or in part the facts

as found in the case of the employee, and that the award to the widow should have been apportioned in accordance with the provisions of the General Statutes, paragraph 5341, as amended. The court held that the grounds of appeal were not well taken, and said in part:

The commissioner's power to modify or reopen an award is governed by General Statutes, paragraph 5355, that any award or voluntary agreement for compensation under the workmen's compensation act (Gen. Stat. 1918, pars. 5339–5414), shall be subject to modification upon the request of either party, "whenever it shall appear to the compensation commissioner that the incapacity of an injured employee has increased, decreased, or ceased, or that the measure of dependence, on account of which the compensation is paid, has changed, or that changed conditions of fact have arisen which necessitate a change of such agreement or award in order properly to carry out the spirit of this chapter."

The point raised by defendants that the claim of deceased and that of his dependent are separate and distinct was settled in the construction of this statute by the court in Hayden & Malstre *v.* Wallace & Sons (100 Conn. 180, 123 Atl. 9), wherein it was held that all that the dependent must prove is the employee's death, the dependence, and the causal connection between the injury compensated and the death.

Section 5341, as amended by Public Acts, 1919, chapter 142, paragraph 1, as amended by Public Acts, 1921, chapter 306, paragraph 1, provides that—

In any case of aggravation of a disease existing prior to such injury, compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to the injury.

The court held that where the amendment used the term "disability" it used it in the sense of incapacity, and referred to the living, since death was a fixed fact which could not be apportioned in the manner provided in the amendment to this section of the General Statutes.

A final contention considered was to the effect that the amendment of 1919 permitting compensation for disease related only to occupational diseases, and did not invalidate earlier decisions excluding diseases of a general nature. The court had held in the case of Dupre *v.* Atlantic Refining Co. (98 Conn. 646, 120 Atl. 288) that a compensable personal injury was an abnormal condition of a living body which arose out of and in the course of the employment and produced an incapacity to work for the statutory period whether the disease was occupational or otherwise. This ruling was affirmed in De la Pena *v.* Jackson Stone Co. (103 Conn. 93, 130 Atl. 89), "and these decisions must control while the present statute remains unchanged."

Judgment was accordingly entered dismissing the appeal.

The same court a few months later reversed an award in the case of a dry grinder whose disability after employment for two years was diagnosed as pulmonary tuberculosis. The trade was said to be one that tends to cause this disease, and a commissioner allowed a claim. On appeal, it was shown that the workman was suffering from it when he entered the employment, and the court held that the employment had no more injurious effect "in any way other than a similar amount of exertion or bodily exercise would have aggravated it." There was said to be a failure to establish the necessary causal connection between the disability and the occupation, so that no compensation could be paid. (Madore *v.* New Departure Mfg. Co. (1926), 134 Atl. 259.)

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—PARESIS—PREEXISTING DISEASE—REVIEW BY COURT—*Walker* v. *Minnesota Steel Co., Supreme Court of Minnesota (June 11, 1926), 209 Northwestern Reporter, page 635.*—Charles A. Walker was employed as a millwright and from November 29, 1923, to February 14, 1924, he sustained three injuries to his head. Soon after November, 1923, he became mentally depressed and in June, 1924, was committed to the State Hospital for the insane. The result of his mental decline was general paresis. History disclosed dormant syphilis. His wife made claim for compensation under the workmen's compensation law in her own right and on behalf of Louis H. Walker and others, his dependent children. The claim was denied by order of the industrial commission and claimant brought certiorari to review the order.

It was not claimed that the injuries caused the paresis but that they aggravated and lighted up the dormant syphilitic condition and hastened its onset. The employer contended that the injuries in no way accelerated the development of the unfortunate condition. The court reviewed and cited numerous cases wherein the question of preexisting condition had been in issue, and speaking of the instant case said in part:

The claim for compensation in this case depends upon whether or not the paresis, which was primarily caused by syphilis, was lighted up or accelerated by the injuries to employee's head. This is a simple question of fact. If answered in the affirmative, it is compensable; otherwise not. We have consistently held that the determination by the commission of controverted questions of fact must be sustained. Relator's claim is supported by competent medical witnesses and other evidence. It is directly met by other circumstances and experts who apparently recognize the correctness of relator's theory but say that the injuries were not serious enough to produce the result claimed. The evidence would support a finding either way. The commission has spoken, and their word is final.

The order of the commission was therefore affirmed.

The Supreme Judicial Court of Maine took quite similar grounds where a workman who was, so far as he knew, a well man, and had lost but nine days'

time in 40 years, was found suffering from diseased conditions of heart and spine after injury from a fall. The court affirmed an award in his favor, saying that: "While causal connection between the accident and disability must be shown, the accident need not be proved to be the sole or even the primary cause of disablement"; and the commissioner's conclusion "must stand if rational and natural." (Swett's Case (1926), 134 Atl. 200.)

To the foregoing may be added recent decisions by the Supreme Court of New Jersey (Pisko *v.* Nelson (1926), 132 Atl. 301), and the Appellate Court of Indiana (Owens *v.* McWilliams (1926), 152 N. E. 841). In both these death followed injury by runaway horses. Pisko lived about two months, and was found to be affected with heart trouble and a hypertrophied liver; but as it was found that "the accident produced his death at the time at which it occurred," it was chargeable therewith, and the widow's claim was affirmed. The case had been "warmly contested," two trials being had, and an allowance of $500 attorney's fee was held not excessive.

In the Owens case the employer claimed that death was due to the condition of the arteries, causing heart failure. Death was not instantaneous, and the prevalent opinion was that the death was due to shock from the fall. Owens' head was bruised, and blood ran from his mouth. In sustaining the award, the court said: "This court has uniformly held that, where the employment hastens an existing disease to its final culmination in death, it is an accident within the meaning of the statute."

In a nonfatal case before the Supreme Court of Illinois an award as for permanent total disability was reversed where a workman received such an award on account of hernia. It appeared that a previous operation had left the muscle walls of the abdomen weakened, but inasmuch as the workman was employed at the time of the injury complained of he "was entitled to compensation notwithstanding the fact that a former operation was a contributing cause." But since it appeared that an operation would restore the claimant's earning capacity, the award as for permanent total disability could not stand, there being no basis in the record for a life benefit. Further hearing was therefore directed for a determination on the basis indicated. (O'Gara Coal Co. *v.* Industrial Commission (1926), 150 N. E. 640.)

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—PROXIMATE CAUSE—REVIEW BY COURT—*United States Casualty Co.* v. *Matthews, Court of Appeals of Georgia (June 16, 1926), 133 Southeastern Reporter, page 875.*—Mrs. R. A. Matthews proceeded under the workmen's compensation act to recover compensation for the death of her husband, who, on November 26, 1924, while in the employ of the defendant, sustained a severe physical injury by which his ankle was dislocated and certain ligaments torn. It appeared that prior to the injury the deceased was in vigorous health; that the injury caused continued swelling of the ankle, pain and loss of sleep, resulting in an enfeebled and weakened condition of health, until finally on December 22 he was confined to his bed, complaining of pain in his eyes. He became unconscious soon after this and died two days later of acute illness. The attending phy icians testified that it was their opinion that the death of the deceased was due to apoplexy, to which the injured foot might have

been a contributing cause; that if the foot had brought on apoplexy it would have been caused by the pain and the poison that his system absorbed from the foot. The claimant was awarded compensation by the commission; this was affirmed by the superior court, and the insurance carrier brought error to have the case reviewed. There was no dispute as to the injury, but it was argued that the judgment of the superior court affirming the findings of the commission was not supported by sufficient evidence.

The court, on review, speaking through Judge Jenkins, said in part:

The finding of the industrial commission upon the facts can not be set aside, if there is evidence to support it. It "is conclusive and binding upon all the courts."

Under the evidence submitted in this case, it was for the commission to say, in the light of all the proved facts and surrounding circumstances, including the expert testimony, whether or not the injury set forth was the proximate cause of the death. In arriving at a conclusion upon this question they were privileged, but not compelled, to accept the expert testimony tending to show that the immediate cause of death was something akin to apoplexy. Even if, under the expert testimony, the condition of the decedent must have been such as would predispose him to such an attack from such a cause, if such result followed naturally and unavoidably from the injury, the original injury, and not the forces thus put into operation by it, could be accounted as the active, proximate cause of the final result.

If the original act be such as to put other forces in operation so as to naturally and unavoidably bring about the existence of the intervening agency, its effect, or result, can still be properly attributed to the original cause as the proximate cause.

The judgment was accordingly affirmed.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ACTION BY DEPENDENTS—LIMITATION—*Clough & Molloy* v. *Shilling, Court of Appeals of Maryland (December 4, 1925), 131 Atlantic Reporter, page 343.*—Frainie Bros. & Haigley were general contractors in charge of the work of building a dormitory for the Johns Hopkins University, Baltimore, Md. The Pen-Mar Co., employer of John Edgar Shilling, and Clough & Molloy, defendants in this suit, were subcontractors for certain of the construction work. It appears that on March 28, 1923, the employees of Clough & Molloy were working on a scaffold and were using pieces of scantling to extend it upward when one of the pieces of scantling fell and in falling struck John Edgar Shilling upon the head and killed him. He left surviving him a widow and four minor children. The State industrial commission granted them an award of $5,000 and $125 funeral expenses against the Pen-Mar Co. and the Indemnity Insurance Co. of North America, the insurer. A statute of Maryland provides that where the death of the employee creates legal liability in some person other than the employer, and

the insurer or employer fails to enforce such liability within two months after the award under the compensation act, the dependents may enforce such liability. Under this provision of the law the widow of the deceased instituted her suit to collect damages against Clough & Molloy in behalf of herself and her minor children, and to the use of the Indemnity Insurance Co. of North America. She was awarded a verdict for $15,000, to be apportioned among the insurer, the widow, and the minor children. From this judgment the defendants appealed, their contention being that the plaintiffs did not have a right to maintain the action in its present form and that there was not sufficient evidence to go to the jury.

