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DECISIONS OF COURTS AND OPINIONS AFFECTING LABOR 1929–1930

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BULLETIN OF THE

U. S. BUREAU OF LABOR STATISTICS

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Introduction

FOURTEEN bulletins have preceded the present publication in a series devoted to the presentation of decisions of courts and opinions of the Attorney General construing and applying the labor laws of the United States. Prior to the year 1912 publication was made in the bimonthly bulletins of the Bureau of Labor Statistics and its predecessors. Since that date annual volumes have been published with the exception of the volumes for the years 1919, 1920; 1923, 1924; 1927, 1928; and the present bulletin, which likewise covers two years, 1929 and 1930. The separate bulletins published since 1912 are numbered 112, 152, 169, 189, 224, 246, 258, 290, 309, 344, 391, 417, 444, and 517.

As in past years, the National Reporter System, published by the West Publishing Co., St. Paul, Minn., is the chief source of the material used. The Washington Law Reporter was reviewed to secure decisions of interest in the District of Columbia, and also the advance sheets of the Opinions of the Attorney General for the Department of Justice were examined for matters of interest. The current bulletin, however, contains no opinions from the Attorney General as none construing labor statutes were received.

In selecting the decisions to be published, cases were chosen which were of special interest and importance to labor in general and also to students interested in the relation of employer and employee. Despite the very general enactment of compensation laws a considerable number of cases still come before the courts, even in compensation States, involving suits for damages either under the common law or its statutory modifications. These cases involve the fellow-servant doctrine, negligence on the part of the employer, and the assumption of risk by the employee, and are listed under the general heading "Employers' liability."

The phrase "injury arising out of and in the course of the employment," found in most of the compensation laws of the United States, apparently causes the greatest amount of controversy and the most frequent appeals to the courts. A number of cases listed under workmen's compensation involve this question. Various phases of child labor legislation are also involved in cases under employers' liability and workmen's compensation as incidental to the redress of accidental injuries. Other cases involving legislation and rules of law as applying to seamen, wages, and contracts of employment are included. A variety of cases involving the status and power of labor organizations in their different aspects and activities and the constitutionality of a number of statutes relating to labor are also included in this publication.

In the following presentation of individual cases, a brief statement of the facts in each case is given, and this is followed by the conclusions reached by the courts, expressed either in the language of the courts or in condensed form without quotation.

The decisions used in the present bulletin appeared in the following reporters for the years 1929 and 1930:

Federal Reporter, volume 29 (2d), page 1, to volume 44 (2d), page 280.
Supreme Court Reporter, volume 49, page 84, to volume 51, page 91.
Atlantic Reporter, volume 143, page 697, to volume 152, page 304.
New York Supplement, volume 231, page 489, to volume 245, page 712.
Northeastern Reporter, volume 163, page 769, to volume 173, page 552.
Northwestern Reporter, volume 222, page 145, to volume 233, page 464.
Pacific Reporter, volume 272, page 1, to volume 293, page 432.
Southeastern Reporter, volume 145, page 609, to volume 155, page 872.
Southern Reporter, volume 118, page 769, to volume 130, page 927.
Southwestern Reporter, volume 10 (2d), page 873, to volume 32 (2d), page 712.
Washington Law Reporter, volumes 57 and 58.

[Quoted matter in the decisions of cases reported in this bulletin has been punctuated in accordance with the rules for punctuation laid down by the Government Printing Office for Government publications and does not follow, in all cases, the reported decisions.]

Decisions of the Courts

ADMIRALTY—EMPLOYERS' LIABILITY—EFFECT OF STATE LAW—STEVEDORE—*Northern Coal & Dock Co. et al.* v. *Strand et al., Supreme Court of the United States (December 10, 1928), 49 Supreme Court Reporter, page 88.*—The Northern Coal & Dock Co., an Ohio corporation whose business was mining, hauling, and selling coal, maintained a dock on Superior Bay, Wis., where it received and unloaded coal brought by vessels from other lake ports. Charles Strand was employed by the company to assist in unloading these vessels, along with some 17 other men regularly employed. On October 10, 1924, while on the steamer *Matthew Andrews* assisting, as his duties required, in the discharge of her cargo, he was struck by a clamshell and instantly killed.

The widow, Emma Strand, asked the Industrial Commission of Wisconsin for an award of death benefits against the employer and insurance carrier. The commission found Strand and his employer subject to the State compensation act (Wis. Stat., sec. 102.01 et seq.) and awarded benefits. To review this award the employer brought an action in the Dane County circuit court. That court sustained the award and the Wisconsin Supreme Court approved its action. The case was then carried to the Supreme Court of the United States.

The opinion of this court was rendered by Mr. Justice McReynolds, who said the right of the parties must be ascertained upon a consideration of the maritime law, for Strand was doing stevedore work on a vessel in navigable waters when killed and the tort was maritime. He continued, in part, as follows:

The unloading of a ship is not matter of purely local concern. It has direct relation to commerce and navigation, and uniform rules in respect thereto are essential. The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred.

In regard to the question whether the Wisconsin workmen's compensation law applies, the court said, "the State has no power to impose upon an employer liabilities of that kind in respect of men engaged to perform the work of stevedores on shipboard." How-

ever, section 20 of the merchant marine act was cited as applying in this case. It reads as follows:

SEC. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

In the case of International Stevedoring Co. *v.* Haverty (272 U. S. 50, 52, 47 Sup. Ct. 19) the Supreme Court ruled that within the intendment of the merchant marine act—

"Seaman" is to be taken to include stevedores employed in maritime work on navigable waters as the plaintiff was.

Mr. Justice McReynolds cited cases previously decided by the Supreme Court holding the employers' liability act to be "comprehensive and exclusive" regarding State statutes, and that "section 20, act of March 4, 1915, as amended by the merchant marine act, incorporated the Federal employers' liability act into the maritime law of the United States."

He concluded the opinion by saying:

We think it necessarily follows from former decisions that by the merchant marine act—a measure of general application—Congress provided a method under which the widow of Strand might secure damages resulting from his death, and that no State statute can provide any other or different one.

The judgment of the lower court was reversed.

A minority opinion was rendered by Mr. Justice Stone in which Mr. Justice Holmes and Mr. Justice Brandeis concurred. Mr. Justice Stone said that he "should have found it difficult to say that the present case is controlled by the maritime law, and so to suggest that workmen otherwise in the situation of the respondent, but who are not seamen and therefore are not given a remedy by the Jones Act, are excluded from the benefits of a compensation act like that of Wisconsin." Continuing, Mr. Justice Stone said:

The State act here is contractual, as we have held in Booth Fisheries Co. *v.* Industrial Comm. (271 U. S. 208, 46 Sup. Ct. 491), and the employer is bound to pay compensation in accordance with the schedules of the act because the parties have agreed that they shall apply rather than the common or any other applicable law. The employer, a wholesale coal dealer, owned or controlled no ships

and, except that it owned a dock at which coal was delivered to it from ships, had no connection with maritime affairs. The employee's regular work was nonmaritime, and he spent but 2 per cent of his time unloading his employer's coal from ships. To me it would seem that the rights of parties who have thus stipulated for the benefits of a State statute in an essentially nonmaritime employment are not on any theory controlled by the maritime law or within the purview of Southern Pacific Co. *v.* Jensen (244 U. S. 205, 37 Sup. Ct. 524).

Nor would it seem that resort by an employee only casually working on a ship through such a nonmaritime stipulation to a State remedy not against the ship or its owner, but against the employer engaged in a nonmaritime pursuit is anything more than a local matter or would impair the uniformity of maritime law in its international or interstate relations.

ADMIRALTY—EMPLOYERS' LIABILITY—SAFE PLACE AND APPLIANCES—ASSUMPTION OF RISK—JURISDICTION—*Watkins* v. *Jahncke Dry Docks (Inc.), Court of Appeal of Louisiana (December 16, 1929), 125 Southern Reporter, page 469.*—William B. Anderson was employed on the dry dock of a steamship floating in the Mississippi and owned by the Jahncke Dry Docks (Inc.). Anderson and two assistants were working on a scaffold constructed of four step-ladders across which boards had been placed. As a result of the breaking of one of the boards on which Anderson was standing, he fell about 20 feet to the floor of the dock and sustained injuries from which he died nearly two weeks later. From the evidence it appeared that—

It became apparent that the planking on which Anderson was working was not sufficiently wide to afford him reasonable safety, and he caused his two helpers to descend to the deck of the dry dock to select and hand up to him additional planks.

Near the ladders there were a few planks, and at about 50 or 75 feet away (so defendant claims) there was a pile of others of various sizes and grades. Anderson's helpers handed him a plank which was near the ladders, but he, noticing a knot almost entirely across it, rejected it. His helpers then went to the larger pile of lumber to make a better selection. When they returned some one had placed in position across the ladders boards where it was intended that those for which they had gone should be placed, and they did not hand up the ones which they had brought. A short time later one of the boards, which had been handed up and placed, broke and Anderson fell.

Plaintiff charges that one Stinespring, who was superior in authority to Anderson, had ordered the particular board to be placed on the scaffold, and she claims that Anderson was justified in relying on Stinespring's superior judgment. Stinespring denies that he had anything to do with the board and states that he was working on the other side of the vessel,

Suit was filed by the widow in the civil district court, Parish of Orleans, La., and a verdict was rendered in her favor. The Jahncke Dry Docks (Inc.) appealed the case to the Court of Appeal of Louisiana, contending (1) that the State courts did not have jurisdiction, as the question was maritime, (2) that the Dry Docks (Inc.) was not guilty of negligence, and (3) that the risk was assumed by Anderson. The court held the State court did have jurisdiction over the case and that—

The United States Supreme Court has several times held that the question of jurisdiction as between the Federal courts and the State courts is not involved in matters of this kind, and that the State courts may decide the issues presented, subject only to the limitation that the remedy which the State court may afford shall be such remedy as is provided by the "common law" as distinguished from some special remedy furnished by particular legislation, such as State compensation statutes. The right in the State court to proceed with a matter of this kind results from the saving clause in the judiciary act of the United States of 1789, section 9, which is now contained in the third paragraph of section 256 of the United States Judicial Code (28 U. S. C. A., sec. 371), which, in matters of admiralty and maritime jurisdiction, vests exclusive jurisdiction in the courts of the United States, but which saves "to suitors in all cases the right of a 'common-law' remedy where the common law is competent to give it."

Regarding the second and third contentions, the court quoted the general rule as stated in Griffin & Son *v.* Parker (129 Tenn. 446, 164 S. W. 1142):

The general rule is that an employer is bound to use reasonable diligence to furnish the employee a safe place and safe instrumentalities for the work to be done; but an exception exists in case of a scaffold where the employer supplies ample material of good quality and competent labor for the construction of such appliance, which he is not required to furnish in a completed state, and which the employees, within the scope of their employment, are themselves required to construct. In such case the employer is not liable to one of the workmen for the negligence of a fellow servant in the construction of the scaffold.

It was contended, however, by the counsel for the widow that Anderson was forced to accept the repair and alteration of the scaffold, in this case, as it was done by his superior.

In concluding the opinion the court said:

Whether or not the circumstances were such that a man of Anderson's experience should have noticed the defect in the board is entirely a question of fact, as is the question of who in fact placed the board, or ordered it placed. The testimony on these points, as it appears in cold type in the record, does not appear to us to preponderate either way, and therefore we do not feel justified in reversing the judge a quo, who saw the witnesses and was therefore in better position to

weigh the evidence. The fact that the accident happened at night, and that therefore Anderson's vision was to some extent limited, and that consequently he did not notice a defect which in daylight might have been apparent, is a circumstance which was no doubt taken into consideration by the judge a quo.

Since we believe that the defendant is liable, it becomes necessary for us to consider whether or not the amount allowed by the trial court, $7,000, is adequate. Anderson suffered considerably and did not die until nearly two weeks after the accident. He had been earning nearly $200 a month. His age was 52. Taking all these matters into consideration, we are of the opinion that the amount allowed was not sufficient and was somewhat below the amounts allowed in similar cases heretofore. It seems to us that $10,000 would be more nearly correct.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by increasing the amount thereof to $10,000, and as thus amended, affirmed.

ADMIRALTY—FEDERAL LIABILITY STATUTE—NEGLIGENCE—UNSEAWORTHINESS—*Slaney* v. *Cromwell, District Court, District of Massachusetts (February 20, 1930), 38 Federal Reporter (2d), page 304.*—George J. Slaney was a member of the crew of the schooner *Henrietta* which was fishing on the fishing grounds in the Atlantic Ocean, southeast of Cape Cod. On the 13th day of March, Slaney was fishing from a "single dory" and by order of the captain of the schooner had put out in his dory for a second time that day to continue the day's fishing; a heavy fog came up and shut off the view of the vessel from Slaney's dory. On account of the fog and his inability to locate the schooner, Slaney went astray and his life was lost.

Annie M. Slaney, administratrix, filed suit against the employer to recover for loss of life at sea, under the merchant marine act (46 U. S. C. A., sec. 688). She alleged two causes for the liability of the employer; namely, the negligence of the employer and his agents in failing to keep the whistle in working condition so that Slaney could be informed of the schooner's location, and the failure of the employer to supply the vessel with proper equipment and appliances to enable Slaney to locate the schooner in time of fog.

Cromwell, the employer, made the contention that the declaration set out two distinct claims for the same loss of life, the first based on the negligence of the master or crew and the second on defective and insufficient equipment; that these claims were alternative and inconsistent and could not be joined in an action under the Jones Act.

However, District Judge Brewster did not agree with this contention, and held that the only difference between the two counts was

that they described different acts of negligence. The case of Baltimore Steamship Co. *v.* Phillips (274 U. S. 316, 47 Sup. Ct. 600) was cited, in which case Mr. Justice Sutherland, in dealing with the effect of the merchant marine act made this observation:

The effect by virtue of * * * that act (Federal employers' liability act (45 U. S. C. A., secs. 51–59)) is to give a right of action for an injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of the ship, as well as for an injury or death resulting from defects due to negligence, etc., and irrespective of whether the action is brought in admiralty or at law.

In concluding the opinion Judge Brewster held that the counts in the declaration of the administratrix were not for distinct inconsistent claims, and while they might well have been incorporated in a single count they did not set up two separate and inconsistent causes of action precluding joinder.

The judgment was therefore rendered in favor of the administratrix.

ADMIRALTY—JURISDICTION—UNSEAWORTHINESS—FEDERAL AND STATE LAWS—*Lindgren* v. *United States et al., Supreme Court of the United States (February 24, 1930), 50 Supreme Court Reporter, page 207.*—In 1926, one Barford was a seaman employed as third mate on a merchant vessel owned by the United States, lying in a floating dry dock at the port of Norfolk, Va. While working in a lifeboat swinging on the vessel's davits, he was thrown to the dock by the sudden release of one end of the lifeboat and instantly killed. An action was brought by the administrator of the estate of Barford in the United States District Court for Eastern Virginia. This court found that Barford's death was caused by the unseaworthy device used in the lifeboat, and held that—

Although the administrator could not recover under the merchant marine act, applying the rule under the Federal employers' liability act, since the surviving nephew and niece were not dependent, he was entitled to recover under the Virginia death statute, which provided that a personal representative might maintain a suit for damages on account of the death of a person caused by the wrongful act of another—under which dependency was not a necessary condition and the probable earnings of the decedent might be shown; and fixed the damages under this statute at $5,000, for which the administrator was given a decree against the United States.

On appeal the circuit court of appeals denied the right of action of the personal representative and held that the merchant marine act (46 U. S. C. A., sec. 688) was exclusive and superseded the Virginia statute. The case was then carried by the administrator to the United States Supreme Court.

The Supreme Court, speaking through Mr. Justice Sanford, pointed out the modifications in the maritime law by the merchant marine act which gave to personal representatives of seamen whose death had resulted from personal injuries, the right to maintain an action for damages in accordance with the Federal employers' liability act. After citing cases to show the development of the court's interpretation of the act, the court said, in part, as follows:

We conclude that the merchant marine act—adopted by Congress in the exercise of its paramount authority in reference to the maritime law and incorporating in that law the provisions of the Federal employers' liability act—establishes as a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all of the States and is as comprehensive of those instances in which by reference to the Federal employers' liability act it excludes liability, as of those in which liability is imposed; and that, as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all State statutes dealing with that subject.

It results that in the present case no resort can be had to the Virginia death statute, either to create a right of action not given by the merchant marine act, or to establish a measure of damages not provided by that act.

ADMIRALTY—MAINTENANCE AND CURE—NEGLIGENCE—UNSEAWORTHINESS—*Nelson* v. *The William Nelson, District Court, Western District of New York (April 19, 1929), 33 Federal Reporter (2d), page 539.*—Charles Nelson was a fireman aboard the steamer *The William Nelson* and was directed by the first assistant engineer to clean out the combustion chamber of the fire box. After he had crawled into the fire box with a shovel and a hose, some one outside the box turned on the hose and water instantly filled the fire box with steam and ashes, as the interior had not sufficiently cooled. Nelson suffered burns on his arm; and his back, knee, left elbow, and right hip were also injured.

He filed suit against the steamship alleging negligence because of its failure to station a man outside the fire box to turn on the hose when so directed by him and further that the first assistant engineer was negligent in sending him into the chamber before it had sufficiently cooled.

The court, however, found that the steamship was not unseaworthy and that no defect in her boiler contributed to the injury. Also no maritime tort for which a maritime lien arose resulted from the act of the first assistant engineer or his fellow servants or by their failure to act. For these reasons the court held there could be no recovery of

indemnity for the injuries sustained. However, the court found Nelson was entitled to maintenance and cure and awarded him $60 as doctor's fee and $250 to compensate him for other expenses for treatment to relieve his condition.

ADMIRALTY—WAGES OF SEAMEN—PUBLIC ADMINISTRATOR—UNCLAIMED WAGES—*In re Buckley et al., District Court, District of Massachusetts (July 11, 1929), 33 Federal Reporter (2d), page 615.*—One Leveroni was appointed by the probate court of Suffolk County, Mass., administrator of 10 deceased seamen who were members of the crew of the steamship *Daniel C. Reed* and were lost when she foundered at sea in October, 1928. They belonged to various countries, 2 to the United States, 3 to the Philippine Islands, 1 to Hawaii, 2 to Sweden, 1 to Denmark, and 1 to Russia.

The question involved in this case was whether Mr. Leveroni, a public administrator of Massachusetts, was entitled to receive the sum paid to the shipping commissioner as wages of the deceased seamen. Claims had also been filed by the vice consul of Denmark for the wages of the seaman who was a national of that country, and by one W. H. Scott, of Portland, Oreg., appointed by the courts of that State as administrator of Buckley who was a resident of Portland; and Cresenciana Legazpi, as widow of one of the Filipino seamen, had filed a claim for his wages. In explaining the case, District Judge Morton said in part as follows:

Considering first the cases in which no claim has been filed except Mr. Leveroni's: The United States attorney has appeared and objected to the payment of the funds to the public administrator, the ground for his objection being that, if the wages are paid over to Mr. Leveroni and no next of kin of these decedents are discovered, the estates will escheat to the Commonwealth, while, if left in the registry, they will find their way into the Treasury fund for disabled and sick seamen, and that the United States is therefore interested to protect the Treasury fund.

There can be no doubt as to the power of Congress to provide for the disposition of the wages and effects of seamen who die in service. It has undertaken to do so by statutes which provide a complete scheme of disposition. (Rev. Stat., secs. 4544, 4545.) These sections recognize that the amounts involved will generally be small, that the persons entitled to them will often be remote, poor, and unused to business, and that the money ought to be paid to them with the least possible trouble and expense. Where the amount is less than $300 the whole matter is therefore left to the discretion of the district judge to make payment to the person who appears to him to be justly entitled to the wages. Above that amount payments can only be made to "the legal personal representative of the deceased;" i. e., to his administrator or executor.

Leveroni contended that, as he had been appointed administrator by the probate court, he was by right entitled to the amounts over $300, and that as to the amounts under $300 the court ought in its discretion to pay them over to him. On the other hand, it was contended that the court had no jurisdiction to appoint an administrator and that a public administrator was not a "legal personal representative" within the meaning of the statute.

The court held that as the wages in the registry were funds within the Commonwealth the court had jurisdiction to appoint an administrator, and, further, that a "legal personal representative of the deceased" as there used did include a public administrator. The court concluded the opinion by saying:

The Commonwealth has no equitable claim on this money. If unclaimed, it ought to go where the Federal statute places it; i. e., into the fund to help other seamen who are ill or disabled. Because such funds are paid to an administrator, it does not follow that they will, if unclaimed, escheat to the Commonwealth. The administrator takes them to be disposed of according to Revised Statutes, section 4545; i. e., if no claimant appears, they are to be paid, less the reasonable expenses of the administration, into the United States Treasury fund.

It follows that the wages of Golden, which amount to over $300, will be paid to the petitioner, there being no other claim to them. In the case of Banal there is a claim by his widow, who lives in the Philippines. As this amount also is over $300, there must be administration. I see no reason why the public administrator's appointment should not be recognized. It is for the probate court to say whether he ought to be superseded by an administrator nominated by the widow. In both these cases the clerk of this court is to receive notice of the presentation of the administrator's final account. In the case of Buckley, payment may be made to Scott, administrator, who is acting for the decedent's father and mother. In the case of Jensen, the money may be paid to the Danish vice counsel [consul] on satisfactory proof—it may be by affidavit—that there are next of kin for whom he is acting. In the other cases the funds are to remain in the registry.

ADMIRALTY—WORKMEN'S COMPENSATION—EFFECT OF STATE LAW—JURISDICTION—*Merchants' & Miners' Transportation Co.* v. *Norton et al., District Court, Eastern District of Pennsylvania (April 16, 1929), 32 Federal Reporter (2d), page 513.*—Vigo A. Zachariasen was employed by the Merchants' & Miners' Transportation Co. on an hourly compensation basis, and he performed his work when and where on land or sea as directed. He had been directed to go aboard the steamship *Tuscan* moored at the pier to repair a dynamo. He had occasion in the course of his employment to go from the ship to the pier a distance of about 3 feet, connected by a ladder. As he was getting off the last rung, the ladder tilted or in some way was

displaced, so that he was precipitated into the water and was drowned. On October 18, 1928, a petition was filed by the widow for compensation under the longshoremen's and harbor workers' act (33 U. S. C. A., secs. 901–950). The deputy commissioner filed an order for compensation, and the Merchants' & Miners' Transportation Co. filed this suit to restrain the enforcement of the order granting compensation. In delivering the opinion of the district court, Judge Dickinson said:

The right of recovery in the instant case is thus dependent upon three findings (ignoring features not in controversy): (1) The affirmative one that the death resulted from an occurrence "upon navigable waters"; (2) the negative one that the laws of Pennsylvania do not "validly provide" for workmen's compensation of which the claimant might avail herself; and (3) that the claimant before the commissioner is the rightful claimant. The commissioner has made all of these findings in favor of the claimant by making an order in her favor.

The appellate revision by the courts is restricted to the question of whether the order has been made "in accordance with law." The facts must thus be assumed to be as found. This reduces the controversy presented to one of whether the benefits of a like law have been "validly provided by a State law." Broadly stated, they have. This further reduces the question to one of the conflict of the State law with that of the law maritime. The test of this is in the application of two propositions: (1) That the law maritime must be preserved in its integrity, unaffected by State legislation; but that (2) a State law relating to the subject of the relations and liabilities of employers and employees, which is of local application only and which does not affect the general law maritime, may operate with it.

The counsel for the Merchants' & Miners' Transportation Co. contended (1) that "the State law (Pa. Stat. 1920, sec. 21916 et seq.) does apply to the employment now under consideration, and (2) that this State law is so far local in its application and effects as that it may be in existence and enforced alongside of and along with the law maritime." (Cases cited.) In regard to this contention the court said:

Upon a cursory reading of these cases it would be gathered that the Pennsylvania compensation law applied in the instant case, and in consequence that the United States statute was by its terms inoperative. When, however, these cases are read in the light of Northern Coal & Dock Co. *v.* Strand (278 U. S. 142, 49 Sup. Ct. 88), the cases referred to above may be given a wholly different meaning.

Upon the authority of the Strand case the court decided the State law was not a "valid" law. The bill filed by the Merchants' & Miners' Transportation Co. was therefore dismissed. A motion for reargument was denied after the court explained more fully the similarity between the Strand case and the case at bar.

ADMIRALTY — WORKMEN'S COMPENSATION — EVIDENCE — AWARD— *Grays Harbor Stevedore Co. et al.* v. *Marshall et al., Rothschild & Co. et al.* v. *Same, District Court, Western District of Washington (December 16, 1929), 36 Federal Reporter (2d), page 814.*—Separate proceedings were made by the Grays Harbor Stevedore Co. and by Rothschild & Co. against William A. Marshall, deputy commissioner of the United States Employees' Compensation Commission, to review and set aside certain compensation awards made under the longshoremen's and harbor workers' compensation act (33 U. S. C. A., sec. 902 et seq.). It was contended that no evidence was presented to support the awards.

In the second case the evidence disclosed that the employee testified that on March 11, 1929, while engaged in lifting he "was hurt in the back * * * got a wrench in my back, * * * I couldn't continue with no work, * * * I had to quit"; that thereupon he drove his car to the hospital, and he is "still disabled."

During the hearing the doctors testified that for years the employee "had been and now is afflicted with arthritis of the spine, which might disable him at any time; that his lifting aggravated that condition; and that his present condition rendered it doubtful if he could presently engage in hard labor." The court set aside the award, as the evidence was insufficient, saying, in part:

The evidence is scanty, ambiguous, indefinite, and uncertain in respect to the elements of effect, continuity, and time, and is not legally sufficient to warrant what appears to be the deputy's arbitrary finding. Neither expressly nor by reasonable implication does it appear that the employee has been continuously or at all totally disabled in respect to any and all employment.

Adverting to the first case, the deputy commissioner found that by reason of injury to his foot the employee suffered temporary total disability for 67 weeks and permanent partial disability equivalent to 25 per cent of a foot lost, and he awarded compensation for the 67 weeks plus 25 per cent of 205 weeks. The court held that under 33 U. S. C. A., section 908 (c) (22), compensation for temporary total disability by reason of injury to a foot is limited to the extent of the total period in excess of 32 weeks, in addition to a percentage of 205 weeks by reason of permanent partial disability. However, as the employee's disability was largely due to a bunion aggravated by the injury, the court ruled that the evidence in this case was also insufficient and set aside the award.

Both cases were therefore remanded to the deputy commissioner with instructions to proceed in accordance with the ruling of the court.

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ADMIRALTY — WORKMEN'S COMPENSATION — FEDERAL AND STATE LAWS—*Employers' Liability Assurance Corporation (Ltd.) of London, England*, v. *Cook et al., Supreme Court of the United States (April 14, 1930), 50 Supreme Court Reporter, page 308.*—In January, 1927, while regularly employed by the Ford Motor Co., Hal Cook was instructed as "a part of his contract of employment to assist in unloading cargo" from the steamship *Lake Gorian* at Houston, Tex. While at work in the hold of the vessel he received serious injuries, from which, it was asserted, he died.

The Ford Motor Co. carried a policy of workmen's compensation insurance with the Employers' Liability Assurance Corporation, which undertook to protect the assured against loss by reason of injuries to its employees. Mrs. Myrtis Cook, purporting to proceed under the workmen's compensation act of Texas (Rev. Stat. 1925, arts. 8306–8309), presented to the industrial accident board a claim for compensation against both the motor company and the insurer because of Cook's death. This was denied upon the ground that the death "was due to a condition in no way incident to or associated with his employment." She refused to abide by the action of the board and brought a suit in the State court. The cause was removed to the United States district court, where a judgment was entered in the widow's favor. Appeal was taken to the Circuit Court of Appeals for the Fifth Circuit, which held:

We think it fairly can be said that the matter of unloading these two ships of the Ford Motor Co. at rare intervals was "of mere local concern, and its regulation by the State will work no material prejudice to any * * * feature of the general maritime law."

The case was then appealed to the United States Supreme Court for review. Mr. Justice McReynolds, delivering the opinion, said in part:

The record plainly discloses that, while in the course of his employment and at work in the hold assisting in unloading a vessel afloat on navigable waters, Cook received injuries out of which this suit arose. There is nothing in principle to differentiate this case from Northern Coal Co. *v.* Strand (278 U. S. 142, 49 Sup. Ct. 88), and the judgment of the circuit court of appeals must be reversed. (Nogueira *v.* New York, N. H. & H. R. Co., 50 Sup. Ct. 303.)

The proceeding to recover under the State compensation act necessarily admitted that the decedent was employed by the insured when injured. Any right of recovery against the insurance carrier depends upon the liability of the assured. Whether Cook's employment contemplated that he should work regularly in unloading vessels or only when specially directed so to do is not important. The unloading of a ship is not matter of purely local concern as we have often pointed out. Under the circumstances disclosed, the State lacked power to prescribe the rights and liabilities of the parties growing out of the accident. The fact that the compensation law of the State

was elective in form does not aid the respondents. The employer did not surrender rights guaranteed to him by the Federal law merely by electing to accept one of two kinds of liability in respect of matters within the State's control, either of which she had power to impose upon him.

The judgment of the court below must be reversed. The cause will be remanded for further proceedings in conformity with this opinion.

Mr. Justice Stone rendered a dissenting opinion, in which Mr. Justice Holmes and Mr. Justice Brandeis concurred. This opinion was based upon the view that the local compensation law should apply when the workman is not given a remedy by the Jones Act and not within the purview of the Federal employers' liability act (45 U. S. C. A., sec. 51).

ADMIRALTY—WORKMEN'S COMPENSATION—FEDERAL AND STATE LAWS—*John Baizley Iron Works et al.* v. *Span, Supreme Court of the United States (April 14, 1929), 50 Supreme Court Reporter, page 306.*—Abraham Span, an employee of the John Baizley Iron Works of Philadelphia was injured while working on board the ship *Bald Hill*, tied up at a pier in the Delaware River at Philadelphia. Span had gone on board the ship to paint angle irons and to do some repair work in the engine room of the vessel, and while so employed sparks from an acetylene torch used by a fellow employee struck his eyes, causing serious injuries. A compensation claim was filed by Span with the Pennsylvania Workmen's Compensation Board, and upon a hearing before a referee an award was granted. The employer appealed the award and judgment successively to the State compensation board, the court of common pleas, the superior court, and the State supreme court, the award in each appeal being upheld.

Span, in upholding his claim to compensation under the State act, contended that he was doing work of a nature which had no relation to navigation or commerce. The Pennsylvania Supreme Court declared that the insurance carrier could be held only to such liabilities as may be imposed on the employer, and held that when Span was injured he "was doing work of a nature which had no direct relation to navigation or commerce."

The employer thereupon carried the case to the United States Supreme Court, which court did not concur in the view expressed by the Pennsylvania Supreme Court, and in a divided opinion held that the work which Span was performing was directly related to navigation and commerce. Mr. Justice McReynolds, in delivering the opinion of the court, said in part that—

The *Bald Hill* had steamed to Philadelphia for necessary repairs. She was a completed vessel, lying in navigable waters; the employer, iron works, was engaged in making repairs upon her, painting the

engine room and repairing the floor; the claimant went aboard in the course of his employment and was there engaged about the master's business when hurt. Obviously, considering what we have often said, unless the State workmen's compensation act (Pa. Stat. 1920, sec. 21916 et seq.) changed or modified the rules of the general maritime law, the rights and liabilities of both the employer and the employee in respect of the latter's injuries were fixed by those rules, and any cause arising out of them was within the admiralty jurisdiction.

The judgment of the State court was therefore reversed.

Mr. Justice Stone filed a dissenting opinion which was concurred in by Mr. Justice Holmes and Mr. Justice Brandeis. The dissenting opinion was based on the authority of Rosengrant *v.* Havard (273 U. S. 664) in which recovery was allowed under the local compensation law on the ground that the contract of employment had no relation to navigation and was nonmaritime.

ADMIRALTY—WORKMEN'S COMPENSATION—PLACE OF ACCIDENT—EVIDENCE—*Pocahontas Fuel Co. (Inc.) et al.* v. *Monahan, Deputy Commissioner, et al., District Court, Southern District of Maine (August 3, 1929), 34 Federal Reporter (2d), page 549.*—This action was brought by the Pocahontas Fuel Co. to set aside an award of compensation made by the deputy commissioner of the first district under the provisions of the Federal longshoremen's and harbor workers' compensation act (33 U. S. C. A., secs. 901–950).

The company claimed the above act did not apply and that the commissioner had no jurisdiction because there was not sufficient evidence that the death resulted from an injury occurring upon the navigable waters of the United States.

The court held that the evidence establishing the fact of injury would necessarily establish the place where the injury occurred. From the facts it appears that—

The deceased employee was at work in the hold of the ship on the morning of the accident, cleaning down coal from the beams or stringers overhead. A fellow workman testified that the last he saw of the deceased he was picking up lumps of coal and throwing them at the lumps on the beams to knock them down. No one saw the accident. Presently the deceased was seen on the wharf holding his hand to his head, evidently requiring assistance, and made the statement, upon inquiry, that he had been struck on the head by a lump of coal. There was a cut on his head; and on the way to the hospital where he was taken immediately he made a further detailed statement to the same effect.

Continuing, the court said:

While his statement that he was struck on the head by a piece of coal is not corroborated by any witness who saw the actual occurrence, there is ample justification from all the evidence and the cir-

cumstances for the conclusion that the accident occurred on the ship, and therefore that the longshoremen's compensation act applies. This being the case, it is apparent that no conclusions of the deputy commissioner can be disturbed as not being in accordance with the law, because they have evidence to support them.

Concluding the opinion, the court said:

The deputy commissioner is given wide authority; his findings are conclusive if there is any evidence to support them. Having found that he was justified in taking jurisdiction in the matter, I am not authorized to interfere unless it appears that his proceedings were not in accordance with law, and I can not say that such is the fact.

The bill was therefore dismissed and the decision of the lower court affirmed.

BLACKLIST—DAMAGES—INTERFERENCE WITH EMPLOYMENT—*Goins v. Sargent et al., Supreme Court of North Carolina (January 9, 1929), 146 Southeastern Reporter, page 131.*—David Goins, a stonecutter, prior to January 1, 1922, was employed by the North Carolina Granite Corporation. The corporation discharged him because of his union membership and refused to deliver stone from its quarry to any stonecutter employing Goins. He failed to obtain other employment in North Carolina and was compelled to go to other States to obtain employment at his trade. He filed suit against the corporation and others for damages caused by their action in dismissing him and in blacklisting him. The superior court, Surry County, N. C., rendered a verdict in favor of Goins and the corporation appealed to the North Carolina Supreme Court.

Section 4477 and 4478 of the consolidated Statutes of North Carolina of 1919, which are sections 1 and 2 of chapter 858, Public Laws 1909, are in these words:

4477. *Blacklisting employees.*—If any person, agent, company, or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company, or corporation, such person, agent, or corporation shall be guilty of a misdemeanor and shall be punished by a fine not exceeding $500; and such person, agent, company, or corporation shall be liable in penal damages to such discharged person, to be recovered by civil action. This section shall not be construed as prohibiting any person or agent of any company or corporation from furnishing in writing, upon request, any other person, company, or corporation to whom such discharged person or employee has applied for employment, a truthful statement of the reason for such discharge.

4478. *Conspiring to blacklist employees.*—It shall be unlawful for two or more persons to agree together to blacklist any discharged employee or to attempt, by words or writing or any other means

whatever, to prevent such discharged employee, or any employee who may have voluntarily left the service of his employer, from obtaining employment with any other person or company. Persons violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court.

Holding that the complaint came within the terms of this statute and stated a good cause of action without proof of special malice on the part of the corporation, the Supreme Court of North Carolina said:

In the instant case, defendants, having discharged plaintiff from their employment, solely because he was a member of an organization authorized by the laws of this State, notified other persons, firms, or corporations, who would otherwise have employed plaintiff as a stonecutter, of the fact of such discharge, and of the ground for the same, and advised such persons, firms and corporations that, if any person, firm, or corporation employed plaintiff as a stonecutter, or in any capacity, defendants would refuse to deliver stone to such person, firm, or corporation. This notice was given by defendants without any request, in writing or otherwise, for the same. It was given, not to promote the interests of defendants, or of other persons, firms, or corporations, but to prevent plaintiff from obtaining employment in this State. If these facts, now admitted by the demurrer, are established at the trial by a verdict, then by reason of the statute plaintiff will be entitled to recover of defendants penal damages, to be assessed by the jury.

By virtue of the statute, plaintiff is not required to allege or prove malice or actual damages; both are presumed. The general assembly of this State evidently thought it just to relieve discharged employees, who were prevented by former employers from obtaining employment by other persons, firms, or corporations, by notice of the fact and ground for the discharge, without request, of the burden of proving either malice or actual damages. The right of a prospective employer to obtain from former employers truthful statements as to the ground of the discharge is fully safeguarded by the provisions of the statute. The statute has now been in force in this State for 20 years, without amendment or alteration. It serves a useful purpose, and has evidently met with the approval of the people of this State.

The judgment of the superior court was therefore affirmed.

CONSTITUTIONALITY OF LAW—CONTRACT OF EMPLOYMENT—FREEDOM IN MAKING—FEDERAL AND STATE LAWS—*In re Opinion of the Justices, Supreme Judicial Court of Massachusetts (April 15, 1930), 171 Northeastern Reporter, page 234.*—The House of Representatives of the Commonwealth of Massachusetts asked the opinion of the justices of the Supreme Judicial Court of Massachusetts regarding a proposed bill which declared that a contract of employment

whereby either party agrees not to become or remain a member of a labor union or of any organization of employers, is against public policy and void.

The court, in the course of its opinion, cited a number of well-known cases throughout the United States in which the same principles were involved, and regarding these cases said as follows:

A contract similar to those described in the proposed bill was assailed and its validity was under consideration in Hitchman Coal & Coke Co. *v.* Mitchell. It there was said at pages 250, 251 of 245 United States, 38 Supreme Court 65, 72: "That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing nonmembership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to 'run union' were a sufficient explanation of its resolve to run 'nonunion,' if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of 'collective bargaining' it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegience or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make nonmembership in a union a condition of employment, as the workingman is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the 'paramount police power.' It is not necessary to consider whether the extent of the 'paramount police power' in this connection can extend beyond provisions to secure that such contracts be free from coercion because it is plain that the proposed bill does not avoid insuperable difficulties now to be mentioned."

In Adair *v.* United States (208 U. S. 161, 28 Sup. Ct. 277), an act of Congress was attacked whereby a penalty was imposed upon an employer of labor for making a contract of the same general nature as those described in the proposed bill or for discharging an employee because of membership in a labor union, the acts thus denounced being declared misdemeanors. It was held in an exhaustive opinion that the act was violative of the provisions of the fifth amendment to the Federal Constitution forbidding Congress to enact any law depriving a person of liberty or property without due process of law. In Coppage *v.* Kansas (236 U. S. 1, 35 Sup. Ct. 240), the main point for consideration was the validity of a statute of Kansas declaring it a misdemeanor for an employer to make a contract indistinguishable in its essential features from those described in the proposed bill. It was held after elaborate discussion and review of decided cases that the statute was repugnant to the guaranties contained in the fourteenth amendment to the Constitution of the United States. It there was said at page 14 of 236 U. S., 35 Sup. Ct. 240, 243: "The

principal is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money." The decision in the Coppage case was followed and reaffirmed in Adair *v.* United States. To the same general effect is the decision in Adkins *v.* Children's Hospital (261 U. S. 525, 545, 546, 43 Sup. Ct. 394). Those decisions, of course, are binding upon the several States as to the force and effect of the Federal Constitution touching a statute like that in the proposed bill.

The court continued the opinion by saying that "the principles thus declared by the Supreme Court of the United States prevail in this Commonwealth. The provisions of articles 1, 10, and 12 of the declaration of rights of the constitution of this Commonwealth are as strong in protection of individual rights and freedom as those of the fifth and fourteenth amendments to the Constitution of the United States." A number of Massachusetts cases were cited upholding this view. The court then concluded the opinion by saying that—

> The views expressed in these several opinions and decisions, which need not be further amplified, are decisive of the question here propounded. There is a wide field for the valid regulation of freedom of contract in the exercise of the police power in the interests of the public health, the public safety, or the public morals and in a certain restricted sense of the public welfare. A somewhat extended collection of references to such statutes and a review of relevant decisions were made in Holcombe *v.* Creamer (231 Mass. 99, 104–107, 120 N. E. 354). None of them go so far as to justify a statute like that in the proposed bill.

Guided by the decisions of binding authority already cited, we respectfully answer that in our opinion the provisions of the proposed bill, if enacted into law, would be in conflict with the Constitution of the United States and of this Commonwealth.

CONSTITUTIONALITY OF LAW—EXAMINATION, LICENSING, ETC., OF WORKMEN—BARBERS—*State ex rel. Melton* v. *Nolan, Treasurer, Supreme Court of Tennessee (July 19, 1930), 30 Southwestern Reporter (2d), page 601.*—The State of Tennessee, on the relation of one Melton, filed suit against John F. Nolan, treasurer, challenging the constitutionality of chapter 118, Acts of 1929, entitled "An act to

define and regulate the practice of barbering in the State of Tennessee and to provide penalties for the violation of the act."

It was argued that the act was violative of article 1, section 4, of the constitution of the State of Tennessee in that it provides for a political or religious test as a qualification for office or public trust. The court, however, found no such test required by any provision of the act. As to the contention that it was violative of article 1, section 6 of the Tennessee constitution which provides for the right of a trial by jury, the court said, "The provisions of the act fixing penalties for its violation in no manner violate this constitutional right. Due legal procedure is contemplated in its enforcement." The court also held that it did not provide for unreasonable and illegal search and seizures, and said that the inspection of a place of business during business hours, in the enforcement of reasonable regulations in the exercise of the police power was not a violation of this constitutional right. Regarding the contention that the act was a retrospective law impairing the obligation of contract, the court said:

We are unable to see wherein this section is violated. Appellant shows that he is conducting a barbers' college under a trust provision in the will of his deceased wife, and his theory seems to be that the regulatory provisions of this act, passed since this business was established, impair contractual or vested rights which his business had previously acquired. We are unable to agree. No contract or existing right is impaired, in the sense of the constitutional provision invoked, by the enactment under the police power of such regulations as are contained in this act.

The court held there was no merit to the contention that this act violated article 2, sections 1 and 2 of the Tennessee constitution providing for the departmental division of governmental powers.

It was also contended that the act was violative of article 11, section 8 of the State constitution in that it attempted to create unreasonable and arbitrary distinctions and exemptions in the application and enforcement of its provisions. The court said:

The complaint under this head appears to be directed chiefly to the exemptions provided for by section 4, excluding doctors, nurses, and ladies' beauty parlors. It is urged that there is no basis for exemption of the last-named class. A large discretion is vested in the legislature in determining the question of proper classification. It is not necessary that the reasons for the classification shall appear on the face of the legislation. The persons, barbers, and their apprentices, covered by the act, are a well-defined class, not only by common knowledge, but by the terms of section 2. If such a person practices his calling in a barber shop regularly conducted for that purpose, he comes under the act. A ladies' beauty shop is not a barber shop, and it was within the power of the legislature to exclude one engaged therein, even though incidentally performing

some of the work commonly done by a barber. To justify the courts in declaring legislation invalid under this section of the constitution, the classification must affirmatively appear to be arbitrary and unreasonable.

The act was therefore declared to be constitutional, and the decree of the lower court sustaining a demurrer to the suit was therefore affirmed.

CONSTITUTIONALITY OF LAW—EXAMINATION, LICENSING, ETC., OF WORKMEN—BARBERS—POLICE POWER OF THE STATE—*State* v. *Lockey*, *Supreme Court of North Carolina* (*April 2, 1930*), *152 Southeastern Reporter, page 693.*—C. P. Lockey was arrested and convicted for the violation of the North Carolina barbers' act (Pub. Laws, 1929, ch. 119) by shaving and cutting hair for various persons for pay "without first having obtained a certificate of registration, either as a registered apprentice or a registered barber, issued by the State board of barber examiners."

Lockey had paid the annual tax of $2 as required by the revenue act, but had failed to pay either the $5 temporary fee or the $3 annual fee as required by the barbers' act. A fine of $10 imposed upon Lockey by the recorder was affirmed by the superior court of Cumberland County. Lockey appealed to the Supreme Court of North Carolina, contending that the general assembly had no authority to create an expense and arbitrarily and unreasonably classify the citizens of the State in this manner, and furthermore, that in taxing the apprentices the State had placed a tax upon "the hired man" or "daily worker" for exercising the right of working with his own hands for a living.

The North Carolina Supreme Court held that these contentions could not be maintained, as the act comes within the police powers of the State. The court cited numerous cases laying down the rule that a State, in the exercise of its police power, has a right to require an examination and certificate as to the competency of persons exercising callings, whether skilled trades or professions, which affect the public and require skill and proficiency.

In the course of the opinion the court quoted Judge Cooley, who said that the police power of a State—

Embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others.

Continuing the court said:

It goes without saying that barbering requires a degree of skill, proficiency, and training. Then again, the act requires a high physical and moral standard for the barber. It requires training, skill, and efficiency for the barber, and requires sanitary regulations in reference to the barber and barber shop patronized by the general public. All in the class are treated alike. We think the regulations reasonable and the whole act in the interest of skill and proficiency, health and sanitation; and brings the barber and barber shop up to a high standard for the protection of the health of the public.

In regard to the right of the State to require the payment of the tax, the court quoted from the Assistant Attorney General, in part, as follows:

The annual occupation tax of the revenue act is for the privilege of exercising the trade of barbering and is simply a revenue act, whereas, the barbers' act is an exercise of the public power of the State to secure the public welfare by requiring proven capacity in the barbers and sanitary arrangements both in the barber shop and the tools that are used therein. The fees levied in this act are solely to pay the expenses of its operation and those of proper inspection by the State board of health.

CONSTITUTIONALITY OF LAW—EXAMINATION, LICENSING, ETC., OF WORKMEN—ELECTRICIAN—CITY ORDINANCE—*Becker* v. *Pickersgill, Recorder et al., Supreme Court of New Jersey (December 13, 1928), 143 Atlantic Reporter, page 859.*—The city of Perth Amboy, N. J., passed an ordinance, section 2 of which reads as follows:

An ordinance to provide for the examination and registration of master electricians and journeymen electricians and fix the fees for such registrations and to provide penalties for the failure to comply with the provision thereof.

Chester E. Becker had been a resident of the city of Perth Amboy for a period of 2 years and 6 months and for the past 5 years had been engaged in the electrical contracting business in the various municipalities of Middlesex County. He entered into a contract for the wiring of a house in the city of Perth Amboy and on February 23, 1928, he made an application to the city electrician of that city for a permit to install the electric wiring, complying with the rules and regulations of the ordinance. The city electrician refused to accept the application and refused to issue the permit, giving as a reason for his refusal that the ordinance forbids the granting of such a permit because Becker was not a master electrician.

Becker proceeded on February 25, 1928, to wire the house and was convicted for violation of the statute. Becker took the case to the Supreme Court of New Jersey for a review.

This court answered his first contention, that the city had no authority to license electricians, by showing that this expressed authority is conferred upon municipalities in the statute of 1917 (Pub. L., ch. 152, art. 15, sec. 1), which gives authority—

"To make, enforce, amend, or repeal ordinances to license and regulate," inter alia, the various classes of businesses and occupations designated in subdivision (d), p. 959, "lumber and coal yards, stores for the sale of meats, groceries and provisions, dry goods and merchandise, and goods and chattels of every kind, and all other kinds of business conducted in such city other than those herein mentioned, the place or places of business or premises in which or at which the different kinds of business or occupations are to be carried on."

The other contentions are discussed by the court in part as follows:

The second reason advanced, on behalf of the prosecutor, to set aside the conviction and judgment, is that the ordinance is not designed to promote the public health, safety, and general welfare. This assertion is manifestly without any support from a fair reading and plain purport of the ordinance.

It is a matter of common knowledge, arising out of experience, that the mechanics of electricity require technical knowledge and skill in order to guard the safety, health, and general welfare of the public against harmful and destructive results, through unskillful or improper installation of electric wires.

The application and use of electricity for locomotion, heating, lighting, and for other utilities, both public and private, and especially in the installation of the electric wires in public buildings, stores, and private dwellings are essential factors to be taken into account on the question of the legal property of a police regulation to the end to prevent incompetent persons from exercising, without due authorization, a business or occupation fraught with danger to the public safety, health, and general welfare. It is a matter of general history of the use of electrical power that there is much greater hazard of injury to life, limb, and property as a result of the use and application of electricity in the hands of the ignorant than there otherwise would have been if only those who are skilled in the work were intrusted with the task.

Under point 3 of the brief of counsel of prosecutor, it is argued that the ordinance is not designed to regulate, and is in fact one for revenue only.

It is quite clear that the law-making power of this State has delegated to municipalities, not only the power to regulate but also the power to tax for revenue, and that both of these powers may be unitedly exercised. The ordinance in the instant case does both.

The fourth and last point argued in the brief of counsel of prosecutor is that the ordinance is unconstitutional in that it deprives the prosecutor of his personal rights and property and is a denial to him of the equal protection of the law.

The broad assertion of counsel of prosecutor that the ordinance in question deprives the latter of his personal rights and property finds no support from a plain reading of the ordinance. One of the results of being a member of organized society, under the Con-

stitution and laws, unquestionably is the yielding by the individual of certain absolute rights for the benefit and welfare of the community which he joins. Salus populi suprema lex. Such natural and absolute rights which the individual possessed become as to him, as a member of civil society, purely relative, and therefore are subject to regulation. The safety and general welfare of the community require that certain businesses and occupations, because of their dangerous tendencies to injure the safety, health, or general welfare of the public, require regulation, and hence the requirement of a license to carry on such businesses or occupations, and the imposition of a tax for revenue are nothing more than the proper exercise of the police power to safeguard the community, and such legislation is permissible.

The judgment was therefore affirmed.

CONSTITUTIONALITY OF LAW—LIMITING NUMBER OF APPRENTICES—INTERFERENCE WITH CONTRACT AND DUE PROCESS OF LAW—*Marx* v. *Maybury, State Director of Licenses of Washington, et al., District Court, Western District of Washington (February 11, 1929), 30 Federal Reporter (2d), page 839.*—The State of Washington amended the "barber law" by chapter 211 of the Laws of 1927 to provide, among other things, "that not more than one student or apprentice shall be employed in any one barber shop;" also that—

No barber school or college shall be issued a permit by the director of licenses unless such school or college requires * * * as a prerequisite to graduation a course of instruction of not less than 1,000 hours to be completed within 6 months of not more than 8 hours in any working-day, such course of instruction to include the following subjects: Scientific fundamentals for barbering, hygiene, bacteriology, histology of the hair, skin, nails, muscles and nerve structure of the head, face, and neck, elementary chemistry relating to sterilization and antiseptics, diseases of the skin, hair, glands, and nails, massaging and manipulating the muscles of the upper body, hair cutting, shaving and arranging, dressing, coloring, bleaching, and tinting the hair.

Roy Marx, a master barber and owner of a school for barbers and of several barber shops, filed suit against Charles R. Maybury, as director of licenses for the State of Washington to restrain him from enforcing this act. He alleged the act deprived him of his right to earn a livelihood by following his lawful trade in violation of the United States Constitution, particularly the fourteenth amendment thereof. He further alleged that the provisions of the statute are unreasonable and unnecessary.

The court held that the practice of barbering was closely related to public health and that its regulation in the interest of health and sanitation was reasonable, but that there was no other evidence of

any other basis for its regulation within the police powers of the State and that the limitation of apprentices and the regulation for barbers' schools here imposed were not pertinent to the protection of public health.

In granting the injunctive relief, the court said, in part, as follows:

If the limiting of the number of apprentices to one to each barber shop, whether the number of barbers in a particular shop be one or a dozen or more, has even a remote bearing upon public health, it is so remote we are unable to see it. We think it an unreasonable and arbitrary interference with the liberty of the citizen. That the practice of barbering by apprentices does not necessarily imperil the public health or safety the Washington Legislature recognizes, for by the act under consideration such practice is expressly authorized. That being true, the only conditions that may lawfully be imposed upon the practice are such as fall within the principles we have stated. If, as contended, apprentices may reasonably be required to work under the supervision of an experienced barber, no one has suggested why, if two such barbers operating separate shops can efficiently supervise two apprentices they can not as well exercise the same supervision when all four are working in the same shop.

Section 14 sets forth an imposing array of subjects to be covered by a course of instruction in barber schools and colleges. Doubtless the legislature did not intend that the student in his "course of instruction of not less than 1,000 hours to be completed within 6 months," should master more than some rudiments of hygiene, bacteriology, diseases of the skin, hair, glands, nails, etc. It may be that this course of instruction is not intended to do more than enable the graduate to successfully pass an examination such as that prescribed in section 5 in cases of persons from other States applying "to practice the occupation of barber." It is provided in that section that such an applicant "shall be examined as to his skill in properly performing all the duties of a barber, including his ability in the preparation and care of the tools used, shaving, cutting of the hair and beard, and all the various services incident thereto, and as to his knowledge of sanitation as applied to the occupation of barbering and as to whether he has sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravation and spreading thereof in the practice of the occupation of barber."

While the section is indefinite as to the extent of knowledge to be acquired in these various subjects, further than may be indicated by the time provisions, or possibly as indicated by the provisions of section 5 (Laws Wash. 1923, ch. 75, p. 230), the director of licenses would have difficulty in determining when and when not a permit should issue to a school or college which must be prepared to impart such instruction. If the director of licenses should not himself be a qualified judge of such matters, possibly it was intended to be assumed he would call on members of the occupation or the health authorities for advice.

While section 14 on its face appears to make elaborate provision to guard the health of patrons of barber shops, it is difficult to avoid the impression that its practical effect is to limit the number of barber schools or colleges and the number of students, graduates, or ap-

prentices. What, if any, reason could exist why the course is "to be completed in six months" is not apparent. Nor is it apparent how the public health is to be protected by the age restrictions. The entire section, we think, has no real or substantial relation to the public health, is unreasonable and unnecessary, and an invasion of rights secured by the Constitution.

CONSTITUTIONALITY OF LAW—LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT—JURISDICTION—*Obrecht-Lynch Corporation et al.* v. *Clark, District Court, Maryland District (January 2, 1929), 30 Federal Reporter (2d), page 144.*—The Obrecht-Lynch Corporation employed Alonzo V. Kimbel as a repairman on the steamship *City of Flint.* While so engaged, on December 22, 1927, he was injured by a heavy tank covering falling against his left leg, causing contusions above and below the knee. On January 6 (although he was no longer confined to his bed he had not yet returned to work) he became suddenly ill, complained of great difficulty in breathing, and died in 10 or 15 minutes.

In due course the widow filed claim for compensation. A hearing was had, as a result of which the commissioner found Kimbel had died from a pulmonary embolism resulting from the injury to his leg, and awarded the widow compensation.

In this suit in equity the Obrecht-Lynch Corporation contested this claim on the ground that there was no causal connection between the injuries which the deceased suffered and his death, and asked that the longshoremen's and harbor workers' compensation act be declared unconstitutional, that the award be set aside, and for a temporary stay of all payments until the award be allowed. The corporation asserted three grounds on which the act was claimed to be unconstitutional:

First, That it violates the seventh amendment to the Constitution by failure to provide for trial by jury; second, that it seeks to limit the admiralty jurisdiction of the Federal courts; and, third, that no adequate provision for appeal is made, and that therefore due process of law is denied them, pursuant to the fifth amendment.

The court, in discussing each of these grounds, said:

As to the first question, namely, failure to provide in the act for trial by jury, while the New York law does so provide, it is sufficient to quote from the decision of the Supreme Court in Parsons *v.* Bedford (3 Pet. 433), at pages 445, 446 (7 L. Ed. 732), in which as early as 1830 Justice Story said:

"It is well known, that in civil causes in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court. When, therefore, we find, that the amendment requires that the right of trial by jury shall be preserved, in suits at common

law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment.

"In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And Congress seems to have acted with reference to this exposition, in the judiciary act of 1789, chapter 20 (which was contemporaneous with the proposal of this amendment); for in the ninth section it is provided that 'the trial of issues in fact in the district courts, in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury'; and in the twelfth section it is provided that 'the trial of issues in fact in the circuit courts shall, in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury'; and again, in the thirteenth section, it is provided that the trial of issues in fact, in the Supreme Court, in all actions at law, against citizens of the United States shall be by jury."

Turning to the second question, namely, that the act limits the admiralty jurisdiction of the Federal courts, the court said:

The gist of this argument appears to be that since the judicial power of the United States by article 3, section 2, of the Constitution is extended to all cases of admiralty and maritime jurisdiction, the vesting in an administrative officer, such as the deputy commissioner under the present act, of the power to hear and determine the rights of the parties in such cases as the present one, is an unwarranted delegation by Congress of this judicial power which, by article 3, section 1, of the Constitution, is vested "in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." This argument seems to be conclusively overcome by the language in the Dawson case above quoted and also by the language in the Jensen case, supra, in which the court said, on pages 214, 215, of 244 U. S. (44 Sup. Ct. 528):

"Article 3, section 2, of the Constitution, extends the judicial power of the United States 'to all cases of admiralty and maritime jurisdiction'; and article 1, section 8, confers upon the Congress power 'to make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.' Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

The court continued the opinion by saying:

There remains to be considered the third and last constitutional objection that has been raised to the act, namely, that there is provided no adequate right of appeal, and that therefore complainants are denied due process of law. What has already been said with respect to this point would seem to refute any argument that the right of appeal must be more extensive than that which is actually granted.

Similarly, in the recent case of Luckenbach Steamship Co. *v.* United States (272 U. S. 533, 47 Sup. Ct. 186), it was held that the limits placed by Congress on the scope of review by the Supreme Court of judgments of the court of claims do not deprive defeated claimants of due process of law under the fifth amendment, the court saying, at page 536 (47 Supt. Ct. 187), that "the well-settled rule applies that an appellate review is not essential to due process of law but is a matter of grace."

The court reviewed the evidence and held that the commissioner was justified in accepting the testimony of one of the physicians, who claimed the death was a direct result of the accident, even though there was testimony to the contrary. The court having found the act to be constitutional and that the compensation ordered thereunder was wholly "in accordance with the law," the complaint was therefore dismissed and the opinion of the deputy commissioner affirmed.

CONSTITUTIONALITY OF LAW—REGULATION OF COAL MINES—ARBITRARY AND UNREASONABLE CLASSIFICATION—*Sun Coal Co.* v. *State, Supreme Court of Tennessee (December 8, 1928), 11 Southwestern Reporter (2d), page 893.*—By the provisions of chapter 24 of the Public Acts of 1921, operators of coal mines employing more than 50 persons are required to provide a suitable building equipped with shower baths and lockers for the use and benefit of employees.

The Sun Coal Co., having been found guilty of a misdemeanor for failure to comply with this statute, attacked its constitutionality by appealing the case from the circuit court of Campbell County to the Supreme Court of Tennessee.

The coal company contended that the requirements of the statute were in violation of article 1, section 8, and article 11, section 8, of the constitution of Tennessee and of the fourteenth amendment to the Constitution of the United States, in that the statute was partial in its application by creating a class not founded upon any reasonable basis for classification. It contended that the legislature had no power to make such a requirement of coal mines, also that the classification was arbitrary in that the statute was not made to apply to coal mines in which less than 50 employees were engaged. The court upheld the constitutionality of the statute and, in answering the contentions made by the coal company, said in part as follows:

The statute is clearly an exercise by the legislature of its police power. In its caption the statute is described as one "to promote the health of employees by requiring washhouses to be provided at coal mines."

The extent of the industry, the number of employees engaged in coal mining, the financial ability of the industry to comply with the regulation, the conditions under which such employees are required to work, the general state of health of coal miners, the percentage of mortality among coal miners, the effect of coal dust upon the health of the miners, are all circumstances which may well be conceived as influencing the legislature in the enactment of the statute. If, upon consideration of these and other aspects of the industry, the legislature determined that the regulation was necessary to the preservation of the health of coal miners, the courts of the State are without power to review the exercise of legislative discretion and to say that the regulation was neither necessary nor desirable in the interest of the public welfare. Certainly we could not say as a matter of judicial knowledge that the same conditions which impelled the legislature to enact the statute exist in equal degree in other mining or manufacturing enterprises.

Legislation designed to protect the health of coal miners can not be said to be founded upon an arbitrary classification because it is not extended to other industries, in which the legislature may have found that working conditions were dissimilar.

Nor can we say that the failure to make the statute applicable to mines in which less than 50 employees are engaged is an arbitrary or unreasonable classification.

As pointed out in the brief of the learned Assistant Attorney General, even though the health of the employees in a smaller mine should be accorded the same protection, the expense of compliance with the statute may have been regarded by the legislature as too great a burden to be required of the smaller mine, and this consideration would furnish a reasonable basis for the classification.

CONSTITUTIONALITY OF LAW—STATUTE REQUIRING ONLY QUALIFIED VOTERS TO BE EMPLOYED—PUBLIC WORKS—*State* v. *Caldwell, Supreme Court of Louisiana (May 5, 1930), 129 Southern Reporter, page 368.*—George A. Caldwell was convicted of employing as a mechanic, in construction of certain public work, one who was not a duly qualified voter, without having first applied to proper authorities for a list of qualified mechanics. This was in violation of the provisions of Act No. 116 of 1928, amending Act No. 271 of 1908. Caldwell was general superintendent and agent in charge of construction for certain contractors who were erecting buildings for the city of New Orleans. He appealed to the Louisiana Supreme Court on three contentions.

First, he contended that the statute violated article 1, section 2, of the Louisiana State constitution and the fourteenth amendment to the Constitution of the United States by depriving him and those whom he wished to employ of their property without due process of law—freedom of contract, and by depriving those whom he wished

to employ of the equal protection of law—equal opportunity for employment on public works. The court said this contention was without merit, for—

As legislator the power of the State is restricted in many respects in which it is not so restricted with reference to its own property and business. "Its commands in such matters transcend, as it were, the domain of ordinary legislation; it then speaks with dual authority, that of sovereign and that of master." (State *v.* Board of Commissioners, 161 La. 361, 363, 108 So. 770, 771.)

It is therefore from its status as master in its own house with reference to the construction of public works, rather than from its status as legislator, that the State derives its right "to prescribe the conditions upon which it will permit public work to be done in its behalf or on behalf of its municipalities." (Cf. Lacoste *v.* Department of Conservation, 151 La. 909, 921, 92 So. 381, syl. No. 13.)

The second contention was that—

Act No. 116 of 1928 is broader than its title, in that the body makes it an offense to employ nonvoters in the "construction" of public buildings and public works, whereas the title to said act purports to forbid their employment only on such public buildings and public works.

The court said that "to employ a mechanic in the construction of a building or work is to employ him on such building or work," and hence the title of the act was sufficiently "indicative" of its object to suffice therefor.

The third contention was that the provisions of the act were so meaningless as to be inoperative, and again the court ruled against the contention and held the provisions were sufficiently clear to convey the intention of the legislature in passing the act.

The decision of the lower court convicting the contractor was therefore upheld.

CONTRACT OF EMPLOYMENT—BREACH—DISCHARGE—DAMAGES—*Powell Paving Co. of North Carolina (Inc.)* v. *Scott, Court of Appeals of Georgia (February 18, 1930), 152 Southeastern Reporter, page 309.*—Action was brought by E. Y. Scott against the Powell Paving Co. of North Carolina to recover damages for the breach of a contract of employment. At the trial Scott testified as follows:

I had a transaction with Powell Paving Co., or with Mr. Knetsch as their representative, on July 16, 1927. That transaction was about working for them. He wanted to know if I would work with him, and the price wasn't mentioned right then. He made me an offer what he would give, and I told him that I wouldn't take that, because I had a job with the county at so much a month, but I would accept if he would give more, and so it went on a few days and he told me that he would give me $225 a month straight time, and I told him that the job I had with the county that I couldn't afford to turn it

loose for a job just for two or three months, and I could not accept the job unless it was for 12 months or more, and he said that the job would last 12 months if not 18, and I told him that I would take it for $225, providing it would be 12 months' work in it, and he said there would be that at $225 a month straight time for 12 months if not longer, and I told him I would let him know in a few days whether I would accept it at that price or not, and a few days later I told him I would take it.

The city court of Swainsboro, Ga., rendered judgment in favor of Scott, holding that the evidence was sufficient to infer the contract was for one year and the paving company should be held liable for a breach. The company's motion for a new trial was overruled and it appealed the case to the court of appeals. The Georgia Court of Appeals reversed the judgment of the lower court and held that the evidence was not sufficient to establish a contract of employment for one year. The court said the evidence authorized the inference that the agent of the paving company merely assured Scott that the paving project would last for a year and that his services would be needed for that period, and where it does not appear that Scott agreed to work for the company a year, neither does it appear that Scott was employed for a year or for any definite period of time. The evidence is insufficient to authorize a finding that the contract was one by which the company agreed to employ Scott for any definite period of time, as for a year.

CONTRACT OF EMPLOYMENT — BREACH — DISCHARGE — DAMAGES — *Detroit Graphite Co.* v. *Hoover et al., Circuit Court of Appeals, First Circuit (June 5, 1930), 41 Federal Reporter (2d), page 490.*—The Detroit Graphite Co., a large manufacturer and distributor of paint in Boston and New York, employed Walter T. Hoover shortly after his graduation from Massachusetts Institute of Technology in 1913. In 1919 he went under a written contract to the Pacific coast to introduce its business in that section of the United States. On March 31, 1923, he made another written contract with the company out of which this controversy arose.

Suit was filed by Hoover against the company to recover damages as a result of the alleged breach. The United States District Court for the District of Massachusetts rendered a verdict of $50,000 damages in favor of Hoover, and the company appealed to the Circuit Court of Appeals, First Circuit, and also filed suit against Hoover for $11,770.59 for advances made to him under the contract. In the course of business under the contract, the company paid, on vouchers approved by Hoover, commissions to the subagents, freight and storage, cartage charges to the coast, and Hoover's drawing

account of $1,000 a month, as a minimum—or, until the fall of 1925 when business decreased, $1,250 a month.

On March 17, 1926, Hoover received a letter from Davis, the president of the company. After referring to earlier letters and telegrams, pertaining to the unsatisfactory status of relations under the contract, Davis said:

I would add here that any disbursements made on your account from March 1 will be charged against your drawing account allowance for this month.

This was inconsistent with the company's obligation under the contract, and in reply Hoover wired Davis as follows:

Recognize now your desire to force my resignation by your handling March check and general attitude. I am entitled to advance notice relative your decision covering March funds, and assuming wires had fully covered discussion as doing business as usual; had counted upon check for $1,000. In view your expressed wish, I agree mutual cancellation of contract, provided you will wire balance of $500 due me for March. Wire answer at once, please.

Regarding this wire and the reply from Davis on March 18, 1926, the court said:

Construing this telegram in the light of the surrounding circumstances, it is not perfectly clear, in at least two particulars: (1) Hoover takes his position on the theory that Davis is forcing his resignation. (2) The phrase "I agree mutual cancellation," etc., is, at least in the light of the conflicting views as to his personal liability for advances, doubtful. The doubt becomes greater when we consider the subsequent telegrams. Davis replied March 18: "For company I accept your proposal that contract between us be canceled provided we send you $500 additional on March drawing account, which is being done, and your resignation is hereby accepted. This cancellation is made effective to-day by your proposal and our acceptance which constitute a mutual agreement. You are, of course, to reimburse us for debit balance which your account shows either cash or in some manner to be agreed upon. You well know that there has been no desire to force your resignation, but on the contrary repeated expressions of confidence and desire that you should continue with us."

The $500 was sent, but Davis added—to what otherwise might be construed as a flat acceptance of an offer from Hoover to cancel—the following: "You are, of course, to reimburse us for debit balance which your account shows either cash or in some manner to be agreed upon."

Hoover's reply telegram of March 18 makes the situation still more confused and doubtful. In his telegram he said:

Referring your letter twelfth, second paragraph accepts my resignation. which I had never submitted. Your third paragraph suggests I resign; hence my wire seventeenth accepts your proposal, not otherwise. Your wire eighteenth therefore confirms cancellation on this basis per terms outlined. In consideration of your wiring

me Friday to San Francisco, additional five hundred for purchase office furniture, including best grade two desks, steno desk, typewriter, two swivel chairs, three new arm chairs, two Wernicke three-draw filing cabinets, six sectional files, and miscellaneous, and giving me full company's release from any sums or drafts you claim due from me, I will turn over all my files and records for continued prosecution your business, also afford aid and good will you desire. Wire answer San Francisco Friday.

The court construed this reply to mean that Hoover repudiated the notion that his resignation had been initiated by him; and that he agreed to cancellation only if Davis took the responsibility of admitting that he desired and had initiated steps for it. Regarding these communications the court said:

It might well be found, or even ruled, from these communications that Hoover was throughout insistent on two things: (1) That his resignation should be admitted to have been asked for by Davis and not submitted by him; (2) that the company should formally release all claims against him for the debit balance.

It is unnecessary to consider performance or nonperformance of the first condition, for admittedly the second—the release of the debit balance—was never made by the company. But the company thereupon treated the contract as at an end and so notified Hoover's subagents. This warranted the jury in finding a breach by the company.

However, the court reversed the decision of the lower court on the question of damages, saying—

On the whole, we think that it was reversible error to charge the jury that Hoover's damages were to be reckoned at $1,000 a month as a minimum, diminished only by expenses chargeable to his drawing account. * * * The judgment of the district court is vacated, the verdict set aside only as to damages, and the case stands for a new trial, on damages only.

CONTRACT OF EMPLOYMENT — BREACH — DISCHARGE — DAMAGES — COMMISSIONS AS EARNINGS—*Clinton* v. *Des Moines Music Co., Supreme Court of Iowa (January 21, 1930), 228 Northwestern Reporter, page 664.*—The Des Moines Music Co. was a corporation engaged in selling, among other things, musical instruments. Henry Clinton was employed as a salesman under a contract of employment, which, according to a letter from the company to Clinton, dated November 1, 1927, read as follows:

* * * Please be advised that the following constitutes an agreement between the Des Moines Music Co. (Inc.) and yourself for a period of 12 months dated October 25, 1927:

The Des Moines Music Co. (Inc.) to pay you $40 per week as a drawing account. An allowance of 1 per cent on the net sales to cover car expenditures with a maximum of $25 per month. Your

sales quota on this basis at $25,000 net; $26,000 to $40,000 net, 5 per cent additional; $40,000 and over, net, 7 per cent additional.

Clinton continued to work under this contract until February 4, 1928, during which time he had made sales in the aggregate of $11,028. It is claimed by Clinton that on January 24, 1928, the company breached the contract by refusing, without just cause, to allow a commission of $5 on a $500 sale made by Clinton and accepted by the company. On account of this refusal Clinton tendered his resignation in writing on January 24, to become effective February 24, 1928. Later, on February 1, he wrote a letter amplifying his letter of January 24. This was followed by a peremptory discharge of Clinton by the company on Febuary 4, 1928.

Clinton filed suit against the Des Moines Music Co. to recover compensation for services rendered as a salesman upon a written contract alleged to have been breached by the company. The company claimed in defense that Clinton breached the contract and that he voluntarily resigned. The municipal court of Des Moines rendered a verdict in favor of Clinton, and the company appealed the case to the Supreme Court of Iowa. Regarding the legal effect of Clinton's written resignation tendered on January 24, the court said:

Under the terms of the contract of November 1, 1927, the employment had an absolute limitation of 12 months after October 24, 1927, but in addition thereto it reserved to each of the parties the definite right to terminate the contract on 30 days' notice. Plaintiff's letter of January 24 can not be constituted otherwise than as an election on his part to terminate the contract February 24, 1928.

If the defendant breached the contract on January 24, by failure to pay the commission which the plaintiff demanded, the plaintiff was not bound to cancel the contract on that account. He might have continued to work and reserve his right to recover, if possible, that item of compensation at a later date. On the contrary, however, he elected to avail himself of the 30-day cancellation clause in the contract by serving a notice on January 24, 1928. Furthermore, the defendant's peremptory discharge of the plaintiff on February 4 did not deprive the plaintiff of his right to recover under the terms of his contract for the 30 days following January 24, 1928, or the disputed $5 commission, if properly proven.

In considering the amount of Clinton's recovery it was necessary for the court to interpret certain parts of the contract regarding Clinton's commission:

The court construed the words, "Your sales quota on this basis at $25,000 net," to mean that, upon sales made month by month, in excess of one-twelfth of $25,000, the plaintiff is entitled to 5 per cent commission additional to all other sums of payment, and this regardless of whether a total of $25,000 net in sales has been made.

On appeal the Iowa Supreme Court placed a different interpretation on the words, "your sales quota on this basis." The court said that the company agreed to pay Clinton a drawing account of $40 per week, and 1 per cent of net sales to cover car expenditures on the agreement that Clinton would sell $25,000 in the 12-month period. Continuing the court said:

We think it clearly appears that it was not the intention of the parties that the additional 5 per cent should be paid until $25,000 net of goods had been sold, and then only on goods sold amounting to $26,000 and up to $40,000, and the 7 per cent applied only to all goods sold over $40,000. In other words, these commissions were not to be paid when the goods were sold at the rate of more than $25,000 a year, but only paid when more than $25,000 net of goods had been sold.

The court, therefore, reduced the amount of damages awarded Clinton by the lower court and upon this condition the judgment was accordingly affirmed.

CONTRACT OF EMPLOYMENT — BREACH — DISCHARGE — DAMAGES — TERM OF EMPLOYMENT—*Dallas Hotel Co.* v. *McCue, Court of Civil Appeals of Texas (January 25, 1930), 25 Southwestern Reporter (2d), page 902.*—On September 30, 1925, Mary McCue entered the employ of the Dallas Hotel Co. as mail clerk. She had called upon Mr. Schubert, an assistant manager of the hotel, and told him that she was informed there was a vacancy in the position of assistant mailing clerk and that she desired to apply for such position. She was advised that she might go to work at once, and without further discussion she assumed the duties of the position. She received $75 per month at first, but soon received an increase raising her salary to $85 per month.

On November 1, 1927, she was discharged, and shortly thereafter filed suit in the district court of Dallas County for damages for the breach of the contract, alleging an employment from month to month at the rate of $85 per month, and sought to recover such sum as actual damages. She also sought to recover exemplary damages, basing such claim on the conduct of Mr. Ellifritz, the manager of the hotel at the time she was discharged. At the trial she testified that—

When telegrams or other communications to the hotel for its guests were received, it was her duty as mail clerk to take the telegrams for the guests and hold them, unless a guest should telephone down from his room to have the telegram sent up, or if a guest of the hotel should telephone or wire her to forward his telegram, then it would be forwarded to him. * * * That on such morning, when she went into the mail room to go to work, she saw a telegram lying on the desk; that Mr. Charninski, appellant's credit manager, came in after she had been at work a short time and said that he had opened

a guest's telegram and that he wanted her to go to the Western Union Telegraph office and get a new envelope and put the telegram in the new envelope; that she replied that he had no right to open a guest's telegram; that Charninski then told her that the reason he had opened this telegram was that the guest had told him or given him permission to do so, and told appellee that she must do as she was told, to which she replied that she would not tamper with any mail or telegrams; that Mr. Charninski said that he would show her, and that she would have to do as he said; that a short time thereafter Mr. Ellifritz came in with Mr. Schubert, and the former directed her to go over to the Western Union Telegraph office and get a new envelope, put the telegram in it, seal it up, and then apologize to Mr. Charninski; * * * that, after she had thus refused, Ellifritz grabbed her by the arm and shoved her, leaving scratches on her arm; that "he throwed me out of the room just as roughly as he could, and told me to get out and not come back"; that he left his finger marks on her arm, the marks being blue.

Among other things, she alleged that as a result of the discharge she had not been able to get employment since that time, that her health was broken and her nervous system was giving her considerable trouble, and that she had not received any money for the work she had done on the day she was discharged.

Ellifritz testified that Charninski had authority over Miss McCue and that on the day in question he went with Mr. Schubert to see Miss McCue and told her:

You will have to put that telegram in an envelope as directed by Mr. Charninski, and then tell Mr. Charninski that you will obey him, or you will have to quit; that she replied that she would quit, and that he and Mr. Schubert then walked out of the office; that he did not touch appellee while in the mail room.

The case was submitted to the jury on the issues and the jury returned the following findings: (1) That the employment was from month to month; (2) that the employer did not have just cause for the discharge of the employee; (3) that at the time of the discharge the employee suffered pain and humiliation; (4) that she had been damaged in the sum of $85; and was entitled to recover, as exemplary damages for her wrongful discharge, the sum of $1,500. The jury also found as a matter of fact that the claimant had used reasonable diligence to secure employment during November, 1927.

The case was appealed to the Court of Civil Appeals of Texas by the hotel company. It was contended that there was not sufficient evidence to support the finding that the contract of employment was from month to month. In interpreting the contract of employment the court said, in part:

We have seen that, under the interpretation the parties placed on this contract, wages to be paid appellee were measured by the month. The intention of the parties being that appellee's wages as mail clerk

should be $85 a month, we see no reason why the rule adopting the unit of time for the payment of wages as the unit of time of employment should not be adopted as the rule in this case. For these reasons, we believe the evidence, even from appellant's construction of its meaning, raised an issue of fact as to whether appellee's employment was from month to month, that the court did not err in submitting such issues to the jury, and that the finding of the jury in this respect is supported by evidence.

The court, however, did not consider the evidence sustaining the fact that Miss McCue had suffered pain and humiliation sufficient to support the finding of the jury. The case was therefore reversed.

CONTRACT OF EMPLOYMENT—BREACH—DISCHARGE—LABOR ORGANIZATION AS PARTY—*Hall* v. *St. Louis-San Francisco R. Co., Springfield Court of Appeals, Missouri (May 20, 1930), 28 Southwestern Reporter (2d), page 687.*—S. F. Hall filed suit against the St. Louis-San Francisco Railway Co. for damages for an alleged wrongful discharge and refusal to give a service letter as required by section 9780, Rev. Stat. 1919. The first count of the petition alleged the employment of Hall by the railway company and a discharge in violation of an agreement between the railway company and the Frisco Association of Metal Crafts, of which Hall was a member, and asked both actual and punitive damages. The second count alleged the employment of Hall by the railway company and a wrongful discharge, and refusal to issue to Hall, upon his demand, a service letter, as required by statute, and asked for both actual and punitive damages.

In the Ripley County circuit court Hall recovered nominal damages on each count and $1,500 punitive damages on the second count. Both parties appealed. The railway company contended that the second count was based upon a hiring for three years, a definite period, and that Hall was allowed to recover upon a violation of the agreement between the railway company and the union. It was also contended this was a violation of the rule that a party can not allege one cause of action and recover upon another. Regarding this contention the court said:

There is a direct allegation in the petition that the employment was for a term of three years, but there is also an allegation which shows that he was working under the agreement between defendant and the union of which plaintiff was a member. The petition in this count, in fact, pleads both the hiring for three years and a hiring under the agreement with the union. There was no motion filed asking that plaintiff be required to elect, nor was this count attacked in any way, except by a motion to strike out other portions of it, which was sustained. Counsel for defendant insists that this count only alleges one employment and that was a direct hiring for a 3-year

period, and the allegations about the agreement between defendant and the union and his discharge in violation thereof was only to show a wrongful discharge and does not amount to an allegation of employment under the agreement with the union. We do not agree with that contention. Our conclusion is that it alleges employment in both ways and authorized the submission of the case, as was done, on the theory of an employment under the agreement with the union.

The agreement between the employer and the labor union provided that no employee in service for a period of 30 days would be discharged for any cause except drunkenness without first being given an investigation, and it further provided for the right to appeal to a high official of the employer. From the facts it appears that Hall was discharged because of certain information reported regarding his foreman, and he alleged that he was denied the right to an investigation. Regarding the railway company's contention that it had discharged this duty to Hall, the court said:

We do not think so. There is no evidence on the part of either plaintiff or defendant that plaintiff was ever notified of any claim by any person that he had been guilty of conduct that might justify his discharge or that a hearing on that question would be held. * * * It does not require formal charges to be filed nor a trial governed by the rules of court procedure, but it does mean that he shall be notified beforehand of the investigation and be given an opportunity to secure a fellow employee to assist him, if he so desired, and also be given a fair opportunity to refute proof of any alleged misconduct upon his part. It is clear to us that on plaintiff's testimony a case for the jury was made on the question of a wrongful discharge, and the verdict for nominal damages on the first count of the petition was sustained by the evidence.

The court also found that the company denied the service letter to Hall, in violation of the statute, and that there was sufficient evidence to take the question of legal malice to the jury. The court said:

While plaintiff's testimony as to what occurred between him and Mr. Gamel [the master mechanic] at Memphis tends to show actual malice against plaintiff by Mr. Gamel, yet it is not necessary to show actual malice in order to recover punitive damages. Malice in law, which is the intentional doing of a wrongful act, without just cause or excuse, is sufficient.

If the evidence most favorable to plaintiff in this case be true, and that is all that we can consider in passing upon a demurrer to the evidence, we are of the opinion that there was sufficient evidence on the refusal to issue the service letter and of at least legal malice in that refusal, and that was all that was necessary to take the question of punitive damages to the jury.

The judgment of the lower court was therefore affirmed.

CONTRACT OF EMPLOYMENT—BREACH—DISCHARGE—MISCONDUCT AS GROUND—LIFE EMPLOYMENT—*Campion* v. *Boston & Maine R. Co., Supreme Judicial Court of Massachusetts (January 3, 1930), 169 Northeastern Reporter, page 499.*—For several years prior to 1921 James E. Campion had been in the employment of the Boston & Maine Railroad, and during that year he was employed as a "spare" tower man. Later during the same year the railroad company published a bulletin showing a "permanent vacancy" in the Wakefield Junction tower "second trick" which was "bid off" by Campion. In 1923 he was suspended and afterwards discharged on the ground of insubordination. He filed suit against the railroad company contending that his contract with the railroad was one of permanent employment and that the railroad had no right to discharge him. The superior court, Suffolk County, Mass., rendered a verdict for the railroad company and Campion carried the case to the Supreme Judicial Court of Massachusetts. This court held that even though Campion was hired to fill a "permanent vacancy" he could be discharged later by the railroad at any time it no longer desired his services.

In affirming the decision of the superior court, the court said:

In the case at bar there was no express agreement on the part of the defendant to employ the plaintiff for any definite period, nor can such an agreement be implied. The contract could be terminated at the will of either party. * * *

It is manifest that the invitation for bids to fill a "permanent vacancy," construing these words in the sense in which they were used and would be commonly understood, did not amount to an offer to employ for life, or for any definite term, a person who might accept the invitation and enter the employment of the defendant. The testimony of the plaintiff to the effect that he understood when he took the position that he could not be discharged and that he could not leave the employment for any reason, can not affect the legal right of the defendant under the terms of the employment to discharge him for cause or without cause. His testimony can not be used to define the contract which is to be construed by its terms. [Cases cited.]

Although under the terms of the employment the plaintiff could be discharged without cause, the evidence, if believed, warranted a finding that he was guilty of insubordination which warranted his discharge. "Insubordination imports a willful disregard of express or implied directions and refusal to obey reasonable orders. When this is established it is such a breach of duty on the part of the servant as to warrant his discharge.

CONTRACT OF EMPLOYMENT—BREACH—INDEFINITE EMPLOYMENT—*Peacock* v. *Virginia-Carolina Chemical Co., Supreme Court of Alabama (October 23, 1930), 130 Southern Reporter, page 411.*—On September 1, 1926, A. J. Peacock entered into a contract of employ-

ment with the Virginia-Carolina Chemical Co. Among other things the contract provided that his salary was "to be at the rate of $2,000 per annum, payable monthly, beginning October 1, 1926." Peacock entered upon the discharge of his duties in accordance with the agreement and continued satisfactorily to perform such duties until May, 1927, when he received a letter from the manager of the company, inclosing a salary check for the first 15 days of May, and stating that, to his regret, he was forced to discharge Peacock, although his work was entirely satisfactory. Peacock then filed suit against the Virginia-Carolina Chemical Co., alleging that thereafter and until October 1, 1927, he was able, willing, and ready to continue in the performance of his duties under the contract, but the company had not paid him any salary for the period from May 16, 1927, to September 30, 1927.

As a defense to the suit the company alleged that as no definite time of employment was contained in the contract it was but an employment at will, terminable at any time by either party.

The circuit court of Montgomery County rendered a verdict in favor of the chemical company and the case was appealed to the Supreme Court of Alabama. The latter court pointed out the distinction between the use of the phrase "at a certain sum per month" and the phrase "at the rate of a certain sum per month," and in affirming the decision of the circuit court said in part:

It can not be said that men, in making their contracts, would always observe a distinction between a salary of a stated amount for a given period and a salary of a fixed rate per period. But when contracts are couched in very brief terms, and courts come to seek their meaning from these words alone, they must note the real difference in the terms employed.

Here we have a contract "at the rate of" so much per annum, "payable monthly." It can not be an entire contract for the year in the sense that no pay would be due unless the employee served a full year. * * *

Contracts of employment, payable only by the year, are so unusual in modern times and conditions that courts avoid a construction leading to such result, a result attempting a definite term at a fixed wage.

"At the rate of so much per annum, payable monthly," may obviously mean merely the fixing of the rate, not the duration of employment.

Indulging the presumption heretofore recognized, and looking to the writing alone, in the absence of averment of custom or accompanying circumstances indicating a different intent, it will be so construed.