The court of appeals sustained the judgment, citing first the provisions of the compensation act authorizing the dependents to bring action in default of its prosecution by the employer or insurer, with distribution of any recovery to cover disbursements of the employer or insurer. It then found that the law had been complied with, so that no grounds for the appeal existed. There was also found to be sufficient evidence for consideration by the jury, and the judgment was affirmed, with costs.

The same law was before the same court in a question in which another aspect of the right to sue was considered. The employer delayed action for reimbursement until after the two months' period following the award, but subsequently began proceedings. The third party demurred, claiming that with the expiration of two months after the award, the right to sue vested exclusively in the injured person or his dependents. The court ruled otherwise, finding that while the employer's right was exclusive during this period, on its expiration such right was shared with the employee or his dependents, but was not absolutely taken away from the employer. The decision of the court below, sustaining the demurrer, was therefore overruled, and a new trial granted. (State *v.* Francis (1926), 134 Atl. 26.)

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ELECTION—SUBROGATION—RIGHTS OF INJURED MINOR AFTER REACHING MAJORITY—LIMITATIONS—*McKee* v. *White, Supreme Court of New York, Appellate Division (November 11, 1926), 218 New York Supplement, page 215.*—William P. McKee, 19 years of age, while in the employ of Charles White on September 18, 1922, was injured by the negligence of a third party. He filed an election to pursue his remedy against the third party and began an action for damages. The case was called for trial on May 14, 1925, but no one appeared for the plaintiff and the action was dismissed for default. Claimant then made a claim for compensation before the industrial board, which granted him an award on June 25, 1926. The defendants appealed on the ground that the failure to prosecute his action, after electing to sue the third party, deprived them of their right of subrogation to the

claimant's remedy against the third party provided for in section 29 of the workmen's compensation law.

The court, in disposing of the case, said in part:

The carrier could not be subrogated to claimant's remedy while claimant's election was in force and his action was pending; and the statute of limitations had run against that action on September 18, 1925, and before the carrier knew that claimant's action was dismissed. Since claimant was a minor when his cause of action accrued, the time of his disability is not a part of the time limited for beginning the action, "except that the time so limited can not be extended * * * more than one year after the disability ceases." (Civil Practice Act, sec. 60.) The claimant reached his majority more than one year before the period limited in the statute for beginning his action against the third party. The infancy then does not extend the three-year period. The claimant, having reached his majority before the three-year limitation had expired, was required to commence his action either before the expiration of that period or within one year after he attained his majority, whichever would be the longer period.

We think the appellants' rights have been sacrificed, and that the claimant is estopped from asserting a claim for compensation against them.

The award was therefore reversed and the claim dismissed, with costs against the State industrial board.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—INEFFECTIVE SUIT — LOSS OF RIGHT OF SUBROGATION — IGNORANCE AS EXCUSE—*Employers' Indemnity Corporation* v. *Felter, Commission of Appeals of Texas (December 2, 1925), 277 Southwestern Reporter, page 376.*—George R. Felter, while employed as a meter reader in the water and light department of the city of Austin, Tex., and while engaged in the course of his employment, received injuries in an automobile collision which resulted in his death a few days later. Four years later, on March 30, 1923, the industrial accident board awarded compensation to the widow and two children at the rate of $15 a week for 360 weeks from the date of the accident in 1918. The Employers' Indemnity Co., insurance carrier, gave due notice of its unwillingness to abide by the award and filed suit to set it aside. A judgment for the claimants was affirmed by the court of civil appeals and the company brought error to the commission of appeals.

On reviewing the evidence it was found that Mrs. Felter had filed suit in 1920 to recover damages in the total sum of $50,000 as guardian of her children and executrix of the estate of her husband for the alleged negligent killing of her husband by Mrs. Jeffie Barkley and Edgar J. Barkley, her husband. April 7, 1922, judgment was entered in the court for the defendants. The counsel for the indemnity corporation in the instant case requested an instruction based on the

fact that the Felters had proceeded to final judgment against the tort-feasors, third parties, that they were precluded from later seeking compensation under the compensation act for the same injury, and, in addition, because the proceeding for compensation was not instituted for more than four years after the accident occurred. The action of the trial court in refusing this peremptory instruction was said by the commission of appeals to be erroneous.

Under the facts, it appeared that the indemnity company had been absolutely deprived of its right of subrogation. "So it is quite clear that, as a result of the conduct of the Felters, plaintiff in error has been deprived of its valuable right, in its own way * * * to sue the alleged tort-feasors and attempt to recoup the amount of compensation it was being called upon to pay."

It also appeared from the evidence that the widow was in complete ignorance of the fact that the city carried an insurance policy for its employees, and this was offered as a reason why her claim should be allowed. In the course of the opinion denying this ground as valid, it was said that:

In all cases, compensation or otherwise, the rule is recognized that ignorance of facts will not relieve against an election of remedies where such relief would injure an innocent party. We find no authorities to the contrary. In other words, equity will not, in its generosity, permit one to profit at the contemporaneous expense of another. The company in this case violated no rule and neglected no duty. It is blameless. On the other hand, Mrs. Felter did violate the subrogation statute as well as section 4a. Upon the broad grounds of equity, she asks that her ignorance be excused. Her request can not be granted when its granting deprives the company, a thoroughly innocent party, of its valuable right of subrogation.

Mrs. Felter by her action had placed the insurance company in a disadvantageous position where it could not recover against the third party causing the injury because as to them res adjudicata was a complete defense. In a situation of this kind the commission of appeals said:

We hold that defendants in error can not recover compensation. * * * The construction of the lower courts in the case at bar renders totally ineffective the subrogation section of the law. This should not be done. Under the holdings of the lower courts, a person might be ignorant for 20 or 30 years and still recover compensation, even though the insurance company had in the meantime entirely lost its right of subrogation.

It was recommended that the judgments of the district court and the court of civil appeals be reversed and that judgment be rendered by the supreme court in favor of the plaintiff in error.

The judgment was accordingly reversed and judgment was entered for the plaintiff in error.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—SUBROGATION—SETTLEMENT—*Wisconsin Mutual Liability Co.* v. *Industrial Commission, Supreme Court of Wisconsin (June 21, 1926), 209 Northwestern Reporter, page 697.*—Section 102.29 of the compensation act of Wisconsin provides that the making of a lawful claim against the employer or compensation insurer for compensation shall operate as an assignment of any cause of action in tort which the employee may have against any other person on account of the accident, and the employer or insurer may enforce such liability in its own name, with provision as to the distribution of any amounts recovered. Any settlement of any such claim, if in litigation, must have the approval of the court in which the matter is pending; otherwise the settlement must be approved by the industrial commission.

One Perkins, an employee of the Oshkosh Motor Truck Co., while in the course of his employment received injuries when attempting to drive a motor truck owned by his employer across the railroad track of the Soo Railway, the truck being struck by the engine of said railway company. Perkins was awarded compensation against his employer. The award was paid by the employer's insurance carrier, which thereby became subrogated under its policy to the rights of the employee against any third-party liability for damages to Perkins. The railway company denied any liability to Perkins, but paid him $1,000 and took from him an acknowledgment of settlement of his claim for damages by reason of the accident. The insurance company petitioned the industrial commission to make an order approving the settlement of the claim of Perkins with the railway company and for an order of distribution of the proceeds. The commission entered an order directing Perkins to account to the insurance company for $666.67. The insurance company then brought action in the circuit court for review of the order of the commission, and demanded judgment that the railway company be directed to pay the amount ordered by the commission. The circuit court held that the commission had no jurisdiction over the railway company, and the court had no jurisdiction on review. It therefore affirmed the order of the commission and denied further relief. From such judgment the insurance company appealed. The supreme court, in disposing of the case, said in part:

The settlement of Perkins was null so far as his employer or the appellant was concerned, because his claim against the railroad company was assigned by operation of the statute to the employer, as soon as he made a valid claim for compensation against the employer. This being so, there was no settlement so far as the appellant or the employer was concerned, and there was nothing upon which the industrial commission could act. It follows that its order was void. The jurisdiction of the circuit court to review the proceedings of the commission likewise depends on the statute (section 102.23). By its

judgment it could only affirm said order or set it aside. The circuit court was therefore in error in affirming the order of the commission.

The judgment of the circuit court was reversed, with directions to enter judgment setting aside the order of the industrial commission, the appellant to pay clerk's fees.

WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—INFECTION OF OPEN SORE—CONSTRUCTION OF STATUTE—*Jasionowski* v. *Industrial Commission of Ohio, Court of Appeals of Ohio (May 17, 1926), 153 Northeastern Reporter, page 247.*—Wanda Jasionowski was employed by Tiedtke Bros. Co. on October 22, 1924, and was engaged in handling large sheets of blue carbon paper used in tabulating accounts. In the course of her employment she wiped or rubbed her face with her hands, and having a slight cold sore near the corner of her mouth through which her blood became infected, cellulitis developed into acute blood poisoning, which caused her death, Her mother, asserting dependency, filed a claim with the industrial commission for compensation. The claim was rejected and an appeal was taken to the court of common pleas, where the case was tried by a jury, but at the close of the evidence the court directed a verdict for the defendant and entered judgment thereon. The plaintiff brought error.

It was contended on behalf of the defendant that the evidence did not show an injury within the meaning of the workmen's compensation law, and that if the decedent was injured such injury was not suffered in the course of her employment.

Taking up the sequence of events as set forth above, the court said:

If this condition should be found by the jury to be sustained by the evidence, it would amount to an injury within the meaning of the workmen's compensation law [citing English and American cases].

Ohio decisions were said to agree, making a distinction between occupational diseases "developed in the usual and ordinary manner because of the occupation, and an injury happening suddenly from the same cause."

As to whether the injury was received in the course of the employment, it was admitted that part of the physician's affidavit was hearsay, as he could not have had personal knowledge of all the facts therein set forth; but as the commission is not bound by the usual rules as to evidence, the statement was properly before the jury on the appeal. The injury being found to be within the statute, the judgment for the defendant must be reversed, and a new trial granted, and it was so ordered.

WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—RETURNING HOME FROM WORK—*Cymbor* v. *Binder Coal Co., Supreme Court of Pennsylvania (February 8, 1926), 132 Atlantic Reporter, page 363.*—J. Stanley Cymbor was employed by the defendant as an electrician and was paid by the hour for that work. It was also his duty to start the pumps in the mine sometime during the night, for which he received extra pay. On the night in question he had gone from his home to the mines to start the pumps, and was returning on the tracks of the Pennsylvania Railroad, his usual route, when he was killed by an engine. His widow was awarded compensation by the referee and workmen's compensation board. This award was reversed by the court of common pleas on the question of course of employment, and she brought appeal. In reversing the lower court and holding that the death occurred in the course of the employment, the court cited Haddock *v.* Edgewater Steel Co. (263 Pa. 120, 106 Atl. 196; see Bul. No. 290, p. 426), and said in part:

In the instant case the nightly trip to the mine was in furtherance of the master's business to do an errand for the master, and he was properly on the latter's time not merely at the moment of starting the pumps, but going and coming as well. The case is not analogous to that of a day laborer whose work and pay being when he arrives in the morning and ends when he quits in the afternoon. His furtherance of the master's business begins and ends with the work of the day. In the instant case to hold the employee was furthering the master's business only after reaching the mine or while starting the pumps is drawing too fine a sight on a statute which must be liberally construed. If Cymbor was paid only for the actual time engaged in turning the button or otherwise starting the pumps, it would practically amount to nothing, although in a month he would travel miles in the dark to enable him to perform that duty.

The judgment appealed from was therefore reversed, and the record remitted to the lower court that judgment may be there entered in favor of claimant on the award.

The compensation law of Utah uses the disjunctive "or" in the clause, "arising out of or in the course of employment." This was held by the supreme court of that State to warrant compensation to a workman leaving the place of his employment by a path along which a cable was used to move trams. This cable accidentally became charged with electricity, and contact therewith caused death. The court was of opinion that the time, place, circumstances, and death were all within the course of the decedent's employment, and affirmed an award to his widow. (Utah Apex Mining Co. *v.* Industrial Commission (1926), 248 Pac. 490.)

WORKMEN'S COMPENSATION—INJURY "IN OR ABOUT" FACTORY—REPAIRING TRUCK USED IN BUSINESS—*Wise* v. *Central Dairy Co., Supreme Court of Kansas (June 12, 1926), 246 Pacific Reporter, page 501.*—Hobart M. Wise was awarded compensation by the district court of Wyandotte County for injury received in the employ of the

company named. The company appealed from the judgment on the ground that the plaintiff was not injured by reason of an accident "in, on, or about" its place of business.

Wise was employed by the defendant to repair trucks used in its dairy business. At the time in question the starter on one of the trucks had become stuck, and the plaintiff and other employees were directed by the foreman to push the truck into a street down a grade and try to force the starter loose. That was done and the starter was forced loose. The car was stopped on the street some 200 feet from the plant. While plaintiff was examining it to see what caused the trouble, he was struck and injured by an automobile driven by someone who was not an employee of the defendant.

There was no controversy over the extent of the injury, nor the amount of compensation allowed, but the question was whether under the circumstances the plaintiff was entitled to compensation. To the defendant's contention that the plaintiff's injuries were not received "in, on, or about the factory" of the defendant within the meaning of the statute (R. S. 44–505, 48–508); that the car was on a public street 200 feet from its factory when the accident occurred; and that the word "about" as used in the statute was one of locality, the court said:

This was near the factory; the particular place for this work to be done was selected by the defendant's foreman when he directed that the car be pushed into the street for that purpose, and hence was adopted by defendant as the place for making such repairs, and was within the danger zone of the factory as then being conducted by defendant.

Finding no error in the record, the judgment of the court below was affirmed.

WORKMEN'S COMPENSATION—"INJURY SUSTAINED IN THE COURSE OF EMPLOYMENT"—HORSEPLAY—*Cassell* v. *United States Fidelity & Guaranty Co., Supreme Court of Texas (April 7, 1926), 283 Southwestern Reporter, page 127.*—L. P. Cassell was employed by the Wichita Theater Co. as a stage hand, and at the time in question was engaged in his regular duties. The employer's stage manager, one Shaver, went onto the stage and in fun snapped a pistol kept by the company for use during theatrical performances and supposed to be unloaded at other employees and at Cassell, when the pistol fired and injured Cassell. He was awarded compensation for his injuries by the district court. The civil court of appeals reversed that judgment and entered judgment for the defendants, whereupon the plaintiff brought error. The question for the court was whether or not the injury received by the plaintiff was compensable under the workmen's compensation act.

The facts in the case were undisputed and the district court held as a matter of law that Cassell was entitled to compensation. Upon the same state of facts the civil court of appeals held as a matter of law that Cassell was not entitled to compensation and rendered final judgment accordingly.

The supreme court cited a number of cases in which questions similar to that in the instant case were involved, in most of which the courts held that injury sustained under such circumstances as herein set forth were compensable.

Judge Greenwood, speaking for the court, then said in part:

We think, with the decisions already quoted, that it is a matter of common knowledge that in groups of employees horseplay of some kind is an incident that should be expected. If that be true, then we submit that the particular kind of horseplay indulged in, in the case at bar, was the most natural kind. The facts show that Shaver was in the habit of "creating atmosphere" by shooting blank cartridges during performances. Furthermore, the stage is a place where pranks are practiced perhaps more than any other. While the court finds that the practice of snapping pistols at each other had not occurred until about 15 minutes before this accident, still the record shows that pistols were commonly used by the employees at this theater at various times and that they were fooled with by these employees in various ways, including the creating of atmosphere by firing. Therefore, we submit that, if horseplay of any kind was a reasonable incident to this employment, it certainly should have been anticipated that it would grow out of the use of a pistol in some way. We are of the view that the horseplay indulged in here was a reasonable incident of this particular employment.

The judgment of the court of civil appeals was accordingly reversed and the judgment of the district court awarding compensation affirmed.

A court of the same class as that reversed above (Texas Civil Appeals) affirmed an award in a case in which a workman was rendered totally blind by an accidental shooting by a revolver in the hands of the foreman. There had been habitual and reckless shooting going on, which the court held could have been ascertained by the employer's agents by the exercise of reasonable diligence. Under the circumstances the injured man suffered by reason of a "risk created by the conditions under which the business was carried on," and was entitled to compensation. (Standard Accident Co. *v.* Stanaland (1926), 285 S. W. 878.)

WORKMEN'S COMPENSATION—JURISDICTION—ENFORCEMENT OF LAW BY COURTS OF OTHER STATES—*Texas Pipe Line Co.* v. *Ware, United States Circuit Court of Appeals, Eighth Circuit (1926), 15 Federal Reporter (2d), page 171.*—J. L. Ware received an injury while employed in the State of Louisiana, his employer operating under the compensation law of that State. An action was subsequently brought in the circuit court of Fayette County, Ark., to recover damages for the injury. On petition of the employer the case was

removed to the United States District Court for the Western District of Arkansas (presumably on the ground of diversity of citizenship). In that court the employer moved to require the plaintiff to state whether or not a contract had been entered into with reference to the compensation law of Louisiana, and whether or not he was seeking to enforce the liability prescribed by that statute. Ware replied "that the suit was brought in a double aspect, but, if required so to do, he would elect that the case should be governed by the workmen's compensation law of Louisiana." The employer then moved for a dismissal of the case on the ground that the provisions of said act could not be enforced by any court outside the State. The trial court rejected this motion and proceeded to hear the case without a jury, entering a judgment for an award. The employer thereupon brought error, submitting the question of the power of any court other than those of the State of Louisiana to administer the compensation law.

Circuit Judge Kenyon, speaking for the court, stated the facts as above, and then declared that there was no question that the district court had jurisdiction when the case was removed to it from the State court on petition of the employer. The question remained whether the plea by way of amendment electing that the case should be governed by the compensation law of Louisiana deprived the court of jurisdiction. This question was discussed at length, citing several cases in which legislatures had undertaken to limit the forum in which cases under a prescribed statute could be tried, but without success. "Such statutes can not prevent the exercise of jurisdiction by the Federal courts, where the facts exist which under the Constitution and the statutes of Congress give jurisdiction to such Federal courts." A citation was made from a decision of the Supreme Court to the effect that "an action for personal injuries is universally held to be transitory, and maintainable wherever a court may be found that has jurisdiction of the parties and the subject matter."

The Louisiana law provides for enforcement of its provisions by the courts, and uses terminology appropriate therefor. In a majority of the States having compensation laws administration is by a board or commission or other special agency with prescribed methods of procedure. The Supreme Court of Arkansas had declined to undertake to enforce rights given by the Oklahoma compensation law on that ground. (Logan *v.* Missouri Valley Bridge & Iron Co., 152 Ark. 529, 249 S. W. 21.) Judge Kenyon found this decision not a guide in the instant case, saying "such act provided for an administrative board to which the claims were to be presented. There was no provision for any court action or judgment of the court. The rights

asserted were to be determined by a board. That case bears no similarity to this."

It was admitted that "there may be difficulties in enforcing in the Federal courts the workmen's compensation acts," but they should not be regarded as insuperable unless they are in fact so." No such obstacles were found in the instant case, the right being prescribed and conditioned by the law of the State where granted, and the remedy governed by the law of the forum.

The judgment below in favor of the plaintiff was therefore affirmed.

The Supreme Court of North Carolina reversed an award given by way of judgment in a county court of the State, in which a workman injured in Tennessee was held to be entitled to the benefits of the compensation law of the latter State. The supreme court found no provision in the laws of North Carolina, which has no compensation statute, for the enforcement of a compensation law such as that of Tennessee, so that there was no comity between the States in respect of such remedy. (Johnson *v.* Carolina, C. & O. R. Co. (1926), 131 S. E. 390.)

WORKMEN'S COMPENSATION—LUMP-SUM JUDGMENT—OBJECTIVE EXAMINATION—USE OF X RAY—*Reeder* v. *Thompson et al., Supreme Court of Kansas (April 10, 1926), 245 Pacific Reporter, page 127.*—Edward Reeder was employed by F. M. Thompson and others, doing business a the T. R. & G. Coal Co., as a hoist engineer in its mine. On March 20, 1923, an explosion occurred in the mine, which filled it with flames and carbon monoxide gas. Plaintiff was badly burned about his hands, face, mouth, throat, and lungs, which permanently disabled him. He was paid compensation up to and including November 26, 1924, when it was discontinued. He then brought action in the District Court of Kansas, alleging permanent disability, and recovered a lump-sum judgment in the amount of $4,935. The defendants appealed on the ground that the radiograph pictures introduced in evidence did not constitute an objective examination within the meaning of the statute and were therefore insufficient on which to base a lump-sum judgment.