CONTRACT OF EMPLOYMENT—BREACH—INVENTION OF EMPLOYEE—*Engel* v. *Ansco Photoproducts (Inc.)*, *Supreme Court of New York, Appellate Division (March 14, 1930)*, *240 New York Supplement*,

page 737.—The Ansco Photoproducts (Inc.), a company engaged in photographic art, employed Arthur F. Engel as consulting engineer. He granted the company exclusive license to deal in and sell his inventions under a contract requiring the company to prepare and prosecute applications for a patent and providing for a salary of $5,000 per year plus the royalties from the inventions. Engel turned over to the company working models of three devices, after which he received the minimum sum of $5,000 for the first year. No further payments were made for three years and the company failed to prosecute applications for a patent. Engel considered this a breach of the contract and contended that he was damaged thereby. He filed suit against the company and the New York Supreme Court entered a verdict in favor of the employer. Engel appealed to the appellate division alleging three causes of action as follows:

The first is for Engel's compensation for two years as a consulting engineer at the rate of $5,000 per year; the second is for minimum royalties alleged to be due Engel for the second and third years of the contract amounting to $10,000; and the third is based on the alleged expenses to which Engel would be put for preparing patent applications.

The appeals court reversed the decision and remanded the case for further hearing. The court said:

The record fails to disclose evidence sufficient to show that plaintiff's invention for preventing double exposure of film was not patentable. This invention was separate and distinct from plaintiff's camera and could be used on other cameras. As to this, at least, defendant was obliged, under the contract, to prosecute an application for letters patent within a reasonable time after the contract was made. This it failed to do, and we are of the opinion that defendant must be held to be in default in this respect as a matter of law. This being so, defendant had no right to cancel the contract.

We are further of the opinion that sections 1450 and 1466 of the education law are not applicable to plaintiff's employment. We also think that there is no merit in defendant's contention that it was not obligated to make the payments provided in clause 7 of the contract until manufacture. The contract, by clause 8, provided for the first payment of royalties to be made at the time the contract was executed and this payment was made, and discloses the true intention of the contract in this respect.

The judgment should be reversed upon the law and the facts, with costs to appellant, the action severed and judgment directed in favor of plaintiff upon his second cause of action for $10,000, with costs. A new trial should be granted as to the first cause of action because the question of the amount of plaintiff's damage must be decided by a jury.

CONTRACT OF EMPLOYMENT — BREACH — SICKNESS CAUSE FOR BREACH—*Fahey* v. *Kennedy et al., Supreme Court of New York, Appellate Division, Third Department (June 27, 1930), 243 New York*

Supplement, page 396.—On November 23, 1924, Thomas F. Fahey entered into an employment contract with Thomas P. B. Kennedy, whereby Kennedy agreed to employ Fahey as the superintendent of a garage in the city of Albany, N. Y. The agreement was for five years, at a salary of $300 per month for the first year, $350 per month for the next two years, and $375 per month for the remaining two years. Fahey accepted the employment by taking charge of the business and acting as superintendent until December 3, 1927, when he fell ill. His wages were paid regularly until January 1, 1928. On February 20, 1928, he returned to work and the employer refused to pay the $375 per month as agreed, contending that Fahey's illness breached the contract and relieved him of further liability. He offered to pay Fahey $60 per week, but Fahey declined this offer and filed suit to enforce the contract entered into in 1924. The city court dismissed the suit and on appeal the county court affirmed the judgment in favor of the employer. Fahey appealed the case to the appellate division of the New York Supreme Court.

In reversing the judgment of the lower court the New York Supreme Court said, in part:

The principal controversy here relates to whether or not the contract was terminated by the illness of the plaintiff. There is no general or well-established rule as to whether the illness of an employee constitutes sufficient cause for the employer to terminate the contract, or whether the employee, under such circumstances, may be discharged from his obligation to perform. Much depends upon the facts disclosed in the particular case. The period of illness, its nature, the kind of service rendered, and many other facts must be considered as bearing upon the question of whether the employee is fairly performing the obligations he had assumed. That men may become sick is one of the commonest experiences. Both parties know it when they make contracts for personal service. Just what they may contemplate in that contingency, if nothing is said on the subject in advance, must be determined when the facts of the situation are presented.

The plaintiff, as we have said, became ill on December 3, 1927, and later was taken to a hospital. His condition improved, and during his convalescence for a time he went away for recuperation on the advice of his physician. He returned on February 20th in a condition of health to resume his employment. In the meantime the business had been conducted by a force of men he had organized, so that the employment of a new superintendent does not appear to have been necessary. During the time of his illness he was in contact with his employers by telephone and by personal calls they made on him. They had notice of his condition of health and of his convalescence and departure for recuperation, advised him that it was all right, and were very considerate in their attitude toward him. Nothing whatever was said between them concerning any inconvenience they were suffering by his absence, the necessity of em-

ploying another in his place, or their purpose to regard the contract terminated.

We think that the failure of the defendants to notify the plaintiff during the time he was ill that his contract was ended, their conduct during that period, and the excuses they finally made when plaintiff was ready to return to work, do not indicate, as the case now stands, that they were exercising the election they may have had, but rather were seizing upon his illness as an excuse to extricate themselves from a contract becoming burdensome, and to suit purposes of their own convenience and advantage. (*See* Gaynor *v.* Jonas, 104 App. Div. 35, 38, 93 N. Y. Supp. 287.) Their prior conduct may, as a question of fact, operate as a waiver of their rights. (Spindel *v.* Cooper, 92 N. Y. Supp. 822.) Therefore, they do not now stand in the place of employers injured by the inability of their employee to perform valuable services imperative to the success of their business. We regard it as a question of fact as to whether they were justified in discharging plaintiff under the circumstances above detailed. For the reason that all of these questions were not submitted to the jury so that they could be passed upon in the light of proper instructions, we think that there must be a new trial. The judgment should be reversed on the law, and a new trial granted in city court, with costs to the appellant to abide the event.

CONTRACT OF EMPLOYMENT—COMMISSIONS AS EARNINGS—BREACH—*Parkway Motor Co. (Inc.)* v. *Charles, Court of Appeals of District of Columbia (March 3, 1930), 39 Federal Reporter (2d), page 292.*—The Parkway Motor Co. (Inc.) filed suit against Charles A. Charles upon his promissory note for $846.02, with interest, less a credit of $143.12. Charles admitted the validity of the note, but set up a counter claim in the sum of $900 for commissions alleged to be due on the sale of 32 Ford automobiles for which he had obtained orders while employed by the Parkway Motor Co. (Inc.) as a salesman. The municipal court of the District of Columbia allowed the counter claim in full, and the Parkway Motor Co. (Inc.) appealed the case to the District of Columbia Court of Appeals. The contract of employment between Charles and the Parkway Motor Co. provided that he should only be entitled to commissions on new automobiles sold by him and delivered and paid for in full at the time of the termination of the contract, if terminated by him.

It appears that in May, 1927, the Ford Motor Co. discontinued the manufacture of cars of its former model; there was great delay in the production of the new-model cars so that Ford dealers generally were unable to secure sufficient cars to meet the demand. Consequently the 32 orders obtained by Charles for new cars were not filled when he voluntarily terminated his employment. At the time of the trial 15 of the cars remained undelivered and unpaid for, while 10 of the orders had been canceled by the purchasers and their

deposits refunded; only 7 of the 32 cars had been delivered and paid for.

The appeals court said that Charles, a salesman familiar with the business, in entering into this contract was charged with notice that the company had nothing to do with the production of the cars and was entirely dependent for its supply on the Ford Motor Co. The failure to deliver the cars was not chargeable to the Parkway Motor Co.; since the orders were taken contingent upon the supply of new cars being sufficient to meet the demand, and since Charles voluntarily terminated the contract, he was in no position to complain that the cars had not been delivered and settled for in full at the time he terminated the contract. The court concluded that the written terms of the contract should be applied in this case and that Charles was entitled to commission by way of offset only on the number of cars that had been sold and settled for in full at the time he terminated the contract.

The judgment of the lower court was therefore reversed.

CONTRACT OF EMPLOYMENT—COMMISSIONS AS EARNINGS—DAMAGES FOR CAUSING DISCHARGE—RIGHTS TO PRIZE—*E. D. Lanford Co.* v. *Buck, Supreme Court of Alabama (November 7, 1929), 124 Southern Reporter, page 418.*—B. B. Buck sued the E. D. Lanford Co. in the circuit court, Etowah County, Ala., claiming a balance due him for commissions earned by him as salesman for the said company which was engaged in the automobile business. He also claimed a $65 prize offered by the company to the salesman selling the greatest number of cars for a period ending June 17, 1927. Early in June a controversy arose between the parties as to a commission Buck claimed to have earned by the sale of a car, and on June 10 he was discharged. Buck claimed his salary at the agreed amount per month for the whole of the month of June on the theory that he had been wrongfully discharged.

The circuit court awarded judgment in favor of Buck and the automobile company carried the case to the Supreme Court of Alabama for review. Regarding Buck's claim for his salary and commission the court said, in part, as follows:

The contract between the parties provided for the payment of a sum certain per month and a percentage on sales made in addition. This, without more will be accepted as in the nature of distinct contracts, and an action of debt for each monthly wage (and percentage earned, if any) will lie as it becomes due. (Davis *v.* Preston, 6 Ala. 85.) * * * According to the principle stated above on the authority of Davis *v.* Preston, plaintiff's statement that he would quit at the end of the then current month was not a breach of his

contract, and if Lanford, without just cause or good excuse to be determined by the jury, then—June 10—discharged plaintiff, the latter was entitled to his month's salary, provided of course he did not find employment elsewhere—as to which proviso no contention was suggested in the trial court.

In considering Buck's right to the $65 prize offered, the court said:

His right was affected by the condition named, viz, that he sell more cars than any other salesman, but the contract between the parties, though affected by that condition, if executed in good faith on both hands, operated to the advantage of defendant as well as plaintiff. At the time of the breach, plaintiff's name, according to his testimony, led all the rest—indeed, there was no dispute as to that. Nor was there any fact in evidence tending to establish a change in this order. If there had been a change, the probative facts lay within the peculiar knowledge of defendant and should have been exhibited by him.

The Alabama Supreme Court therefore affirmed the holding of the circuit court, rendering the judgment in favor of the salesman.

CONTRACT OF EMPLOYMENT—CONSTITUTIONALITY—PURCHASE OF CAPITAL STOCK BY EMPLOYEE—*In re Opinion of Justices, Supreme Judicial Court of Massachusetts (May 20, 1929), 166 Northeastern Reporter, page 401.*—In answer to questions contained in an order adopted by the Massachusetts Senate, May 7, 1929, and submitted by the senate of the Commonwealth to the Supreme Judicial Court of Massachusetts, the justices respectfully submit the following answers:

The first question in substance is whether under the constitution legislation may be enacted providing that any written contract of employment shall be void unless at the time of making the same a copy be delivered to the employee, or prospective employee, signed by the employer, or prospective employer, or an authorized representative. This question is answered in the affirmative. The kind of contract thus described differs in no material respect as to its constitutional aspects from other contracts required by legislation to be in writing.

It is competent for the general court to enact legislation regulating business transactions to the extent indicated in this question without being in conflict with the Constitution either of this Commonwealth or of the United States.

The second question in substance is whether under the constitution legislation may be enacted providing that any contract of employment shall be void whereby is included as a consideration for the acceptance of such contract by the employer the purchase by the employee of capital stock of any nature in the business of the employer. This question is answered in the negative. This inquiry touches the natural, essential, and inalienable rights secured to every member of society by articles 1, 10, and 12 of the declaration of rights of the constitution of this Commonwealth to enjoy liberty, to acquire, possess, and defend property, and to seek and obtain safety and

happiness. These rights are secured also against interference by the several States under the fourteenth amendment to the Constitution of the United States. These constitutional guaranties include liberty of contract, and secure protection of that liberty against unwarranted legislative encroachments. * * * The rights of liberty and private property guaranteed by the Constitution are subject to such reasonable restraints as the common good or general welfare may require. There is a broad field of regulation in this particular which is open to the valid exercise of legislative power. But no case, so far as we are aware, has gone to the extent of making void contracts of the nature here inhibited.

The proposed statute attached to the order strikes down as void every contract of employment whereby employer and employee agree upon purchase by the latter of capital stock in the business of the employer. It is an absolute prohibition which declares contracts of that nature "null and void." We are of opinion that legislation of this nature is an interference with freedom of contract, which can not be justified under the constitutional mandates above referred to. Everybody has a right to be free in the enjoyment and use of his faculties in all lawful ways, to live and to work where and as he chooses, to contract to earn his living in any lawful pursuit, and to that end to enter into all proper contracts.

CONTRACT OF EMPLOYMENT—DAMAGES FOR BREACH—AUTHORITY TO HIRE—*Palmer et al.* v. *New York Herald Co., Supreme Court of New York, Appellate Division (February 14, 1930), 239 New York Supplement, page 619.*—The New York Herald Co. owned and published newspapers in the eastern part of the United States. The company was owned by James G. Bennett, who conducted the company as a 1-man corporation. After his death, Candler, counsel for the company, called a meeting of the board; it was decided that the papers were to continue under the direct supervision of the board and that all business should be handled by the members of the board. Candler also instructed all heads of departments that no contracts were to be made, no commitments or action taken, or news matter printed, which might create any liability against the company without referring the matter to him.

De Witt, advertising manager for the company made arrangements with one John Glass to represent the company in the western territory on a 10 per cent commission basis. De Witt drew up a letter outlining a contract of employment for three years and forwarded it to Glass, who wrote "accepted" on the letter and signed his name. Thereupon a copy of the letter was sent to the treasurer of the company and also a copy to the executive committee.

In 1920 the executors of the estate of James G. Bennett contracted to sell the stock in the company, free of all contracts to Frank Munsey. A letter was written to Mr. Candler respecting the contract

with Glass stating that since the contract was for three years it would not be accepted by Munsey. The contract was immediately terminated, and Glass was discharged. He filed suit against the company for an alleged breach of the contract, and upon his death the suit was continued by Charles M. Palmer.

The supreme court rendered a judgment in favor of Palmer in the sum of $34,275.68; the board appealed the case to the appellate division, contending that there was no authority, express or implied, in the advertising manager, De Witt, to make such a contract as the one in suit. The board also claimed the court erred in fixing the amount of damages. Regarding the validity of the contract, the court said, in part, as follows:

We think that under all the rules applicable to the construction of a letter of this character it must be held that the contract in suit was not void for lack of mutuality.

We think, too, that it must be held besides that the contract was authorized and ratified and that the defendant corporation is bound thereby and could not deny validity.

It appears in our judgment that the executive committee itself had power, express or implied, to authorize De Witt to execute the contract for the company or that they had been held out as possessing such power. But whether or not the committee had power to authorize De Witt to make the contract with Glass, it would seem to be obvious that the contract has been ratified.

The Glass contract was in operation for more than a year, and there is nothing to indicate that any attempt would have been made to cancel it had it not been for the sale of the Herald and Telegram to Mr. Munsey.

The only reason assigned in the proof is the letter of Flaherty to Candler on January 20, 1920, in which he states that the contract being for a period of three years will not be accepted by Mr. Munsey and should be terminated.

During all this period the Herald received the benefit of the contract and can not now be heard to deny its execution as unauthorized.

However, the court reversed the judgment in part because a correct rule of damages was not applied. The case was therefore remanded for a new trial.

CONTRACT OF EMPLOYMENT—DISCHARGE—DAMAGES FOR CAUSING—RIGHTS OF EMPLOYEE—*Caulfield* v. *Yazoo & M. V. R. Co., Supreme Court of Louisiana (March 5, 1930), 127 Southern Reporter, page 585.*—George L. Caulfield was employed as a conductor on a passenger train of the Yazoo & Mississippi Valley Railroad Co. at a salary of $430 per month. He had been in the service of the company for 37 years continuously and was one of the senior conductors, with the expectation of some day retiring on a pension. He was discharged for an alleged violation or neglect of a rule of the company by

failing to include in his report to the railroad auditor the fare of a passenger who rode on his train and by failing to give a satisfactory account of the omission. The passenger referred to was a colored man named Forest, who was put aboard the train by the division superintendent for the purpose of checking up the conductor's observance of his duties. The passenger rode from Istrauma to Walker and no record of the fare, which was only 66 cents, appeared in the conductor's report.

The rule regarding the procedure followed in dismissing conductors, as stated in the agreement between the railroad and the Order of Railway Conductors, was as follows:

Conductors will not be dismissed or suspended from the company's service without just cause; investigation will be conducted ordinarily within 10 days. In case of suspension or dismissal, if the employee thinks his sentence unjust, he shall have the right within 10 days to refer his case by written statement to the superintendent. Within 10 days from the receipt of this notice his case shall have a thorough investigation by the superintendent, at which he shall be present. In case he shall not be satisfied with the result of said investigation he shall have the right to appeal to the general superintendent and from him to the general manager. In case the suspension or dismissal is found to be unjust he shall be reinstated and paid for time lost. The result of the investigation shall be made known within 10 days. A conductor called in for investigation may be accompanied by a conductor of his choice, in the employ of the company, who may be present during the entire investigation, and ask such questions as might develop facts pertinent to the case. If the evidence at any investigation is transcribed, copy will be furnished local chairman on request.

Caulfield brought this suit for damages, averring that he was not given a hearing on the charge, that he was not guilty, and that even if he was negligent, as charged, it was a trivial matter and not one which would justify his dismissal. He claimed "$10,000 for mental suffering, $10,000 for injury to his reputation by the suspicion cast upon his character for honesty and integrity, $10,000 for the loss of his prospect of retiring upon a pension, and $430 per month for the loss of salary from the date of his discharge until the date when he would be reinstated or the date of the final judgment in the case."

The district court, nineteenth judicial district, gave judgment in favor of the conductor for $430 per month from the date of his discharge until the date of the judgment of the court, but rejected the demand for the $30,000 damages. He appealed to the Supreme Court of Louisiana, contending that the investigation made by the division superintendent was not a thorough one. The court did not uphold this contention, as no such complaint was made by the con-

ductor previous to this appeal. The court affirmed the decision of the district court, saying in part:

It appears, therefore, that the discharge of the plaintiff was done according to the rules governing his employment. The railroad business is one which in its very nature requires strict obedience of the rules of the company on the part of the employees. The rule which requires conductors to report and account for the fares of all passengers who ride on their trains, and which admits of no deviation or excuse, is not so harsh as to be opposed to public policy. And there is nothing contrary to public policy in the agreement between the railroad company and the Order of Railway Conductors that, after a full and fair investigation, the division superintendent of the railroad, and after him the general superintendent, and after him the general manager of the road, shall decide finally on the justness of a suspension or dismissal of a conductor.

The rule is stated thus in 39 C. J. 73, sec. 62:

"Where a contract of employment provides that any dispute arising in connection with the agreement should be referred to arbitration in accordance with the provisions of the by-laws of an association, an award adverse to the employee on a reference of the question of misconduct involved the question of the right to dismiss, as a dispute arising in connection with the agreement for service, and is binding upon the employee."

The same principle is applied to other contracts—other than contracts of employment—and particularly to building contracts containing the stipulation that the work shall be performed to the satisfaction of the architect or engineer.

CONTRACT OF EMPLOYMENT—DISCHARGE—DAMAGES FOR CAUSING—UNSATISFACTORY SERVICE—*Weisenbach* v. *McDermott Surgical Instrument Co. (Inc.)*, *Supreme Court of Louisiana (June 17, 1929)*, *123 Southern Reporter, page 336.*—On July 1, 1922, Leo Weisenbach was employed by the McDermott Surgical Instrument Co. for a period of two years at a salary of $100 per week. As his sales during that period showed a gross profit of 41 per cent, his contract was renewed for another two years at an increased salary of $135 per week. On September 12, 1925, he was discharged and as a result of this sued the company for his salary for the unexpired term, alleging he was discharged without just cause.

The employer made the defense that he was discharged for good and sufficient cause, and brought facts into court to show that when the contract with Weisenbach was made he was advised that his sales must average a gross profit of 33 per cent. The evidence showed that Weisenbach averaged only 19 per cent during the first six months of 1925, and that he was dissatisfied with his employment and had been endeavoring to establish for himself a business to compete with the McDermott Surgical Instrument Co.

The trial judge of the civil district court, Parish of Orleans, found the company had sufficient cause to discharge Weisenbach and upon appeal to the Supreme Court of Louisiana, this decision was affirmed.

CONTRACT OF EMPLOYMENT—DISCHARGE—UNSATISFACTORY SERVICES—COMMISSIONS AS EARNINGS—*Fried* v. *Portis Bros. Hat Co., Court of Appeals of Georgia (January 24, 1930), 152 Southeastern Reporter, page 151.*—Harry Fried was employed by the Portis Bros. Hat Co. under a contract of employment authorizing discharge when the employer was dissatisfied with the employee's services. Fried was discharged upon the ground that his services were unsatisfactory, whereupon he filed suit against the employer alleging the discharge was wrongful, as the employer had fraudulently claimed his services were unsatisfactory. The city court of Macon, Ga., rendered judgment in favor of the employer and Fried carried the case to the Court of Appeals of Georgia, where the decision of the lower court was reversed.

Judge Stephens, speaking for the court, said in part as follows:

Where, by the terms of a contract of employment, the employer may discharge the employee when dissatisfied with his services, the employer, when exercising this right, must do so honestly and in good faith and only when the services are in fact unsatisfactory to the employer. (Mackenzie *v.* Minis, 132 Ga. 323, 63 S. E. 900.) Where the discharge of the employee purports to be upon the ground that his services are not satisfactory to the employer, yet they are in fact satisfactory, the discharge, notwithstanding the purported ground assigned by the employer, is not a discharge because the employee's services are unsatisfactory to the employer. Where such discharge is not otherwise justified it is wrongful and constitutes a breach of the contract.

The breach of the contract consists in the discharge of the employee in violation of the contract. Where the contract permits the discharge when the employee's services cease to be satisfactory to the employer, a breach of the contract is shown where it appears that the employee's services were not unsatisfactory to the employer, and that the employer, when discharging the employee upon the ground that the latter's services were unsatisfactory, falsely, fraudulently, and in bad faith gave this as a reason for the employee's discharge.

Regarding the amount Fried was entitled to recover under the contract, the court said:

A contract of employment under which the employee is to act as a salesman for the employer for a definite period of time and is given a "drawing account" payable monthly in designated installments during the term of the contract, the payments made on the drawing account to be charged against commissions to be earned by the employee as a salesman, and which provided that the employer is to advance to the employee amounts to be mutually deter-

mined by them from time to time as traveling expenses for the employee, and which are to be charged against the commissions to be earned by the employee, the amounts paid to the employee as a drawing account, although chargeable against the commissions to be earned by him, are nevertheless unconditional payments for services rendered, irrespective of the amount of commissions which the employee may earn. Where the employee is unlawfully discharged before the expiration of the term of employment, and, before the expiration of the term, brings suit against the employer for damages sustained by reason of such discharge, the employee's measure of damages is the salary or advancements which he was entitled to receive under the terms of the contract for the remainder of the term subject to reduction by proof at the trial. (Civil Code 1910, secs. 3588, 3589; Roberts *v.* Rigden, 81 Ga. 440, 7 S. E. 742.)

The Supreme Court of New York (Westchester County) held that an employer was entitled to cancel the employment contract only because of real dissatisfaction with the employee's work. Whether the employer's claimed dissatisfaction with employee's work was real or feigned was a question of fact for the jury to determine. If not a real dissatisfaction the employee had a cause of action against the employer for breach of the contract. (Gutner *v.* Success Magazine Corp. et al. (1930), 242 N. Y. Supp. 679.)

CONTRACT OF EMPLOYMENT—RIGHTS TO INVENTION—PATENTS—*Hoyt* v. *Corporon, Supreme Judicial Court of Massachusetts (October 5, 1929), 168 Northeastern Reporter, page 94.*—George J. Corporon began working for Frank M. Hoyt in June, 1920, in his business of blanching peanuts, salting them, and making peanut butter. Corporon was hired because of his mechanical training and knowledge, and was employed to exercise supervision over the mechanical operation of the entire plant, "including the improvement of existing, and the development of new or additional machinery, and the general improvement of production and efficiency."

In the course of his work Corporon perfected a machine which was satisfactory. This machine and also another machine later invented were patented in Corporon's name, and the employer paid all expenses thereto, supposing and expecting the rights would be his. Hoyt consented that the patent be applied for in Corporon's name as a means of complete and adequate protection and as a means of keeping the machine away from public view.

Corporon was discharged from Hoyt's employment in January, 1925, and this suit was made to recover the title to the patents.

Corporon defended his right to the patents on the ground (1) the mere fact that one is employed by another does not prevent him from making improvements on the appliances and machinery used in the business and obtaining patents therefor as his own property; (2) that Hoyt was guilty of laches. "The patent for the blanching ma-

chine was issued June 7, 1921; the application for the vending apparatus was filed February 2, 1922; the defendant was discharged January 15, 1925; and the plaintiff's bill was filed November 29, 1926."

The court rendered a decree for the employer and said regarding his rights:

The plaintiff was not satisfied with the machines he was using; he desired to perfect them, to improve his processes for blanching and to bring about a general improvement in production and efficiency. It was for this purpose the defendant was employed. The results of his efforts in perfecting the blanching machine and in inventing the vending machine belong to the plaintiff, and the patents for these machines are the property of the plaintiff.

Regarding the second contention the court said in part as follows:

In view of the defendant's conduct, his concealment of his true intent, and all the facts found by the master, together with the confidence reposed in the defendant by the plaintiff, and the absence of a refusal to assign the patents, although the plaintiff admitted on cross-examination that he knew in 1921 "the defendant was claiming the patent on the blancher to be his own," in our opinion the plaintiff was not guilty of laches and did not by his delay deprive himself of the right to the patents.

CONTRACT OF EMPLOYMENT—VIOLATION OF LABOR CONTRACT LAW—BREACH WITH FRAUDULENT INTENT—*Golden* v. *State, Court of Appeals of Georgia (November 13, 1929), 150 Southeastern Reporter, page 452.*—John Golden contracted with Howard-Parker Co. to work certain turpentine boxes from March 8, 1927, to the end of the turpentine season, about November 1, 1927. On June 3, 1927, he approached a member of the firm employing him and borrowed $10 to enable him to go to Savannah and collect money which, he said, was due him on an insurance policy on his wife's life, promising at the time to return and continue his work on June 6, 1927. On June 6 he returned but failed to go to work, his only reason for not doing so being that he was "worried." He testified before the jury—

That he was so worried that he could not work; that he went back to Savannah to try to find the person who had taken his money, and was taken sick and had not been able to work since; that when he got back to Effingham County he got a better job; that his employer agreed to pay a $100 account he had with Howard-Parker Co.; that he intended to work for Howard-Parker Co., but "did not promise to work it out"; that after he left on June 6, 1927, he was worried, and that after he failed to find his insurance money he was taken sick and was unable to work for about a month; and that he got a better job when he was able to work.

This testimony was contradicted by the testimony of Parker, a member of the firm, who said:

That he had offered to settle a $100 account with the defendant, but that this had nothing to do with the said advancement of $10 or with the present case; that after defendant left on June 6, 1927, witness made a diligent search for him, but never saw him until he was arrested about eight months later in Effingham County; that defendant never worked for his firm after June 6, 1927; that defendant never said he was going back to Savannah to look for insurance money he stated he had lost; that defendant said he would come back and work out the money advanced him; and that no one ever offered to pay defendant's account.

The case was tried by the city court of Ludowici, Ga., and Golden was convicted of violating the labor contract act. Upon his appeal, the Court of Appeals of Georgia held the evidence in the case was sufficient to show the intent to defraud and to warrant the jury in finding Golden guilty. The decision was therefore affirmed.

CONTRACT OF EMPLOYMENT—VIOLATION OF LABOR CONTRACT LAW—EVIDENCE—*Garnto* v. *State*, *Court of Appeals of Georgia* (*July 9, 1929*), *149 Southeastern Reporter*, *page 150*.—Walter Garnto was convicted in the superior court, Laurens County, Ga., of violating the labor contract law (Pen. Code 1910, secs. 715, 716) and appealed the case to the Court of Appeals of Georgia, contending the evidence was insufficient to sustain the conviction.

The facts were in dispute. J. M. Gay testified that Garnto had worked for him for several days prior to September 3, 1927, and that he had picked 180 pounds of cotton and pulled fodder for several days. On September 3, 1927, Gay met Garnto in Dublin, Ga., and upon his request Gay gave him $5. Garnto promised to begin picking cotton in Gay's field the following Monday morning and continue until all the cotton was picked. Gay further testified that Garnto did not begin picking cotton the following Monday, in fact had done no work for Gay, and refused to do any work or to pay back the $5. On the other hand, Garnto testified that the $5 he received from Gay was in payment of work already done; that Gay had refused to allow him to continue work and demanded the $5, even though he had picked 400 pounds of cotton and pulled fodder for five days.

The court considered the evidence and upon the authority of Johnson *v.* State (18 Ga. App. 701, 90 S. E. 355) and King *v.* State (36 Ga. App. 272, 136 S. E. 466) found the evidence adduced upon the trial of this case insufficient to support the verdict of guilty. The court of appeals held that the lower court erred in overruling the motion for a new trial and therefore the judgment was reversed.

CONVICT LABOR—ARTICLES MANUFACTURED IN ACCORDANCE WITH STATUTE—MARKING—*Ove Gnatt Co.* v. *Jackson et al., Appellate Court of Indiana (November 18, 1930), 173 Northeastern Reporter, page 335.*—The Ove Gnatt Co., manufacturers of floral baskets, brought action against the superintendent and the board of trustees of the Indiana State Farm, alleging that after the passage of the act of 1917 concerning prison labor the superintendent and trustees of the Indiana State Farm engaged in making and selling floral baskets from willows raised on the State farm, in competition with the manufacture of such baskets in the State, and—

That they are sold and are selling such baskets to the trade generally in this and other States at prices 40 per cent below the cost of production by the use of free labor. That the State, in its institutions and political divisions, have not and can not use said floral baskets, and the defendants are making and selling them without authority of law and in violation of law; that the defendants are employing prison labor in making such baskets which are being sold through sales agents to dealers in Indiana and elsewhere in competition with the plaintiff in violation of law and in excess of the authority given them by the legislature, the said baskets not being marked "prison made."

A trial by the Putnam County circuit court resulted in a judgment for the trustees of the State farm, from which judgment the Ove Gnatt Co. appealed to the Indiana Appellate Court. In discussing the acts of 1917 concerning prison labor and the nature of goods allowed to be manufactured under the act the appellate court said:

The extent to which prison labor shall be used and the disposition of the products of such labor, is an administrative question over which the legislature and not the judicial department has control. It is well recognized that prisoners in penal institutions can not be left unemployed, and that they should, as a matter of course, be employed in such work as will the least affect free labor and legitimate business. The problem is a difficult one to solve. Indeed, it would be hard to conceive of an industry at which prison labor could be employed that would not, in some degree, come into competition with free labor and some existing manufacturing establishment.

Section 2 of the act of 1917, page 237, chapter 83 (sec. 12445, Burns's, 1926), concerning the labor of inmates of our penal institutions, including the State farm, on State account, requires that the State, its institution and political divisions, shall purchase such articles at prices fixed by the board of classification. By section 1 of this act the State farm is "authorized to manufacture such articles as are used by the State, its institutions and its political divisions * * * and to sell the surplus, if any, upon the market."

It was the legislative intent that the penal institutions should use prison labor only for the purpose of manufacturing such articles as are used by the "State, its institutions and its political divisions," and to produce such articles and products as may be found practicable and to sell the surplus. Of the 138,612 floral baskets made by

appellees in 1927, only 0.0238 of 1 per cent was sold to the State, its institutions and political divisions, while 99.9762 per cent was sold in the open market. It was the intention that all articles manufactured or produced by prison labor should be sold on State account—that is, to the State and its political divisions—and that if, in so manufacturing on State account, there should perchance be a surplus such surplus might be sold on the open market. The idea was that the bulk of the articles manufactured should be sold on State account, and that the surplus, if any, would be so insignificant that it would not come into competition with or affect free labor. It was not intended that the authorization to sell the surplus should give appellees the right to engage in a manufacturing business mainly for the purpose of manufacturing goods and merchandise for sale to the trade.

It was also contended that the State should be required to mark all baskets made by it "prison made," and that it should be enjoined from making and selling to the trade floral baskets if such baskets are not so marked. The statute bearing upon this question was chapter 264, Acts of 1901, page 618, section 1, and the court held it was inapplicable to State penal institutions, being applicable only to those purchasing prison goods and offering them for sale.

However, the decision of the lower court was reversed as being contrary to the law.

EIGHT-HOUR LAW—CONSTRUCTION—"WATERWORKS"—*People ex rel. S. J. Groves & Sons Co. (Inc.)* v. *Hamilton, Industrial Commissioner, Supreme Court of New York, Appellate Division (November 27, 1929), 238 New York Supplement, page 81.*—The New York labor law forbids the employment of labor for more than eight hours for all classes of employees except those engaged in farm and domestic service unless otherwise provided by law. Among the exceptions are "employees engaged in the construction, maintenance, and repair of highways and in waterworks construction outside * * * of cities and villages." (Labor law, sec. 3, and sec. 220, subd. 4, par. d.)

S. J. Groves & Sons Co. (Inc.) had a contract with the Hudson River District Regulating Co. for the construction of a dam on the Sacandaga River, the purpose of which erection was the control and regulation of river flow. The industrial commission ruled that the 8-hour day should constitute a legal day's work for the employees on this project.

The company appealed to the appellate division of the New York Supreme Court to review the decision of the commission, contending that this work came within the exception noted in the law as "waterworks construction." The court ruled that the term as used

in section 220 of the labor law did not relate to the work of river regulation. The court said:

The interpretation required by the law is that of ordinary use of the word waterworks in the communities of the State where waterworks are located. (Sutherland on Statutory Construction, sec. 242.) The language of section 220, subd. 4, of the labor law, comprehends only construction of waterworks outside cities and villages. It is obvious that within the contemplation of the legislature was only such waterworks as could be constructed under the law by cities and villages.

What is meant by "stove works," "powder works," "locomotive works," "gas works," are the grounds, buildings, machinery, and plant used to produce stoves, powder, locomotives, or gas. (People *v.* Haight, 54 Hum. 8, 7 N. Y. Supp. 89.) So "waterworks" in general parlance, when used by the lawmaking power, mean the grounds, waters, and structures necessary to prepare water for domestic uses and carry and distribute the same.

Regarding the interpretation of such laws the court quoted Mr. Justice Story, who said in U. S. *v.* Winn (Fed. Cas. No. 16,740, 3 Sumn. 209):

In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature.

The court confirmed the decision of the industrial commission, holding that the legislature did not mean "river-regulating work" construction when it used the term "waterworks construction."

EMPLOYERS' LIABILITY—ACCIDENT—ORDERS OF SUPERIOR—FAILURE TO OBEY INSTRUCTIONS—*Unadilla Valley R. Co.* v. *Caldine, Supreme Court of the United States (December 10, 1928), 49 Supreme Court Reporter, page 91.*—Harold E. Caldine was conductor of train No. 2, operated by the Unadilla Valley Railway Co. upon a track that passed through Bridgewater, N. Y. He had printed orders that his train was to pass train No. 15 in the Bridgewater yard, and that No. 15 was to take a siding there to allow No. 2 to pass. On the day of the accident after reaching Bridgewater, instead of waiting there as his orders required him to do, Caldine directed his train to go on. The consequence was that at a short distance beyond the proper stopping place his train ran into train No. 15, and he was killed.

Ernest Caldine, the administrator, brought an action against the railway company, alleging the collision was due to the negligence of the other employees and the station agent who failed to notify Caldine that No. 15 was near.

The trial court rendered a verdict in favor of Caldine, but on appeal the judgment was reversed by the appellate division of the Supreme Court of New York. The case was carried to the court of appeals by Caldine and the judgment of the lower court was reversed, affirming the judgment of the trial court for Caldine. The case was then appealed to the Supreme Court of the United States.

Mr. Justice Holmes delivered the opinion of the court reversing the judgment of the New York Court of Appeals. He said in part, as follows:

It seems to us that Caldine, or one who stands in his shoes, is not entitled as against the railroad company that employed him to say that the collision was due to any one but himself. He was in command. He expected to be obeyed and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he can not be heard to say that his subordinate ought not to have done what he ordered. He can not hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts.

It seems to us even less possible to say that the collision resulted in part from the failure to inform Caldine of the telephone [call] from train No. 15. A failure to stop a man from doing what he knows that he ought not to do hardly can be called a cause of his act. Caldine had a plain duty and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey.

EMPLOYERS' LIABILITY—ACTS OF EMPLOYEES—ASSAULT—COURSE OF EMPLOYMENT—*Horwitz et al.* v. *Dickerson, Court of Civil Appeals of Texas (January 9, 1930), 25 Southwestern Reporter (2d), page 966.*—Suit was brought by George Dickerson against Will Horwitz, individually, Horwitz Texas Theaters (Inc.), and Preston Amusement Co., the two latter being corporations, to recover actual and exemplary damages for an assault alleged to have been made upon him by Will Horwitz on the 10th day of November, 1928.

From the facts it appears that at the time of the assault there was in existence a strike of union motion-picture operators who had been employed in the theaters owned by the two corporations mentioned above and managed by Will Horwitz. Certain musicians employed in the same theaters organized a strike in sympathy with the motion-picture operators who were on strike. The musicians' local union No. 65 supplied a band to play, on a truck which the operators had employed. Banners were placed upon this truck, gratuitously advertising all prominent theaters in Houston as being fair to organized labor, except those under the management of Horwitz. While the truck was moving over the streets of Houston and the band playing

thereon, Horwitz procured eggs and threw them at the musicians, several of the eggs striking Dickerson, resulting in the alleged damage.

The Harris County district court rendered a judgment in favor of Dickerson and assessed damages. From this judgment the two corporations and Horwitz appealed to the Court of Civil Appeals of Texas, contending—

(1) That under the undisputed facts of this case they were, as a matter of law, not liable for the malicious acts of their agent, Horwitz, as such acts were clearly not performed within the scope of such agent's employment; (2) that, if they are in error as to the first contention, still the judgment as to them should be reversed, because the evidence raised the issue of provocation, and the court refused, upon defendants' request therefor, to submit such issue to the jury; and (3) that the verdict of the jury assessing $500 against defendants as actual damages for humiliation is excessive, no personal injury being shown.

The court sustained the first of these contentions, and in reversing the judgment said, in part:

It clearly appears from the evidence as a whole that the parade instigated by the striking motion-picture operators and musicians was intended as an affront to appellant Horwitz, and that Horwitz taking it as such became angry and made the assault as an individual, and that he was not, in making such assault, acting within the scope of his authority as general manager of the theaters.

If the servant, under the guise and cover of executing his master's orders, and exercising the authority conferred upon him, willfully and designedly, for the purpose of accomplishing his own independent, malicious, wicked, or wrongful purpose, does an injury to another, the master is not liable for the injury done. [Cases cited.]

The court also sustained Horwitz's contention that the question of provocation should be considered and held that if the jury found that the acts of Dickerson and the other musicians provoked the assault, then the damages should be reduced. The judgment against the two corporations was therefore reversed, and the judgment against Horwitz was reversed and the cause remanded for retrial.

EMPLOYERS' LIABILITY — ACTS OF EMPLOYEES — NEGLIGENCE — ASSUMPTION OF RISK—*Finney* v. *Banner Cleaners & Dyers (Inc.) et al., Court of Appeal of Louisiana (March 10, 1930), 126 Southern Reporter, page 573.*—The Banner Cleaners & Dyers of New Orleans was having its building repaired and remodeled. Charles Finney, a Negro 64 years of age, was engaged as foreman by the subcontractor who had a contract for repairing the roof on the building. It appears that Finney was at work in a public alley located at the

rear of the building, preparing tar and the necessary tools for the crew that was to go on the roof of the building, and had taken these tools and buckets from a building on the downtown side of the alley. Observing that there was a truck coming into the alley he stepped across the alley to what he considered a place of safety, placed the buckets on the ground, and stood with his back toward a double-solid gate, located on the Banner Cleaners & Dyers' property. When the truck was in close proximity to him, he was suddenly, violently, and without warning struck from the rear by this gate which one of the Banner Cleaners & Dyers' employees had opened, causing him to fall in front of the truck which ran over his left foot, fracturing three bones.

On the trial of the case by the civil district court, Parish of Orleans, judgment was rendered against Finney and the suit dismissed. Finney thereupon appealed to the Court of Appeal of Louisiana. On appeal Finney contended that—

As the employee of the defendant who opened the doors or gates knew that they opened outwardly and that the alley was a common one traversed by pedestrians and vehicles, he was guilty of negligence and carelessness in suddenly, without warning, and with force opening the door, through which he could not see, in disregard of the rights of those who might be using the alley, and therefore defendant is liable.

The Banner Cleaners & Dyers contended that—

It was not negligence on the part of its employee to open the doors or gates, as he could not foresee that anyone would be standing by them and that he did not owe the plaintiff any duty of anticipating his presence or that of the truck; that the plaintiff saw or should have seen the double-doors or gates and realized that they might be used at any moment, and having assumed a position of danger, he was guilty of contributory negligence which bars his recovery; and that plaintiff assumed the risk incidental to the use of the alley.

The court held that Finney was not guilty of contributory negligence as he had a right to assume that the doors would not suddenly, forcefully, and without warning be opened so as to knock him down. Neither did the court uphold the plea of assumption of risk, as the risk was not incidental to the nature of the work Finney was doing.

In concluding the opinion, reversing the judgment of the lower court, the court said in part as follows:

The plaintiff was lawfully in the alley. The defendant's employee knew that workmen were engaged in the repair and remodeling of the building and were frequently using the alley where they were preparing the material for their work. He also knew that the doors or gates swung outward into a narrow alley. Defendant's employee was therefore at fault in opening the doors suddenly with

force and without warning when he was unable to see if there was anyone passing or standing in front of the doors at the time. He failed to use such care and precaution as an ordinary prudent person should have exercised under the circumstances.

Defendant further contended that a reasonably prudent person could not have foreseen that a truck would be passing at the time that the doors were opened and that the plaintiff would be knocked into the path of the oncoming truck. It is immaterial that defendant's employee may not have foreseen or been able to foresee the particular consequences which followed his negligent act, "That the particular injurious consequence was 'improbable' or 'not to be reasonably expected' is no defense." (Payne *v.* Georgetown Lumber Co., 117 La. 983, 42 So. 475, 477.)

It is therefore ordered, adjudged, and decreed that the judgment appealed from be and it is annulled, voided, and reversed, and it is now ordered that there be judgment in favor of plaintiff, Charles Finney, and against the defendant Banner Cleaners & Dyers (Inc.) in the full sum of $1,363.50 with legal interest from judicial demand until paid.

EMPLOYERS' LIABILITY—ACTS OF EMPLOYEES—THIRD PARTY INJURED—MASTER AND SERVANT—*Nagy* v. *Kangesser, Court of Appeals of Ohio, Cuyahoga County (June 4, 1928), 168 Northeastern Reporter, page 517.*—Julia Nagy was injured on June 8, 1925, in the city of Cleveland, before the hour of 8 a. m., by an automobile driven by one Berg, who was en route to the business place of Kangesser where he was under employment as a collector. The terms of this employment were that during the hours between 8 a. m. and 5 p. m. while using his own automobile for that purpose (the one in which he was riding at the time of the accident) he was to act as collector for the company, and if circumstances were such that it was not feasible or possible for him to report before 5 p. m. and turn in the collections of money received, he was to retain the same and deposit them with Kangesser the next morning when he returned to work with his automobile. Following the accident Julia Nagy brought an action against M. H. Kangesser, the employer, and it was argued that Kangesser was liable under the doctrine respondeat superior, because at the time of the accident Berg had money in his possession and was performing his duty by proceeding to Kangesser's place of business not only for the purpose of resuming work but to return the slips of the day before and deposit the amount of collections.

The court of common pleas sustained a motion on behalf of Kangesser for a directed verdict, on the theory that the doctrine of respondeat superior did not apply, under the undisputed facts in the record. The case was taken to the Court of Appeals of Ohio. This

court affirmed the decision of the lower court and said, in part, as follows:

It is irrefutable that after 5 p. m. and before 8 a. m. of the following day there was no liability between the master and servant, because there was no business or contractual relationship existing between them, under the terms of the contract.

Now, inasmuch as the accident happened prior to 8 a. m., there could be no liability under the doctrine of master and servant, because the employee was not an employee in the performance of any duty in behalf of the master, unless it can be said that the employee is on his master's business while he is en route to his work to perform his duties. This position obviously is not tenable under the authorities, because the master can not be held liable unless the act in question is part of an actual duty connected with employment.

Continuing the opinion the ruling of the lower court was quoted, in part, as follows:

I think that there can be no question but that after Berg ceased his labors for the day, he was then what we might say his own boss from that time until he reported the next morning and started out on his day's labors for that day. There isn't any question but what, in the evening, after he quit work, he could use his automobile to go where he saw fit, yet he could have the money which he had collected that day with him, and until the next morning at 8 o'clock he could do as he liked and go where he liked, and the defendant would have no control over him until he reported at the store at 8 o'clock the next morning to be given cards for his day's labor.

The judgment of the common pleas court was therefore affirmed.

EMPLOYERS' LIABILITY—ADMIRALTY—ASSUMPTION OF RISK BY SEAMAN—SAFE PLACE TO WORK—*Engfors* v. *Nelson Steamship Co. et al.*, *Supreme Court of Oregon* (*September 17, 1929*), *280 Pacific Reporter, page 337*.—Gust Engfors, an employee of the Stout Lumber Co. of Oregon, on the 14th day of January was engaged in work on the steamship *Martha Buehner*. He was ordered to descend into the hold of the vessel to assist in placing lumber as it was delivered. In going from the place where he was then working to the ladder he walked along the hatchway coaming and slipped, fell into the hold—a distance of 15 feet—and received severe and permanent injuries. He proceeded to seek compensation, charging negligence on the part of the employer in the failure to provide a guard around the hatchway and in piling lumber on the deck too near the coaming. The facts show that only 6 or 8 inches were left between the lumber and the hatch coaming. These contentions were met by the employer, who alleged Engfors was negligent in attempting to proceed by the route he chose, that there was a safe, obvious, and convenient way

for him to have proceeded, and that he was fully aware of the risks involved.

The circuit court, Multnomah County, Oreg., found that the operator of the vessel failed to provide safety appliances required by the statute and failed to provide a safe place to work as described by the statute, and in view of these findings awarded $3,500 to the employee. The Nelson Steamship Co. appealed the case to the Supreme Court of Oregon, contending Engfors assumed the risk, relieving them of liability.

The question involved on appeal was the application of assumption of risk and contributory negligence, as the findings of facts by the lower court were binding upon the supreme court.

Chief Justice Coshow rendered the opinion of the court, and, regarding the assumption of risk by the employee, said in part as follows:

Assumption of risk is only correctly applied when an employee is held to assume the natural and ordinary risks of his occupation, and that it should never be said that he assumes the risk of his employer's negligence unless the risk is so apparent and obvious that the employee must have known and understood it or of such long standing that his appreciation and knowledge will be implied. He might be guilty of contributing to his own injury, but under the said employers' liability act that is not a complete defense. Contributory negligence will not prevent an injured employee from recovering damages; it may be used only to reduce the amount, or more accurately speaking, unless he is more guilty than his employer he will recover some damage. If it be that he assumed the risk, he can not recover at all. Under the Federal employers' liability act (45 U. S. C. A., secs. 51–59), when the injury is caused by the failure of the master to provide a safe place to work or safe appliances, the defense of assumption of risk can not be made.

He concluded the opinion by affirming the judgment of the lower court, as follows:

We conclude, after a thorough examination of all the authorities, that the findings of the learned circuit court support the judgment. It is impossible to reconcile all of the decisions with their various shades of difference regarding assumption of risk and contributory negligence, but it is our conclusion that plaintiff did not assume the risk of defendant's negligence in failing to place a suitable guard around the coaming of the hatchway and in failing to leave sufficient space for the workmen to pass around the hatchway in safety.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—CAUSAL CONNECTION—INJURY TO EYE—*Moseley* v. *Reading Co., Supreme Court of Pennsylvania (January 28, 1929), 145 Atlantic Reporter, page 293.*—De Witt Moseley was employed by the Reading Co. to clean the snow and ice from the frogs of the switches at Logan Station, Pa. An-

other employee, named Burke, was to work with him. The switches were cleaned by pouring on oil, which being set on fire melted the snow and ice, so that it could be shoveled or swept away.

The oil can provided for their use was defective, and Moseley refused to pour the oil from it. Thereupon the can was given to Burke, and the foreman directed him to use the can and Moseley to follow after and clean the switches with a shovel and broom. When they had been working about two hours the oil can suddenly exploded and was thrown violently back, striking Moseley, who was working some 15 feet away. He was knocked down and injured. Within two weeks after the accident a cataract practically blinded Moseley's right eye, which had been apparently normal before the accident.

He filed suit under the Federal employers' liability act (45 U. S. C. A., secs. 51–59), and the court of common pleas, Philadelphia County, Pa., rendered a verdict in favor of Moseley. The Reading Co. appealed to the Supreme Court of Pennsylvania, contending Moseley assumed the risk and that contributory negligence barred recovery. Regarding the first contention, the court said in part:

One answer to this contention is that plaintiff neither used the defective can himself nor worked at the point where it was used. Whether by working 15 feet away he assumed a risk so obvious and immediate that it would have been shunned by a reasonably prudent man was for the jury. Furthermore, it does not appear that the danger of explosion was obvious or imminent; in the absence of this the employee might rely on the superior judgment of the foreman. [Cases cited.]

In regard to the contributory negligence the court said:

While contributory negligence is no defense under the Federal statute, it was properly submitted to the jury in mitigation of damages. (See Fox et al. *v.* Lehigh Valley R. Co., 292 Pa. 321, 141 Atl. 157.)

Again, the defendant would under the Federal employers' liability act be liable to plaintiff for an injury sustained through the negligence of the coemployee, Burke. (Baumgartner *v.* Penn. R. Co., 292 Pa. 106, 140 Atl. 622; McDonald *v.* Pittsburgh & Lake Erie R. Co., 279 Pa. 26, 123 Atl. 591.)

The court continued the opinion affirming the judgment of the lower court, saying in part as follows:

The evidence was that plaintiff was burned and injured in the face and in and about the eye, while two specialists, one who had treated the injured optic and the other who had repeatedly examined it, expressed the professional opinion that the cataract resulted from the accident, and there was no opposing proof. The expert opinion was that the blow on the eye caused inflammation which blinded it. A cataract covers the sight with an opaque substance, and may result from an injury or otherwise, as from infection. In the instant case

there was ample proof of the injury, but none of any other producing cause. The circumstances corroborate the expert opinion; here a normal eye receives a blow and a burn, and in two weeks, without other cause, the sight is gone. The lay mind naturally connects the injury with the result, which fortifies plaintiff's contention.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—CAUSAL CONNECTION—LATENT DANGER—*Seaboard Air Line R. Co.* v. *Latham, Court of Appeals of Alabama (April 8, 1930), 127 Southern Reporter, page 679.*—Earnest Latham was a section hand working with a group of other employees under the supervision of a foreman cutting weeds, briars, and underbrush from the right of way of the Seaboard Air Line Railway Co. He was using in this service a grass blade called a scythe; while engaged in the line of his duty, and being unaware of its presence, he cut into a wasps' nest. The wasps being disturbed immediately attacked Latham and in his effort to escape he dropped or threw down the scythe and began fighting them. While so engaged he became entangled and tripped over the blade and was cut severely on the leg near the foot, which proved to be a permanent injury.

Suit was instituted under the Federal employers' liability act for damages resulting from the injury. Latham alleged that the railway's foreman in charge of the work and having supervision over him knew of the location of the wasps' nest and of his proximity thereto and with this knowledge failed to warn him of his approaching danger. The circuit court of Jefferson County rendered a verdict in favor of Latham and the railway appealed the case to the Alabama Court of Appeals, contending that an attack of wasps was a risk ordinarily incident to the service in which Latham was engaged and therefore the risk was assumed by him.

The court did not uphold this contention, saying that—

> Since it was the duty of plaintiff to cut the weeds and briars on defendant's right of way under the orders of the foreman, it was the duty of defendant to use reasonable care to protect plaintiff from danger in the execution of the orders. If defendant's foreman had not been advised of the presence of the wasps and therefore of the danger incident to the service, defendant could not be held liable. But with a knowledge of the danger the foreman allowed plaintiff to proceed with the carrying out of his order in the usual way of doing such things when if plaintiff had been warned, the duty could have been performed in such way as to minimize if not entirely remove the danger. The evidence here presents no ordinary risk, but is extraordinary in that it lies outside of the sphere of the normal and one which might have been obviated by the exercise of reasonable care on the part of defendant's foreman.

The counsel for the railway also argued that owing to the nature of the employment and character of the work there was no duty resting on the foreman to determine if there were wasps ahead before allowing Latham to proceed with his work. Regarding this the court said that "this may be conceded, but * * * the foreman having knowledge of the latent danger incident to a wasps' nest hidden in the bushes was under a duty to warn the servant of its existence, * * *."

It was next contended that the negligence of the foreman, if any, was not the proximate cause of the injury, as the chain of action was broken by an act of Latham.

The court did not agree with this contention, saying in part as follows:

Under the facts in this case it is clear that the sting of the wasps was primarily caused by the negligent act of defendant's foreman, who with knowledge of the facts failed to warn plaintiff of his danger. It is equally clear that what followed was a sequence of the attack of the wasps on plaintiff.

The plaintiff was among the weeds and brush using a scythe which consisted of a long, sharp, hooked blade fastened to the end of a stock or handle, itself bent in a peculiar manner and with two handles sticking out from its side. Through the negligent act of defendant's foreman the plaintiff was suddenly attacked by wasps enraged by the destruction of their nests. In his frenzy to avoid the danger plaintiff dropped the scythe in order to fight the wasps. He stumbled over the scythe and was injured. Such injury was the result of a continuing sequence foreseeable as a result of the negligent act.

The judgment of the circuit court was therefore affirmed.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—AWARD—*Johnson* v. *Boaz-Kiel Const. Co., St. Louis Court of Appeals (January 7, 1930), 22 Southwestern Reporter (2d), page 881.*—On April 29, 1926, Charlie Johnson sustained injuries while in the employ of Boaz-Kiel Construction Co., engaged in erecting an apartment building in the city of St. Louis. Johnson was working on the thirteenth floor engaged in laying concrete. There were certain places on the floor where the concrete was soft and soggy, due to the fact that the concrete was deeper at these particular points than at other places. The concrete was distributed by means of a chute and it frequently became necessary to move one section of the chute from one section of the floor to another. At the time Johnson was injured the foreman directed him and another employee to move one section of the chute. Johnson remonstrated with the foreman by telling him it was too much for two men to carry, but the foreman

told him to go ahead, that they could move it. Whereupon Johnson and the other servant proceeded with it toward the place where it was to be located. In moving the chute Johnson had to walk backwards; in so doing he stepped upon one of the soft areas and on account of the extreme weight of the chute his foot sank down which caused him to fall, and the chute fell upon him, injuring him.

Johnson filed suit against the employer and the St. Louis circuit court rendered judgment in his favor. The employer appealed to the St. Louis court of appeals contending Johnson assumed the risk and also that he was contributorily negligent.

The court held that Johnson could not be convicted of contributory negligence because he was walking backward with an extremely heavy load under the orders and directions of his foreman and, even though he knew that there were such soft places in the floor, the order of the foreman (after Johnson protested) was equivalent to assurance to the employee that such foreman's orders could be observed with reasonable safety. The danger was therefore not so obvious as to render Johnson guilty of contributory negligence. Regarding the assumption of risk by Johnson the court said "under the Missouri rule a servant only assumes the risks that are incident to the employment."

The court also found no error in the instructions given by the lower court and held that the award was not excessive. The judgment of the circuit court was therefore affirmed.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—RES IPSA LOQUITUR—*Chicago Mill & Lumber Co.* v. *Jett, Circuit Court of Appeals, Eighth Circuit (May 6, 1929), 32 Federal Reporter (2d), page 976.*—D. S. Jett was employed by the Chicago Mill & Lumber Co. as engineer at night, coming on duty about 6 o'clock in the evening. Two engines were installed in the mill, one a large Corliss engine, which furnished power and light for the mill, and a small, light engine used principally to furnish light for the plant at night. The large engine was generally shut off along toward midnight and the light engine used. On April 20, 1926, Jett came on duty and found the large engine running. At midnight he turned it off and used the light engine until about 4.30 when he again started the large engine. When the engine started the flywheel burst and Jett was killed.

Alice E. Jett, the administratrix, filed suit in the District Court of the United States for the Eastern District of Arkansas, alleging negligence on the part of the company in allowing parts of the engine to become corroded and improperly lubricated, causing the engine to

become dangerous. The lumber company answered by alleging Jett was guilty of contributory negligence and "was familiar with the use of the machine which he operated at the time of his death, and alleged that he assumed the risk incident to the use thereof."

The district court rendered a verdict in the sum of $3,000 for the widow and the company appealed to the Circuit Court of Appeals. This court affirmed the decision of the lower court and in the course of the opinion said in part as follows:

There is substantial evidence in the case to the effect that on the Friday morning previous the belt had grease on it and had failed to start the governor; that Wyse started the belt and governor by hand; and that it worked all right after being so started. There is evidence that Wyse reported the incident to the assistant master mechanic, one Shiffler, but that nothing was done about the matter. There was no evidence as to the exact time when the belt became greasy prior to Friday morning, or that the belt was in such condition that the grease was apparent or could be easily discovered.

There is no evidence that Jett discovered that the belt was greasy, or that it had ever failed to work with him before the time of the accident. We conclude, therefore, that there was substantial evidence of the negligence of the defendant, sufficient to take the case to the jury on that ground. There was probably in the circumstances also evidence of contributory negligence on the part of Jett in not discovering and remedying the condition of the belt. * * * Contributory negligence, however, in the State of Arkansas is not a defense but merely reduces damages, the rule of comparative negligence prevailing in that jurisdiction. Now, the fact that the accident caused the death of Jett, taken in consideration with his age and earning capacity and that the verdict was only for $3,000, indicates that the jury took into consideration the question of comparative negligence and made due allowance for the contributory negligence of which Jett may have been guilty.

We now come to consider the question of assumption of risk, * * *. Now, it must be kept in mind that Wyse was the day man and Jett was the night man; that the large Corliss engine would be usually running when Jett came on duty and turned off again along toward midnight; that the Corliss engine was running when Jett came on duty on the night of the accident; and that the faulty condition of the belt in question would be likely to produce its effect only on the starting of the engine. We think we can not say as a matter of law that Jett had notice of the faulty condition of the belt before attempting to start the engine early Tuesday morning, April 21st. * * * The assumption of risk against hidden defect or dangers requires notice a reasonable time before the accident.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—EVIDENCE—INFERENCE—SAFE PLACE AND APPLIANCES—*McClary* v. *Great Northern R. Co.*, *Supreme Court of Iowa* (*November 21, 1929*), *227 Northwestern Reporter, page 646.*—On September 15, 1927, one McClary suffered

an injury while in the employ of the Great Northern Railway Co. He was engaged in the operation of a kerosene engine used for the purpose of hoisting coal into elevated bins. As a condition to starting the engine it was requisite that it be preheated. This was accomplished by the use of a torch set upon a bracket and under a cone. The torch was lighted by pouring a small quantity of denatured alcohol into a saucer and igniting it with a match. When the engine was sufficiently heated to generate gas from its kerosene contents the torch was extinguished by the turning of a screw at the end of the torch pipe.

Immediately after the lunch hour on the day of the accident, McClary proceeded to fire the engine as outlined above. While pouring the alcohol into the saucer, apparently in the absence of fire or spark in any form, an explosion occurred in the alcohol can, from which the injuries resulted.

McClary filed a claim under the employers' liability act, claiming a right of recovery on the negligence of the railroad in furnishing him with defective and dangerous instrumentalities and on failure to instruct or warn him regarding this dangerous condition. The railway company used as a defense: (1) A general denial; (2) contributory negligence; (3) assumption of risk.

The district court in Woodbury County rendered a verdict for McClary, and accepted his theory that the explosion was due to a leak at the joint of the torch pipe and his contention that the defense of assumption of risk as pleaded by the railway company was only the form of assumption of risk which simply negatives negligence, adding nothing to the defense of a general denial. (Cases cited.)

The railroad company contended the court failed to instruct the jury properly regarding the defense of assumption of risk; that its motion for a directed verdict should have been sustained; and that the evidence was not sufficient to warrant the verdict. The case was appealed to the Supreme Court of Iowa.

In considering the defense of assumption of risk made by the company the court said:

Turning to the answer of the defendant, we find that it charges specifically that the plaintiff did know of all the defects of instrumentalities of which he complains, and that he did know, or ought to have known, of the deficiencies and faults of method of which he complains, and that he appreciated, or ought to have appreciated, the risk and danger therefrom. In other words, it did plead assumption of risk in its true sense. It was, if proven, a complete affirmative defense. There was evidence in support of it. The court submitted to the jury only that form or phase of assumption of risk which constitutes a mere negation of negligence. In so doing the court misconceived the purport of defendant's affirmative defense and deprived it wholly of such defense.

Next the court considered the evidence supporting the theory that the flame causing the explosion was at the leaking joint of the torch pipe. It said:

It appears to be conceded on both sides that the explosion could not have occurred in the absence of a flame as its immediate cause. Only two possibilities are indicated for the presence of such a flame. One is that the plaintiff had lighted his match while the alcohol can was in his hand; the other is that there was a flame burning at a leaking joint of the torch spout. The alcohol can had no cork or stopper, either at its top or at its spout. It was attended therefore with the halo of vapor, which its volatility would generate. The plaintiff testified that he had not lighted the match. He insists upon the inference, therefore, that the explosion must have been caused by a flame at the leaking joint.

One difficulty confronting him was that it required 100 pounds of air pressure to keep the torch burning. This pressure filled the pipe with gas. The release of the air pressure was the method of extinguishing the torch. The air being released, the torch became at once empty. Apparently the same process that extinguished the main flame of the torch necessarily extinguished the flame at the leaking joint as well.

Moreover, the final word of the testimony lacked value. The next result of it was that, if there be sufficient air pressure, the flame might burn for an hour or more. There was no proof of sufficient air pressure. On the contrary, the proof was that the air pressure had been released. The net result is thereby further diluted and reduced to this syllogism: The air valve might be clogged; if clogged, some air pressure might remain; if sufficient air pressure remained, the flame might burn at the leaking joint. The same hypothesis would make it burn at the spout. It was not burning at the spout.

The court therefore reversed the judgment of the district court and granted a new trial on the ground that the evidence was insufficient to sustain the verdict.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—EVIDENCE—INTERSTATE COMMERCE—*Delaware, L. & W. R. Co.* v. *Koske, Supreme Court of the United States (February 18, 1929), 49 Supreme Court Reporter, page 202.*—John Koske was employed in the roundhouse and coal-chute yard of the Delaware, Lackawanna & Western Railroad Co., at Hoboken. His work was to put sand into the boxes on engines and to turn switches for them. On June 4, 1925, at 4 o'clock in the morning, while alighting from an engine in the course of his employment, he fell into a hole and was injured. He sued the railroad company under the employers' liability act in the circuit court of Hudson County, alleging that the railroad company negligently "permitted an open, uncovered, and unlighted and dangerous hole to exist between certain parts of the tracks." Koske had worked for the railroad company for about 11 years, and throughout the

period of his employment the yard was drained by a shallow open ditch passing under the ties and for a short distance longitudinally between the tracks.

The circuit court gave a judgment in favor of Koske upon the ground that the railroad company was negligent in maintaining the open drain which caused the injury. This decision was affirmed when taken to the Court of Errors and Appeals of the State of New Jersey. The railroad carried the case to the Supreme Court of the United States, contending that it should not be held liable for an injury resulting from an open drain in its yard.

Mr. Justice Butler delivered the opinion of the court and regarding the railroad's liability under the Federal employers' liability act, said:

The Federal employers' liability act permits recovery upon the basis of negligence only. The carrier is not liable to its employees because of any defect or insufficiency in plant or equipment that is not attributable to negligence. The burden was on plaintiff to adduce reasonable evidence to show a breach of duty owed by defendant to him in respect of the place where he was injured, and that in whole or in part his injuries resulted proximately therefrom. And, except as provided in section 4 of the act, the employee assumes the ordinary risks of his employment; and when obvious or fully known and appreciated, he assumes the extraordinary risks and those due to negligence of his employer and fellow employees.

He concluded the opinion of the court by saying, in part, as follows:

The record contains no description of the place where plaintiff was injured other than that above referred to. Fault or negligence may not be found from the mere existence of the drain and the happening of the accident. The measure of duty owed by defendant to plaintiff was reasonable or ordinary care having regard to the circumstances. * * * The evidence is not sufficient to warrant a finding that defendant was guilty of any breach of duty owed to plaintiff in respect of the method employed or the condition of the drain at the time and place in question.

The evidence requires a finding that he had long known the location of the drain and its condition at the place in question. The dangers attending jumping from engines in the vicinity of the drain, especially in the dark, were obvious. Plaintiff must be held to have fully understood and appreciated the risk.

The judgment was therefore reversed.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—INJURY IN COURSE OF EMPLOYMENT—GOING TO AND FROM WORK—*Webre v. Caire & Graugnard, Court of Appeal of Louisiana (May 27, 1929), 123 Southern Reporter, page 168.*—John Webre was employed by Caire & Graugnard in their sugar mill in the Parish of St. John the Baptist

in Louisiana. The employees in the mill worked in 6-hour shifts and Webre's brother was foreman of the gang in which Webre worked. On the day of the accident Webre, while on his way to the mill, met his brother, who advised him there was no work for him to do on this "shift" but to return for the next six hours. Thereupon the plaintiff and his brother left the premises entirely and went to a funeral.

While returning to the mill, but before they had reached the mill premises, a sugarcane train—operated by the mill—came along from their rear, going towards the factory. Although the rules of the company prohibited other than trained employees from riding the trains and although Webre's brother at that particular time instructed all those who were with him that they should not go on the train, Webre attempted to board it and in doing so his foot slipped under one of the wheels and was cut off.

He sued for damages, which were denied by the twenty-fourth judicial district court, Parish of St. John the Baptist, La., and he appealed the case to the court of appeal contending that he did not hear the instruction not to ride upon the train. The employer met this contention by claiming that whether or not the instruction was heard it was manifest that there was no reason whatever, so far as Webre's employment was concerned, for him to board the train and that to do so exposed him to a danger in no way incidental to or connected with his employment.

Judge Janvier delivered the opinion affirming the lower court, saying in part as follows:

> We can not see how it can be held that the injury arose out of the employment, or was in any way incidental thereto. The employer had no control whatever over plaintiff's movements. Webre had voluntarily left the premises and gone off on business of his own. The employer had nothing whatever to do with his movements until his return to the premises.
>
> In practically all of the cases in which compensation was allowed for injuries sustained while going to or returning from work, the transportation was furnished by the employer, or the injury was sustained so near to the work that it could be reasonably said that it resulted from a danger incidental to the employment itself.
>
> We therefore believe that the finding of the trial court, that plaintiff was not entitled to compensation, is correct for two reasons:
>
> First, because the injury did not arise out of nor as an incident to the employment, and,
>
> Second, because the cause of the injury was the voluntary assumption by the plaintiff of an unnecessary risk entirely apart from his employment.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—INTERSTATE COMMERCE—NEGLIGENCE—*Feurt* v. *Chicago, R. I. & P. R. Co., Supreme*

Court of Minnesota (November 1, 1929), 227 Northwestern Reporter, page 212.—The Chicago, Rock Island & Pacific Railway Co. operates interstate railway lines between Chicago, Minneapolis, and Kansas City. A few miles west of Montpelier, Iowa, its tracks are carried across a gully by a bridge about 140 feet in length. Gabe Feurt, a bridge carpenter employed by the railway company, was engaged in laying a walk between the tracks across the bridge. About 3.30 in the afternoon of July 19, 1928, while Feurt and his three companions were at work on the bridge, the whistle of an east-bound freight train announced its approach. They got out of its way and Feurt went down the other track for a drink of water near the west end of the bridge. He took his position facing southwesterly, upon the north end of the west-bound track. As he stood there watching the freight train go by a passenger train approached from the east at about 45 miles per hour. When within about 800 feet, it gave the customary warning to the carpenters and when within 400 feet of the bridge, observing that Feurt did not change his position, gave the stock alarm whistle; this it kept up until Feurt was struck. The engineer had applied the emergency brakes when 200 feet away but was unable to stop the train before striking Feurt.

A claim, based upon the Federal employers' liability act (45 U. S. C. A., secs. 51–59), was filed by Jennie Feurt as administratrix. The district court rendered a verdict for the plaintiff, Feurt, and the railway company appealed the case to the Supreme Court of Minnesota.

The fact that Feurt was engaged in interstate commerce as the servant of the railway company when he met his death was not disputed. The two questions involved were (1) the negligence of the railway company and (2) the assumption of the risk by Feurt.

In discussing the first question and the duty of Trott, the engineer, the court said, in part, as follows:

In our judgment the evidence neither shows nor permits the inference that defendant was negligent. One in charge of a railroad train is not expected to slow down or stop when employees of the railroad or others are discovered on or too near the track, but he is expected to use the means at hand to warn the one exposed to peril. Here Trott did give such warning incessantly and in the most pronounced form. No ordinary person, observing Feurt in the position he was, where but a single step, not requiring half a second of time, would have placed him in safety, could have anticipated that the piercing stock alarm whistling would not have attracted his attention in time for his escape. But we think Trott did more. When 200 feet from Feurt an emergency stop was made, and there is no testimony that it was not made as quickly as it was possible to make a stop with proper equipment.

The court continued the opinion, saying:

The undisputed facts, viewed from another legal ang'e, would seem to lead to the conclusion that as a matter of law Feurt assumed the risk in taking the position he did take in the path of the passenger train. He was an experienced employee. He knew that, as to the employees working about tracks, approaching trains gave only the customary warning whistle and were not expected to slow down or stop. When, therefore, he partly turned his back to the only direction from which a train might come, with knowledge and appreciation that the noise and clatter of the passing freight train interfered with his hearing, he assumed the risk arising from the failure of the usual warnings to reach him. Assumption of risk, if established, is a defense in this case, where the injury and death was not due to defendant's violation of any statute enacted for the safety of employees. [Cases cited.] And under the facts of this case the contributory negligence of Feurt may also be held the sole proximate cause of his death.

The order of the district court was reversed and judgment entered in favor of the railway company.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—MASTER AND SERVANT RELATION—NEGLIGENCE—*Le Blanc* v. *Sturgis, Supreme Judicial Court of Maine (November 12, 1929), 147 Atlantic Reporter, page 701.*—Frank Sturgis was in the steam sawmill business at a place called Grindstone, Me. He personally directed the work in his mill and also was sawyer. Peter Le Blanc was marker in the mill and another employee performed the duties both of fireman and engineer. On December 1, 1928, Le Blanc, then standing near a circular saw, was ordered by Sturgis to assist him in turning the saw. Le Blanc obeyed the order and was injured due to Sturgis's failure to have the steam shut off from the engine.

The case was tried in the supreme judicial court, Oxford County, where nonsuit was imposed and exception was taken, which brought the case to the Supreme Court of Maine.

The court sustained the exceptions, saying in part as follows:

The relation of master and servant did not cease to subsist, because the defendant assisted in the performance of the manual labor necessary to execute his order.

True, it is not in evidence that defendant let on the steam; but it was on, and the giving of the order to turn the saw, when the defendant, either from his experience must have known, or by ordinary forethought or reasonable care could have known, that, the engine being under steam pressure, performance of the order would be attended with grave danger, would warrant conclusion by the jury that the defendant was negligent.

A workman, merely by his contract of employment, does not assume the risk of accident caused by the negligence of his employer.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—NEGLIGENCE—*Donahue* v. *Chicago, M., St. P. & P. R. Co., Supreme Court of Minnesota (January 10, 1930), 228 Northwestern Reporter, page 556.*—Thomas C. Donahue, an experienced trainman, having completed his day's work, boarded the engine of a passing freight train for the purpose of returning home. There was a rule forbidding employees other than those engaged in operating the train from riding on engines, but the engineers did not enforce this rule against employees who were leaving the yard to go home. Donahue knew that the train would not stop at the depot, but would stop a few hundred feet beyond it. He also knew that a heavy snow removed from the track by snowplows or flangers formed a ridge along the side of the track. With no duties to perform and solely for his own convenience, he jumped from the engine near the depot while the train was in motion and fell under the wheels of the next car and was so badly injured that he died at the hospital six or seven hours later.

The widow brought action under the Federal employers' liability act (45 U. S. C. A., secs. 51–59) to recover damages for his death alleged to have been caused by the negligence of the railway company. The district court for Dakota County rendered a verdict in favor of the widow. Thereupon the railway company appealed the case to the Supreme Court of Minnesota, contending that the conceded facts showed as a matter of law that the relation of master and servant did not exist between Donahue and the railway company at the time of the accident. In regard to this the Supreme Court of Minnesota said:

If the record shows as a matter of law that the relation of master and servant did not exist at the time of the accident, plaintiff had no cause of action and could not recover. But we find it unnecessary to determine that question, for we are unable to escape the conclusion that Mr. Donahue assumed the risk incident to alighting at the place and under the circumstances in which he attempted to do so.

Mr. Donahue had taken transfer trains over this same track daily for a long period, and was perfectly familiar with the situation and conditions. * * * Conceding that he was in the course of his employment while returning from the yard on this train and that defendant was negligent in failing to remove the ridge of snow at the side of the track, yet the undisputed facts compel the conclusion that he assumed the risk incident to getting off the train at the place where, simply for his own convenience, he chose to alight. [Cases cited.] Most of the cases involving the question of assumption of risk are cases in which the employee was engaged in performing duties which his employment required him to perform. But the rule applies with greater force where an employee with no duties to perform needlessly exposes himself to a known danger; or where he has the choice of a safe way or of a dangerous way to leave the employer's premises, and he voluntarily selects the dangerous one.

The judgment of the district court was therefore reversed.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—NEGLIGENCE—PROXIMATE CAUSE—*Werling* v. *New York, C. & St. L. R. Co.* (*October 3, 1929*), *Appellate Court of Indiana, 168 Northeastern Reporter, page 42.*—Frank M. Werling was conductor of one of the trains of the New York, C. & St. L. R. Co. between Fort Wayne and Chicago. Werling met his death on the night of May 23, 1924, when he went out the front door of the caboose, which rested in position on a bridge where the train stopped. The deceased was familiar with the surrounding conditions, as he had been a freight conductor running between Fort Wayne and Chicago for the past 25 years. It was not known what his purpose was in going out of the caboose or whether his death resulted from falling or jumping or being pushed into the river.

The widow brought action under the Federal employers' liability act, alleging that the death of her husband was due to the negligence of the company in constructing and maintaining the bridge.

There was a trial by jury, and the railroad company requested the court to give a peremptory instruction in their favor. This motion was sustained, and the jury rendered its verdict for the company. The motion for a new trial was overruled, and the widow appealed the case to the Appellate Court of Indiana, alleging that—

The court erred in overruling her motion for a new trial, presenting that the verdict of the jury is not sustained by sufficient evidence, that it is contrary to law, and that the court erred in sustaining appellee's motion to instruct the jury to return a verdict for appellee.

Appellant contends that she has made her cause in regard to the three essential elements involved in this appeal, which are that the bridge was negligently constructed and maintained, that such construction and maintenance was the proximate cause of decedent's drowning, and that the condition of the bridge on the night of his death and the peculiar location of the caboose thereon were not risks appreciated by the decedent at the time he stepped from the caboose and consequently were not risks assumed by him at the time he engaged to work for appellee or during any of the time he worked for it.

Appellee contends that the decedent assumed the risks and that, wholly aside from the question of the assumption of risk, the proximate cause of decedent's getting into the river is wholly conjectural.

The decision of the lower court was affirmed, the court saying in part as follows:

It is left purely in the realm of conjecture as to whether he stumbled and fell from the platform, or whether he tried to alight and get off the bridge and missed his footing or his handhold. There is no evidence to show that he did not know where he was.

Under the Federal employers' liability act (45 U. S. C. A., secs. 51–59), decedent assumed all the risks ordinarily incident to his employment and also assumed the risks of any defects in the place where he worked that existed long enough for him to have knowl-

edge of those defects or existed long enough so that with ordinary care he could discover such defects; that is to say, assumption of risk is a complete bar to an action under the Federal employers' liability act.

And this is the law, notwithstanding the fact that at the time of his injury he failed to appreciate or recollect the danger.

Where the evidence leaves to guesswork and speculation the proximate cause of the injury, a verdict should be directed. The court did not err in directing a verdict.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—NEGLIGENCE—SAFE PLACE TO WORK—*Los Angeles & Salt Lake R. Co.* v. *Shields*, *Circuit Court of Appeals, Eighth Circuit* (*May 11, 1929*), *33 Federal Reporter* (*2d*), *page 23*.—Thomas Shields was employed as a mucker in a tunnel of the Los Angeles & Salt Lake Railroad Co. The company was widening the tunnel to accommodate two main tracks instead of one, and Shields was to help in removing the débris and to do such other work as he might be called upon to perform. Shields was ordered by O'Brien, his foreman, to go into a new section to scale off an uneven place in the roof with the pick so that supporters and proper timbers for the roof might be put in. He asked O'Brien if the roof was safe, and was advised "You needn't be afraid * * * I examined her and she is just fine." He began to use his pick as instructed and after a few minutes a part of the roof just behind him fell, struck him, carried him down, fractured his lower vertebrae, and caused permanent paralysis in both legs.

He filed suit in the United States District Court for the District of Utah and the court rendered judgment in his favor. The company appealed to the Circuit Court of Appeals, contending that the evidence failed to disclose that they were guilty of any negligence and that Shields was injured as a result of a risk which he assumed. In affirming the decision of the lower court the Circuit Court of Appeals said, in part:

The main controversy is one of fact. O'Brien was an experienced miner. He testified that he inspected the roof in the usual way by sounding, while appellee was away looking for a pick, that from his inspection he believed the roof was safe and told appellee so on his return, and that the roof did not sound drummy. * * * There was, we think, an issue, under the testimony, whether O'Brien tested this roof by sounding, and if he did, the further issue whether in doing so he made a reasonably careful test; and those issues, in our opinion, were properly submitted to the jury. A temporary timber with a cap would have held in place the part that did fall. O'Brien said he could have put in the temporary timber, but he did not think it was needed, that they timbered bad ground for safety, but he did not considered this bad ground. He knew the roof had been exposed for several days. On that the testimony was that the

excavation of the room had been finished for at least eight days, and passing trains and exposure tended to loosen the roof. He further said he was not in the habit of leaving so large a space untimbered in prosecuting the work. Appellee relied on O'Brien's assurance that the place was safe, and there is nothing which tends to show that the dangerous condition was plainly observable or that he was aware of it. He therefore had the right to assume that his employer had taken proper care for his safety.

EMPLOYERS' LIABILITY — ASSUMPTION OF RISK — OVEREXERTION — PREEXISTING CONDITION—*Sweeney* v. *Winebaum et al., Supreme Court of New Hampshire (February 4, 1930), 149 Atlantic Reporter, page 77.*—Jeremiah Sweeney, administrator, brought action against Harry Winebaum for negligently causing the death of an employee. The employee died as the result of a strain sustained, in the course of his employment with Winebaum, while assisting in carrying a Frigidaire box weighing 220 pounds up a flight of stairs. The employee, a man of normal intelligence, was 20 years old, about 6 feet tall, weighed 116 pounds, and at that time was suffering from tuberculosis. Three men assisted in carrying the box up the flight of 18 stairs.

The employer contended that the employee assumed the risk, and the superior court, Rockingham County, upheld this contention and rendered a verdict in favor of the employer. The case was appealed to the Supreme Court of New Hampshire, where the decision of the lower court was affirmed. The court said in part as follows:

The ordinary manner of carrying a heavy article like the box up a flight of stairs was attended with no dangers not known or apparent to one of normal intelligence. It is too common and simple an operation to call for warning and instruction to such a person, and it is not to be said that one of the age of 20 and being normally intelligent is so immature that his appreciation of the danger may not be assumed. Instruction and special experience are not necessary to tell him that in the undertaking there will be some irregularity of progress and some change of balance and weight with more or less abruptness. The situation makes this obvious to anyone giving the matter any thought and attention, and there was no danger of which it can be said the defendants should have informed or warned the intestate. The evidence discloses nothing to show that the intestate did not appreciate all the risk he ran in doing the work as well and as fully as the defendant.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—RAILROAD COMPANY—PROXIMATE CAUSE—*Baltimore & O. S. W. R. Co.* v. *Beach (October 9, 1929), Appellate Court of Indiana, 168 Northeastern Reporter, page 204.*—Ray Beach, an employee of the Baltimore &

Ohio Southwestern Railroad Co., was injured on January 21, 1925. Beach was traveling with Rowe, the company's foreman of signal maintenance, in the line of their duties over the company's road between Cumminsville and East Norwood on a motor car operated by Rowe. The motor car was being operated at a speed of about 30 miles an hour when a dog came upon the track and Rowe, being unable to stop the car, ran over the dog, causing the car to be derailed and Beach to be thrown beneath the car and injured.

Beach brought action against the Baltimore & Ohio Southwestern Railroad Co. and received a verdict in the Jennings circuit court. The case was then carried to the Appellate Court of Indiana, where an objection to Beach's complaint was overruled. In speaking of this objection, the court said:

Objection to the complaint is twofold: (1) That appellee assumed the risk incurred by reason of Rowe's operation of the car at the high rate of speed; and (2) that the averments of the complaint show that the appearance of the dog on the track at the time was the sole proximate cause of the injury of which complaint is made. There is no merit in either of these objections.

The facts averred affirmatively show that the risk was not assumed by appellee, for it is expressly averred that appellee had no control of the car on which he was being carried at the time; that the car was in control of and being operated by appellee's foreman. It does not appear that appellee at the time knew that the car was being operated at an excessive rate of speed; but, if he had become aware of such fact, it would have availed him nothing, for he was without authority to control the speed of the car, and it would have been impossible for him to have alighted from the car at that time.

After considering other questions regarding the evidence and the filing of a bill of exceptions, the court ordered the decision of the lower court affirmed.

EMPLOYERS' LIABILITY—CHILDREN UNLAWFULLY EMPLOYED—CONSTRUCTION OF STATUTE—*Plick et al.* v. *Toye Bros. Auto & Taxicab Co., Supreme Court of Louisiana (July 8, 1929), 124 Southern Reporter, page 140.*—Frank Adams was killed in the city of New Orleans while employed as a chauffeur for the Toye Bros. Auto & Taxicab Co. He was 20 years old at the time of his employment and death. The parents of Adams brought action under the employers' liability act (Act No. 20 of 1914, as amended). The Court of Appeal of Louisiana affirmed a judgment for the taxicab company and the parents took the case to the Supreme Court of Louisiana for review. The lower court upheld the contention of the company that the employment of Adams did not come under the employers' liability act because of a provision in that act to the effect that it was

not applicable to employees of less than the minimum age prescribed by law for the employment of minors in certain occupations, and because of an ordinance in New Orleans requiring one acting as a chauffeur to be 21 years of age.

The section of the employers' liability act referred to (Act No. 20, 1914, as amended by Act No. 85 of 1926) reads in part as follows:

Any employee of the age of 18 and upwards engaged in any trade, business, or occupation * * * that may be determined to be hazardous under the operation of paragraph 3 of section 1, shall himself exercise the right of election or termination or waiver authorized by this section. Such right of election or termination or waiver shall be exercised on behalf of any employee under the age of 18 by either his father, mother, or tutor, or if neither of these can readily be gotten to act, then by the court. *Provided*, That this act shall not apply to employees of less than the minimum age prescribed by law for the employment of minors in the trades, businesses or occupations specified in paragraph 2 of section 1, or that may be determined to be hazardous under the operation of paragraph 3 of section 1.

The question involved on appeal was whether the employment of minors less than the minimum age prescribed by law as used in the employers' liability act included minors employed in violation of a city ordinance. The court held that it did not include such minors, saying in part as follows:

There is no State law prohibiting a minor 20 years of age from seeking employment or being employed as a chauffeur to drive a taxicab engaged in the business of transporting people for hire. The fact that one is so employed in violation of a municipal ordinance does not so affect the contract of employment as to place the one employed outside of the employers' liability act.

The judgment of the court of appeal was therefore annulled.

On application for rehearing filed 14 days later the Supreme Court of Louisiana ruled the application was filed within the time allowed, as Act No. 223 of 1908, allowing 14 days in which to apply for a rehearing, superseded the Act No. 15 of 1900. However, the rehearing was denied as the question whether the occupation was hazardous was left open for decision by the court of appeal when the case was remanded for further proceedings.

EMPLOYERS' LIABILITY—CHILDREN UNLAWFULLY EMPLOYED—CONTRIBUTORY NEGLIGENCE—FRAUD—*Anderson Manufacturing Co. (Inc.)* v. *Wade, Supreme Court of Mississippi (December 17, 1928), 119 Southern Reporter, page 313.*—Charles Wade brought an action in the circuit court of Hinds County, Miss., against the Anderson Manufacturing Co. (Inc.), to recover damages for injuries received

by him while in the employ of the company and caused by its alleged negligence. He recovered judgment in the sum of $3,700 and the company appealed to the Mississippi Supreme Court, alleging contributory negligence on the part of Wade and also fraud in regard to his being employed in violation of the child-labor statute.