The statute on which the objection was based is in part as follows:

> In no case shall a lump-sum judgment be rendered for any injury not ascertainable by objective examination, but in such cases the court may order periodical payments during incapacity. [R. S., 44–534.]

The court on review found that the physician who examined the plaintiff at the time of his injuries had testified that he found him suffering from pulmonary burns and carbon monoxide poisoning; that his examination with the X ray showed that his lungs were badly affected; that he had a slight enlargement of the heart; and that the radiograph pictures taken of his chest showed scars on the lungs and

a marked fibrous condition. This testimony was affirmed by another physician who was an authority on radiograph pictures and who had examined the plaintiff a short time before the trial.

The opinion of the court, as delivered by Judge Johnston, was in part as follows:

Objective symptoms are those which the physician by the ordinary use of his senses discovers from a physical examination. What he discovers through his vision, aided by magnifying glasses or an X-ray instrument, are objective symptoms. By the use of the X ray a view may be had of internal conditions not perceivable by the ordinary or unaided senses. The sense of sight is enlarged by its use, and, although a recent invention, its use is now common, and what it reveals is generally recognized and accepted. (1 Wigmore on Evidence, 795.) Of course, the instrument should be one that is trustworthy and the operator competent.

The court found no material error in the proceeding, and the judgment was therefore affirmed.

WORKMEN'S COMPENSATION—LUMP-SUM SETTLEMENT—"COMPENSATION"—MEDICAL SERVICES—*Melcher's Case, Supreme Judicial Court of Maine (September 28, 1926), 134 Atlantic Reporter, page 542.*—One Melcher, employed in Wyman's café, was injured in the course of her employment and was awarded compensation. After compensation had been paid for more than six months, but before the plaintiff had paid the physician who ministered to her during convalescence, she filed a request for commutation of future payments into a lump sum, which was ascertained and paid. Within 60 days thereafter the plaintiff filed a petition with the industrial accident commission for determination of a sum to be paid by her employer to defray the expense of medical and surgical aid incurred immediately after the accident. Upon her petition being denied, she appealed to the supreme judicial court, Cumberland County, which dismissed the petition, and she again appealed to the supreme judicial court of the State. That court held that the question was purely legal, and that its solution is found in section 28 of chapter 238 of the Public Laws of 1919, reading in part as follows:

In case payments have continued for not less than six months either party may, upon due notice to the other party petition the commission for an order commuting the future payments to a lump sum. Upon payment of such amount the employer shall be discharged from all further liability on account of the injury or death, and be entitled to a duly executed release, upon filing which, or other due proof of payment, the liability of such employer under any agreement, award, findings, or decree shall be discharged of record, and the employee accepting the lump-sum settlement as aforesaid shall receive no future compensation under the provisions of this act.

Speaking of this section, the court said:

The wording of the phrase under inspection is entirely unambiguous, and its meaning must be held to be that, after paying the amount of the settlement ordered by the commission, the employer shall not be called upon for further or other payments.

We hold that the services, restoratives, and aids required by statute to be supplied are "compensation," within the meaning of the act, and our conclusion, therefore, is that, after payment to him under a lump-sum settlement order, regularly arrived at, the injured workman can no longer, as of right, demand of the employer any contribution of any sort.

The decree was affirmed and the appeal dismissed.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—REFUSING OPERATION—*Palloni* v. *Brooklyn-Manhattan Transit Corporation, Supreme Court of New York, Appellate Division (March 3, 1926), 214 New York Supplement, page 430.*—Parlo Palloni, who was known to be suffering with a hernia of the left side, was employed by the defendant, and while in the course of his employment he received an injury which produced a right inguinal hernia and aggravated the preexisting one. It appeared that some time prior to the injury in question the plaintiff had been severely burned, and when sent to the hospital for treatment of the hernia he was not, in the opinion of the doctors, in condition to be operated on, although he consented to an operation. Four months later he was advised to have an operation and was told by the referee that unless he consented he could not receive compensation. He was also told that he would not have to meet any of the expenses incident to the operation. The hospital physicians and his own doctor assured him that there was practically no danger from the operation and there might be serious results from strangulation if he attempted to work in his present condition, but he declined to submit. He alleged as a reason fear that he would be killed, and it was upon that ground that the referee based his award. The defendant appealed. The court in reversing the award said in part:

The attention of the court has not been called to any reported case in this State defining the duty of a claimant with reference to an operation. It has been generally recognized, however, that, when such claim arises on a hearing in compensation court, it is the duty of the court to make a finding as to whether or not the claimant unreasonably refused. This in effect is a recognition of the fact that, if the refusal was unreasonable, compensation should be denied.

Reference was made by the court to several cases in which the facts involved were very similar to those in the instant case, and it

quoted from the opinion given in McNally *v.* Hudson & Manhattan R. Co. (95 Atl. 122, 87 N. J. L. 455), as follows:

It is true that, whether a workman reasonably refuses to have an operation performed is one of fact for the trial judge to determine. It can not, however, be properly said that, where it appears, as it does in the present case, that a risk of life is involved, the refusal of the prosecutor to submit to an operation is unreasonable.

The opinion continued:

The question of reasonableness may be one of fact, and, if so found, is binding on this court, but in this case there is no dispute of fact. There is a single question, Was unjustifiable fright a reasonable ground for refusal to submit to an operation which had been recommended by physicians representing the claimant, the employer, and the industrial board, and consequently presumed to be for the best interests of the claimant, especially where there is not proof that such operation is fatal or even dangerous? As a matter of law, it must be held that such fright alone was not a reasonable ground for refusal.

The award was reversed, and the matter remitted to the State industrial board to give claimant an opportunity to submit to an operation, with costs against the State industrial board to abide the event.

The Supreme Court of Alabama affirmed an award to a man whose eye was injured, causing cataract, his employer contending that unless an operation was submitted to compensation should be suspended. The operation had not before been tendered, and the court held that the employee was entitled to "reasonable opportunity to be properly advised" as to the nature and probable success of the operation, and whether free from serious danger. (Gulf States Steel Co. *v.* Cross (1926), 106 So. 870.)

WORKMEN'S COMPENSATION — MEDICAL AND SURGICAL AID — REFUSING OPERATION—DISCONTINUANCE OF COMPENSATION — JUDICIAL NOTICE—*Southern California Edison Co.* v. *Industrial Accident Commission of State of California et al., District Court of Appeal of California (December 22, 1925), 243 Pacific Reporter, page 455.*— The Industrial Commission of California awarded compensation to Oliver R. Harris for disability resulting from injuries received nearly two years prior thereto. The award was opposed by the employing company, which brought a writ of certiorari to have the order of the commission reviewed.

Harris on March 6, 1923, fell from an electric light pole and thereby sustained an injury to his back. Within three weeks he had recovered sufficiently to do light work for his employer, which he continued to do for some four weeks, when he suffered a wrench to his back which caused him to desist from further labor. From that time until the date of the hearing before the commissioners, some two

years later, he was unable to work, due to the condition of his back. He was examined at intervals during that period by some four or five surgical experts and received more or less medical and surgical treatment.

All the surgeons who examined him in the earlier period of his disability advised him that a surgical operation would greatly relieve him, some of them expressing an opinion that he could be entirely cured. Two methods of treatment were recommended, the "Albee" and the "Hibbs" treatment. The report of Dr. John C. Wilson, who examined Harris some 22 months after his injury, corresponded with that of the other surgeons, except that he expressed some doubt as to a complete recovery, and Doctor Southworth also qualified his report in the following words:

It must be borne in mind that a Hibbs or Albee operation is not always followed by prompt and satisfactory relief.

It appeared that the company repeatedly offered to provide and urged the recommended operation, but from the outset Harris refused to consent to it. The commission found that the refusal was not unreasonable. The company contended that the refusal to submit to an operation was unreasonable and therefore it was not liable for the continued disability of Harris. Subdivision (*e*), section 11, of the workmen's compensation insurance and safety act of 1917, upon which the company relied reads as follows:

No compensation shall be payable in case of the death or disability of an employee if his death is caused, or if and so far as his disability is caused, continued or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, the risk of which is, in the opinion of the commission, based upon expert medical or surgical advice, inconsiderable in view of the seriousness of the injury.

The court, on review of the commission's findings, said in part:

It must be admitted that there is nothing in the record which can support the conclusion that there was any risk involved in the proposed operation. Doctor Wilson's report, while recommending the operation, does throw some doubt upon the probability of beneficial results, but it must be kept in mind that the doubt is based upon the fact that some 22 months had elapsed between the time of the injury and Doctor Wilson's examination, and the fact that an operation had not been performed previous to Doctor Wilson's examination is wholly due to the refusal of Harris.

We cannot agree with respondent's contention that the commission may take judicial cognizance of what is involved in the "Hibbs" or "Albee" treatment. The rules of evidence which obtain in hearings before the industrial accident commission, so far as the present instance is concerned, are the same as those which prevail in the trial courts of this State.

Where the issue pertains to medical or surgical treatment, the nature, effect, or result of which are the subjects of common knowledge, such matters are within the rule of judicial knowledge, as for

instance, the court will take judicial notice of the nature, purpose, and effects of vaccination. Also that syphilis is a serious disease. But where the matter is not one of common knowledge, but known generally only to medical experts, it must be proven by competent evidence just as any other issue of fact.