At the time of the injury Wade was a minor, 15 years and 9 months of age. The Mississippi child-labor statute provided, among other things, that minors between the ages of 14 and 16 years were prohibited from being employed except upon an affidavit of parent or guardian. Wade claimed the right to recover for his injury under this statute, as he was employed without being required to produce an affidavit as required by the statute.

Judge Anderson, in delivering the opinion of the court, cited a decision of the Louisiana Supreme Court in the case of Flores *v.* Steeg Printing & Publishing Co. (78 So. 119), holding—

That a child between the ages of 14 and 16, employed without the production of the required affidavit, was chargeable with contributory negligence in a case where the evidence tended to show he was guilty of such negligence—not negligence in seeking and accepting the employment, but negligence on his part in contributing to and bringing about the specific act which immediately caused his injury.

The court found ample evidence to go to the jury tending to show that Wade, in taking hold of the saw as he did was guilty of negligence which proximately contributed to his injury. The court held that a minor between the ages of 14 and 16 can be guilty of fraud as well as contributory negligence. The evidence tended to show that the violation of the statute in employing Wade was brought about by Wade's fraud—his false and fraudulent representation as to his age, in connection with his physical appearance.

The court, in reversing the decision of the lower court and remanding the case for further proceedings, concluded the opinion by saying:

If appellee was employed by appellant through his own fraud as defined above, the case will stand exactly as if there were no child-labor statute; and therefore, if appellant was guilty of no negligence proximately contributing to appellee's injury, but such injury was brought about solely by appellee's own negligence, appellant would be without liability therefor.

EMPLOYERS' LIABILITY—CHILDREN UNLAWFULLY EMPLOYED—DEPENDENTS—HAZARDOUS OCCUPATIONS—*Bagesse* v. *Thistlewaite Lumber Co. (Ltd.)*, *Court of Appeal of Louisiana (December 30, 1929)*, *125 Southern Reporter, page 322.*—Joseph Bagesse, jr., an employee of the Thistlewaite Lumber Co. (Ltd.), was injured on October 23, 1928, while in its service and died from the effects of the injury so

received five days thereafter. His mother, Mrs. Josephine Bagesse, sued the company in her individual capacity for damages in the sum of $30,300 and in the alternative, for compensation under the employers' liability act.

It was alleged that the company had, in violation of the State statute enacted in the interest of public policy and particularly of Act No. 301 of 1908, employed the deceased, Joseph Bagesse, jr., then a minor, in a hazardous occupation.

The district court, Parish of St. Landry, La., dismissed her claim for damages, allowing her to continue the suit on her alternative demand. She appealed the case to the Louisiana Court of Appeal, where the decision of the district court was affirmed. The court quoted from the case of Alexander *v.* Standard Oil Co. of La. (140 La. 54, 72 So. 806), as follows:

> The duty imposed by said statute upon the defendant not to employ a child in a dangerous occupation is thus imposed for the protection of the child and in his interest and that of society in general, not in the interest of the parent of the child. The defendant owed no duty therefore to the mother of the child, and has been guilty of no fault toward her which could serve as a basis on her part for a claim of damages.

Concluding the opinion the court said:

> Likewise, in this case, the defendant incurred no obligation toward plaintiff, in whose favor there exists no ground for her demand in damages. As she has no basis for such a claim, it follows that she had no cause of action, which authorized the judgment dismissing her demand under the exception filed, with due reservation permitting the continuation of her suit for compensation.

EMPLOYERS' LIABILITY—CHILDREN UNLAWFULLY EMPLOYED—HAZARDOUS OCCUPATION—*Employers' Casualty Co.* v. *Underwood et al., Supreme Court of Oklahoma (January 7, 1930), 286 Pacific Reporter, page 7.*—Fred Garrett, a boy under the age of 16 years, was killed while employed by H. F. Underwood and another, doing business as partners under the name of the Elk City Compress & Warehouse Co. The parents of the boy sued the compress company and the suit was settled and compromised by the payment of $5,000 to the parents. The Employers' Casualty Co., the insurer, was notified of the proposed settlement and in response to the notice advised Underwood that "in event it developed that the deceased was legally employed the company would reimburse Underwood for the amount paid in settlement, not exceeding, however, the amount of the liability stipulated in the policy." Thereupon Underwood paid the parents of the deceased boy the sum of $5,000 in full for their claim. At a later

date, to recover indemnity, suit was filed in the district court of Oklahoma County by Underwood against the insurance carrier and judgment was rendered in favor of Underwood. The Employers' Casualty Co. appealed to the Supreme Court of Oklahoma, contending—

That the deceased was not legally employed by the plaintiff, in that he was employed to work in the compress, (1) in operating and assisting in operating dangerous machinery, (2) and operating and assisting in operating steam machinery; (3) that he was working in a factory or factory workshop where a machine was being used operated by steam power and electric power; (4) that the operation was especially hazardous to life and limb; (5) that the place where he was employed was a factory or factory workshop within the meaning of the child labor laws, and that he was a minor under 16 years of age and employed therein without the consent of his parents and without the age of the boy or his schooling certificate, as required by law, and no record was kept on file or posted showing the name, age, certificate of the minors employed, hours of work, etc. That the minor did not have the required schooling to permit him to work, and that he was employed to work more than eight hours a day, and all told, therefore, his employment was in violation of Comp. Okla. Stat. 1921, secs. 7208, 7209, 7211, 7212, 7213, and 7214.

The court, however, considered it unnecessary to consider but two of the grounds set forth: First, that the boy was operating or assisting in the operation of steam machinery; second, that he was employed or permitted to work in an "occupation especially hazardous to life and limb."

From the facts it appeared that Garrett was engaged in fastening the bagging together with hooks as the bales were compressed. When the cotton was placed in the master press the hooks fell off. A number of them would fall in an opening between the floor and the plate connected to the movable plate of the press. The deceased, after he had been working but a few hours, went under the floor of the compress and under the giant plate apparently for the purpose of recovering these wire hooks, although this was no part of his work, and he was crushed to death when the press receded.

The insurance carrier contended that because Garrett was not employed to manipulate the lever, throttle, or valves of the steam machinery he was not assigned to its operation. Regarding this contention the court said:

We think such a construction would be subversive of the purpose of the statutes and would strike down the child labor law in practically all cases where the legislature undoubtedly intended it to apply. The Negro boy, Willie Easley, who operated the levers which controlled the machine, perhaps had the safest position of the three persons operating or manipulating this particular machine called the "dinkey" press. All he had to do was to stand some distance

away and open and close the throttle. The other persons, including the deceased, undertook the greater hazards surrounding that particular machine. The law was intended to throw the arm of protection around children working at or on a steam machine, as well as the person simply operating the control levers thereto. It would be but an empty play upon words to say that in operating or putting to practical use a piece of steam machinery like a paper mill, steel mill, printing press, or cotton compress by a sufficient number of persons necessary to perform the work and purpose for which the machine was intended, nobody was assisting in the operation of the machine except the engineer who handled the throttle, valves, or clutch connecting or disconnecting its power. Such a perversion of the established meaning of the word "operate" in connection with machinery so extensive in use in modern life would be ridiculous.

In considering the question whether or not the deceased was employed at an "occupation especially hazardous to life or limb" the court reviewed a number of cases decided by courts throughout the United States, and concluded by saying in part as follows:

These decisions, as well as reason, explode plaintiff's [Underwood's] theory that a person may be employed in a hazardous and dangerous place or occupation, provided he is assigned some duty which in itself is not dangerous. To measure legality or illegality of employment by the particular character of the work assigned to the employer would render the statute not only impotent but wholly absurd. * * * Many duties and much work within itself is neither hazardous nor injurious, but becomes hazardous because of the unsafe surroundings.

We clearly understand that the testimony indicated that the particular work to which the deceased was assigned, narrowed and circumscribed from other adjacent and proximate dangers, was not necessarily hazardous. All the witnesses, however, testified that the large press was an exceedingly dangerous machine; and its death-dealing performance in this case clearly demonstrated that fact. We can not, therefore, so construe the statutes as to restrict their application to the nature of the particular work or task to which the child was assigned, instead of the occupation in which he was engaged—the particular work with all its concomitant and directly associated perils—which means those dangerous agencies in proximity of and surrounding the work assigned to the child. In simple language, we may say, the dangerous surroundings.

The court also held there was error in the trial by the lower court in submitting certain questions to the jury. The judgment of the district court was therefore reversed.

EMPLOYERS' LIABILITY—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—*Bell* v. *Terminal Railroad Association of St. Louis, Supreme Court of Missouri (May 18, 1929), 18 Southwestern Reporter (2d), page 40.*—On January 1, 1925, George Bell, with three weeks' experience as a fireman, entered the service of the Terminal Rail-

road Association as an extra fireman to fire engines used in moving cars from St. Louis, Mo., to Relay Station, Ill. On January 3, Bell arrived in St. Louis about 2.30 o'clock with a Pennsylvania train from Relay Station, and the engineer and Bell were relieved by another engineer and fireman. Bell was ordered to go to the Twelfth Street roundhouse for further orders. He remained on the train and asked the engineer to slow down at Twelfth Street to permit him to alight. In attempting to alight he descended from the engine deck to the steps, from which he slipped and was injured. The steps at the time of the accident were covered with ice and snow.

Bell filed suit against the company, charging negligence in their failure to provide him with a reasonably safe place and reasonably safe instrumentalities for the performance of his work. In answer the company made a general denial, with a plea of assumption of risk and pleas of negligence of Bell "in assuming a position upon the step board of an engine while the same was in motion so as to be in danger of falling therefrom." The St. Louis circuit court rendered a judgment in favor of the railroad association, and Bell appealed the case to the Supreme Court of Missouri.

This court reversed the decision of the lower court and remanded the case for a new trial on the ground that the charge to the jury was incorrect regarding the assumption of risk by Bell, as the danger was not so glaring as to threaten immediate injury. The steps had been used in that condition by the engineer and fireman from 9 a. m. to 2.30 p. m. of that day, and Bell was justified in believing no immediate injury would follow by his use of the icy steps. The court also found Bell was not guilty of contributory negligence and that the other assignments of error were without merit.

EMPLOYERS' LIABILITY—CONTRIBUTORY NEGLIGENCE—RAILROAD—SAFE PLACE—*Birmingham* v. *Bangor & Aroostook Railroad Co., Supreme Judicial Court of Maine (July 31, 1929), 147 Atlantic Reporter, page 149.*—George L. Birmingham, while employed by the Bangor & Aroostook Railroad Co. as brakeman was killed on March 15, 1927, in the company's yard at Oakfield, Me. No witness saw the occurrence. It was evident, however, that young Birmingham, in using the ladder on the side of a moving refrigerator car, while attempting to reach the top of the car, lost his hold, fell, and was killed. This action was brought by the father and administrator under the Federal employers' liability law (45 U. S. C. A., secs. 51–59). On motion from the superior court, where there was a verdict for Birmingham, the case was carried to the Supreme

Judicial Court of Maine. It was contended by Birmingham that his son came in contact with a semaphore negligently located and maintained too near the track. No other negligence on the part of the company was claimed or pleaded or indicated by the evidence. In denying Birmingham's contention the court said in part:

The evidence showed that Birmingham's post of duty at the time of the accident was on the top of the refrigerator car.

The evidence further shows that the defendant had warned its employees against using the side ladder on freight cars while switching in yards. This warning was printed upon the employee's time cards. The undisputed evidence shows that the plaintiff's intestate had in his possession such a card with its warning, which is as follows: "Employees are warned not to use the side ladders of cars when passing through bridges or on the sides of cars next to buildings or cars when switching in yards."

Contributory negligence on the part of the plaintiff is not set up in this case, and under the Federal employers' liability law it is not a complete defense. Contributory negligence implies negligence on the part of the defendant. (18 R. C. L. 129.) In this case no negligence of the defendant is shown, because in locating its semaphore it was not bound to foresee and guard against a violation of its rule and warning.

The motion in the case was sustained and the verdict set aside.

EMPLOYERS' LIABILITY—DUTY OF EMPLOYER TO INSTRUCT—SAFE PLACE—RELEASE—*Miller* v. *Paine Lumber Co.* (*Ltd.*), *Supreme Court of Wisconsin* (*December 3, 1929*), *227 Northwestern Reporter, page 933.*—The Paine Lumber Co. operated a sash and door factory at Oshkosh, Wis. On March 30, 1925, Reinhardt Miller entered the employ of the company as a common laborer. His duties were to assist in the moving of doors on trucks from place to place in and about the room in which he was employed. The loads on these trucks were 6 feet high, and Miller's duty was to push the truck and its load from the rear, while another workman was in front pulling and steering the truck. After working about 10 days and after having moved from 800 to 1,000 of these loads, Miller was injured by a door falling from the top of the load and striking him on the head. It appeared from the evidence that the door was brushed from the top of the load when it came in contact with the side of another load abutting on the alleyway.

Miller brought action against the lumber company and the circuit court for Winnebago County rendered a judgment in favor of the employer. Thereupon Miller appealed to the Supreme Court of Wisconsin, alleging that the company failed to furnish him a safe place of employment by reason of its failure to warn him of the danger of doors falling off the trucks.

Regarding the duty of the employer to furnish a safe place the court said:

It is apparent that a warning concerning dangers incident to the performance of specific duties within a given place works no change upon the physical aspects of the place where the work is to be performed. If the place was unsafe before, it continued to be unsafe after the warning. The effect of the warning is to apprise the employee of the dangers incident to the performance of the service, so that he may exercise care and caution for his own safety, which he might not exercise were he insensible to the danger. A mere reading of the statute reveals the dominant purpose of the legislation to have been to impose upon the employer the duty to furnish employees with a safe place to work in a physical sense.

However, that duty exists independent of any statute, and the failure to perform such duty has long been recognized as a ground of the employer's liability to an injured employee. It is a common-law duty, and it has been in no respect modified by the legislation we are considering.

The employer contended that no duty to warn rested upon the company because the danger was obvious, and that Miller must have been cognizant of the danger of falling doors. The court said, however, that—

He must be held to have known that if the top door of the truck became engaged with a door protruding from an adjoining truck load it would be brushed from the top of his load, and that by force of gravity it would fall; that it would be brushed to the back of the load, where he was working, and that in such event it was quite likely to fall upon him. These things he certainly knew, and the consequences he must have foreseen, if he paused to consider. But he was not warned of any such danger. He had worked there 10 days, during which time he had moved from 800 to 1,000 truck loads without anything of the kind happening. Neither his experience nor warnings from the defendant had encouraged a cautious or watchful disposition on his part.

In regard to the handling of the case by the lower court, the court said:

The case was submitted on the theory that the duty to warn was imposed upon the defendant by statute. If so, the duty was absolute, if reasonably necessary to make the place of employment safe (Van de Zande *v.* Chicago & North Western Railway Co., 168 Wis. 628, 170 N. W. 259), and the jury was so instructed. This, however, is not the duty which the rule of the common law imposes on employers. That rule requires merely the exercise of ordinary care. The rule as applicable to this situation is well stated in Montevilla *v.* Northern Furniture Co. (153 Wis. 292, 296, 141 N. W. 279, 280). It requires a warning "against dangers which an ordinarily prudent man may reasonably anticipate may occur in the ordinary course of the servant's employment, and then only when the servant may reasonably be presumed to be ignorant thereof."

Although the jury found that the failure to warn rendered the place of employment unsafe, pursuant to the court's instruction relative to the absolute duty of the master to furnish a safe place of employment and in such connection that "it is the duty of employers to warn their employees of any dangers known to the employer or reasonably to be apprehended by the employer that are incident to the employment of such employees," they might have found that ordinary care required such warning under the circumstances here presented. It seems apparent that the verdict can not be treated as one finding the defendant guilty of a want of ordinary care by reason of its failure to so warn the defendant, and that a new trial must be had.

The court, in conclusion, considered the question regarding the release executed by Miller to the company upon receipt of $457.45. Miller alleged that he could not read, and he thought the release was a receipt for six month's compensation when he signed it. In the trial court the jury found the company falsely represented the character and purpose of the release, but the court rendered judgment in favor of the company, expressing the view that these answers were not sustained by the evidence. The Wisconsin Supreme Court ruled that this was error on the part of the trial judge and therefore reversed the judgment.

A case was appealed to the Supreme Court of Wisconsin and the question involved was the interpretation of section 101.06, Wisconsin Statutes 1929, regarding "safe employment." The court held that the requirement that the employer provide a safe employment should be construed to mean more than a place of employment safe in a physical sense.

The court also said that the statute requires every employer to furnish employment which shall be safe for the employees therein and the frequenters thereof, and to furnish safety devices and safeguards, etc., and to do every other thing reasonably necessary "to protect the life. safety, and welfare of such employees and frequenters." (Miller *v.* Paine Lumber Co., Supreme Court of Wisconsin (April 29, 1930), 230 N. W. 702.)

EMPLOYERS' LIABILITY—EMPLOYMENT STATUS—FRAUD—*Minneapolis, St. Paul & Sault Ste. Marie R. Co.* v. *Rock, United States Supreme Court (May 13, 1929), 49 Supreme Court Reporter, page 363.*—On October 1, 1923, one Joe Rock applied for employment as a switchman in the railroad yards of the Minneapolis, St. Paul & Sault Ste. Marie Railway Co., in Kolze, Ill. In accordance with the rules of the company Rock was sent to the company physician for physical examination. It was found that he had been treated surgically for ulcer of the stomach and removal of the appendix, and that at the time of the examination he had a rupture. His application was rejected because of his physical condition. A few days later Joe Rock, under the name of John Rock, representing that he had

not heretofore applied, made application for such employment. The superintendent was deceived as to Rock's identity, and accepted him subject to the physical examination. Rock procured a man by the name of Lenhart to impersonate him and in his place to submit to the required examination. The physician found Lenhart's condition satisfactory, and believing that Lenhart was the applicant Rock, reported favorably on the application. As a result of the deception the railroad gave Rock employment and did not learn of the fraud until December 24, 1924, on which date Joe Rock, while employed under the name of John Rock, was injured.

Rock brought suit under the provisions of the Federal employers' liability act in the circuit court of Cook County, Ill., and obtained a verdict for $15,000. This judgment was later affirmed by the Appellate Court of the First District, Illinois. The case was then taken to the United States Supreme Court. That court reversed the judgment of the Illinois court, saying:

We are called upon to decide whether, notwithstanding the means by which he got employment and retained his position, respondent may maintain an action under the Federal employers' liability act.

In reaching the conclusion that Rock did not have a right of action under the Federal employers' liability act, the court said that the carrier owed a duty to its patrons as well as to those engaged in the operation of the railroad to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. Rock's physical condition was an adequate cause for his rejection, as the railway company had a right to require applicants for work to pass appropriate physical examinations.

The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest, because calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes sought to be advanced by the act.

Mr. Justice Butler, delivering the opinion, pointed out that Rock's position as employee was essential to his right to recover under the act and that—

He, in fact, performed the work of a switchman for petitioner [the railway company] but he was not of right its employee, within the meaning of the act. He obtained and held his place through fraudulent means. While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and physical condition to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contempo-

rary facts. As a result of his concealment his status was at all times wrongful, a fraud upon petitioner, and a peril to its patrons and its other employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public policy.

EMPLOYERS' LIABILITY—EMPLOYMENT STATUS—LOANED EMPLOYEE—*Spodick* v. *Nash Motor Co., Supreme Court of Wisconsin (November 11, 1930), 232 Northwestern Reporter, page 870.*—Peter Spodick was in the general employ of the Racine Boiler & Tank Works as a boiler maker. On August 5, 1928, the Nash Motor Co. asked the boiler and tank works for men to serve them in a repair job. After looking over the boiler it was decided not to take the job because more men were needed than the boiler company could furnish. However, the company let them have one of its men, Peter Spodick, who worked in repairing the boiler with men from the Freeman Co. and employees of the Nash Motor Co. Spodick's wages were paid by the boiler and tank works, and the motor company was charged the regular rate. While working under this arrangement, Spodick received serious injuries and he filed suit against the Nash Motor Co. to recover damages for the personal injuries. The question involved in the case was whether Spodick was an employee of the motor company at the time of the injury; if so, his remedy was under the workmen's compensation act and this suit would not be maintainable.

The municipal court for Racine County held Spodick was an employee of the Racine Boiler & Tank Works at the time of the injury and rendered a verdict in his favor. On appeal to the Wisconsin Supreme Court this decision was reversed. The court said:

At the foundation of the relation of employer and employee is a contract, express or implied, and the consent of the employee to enter the services of a special or temporary employer must exist. As suggested, this may be given expressly or by acts implying it. In the case before us the general employer did not undertake to repair the boiler, but sent one man, who, with others from yet another employer, and some of defendant's own employees, were to make up a group to do this work under the general control of defendant's agents. This the plaintiff knew. He was an expert and evidently did not need much, if any, direction, but he engaged in the business of the defendant, who at the time had the right to control and direct his conduct, who could have dismissed him from the service, who at all times had authoritative control of the work. Plaintiff knew how the men were procured to do this work under the general management of the Nash Co. * * * There is no credible evidence to support a finding other than that the plaintiff at the time of the accident was in the employ of the defendant. The boiler was being repaired by the defendant, not by the Racine Boiler & Tank Works, nor by the Freeman Boiler Co. Men from those concerns were

loaned to the defendant to assist in repair work. These loaned employees worked with defendant's men.

The plaintiff was an employee of the defendant at the time he sustained his injury and his remedy is under the workmen's compensation act.

The judgment was reversed.

EMPLOYERS' LIABILITY—EVIDENCE—ACCIDENT—NEGLIGENCE—*Newark Gravel Co.* v. *Barber*, *Supreme Court of Arkansas* (*June 17, 1929*), *18 Southwestern Reporter* (*2d*), *page 331.*—On July 1, 1927, Cecil Barber was working as a laborer for the Newark Gravel Co. near the town of Newark, Ark. Barber and another employee were carrying railroad ties. The method used was for one laborer to take one end on his shoulder and the other laborer the other end and when they reached the place where they were to put the tie it was thrown from the shoulder. The person behind would give the signal and both parties would throw at the same time. On July 1, 1927, while carrying railroad ties in this manner, a fellow employee of Barber, whose duty it was at that time to give the signal, failed to do so and without any notice threw his end of the tie. One end of the tie rebounded and caught Barber's left foot and crushed it. Barber suffered pain and was unable to work for more than two months. He filed suit against the Newark Gravel Co. asking damages in the sum of $5,000. The circuit court of Pulaski County rendered judgment in the sum of $2,000 in favor of Barber, and the company carried the case to the Arkansas Supreme Court.

The employer alleged that Barber voluntarily exposed himself to the risk and also that he was guilty of contributory negligence. Upon appeal the employer urged a reversal of the case on the ground that the injury was due to an inevitable accident for which he would not be liable. The court, however, found there was negligence on the part of the fellow servant in not giving the signal and concluded that this evidence was sufficient to sustain the verdict of the jury that it was not a mere accident. In the course of the opinion the court said:

The fellow servant threw his end of the tie without giving any warning, and, when the appellee felt the tie moving, then he pushed it from his shoulder. It was the duty of Austin to give the signal, and he should not have thrown his end of the tie without giving the customary signal, and if he did this, threw his end of the tie without giving any signal, he was guilty of negligence, and, if this negligence was the proximate cause of the injury, appellee was entitled to recover.

The court also cited cases showing that a laborer was justified in acting upon the belief that his fellow servant would do his part of

the work in the ordinary way. They found substantial evidence to support the conclusion that the negligence of the fellow servant was the proximate cause of the injury and therefore affirmed the judgment of the lower court.

EMPLOYERS' LIABILITY—FEDERAL AND STATE JURISDICTION—INTERSTATE COMMERCE—*Efaw* v. *Industrial Commission of Wisconsin et al., Supreme Court of Wisconsin (November 5, 1929), 227 Northwestern Reporter, page 249.*—The Great Northern Railway Co. operates an extensive system through several States, and about 25 miles of this track is in the State of Wisconsin. At Superior, Wis., it has docks and facilities for unloading and storing coal. Russell B. Efaw, a laborer, was engaged most of the time in repairing and cleaning the railway structures and water system in the Superior terminal. On the afternoon of the accident Efaw and his crew had unloaded several cars of coal which they had to haul upon the "load" track. While walking down the incline to turn the switch and clear the "load" track for another car loaded with coal, which was for use in interstate and intrastate commerce, the empty car overtook him and inflicted serious injuries. He was awarded compensation by the Industrial Commission of Wisconsin, upon the conclusion that Efaw and the railway company, at the time of the injury, were subject to the Wisconsin workmen's compensation statute (Wis. Stat., secs. 102.03–102.35).

The case was appealed to the circuit court for Dane County, where the award was vacated upon the ground that Efaw was engaged in interstate commerce and therefore was not governed by the Wisconsin statute. Efaw then appealed to the Supreme Court of Wisconsin.

The facts were not in dispute, the only question being whether Efaw was engaged in interstate or intrastate commerce at the time of the accident. The industrial commission contended that all the steps performed by Efaw in his employment on that day were essentially a part of the operation of putting the coal in the chute and in so far as they were a part thereof Efaw was assisting and engaged in unloading coal into the chute at the time of the injury. On the other hand, the railway company contended that as some of the coal was to be used by locomotives engaged in interstate commerce, Efaw was, at the time of his injury, engaged in interstate commerce.

In rendering the decision the court quoted from the case of Erie Railway Co. *v.* Collins (259 Fed. 172, 175), in part as follows:

In unloading the coal into the chute, from which it was to be taken by locomotives in interstate and intrastate commerce, it became converted into an instrumentality of interstate commerce. The act

of putting the coal into the chutes from which the engines can take it is an act performed in interstate commerce, as much so as is the act of putting water into the trough by the side of the tracks to be scooped by passing engines; and we can not distinguish the act of putting the coal into the coal chutes for the supply of the engines from the act of putting rails alongside of a track into which they are to be fitted or the bolts by the side of the bridge, as in the Pedersen case.

It concluded the opinion by saying:

Efaw, when injured, was engaged in work so closely related to interstate transportation as to be part of it, and, therefore the industrial commission was in error in concluding that at the time of such injury he and his employer were subject to the provisions of sections 102.03 to 102.35, Wis. Stats.

The judgment was therefore affirmed.

EMPLOYERS' LIABILITY—FEDERAL AND STATE JURISDICTION—NEGLIGENCE—ASSUMPTION OF RISK—*Candler* v. *Southern Railway Co., Supreme Court of North Carolina (September 11, 1929), 149 Southeastern Reporter, page 393.*—C. H. Parker was employed by the Southern Railway Co. as conductor of a freight train running from Asheville, N. C., to Knoxville, Tenn. His train was standing in the company's passenger yard at Asheville, N. C., awaiting orders for its movement on its regular schedule. He had received orders for its movement, delivered to him in the office of the dispatcher, and was walking across the tracks located between the dispatcher's office and the track upon which his train was standing, when he was knocked down by a moving car on one of these tracks, dragged a distance of about 90 feet, and killed. The car striking Parker had been shunted or kicked into this track, no engine was attached to it, and no brakeman or other employee of the railway company was on the car. The evidence tended to show the car was shunted by the switching crew engaged in making up a train, in violation of rules of the company and contrary to the custom followed by the switching crew.

W. W. Candler, administrator of Parker's estate, filed suit against the railway company and the superior court, Buncombe County, N. C., rendered judgment in his favor. Thereupon the railway company appealed the case to the Supreme Court of North Carolina. In affirming the opinion of the superior court, the North Carolina Supreme Court said in part as follows:

The liability of defendant to plaintiff in this action, if any, must be determined in accordance with the provisions of the Federal employers' liability act (45 U. S. C. A., secs. 51–59), as the same have

been construed and applied by the Federal courts, the law of this State with respect to the liability of a common carrier by railroad to its employee for damages resulting from personal injuries sustained by him, or to his personal representatives for damages resulting from his death, has been superseded by the act of Congress, when such act is applicable.

There was evidence tending to show affirmatively negligence on the part of defendant's employees, in causing the car to be shunted or kicked a distance of 200 yards from the west yard into the passenger yard, without warning to persons or employees rightfully in the passenger yard, and that this negligence was the proximate cause of the death of plaintiff's intestate. He had no duty by reason of his employment by defendant with respect to said car or with respect to the train which was to include said car. He was at a place on defendant's premises where he was required to be in order to perform his duties as a conductor. While he was there, engaged in the performance of his duties, defendant owed him the duty to exercise due care to furnish and maintain for him a reasonably safe place in which to perform his duties. There was evidence tending to show a breach of this duty, which was properly submitted to the jury.

The jury has found that plaintiff's intestate by his own negligence contributed to his death, and under the provisions of the Federal employers' liability act, the amount of plaintiff's recovery in this action has been reduced in accordance with this finding.

It can not be held as a matter of law, as contended by defendant, that upon all the evidence plaintiff's intestate assumed the risk of injury arising from the negligence of defendant, as found by the jury. The conflicting evidence as to whether plaintiff's intestate, as an employee of defendant, knew of the custom of defendant's switching crew, if any such custom existed, to kick or shunt cars upon the track over which he was passing, without warning by signals or otherwise, or of the continued violations of the rules of defendant with respect to the movement of cars on its tracks, which resulted in the abrogation of such rules, was properly submitted to the jury. Without such knowledge it can not be held that he assumed the risk arising from the negligence of defendant's switching crew.

EMPLOYERS' LIABILITY—FEDERAL EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—*Thrall* v. *Pere Marquette R. Co.*, *Supreme Court of Michigan* (*March 6, 1930*), *229 Northwestern Reporter*, *page 488.*—William P. Thrall was a section foreman on the Pere Marquette Railway between Holland and Allegan, Mich., and was injured while returning from work with his crew. At the time of the accident they were riding the track on a motor car. The car was derailed and Thrall was thrown under it, receiving injuries from which he died.

An action was brought under the Federal employers' liability act by Alice A. Thrall, administratrix, for injuries resulting in his death, which she claimed was caused by the negligence of the rail-

way company. It was contended that the overloading of the motor car together with the failure to maintain the track and car in a safe condition caused the accident. As a defense the railway company pleaded contributory negligence and assumption of risk by Thrall.

The circuit court, Allegan County, rendered judgment in favor of the widow, and the railway company appealed the case to the Supreme Court of Michigan. In regard to the assumption of risk by Thrall the court said:

It may be true that the decedent assumed the risk as to the defective condition of the track and the motor car, though whether he did so was a question for the jury. But the improper loading of the drill was the act of fellow employees and, in the absence of evidence that decedent had actual knowledge of their negligence, the doctrine of assumed risk does not apply. The evidence leaves no doubt that the drill was loaded by two fellow employees, Hanson and Baker, and that Baker rode on the car within easy reach of the drill and could have prevented it from toppling over if he had used ordinary care. But it is said that decedent also had a duty to perform in connection with the loading of the drill. Assuming that to be true, and that he failed in his duty and was guilty of contributory negligence, his right of recovery would not be barred thereby.

The court was also of the opinion that Thrall did not as a matter of law assume the risk of the defects in the track and motor car, for the records show that neither Thrall nor any member of his crew thought there was any danger in their use of the track in its defective condition.

As to the defense of contributory negligence, the courts said that assuming Thrall was negligent, as it was claimed, his negligence was not an independent cause of the accident. His negligence and the negligence of the company operated together to cause it. They were concurring causes and the company would be liable though other negligence for which it was not responsible contributed directly to produce the injury. The court cited section 16, Roberts, on Injuries to Interstate Employees on Railroads, in which it is said that "if the injury resulted in whole or in part from the company's negligence, the statute can not be nullified and the right of recovery defeated by calling the plaintiff's act the proximate cause of the injury."

The judgment of the lower court was therefore reversed.

EMPLOYERS' LIABILITY—FEDERAL RAILROAD STATUTE—ACTION FOR DEATH—LIMITATIONS—*Flynn* v. *New York, N. H. & H. R. Co., Supreme Court of Errors of Connecticut* (*March 31, 1930*), *149 Atlantic Reporter, page 682.*—On December 4, 1923, Edward L. Flynn was

injured through the negligence of the New York, New Haven & Hartford Railroad Co. Flynn died on September 1, 1929, leaving a widow and five daughters. Following the death of the deceased the executor filed suit against the railroad to recover damages The railroad contended there was no cause of action as the injury occurred in 1923 and death occurred in 1928, the action being barred by the limitation of a 2-year period; hence, no cause of action accrued after the death. The action was based upon the Federal employers' liability act, which was amended April 5, 1910 (36 Stat. 291, ch. 143), by adding to it section 9 (45 U. S. C. A., sec. 59):

That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

Counsel for the railroad cited section 1 of chapter 143 of the act of 1910, cited above, which provides that "no action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued." The superior court, New Haven County, rendered a verdict for the railroad company and the executor appealed to the Supreme Court of Errors of Connecticut, which court affirmed the judgment of the lower court, saying in part as follows:

The act of 1910 in terms covers both of the actions authorized under section 1 of the act of 1908, and since the decedent did not bring his action for his own injury within two years from the occurrence of the accident, the right of his representative to bring his action is barred.

The new right of action given the representative of the designated relatives to recover for the pecuniary loss to them through the death of the decedent is, as we have stated, "dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." * * *

The cause of action for death arises upon the occurrence of the death, but, if the decedent's right of action for his wrongful injury has ceased to exist, it would be, as defendant insists, anomalous to hold that the right of action for the wrong to the beneficiaries arising out of the wrongful injury to the decedent is enforceable. We discover no distinction between a judgment, or a settlement obtained by the decedent, and the lapse of the statutory period, in barring the maintenance of an action under this act.

EMPLOYERS' LIABILITY—FEDERAL RAILROAD STATUTE—FRAUDULENT REPRESENTATION—DISEASE—*Fort Worth & D. C. R. Co.* v. *Griffith, Court of Civil Appeals of Texas (April 9, 1930), 27 Southwestern Reporter, page 351.*—C. O. Griffith sued the Fort Worth & Denver

City Railway Co. claiming damages for personal injuries as the result of the negligence of the railway company and its servants. It appears that while Griffith was serving as switchman and working as the foreman of a yard crew, the fire box of the engine exploded, resulting in Griffith's injury and the loss of his left eye. He further alleged that both eyes were injured, the left eye entirely lost and the right eye impaired about 20 per cent.

The railway company alleged that as Griffith was engaged in interstate commerce at the time of the accident the Federal employers' liability act (45 U. S. C. A., secs. 51–59) would control the rights of the parties. It further contended that Griffith assumed the risk and was guilty of contributory negligence; it also pleaded that the contract of employment was procured by fraud as Griffith failed to give required information regarding previous employment and fraudulently concealed the fact that he was color blind when applying for work; and it further alleged that the condition of Griffith's eyes was not the result of the accident but due to the fact that Griffith was suffering from certain eye diseases. The case was tried by the district court, Wichita County, and the jury found that—

At the time of the accident the fuel oil of the engine contained water, which caused an explosion in the fire box of the engine, and that allowing water in the fuel oil constituted negligence resulting in injuries to appellee's eyes, and that such negligence was the proximate cause of the damages; that the appellant failed to exercise ordinary care in providing reasonably safe and suitable fuel oil for the engine, which was a proximate cause of appellee's injuries; that he was damaged in the sum of $500, and that the loss of plaintiff's sight was due principally to syphilis or some other disease; and that appellee had not assumed the risk.

From a judgment for Griffith in the sum of $500 the railway company appealed to the court of civil appeals.

The only question considered by the appeals court was the fraud perpetrated by Griffith when he made application for employment. The court said:

This suit being brought under the Federal employers' liability act, and because the record shows that, as a switchman, appellee was continually engaged in interstate commerce, the decision of the Supreme Court of the United States, upon the question involved, will control whenever there is a conflict between such decision and the decision of State courts.

The court then cited the case of Minneapolis Ry. Co. *v.* Rock (279 U. S. 410, 49 Sup. Ct. 363), in which the Supreme Court passed upon the rights of an employee who had secured employment by fraudulent means. The Supreme Court, in denying recovery, said in part:

While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such em-

ployment. It was at all times his duty to disclose his identity and physical condition to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recover may not justly or unreasonably be rested on a foundation so abhorrent to public policy.

In concluding the opinion reversing the judgment of the district court the court said:

The general rule is that fraud of this character renders a contract voidable rather than void, but that rule has been ignored in the Rock case by the Supreme Court upon the ground that the safety of the traveling public is involved in a contract of this character, and for reasons of public policy it is held that the contract is void and, in effect, that appellee never became an employee of the appellant. The parties are not in pari delicto, and the false representations made are material. The fact that the two vision tests made by the appellant failed to disclose color blindness becomes immaterial in the light of this record, which shows that appellee resorted to positive and affirmative fraud in inducing Day to write false statements with reference to appellee's employment. Being guilty according to his own testimony, of positive and affirmative fraud and deceit with reference to a matter affecting the public interest, he has no standing in a court of law or equity.

We are strongly inclined to the opinion that the loss of vision in defendant's eye was due to disease and that the proof is overwhelming upon this issue, but do not base the decision upon that ground. In deference to the holding of the Supreme Court of the United States, which we feel constrained to follow, the judgment is reversed and is here rendered for the appellant [railway company].

EMPLOYERS' LIABILITY—FEDERAL RAILROAD STATUTE—INTERSTATE COMMERCE—*Onley* v. *Lehigh Valley R. Co.*, *Circuit Court of Appeals, Second Circuit* (*December 9, 1929*), *36 Federal Reporter* (*2d*), *page 705*.—Charles Onley was employed as a brakeman and worked in the Phillipsburg, N. J., yard of the Lehigh Valley Railroad Co. in a switching crew helping to make up trains. He was so employed during the morning of August 13, 1927. After having finished lunch at noon on that day he returned to work and was told by the yardmaster to oil an engine. When this work was finished the yardmaster directed him to back the engine to a certain track and there test the fire hose with which it was equipped. The engine was taken to the place as ordered and Onley held the hose, after a fireman had attached one end to the engine, while the engineer turned on the water. Suddenly the hose burst at a point behind Onley and he was severely burned by steam and hot water.

Onley filed an action against the railroad under the Federal employers' liability act, and the United States District Court for the Southern District of New York dismissed the case. The defense used by the railroad in securing the dismissal of the suit was that Onley was not engaged in interstate commerce when injured. The case was appealed to the Circuit Court of Appeals, where the judgment was affirmed. Circuit Judge Chase in speaking for the court said that testing a fire hose on an engine might be employment either in interstate commerce or intrastate commerce, depending entirely upon what Onley had previously done or what he was about to do.

In regard to the work to be performed in the future he said:

The future is barren of assistance, for he was not employed in preparing for some definite movement, so that his work was a necessary incident of it and became of like character with it; and nothing is known but that the plaintiff, and we may assume the engine, would have in the ordinary course of events done such switching as would have been required. We do not know what would have been required, except that it might have been wholly interstate switching, wholly intrastate, or partly both. Obviously the plaintiff has not thus shown himself to have been engaged in interstate commerce when injured.

The case of Erie Railroad Co. *v.* Walsh (242 U. S. 303, 37 Sup. Ct. 116) was cited, in which the court held that "the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act."

Accordingly the court examined the previous work performed by Onley and found nothing there to indicate that any operation of the morning's interstate or intrastate switching was unfinished when he stopped for lunch. The court said the hose testing was a detached and isolated piece of work which had to be done from time to time to keep the engine in the proper condition for such use as would be required and was not made necessary by any interstate movement. The circuit judge concluded the opinion by saying:

Having failed to show that the test was occasioned by any use in interstate commerce, made in connection with any such commerce, or having at best more than some remote, indefinite relation to commerce, interstate and intrastate generally, the plaintiff has not discharged the burden of proving that he was engaged when hurt in performing a task so closely connected to any interstate work that it was a necessary incident of such work and to be taken as a part of it. On the contrary, the fact that all previous work had been completed and no particular work was contemplated gave rise to the opportunity for taking time to test the hose, and it became a separate and distinct part of the day's work performed by the plaintiff for no other reason than that the yardmaster happened to order it done when he did. This makes it impossible for the plaintiff to bring himself within the Federal employers' liability act.

EMPLOYERS' LIABILITY—FEDERAL RAILROAD STATUTE—NEGLIGENCE—SAFE PLACE—*Phillips* v. *Chicago B. & Q. R. Co., Supreme Court of Nebraska (December 10, 1929), 227 Northwestern Reporter, page 931.*—Theodore H. Phillips brought action under the Federal employers' liability act (45 U. S. C. A., secs. 51–59) to recover damages for an injury received while employed as a section foreman by the Chicago, Burlington & Quincy Railroad Co. From the evidence it appears that Phillips was injured while replacing a tie in the roadbed. The company provided a common pick as a tool; while engaged in removing the tie from the roadbed the pick slipped out of the tie and Phillips tumbled over the embankment and struck a snag, and was seriously injured.

He filed suit against the railroad company in the district court, Holt County, Nebr., alleging negligence on the part of his employer in its failure to furnish him safe tools and appliances. The district court rendered a verdict in favor of Phillips and the company appealed the case to the Supreme Court of Nebraska.

In rendering the decision the court said that in a case brought under the Federal employers' liability act for damages there can be no recovery against the employer unless some act of negligence on the part of the employer be alleged and proved.

Continuing, the court said in part as follows:

> The question squarely before this court for its determination in this case is whether or not the defendant was negligent in its failure to furnish tie tongs instead of picks for the use of its trackmen in removing and replacing ties. The question involved in this case is not that of a defective tool, which was known to the employer to be defective, and was continued in use and the employee injured as a consequence. We must determine whether the furnishing of one tool for the work rather than another was such negligence as would sustain a verdict for the plaintiff. The employer is not bound to supply the best, the newest, or the safest tools to insure the safety of his employee. It is his duty to use all reasonable care and prudence for the safety of his employees, by providing them with machinery and tools reasonably safe and suitable for the use to which they are to be put. [Cases cited.]
>
> The Federal courts have held that the employer has reasonable discretion in selecting facilities for the use of employees. It is the duty of the master to provide reasonably safe machinery or appliances for the servant to do the work. In making such provision, they are given much freedom of choice, and in the exercise thereof they must use reasonable care and ordinary prudence. [Cases cited.]
>
> The pick which was used by the trackmen in this case was not a tool which was recognized as dangerous in its use. It was a simple tool, ordinarily used for the purpose, and the failure of the railroad company to supply tie tongs in place thereof was not such negligence as would justify a recovery by the plaintiff under the

Federal employers' liability act, and the trial court should not have submitted the question of negligence to the jury.

Since we have reached the conclusion that the failure of the railroad company to furnish the parties with a tie tong instead of a pick for their work as trackmen is not negligence to sustain a verdict under the Federal employers' liability act, the judgment is reversed and the action dismissed.

EMPLOYERS' LIABILITY—FEDERAL RAILROAD STATUTE—SAFE PLACE AND APPLIANCES—ASSUMPTION OF RISK—*Fredericks* v. *Erie R. Co., Circuit Court of Appeals, Second Circuit (December 9, 1929), 36 Federal Reporter (2d), page 716.*—John F. Fredericks, while in the course of his employment as a fireman on one of the Erie Railroad's switching engines in the yard at Elmira, N. Y., fell from a running board while trying to close a drain cock and was severely injured.

At the time of the accident the engine was standing still, but the running board was somewhat icy and slippery. Being unable to close the valve with one hand, Fredericks let go the grab rail and used both hands in trying to close the valve. His pull loosened the pet cock or the fitting so that it turned and shot up about two inches into the pipe, which caused him to lose his balance and fall to the ground.

He filed suit under the Federal employers' liability act (45 U. S. C. A., secs. 51–59) and the boiler inspection act (45 U. S. C. A., sec. 22 et seq.). The United States District Court for the Western District of New York rendered judgment in his favor and the railroad company carried the case to the Circuit Court of Appeals.

The court said it was the duty of the railroad company to see that the pet cock was fitted to the engine and maintained in such a way that the application of manual force by an employee, whose duty it was to close it, would not pull it loose. The company was not allowed to excuse itself for the condition of the fitting by saying that its servant was too strong and heavy for the job.

To comply with the boiler inspection act requiring the appurtenances of the locomotive to be in proper condition and safe to operate, the court cited cases holding that for injuries due to the employer's failure to comply with this law, the injured employee may recover without showing the employer to have been negligent. Regarding this question the circuit court held that—

The evidence was conflicting about the condition of the drain cock and fitting, and with the defendant's evidence strongly indicating that nothing was loose after the accident we can not take it for granted that the jury found the appliance defective because of insecure fastening.

The court also considered the question decided by the jury in the lower court, that the engine was defective because of the unsafe location of the drain cock. The court said:

When, as in this case, the evidence was overwhelming that the drain cock was located in the only place that it could be put and work properly, and that such location was of necessity uniformly used on lifting injectors by railroads in the territory where the plaintiff was hurt, it was error to permit the jury to call into play its own ideas as to a safe and proper location, and allow it to find the engine defective because the drain cock was not placed, perhaps, where the jury thought it should have been put.

The Circuit Court of Appeals also ruled that the lower court should have complied with the request to charge the jury that, if the engine was not otherwise defective, Fredericks assumed the risk of the location of the drain cock and also the risk of injury due to the ice on the running board.

The judgment of the lower court was therefore reversed.

EMPLOYERS' LIABILITY—FEDERAL RAILROAD STATUTE—SAFE PLACE TO WORK—ASSUMPTION OF RISK—*Shortway* v. *Erie R. Co.*, *Supreme Court of New Jersey* (*December 30, 1929*), *148 Atlantic Reporter*, *page 172*.—Abram Shortway was a trainman employed by the Erie Railroad Co. in its passenger service in interstate commerce. On November 11, 1927, about 3.30 o'clock, he was riding on the rear of the train when they were about a half mile from the Jersey City station. He noticed the train passed an unlighted signal and he stopped the train and signaled the engineer to pull in the opposite direction so as to clear the signal. It was dark and the signal was unlighted and not visible from the point where Shortway stood. He left the train and started to walk in the direction of the signal along some planking between the rails, using his lantern as best he could to light his way. The planking was on a trestle crossing Jersey Avenue in Jersey City. It extended over the trestle but when Shortway came to the end of the trestle he fell into a large excavation about 6 feet deep and suffered injuries. This excavation was on the railroad right of way and at the end of the planking.

Shortway filed suit against the railroad company under the Federal employers' liability act (45 U. S. C. A., secs. 51–59) and the circuit court of Passaic County rendered a verdict in favor of Shortway in the sum of $6,000. The employer appealed the case to the New Jersey Supreme Court, contending that negligence on the part of the railroad was not proved and if it were, the risk was assumed by Shortway. The case of D., L. & W. R. Co. *v.* Koske (279 U. S. 7, 49 Sup. Ct. 202) was cited to sustain this contention. The court said the Koske case and the case at bar differed in that—

In the Koske case, the plaintiff stepped into an open drain or ditch in the railroad yard. There is no evidence that this drain was

not suitable and appropriate for the purposes for which it was intended, and obviously no court can dictate to railroads the way in which they shall meet their yard engineering problems. On the other hand, in the present case there is nothing to suggest that the excavation 6 feet deep at the end of the plank walk in a railroad yard has any suitable or appropriate purpose, or that any engineering problem is involved in leaving such an excavation at the end of a plank walk designed for trainmen.

Continuing the court said:

The proofs in this case show that the employee did not know of this particular risk. He had not been in the yard since the excavation was made, or the tracks were elevated, and there was nothing to warn him of the excavation at the end of his path. It can hardly be contended that such an excavation is one of the ordinary risks of railroading.

Certainly a pit at the end of a path designed for workmen to walk upon is a danger to employees not familiar with the locality towards dusk or after dark. It would seem absurd to say that such a pit made the pathway reasonably safe.

EMPLOYERS' LIABILITY—FELLOW SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—*Wagner* v. *St. Louis-San Francisco R. Co., Springfield Court of Appeals, Missouri (July 12, 1929), 19 Southwestern Reporter (2d), page 518.*—Taylor Wagner was employed by the St. Louis-San Francisco Railway Co. as a bridge carpenter. On April 22, 1926, while working on a railroad bridge under his employer's direction, engaged in boring holes, he was warned of the approach of a push car by Harry Smith, a fellow employee. After some difficulty he pulled his auger out of the hole he was boring and stepped to the side on the guard rail to let the car go by. Smith, in walking along on the outside of the push car, bumped against Wagner and knocked him off the bridge. Smith also fell and struck Wagner, inflicting severe and permanent injuries upon him.

Wagner sued the railroad company, alleging negligence and carelessness on the part of its agent, servant, and employee in handling the push car. Among the defenses pleaded in the answer were assumption of risk by Wagner and contributory negligence on his part. Wagner received a judgment in the circuit court, Christian County, Mo., and the company appealed to the Springfield, Mo., court of appeals.

Judge Bailey, in upholding the defense made by the railway, said in the course of his opinion in part as follows:

As we view this evidence, plaintiff had timely warning of the approach of the car. It seems his auger stuck in the hole he was boring and he spent a few moments in pulling it out. He certainly

was not required to stay with that auger in order to extricate it, if by so doing he placed himself in danger of being run down. To do so was negligent. As the car approached, he could do one of three things; i. e., (1) walk ahead to the end of the bridge, (2) step off onto a cap, or (3) stand on the guard rail. The first two alternatives were safe. The last alternative was not safe, but required the exercise of great care in order to avoid being struck because of the short space between the guard rail and the track. Plaintiff adopted the unsafe course. He stepped on the guard rail of the bridge with his back toward the crab car. He apparently made no attempt to see the car or observe any projections that might be extending therefrom. For that reason he failed to see Smith walking back of the "bull wheel" on the side of the car. That plaintiff was guilty of contributory negligence is beyond dispute.

However, the court said:

The Federal rule as to contributory negligence seems to exonerate the master only when the servant's act is the sole cause of the injury and the act of the master or its servants is no part of the causation.

In deciding whether Wagner's negligence was the sole cause of the injury the court considered the alleged negligence of the railway employee, Smith, whose collision with Wagner caused them both to fall. Regarding this the court said:

The employee Smith was at a place where in the proper operation of the "bull wheel" he might be expected to be. * * * It seems unreasonable to say that Smith was under a greater duty to watch out for plaintiff's safety than plaintiff was himself. This slowly moving car was not particularly dangerous if workmen took proper precaution to step out of the way on its approach and into a place of safety. Smith no doubt heard the cry of warning the same as plaintiff testified he himself did. He had a right to assume that such warning would be heeded. * * * The very fact that Smith also fell gives rise to an inference that he failed to see plaintiff standing on the guard rail. There is no evidence as to what Smith actually did. In so far as this record shows, he may have stumbled, slipped, or fallen against plaintiff. We are, therefore, of the opinion there was an entire failure of proof of actionable negligence.

The court also held that under such circumstances the dangers were obvious and should have been fully appreciated by Wagner when he assumed this dangerous position on the rail; the conclusion therefore was that he assumed this risk when he stood on the guard rail.

The judgment of the lower court was therefore reversed.

EMPLOYERS' LIABILITY—FELLOW SERVANT—GOING TO AND FROM WORK—EMPLOYMENT STATUS—*Hamilton Bros. Co.* v. *Weeks, Supreme Court of Mississippi (December 9, 1929), 124 Southern Reporter, page 798.*—Hamilton Bros. Co. was engaged in the roofing

and plumbing business, with its office and warehouse located in Gulfport, Miss. On out-of-town contracts it furnished free transportation to its employees, carrying them to their jobs in the morning and bringing them back after the day's work was completed. While being so carried the employees received no compensation from the company, nor were they under any duty to serve the company in any manner whatever.

J. H. Weeks was an employee of the company and was working on a job in Gulf Hills. The company's truck, driven by Walter Wood, picked up the employees in Gulf Hills and proceeded to Biloxi, picking up others until there were 16 on the truck. At a point between Biloxi and Gulfport the truck skidded and turned over, crushing Weeks's leg, resulting in a serious and permanent injury. The evidence tended to show that the injury was the result of the negligence of the driver, Wood. Weeks filed suit against his employer, and the circuit court, Harrison County, Miss., rendered a judgment in his favor. Hamilton Bros. Co. appealed to the Mississippi Supreme Court, contending—

(1) That the evidence showed without conflict, at the time appellee [Weeks] was injured, the relation of master and servant existed between him and appellant, and therefore appellant was not liable for the negligence of appellant's fellow servant, Walter Wood, which negligence brought about the injury; and (2) that the evidence showed without conflict that appellant was guilty of no negligence in selecting its truck driver, Walter Wood.

The Mississippi Supreme Court held that the relation of master-servant did not exist at the time of the accident as there was no contract to transport employees to and from its out-of-town jobs on which they were engaged. In the course of the opinion the court said in part as follows:

The appellant's servants, on out-of-town jobs, could use the former's trucks in going and returning, if they chose to do so; for the evidence tended to show that appellant assumed no obligation whatever in that respect. As stated, appellee and various other employees of appellant went to, and returned from, out-of-town jobs in their own cars. Appellant's trucks were not maintained for the sole purpose of transporting its employees to and from out-of-town jobs; they were used for transporting materials to such jobs. The trucks were available to appellant's employees, but it was distinctly understood that they were under no obligation to accept that means of transportation; they were free to use their own cars, or any other means, instead. They were drawing no wages from appellant while going to or returning from their work, whether they were carried on appellant's trucks or went in their own cars. The trips were made before and after work hours. Appellant's control over their services began only when they entered upon their work, and ceased when that work was over. Therefore the time spent by appellant's servants in going to and from their work, whether they were carried

on appellant's trucks or in their own conveyances, was their time, and not the time of appellant. Appellant had no control whatever over them during such transportation. Under such circumstances the servant was enjoying a mere permissive privilege unconnected with his employment.

In such a case we are of opinion that the better view is that the relation of master and servant did not exist during the transportation. [Cases cited.]

The court also held that the lower court did not err in submitting to the jury the issue as to the competency of Walter Wood, the driver of the truck at the time of the accident. The court said:

The retention of an incompetent servant after the master has had reasonable notice, either direct or constructive, of such incompetence, constitutes negligence on the part of the master; the master is chargeable with knowledge of the incompetency of the servant if by the exercise of due care he could have ascertained such incompetence. A master is liable for an injury received by an employee on the ground of negligence in employing or retaining an incompetent servant, if such incompetency was the proximate cause of the injury.

The decision of the lower court in favor of Weeks was therefore affirmed.

Where the employer agreed in an employment contract merely to permit employee to use employer's automobile in going between employee's home and place of work, and sometimes called on him to use the car in employer's business at night, while it was at employee's home, the Supreme Court of Wisconsin held that an injury to a third person while the employee was driving the car from his home to place of work did not render the employer liable. The court ruled that the car was used to facilitate the employee's work and not in carrying out the business of the employer. (Geldnich *v.* Burg (1930), 231 N. W. 624.)

EMPLOYERS' LIABILITY—INDEPENDENT CONTRACTOR—EMPLOYMENT STATUS—*Williams* v. *Central of Georgia R. Co., Supreme Court of Alabama (October 17, 1929), 124 Southern Reporter, page 878.*—The Central of Georgia Railway Co. let a contract to one Kreis to build a roadbed in Shelby County, Ala. Williams was an employee of Kreis while performing this work. Under the contract Kreis was to furnish his own locomotive and his own crew to operate it. In the progress of the work it was necessary for the work train to go out on the main line. The trainmen of the Central of Georgia belonged to a union, and under their agreement they said that only union men should be permitted to operate trains. Thereupon it was agreed that the trainmen of the Central of Georgia should operate the contractor's trains. This was done, the contractor paying the trainmen and the Central of Georgia paying the excess of the union wage over and above the nonunion wage. While the trains were

being operated in this manner a collision occurred, resulting in a serious injury to Williams.

He filed suit against the Central of Georgia Railway Co., and the case was allowed to turn on the question: Whose employee was the engineer at the time of the collision? The circuit court, Shelby County, Ala., answered the question in favor of the Central of Georgia Railway Co., and Williams appealed to the Alabama Supreme Court. This court affirmed the decision of the lower court, holding that the engineer was an employee of Kreis at the time of the accident. The court quoted from the opinion of Chief Justice Cockburn in Ronoke *v.* Colliery Co. (2 C. P. Div. 205), as follows:

When one person lends his servant to another for a particular employment, the servant, for anything done in that employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him.

In concluding the opinion the court said:

The ruling of the Supreme Court of the United States in Linstead *v.* Chesapeake & Ohio R. Co., 276 U. S. 28, 48 Sup. Ct. 241, will be sufficiently shown by the following from the headnote: "Though the men were paid by the Big Four (Railroad) and subject to discharge or suspension only by it, the traffic was C. & O. (Chesapeake & Ohio) traffic, * * * and the work was done under the rules of that railroad and under the immediate supervision of its train master." In that case the court quoted Standard Oil *v.* Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 254, as follows: "The master's responsibility can not be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it."

Applying the principle of the cases to which we have referred it becomes necessary to hold that the engineer operating the contractor's engine at the time of plaintiff's hurt, and of whose negligence in that operation plaintiff in this cause complains, was not the servant or employee of defendant, but of the contractor, and that the general charge was properly given on defendant's request.

EMPLOYERS' LIABILITY—INDEPENDENT CONTRACTOR—THIRD-PARTY LIABILITY—SAFE PLACE TO WORK—*Baker* v. *Scott County Milling Co., Supreme Court of Missouri (June 4, 1929), 20 Southwestern Reporter (2d), page 494.*—The Scott County Milling Co. of St. Louis had on its premises two steel elevators or grain tanks, which it desired to have taken down. Otis Bryant was engaged to perform this task and he employed Henry Baker and two other laborers to assist him. While the work was in progress, Baker was severely injured by the sudden falling of dirt and concrete used in the partitions, due to the defective wall and the method used in tearing down the elevator.

Baker filed suit in the St. Louis circuit court against the Scott County Milling Co. and the court rendered a verdict favoring the company, upholding their contention that Bryant was an independent contractor, as he employed the laborers and paid them himself each week. Baker thereupon appealed the case to the Supreme Court of Missouri.

The questions involved in the appeal were: (1) Whether the case should have been submitted to the jury; (2) whether Baker was an agent or independent contractor; (3) whether the Scott County Milling Co. would be liable for damages resulting from the negligence or wrongful acts of an independent contractor, where the company was negligent in failing to exercise reasonable care in the selection of a competent contractor.

In discussing the first question, the court said the circuit court did not err in submitting the case to the jury, as the employer was required to exercise ordinary care to furnish to his employee a reasonably safe place to work and should take such precautions for the safety of his employees as ordinarily prudent men would take in like circumstances. The duty was a continuing one, and it was a question for the jury whether or not the duty was discharged in this case. In regard to the relation of Bryant and the milling company the court quoted Judge Thompson on negligence (vol. 2, p. 899), which was approved by the Supreme Court of Missouri in the case of Gayle *v.* Foundry Co. (177 Mo. 427, 446, 76 S. W. 987, 992):

The general rule is that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, not in itself unlawful or attended with danger to others, according to the contractor's own methods, and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his subcontractor, or his servants committed in the prosecution of such work. An independent contractor is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished.

The court in the instant case added that—

Taking into consideration all the facts and circumstances revealed by the evidence, together with the testimony of plaintiff and his witness as to the directions given and apparent control exercised by defendant's president and superintendent, we think it was a question for the jury whether the actual relationship existing between defendant and Bryant was that of owner and independent contractor or that of master and servant.

In regard to the third issue the court, basing its opinion on the case of Mallory *v.* Louisiana Pure Ice & Supply Co. (6 S. W. (2d) 617, 626) and section 1531, page 1327, of Corpus Juris, held that an employee had the same right afforded to third persons injured by contractors employed in intrinsically dangerous work. It was the

duty of the employer to use his property so as not to cause injury to anyone—a duty which he could not delegate to another. In the instant case the court ruled that Baker had the right to have the issue submitted to the jury.

The judgment of the lower court was therefore reversed.

EMPLOYERS' LIABILITY—INTERSTATE COMMERCE—ASSUMPTION OF RISK—ELECTION OF REMEDY—*Prink* v. *Longview, Portland & Northern R. Co., Supreme Court of Washington (August 8, 1929), 279 Pacific Reporter, page 1115.*—W. H. Prink was employed by the Longview, Portland & Northern Railway Co. to haul oil to a steam shovel, which was engaged in changing the main channel of a river for the protection of the main-line track of the railroad. The Longview, Portland & Northern Railway Co. had used the track for three years in carrying on interstate commerce. Prink was required to build his own road in reaching the steam shovel, wherever it might be at work along the dike. A switch track was constructed during the course of the work, and the road Prink built from the tank to the shovel ran very close to this switch. The foreman gave Prink to understand he would have the right of way over work trains coming onto the switch.

On the day of the accident Prink had filled his wagon tank from the oil-tank car and delivered his load to the steam shovel. While there a work train backed in upon the switch so that it was not possible for him to drive out along his prepared road. The surface immediately outside his road opposite the train was very rough and hazardous, though apparently not impossible to drive over. Prink asked the trainmen to move the train, but they refused and he was ordered by his foreman to "go on" along the side of the road. In doing so, he drove partially off the road and the wagon tipped over. Prink was thrown from his seat and received injuries. He brought action against the company in the superior court, Cowlitz County, Wash., and was awarded a judgment. The railroad company carried the case to the Supreme Court of Washington contending that Prink assumed the risk, and that he should have been required by the lower court to elect whether he would seek recovery under the Federal statute or at common law.

The supreme court affirmed the decision of the trial court and held that the work was so closely connected with interstate commerce as to be a part thereof. Regarding the contentions made by the railway the court said:

It is contended that Prink assumed the risk of driving alongside the work train, partially off his road, in view of his knowledge of

conditions there existing. We think it can not be so decided as a matter of law. We have noticed that, while Prink was well informed as to those conditions, the foreman in direct charge of the work was equally well informed as to those conditions. Prink drove alongside the train in compliance with the foreman's express direction of a peremptory nature. We think the danger was not so apparent that it can be decided as a matter of law that Prink assumed the risk in proceeding in obedience to the command of the foreman.

Contention is made in behalf of the company that the trial court erred to its prejudice by refusing at the beginning of the trial to require counsel for Prink to elect as to whether they would proceed seeking recovery "under the Federal liability statute (45 U. S. C. A., secs. 51–59) or under the common law." We think our decision in Archibald *v.* Northern Pac. R. Co., 108 Wash. 97, 183 Pac. 95, is decisive against this contention. It is conceded that the pleadings and the court's instructions to the jury were correct and applicable, in the alternative, to both of these theories of recovery, if it be held that counsel for Prink had the right to have the case so proceed. We conclude that he was not required to elect as between these theories of claimed recovery.

EMPLOYERS' LIABILITY—INTERSTATE COMMERCE—ASSUMPTION OF RISK—NEGLIGENCE—*Baird* v. *Fort Dodge, D. M. & S. R. Co., Supreme Court of Iowa (March 11, 1930), 229 Northwestern Reporter, page 759.*—On December 12, 1926, the Fort Dodge, Des Moines & Southern Railroad Co. transported a car of coal from Boone, Iowa, to the farmers' elevator at Rockwell City. This was an interstate shipment and the crew consisted of four employees, including one Baird, a brakeman. The car was duly spotted at Rockwell City on the "team track" so that teams and trucks could unload the car. Several days later it became necessary to move the coal car and it was necessary to move several empty cars in order to gain access to the coal car. In the course of this process the trolley left the trolley wire and before the train could be stopped the trolley pole had come in contact with two mast arms and broken them. While attempting to release the trolley wire Baird was thrown from the top of the car and as a result suffered a severe injury to his knee, causing him serious disability.

He filed suit against the railroad under the Federal employers' liability act and the district court, Polk County, Iowa, rendered a verdict in favor of the railroad on the grounds (1) that Baird failed to prove the railroad was negligent and (2) that he failed to prove that he was engaged in interstate commerce at the time of the injury. He thereupon appealed to the Iowa Supreme Court.

This court reviewed the testimony of the members of the train crew, and concluded the opinion by saying:

There was no material conflict in the testimony. It will be observed from the foregoing that none of the witnesses knew definitely

just how or why the accident to plaintiff happened. There is nothing in the evidence which would relate the accident to the act of one member of the party more than to that of another. If we were to say that the evidence was such as to suggest negligence on the part of somebody, yet such negligence would be as attributable to one as to any or all, and as attributable to the plaintiff himself as to his fellow servants. If it could be said, therefore, that the plaintiff had shown sufficient circumstances to warrant the finding of negligence on the part of somebody, he has, nevertheless, by such evidence connected himself with the negligence as completely as he has connected his fellow servants therewith. We think, however, that a fair analysis of the record sustains the holding of the district court that the plaintiff failed to prove negligence of his fellow servants. We need go no further, therefore, in the consideration of the case.

The judgment of the district court was, therefore, affirmed.

EMPLOYERS' LIABILITY — INTERSTATE COMMERCE — CONTRIBUTORY NEGLIGENCE—EVIDENCE—*Louisville & Nashville R. Co.* v. *Jolly's Admx., Court of Appeals of Kentucky (January 14, 1930), 23 Southwestern Reporter (2d), page 564.*—Henry C. Jolly was an engine hostler employed by the Louisville & Nashville Railroad Co., in Covington, Ky. He was scalded to death by escaping steam as the result of a collision between two locomotives.

Jolly was ordered to prepare engine No. 923 for an "extra job." Thereupon he proceeded, without his helper, to move the engine from the water tank to the coal bins for the purpose of coaling it, after which he was to place the engine on the ready track for the train crew to take charge of it for pulling the extra cut of cars. Before reaching the bins an accident occurred in which the engine was disabled and Jolly injured.

Suit was filed against the railroad under the Federal employers' liability act of April 22, 1908 (45 U. S. C. A., secs. 51–59), as amended April 5, 1910 (45 U. S. C. A., sec. 59). Two grounds of action were asserted, one for the death and the other for the conscious suffering of the injured man. The administratrix recovered a verdict on each cause of action and the Kenton County circuit court refused a request of the railroad company for a new trial. The damages assessed were " for conscious pain and suffering at $5,000 and for the death of Jolly at $28,000, apportioned as follows: To the widow $10,000, to the oldest child $4,000, to the second child $6,000, and to the youngest child $8,000." Thereupon the case was appealed to the Court of Appeals of Kentucky.

The first question raised on appeal was whether the case came under the Federal employers' liability act; that is, whether Jolly was engaged in interstate or intrastate commerce. In answering this the court cited a number of cases and held that each case must be

determined on its own peculiar facts. The court held that in this case Jolly was engaged in interstate commerce as—

There was evidence also tending to show that only interstate transfer cars were handled in this yard between the hours of 12 a. m. and 6 a. m., and that train crews were not called during that period for local work but only for interstate work; that the "1.45 extra job" to which engine No. 923 had been assigned was a string of cars to be delivered in Cincinnati, Ohio, to connecting carriers and was so delivered shortly after the accident.

If the employee is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the Federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars.

It was next urged that Jolly was guilty of contributory negligence. There was some evidence that Jolly had stopped the engine upon a crossover track and that he was moving the train without a headlight. However, there was considerable evidence to the contrary. The court said:

The most that could be said from the evidence was that it afforded room for opposite deductions, and it was within the province of the jury to determine the correct conclusion to be drawn. Cf. Union Pac. R. Co. *v.* Hadley, 246 U. S. 330, 38 Sup. Ct. 318. The act of Congress provides (45 U. S. C. A., sec. 53), that "contributory negligence" of the injured party "shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable" to him, with a proviso not now pertinent. It may be stated generally that under this section the contributory negligence of an employee is not a bar to an action for an injury received by him, but operates only to diminish the damages recoverable for the injury. [Cases cited.] It is only when the negligence of the injured servant is the sole cause of his injury that a recovery is denied him. [Cases cited.]

It was also insisted that excessive damages were allowed by the jury. The court, after considering the fact that Jolly had a wife and three minor children, that he was only 31 years old and in good health, and that he had earned during the year 1927 the sum of $2,518.27, held that the damages were not excessive, saying:

There is no mathematical rule for the measurement of damages, but the matter must be left to the jury to fix the amounts authorized by the evidence in the light of the decisions of the Supreme Court delimiting and defining the elements that may enter into it. And under the inflexible rule adopted and applied by this court the verdict of a properly instructed jury will not be interfered with unless it strikes the judicial mind at first blush as being so grossly excessive as to manifest passion and prejudice on the part of the jury where only deliberation and judgment should prevail.

The court also held that the instruction to the jury complained of was not erroneous, as it conformed exactly to the decisions of the

Supreme Court in cases arising under the act by which the trial court and appeals court were bound. The judgment was therefore affirmed.

EMPLOYERS' LIABILITY—INTERSTATE COMMERCE—NEGLIGENCE—ASSUMPTION OF RISK—*Emch* v. *Pennsylvania R. Co., Circuit Court of Appeals, Sixth Circuit (February 5, 1930), 37 Federal Reporter (2d), page 828.*—Shelby H. Emch was employed by the Pennsylvania Railroad Co. as brakeman. While stooping over to throw a switch, in the course of his employment, he was struck by a passing engine and severely injured. He filed suit against the Pennsylvania Railroad Co., under the Federal employers' liability act (45 U. S. C. A., secs. 51–59). The United States District Court for the Northern District of Ohio rendered a verdict in favor of the railroad on the ground that Emch had assumed the risk. The case was thereupon appealed to the Circuit Court of Appeals, Sixth Circuit.

The appeals court found room to infer negligence by the railroad, as—

Plaintiff had worked upon this line for some time; then had been in other employment, and had just returned to his old work. In these yards where the accident occurred and along the line of the railroad, to the familiar knowledge of plaintiff during his former employment, the switch stand levers were placed at about 55 inches away from the nearest rail. Allowing 22 inches (said in argument to be the right amount) for the overhang of the cylinder head, this would give a clearance of 33 inches, which made it reasonably safe for a man to be operating the switch stand while a train was passing. This particular switch had been installed to be operated from a tower, but that method had been abandoned and the usual manual operating lever had been supplied, spaced 35 inches from the rail, thus allowing only 13 inches clearance. It had been installed since plaintiff's former employment, and this was his first occasion to use it. No reason appears why it was necessary in this instance to depart from the usual spacing.

The appeals court also held that Emch did not assume the risk, if the risk of injury was created by this negligent location, unless he knew and appreciated the danger or unless it was so obvious that the law will charge him with such knowledge. The court said:

Emch's instruction required him to set the distant crossover transfer switch, then hasten back to this one, and be prepared to throw it after the engine and three cars had passed him on the main track and before the arrival of the last car, which by that time would be cut off and following at a short distance. All this required quick work on his part. He had never handled this particular switch nor seen it before. He did not know that it was different from the standard switches. In some haste he reached it and stooped down to be ready to lift the lever at the right instant. The difference between

55 and 35 inches would be obvious to one who looked at it with care; not necessarily so, we think, to one who was in haste and familiar with the standard setting. As he stooped over, he faced the track. The engine was approaching from his left, and he would naturally assume that the switch stand would not be so placed that it would be unsafe for him to operate it in the usual manner. * * * Even though he may have been careless in getting into the danger zone when he might have kept outside of it, a point which we do not consider, it can not be said as a matter of law that he assumed the risk.

The decision of the district court was therefore reversed.

EMPLOYERS' LIABILITY—INTERSTATE COMMERCE—NEGLIGENCE—LAST CLEAR CHANCE—*Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *Kane, Circuit Court of Appeals, Ninth Circuit (July 15, 1929), 33 Federal Reporter (2d), page 866.*—The Chicago, Milwaukee, St. Paul & Pacific Railroad Co. was surfacing and dressing its roadbed and for this purpose established a gang of men at Alcazar, Mont. There being no local facilities for boarding and housing the men, provision was made for them in movable dining and bunk cars. The bunk cars were on one side of the tracks and the water supply and toilet facilities on the other, making it necessary for the men to cross three tracks.

The men working in this gang were employed by the employment agencies of the railroad. Kane and five or six others were employed by the agency in Butte and sent to Alcazar, arriving there some time in the evening of September 14. The foreman met the men at the station, where they assisted in unloading some supplies which arrived on the same train. The men were issued blankets and assigned bunks.

Just before breakfast the next morning Kane was struck and killed by a passing train while he was walking across the tracks. Alma Kane, as administratrix, filed suit against the railroad company and received a favorable judgment in the United States District Court, Montana District. The case was appealed to the Circuit Court of Appeals. The questions submitted on appeal were:

(1) Were Kane's relations to appellant and the conditions at the time of the accident such as to bring the case within the range of the Federal employers' liability act? (45 U. S. C. A., sec. 51 et seq.) (2) Was the evidence sufficient to send to the jury the issue of defendant's primary negligence? (3) Did the evidence warrant submitting to the jury the issue of negligence under the doctrine of the last clear chance?

In answering the first question the court said:

Undoubtedly he was in appellant's employ, and his service was interstate. By the conditions of his employment, he was necessarily

on appellant's premises, and was making necessary preparations for the work in which he was to engage an hour and a half later, in a reasonable manner and within a reasonable time. Appellant's contentions seem to be predicated solely upon the consideration that he had not yet lifted a pick or stuck a shovel into the ground. But his employment was definite, and the nature and place of his service for the day were clearly understood.

The court cited numerous cases upholding its view that deceased was employed in interstate commerce at the time of the accident, and in regard to the alleged negligence, the court said in part as follows:

In short, there was evidence to warrant the jury in finding that appellant had in camp at that station 120 men under conditions where it was necessary for them to cross its tracks in going from the place where they slept and ate, for water and for toilet facilities, and returning. At the hour in the morning when the accident occurred, in getting ready for the day's work, they would naturally be passing back and forth. These conditions were known to the engineman; the train approached the station at a speed of at least 35 miles an hour; though he observed 25 or 30 men milling around near and on the tracks when he was a quarter of a mile away, he did not slacken his speed or give warning by bell or whistle; he saw Kane when he was nearly that far off, and observed that he was crossing the tracks with his back toward the train, that he was walking with his head down, and was apparently unconscious of the approach of the train.

The court concluded that the facts were sufficient to take to the jury the question of the trainmen's negligence under the doctrine of the last clear chance and in affirming the opinion of the lower court, said:

If, under the circumstances, the speed of the train and the failure to give any warning signals, in combination, constituted negligence, the jury was warranted in finding it to have been the proximate cause of the accident. To the two blasts of the whistle sounded when the engine was but a few feet away from him decedent instantly responded, but it was then too late. Had they been sounded 200, or even 100 feet farther away, it is reasonable to assume he would have responded in like manner, and could thus have escaped injury.

EMPLOYERS' LIABILITY—INVITEE—NEGLIGENCE—VOLUNTEER—*Lucas v. Kelley, Supreme Court of Vermont (October 1, 1929), 147 Atlantic Reporter, page 281.*—Kelley owned and operated a sawmill in the town of Derby, Vt. Lucas, an employee of one Ansboro, went to this mill to get some lumber for Ansboro. He entered the mill and found Kelley and his son pulling out a stick of timber which they had just "sized" on the board saw which was to be used in repairs on the mill. Seeing that they were having some difficulty in handling this timber,

Lucas went to their assistance. When he thought the timber had moved so far that Kelley could handle it he stepped back, and in some way his left foot went under the slab saw bench far enough to be caught by the saw, which was then running. His foot was seriously cut and mangled. An action for damages followed.

The Orleans County court rendered a verdict for Kelley, and Lucas carried the case to the Supreme Court of Vermont.

This court affirmed the decision of the lower court and said in part:

There was no emergency calling for his aid, and nothing in the record indicates that the accomplishment of his object in entering the mill depended in any way upon the movement of the timber on which the defendant was working. His going to the assistance of the Kelleys was a departure from the purpose of his entry, and took him to a place where his business did not require him to go. If the plaintiff stands as a mere volunteer he has no right of action here, for the defendant would not owe him the duty of protection from the misfortune that befell him. One owes no duty, except to prevent wanton or willful injury, to one who merely volunteers to assist in his service. This is a firmly established doctrine in the law of negligence. This rule, however, is subject to this important qualification: If the party acting has an interest in the work going on, and for his own advantage or that of his employer undertakes to assist another or his servants, at their request or with their consent, he is not a mere volunteer but one with an interest, and he is not subject to the disabilities of a volunteer but is entitled to such protection as proportionate care would afford him. (4 Labatt, sec. 1564.)

The only evidence in the record before us that can be taken to indicate that the plaintiff was acting in behalf and in the interest of Ansboro is his statement that he did what he did with the timber the quicker to secure his boards.

The plaintiff here had (at best) only an incidental interest in the removal of the timber being handled. Its prompt disposition might have had a slight effect upon the time when he could secure the boards he came for. * * * But he had no such interest in the work he volunteered to assist in as brought him under the protection of the doctrine he invokes. But it is urged that the defendant knew he was there near the saw bench pushing on the timber, and that thereupon it became the defendant's duty to give him warning of the dangerous conditions referred to. It may be taken from the record that the defendant knowingly accepted the plaintiff's assistance, but he did no more. But neither knowledge, silence, acquiescence, nor permission, standing alone, amounts to an invitation. * * * The defendant owed him the duty of active care to protect him from injuries resulting from force negligently brought to bear upon him, but was not bound to keep the premises safe for him or to warn him of their dangerous condition.

As the evidence disclosed no duty owed this plaintiff by the defendant, the nonperformance of which resulted in the injuries suffered by the former, the verdict was properly ordered.

EMPLOYERS' LIABILITY—LIMITATION—NEGLIGENCE—STREET RAILWAY—*Mangum* v. *Capital Traction Co., Court of Appeals of District of Columbia (March 3, 1930), 39 Federal Reporter (2d), page 286.*—John William Mangum was employed as a motorman by the Capital Traction Co., of the District of Columbia, and while operating a street car on March 25, 1924, sustained personal injury. While Mangum's car was at a standstill for the purpose of discharging passengers, another car of the traction company coming from the rear collided with it. The force of the collision threw Mangum backward, causing him to strike his head against the car, inflicting severe injuries.

On March 23, 1926, Mangum commenced an action against the Capital Traction Co., charging that the accident was due to the negligence of the company and its employees. The Supreme Court of the District of Columbia rendered judgment in favor of the company on the sole ground that Mangum's action was barred because it was not brought within one year from the time when the cause of the action accrued.

Mangum appealed to the Court of Appeals of the District of Columbia, contending that the street railway was a "common carrier" and, under the Federal employers' liability act of April 22, 1908 (45 U. S. C. A., secs. 51–59), action could be brought within two years after the cause of action accrued. The traction company contended that the street railway was and always had been a street railway and has never been a railroad in the sense of the employers' liability acts, and that the limitation of the act of 1906 (34 Stat. 232), limiting the time within which an action may be brought to one year after the cause of action accrued, applied in this case.

The court of appeals affirmed the judgment of the lower court and held the Capital Traction Co. to be a "street railway" rather than a "common carrier." The court, speaking through Mr. Chief Justice Martin, said in part:

The distinction between street railways and commercial railroads is thus stated in 25 R. C. L., p. 1115: "* * * Speaking generally, then, a street railway is local, derives its business from the streets along which it is operated, and is in aid of the local travel upon those streets; while a commercial railway usually derives its business, either directly or indirectly, through connecting roads, from a large area of territory, and not from the travel on the streets of those cities, either terminal or way stations, along which they happen to be constructed and operated."

The record herein discloses that the Capital Traction Co. is the successor of several earlier companies, none of which ever possessed the power of eminent domain, nor does the present company have such power; that the entire trackage of the company in the District of Columbia is operated for the public convenience as a street railway

over the public streets and avenues of the District; that no part of its line in the District of Columbia is on a private right of way; and that practically its entire trackage extends through densely populated sections of the city.

EMPLOYERS' LIABILITY—MINOR ILLEGALLY EMPLOYED—DEFENSE—*Gill* v. *Boston Store of Chicago (Inc.)*, *Supreme Court of Illinois (October 19, 1929)*, *168 Northeastern Reporter, page 895.*—The Boston Store of Chicago (Inc.) operated a mercantile establishment engaged in the sale and distribution of merchandise in the city of Chicago. Thomas Gill, a minor 16 years of age, was employed by the Boston Store as a helper on an automobile truck used by them in the delivery of merchandise. When Gill was employed the store neglected to procure any employment certificate as required by section 2 of the Illinois child labor act (Laws of 1921, p. 436). While Gill was riding on the truck in the performance of his duties he fell off and the truck ran over him, causing serious injuries. Suit was filed against the Boston Store, and the superior court of Cook County, Ill., rendered a verdict in the sum of $2,000 in favor of Gill. The Boston Store appealed the case to the Supreme Court of Illinois on the ground that by the superior court's construction of section 2 of the child labor act of 1921 it was deprived of its property without due process of law and was deprived of the equal protection of the law in violation of the constitution of Illinois and the fourteenth amendment to the Federal Constitution.

The evidence showed that Gill was only 16 years old; however, when making application for employment he stated he was 19, and at that time he looked to be 19 years old. The employer contended that the failure to secure the certificate could not of itself establish his liability for the personal injuries received by the boy in the course of his employment. As to the purpose of the child labor act, the court said:

> The child labor act was passed by the general assembly in the exercise of its police power, for the protection of children against the risks of working in certain employments, against whose dangers they would probably be unable or unlikely to protect themselves by reason of their immaturity, inexperience, or heedlessness. While the act does not expressly declare that an employer who violates the act by employing a minor without complying with its terms shall be liable for an action for damages which the minor so employed may suffer by reason of his employment, nevertheless we have held in numerous cases that the employer is so liable.
>
> The appellant assumes that the prohibition of the employment of minors between the ages of 14 and 16 years in, for, or in connection with, the kinds of business mentioned in section 2, is merely ancillary to the compulsory attendance features of the school law, and was not

designed by the legislature to protect such children from any hazards of employment or as a safeguard of the lives, persons, health, morals, and the physical, mental, and moral development and welfare of such children. This assumption can not be sustained. * * * The act concerns children under 16 years of age, and by section 10 entirely prohibits their employment in many specifically named occupations or in any employment which the department of labor finds to be dangerous to their lives or limbs or where their health may be injured or their morals depraved.

In continuing the opinion, the court said the violation of the statute, in employing Gill without the certificate, was the proximate cause of the injury:

The statute prohibited the plaintiff's employment without the statutory certificate, and created an absolute duty not to employ him, unless the certificate was secured. Nonperformance of this duty resulting in injury to another may be pronounced to be negligence as a matter of law (Terre Haute & Indianapolis Railroad Co. *v.* Voelker, 129 Ill. 540, 22 N. E. 20), and we have held in the cases cited that a liability is created, whether specially so declared or not, for the violation of this statute. Clearly, the appellee's unlawful employment was the proximate cause of his injury. It not only occurred in the course of his employment, but arose out of it. In riding on the running board, according to the customary method in delivering parcels from the truck, he was jolted off when the truck struck a depression in the road and received his injury. The injury, having occurred in the course of the appellee's service under an unlawful employment, was enough in itself to show a causal connection, and the law will refer the injury to the original wrong as its proximate cause.

The cause of action is for the violation of the statute, and it is not a defense to show that the child had the physical qualifications to do the work. The prohibition of employment of all children under 16 years is absolute, in the absence of a certificate of employment, and all other evidence is immaterial. Compliance with the act is the only possible justification. * * * This action is for the breach of a statutory duty, and is not based on negligence, and the rules in regard to negligence, contributory negligence, negligence of a fellow servant, and assumed risk do not apply. [Cases cited.]

Regarding the constitutionality of the child labor act the court said the Boston Store was not deprived of the equal protection of the laws since liability was enforced against it because of its employment of Gill without procuring the certificate even though other persons not owning or operating stores or other establishments of the kind mentioned in section 2 could employ a boy over 14 and under 16 years to work on delivery trucks without procuring employment certificates. The court continuing said:

The rule, of course, is recognized that the Legislature may not arbitrarily select a class of individuals and subject them to peculiar rules or impose upon them special obligations from which other persons are exempt. The appellant is only one of numerous classes

of employers who are subject to the requirement of procuring a certificate of employment if they desire to employ boys under 16 years of age to work. It is suggested that there may be persons engaged in business of another kind than those mentioned in section 2 who may desire to employ children under 16 years of age, and who would be exempt from the necessity of securing a certificate of employment. Who these possible employers may be and what the kinds of business may be in which they are engaged is not stated. It must be borne in mind that the employment of children of tender years not only endangers their lives and limbs, but may hinder and dwarf their growth and development physically, mentally, and morally. The State is vitally interested in the protection of the life, persons, health, and morals of its future citizens and the length to which it may go in providing measures for the physical, moral, and intellectual growth and well being of its helpless and dependent wards is a question of expediency and propriety which it is the province of the Legislature to determine.

The court affirmed the judgment of the lower court and concluded the opinion by saying:

We hold that the prohibition, contained in section 2, of employment without securing an employment certificate is absolute; that its purpose is the protection of the lives, persons, health, well being, and physical and mental development of children under 16 years of age; that the appellant's unlawful employment of the appellee was the proximate cause of the appellee's injury; that the appellant was liable to an action upon the statute for the damages suffered by the appellee; that the appellant's property has not been taken without due process of law; and that it has not been deprived of the equal protection of the law.