It was held by the court that there was no competent evidence offered before the commissioners as to the character of risk involved in either the "Albee" or "Hibbs" treatment from which it could properly find that the employee's refusal to submit to an operation was not unreasonable. The award was therefore annulled and the case referred back to the commission with instructions to exclude any compensation for disability in so far as it was caused, continued, or aggravated by unreasonable refusal of the employee to undergo the recommended operation.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—"UNUSUAL CASES"—CONSTRUCTION OF MASSACHUSETTS LAW—*Moore's Case, Supreme Judicial Court of Massachusetts (May 26, 1926), 152 Northeastern Reporter, page 66.*—Galen Moore, an employee of the Bethlehem Shipbuilding Corporation, was injured in May, 1920, by an accident arising out of and in the course of his employment, and tuberculosis resulted from the injury. He was discharged from a hospital in 1923 to enter a sanatorium for lung tuberculosis where he could receive proper treatment. The industrial accident board ordered the insurer of his employer to repay him what he had paid out to physicians and hospitals for services rendered after the two weeks following his injury. It appears that the legislature had by statute given the board authority to require employers to extend medical treatment, etc., beyond the first two weeks in "unusual" cases. In Rys' Case (254 Mass. 244, 139 N. E. 505; see Bul. No. 391, p. 502), classed as "unusual," complications arose after an operation which resulted in degeneration of the skin, necrosis of the bones and tissues, and hemorrhage. After citing this case and quoting from the opinion delivered therein as follows:

Among the "unusual" cases would ordinarily be included, for example, those requiring major operations, spinal injuries calling for expensive special apparatus, and serious injuries to the eye or brain demanding the services of specialists. It is equally clear that the statute is not applicable to the common minor injury, calling for ordinary medical treatment

Judge Carroll, speaking for the court, said in part:

There was nothing unusual in the case at bar. The plaintiff is afflicted with tuberculosis as a result of his injury, but the statute did not intend to put the expense of his cure on the insurer, as no unusual result or complication, no unexpected accident or symptom,

intervened to bring the case within the statute. It follows that the decree must be reversed and a decree entered for the insurer.

The decree was accordingly reversed and a decree entered for the insurer.

WORKMEN'S COMPENSATION—MEDICAL FEE—REQUIRING PAYMENT—JUDICIAL POWERS OF COMMISSION—*Bee Hive Mining Co. et al.* v. *Industrial Commission of Virginia, Supreme Court of Appeals of Virginia (March 18, 1926), 132 Southeastern Reporter, page 177.*—The Industrial Commission of Virginia undertook to require the Bee Hive Mining Co. and its insurer to pay Dr. S. M. Ford $275 for medical attention to an injured employee of that company prior to the assertion of the claim before the industrial commission. The employer and insurer appealed. The appeal was dismissed because the amount involved was less than $300, the statutory amount necessary to give the court jurisdiction in cases of this nature. (Bee Hive Mining Co. et al. *v.* Ford, 131 S. E. 203.)

The instant hearing was on a petition for a writ of prohibition by the mining company and the insurer to restrain the industrial commission from issuing a certified copy of an award and proceeding further. The court, in awarding the writ, said in part:

Whatever control the commission has over fees of physicians it gets from section 65 of the workmen's compensation act, which is as follows:

"Fees of attorneys and physicians and charges of hospitals for services under this act shall be subject to the approval of the commission; but no physician shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the industrial commission in connection with the case."

This section was intended, as we construe it, to give the industrial commission the power to pass on attorneys' fees and physicians' charges when rendered—in other words, it was the intent of the act not to allow an attorney or a physician to overcharge for their services. There is nothing in this section that could be construed to give authority to the industrial commission to make a money award against an employer and insurance carrier and in favor of a physician, who, at their request had rendered services to an injured employee.

Of course, if in accordance with the provisions of the workmen's compensation law, the employer or its insurance carrier had ordered the services of a physician, and refused to pay for them, the physician would have a right to maintain an action at law, but the industrial commission has no authority under the law to require the employer or its insurance carrier to pay a physician ordered by them.

A writ of prohibition will therefore issue, prohibiting the Industrial Commission of Virginia from further proceeding in the matter of the award of a fee to Dr. S. M. Ford, and particularly from issuing a certified copy of the award.

WORKMEN'S COMPENSATION—MEDICAL SERVICES—EMPLOYMENT BY CLAIMANT—*Koch* v. *Lehigh Valley R. Co., Supreme Court of New York, Appellate Division (July 2, 1926), 216 New York Supplement, page 609.*—George Koch, an employee of the Lehigh Valley Railroad Co., while in the course of his employment on March 2, 1921, cut his finger, blood poisoning resulting. He consulted his own physician, Dr. David Brumberg, who lanced the finger on March 3, and saw Koch daily until March 10, at which time incisions were made in the finger and hand to drain them. Thereafter claimant was delirious most of the time until July, 1921. During this period and until September 30, 1921, Doctor Brumberg saw his patient every day and sometimes twice a day, either at his office or at Koch's house. Thereafter calls were made nearly every other day by the physician upon the patient or vice versa until February, 1925. Meanwhile, Dr. Joseph Brumberg, Dr. David Brumberg's brother, had been employed to give claimant X-ray treatments. From an award by the industral board to claimant in the sum of $1,622 on account of medical services of Dr. David Brumberg and $150 on account of the services of Dr. Joseph Brumberg, the employer appealed.

Judge Henry T. Kellogg, rendering the opinion of the court, said in part:

It will be seen that the Brumbergs had in claimant an excellent patient, had his employer been responsible for his bills. We do not think the employer was so liable. Section 13 of the workmen's compensation law (amended by Laws 1918, ch. 634, sec. 3), as it read in March, 1921, provided as follows:

"The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so, or unless the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide the same."

Inasmuch as the claimant had not requested the employer to furnish medical services, nor notified the employer of his injury until nine days after it occurred, it was held that such employer could not be held liable for medical services rendered.

The award was therefore reversed and the claim dismissed with costs against the State industral board.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—ACTION FOR DAMAGES—DEFENSES—*William B. Tilghman Co. (Inc.)* v. *Conway, Court of Appeals of Maryland (April 15, 1926), 133 Atlantic Reporter, page 593.*—Harry L. Conway, a minor under the age of 14 years, was employed by William B. Tilghman Co. (Inc.) on July

1, 1923. On August 15, 1923, being then slightly above the age of 14, he was injured in the course of his employment by being hit in the eye by a piece of timber which broke his glasses and caused an injury which resulted in total blindness of his right eye. He was awarded compensation by the industrial accident commission on September 22, 1923, and on November 22, 1923, the order was annulled for the reason that the claimant was at the time of his employment and the accident under 16 years of age. The plaintiff then instituted a suit in the circuit court of Wicomico County to recover damages for his injury, and in his declaration charged the defendant with illegal employment and negligence. The common-law defenses were held barred by the terms of the compensation act. From judgment for the plaintiff the defendant appealed.

The appeal presented three questions for the consideration of the court of appeals: (1) Was the employment of the plaintiff, although prohibited by article 100 of the Code of Public General Laws, illegal under the provisions of article 101 of the workmen's compensation law? (2) If such employment was not illegal, could the plaintiff bring a common-law action for damages caused by an injury due to the negligence of the employer, etc.? and (3) if such action be brought could the defendant plead the common-law defenses?

The court, after reviewing article 100, Code of Public General Laws, relative to the employment of children under the age of 14, and article 101, workmen's compensation act, stipulating the conditions under which children between the age of 14 and 16 years may be employed, held that the employment of the plaintiff was illegal. Judge Diggs, speaking for the court, said in part:

It could not have been the intention of the legislature to include within the provisions of the workmen's compensation law those persons who by the child labor law were forbidden from engaging in certain employments and were prohibited from being employed except when conditions, specifically set forth, had been complied with; in other words, the legislative branch of the State could not have intended by one law to prohibit the employment of minors, and by another law provide for compensation to such minors injured while engaged in the prohibited employment or occupation.

To the second and third questions and the contention that the plaintiff had elected to apply for compensation and could not therefore bring his suit at common law, Judge Diggs said:

But in the present case the plaintiff here has made no election, for the reason that he could not make an election, not coming under the provisions of the workmen's compensation law. It therefore follows that he is at liberty, upon the industrial accident board's decision that he was not entitled to compensation because of his being outside of the provisions of the act, to bring this action at common law. Upon bringing the action at law, and not being embraced within the provisions of the workmen's compensation law, he can not avail himself of

any of the provisions of that law, and therefore the defendant in this action is entitled to plead and set up the common-law defenses of assumption of risk, fellow servant, and contributory negligence; in other words, the plaintiff and defendant in this case have the same rights and remedies as they would have had in case the workmen's compensation article had never been enacted.

The judgment of the trial court was reversed and a new trial awarded with costs to the appellant.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—TREBLE DAMAGES—CONSTITUTIONALITY OF STATUTE—*Town of New Holstein* v. *Daun, Supreme Court of Wisconsin (June 21, 1926), 209 Northwestern Reporter, page 695.*—Subsection 7 of section 102.09 of the workmen's compensation act of Wisconsin provides that "compensation and death benefits, as provided in sections 102.03 to 102.34, inclusive, shall, in the following cases, be treble the amount otherwise recoverable: (*a*) If the injured employee be a minor of permit age and at the time of the accident is employed, required, suffered or permitted to work without a written permit issued pursuant to section 103.05."

The industrial commission, proceeding under the provisions of that statute, awarded George Daun, a minor of permit age, employed by the town of New Holstein on road work without a permit, treble damages. Daun was employed to load stone on wagons. One Ridgeway, not a coworker, struck a large stone with a hammer and a piece of the stone or hammer flew off and hit Daun's eye and destroyed his sight. The commission found that Daun, who was 16 years old at the time of the injury and earning an average wage of $945 per year, would probably earn an average wage of $1,400 after arriving at the age of 21 years, and therefore assessed the normal compensation at $2,750.03, payable by the town or its insurance carrier, and the further sum of $5,500.06, primarily payable by the town. From a judgment affirming the award the town appealed on the ground that the evidence did not sustain the finding that after reaching the age of 21 years Daun would probably earn $1,400 per year, and also that the statute was unconstitutional because it places upon the employer the burden of proving that the minor would probably not earn $1,400 after his majority.

The court held that there was sufficient evidence to justify the commission's findings as to the probable future earning power of Daun to give it that conclusiveness which the statute requires. It also held that the argument against the constitutionality of the statute was met by the opinion of the Supreme Court of the United States in Booth Fisheries Co. *v.* Industrial Commission (46 Sup. Ct. 491), and quoted from that opinion as follows:

More than this, the employer in this case having elected to accept the provisions of the law, and such benefits and immunities as it gives, may not escape its burdens by asserting that it is unconstitutional. The election is a waiver and estops such complaint.

The court concluded its opinion by saying:

As to subdivisions of the State that come under the compensation law by force of statute, as the plaintiff did in this case, it is clear that the State may prescribe reasonable regulations as to their liabilities under the law. The placing upon them the burden of showing that a minor would probably not earn $1,400 after majority cannot be said to be so unreasonable as to be unconstitutional, assuming that a subdivision of a State can question the constitutionality of liabilities placed upon it by the State.

The judgment was therefore affirmed.

WORKMEN'S COMPENSATION—PAYMENT OF DEBTS OUT OF COMMUTED AWARD—POWER OF COMMISSION—CONSTRUCTION OF STATUTE—*Los Angeles County* v. *Industrial Accident Commission et al., District Court of Appeal of California (February 25, 1926), 245 Pacific Reporter, page 796.*—The industrial accident commission made an award to Jennie C. Lowe, widow of an employee of the County of Los Angeles, which employee was killed in the course of his employment. By order of the commission the award was commuted and the county was ordered to pay to each of several creditors of the deceased, or of the widow, a fixed sum of money, the aggregate amount thereof to be deducted from the total award and the balance thereof to be paid to the widow. The county of Los Angeles objected to the order and sued out a writ of certiorari to have the award reviewed on the ground that under the workmen's compensation insurance and safety act the commission had no authority to make the order complained of.

The act contains a general prohibition against awards being taken for the debts of the parties, but lists certain charges that may be made liens thereon. From this the commission had assumed an implied power to make the distribution complained of. The court held that the power of the commission was limited to the definite provisions of the law, and since the debts allowed in the order were not included in the terms of the act the award must be annulled.

Another question raised was as to the interest of Los Angeles County in the disposition of the award; but the court held that as it was the employer, and part of its money would be used in making the payments under consideration, it was a party in interest and could properly bring the proceedings.

WORKMEN'S COMPENSATION—"PLANT"—CITY EMPLOYEE—INJURY BY THIRD PARTY—CONSTRUCTION OF STATUTE—*Shockey* v. *Royal Baking Powder Mfg. Co. et al., Supreme Court of Washington (March 26, 1926), 244 Pacific Reporter, page 549.*—George F. M. Shockey was employed by the city of Seattle to work upon the public streets of the city. While so employed he was run into and injured by an automobile operated by E. G. Fredbloom for the Royal Baking Powder Manufacturing Co. and the Royal Distributing Co. Shockey brought his action against the companies named. The case was dismissed on the ground that the facts did not constitute a cause of action against the defendants, and plaintiff appealed from the judgment.

The supreme court found the "sole question" before it to be whether the injured man was at the time of his injury working at the plant of his employer. If so, only the compensation right existed; otherwise, he might sue the third parties. In affirming the judgment of the lower court, the court reviewed several of its prior decisions in which the facts and circumstances were virtually the same as those in the present case and referred especially to the word "plant" as it had construed it in the former cases. In Carlson *v.* Mock (102 Wash. 557, 173 Pac. 637), the court held that the word "plant" was intended by the legislature to include no more than that part of the employer's fixed property over which he has exclusive control. Since the city had exclusive control of its streets, and could for the purpose of repair take any and every necessary step to insure the safety of its employees while engaged thereon, it must, under the terms of the statute, be held to be a part of the plant or premises of the city. Of this Judge Fullerton, speaking for the court, said in part:

> We may say here, however, as we have said in similar instances, it is a rule with which we are without sympathy. It permits a person guilty of wrong to charge a fund to which he neither contributes nor has an interest with the consequences of the wrong. But the evil is for legislative correction. The courts must administer the statute as as they find it.

The judgment was therefore affirmed, relegating the employee to his remedy against the industrial fund.

WORKMEN'S COMPENSATION—SECOND INJURY—LOSS OF SECOND MEMBER—TOTAL DISABILITY—*Nease* v. *Hughes Stone Co., Supreme Court of Oklahoma (September 15, 1925), 244 Pacific Reporter, page 778*—W. A. Nease was employed by the defendant and on September 13, 1922, in the course of his employment and arising out of the same, lost the sight of his right eye by an explosion. Prior to his employment by the defendant he had lost the sight of his left eye, and

as a result of the latter accident he was permanently and totally disabled. At a hearing before the commission he was granted an award for the loss of an eye and allowed compensation for 100 weeks. He brought action in the supreme court to reverse and vacate the award under the terms of the act that declare that the loss of both eyes constitutes permanent total disability. In so doing the court stated that the employer and insurer "must have known" that the employee had but one sound eye when he was employed, and that "he was presumably paid the wages which a man in that impaired condition was worth in that service." Such earning capacity as he had being totally destroyed, he was entitled to compensation for permanent total disability, and it was so ordered.

The Supreme Court of Illinois took the same view in the case of a coal miner who had been blind in one eye for eight years and had then lost 75 per cent of the use of the other eye. The result was that "it would be exceedingly difficult, if not impossible," for the injured man to find gainful employment or successfully to perform its duties. The award of the State commission as for permanent total disability was accordingly affirmed. (Superior Coal Co. *v.* Industrial Commission (1926), 152 N. E. 535.)

A like construction was put upon the compensation law of Alaska by a United States Circuit Court of Appeals, which affirmed the judgment of the District Court for the Territory of Alaska awarding total disability benefits in the case of a man losing a second eye by accident. (Killisnoo Packing Co. *v.* Scott (1926), 14 Fed. (2d) 86.)

The law of Iowa contains a schedule for specific injuries, and provides that, in case of successive injuries, compensation shall be awarded for the effects of of each independently. The supreme court of the State upheld an award allowing the schedule amount only in the case of a man whose right arm was off at the shoulder on account of a prior injury, and who then lost the lower third of his left arm, rejecting a claim as for permanent total disability. (Pappas *v.* North Iowa Brick & Tile Co. (1925), 206 N. W. 146.)

WORKMEN'S COMPENSATION—SECOND INJURY—PRIOR PARTIAL INCAPACITY—*American Mutual Liability Ins. Co. et al.* v. *Brock, Court of Appeals of Georgia (September 25, 1926), 135 Southeastern Reporter, page 103.*—E. E. Brock lost a foot and his right leg up to within 3 inches of the knee joint when he was eight years of age. On June 25, 1924, while in the performance of his duties with the Gainsville Cotton Mills, a bale of cotton rolled on his right knee, spraining his hip and knee. His weekly wage at the time of the accident was $9.07. He was paid compensation for 10 weeks' temporary total incapacity in accordance with the laws of Georgia. He returned to work on September 6, 1924, and continued to work until April 20, 1925, when he was discharged. Shortly thereafter he applied for additional compensation on the ground of a change in condition. On a hearing the commission found from medical testimony that

there was a 50 per cent loss of the use of that portion of the claimant's leg which had not been destroyed previous to June 25, 1924. It then proceeded to make its award on the basis that the loss previously suffered by the plaintiff was equal to 150 weeks of compensation and, deducting this from 175 weeks, the period for which compensation is allowable for the loss of a leg, the remaining usefulness would be equal to 25 weeks. Since there was a 50 per cent disability to the remaining portion of the leg, the commission held that plaintiff was entitled to compensation for 12½ weeks at the prescribed rate for a good leg. On plaintiff's appeal to the superior court he was awarded judgment as for a 50 per cent loss of a whole leg without deducting 150 weeks, and the court ordered payments to be made at one-fourth the weekly wages he had been receiving for 175 weeks. The defendants appealed for a review.

The court, on review, said in part:

The employee in this case was wearing an artificial limb and was making out with the piece of leg that he had. Presumably he was charged with the disability in the price of his labor. Since he was not a whole man, and was receiving less for his work because of that fact, he ought not to be charged with the disability again in adjusting the matter of compensation for injury. Compensation being based upon wages, the reduction made in wages on account of the crippled service automatically guaranteed a corresponding reduction in compensation, and to charge the claimant with his prior disability at both ends of the transaction would be manifestly unfair.

He had lost a little more than his foot. The employer accepted him as he was, and paid him as he was, and for the purposes of this case he will be regarded as a two-legged man. If he had lost all the remaining portion of the abbreviated member, or all of the use of it, he would have received compensation at the rate of 50 per cent of his average weekly wages for 175 weeks. Having lost 50 per cent of the use of such remaining portion, he is entitled * * * to be paid 50 per cent of the amount which he would have received for a total loss of use.

The findings made in the instant case remanded the judgment which the superior court rendered, and it was not necessary to recommit the case on sustaining the appeal. The court, in awarding 50 per cent of the compensation to which the employee would have been entitled as for the total loss, or total loss of use, of a leg, should have proportioned the period of the weekly payments rather than the amount of such payments, ordering that the payments be made at one-half the average weekly wages, for 87½ weeks, less credit for payments already made, instead of requiring them to be made at the rate of one-fourth of such wages, for 175 weeks, less such credit.

Under the judge's order the weekly payments would have been less than $4, whereas they can not be less than this amount, except when the weekly wage is less. The judgment will be affirmed, with direction that it be amended to accord with the statute.

The judgment was therefore affirmed with directions.

WORKMEN'S COMPENSATION—SETTLEMENT AND RELEASE—CONTINUING DISABILITY—MINOR—*Evansville Pure Milk Co.* v. *Allen, Appellate Court of Indiana (February 18, 1926), 150 Northeastern Reporter, page 793.*—Estelle Allen, a minor 17 years of age, was injured while in the employ of the defendant. On June 6, 1923, the parties entered into an agreement whereby the defendant agreed to pay her compensation at a certain rate during her disability. That agreement was approved by the industrial board, and compensation was paid accordingly to August 21, 1923. On August 28, 1923, the defendant secured a receipt from the plaintiff for $26.40, which made in all $66, in final settlement of all compensation due her under the compensation law, and also a statement from her that her disability ceased on August 21, 1923. Then followed a statement indicating that the amount received was for total disability. On May 27, 1925, she filed an application for compensation for partial disability, and from an award in her favor the defendant appealed. It set up in defense the receipt given by the plaintiff, and alleged that she had been paid in accordance with the agreement approved by the board and that the claim was barred by lapse of time. It was shown by the evidence that the plaintiff was suffering from a partial disability and that the defendant had on numerous occasions since the date of the receipt furnished her with medical care.