EMPLOYERS' LIABILITY — MINOR ILLEGALLY EMPLOYED — NEGLIGENCE—STATE AND FEDERAL LAWS—*Chesapeake & Ohio R. Co.* v. *Stapleton, Supreme Court of the United States (May 27, 1929), 49 Supreme Court Reporter, page 442.*—Tobe Stapleton, age 15, and his father, Marion Stapleton, were employed by the Chesapeake & Ohio Railway Co. as section hands and were engaged in maintaining the roadbed and railroad for interstate commerce. Tobe was directed by his father, the foreman of the gang, to get water for his companions. In returning with the water he passed between or under the cars of a train standing on a switch track. The train moved unexpectedly while he was under the cars and he was run over and sustained permanent injury.

Suit was brought under the Federal employers' liability act of April 22, 1908 (35 Stat. 65.) The case was tried and resulted in a verdict of $17,500 for Stapleton. The Kentucky Court of Appeals affirmed the judgment (see B. L. S. Bul. No. 517, p. 85) and the railway company carried the case to the Supreme Court of the United States for review. To supply the negligence necessary for

a recovery under the employers' liability act it was argued the violation of the Kentucky statute (331a9, Carroll's Kentucky Stat. 1922) prohibiting the employment by a common carrier of a worker under the age of 16 was negligence sufficient to justify recovery.

In considering whether the violation of a statute of a State prohibiting the employment of workmen under a certain age and providing for punishment of such employment should be held to be negligence in a suit brought under the Federal employers' liability act, Chief Justice Taft, in delivering the opinion, said:

That the State has power to forbid such employment and to punish the forbidden employment when occurring in intrastate commerce, and also has like power in respect of interstate commerce so long as Congress does not legislate on the subject, goes without saying. But it is a different question whether such a State act can be made to bear the construction that a violation of it constitutes negilgence per se, or negligence at all under the Federal employers' liability act. The Kentucky act, as we have set it out above, is a criminal act and imposes a graduated system of penalties. There is nothing to indicate that it was intended to apply to the subject of negligence as between common carriers and their employees. It is true that in Kentucky and in a number of other States it is held that a violation of this or a similar State act is negligence per se, and such a construction of the act by a State court is binding and is to be respected in every case in which the State law is to be enforced. * * * But when the field of the relations between an interstate carrier and its interstate employees is the subject of consideration, it becomes a Federal question and is to be decided exclusively as such.

We have not found any case in which this question has been presented to the Federal courts, but there are three or four well-reasoned cases in State courts wherein this exact point is considered and decided.

After citing several of these cases in which the State courts held the violation of a statute did not supply the necessary negligence for action under the employers' liability act, Chief Justice Taft concluded the opinion by saying:

We think that the statute of Kentucky, limiting the age of employees and punishing its violation, has no bearing on the civil liability of a railway to its employees injured in interstate commerce, and that application of it in this case was error.

The decision of the lower court was reversed.

EMPLOYERS' LIABILITY—NEGLIGENCE—ASSUMPTION OF RISK—INTERSTATE COMMERCE—*Texas & Pacific R. Co.* v. *Aaron, Court of Civil Appeals of Texas (July 24, 1929), 19 Southwestern Reporter (2d), page 930.*—W. A. Aaron was employed by the Texas & Pacific Railway Co. as car inspector in their railway yards at Shreveport, La. The evidence shows that the yard was divided into three sections,

A, B, and C. Each yard contained a number of spur tracks, on which cars were placed for convenience in making up trains. On the night of August 24, 1927, freight train No. 53 arrived at Shreveport and was due to leave some time later for points in the West. It was necessary to rearrange the cars before the train departed, so the cars were switched on spur tracks to be arranged in "station order." It was Aaron's duty to inspect these cars while the switching operations were going on. While he was making a hose connection between two of the cars, three other cars were shunted onto the track, striking the cars Aaron was inspecting. He was knocked some 8 feet and one of his legs severed.

Aaron filed suit against the railway company alleging negligence on their part in shunting the cars with such force and violence. The railway company pleaded assumed risk and contributory negligence. The district court, Marion County, Tex., rendered a verdict in favor of Aaron for the sum of $20,000.

The case was carried to the Texas Court of Civil Appeals, where the judgment was affirmed, the court saying in part as follows:

> The testimony of the appellee warranted the jury in concluding that the prevailing custom was not followed. The verdict therefore must be interpreted as a finding that his testimony was true and that the switching operations on that occasion were not conducted in the usual and customary manner; that the shunting of the cars which caused the injury was done with unusual violence, creating a situation more dangerous than that to which the inspector was usually exposed. The jury was warranted, therefore, in concluding, and evidently did conclude, that the shunting of the cars in the manner adopted on that occasion was negligence and created a risk which the appellee as an inspector did not assume. [Cases cited.]

The court disposed of the assignments of error and held that the lower court had charged the jury correctly. Furthermore, a new trial could not be granted on account of the misconduct of the jury as there was insufficient evidence to support this claim. The judgment of the district court in favor of Aaron was therefore affirmed.

EMPLOYERS' LIABILITY—NEGLIGENCE—ASSUMPTION OF RISK—JOINT TORT FEASORS—*Southern Railway Co.* v. *Hobbs et al., Circuit Court of Appeals, Fourth Circuit (October 15, 1929), 35 Federal Reporter (2d), page 298.*—J. B. Hobbs was employed by the Southern Railway Co. as an extra switchman and was injured on the evening of December 9, 1926, while at work on top of a freight car then being moved in interstate commerce by the railroad company from within the Ford Motor Co.'s plant at Charlotte, N. C. The track into the plant had been constructed by the Ford Motor Co., at the same time

the company also constructed a line of light fixtures, suspended from the ceiling of the building and immediately over the center of the track. On the night of the accident Hobbs was on the last car and had walked some 8 or 10 feet forward when a light fixture struck him in the face, throwing him onto the track, as a result of which he sustained serious injuries.

He sued the railway company and the Ford Co. as joint tort feasors and the District Court of the United States, Western District of North Carolina, rendered a judgment against the railway company. From this decision the railway company appealed to the Circuit Court of Appeals, Fourth Circuit, alleging Hobbs voluntarily assumed the risk of injury and also that he was guilty of contributory negligence in not taking reasonable care for his own safety.

The evidence showed the cars were removed after dark as was the custom, also that for a switchman of ordinary height, standing on top of a car, the distance was sufficient to allow him to pass under the lamp fixture without coming in contact with it. However, the railway had recently begun using higher and larger cars and the Ford Co. had promised "to have these lights moved * * *."

In affirming the opinion of the lower court, the Circuit Court of Appeals held that Hobbs did not assume the risk and that the railway company was guilty of negligence to which Hodds did not contribute. Regarding the assumption of the risk by Hobbs, the court said:

His obligation was to exercise reasonable care for his own safety, and this included the duty of discovering such dangers as were open and obvious, or in the exercise of due care were discernible to a man of his experience. He assumed the risks of such dangers as were ordinarily incident to the work in which he was engaged, but at the same time he had a right to assume that the company would not send him into a place of danger, which, in the exercise of ordinary care on its part, it could have remedied, and until it was shown, as it was not shown here, either that he knew of the danger, or that it was so obvious that an ordinarily prudent person, under the circumstances, should have observed it, he can not be said in law to have assumed the risk.

The court also held that the promise of the Ford Co. "to remove the lights" did not relieve the railway from its obligation not to send its employees without warning into a place of danger. The fact that the Ford Co. had built the track and placed the light fixtures in this position was not considered actionable negligence by the court, as the furnishing of the cars was the duty of the railway and there was no danger until the larger cars were used. The railway company had recently inspected the lights and, realizing the danger, had requested that the lights be moved. Such knowledge

placed upon them the obligation of warning the men required to go on top of the cars of the danger, or else supplying cars which could be used without danger. In this case they did neither. The railway company contended that as the Ford Co. had been acquitted by the jury, the railway company should also be acquitted. The court held this contention could not be upheld because—

The negligence of the railway company, as ascertained by the verdict of the jury, did not depend exclusively upon the negligence of the Ford Co. in the installation of its lamps, but, on the contrary, was the direct act of the railway company itself, with knowledge of the danger, in furnishing a car for use in the Ford plant which did not permit the necessary clearance. The jury may well have found from the evidence that this action of the railway company did not involve lack of due care on the part of the Ford Co., since it had no knowledge that the car in question was to be used.

EMPLOYERS' LIABILITY—NEGLIGENCE—ASSUMPTION OF RISK—SAFE PLACE AND APPLIANCES—*Turbeville* v. *Avery Lumber Co., Supreme Court of South Carolina (March 11, 1930), 152 Southeastern Reporter, page 439.*—A. H. Turbeville was employed by the Avery Lumber Co., of Sumter, S. C. On November 8, 1928, while in the discharge of his duties at the plant, he was injured when a feed belt broke. The belt was fastened together by means of "clipper hooks," and when the belt broke one of these hooks was thrown some distance, striking Turbeville on the nose and eye, causing him serious and painful injury and resulting in the loss of the sight of one eye. He filed suit against the company, and the common pleas circuit court of Sumter County rendered a judgment of $3,000 in his favor. The lumber company appealed the case to the South Carolina Supreme Court, contending there was no negligence on its part, that it was Turbeville's duty to see that the belt was in good condition, and that he assumed the risk.

The supreme court found that the lumber company was negligent in fastening belts together by means of "clipper hooks," for when they pull apart it may be reasonably expected the hooks will fly through the air, causing injury. There was testimony to the effect that it was better to fasten belts together with leather lacing, and if this had been done in the case involved the injury would not have occurred. The testimony also showed that Turbeville was superintendent of "production" only and that he had nothing to do with keeping the machines in repair.

Regarding the contention that Turbeville had knowledge of the condition of the belt and that he assumed the risk by continuing in the company's employment after acquiring such knowledge, the court said that it did not appear from the testimony that Turbeville knew

of the defect in the belt and appreciated the danger. However, the court also found that the lumber company was charged with such knowledge as a matter of law, and also was charged with the duty of apprising Turbeville of this danger.

The Supreme Court of South Carolina, therefore, affirmed the decision of the lower court awarding judgment in favor of the injured employee.

EMPLOYERS' LIABILITY—NEGLIGENCE—ASSUMPTION OF RISK—SAFETY APPLIANCE—*Klotz* v. *Balmat, Court of Appeals of Ohio (February 25, 1930), 171 Northeastern Reporter, page 409.*—On January 13, 1927, Joseph Balmat, while in the employ of George Klotz, a farmer, was engaged in grinding sausage in a meat grinder. While so engaged the four fingers on his right hand became enmeshed in the grinder and were amputated.

Balmat filed suit against his employer, alleging that the injury was occasioned directly by Klotz's negligence in failing to provide a guard, that he failed to provide an idle pulley on the machine so that it might be thrown out of gear, and that Klotz was further negligent since it was his duty to operate the engine and he did not shut off the power when advised to do so by Balmat, which delay increased Balmat's injury.

The trial court rendered a verdict in favor of Balmat and the case was appealed to the court of appeals. This court said that the employee was attempting to bring the employer within the provisions of the law applicable to workshops and factories, but that—

Nowhere does he allege that the defendant had in his employ three or more persons, or that the defendant was a manufacturer, or that this was not a grinder in common use among farmers in grinding meat, or that there was any safety device or attachment manufactured or in common use on the kind of grinder used, or that he was inexperienced in the work in which he was engaged, or that he refused or objected to feeding this grinder, or that the accident was caused by the lack of an instrumentality that would have enabled the plaintiff to have shifted the belt to an idle pulley. Nor does it appear that the plaintiff was regularly employed along with others, nor that such employment was more than casual.

In view of the suggested omissions it is the opinion of this court that this action is clearly characterized as one of ordinary negligence, and is only based upon the common-law duty to exercise ordinary care.

The court then cited the case of Coal & Car Co. *v.* Norman (49 Ohio St. 598, 32 N. E. 857), wherein the court held:

In an action by a servant against his master for an injury resulting from the negligence of the latter in furnishing appliances, or in

caring for the premises where the work is to be done, the plaintiff must aver want of knowledge on his part of the defects causing the injury, or that, having such knowledge, he informed the master and continued in his employment upon a promise, express or implied, to remedy the defects. An averment that the injury occurred without fault on his part is not sufficient.

Continuing the opinion, the court said:

It is fully proven that the plaintiff was a farm laborer, 51 years of age, performing only casual labor for the defendant, and that he had full knowledge of the construction and the manner of operation of an ordinary small size meat grinder such as farmers use—like the one in this case—and that the grinder and its attachments were open to his view. And it is proved that there is no known device or attachment in common use that could have been placed upon this grinder.

We are unable to convince ourselves from a study of the complete record in this case that the defendant was negligent, and we hold the view that the servant must be held to have assumed the ordinary risk of the enterprise upon which he voluntarily entered, for such was apparent and discernible and known to him. The plaintiff was not of tender years, and he was experienced in that which he attempted to do and voluntarily did, and the employer can not herein be held to be the insurer of his servant's safety.

The judgment of the trial court was therefore reversed.

EMPLOYERS' LIABILITY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—*Turk* v. *Sweeten, Supreme Court of Arkansas (May 12, 1930), 27 Southwestern Reporter (2d), page 1000.*—T. W. Sweeten was employed by the Turk Construction Co., which was engaged in road construction work. He was employed as night watchman and it was his duty to clean and grease the machinery during the night for the next day's work. One night he brought his son with him to help clean the machinery and on that night he finished his work about 11 o'clock. He went to a place on the premises where there was a 10-gallon can of gasoline and told his son to hold the lantern while he poured some out for the purpose of washing the grease off his hands. He forced open the can of gasoline and was pouring gasoline into another can when the gasoline caught fire and Sweeten was severely burned. The employer had told him to use his coal-oil lantern, because the electric lantern was out of order. The lighted lantern was 3 or 4 feet from the can when Sweeten was pouring the gasoline. He knew the gasoline was for emergency use in running the engines and no one had told him to use the gasoline to wash his hands.

Sweeten filed suit against his employer, alleging the injury was due to the negligence of the employer. The Franklin County circuit

court rendered judgment in favor of Sweeten. The construction company appealed the case to the Arkansas Supreme Court, where the judgment of the circuit court was reversed and the case dismissed.

The court held that the construction company was not guilty of negligence, that the injury was the result of Sweeten's own act for his own benefit or convenience and not in the line of his duty as an employee of the company. It was not necessary for him to use the gasoline and the company owed him no duty to instruct and warn him while he was acting outside the scope of his employment. The court also held that Sweeten was not entitled to a judgment because he was guilty of contributory negligence. Sweeteen was using a kerosene lantern in the discharge of his duties, and, when he knocked the top off of the gasoline can and started to pour the gasoline out into another can within 3 or 4 feet of the lighted lantern, he was charged with the knowledge that an explosion, which would burn him, would likely occur.

EMPLOYERS' LIABILITY—NEGLIGENCE—EVIDENCE—FEDERAL AND STATE JURISDICTION—*Pennsylvania R. Co.* v. *Johnson*, *Appellate Court of Indiana* (*December 19, 1929*), *169 Northeastern Reporter*, *page 359*.—The Pennsylvania Railroad Co. operated trains from the city of Fort Wayne, Ind., to Chicago. Edward L. Johnson was employed by the railroad as head brakeman upon one of these trains. The tracks of the railroad ran through Clark, Ind., where a pumping station and water plug were maintained for the purpose of supplying locomotives with water. It was Johnson's duty as head brakeman to uncouple the engine at Clark, so that it could move forward to the water plug. It was also his duty while the engine was being supplied with water to look over and inspect the train and to couple the locomotive onto the train after it had taken water. Johnson had been employed for a number of years as a brakeman, and during the year 1922 he had made 67 round trips over this route.

On the day in question the train arrived at Clark Station about 6 o'clock in the evening and Johnson performed his customary duties. After the train had proceeded 3 or 4 miles west it was discovered Johnson was not upon the train. He was subsequently found by a member of a work train at Clark Station, sitting in a chair immediately inside the door of the pump house with the side of his face covered with blood and otherwise injured, from which injuries he died shortly thereafter.

Loella Johnson, as administratrix, filed suit in the superior court, Allen County, Ind., under the Federal employers' liability act (45 U. S. C. A., secs. 51–59), alleging that the railroad was negligent in

carelessly and negligently constructing and maintaining a waterspout by the side of the track in such close and dangerous proximity as to be a constant menace and a source of danger to the life and limb of its employees. She further alleged that Johnson—

Did not know nor did he have equal means or opportunity of knowing the dangers and conditions as herein set out; but, as a direct and proximate result of the carelessness and negligence of the appellant as herein set forth, and without any fault or negligence on the part of the appellee's decedent, he was thrown, jerked, and hurled against said waterspout or structure and to the ground in such a manner that his arms were broken and crushed, his limbs were fractured, his back was broken, and his ribs crushed, and otherwise so injured that he died, as a result of his injuries, approximately three days thereafter.

The superior court rendered a judgment in favor of the widow in the sum of $7,500 and the railroad appealed the case to the Appellate Court of Indiana, contending there was no evidence, either direct or circumstantial, upon which the verdict could reasonably be predicated as to how Johnson met his death, and that the verdict was merely a conjecture and a speculation.

The appellate court held that as the action came under the Federal employers' liability act all State laws upon that subject were superseded and that—

The rights and obligations of the plaintiff depend upon that act and applicable principles of common law as interpreted by the Federal courts. The employer is liable for the injury and death resulting in whole or in part from the negligence specified in the act, and proof of such negligence is essential to recovery. The kind and amount of evidence required to establish it is not subject to the control of the several States. The court will examine the record, and if it is found that, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed.

The undisputed evidence in this case showed that the water plug alleged to have caused the injury was located 7 feet 5½ inches north of the center of the track and that the cab of the engine was 10 feet wide at its widest point. Therefore there was a space of 2 feet 5½ inches clearance between the cab of the engine and the water plug.

The appellate court held the evidence was not sufficient to sustain the verdict of the lower court, which judgment was therefore reversed, the court saying:

As a final consideration in this case, we are bound to conclude as a matter of law that there were not sufficient facts proven to justify the conclusion that Johnson met his death by coming in contact with the water plug. * * * He may have fainted, or he may have attempted to get off the engine and slipped and fell, or

he may have been struck by some other object. There is as much reason to suppose that he got off the left-hand side of the engine as there is that he got off the right-hand side, because there is no evidence either way.

In view of the fact that the water plug was located farther from the center of the track than the minimum distance required by statute, and whereas there is no showing that there was any unusual construction in the locomotive and the cars or the width thereof, and there is no showing that the roadbed was out of repair, so as to cause any sudden jerking or other motion that is not usual to a train that is being started, we hold that, under the undisputed facts of this case, the appellant was not negligent.

EMPLOYERS' LIABILITY—NEGLIGENCE—EVIDENCE—PRESUMPTION—*St. Louis-San Francisco R. Co.* v. *Smith, Supreme Court of Arkansas (July 8, 1929), 19 Southwestern Reporter (2d), page 1102.*—Sterling Smith was employed by the St. Louis-San Francisco Railway Co. as brakeman on a freight train running from Hugo, Okla., to Ashdown, Ark. On the night of July 9, 1927, he was killed while attempting to switch three cars upon a side switch. In doing this it was part of Smith's duty to uncouple the cars, and after doing that "throw the switch." The evidence showed Smith had uncoupled the cars and had started toward the switch stand. He was never seen alive by any person after starting for the front end of the caboose, and later his mangled body was found upon the track. No one was able to say just how the accident happened.

The widow filed suit in the circuit court, Little River County, Ark., to recover damages on account of the death of her husband, alleged to have been caused by the negligence of the railway. The judgment was rendered in favor of the widow, and the railway appealed to the Supreme Court of Arkansas, contending the evidence was not sufficient to support the verdict.

In regard to the sufficiency of evidence to establish negligence under the employers' liability act the supreme court found that—

The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act, and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several States. The court will examine the record, and if it is found that as a matter of law the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed.

Bearing in mind that the death of Smith must have resulted "in whole or in part from the negligence of" one or more of the railway's employees, and that "proof of such negligence is essential to recovery" the court scrutinized the evidence to determine whether

it was sufficient to support the verdict. It was a part of Smith's duty to give the signal to the engineer when to "kick" the cars away from the train. The evidence showed that this signal was given by Rhodes, a fellow brakeman. This was the principal ground of negligence relied upon, and it is contended by the widow that this unexpected movement caused Smith to fall and to be thus run over and killed. There was no direct evidence to support this last conclusion, but the court was asked to approve it as an inference reasonably to be deducted by the evidence. In regard to this, the court said:

Is it an inference reasonably to be deduced from the evidence? We think not. There was no sudden, unexpected, unusual jerking of the caboose, but only a gradual increase in speed not to exceed 10 or 12 miles per hour from the rate it was traveling. It appears to us that it is just as probable that he got off the caboose to cross over the north side and throw the switch; that in doing so he either stumbled and fell in the dark across the track, or was struck by the car following and was knocked down on the track. One seems about as probable as the other.

The court quoted from the case of Philadelphia & Reading R. Co. *v.* Cannon (296 Fed. 302), wherein the Supreme Court of Pennsylvania said:

It is not enough for plaintiff to show his injury might have been due to more than one possible cause, for only one of which defendant is responsible. He is obliged to go further and show the cause that fastens liability upon defendant was the proximate one and the jury should not be permitted to base a verdict upon a mere conjecture that the injury was caused by one or the other.

The opinion was concluded by the court as follows:

This is also the rule in this court. Juries are not permitted to base verdicts on mere conjecture or speculation. There must be substantial testimony of essential facts, or facts which would justify a reasonable inference of such essential facts, on which to base a verdict before it will be permitted to stand. [Cases cited.]

The burden was upon appellee, not only to establish negligence, but that such negligence was the proximate cause of the injury. Assuming, therefore, that the act of brakeman Rhodes in giving the "kick" signal constituted negligence, there is a total lack of proof or inferences reasonably to be drawn therefrom, that such negligence was the proximate cause of the injury, or that such injury resulted in whole or in part from such negligence. We have therefore reached the conclusion that the verdict and judgment are without substantial evidence to support them, and must be reversed, and the cause remanded for a new trial.

EMPLOYERS' LIABILITY—NEGLIGENCE—EVIDENCE—RAILROADS—*Pullen* v. *Chicago, M., St. P. & P. R. Co., Supreme Court of Minnesota (October 25, 1929), 227 Northwestern Reporter, page 352.*—On April

12, 1928, a freight train of 60 or more cars left Mobridge, S. Dak., for Marmarth, N. Dak., and reached its destination a little after midnight. Wayne Pullen was rear brakeman and rode in the caboose on this trip. At Marmarth it was necessary to switch the train and place the cars on a side track. In doing this the caboose became detached from the train and stopped before it cleared the switch. The engine was switched to an adjacent track and a chain was used to move the caboose into position. After moving the caboose several times, the engine stopped, the chain became slack, but the caboose continued in motion. Pullen stepped between the chain and the end of the caboose and was caught and crushed.

The administratrix proceeded under the Federal employers' liability act, claiming the injury was due to the negligence of the railway. The trial court rendered a verdict for the railway company on the ground that no negligence had been proven. The case was appealed to the Supreme Court of Minnesota.

This court affirmed the decision of the lower court, and said that the act of Pullen in going between the chain and the caboose was "not only unnecessary but obviously dangerous in the extreme." The court found no evidence of negligence other than that of Pullen himself.

EMPLOYERS' LIABILITY — NEGLIGENCE — FELLOW SERVANT — *Hendricks* v. *New York, N. H. & H. R. Co., Court of Appeals of New York (July 11, 1929), 167 Northeastern Reporter, page 449.*—Benjamin F. Hendricks was an employee of the New York, New Haven & Hartford Railroad Co. After the close of working hours Hendricks was given free transportation by the company to the station nearest his home. On the day he was injured the train stopped on a trestle some distance south of the station. Hendricks, fearing the train would start before he could traverse the length of the train, made his exit from the rear. As the rear exit on the right was blocked by a steel girder, he descended from the rear end on the left, alighted upon planks forming part of the trestle's deck, and, breaking through them, fell to the street, sustaining serious injuries.

An action was brought in the New York Trial Term Court by Hendricks against the New York, New Haven & Hartford Railroad Co., under the Federal employers' liability act, and he recovered judgment for personal injuries. This decision was reversed by the New York Supreme Court, appellate division, upon the ground that the employer had not failed in its duty to protect the employee, and that at the time of his injury he had deviated from his employment.

The case was taken by Hendricks to the Court of Appeals of New York, where the judgment of the trial term court was affirmed and

that of the appellate division was reversed. Judge O'Brien rendered the decision of the court, saying, in part:

The evidence warrants the finding that plaintiff assumed no risk known to him nor one so obvious that he should have been aware of it and that his use of the trestle as a connecting passage to the street would have been safe except for the presence of defective planks. Plaintiff, having assumed no known risk and defendant having negligently maintained its structure, he is entitled, under this statute, whether negligent or otherwise, to recover in some amount by way of apportionment of damage, unless his means of exit constitutes a deviation from his employment.

He had not severed his employment with defendant. He was yet on his employer's premises, the relation of master and servant continued to exist, and he was still engaged in discharging a duty of his employment.

If, as matter of fact, plaintiff could not safely alight from the right side of the train, he did not, as matter of law, deviate from his employment when he made his exit on the left.

EMPLOYERS' LIABILITY—NEGLIGENCE—INTERSTATE COMMERCE—CONTRIBUTORY NEGLIGENCE—*New York Central R. Co.* v. *Marcone, Supreme Court of the United States (April 14, 1930), 50 Supreme Court Reporter, page 294.*—Joseph Marcone was employed in the roundhouse of the New York Central Railroad Co. at New Durham, N. J., in which there are 32 engine stalls adjacent to a turntable. His hours were from 7 p. m. to 3 a. m., and his duty was to fill the grease cups and pack the journal boxes of engines while in the roundhouse for inspection. On the night in question, at about 2.15 a. m., he was instructed by his foreman to work on engine No. 3835 and when finished to wait at the inspection wagon between track 7 and track 8. At about 2.35 a. m. Marcone's body, with head and one arm severed, was discovered on the right-hand rail of track 8 underneath the trucks of the tender of engine No. 3709, which was then being backed on track 8 from the roundhouse to the turntable.

Suit was filed by the administrator of Marcone's estate in the circuit court of Hudson County, N. J., and at the trial the hostler who removed the engine from the roundhouse testified that—

Before moving it he inspected track 8, that he saw no one on or near the track, that he then mounted the engine, started the air pump, turned on the headlight, rear light, and cab lights, started the engine bell ringing, and blew three blasts of the whistle as a warning that he was about to back the engine out and as notice to the operator of the turntable. At about 2.30 a. m., some 10 minutes after mounting the engine, he backed the engine toward the turntable at the rate of about 4 miles an hour, looking behind as he did so. The operator of the turntable not responding to the signal, he stopped the engine, blew three more blasts, and when the turntable was set he again started the engine and proceeded until decedent's body was discovered.

There was also evidence to show that the engine was moved a half hour earlier than the actual time for its removal. However, the company contended that there was no regular time for the removal from the roundhouse to the turntable, as the only time stated was for its departure from the yard.

Judgment rendered in favor of the administrator was affirmed by the New Jersey Court of Errors and Appeals. The case was carried to the United States Supreme Court. Mr. Justice Stone, in delivering the opinion of the court, said:

We think that there was sufficient evidence of petitioner's negligence to take the case to the jury. Workmen were constantly moving about the engines stalled in the roundhouse. Any movement of an engine without warning was dangerous to life and limb. After the hostler mounted the engine and before it was moved, sufficient time elapsed for the deceased to come into proximity with it which was dangerous if, as the jury might have found, he could not be seen from the engine cab by the hostler and was not warned of the impending movement. On the evidence it was for the jury to say whether petitioner exercised due care in moving the engine without a more specific and effective warning and whether failure to give it was the cause of the death.

The jury, having found, as it might, that the negligence was the cause of the death, might also have inferred that the deceased was guilty of contributory negligence, but the trial judge correctly charged that under the Federal employers' liability act (45 U. S. C. A., secs. 51–59) contributory negligence is not a bar to recovery unless it is the sole cause of the injury or death, and may be taken into consideration by the jury in fixing the amount of damage.

The engine, No. 3835, on which deceased last worked, was used in hauling interstate trains. It was not withdrawn from service. [Cases cited.] But petitioner contends that deceased, having finished his work, was no longer employed in interstate commerce. The trial court submitted to the jury the question whether deceased had finished his work on this engine at the time of the accident, and there was some evidence to support a finding that he had not finished it. But if we assume that he had completed the work a few minutes before his death, he was still on duty. His presence on the premises was so closely associated with his employment in interstate commerce as to be an incident of it and to entitle him to the benefit of the employers' liability act.

The decision of the lower court was therefore affirmed.

EMPLOYERS' LIABILITY—NEGLIGENCE—ORDINARY CARE—*Millett* v. *Maine Central Railroad Co., Supreme Judicial Court of Maine (September 12, 1929), 146 Atlantic Reporter, page 903.*—Linneous M. Millett, an employee of the Maine Central Railroad Co., suffered injuries when a spark lodged in his eye while he was engaged in burning grass along a right of way. The evidence showed the day

was suitable for burning grass and that Millett was an experienced man at such work. His work required that he walk along the edge of the location to prevent the escape of fire to contiguous land, and while so doing the accident occurred. The railroad company did not assent to the workmen's compensation act (Rev. Stat., ch. 50, as amended by Laws 1919, ch. 238). Millett therefore brought action against the railroad company. A nonsuit was granted and Millett excepted, taking the case to the Supreme Judicial Court of Maine. This court overruled the exception, saying in part as follows:

The law permits recovery, under any of the courts, only on the basis of negligence. Negligence is nothing more or less than a failure of duty. (Boardman *v.* Creighton, 95 Me. 154, 159, 49 Atl. 663.)

An employer is bound to exercise ordinary care to provide reasonably safe and reasonably suitable methods, and such only, to enable the employee to do his work as safely as the hazards incident to employment will permit.

But the employer is not an insurer. Plaintiff had the burden to adduce reasonable evidence which would tend to show, primarily, a breach of duty owed to him in respect to the method of doing the work. Negligence may not be found from the mere happening of accident. Wormell *v.* Railroad Company, 79 Me. 397, 403, 10 Atl. 49.)

There is no evidence that the method employed was not common and usual in the occupation.

The plaintiff did not prove a prima facie case. The trial judge did not err in granting the nonsuit.

Therefore the court held that Millett was not entitled to recover.

EMPLOYERS' LIABILITY—NEGLIGENCE—PROXIMATE CAUSE—ASSUMPTION OF RISK—*Rio Bravo Oil Co.* v. *Matthews, Court of Civil Appeals of Texas (July 23, 1929), 20 Southwestern Reporter (2d), page 342.*—The Rio Bravo Oil Co. held a mineral lease on the part of the right of way of the Texas & New Orleans Railroad Co., about 500 feet long, which crossed Spindletop Oil Field in Jefferson County, Tex. It extended only to that portion of the right of way not covered by the railroad track and roadbed, over which the oil company had no control or authority. The company had 25 or 30 oil wells on either side of the track. Well No. 54 was built within 15 or 20 feet of the crossties, and the steam pump was located between the platform and the railroad in such a manner that the exhaust from the pump was discharged directly across the railroad.

L. J. Matthews, an employee of the oil company, was assigned to work on well No. 54. On the morning of the accident he had arrived on the premises of the company and had gone into the dressing room and changed his clothes before crossing the track to begin his work. While walking down the track he approached the section where the exhaust from the pump was discharged directly across the tracks.

The steam was so dense he could not see through it, and as a result he was struck by a train approaching from the opposite direction and was severely injured. He filed suit in the district court of Jefferson County against the oil company for the damages suffered by reason of such injuries, alleging that the company was negligent in that it (1) failed to place a watchman on the premises near well No. 54 to warn its employees of the approach of trains; (2) failed to place a signal lamp near well No. 54 to warn its employees of approaching trains; (3) failed to place a barricade along the railroad track; (4) failed to place an electric bell to warn its employees; (5) failed to place an electric signal on the premises; (6) failed to provide a way of leaving and entering the place of work; (7) provided the way along the railroad track; and (8) placed the pumps so near the track that the steam was discharged in close proximity to the railroad track so as to obstruct the view of an approaching train by those using the track.

The jury found each of these to be a proximate cause of the accident and held that the injury occurred while Matthews was in the performance of his duties. A judgment of $50,000, exclusive of a $2,500 doctor's bill was rendered in favor of Matthews. The Rio Bravo Oil Co. appealed the case to the Court of Civil Appeals of Texas. In the appeal the company attacked the theory of master and servant and contended that Matthews was not performing the duties of his employment when injured.

The appeals court found that he was not injured on his master's premises, but on his way to the premises. The court said further that "he was not entitled to claim rights of servant after entering premises originally, since such relationship was severed at time he voluntarily left premises and walked on railroad track." His master had not contracted with him to furnish him a way for this purpose and he was therefore not in the discharge of his duties when injured. There was no relation of master and servant at the time of the injury and issues Nos. 1, 2, 4, and 5 made by Matthews based upon the theory of master and servant therefore could not stand. The three last-named issues could not have constituted negligence for the further reason that the company had no control over the railroad and no right to attach signals to the rails. Issues 3, 6, and 7 did not suggest negligence because they did not violate any duty toward the public.

However, the claim based upon the duty not to create or maintain a dangerous agency or obstruction across the track applied to the public as well as to the employees, and the court ruled that if this duty was violated and if injury proximately resulted therefrom the company would be liable unless it proved a defense good at law.

The defense used by the company was that (1) Matthews was guilty of negligence in walking into the exhaust, and that this was the sole cause of the accident; (2) the act of the train in striking Matthews was the sole cause of the accident; and (3) the negligence in discharging the exhaust was not a proximate cause and the jury's verdict on this was without support.

Regarding the eighth issue raised by Matthews, the court said in part as follows:

On the principles thus stated, the issue of negligence was raised by discharging the exhaust from the pump and engine across the railroad track, and the verdict of the jury, convincing appellant of negligence on the three divisions of question No. 8, has support.

It knew the condition of the premises. It knew that the railroad track was being used as a way by many people. It knew that the railroad company was operating its trains upon this track. It knew that the exhaust was so dense as to obstruct the view of one using the track. The finding that it should have foreseen the consequences of its act in discharging its exhaust as it did has support.

The oil company also complained of several errors in the trial by the lower court. It complained of the trial court's definition of "proximate cause" and the refusal of the court to define "efficient intervening cause" and "natural and continued sequence" as used in the charge. Upon this assignment of error the court of appeals reversed the decision of the lower court and ordered the case for a new trial.

EMPLOYERS' LIABILITY—NEGLIGENCE—SAFE PLACE AND APPLIANCES—*Primmer* v. *American Car & Foundry Co., St. Louis Court of Appeals (October 8, 1929), 20 Southwestern Reporter (2d), page 587.*—On January 21, 1924, Robert Primmer was injured in the course of his employment with the American Car & Foundry Co., located in the city of St. Louis. The injury was received while he was in the act of cutting a metal brake rod upon an electrically-controlled machine known as an "alligator shear."

Primmer filed suit in the St. Louis circuit court and received an award of $2,500. The American Car & Foundry Co. appealed to the St. Louis court of appeals, contending that Primmer was guilty of contributory negligence. Primmer alleged the company was negligent in (1) permitting the shears to become dull, worn, and loose so that they were dangerous to operate, and (2) that the machine was so situated as to be dangerous to the employees in their ordinary work and should have been safely and securely guarded.

The foundry company contended it was part of Primmer's duty to sharpen and tighten the blades and therefore his first contention was attributable to his own neglect and not that of the company.

The court, however, did not bear out this position. Primmer was only a helper upon and around the machine, the regular operator being one Tonko, who in turn received his orders from the foreman. It was Tonko who decided when the machine should be sharpened and, on this occasion, he had issued no orders to Primmer to take the machine apart and sharpen the blade.

The court also upheld Primmer's contention that the company was negligent in not furnishing a guard for the machine. They found that a "hold-down bar" would have prevented the accident, and would have involved no change in structure of the machine nor affected the efficiency of the machine.

The foundry company assigned error in numerous respects to the instructions of the court. However, the court of appeals found no error in the trial of the case materially affecting the company's rights, and the judgment of the trial court was therefore affirmed.

EMPLOYERS' LIABILITY—NEGLIGENCE—VIOLATION OF STATUTE—ASSUMPTION OF RISK—*Suess* v. *Arrowhead Steel Products Co., Supreme Court of Minnesota (March 28, 1930), 230 Northwestern Reporter, page 125.*—Henry B. Suess brought action against his employer, the Arrowhead Steel Products Co., to recover damages for injuries to his health, claiming that while in the employ of the company for a period of six years as superintendent and inspector he contracted tuberculosis. He alleged that the company had failed to comply with section 4174, General Statutes 1923, of Minnesota, and that by reason thereof he contracted the disease from which he was suffering at the time he brought action. This disease is not compensated under the Minnesota workmen's compensation act.

Section 4174, General Statutes 1923, upon which the action is based, reads:

In every place of employment the employer shall provide in each workroom thereof proper and sufficient means of ventilation and shall maintain proper and sufficient ventilation. If excessive smoke, steam, gas, fumes, vapors, dust, or other impurities are created or generated by the manufacturing process or handicraft carried on therein, in sufficient quantities to obstruct the vision, or to be irritating, obnoxious, or injurious to the health or safety of the employees therein, the rooms shall be ventilated in such manner as to remove them or render them harmless, so far as is practicable.

The district court, Hennepin County, submitted to the jury the question whether Suess had assumed the risk, and upon this rule a verdict was rendered for the company. Suess requested a new trial, contending that the rule of assumption of risk did not apply, for the assumption of risk was a result of the contract of employment; that it was unlawful and contrary to public policy to permit parties

to contract either expressly or impliedly to violate a statute; and that if it is against public policy so to contract, it would seem equally against public policy to hold that assumption of risk applies where there is no such contract.

The request for a new trial was denied and the case was appealed to the Supreme Court of Minnesota. In deciding whether the doctrine of assumption of risk applied to the case the supreme court said:

The doctrine of assumption of risk is not favored, and should be limited rather than extended. The latest Minnesota decision called to our attention, where the doctrine was held to apply in cases based on the violation of a statute requiring an employer to provide safety appliances or safe instrumentalities or places of work for the protection of his employees, is the Glockner case, decided more than 20 years ago. Since then there have been many marked changes in industrial relations between employers and employees and in legislation governing such relations. The first workmen's compensation act was passed in 1913 and abolished the defense of assumption of risk in all workmen's compensation cases based on the failure of the employer to provide and maintain safe premises and suitable appliances for employees. In 1915 the act governing liability of common carriers operating steam railways in this State, for death or injury to employees, was passed. That act, in harmony with the Federal law, abolished the defense of assumption of risk in any case where the violation by the employer of any statute enacted for the safety of employees contributed to the injury or death of such employee. In addition to these acts, there has been a rapid growth and extension of laws providing for the safety and protection of employees in industrial plants and other occupations. The public policy of the State, as gathered from legislation enacted during the last 20 years and more, is to make the employer liable for injury to an employee, caused by the violation by the employer of a statute requiring him to provide and maintain safe premises and appliances for the protection of his employees, and that the defense of assumption of risk should not apply in such cases. This conclusion is in harmony with the line of decisions in this State that a violation of a statute, resulting in injury to one for whose benefit the statute was enacted, is negligence per se, or, as stated in some cases, that the question of negligence is not involved—that, if a violation of the statute is the proximate cause of injury to one for whose benefit the statute was enacted, liability follows, irrespective of any question of negligence in the ordinary sense of that word. [Cases cited.]

In concluding the opinion the court held that where an action is based upon the violation by the employer of such a statute and the injury complained of is a proximate result of such a violation, assumption of risk is not a defense open to the employer. The case was therefore reversed.

EMPLOYERS' LIABILITY—OCCUPATIONAL DISEASE—SAFE PLACE TO WORK—ASSUMPTION OF RISK—*Depre* v. *Pacific Coast Forge Co., Supreme Court of Washington (April 4, 1929), 276 Pacific Reporter,*

page 89.—Andrew Depre was employed by the Pacific Coast Forge Co., as manager of its galvanizing plant, from March, 1924, until May, 1926. A part of the plant consisted of a large tank into which was poured a mixture of muriatic acid, sulphuric acid, and water, which emitted noxious gases. The ventilation provided was insufficient to remove the gases. As a result Depre's lungs became inflamed, making him susceptible to tuberculosis, which disease he subsequently contracted. The evidence showed that he had complained to his employer and was promised that the condition would be remedied, but nothing was done until it was too late to benefit him. He filed suit against his employer and received a judgment in the superior court, King County, Wash. The case was appealed to the Supreme Court of Washington.

The court held that Depre could not recover under the Washington workmen's compensation act, as that act covered only the injuries resulting from some fortuitous event and not occupational diseases. However, the court also held that this act did not repeal the provisions of the factory act (Rem. Comp. Stat., sec. 7659, Laws, 1911, p. 345) and that the evidence showed the employer had failed to comply with the requirements of this act with respect to the place in which he required his employees to work.

The court considered the evidence sufficient to sustain the award and held that the defense, used by the employer, of assumption of risk was not available as a defense when the employer failed to comply with the requirements of the act. The judgment of the lower court was therefore affirmed.

EMPLOYERS' LIABILITY—OVEREXERTION—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—*Baker* v. *Sterrett Operating Service (Inc.), Court of Appeals of District of Columbia (April 7, 1930), 58 Washington Law Reporter, page 322.*—On January 23, 1928, Irving Baker was in the employ of the Sterrett Operating Service (Inc.) as an apprentice painter. His duties consisted of raising on jacks and painting the chassis of automobile trucks. He filed suit against his employer alleging that on the above date he received a hernia by reason of lifting while in the course of the employment.

The employer, in defense, (1) failed to recognize any cause of action against the company, (2) pleaded that Baker was guilty of contributory negligence, and (3) that Baker assumed the risk. The Supreme Court of the District of Columbia upheld this contention and rendered a verdict in favor of the employer. Baker thereupon appealed the case to the Court of Appeals of the District of Columbia,

which court quoted the general rule regarding overexertion as stated in 25 L. R. A. (N. S.) 362, as follows:

It is a general rule that a servant who injures himself by overstraining his muscles in overexerting himself in lifting weights, etc., can not hold his master liable, as he himself must be the judge of his own strength, and this is so even if the work is attempted at the immediate direction of the master. Even in such cases the servant is deemed to have assumed the risk.

Following this rule the court affirmed the decision of the lower court, saying in part as follows:

In our opinion the ruling of the lower court was right. It is not claimed by the plaintiff that there was any defect in the construction or condition of the jack which he used at the time of the accident. Nor did the jack fail to operate as it should. The declaration implies that plaintiff succeeded in lifting the chassis by means of the jack, but did not realize at the time that he was exerting unusual physical effort in doing so, for it is stated that he unconsciously exerted great and unusual physical pressure in operating the jack, and thereby unknowingly exerted greater pressure than he was capable of without injury to himself. It appears, therefore, that the cause of plaintiff's injury was his own overexertion or strain while engaged in his employment, and that had he not thus overexerted himself he would not have sustained the injury of which he complains.