The court, in disposing of the case, said in part:

The award might well be affirmed on the authority of Standard etc. Mfg. Co. *v.* Lliff (119 N. E. 479, 67 Ind. App. 508), and would be so affirmed were it not for the fact that we desire to express our emphatic disapproval of the action of the insurance carrier in its action in securing the receipt in question from a 17-year-old child, and then, through a technicality, attempting to prevent the payment of compensation under one of its policies, when it at all times knew appellee had not recovered from the effect of her injuries, and when it had been furnishing her with medical and surgical care.

There is no merit or justice in this appeal.

The award was therefore affirmed, with 5 per cent penalty.

WORKMEN'S COMPENSATION INSURANCE—SURETY ON CONTRACTOR'S BOND—LIABILITY FOR INSURANCE PREMIUM—*State* v. *Padgett et al., Supreme Court of North Dakota (May 26, 1926), 209 Northwestern Reporter, page 388.*—This action was brought in the name of the State of North Dakota against the Northern Trust Co., surety on the bond of C. M. Padgett and the Padgett Co. to compel them to pay to the workmen's compensation fund premiums alleged to have been due and unpaid. The surety company demurred on the ground that the complaint did not state facts sufficient to constitute

a cause of action against it. The demurrer was overruled and the surety company appealed.

It appeared that C. M. Padgett and the Padgett Co. were road contractors, and as such had given bonds to the North Dakota State Highway Commission with the Northern Trust Co. as surety thereon. These bonds provide that neither the State nor any person performing labor or services or furnishing material to be used in the performance of the agreement shall suffer loss. It was alleged on behalf of the State that in each of the contractor's agreements the following proposal appeared and was a part of the contract:

To comply with the requirements of the workmen's compensation act (known as H. B. 56) enacted by the sixteenth legislative assembly, in 1919.

It was contended that the phrase "labor, services, or materials" which appeared in the contractor's bond included premiums payable by the contractor to the workmen's compensation fund.

The supreme court, in reversing the trial court, said in part:

The workmen's compensation fund is not synonymous with the State of North Dakota, nor is the bureau the State of North Dakota. The claims against the fund are not claims against the State, and the fund itself is not a State fund. (Bordson *v.* N. D. W. C. Bureau, 49 N. D. 534, 191 N. W. 839, 842; see Bul. No. 391, p. 492.)

There is no express promise by the surety to pay the premium now claimed due. The promise is to pay those who furnish labor, services, and materials, and to protect the State of North Dakota from loss. The bureau now says that the contract was made expressly for its benefit, within section 5841, C. L. 1913, and that it may recover the premium just as any laborer or materialman might recover against the surety had payment for labor or materials not been made.

It must not be overlooked that the surety is a favorite of the law and has the right to stand upon the strict terms of his obligation when such terms have been ascertained. This rule is generally recognized by the courts and is applicable in all circumstances.

We are satisfied that the benefit to the bureau from the stipulation in the contractor's agreement with the highway commission was incidental, within the above rule, and was not within the contemplation of the parties at the time of the execution of that instrument. We think it would be a wholly unjustifiable perversion of language to construe the terms of the undertaking so as to obligate the surety to pay the premium to the bureau in the circumstances disclosed in the record.

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CUMULATIVE INDEX[1]

[1] This index cumulates the indexes of bulletins on decisions, Nos. 112, 152, 169, 189, 224, 246, 258, 290, 309, 344, 391, 417, and 444—years 1912 to 1926, inclusive.

LIST OF BULLETINS OF THE BUREAU OF LABOR STATISTICS

The following is a list of all bulletins of the Bureau of Labor Statistics published since July, 1912, except that in the case of bulletins giving the results of periodic surveys of the bureau, only the latest bulletin on any one subject is here listed.

A complete list of the reports and bulletins issued prior to July, 1912, as well as the bulletins published since that date, will be furnished on application. Bulletins marked thus (*) are out of print.

Conciliation and Arbitration (including strikes and lockouts).

*No. 124. Conciliation and arbitration in the building trades of Greater New York. [1913.]
*No. 133. Report of the industrial council of the British Board of Trade in its inquiry into industrial agreements. [1913.]
*No. 139. Michigan copper district strike. [1914.]
No. 144. Industrial court of the cloak, suit, and skirt industry of New York City. [1914.]
No. 145. Conciliation, arbitration, and sanitation in the dress and waist industry of New York City. [1914.]
*No. 191. Collective bargaining in the anthracite coal industry. [1916.]
*No. 198. Collective agreements in the men's clothing industry. [1916.]
No. 233. Operation of the industrial disputes investigation act of Canada. [1918.]
No. 255. Joint industrial councils in Great Britain. [1919.]
No. 283. History of the Shipbuilding Labor Adjustment Board, 1917 to 1919.
No. 287. National War Labor Board: History of its formation, activities, etc. [1921.]
No. 303. Use of Federal power in settlement of railway labor disputes. [1922.]
No. 341. Trade agreement in the silk-ribbon industry of New York City. [1923.]
No. 402. Collective bargaining by actors. [1926.]
No. 419. Trade agreements, 1925.

Cooperation.

No. 313. Consumers' cooperative societies in the United States in 1920.
No. 314. Cooperative credit societies in America and in foreign countries. [1922.]
No. 437. Cooperative movement in the United States in 1925 (other than agricultural).

Employment and Unemployment.

*No. 109. Statistics of unemployment and the work of employment offices in the United States, [1913.]
No. 172. Unemployment in New York City, N. Y. [1915.]
*No. 183. Regularity of employment in the women's ready-to-wear garment industries. [1915.]
*No. 195. Unemployment in the United States. [1916.]
No. 196. Proceedings of the Employment Managers' Conference held at Minneapolis, Minn., January, 1916.
*No. 202. Proceedings of the conference of Employment Managers' Association, Boston, Mass., held May 10, 1916.
No. 206. The British system of labor exchanges. [1916.]
*No. 227. Proceedings of the Employment Managers' Conference, Philadelphia, Pa., April 2 and 3, 1917.
No. 235. Employment system of the Lake Carriers' Association. [1918.]
*No. 241. Public employment offices in the United States. [1918.]
No. 247. Proceedings of Employment Managers' Conference, Rochester, N. Y., May 9-11, 1918.
No. 310. Industrial unemployment: A statistical study of its extent and causes. [1922.]
No. 409. Unemployment in Columbus, Ohio, 1921 to 1925.

Foreign Labor Laws.

*No. 142. Administration of labor laws and factory inspection in certain European countries. [1914.]

Housing.

*No. 158. Government aid to home owning and housing of working people in foreign countries. [1914.]
No. 263. Housing by employees in the United States. [1920.]
No. 295. Building operations in representative cities in 1920.
No. 424. Building permits in the principal cities of the United States, 1925.

Industrial Accidents and Hygiene.

*No. 104. Lead poisoning in potteries, tile works, and porcelain enameled sanitary ware factories. [1912.]
No. 120. Hygiene of the painters' trade. [1913.]
*No. 127. Dangers to workers from dusts and fumes, and methods of protection. [1913.]
*No. 141. Lead poisoning in the smelting and refining of lead. [1914.]
*No. 157. Industrial accident statistics. [1915.]
*No. 165. Lead poisoning in the manufacture of storage batteries. [1914.]
*No. 179. Industrial poisons used in the rubber industry. [1915.]
No. 188. Report of British departmental committee on the danger in the use of lead in the painting of buildings. [1916.]
*No. 201. Report of committee on statistics and compensation-insurance cost of the International Association of Industrial Accident Boards and Commissions. [1916.]
*No. 207. Causes of death by occupation. [1917.]
*No. 209. Hygiene of the printing trades. [1917.]
No. 219. Industrial poisons used or produced in the manufacture of explosives. [1917.]
No. 221. Hours, fatigue, and health in British munition factories. [1917.]
No. 230. Industrial efficiency and fatigue in British munition factories. [1917.]
*No. 231. Mortality from respiratory diseases in dusty trades (inorganic dusts). [1918.]
No. 234. Safety movement in the iron and steel industry, 1907 to 1917.
*No. 236. Effect of the air hammer on the hands of stonecutters. [1918.]
No. 249. Industrial health and efficiency. Final report of British Health of Munition Workers Committee. [1919.]
No. 251. Preventable death in the cotton-manufacturing industry. [1919.]
No. 256. Accidents and accident prevention in machine building. [1919.]
No. 267. Anthrax as an occupational disease. [1920.]
No. 276. Standardization of industrial accident statistics. [1920.]
No. 280. Industrial poisoning in making coal-tar dyes and dye intermediates. [1921.]
No. 291. Carbon monoxide poisoning. [1921.]
No. 293. The problem of dust phthisis in the granite-stone industry. [1922.]
No. 298. Causes and prevention of accidents in the iron and steel industry, 1916 to 1919.
No. 306. Occupational hazards and diagnostic signs: A guide to impairments to be looked for in hazardous occupations. [1922.]
No. 339. Statistics of industrial accidents in the United States. [1923.]
No. 392. Survey of hygienic conditions in the printing trades. [1925.]
No. 405. Phosphorus necrosis in the manufacture of fireworks and in the preparation of phosphorus. [1926.]
No. 425. Record of industrial accidents in the United States to 1925.
No. 426. Deaths from lead poisoning. [1926.]
No. 427. Health survey of the printing trades, 1922 to 1925.
No. 428. Proceedings of the Industrial Accident Prevention Conference, held at Washington, D. C., July 14–16, 1926.

Industrial Relations and Labor Conditions.

No. 237. Industrial unrest in Great Britain. [1917.]
No. 340. Chinese migrations, with special reference to labor conditions. [1923.]
No. 349. Industrial relations in the West Coast lumber industry. [1923.]
No. 361. Labor relations in the Fairmont (W. Va.) bituminous coal field. [1924.]
No. 380. Postwar labor conditions in Germany. [1925.]
No. 383. Works council movement in Germany. [1925.]
No. 384. Labor conditions in the shoe industry in Massachusetts, 1920 to 1924.
No. 399. Labor relations in the lace and lace-curtain industries in the United States. [1925.]

Labor Laws of the United States (including decisions of courts relating to labor).

No. 211. Labor laws and their administration in the Pacific States. [1917.]
No. 229. Wage-payment legislation in the United States. [1917.]
No. 285. Minimum-wage legislation in the United States. [1921.]
No. 321. Labor laws that have been declared unconstitutional. [1922.]
No. 322. Kansas Court of Industrial Relations. [1923.]
No. 343. Laws providing for bureaus of labor statistics, etc. [1923.]
No. 370. Labor laws of the United States, with decisions of courts relating thereto. [1925.]
No. 408. Laws relating to payment of wages. [1926.]
No. 417. Decisions of courts and opinions affecting labor, 1925.
No. 434. Labor legislation of 1926.

Proceedings of Annual Conventions of the Association of Governmental Labor Officials of the United States and Canada.

No. 266. Seventh, Seattle, Wash., July 12–15, 1920.
No. 307. Eighth, New Orleans, La., May 2–6, 1921.

Proceedings of Annual Conventions of the Association of Government Labor Officials of the United States and Canada—Continued.

*No. 323. Ninth, Harrisburg, Pa., May 22–26, 1922.
No. 352. Tenth, Richmond, Va., May 1–4, 1923.
No. 389. Eleventh, Chicago, Ill., May 19–23, 1924.
No. 411. Twelfth, Salt Lake City, Utah, August 13–15, 1925.
No. 429. Thirteenth, Columbus Ohio, June 7–10, 1926.

Proceedings of Annual Meetings of International Association of Industrial Accident Boards and Commissions.

*No. 210. Third, Columbus, Ohio, April 25–28, 1916.
No. 248. Fourth, Boston, Mass., August 21–25, 1917.
No. 264. Fifth, Madison, Wis., September 24–27, 1918.
*No. 273. Sixth, Toronto, Canada, September 23–26, 1919.
No. 281. Seventh, San Francisco, Calif., September 20–24, 1920.
No. 304. Eighth, Chicago, Ill., September 19–23, 1921.
No. 333. Ninth, Baltimore, Md., October 9–13, 1922.
No. 359. Tenth, St. Paul, Minn., September 24–26, 1923.
No. 385. Eleventh, Halifax, Nova Scotia, August 26–28, 1924.
No. 395. Index to proceedings, 1914–1924.
No. 406. Twelfth, Salt Lake City, Utah, August 17–20, 1925.
No. 432. Thirteenth, Hartford, Conn., September 14–17, 1926.

Proceedings of Annual Meetings of International Association of Public Employment Services.

No. 192. First, Chicago, December 19 and 20, 1913; Second, Indianapolis, September 24 and 25, 1914; Third, Detroit, July 1 and 2, 1915.
No. 220. Fourth, Buffalo, N. Y., July 20 and 21, 1916.
No. 311. Ninth, Buffalo, N. Y., September 7–9, 1921.
No. 337. Tenth, Washington, D. C., September 11–13, 1922.
No. 355. Eleventh, Toronto, Canada, September 4–7, 1923.
No. 400. Twelfth, Chicago, Ill., May 19–23, 1924.
No. 414. Thirteenth, Rochester, N. Y., September 15–17, 1925.

Productivity of labor.

No. 356. Productivity costs in the common-brick industry. [1924.]
No. 360. Time and labor costs in manufacturing 100 pairs of shoes. [1924.]
No. 407. Labor cost of production and wages and hours of labor in the paper box-board industry. [1925.]
No. 412. Wages, hours, and productivity in the pottery industry, 1925.
No. 441. Productivity of labor in the glass industry. [1927.]

Retail Prices and Cost of Living.

*No. 121. Sugar prices, from refiner to consumer. [1913.]
*No. 130. Wheat and flour prices, from farmer to consumer. [1913.]
*No. 164. Butter prices, from producer to consumer. [1914.]
No. 170. Foreign food prices as affected by the war. [1915.]
No. 357. Cost of living in the United States. [1924.]
No. 369. The use of cost-of-living figures in wage adjustments. [1925.]
No. 418. Retail prices, 1890 to 1925.

Safety Codes.

No. 331. Code of lighting factories, mills, and other work places.
No. 336. Safety code for the protection of industrial workers in foundries.
No. 350. Specifications of laboratory tests for approval of electric headlighting devices for motor vehicles.
No. 351. Safety code for the construction, care, and use of ladders.
No. 364. Safety code for the mechanical power-transmission apparatus.
No. 375. Safety code for laundry machinery and operation.
No. 378. Safety code for woodworking plants.
No. 382. Code of lighting school buildings.
No. 410. Safety code for paper and pulp mills.
No. 430. Safety code for power presses and foot and hand presses.
No. 433. Safety code for the prevention of dust explosions.
No. 436. Safety code for the use, care, and protection of abrasive wheels.

Vocational and Workers' Education.

*No. 159. Short-unit courses for wage earners, and a factory school experiment. [1915.]
*No. 162. Vocational education survey of Richmond, Va. [1915.]
No. 199. Vocational education survey of Minneapolis, Minn. [1916.]
No. 271. Adult working-class education in Great Britain and the United States. [1920.]

Wages and Hours of Labor.

*No. 146. Wages and regularity of employment and standardization of piece rates in the dress and waist industry of New York City. [1914.]
*No. 147. Wages and regularity of employment in the cloak, suit, and skirt industry. [1914.]
No. 161. Wages and hours of labor in the clothing and cigar industries, 1911 to 1913.
No. 163. Wages and hours of labor in the building and repairing of steam railroad cars, 1907 to 1913.
*No. 190. Wages and hours of labor in the cotton, woolen, and silk industries, 1907 to 1914.
No. 204. Street railway employment in the United States. [1917.]
No. 225. Wages and hours of labor in the lumber, millwork, and furniture industries, 1915.
No. 265. Industrial survey in selected industries in the United States, 1919.
No. 297. Wages and hours of labor in the petroleum industry, 1920.
No. 356. Productivity costs in the common-brick industry. [1924.]
No. 358. Wages and hours of labor in the automobile-tire industry, 1923.
No. 360. Time and labor costs in manufacturing 100 pairs of shoes. [1924.]
No. 365. Wages and hours of labor in the paper and pulp industry, 1923.
No. 371. Wages and hours of labor in cotton-goods manufacturing, 1924.
No. 374. Wages and hours of labor in the boot and shoe industry, 1907 to 1924.
No. 376. Wages and hours of labor in the hosiery and underwear industry, 1907 to 1924.
No. 394. Wages and hours of labor in metalliferous mines, 1924.
No. 407. Labor cost of production, and wages and hours of labor in the paper box-board industry. [1925.]
No. 412. Wages, hours, and productivity in the pottery industry, 1925.
No. 413. Wages and hours of labor in the lumber industry in the United States, 1925.
No. 416. Hours and earnings in anthracite and bituminous coal mining, 1922 and 1924.
No. 421. Wages and hours of labor in the slaughtering and meat-packing industry, 1925.
No. 422. Wages and hours of labor in foundries and machine shops, 1925.
No. 431. Union scale of wages and hours of labor, May 15, 1926.
No. 435. Wages and hours of labor in the men's clothing industry, 1911 to 1926.
No. 438. Wages and hours of labor in the motor vehicle industry, 1925.
No. 442. Wages and hours of labor in the iron and steel industry, 1907 to 1925.
No. 443. Wages and hours of labor in woolen and worsted goods manufacturing, 1910 to 1926.

Welfare work.

*No. 123. Employers' welfare work. [1913.]
No. 222. Welfare work in British munitions factories. [1917.]
*No. 250. Welfare work for employees in industrial establishments in the United States. [1919.]

Wholesale Prices.

No. 284. Index numbers of wholesale prices in the United States and foreign countries. [1921.]
No. 440. Wholesale prices, 1890 to 1926.

Women and Children in Industry.

No. 116. Hours, earnings, and duration of employment of wage-earning women in selected industries in the District of Columbia. [1913.]
*No. 117. Prohibition of night work of young persons. [1913.]
*No. 118. Ten-hour maximum working-day for women and young persons. [1913.]
*No. 119. Working hours of women in the pea canneries of Wisconsin. [1913.]
*No. 122. Employment of women in power laundries in Milwaukee. [1913.]
No. 160. Hours, earnings, and conditions of labor of women in Indiana mercantile establishments and garment factories. [1914.]
*No. 167. Minimum-wage legislation in the United States and foreign countries. [1915.]
*No. 175. Summary of the report on condition of woman and child wage earners in the United States. [1915.]
*No. 176. Effect of minimum-wage determinations in Oregon. [1915.]
*No. 180. The boot and shoe industry in Massachusetts as a vocation for women. [1915.]
*No. 182. Unemployment among women in department and other retail stores of Boston, Mass. [1916.]
No. 193. Dressmaking as a trade for women in Massachusetts. [1916.]
No. 215. Industrial experience of trade-school girls in Massachusetts. [1917.]
*No. 217. Effect of workmen's compensation laws in diminishing the necessity of industrial employment of women and children. [1918.]
No. 223. Employment of women and juveniles in Great Britain during the war. [1917.]
No. 253. Women in lead industries. [1919.]

Workmen's Insurance and Compensation (including laws relating thereto).

*No. 101. Care of tuberculous wage earners in Germany. [1912.]
*No. 102. British national insurance act, 1911.
*No. 103. Sickness and accident insurance law of Switzerland. [1912.]
No. 107. Law relating to insurance of salaried employees in Germany. [1913.]

Workmen's Insurance and Compensation (including laws relating thereto)—Continued.

*No. 155. Compensation for accidents to employees of the United States. [1914.]
No. 212. Proceedings of the conference on social insurance called by the International Association of Industrial Accident Boards and Commissions, Washington, D. C., December 5–9, 1916.
No. 243. Workmen's compensation legislation in the United States and foreign countries, 1917 and 1918.
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