EMPLOYERS' LIABILITY—PROXIMATE CAUSE—NEGLIGENCE—EVIDENCE—*Atchison, T. & S. F. R. Co.* v. *Toops, Supreme Court of the United States (April 14, 1930), 50 Supreme Court Reporter, page 281.*—M. G. Toops was a conductor in charge of a freight train owned and operated by the Atchison, Topeka & Santa Fe Railway Co. He was killed near the station at Rolla, Kans., while in the course of a switching operation. Toops and other employees were engaged in switching cars on the grain elevator tracks. Shortly after the directions were read to the crew, Toops said that he would look out for the cars. He was last seen alive, standing, lantern and train book in hand, on the station platform. His body was not found until after the grain cars had been "kicked" upon the elevator tracks. The body was lying diagonally across the track and the head and shoulders had been severed. There were no eye witnesses to the accident.

The widow filed suit against the railroad contending that the deceased was knocked down and killed as a result of its negligence in carrying out the "kicking" movement of the grain cars without signal and without placing a flagman or a light on them. A judgment was rendered for the widow.

Upon appeal to the Supreme Court of Kansas the judgment was affirmed and the case was appealed to the United States Supreme

Court. Mr. Justice Stone delivered the opinion of the court and, in reversing the decision of the State court, said in part:

Proof of negligence alone does not entitle the plaintiff to recover under the Federal employers' liability act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer.

Even though we assume that in all the respects alleged the petitioner was negligent, the record does not disclose any facts tending to show that the negligence was the cause of the injury and death. The only evidence relied upon by respondent to account for the deceased's presence at the point of the accident was that already stated, which indicated that he had proceeded to the elevator track in order, as he had said, to "look out" for the kicked cars, whether by climbing onto them and controlling their movement on the elevator track, as is usual in such movements, or by assisting in the spotting movement to be later carried out, can only be inferred.

On respondent's own theory, deceased was fully cognizant of the contemplated movement. He knew that the grain cars were to be kicked onto the elevator track where he went to meet them, and knew that his train crew, consisting of only two brakemen, and the lanterns which they carried, would be needed in attending to the switching, signalling, and uncoupling of cars in order to kick the train of stock cars onto the passing track, and that the grain cars for which he was to "look out" would be without brakeman or warning light. It is presumed that deceased proceeded with diligence and due care. (Looney *v.* Metropolitan R. R. Co., 200 U. S. 480, 488, 26 Sup. Ct. 303.) The movement of the 15 cars to and across the switch and onto the elevator track in a quiet neighborhood on a still night can not be assumed to have given no warning sounds of their approach.

All these factors, taken together, render highly improbable the theory of respondent that deceased was run down by the grain cars while he was crossing or standing upon the track, and they give sharp emphasis to the absence of any proof of the fact, indispensable to respondent's case, that deceased, while standing on or attempting to cross the track, was struck by the leading car.

EMPLOYERS' LIABILITY—SAFE PLACE AND APPLIANCES—DUTY OF EMPLOYER TO INSTRUCT—"SIMPLE TOOLS"—*Middleton* v. *National Box Co., District Court, Southern District, Mississippi (February 10, 1930), 38 Federal Reporter (2d), page 89.*—Ed. Middleton was employed in the box factory of the National Box Co., in Mississippi. He filed suit against the company claiming that—

A chisel, among other tools, was furnished him by his employer with which to do his work; that the chisel was made by the defendant of material which it knew, or ought to have known, was unsuit-

able for the purpose, and which rendered the tool not only defective, but dangerous to any employee who should use it as the plaintiff was required to do in the performance of his duties. * * * The end which is to be struck with a hammer should be soft and malleable so that it will not chip off or break. The proper way * * * to have converted the discarded file into a chisel, * * * was to have put it in the fire and tempered it so that the blunt end would not be brittle. This * * * was not done, and the chisel furnished was "brittle as glass."

As a consequence, Middleton, who was ignorant of these facts, and while engaged in his duties struck the chisel with a hammer, a tiny piece of steel chipped off and lodged in his eye causing an injury which destroyed the sight and caused the subsequent removal of the eyeball, and the probable impairment of the sight of the other eye. The company denied either the manufacture or the furnishing of the tool in question, but claimed to have furnished other safe and suitable tools in sufficient number.

In delivering the opinion of the court, District Judge Holmes cited the case of Kilday *v.* Jahncke Dry Dock & Ship Repair Co. (281 Fed. 133), in which the court denied liability for injuries to the eye from a defective chisel which broke from a latent defect. The negligence charged was the failure to test the chisel. The court said:

> The general rule that it is the duty of the master to supply the servant with safe tools and appliances is subject to a well-established exception in case of common and simple tools and appliances. Upon the theory and for the reason that the servant has as good opportunity for ascertaining defects in simple tools, such as a chisel, as the master has, the law relieves the master of the duty which it imposes upon him, where he furnishes complicated tools or machinery for the use of his servant.

The district judge upheld the theory that "the employee's knowledge of 'simple tools' is presumed to be equal to that of the master," and as it did not appear by whom the tool was manufactured or improperly tempered or that the company had any knowledge superior to that of the employee, the judgment was entered for the company.

EMPLOYERS' LIABILITY—SAFE PLACE AND APPLIANCES—FAILURE TO INSTRUCT—ASSUMPTION OF RISK—*Shey* v. *Central Coal & Coke Co., Supreme Court of Missouri (October 8, 1929), 21 Southwestern Reporter (2d), page 772.*—On August 23, 1917, Engelbert Shey, employed by the Central Coal & Coke Co., in its coal mine at Bevier, Mo., was injured by a premature explosion while charging a drill

hole with blasting powder. He sued for damages in January, 1924, and the St. Louis circuit court rendered a judgment dismissing the suit. Shey appealed to the Supreme Court of Missouri, alleging (1) that the company carelessly and negligently failed to furnish him reasonably safe tools with which to work; and (2) that the company carelessly and negligently failed to instruct him in the proper use of tamping tools and especially failed to instruct him that an iron tamper was highly dangerous and was likely to explode powder when such tamper came in contact with sulphur in the coal vein.

The company answered by alleging that it was the custom and practice in coal-mining districts for miners to furnish their own tools and the selection of tools was left to the discretion of the miner, and, further, that Shey assumed the risk involved.

The court found Shey had met all the requirements of section 7527, Rev. Stat. 1919 of Missouri, and even though he was only 18, he had met all the qualifications of an experienced miner. The company therefore owed no more duty to him on account of his age than it would have owed to any other miner qualified to mine under the statute.

In regard to the equipment used and the company's failure to instruct, the court said the coal company—

Was not under obligation to furnish the very best appliances. He discharged his duty when he furnished tools which were then in general use and were regarded as reasonably safe. Plaintiff's main witness testified that he did not know, notwithstanding all his experience, that an iron tamper was unsafe until after the injury to the plaintiff. No witness testified to any knowledge at the time of plaintiff's injury, or prior thereto, that a steel or iron tamper was dangerous.

It is quite probable from the evidence that the injury to plaintiff, apparently the first of its kind in a Missouri mine, and similar injuries after that, called attention to the danger of using iron tampers in mines where hard substances are likely to be struck by them. The evidence is entirely insufficient to charge the defendant with notice, at the time the plaintiff was furnished an iron tamper, that it was a dangerous instrumentality.

The plaintiff brought this suit seven years after his injury. If he had been of age, the statute of limitations would have barred his action. It is reasonable to infer that at the time of his injury he was advised that the defendant owed him no duty to furnish a different kind of tamper. After he acquired experience in Illinois and elsewhere, and learned that other and safer tampers were later used, he saw fit to bring this suit. There is no evidence to show that the defendant at the time of the injury had any more knowledge of the danger of the use of a steel tamper, or of the use elsewhere of any other kind of a tamper, than the plaintiff and his main witness, Sam Cook, had.

So we are constrained to hold that the evidence fails to show that at the time the plaintiff was injured the defendant was under any duty to supply him with a tamper other than the one which was furnished him.

The judgment of the lower court was therefore affirmed.

EMPLOYERS' LIABILITY—SAFE PLACE TO WORK—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—*Wisconsin & Arkansas Lumber Co.* v. *Ward, Circuit Court of Appeals, Eighth Circuit (May 22, 1929), 32 Federal Reporter (2d), page 974.*—On August 22, 1926, Algie Ward was injured as a result of a piece of board thrown back against his abdomen while he was engaged in operating a ripsaw machine in the spool mill of the Wisconsin & Arkansas Lumber Co. Following his death on November 6, 1926, Susie Ward, the widow, filed suit against the company, alleging that his death resulted from the accident which was due to the negligence of the company in failing to exercise ordinary care to furnish the deceased a reasonably safe place to work. The complaint specified that the machine was dull and worn and the shaft to which it was attached was so worn as to cause the saw to wobble and kick back close-grained wood; that the company could easily have prevented this injury by a guard between the saw and the operator. The lumber company denied that the injury was caused by negligence on its part, and in addition pleaded the defense of contributory negligence and assumption of risk by Ward.

The United States District Court for the Eastern District of Arkansas rendered a verdict in favor of the widow, and from this judgment the lumber company appealed to the Circuit Court of Appeals. This court found the evidence sufficient to sustain the finding of the jury regarding the negligence of the company and that Ward did not assume the risk unless he knew that the throwing back of the boards seriously endangered his safety and that the danger was fully appreciated by him. However, the court did find errors appearing in the instructions given by the district court and that it failed to instruct that the burden of proving the cause of the death was on the counsel for the widow. For these errors the judgment was reversed and the cause remanded to the district court with directions to grant a new trial.

EMPLOYERS' LIABILITY—SAFE PLACE TO WORK—NEGLIGENCE—ASSUMPTION OF RISK—*International Harvester Co. of America* v. *Hawkins, Supreme Court of Arkansas (February 3, 1930), 24 South-*

western Reporter (2d), page 340.—Peter D. Hawkins was employed by the International Harvester Co., a corporation engaged in selling harvester machines, parts of machinery, and other merchandise in the city of Little Rock, Ark. Pursuant to the directions of the foreman, Hawkins was engaged in making an inventory of parts and merchandise located in small bins. A strip of timber was nailed to the bins at the bottom part and this strip served as a place to fasten a chair and also to prevent the parts from coming out. While Hawkins was in the discharge of his duties making the inventory and using this chair attached to a bin several feet above the floor, the strip of board broke and caused him to fall, resulting in severe injuries.

Hawkins filed suit against the company alleging that the company was negligent and careless in failing to furnish a safe place for him to work. The company denied this allegation and pleaded that Hawkins assumed the risk in his contract of employment. The Pulaski County circuit court rendered judgment in favor of Hawkins and the company appealed to the Supreme Court of Arkansas.

The higher court held that while a master was not required to furnish an absolutely safe place to work, he was required to exercise ordinary care to provide safe appliances and a reasonably safe place to work. The court also pointed out that it was the master's, not the employee's, duty to make inspection.

The employer contended that negligence could not be inferred merely from the injury. The supreme court in rendering the decision said:

> While negligence can not be inferred merely from the injury, negligence may be inferred from facts shown in evidence. And the facts here are sufficient to justify the jury under proper instructions to find that the appellant was guilty of negligence and that this negligence caused the injury.

Regarding the next contention, that Hawkins assumed the risk, the court said:

> The servant, when he enters into the employment, assumes all of the ordinary risks and hazards of the employment, but he does not assume the risk of negligence of the company for which he was working or any of its servants. And where a servant, engaged in the performance of his duty for the master, in the exercise of ordinary care for his own safety is injured, whether by the negligence of the company for which he works or by the negligence of any other servant of the company, he is entitled to recover.

After considering all the evidence the court concluded that the judgment of the circuit court should be affirmed.

EMPLOYERS' LIABILITY—SAFE PLACE TO WORK—OCCUPATIONAL DISEASE—CONSTITUTIONALITY OF STATUTE—*Boll* v. *Condie-Bray Glass & Paint Co., Supreme Court of Missouri (October 4, 1928), 11 Southwestern Reporter (2d), page 48.*—John Boll, while in the employ of the Condie-Bray Glass & Paint Co., of St. Louis, Mo., as general utility man, filed suit for damages against his employer in the sum of $20,000. He asked damages from the company on two separate and distinct causes of action, each one due to alleged negligence and each one resulting in personal injuries which he sustained. In the first count Boll alleged that he suffered an injury due to a rupture received by him while attempting to move barrels of lead weighing 700 pounds. The St. Louis circuit court sustained a demurrer to this cause of action and on appeal the Supreme Court of Missouri affirmed the decision, saying that "the master is not responsible for a servant overtaxing his strength and therefore can not be made to respond in damages for injuries resulting therefrom." In the second count, complaining of the alleged negligence of the employer, Boll pointed out that the employer failed to provide a reasonably safe place to work, in that there were mixers on the employer's premises where dry lead, dry paint, dry zinc, and dry whitening were placed in large quantities, causing poisonous gas and dust to be emitted in harmful quantities; and that the employer negligently failed to provide proper ventilators in the factory where Boll was required to do part of his work and by reason of such failure Boll was overcome with fumes and received permanent injuries. This cause of action was based upon sections 6817, 6819, 6825, and 6827 of the Revised Statutes of Missouri for 1919, which provides that any employer engaged in carrying on any work which may produce illness or is especially dangerous to the health of the employees shall comply with certain prescribed requirements for the prevention of industrial or occupational diseases.

The employer alleged that the sections above referred to are arbitrary and unreasonable and do not specify the nature, kind, and character of the device or facilities to be furnished by the employer or designate what shall constitute adequate and sufficient devices or facilities, and that such sections are therefore unconstitutional.

The lower court sustained the contentions of the employer and Boll took the case to the Supreme Court of Missouri. That court, on October 4, 1928, upheld the constitutionality of the statutes above referred to, saying:

These sections of the statute were enacted for the purpose, the very laudable purpose, of preventing diseases among laborers, which diseases are incident to the operation of such business. Courts are not called upon to pass upon the reasonableness, the wisdom, or the

necessity of a legislative act, as such matters are alone for the consideration of the legislative body.

* * * We have no hesitation in holding that sections 6817, 6819, 6825, and 6827, Rev. Stat. Mo., 1919, are constitutional, and that they are a reasonable exercise of the police power of the State. Health measures and measures for the protection of the lives and limbs of employees have very properly been held to be legislation of the highest type and indicative of the desire of an enlightened people to help those who are in need of such assistance.

But respondent is in no position in this appeal to complain of the statute requiring adequate devices, means, or methods to prevent such injury, for the evidence shows (appellant's evidence being all that was offered) that respondent had no devices, means, or methods either for carrying off the fumes, dust, and gases or for the prevention of the inhaling of the same by its employees. If the evidence showed that respondent had had certain devices, means, or methods for the carrying off of fumes, dust, and gases, then the question could be considered as to whether or not such devices, means or methods were adequate; but, having no devices, means, or methods therefor, such question can not be considered. Here we have a clear violation of the statute, which establishes a prima facie case of negligence.

EMPLOYERS' LIABILITY—STATE AND FEDERAL STATUTE—FEDERAL LONGSHOREMEN'S AND HARBOR WORKERS' ACT—INTERSTATE COMMERCE—*Nogueira* v. *New York, N. H. & H. R. Co., Supreme Court of the United States (April 14, 1930), 50 Supreme Court Reporter, page 303.*—Victorio Nogueira was employed by the New York, New Haven & Hartford Railroad Co. as a freight handler loading freight into railroad cars on a car float in navigable waters at a pier in New York Harbor. While so employed Nogueira was injured when a bale of paper slid down a gangplank and threw him on the floor of the float, crushing his leg. In an action brought by Nogueira in the United States District Court for the District of New York, he contended that the car float upon which he was working was used as an adjunct to railroad transportation in interstate commerce, and that it was not the intention of Congress to substitute the remedy under the Federal longshoremen's and harbor workers' compensation act for that afforded by the Federal employers' liability act.

The district court, however, dismissed the complaint brought under the employers' liability act. Upon appeal to the United States Circuit Court of Appeals for the Second Circuit this court affirmed the judgment of the district court, but assumed that Nogueira would have been allowed to prosecute his claim under the Federal employers' liability act if the longshoremen's and harbor workers' compensation act did not apply, but if the latter did apply the remedy under that act was exclusive.

The case was then carried by Nogueira to the United States Supreme Court to review the judgment of the Circuit Court of Appeals.

Mr. Chief Justice Hughes delivered the opinion of the court and, after stating the general scheme and purpose of the Federal longshoremen's and harbor workers' compensation act and defining the word "employer," held that the definition is "manifestly broad enough to embrace a railroad company, provided it has employees who are employed in maritime employment, in whole or in part, upon the navigable waters of the United States."

In reviewing the judgment of the lower court, Mr. Chief Justice Hughes referred to several former cases decided by the court. In Atlantic Transport Co. *v.* Imbrovek (234 U. S. 52) a stevedore was loading a ship lying in port in navigable waters and the court held that there was no doubt "that he was performing maritime service and that the rights and liabilities of the parties were matters within the admiralty jurisdiction." Also in the case of Southern Pacific Co. *v.* Jensen (244 U. S. 205) it was held that the case was not within the Federal employers' liability act, as the ship upon which the employee was injured could not properly be regarded "as a part of the railroad's extension or equipment."

From the standpoint of maritime employment, the court said that it made no difference "whether the freight is placed in the hold or on the deck of a vessel or whether the vessel is a car float or a steamship." A car float in navigable waters, the court said, "is subject to the maritime law like any other vessel."

The court then considered the exceptions contained in section 3 of the longshoremen's act and held that the case did not come within any of these exceptions of the act. Their limited character, the court said, "is significant." "No exception is made of the employees of a railroad company employed in maritime service on the navigable waters of the United States or with respect to the question whether such employment was in connection with an extension of railroad transportation."

The Supreme Court, in concluding the opinion, reviewed the history of the longshoremen's and harbor workers' compensation law while it was pending in Congress, and affirmed the judgment of the lower courts, holding that a railroad freight handler injured on a railroad car float in any of the navigable waters of the United States must seek relief under the Federal longshoremen's and harbor workers' compensation act and not under the Federal employers' liability act.

EMPLOYERS' LIABILITY—THIRD-PARTY LIABILITY—INDEPENDENT CONTRACTOR—EVIDENCE—*Smith* v. *Matthews Construction Co. (Inc.), Supreme Court of New York, Trial Term (April 21, 1930),*

241 New York Supplement, page 689.—John F. Smith was employed by an elevator subcontractor in the construction of a building. While he was in the center of the elevator shaft at about the seventh or eighth floor, sitting on some planks laid across the shaftway and engaged in untying a chain fall which had been used for hoisting certain machinery through the shaftway, he was struck on the head by a brick and sustained injuries.

Smith thereupon filed suit against the Matthews Construction Co. (Inc.), the general contractor in charge of the construction of the building, to recover damages for his injury. The court rendered a judgment in favor of the construction company and in the course of the opinion said, in part:

The source of the offending brick is not satisfactorily accounted for. Whence it emanated is a matter of conjecture. There is no proof that the defendant had or exercised control over the brick, or as to the duration of the attacked condition; nor does it appear that the defendant had notice, actual or constructive, of such condition. The plaintiff attempted to show that the defendant maintained a superintendent on the premises, but there is no convincing proof that the person sought to be clothed with superintendence was employed by the defendant or that he actually was or functioned as superintendent, that he took any part in the performance of the work other than that of general supervision; nor is there any proof of active participation by him in any affirmative act of negligence complained of.

"It is now well settled that the owner of premises who contracts for the erection of a building thereon owes no duty of active vigilance to protect the employees of one contractor from the negligence of those of another, and that to the employees of the various contractors the only liability on the part of the owner in such case is for some affirmative act of negligence on his part, as by taking some part in the performance of the work other than such general supervision as is necessary to insure its performance in accordance with the contract." [Cases cited.]

The plaintiff has received $3,000 from the brick subcontractor for these same injuries. The testimony concerning the nature, extent, and permanency of the injuries and their effect on his earning capacity is somewhat indefinite.

As the plaintiff has failed to sustain the burden the law casts upon him, verdict is directed for the defendant.

EMPLOYERS' LIABILITY—THIRD-PARTY LIABILITY—NEGLIGENCE—*Baker Tow Boat Co. (Inc.)* v. *Langner, Circuit Court of Appeals, Fifth Circuit (February 14, 1930), 37 Federal Reporter (2d), page 714.*—W. R. Langner was employed by the Baker Tow Boat Co. (Inc.) as a carpenter to do repair work on its boats at the plant of a shipbuilding company on Pinto Island, which is across the Mobile River from the city of Mobile, Ala. The boat company had an

agreement with the shipbuilding company whereby it paid a percentage of wages to the shipbuilding company as compensation for the use of its plant. The shipbuilding company owned and operated a launch on the river between Mobile and Pinto Island for the convenience of its own employees but also permitted the tow-boat company's employees to ride free of charge. Langner was injured while riding in the launch on the way to his work, when it struck an obstruction in the river.

Langner filed suit against the Baker Tow Boat Co. (Inc.) to recover damages for the injury, and the United States District Court, Southern District of Alabama, rendered judgment in his favor on the theory that the relation of master and servant existed, for the time being, between the tow-boat company and the man in charge of the launch. This relation was brought about by the joint adventure of the shipbuilding company and the tow-boat company under their agreement for the repair of the latter's boats at the former's shipbuilding plant.

The tow-boat company appealed the case to the Circuit Court of Appeals, Fifth Circuit, where the decree of the district court was reversed. The circuit court held that the relation of master and servant did not exist as the parties to the agreement were neither partners nor joint adventurers; the payment by the tow-boat company of a percentage of the wages of its employees to the shipbuilding company was a mere method of providing compensation for the use of the shipbuilding plant.

EMPLOYERS' LIABILITY—VOLUNTEER—AUTHORITY TO HIRE—*Bloss* v. *Pure Oil Co., Supreme Court, Madison County, New York (January 8, 1929), 232 New York Supplement, page 332.*—Robert C. Bloss and one Diefendorf were copartners, conducting a garage at Chittenango, N. Y. The Pure Oil Co. was installing a gasoline pump on their garage premises. The work was in charge of a Mr. Salisbury and one or two assistants. In laying the pipe it was necessary to raise a cement block from the walk on the garage premises. Salisbury came into the garage and asked Bloss and Diefendorf to help raise it, which they did. As the block was being lowered it got out of control of the men, and Salisbury shouted a warning to let go. The block was dropped, striking Bloss's hand and foot and causing injuries. He filed suit against the Pure Oil Co., alleging his injury was caused by the negligence of the employees of the Pure Oil Co. The company alleged as a defense that its employee had no authority to engage the services of Bloss, which made Bloss a mere volunteer,

and if by reason of an emergency Salisbury did have this authority, then Bloss became an employee and was subject to the fellow-servant rule.

The court held that Bloss was not a mere volunteer, as he had a right to be there. Regarding this, the court said:

The cases which have held the doctrine invoked by the defendant herein have generally been where those rendering the emergency aid were persons who had otherwise no relation to or essential interest in the work being done. Perhaps it was to discourage interlopers (well meaning and otherwise) from acquiring rights which otherwise they could not claim that this common-law rule was so rigidly applied.

However that may be, I feel that the rule should not apply to the case at bar. The plaintiff and Diefendorf had an interest in the work being done. When the emergency arose which necessitated their help, and when requested by defendant's foreman, it was right and proper that they should respond. Plaintiff's status was more than that of a mere volunteer. By no stretch of the imagination can it be said that he was an employee of the Pure Oil Co. Being properly where he was, it was the duty of the defendant's servants to do their work in such a way as not to negligently injure him.

The case of Cannon *v.* Fargo (222 N. Y. 321, 118 N. E. 796) was cited by the court. In that case a railway gatekeeper was injured while helping the express company's servants in unloading the express baggage. In that case the court said:

While such a man * * * might thus incidentally be of assistance and help to the express company and relieve it from some of its work, yet the widest stretch of the ad hoc doctrine would never make such an employee a servant of the express company. Such a theory would be so inconsistent with the actual facts as to render the whole doctrine an absurdity. * * * The plaintiff in this case was neither loaned nor hired to the express company, nor was he subject to the direction and orders of the express messenger. The fact that the express messenger called the plaintiff at times and might have given him instructions how to lift out the packages did not change the relationship.

In concluding the opinion the court held the Pure Oil Co. was not liable for the injuries to Bloss and the case was dismissed, the court saying:

Bloss, the plaintiff, was in a sense an employee of his firm, its agent and servant. If the master may loan his servant, partly for his own purposes, as in Cannon *v.* Fargo, without that servant becoming the servant of the other master, it must follow that the plaintiff in part furtherance of his own interests or that of his firm could give his own services without becoming a servant or employee of the other party. Therefore he was not a fellow servant, he was far from being an interloper, he was more than a mere volunteer, and he was properly there.

EMPLOYERS' LIABILITY—VOLUNTEER—MINOR—EMPLOYMENT STATUS—*Supornick* v. *Supornick, Supreme Court of Minnesota (November 30, 1928), 222 Northwestern Reporter, page 275.*—Joseph Supornick was arranging for a sale of fire-and-smoke damaged merchandise stored in a building located in St. Paul, Minn. William Supornick. his brother, was employed as general agent in charge of the merchandise. On Sunday, March 20, 1927, as William Supornick was preparing to go to the store, his daughter Edna asked for permission to go with him for the purpose of meeting her cousin. The permission was granted and she accompanied her father to the store, arriving there about 8 o'clock a. m. She remained there until between 12 and 1 o'clock, when she fell into the elevator shaft and received severe injuries.

Suit was filed by her father in her behalf against Joseph Supornick, and the district court, Ramsey County, Minn., rendered a verdict awarding damages to the minor. The case was thereupon appealed to the Supreme Court of Minnesota. The evidence disclosed that the child had remained at the store "helping * * * with the goods," "checking bills," and doing general work in putting the merchandise in shape for the sale and was injured while directing some prospective customers to the elevator.

The Minnesota Supreme Court, in affirming the decision of the district court, said in part as follows:

The theory of plaintiff's case is that she was an invitee rather than a licensee. That issue was submitted to the jury and an affirmative answer is implicit in the verdict. The only question for us is whether the evidence supports that conclusion.

All of plaintiff's services inured to the benefit of defendant and, even though plaintiff be considered a volunteer to start with, the work was done for defendant with the consent of her father, who was the agent "in charge" for him of the work in hand. So, notwithstanding the relationship between father and daughter, the conclusion is tenable that the services were accepted by defendant through his agent, the father.

Plainly, one may go upon the premises of another as a mere licensee and by remaining there with the consent of the owner and for his benefit change his position and rights to those of an invitee. In order to entitle one to the status of a person who has entered premises or remains thereon by invitation, "it must appear, it seems, that his purpose was one of interest or advantage to the owner or occupant." [Cases cited.]

Although plaintiff came upon defendant's premises as a mere volunteer, she remained there several hours performing services for his benefit and with the approval and consent of his agent in charge. The situation is the same as though plaintiff had worked all of the forenoon in the immediate presence and with the consent of defendant himself. So there are present both the element of the services being for the benefit of the defendant and his consent to their ren-

dition as they were rendered. Under the authorities those two factors were sufficient to justify the conclusion of the jury that plaintiff was an invitee and therefore that defendant owed her the duty of ordinary care.

It does not follow from the foregoing that plaintiff became the employee of defendant and subject to the workmen's compensation law. Under that statute only those are employees who "perform a service for hire" and to whom some "employer directly pays wages." (Gen. Stat. 1923, sec. 4326 (d).)

EMPLOYERS' LIABILITY—WILLFUL MISCONDUCT—INJURIES CAUSING DEATH—FELLOW SERVANT—*Morris et al.* v. *Young & De Britton, Court of Appeal of Louisiana (November 10, 1928), 119 Southern Reporter, page 277.*—Young & De Britton were engaged in road building by the Louisiana Highway Commission. Lee Morris was employed by them to perform the duties of foreman of a small squad of levee laborers near Union, La. In attempting to force one of the laborers to go on the works Morris cursed and abused the Negro, and in the course of the argument Morris drew the pistol he was carrying and shot him. Thereupon the Negro fired upon Morris and killed him. An action was brought by Mrs. Tessie Morris as widow, acting for herself and her three minor children, to recover damages under the employers' liability act (Act No. 20 of 1914). Mrs. Tessie Morris was divorced from Lee Morris in 1910, but claimed the divorce was not valid and showed that she and the children were dependents. Following a judgment for the employer the case was appealed from the Parish of East Baton Rouge to the Court of Appeal of Louisiana by the widow.

The third and main defense made by the employer to this action by the widow was as follows:

(1) That the killing was caused by the said Lee Morris's willful intention to injure the Negro (Curley Williams) who killed him.

(2) That the said injury was caused by the said Lee Morris's deliberate breach of statutory regulations affecting safety of life and limb.

(3) That the said injury was due to the willful misconduct of the said Lee Morris, and to his illegal and criminal actions.

The evidence presented showed the employer had warned Morris not to go armed while performing his duties as foreman, and that Morris knew he was violating a criminal statute in carrying a concealed weapon. He had also received express orders to treat the laborers gently and not to abuse or harass them.

The court found this third defense sufficient to support the judgment rendered by the district court and therefore affirmed the decision.

FACTORY, ETC., REGULATIONS—PROVIDING SEATS FOR FEMALE EMPLOYEES—*People* v. *Wells*, *Supreme Court of Michigan* (*December 3, 1929*), *227 Northwestern Reporter, page 696.*—Carl S. Wells, president of the Homer Warren & Co., was arrested and convicted in the recorder's court of Detroit for his failure to comply with the order of two inspectors of the Michigan Department of Labor, requiring the company to furnish stools or seats in the elevator cabs for female operators. The statute under which he was convicted provides that all persons who employ females in stores, shops, offices, or manufactories as clerks, assistants, operators or helpers in any business, trade, or occupation carried on or operated by them shall be required to procure and provide proper and suitable seats.

The case was appealed to the Supreme Court of Michigan, which court reversed the decision of the lower court and held that elevator operators were not included within the statute. The court said in part as follows:

The most casual reading of the statute indicates it does not cover a case of this kind. Defendant was not employing females in a store as clerks or otherwise; he was not operating a shop; he was not operating a manufacturing institution; and he was not employing these girls in an office. If the legislature desires to have girls employed in elevators covered by the statute, it may be amended; but the defendant is entitled to any reasonable doubt as to the construction of the statute.

LABOR ORGANIZATIONS—ACTION BY OR AGAINST—ILLINOIS COMMERCE COMMISSION—SUFFICIENCY OF FINDINGS AND ORDERS—*Brotherhood of Locomotive Firemen and Enginemen* v. *New York Central R. Co.*, *Supreme Court of Illinois* (*April 17, 1930*), *171 Northeastern Reporter, page 148.*—On February 23, 1926, the Brotherhood of Locomotive Firemen and Enginemen, by Dennis McCarthy, chairman of the Illinois State Legislative Board, filed a complaint against the New York Central Railway Co. for its failure to provide adequate facilities—shower baths, lockers, etc.—for engineers, firemen, and hostlers at Englewood roundhouse, Chicago, Ill., as required to safeguard the health of such employees and the public. The railway company filed answer denying the brotherhood was entitled to relief, and this was followed by hearings before the Illinois Commerce Commission. Following the first two hearings of this case a joint conference was held on December 27, 1926, at which conference representatives of the brotherhood, the New York Central Railway Co., and the Illinois Commerce Commission were present. At this time a memorandum was drawn up and agreed upon between the representatives of the brotherhood and the railway company as to

the necessary improvements properly to safeguard the health of the employees and the public. The memorandum stated that the complaint would be satisfied if the suggested improvements were carried out. Without further investigation the Illinois Commerce Commission entered an order against the railway requiring it "to carry out the aforesaid improvements within a reasonable time." This order was sustained by the circuit court of Cook County, and from this decision and the order of the Illinois Commerce Commission the railway appealed to the Supreme Court of Illinois, contending that the Illinois Commerce Commission had no jurisdiction over the matter involved. In support of this contention they argued that nowhere in the statute concerning public utilities was any definite or specific authority given the commission to regulate wash rooms, lockers, etc., of public utilities, and that—

The Illinois Commerce Commission act was enacted at the same session of the legislature as the wash-room act (Cahill's Stat. 1929, ch. 48, pars. 175–179); that the commerce commission act is a general statute, whereas the wash-room act is a special statute; that the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment; and that the subject matter of the present proceeding was consequently governed by the wash-room act to the exclusion of the power of the commerce commission to deal therewith.

The court, however, refused to pass upon the powers of the commerce commission, as neither the findings of the commission nor the evidence in the record brought the proceedings under the wash-room act. Regarding the memorandum the court said:

In order that the courts may intelligently review the decisions of the commission, the latter must make its findings sufficiently specific to enable the courts to determine whether such decisions are based on such findings, otherwise the courts would be helpless in their efforts to determine that question.

One of the findings of the commission in the present case deals with an "understanding and agreement" between appellant and appellee; the other is a general finding that present facilities "are inadequate and insufficient for the purpose intended." The order is that "the improvements" be carried out.

At first glance it might appear that the within order is based upon a finding of an agreement entered into by appellant. However, the special finding is "that through conferences and investigations the parties hereto have come to an understanding and agreement whereby certain suggested improvements, if carried out, will satisfy the complaint." Clearly this can not possibly be construed as a finding that appellant agreed to do anything. It is merely a finding that appellee would be satisfied if certain things were done.

In the absence of agreement, if the order is to be supported it must be upon the finding "that the wash room and other facilities provided and now being maintained by the New York Central Railway Co. at their Englewood roundhouse at Chicago, Ill., are inade-

quate and insufficient for the purpose intended." This is only a conclusion of law. The inadequacy of such finding to sustain the order is established by Chicago Railways Co. *v.* Commerce Com. ex rel. Chicago Motor Coach Co., supra, where the commission had made a finding to the effect that "public convenience and necessity" required the operation of motor buses over certain streets in the city of Chicago. This court said that such finding was not a finding of fact on which any order granting a certificate of public convenience and necessity could be based, but was simply a conclusion drawn from all the evidence, without any finding of fact upon which the conclusion could be reached. The commission's order not containing the necessary findings of fact, it was held void. The same situation is presented here.

The court held that as the findings of the commission were not sufficient to support the order entered, such order was consequently void. The court also said the order was too indefinite and could be thrown out upon that ground, that—

Even though the question of sufficiency of the findings be left entirely out of consideration, unless the commerce commission be held to have power to make and enforce orders characterized by a very marked degree of indefiniteness, the present one can not be sustained, and in view of the possibility of further proceedings upon remandment it is in order to call attention to this deficiency. Appellant is first ordered to carry out "the improvements." Presumably this refers to the improvements outlined in the memorandum of December 27, 1926, but in which it was specifically stated that the plan should be "worked up" for further consideration. * * * Granting that the order requires an increase in space, and referring to the testimony for light upon what was really contemplated thereby, its indefiniteness is thus only emphasized. The further question comes as to what is meant by "accommodations for those using same." What are "accommodations for those using" the "sufficient space for 314 lockers"? Here, again, talk in the testimony about "rest-room facilities" only emphasizes the indefiniteness of the provision.

Unless it conforms to accepted judicial standards of clarity and definiteness, it does not merit judicial sanction. This order does not conform to those standards.

LABOR ORGANIZATIONS—ACTION BY OR AGAINST—MEMBERSHIP RIGHTS—CONTRACT OF EMPLOYMENT—*Andrews* v. *Local No. 13, Journeymen Plumbers, Gas and Steam Fitters, and Sprinkler Fitters of Rochester, N. Y., Supreme Court, Monroe County, New York (April 12, 1929), 234 New York Supplement, page 208.*—Arthur Andrews, a member of Local No. 13, Journeymen Plumbers, etc., Union, filed suit against the union to restrain it from entering into a contract with the employers' association providing for the payment of compensation to different classes of employees. This contract

provided for three classes of employees—journeymen, juniors, and apprentices—and Andrews claimed that under the by-laws of the national association the classes should be limited to only journeymen and apprentices.

The union was an unincorporated association of more than seven members, who, according to Mandell *v.* Cole (244 N. Y. 221, 155 N. E. 106), were "liable jointly upon its contractual obligations." The general association laws provided that any action against the union should be maintained against the president or treasurer of the association.

The court denied relief in this case and dismissed the bill, saying as follows:

When an unincorporated association is named as defendant, without joining therein the individual member thereof, there is no party before the court capable of being sued, and the mere fact that the summons and complaint in such action are served upon the president or treasurer of the association does not make that officer a representative of the members or authorize him to appear in their behalf. The officer must be sued as such in order to empower him to bind the members and property of the association by his acts.

Furthermore, the complaint in this action does not state who is president of the defendant association, thus showing that the action is not brought against the president of the association. As the suit was not commenced against the president of the defendant, service upon the individual holding that office did not confer upon the court jurisdiction of the members of the defendant association.

A contract similar to the one sought to be enjoined is annually entered into between the employers and the local union. The plaintiff, a member of the local union for many years, has never taken any step to have the national officers or organization determine whether such contract is in conflict with the constitution and by-laws of the parent body.

The plaintiff has a right to appeal to the general president of the United Association of Journeymen Plumbers and Steam Fitters of the United States and Canada. From this decision an appeal may be taken to the general executive board of the united association and from the decision of that body to the convention of the united association.

Generally a member of an association must exhaust his remedies within the organization before appealing to the courts. This is so, even though property rights may be jeopardized by the delay.

LABOR ORGANIZATIONS — BOYCOTT — INJUNCTION — RESTRAINT OF TRADE—*Rockwood Corporation of St. Louis* v. *Bricklayers' Local Union No. 1 of St. Louis et al., Circuit Court of Appeals (May 13, 1929), 33 Federal Reporter (2d), page 25.*—The Rockwood Corporation of St. Louis manufactured out of gypsum a fireproof building

material called "Rockwood lumber." It brought an action in reliance on the Sherman Antitrust Act and the Clayton Act (15 U. S. C. A., secs. 1, 15) against three local labor unions charging them with a conspiracy to inaugurate a boycott of "Rockwood lumber" and to call strikes on building construction wheresoever the material might be used.

Complainant further states that the defendants acting individually and for and in behalf of their associations have unlawfully, wrongfully, and intentionally conspired with each other, and with various other persons to the complainant unknown, to injure and boycott complainant and the products of its factory, and to prevent complainant to carry on its business in interstate commerce, and to prevent the installing of the products of complainant in buildings being erected in the city of St. Louis, and St. Louis County, in the State of Missouri.

A controversy in February, 1927, at a garage then under construction in St. Louis was mentioned in the bill and relied on as tending strongly to support the main charge. The facts regarding this controversy were as follows:

The construction contract called for plaintiff's material in partitions in the garage mentioned in the pleadings, and carpenters began to install it. Brick masons were also at labor on the building. The members of the two crafts there present entered into a controversial discussion as to which had the right to put in the material. Defendant McNamara, agent of defendant Bricklayers' Local Union, No. 1, appeared. It is not clear whether he arrived before or after the discussion between workmen was begun. He took up the claims of the bricklayers and insisted they should put in the partitions. The subcontractor for the brickwork seems to have joined with McNamara. The bricklayers on the job quit work for a while; some testified for about two hours while the discussion was on, others that they laid off for a day. No strike was called. The result was the carpenters withdrew and the bricklayers put in the partition.

The bill was dismissed by the District Court of the United States, and the Rockwood corporation appealed to the Circuit Court of Appeals. Judge Lewis, in affirming the opinion of the lower court, quoted from the opinion of the district judge, in part, as follows:

In short, there is not a scintilla of evidence connecting any person or organization with the act of interference or of calling the strike except defendant McNamara alone. Since I find the record to be utterly barren of any evidence whatever of concerted action here, I find no restraint of interstate commerce, and I find no evidence of a conspiracy. It is but fair to say that all of the acts alleged against McNamara are denied. I have conceded for argument's sake that the fact that the bricklayers were called off for a short time by defendant McNamara has been proven. He acted upon his own initiative and upon his own responsibility, and his acts were not even ratified by the defendant union or by any other defendant in the case. As I construe the Sherman Antitrust Act, it contemplates

concerted action. There is no proof here of any concert of action between defendant McNamara and any other defendant in the case.

Judge Lewis concluded the opinion by saying:

Moreover, conceding a conspiracy between Bricklayers' Local Union, No. 1, and its agent McNamara, that conspiracy was not to restrain or interfere with interstate commerce. The alleged conspirators had no such thought, intent, or purpose. They were entirely willing, so far as the proof shows, that plaintiff's material should be used in St. Louis or elsewhere. They had no grievance other than the claim that as between crafts bricklayers should install the material. The controversy was wholly between bricklayers and carpenters, and the result therefrom, in so far as it affected plaintiff, was an indirect, remote, and unintended obstruction.

LABOR ORGANIZATIONS—COLLECTIVE AGREEMENTS—COERCION—INJUNCTION—*Texas & N. O. R. Co. et al.* v. *Brotherhood of Railway and Steamship Clerks, etc., et al., Supreme Court of the United States (May 26, 1930), 50 Supreme Court Reporter, page 427.*—The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Southern Pacific Lines in Texas and Louisiana brought suit in the District Court for the Southern District of Texas against the Texas & New Orleans Railroad Co. to obtain an injunction restraining the railroad company from interfering with or influencing their clerical employees in the matter of their organization and designation of representatives for the purposes specified in the railroad labor act of 1926 (44 Stat. L. 577).

For a number of years the Brotherhood of Railway and Steamship Clerks had been authorized by a majority of the railway clerks to represent them in all matters relating to their employment. In the latter part of 1925 the brotherhood applied to the railroad company for an increase of wages for the railway clerks. The application was denied, and subsequently the controversy was referred to the United States Board of Mediation created under the railroad labor act of 1926. During the pendency of the wage dispute the railroad company undertook the formation of a company union known as the Association of Clerical Employees, Southern Pacific Lines. The brotherhood contended that in accomplishing this the railroad company had endeavored to intimidate its members, to coerce them to withdraw from the brotherhood, and to make the company union their representative in dealings with the railroad company, all of which was a violation of the third paragraph of section 2 of the railroad labor act which provided that—

Representatives, for the purpose of this act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other

means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.

The District Court for the Southern District of Texas (see B. L. S. Bul. No. 517, p. 127) granted a temporary injunction against the railroad company. Subsequently the railroad company refused to recognize the brotherhood, stating that the brotherhood did not represent a majority of the clerical employees, and recognized only the company union, which the company claimed represented a majority of the clerical employees. Contempt proceedings were brought in the district court, and it was found that the railroad company had violated the order of injunction. The court (see Labor Review, June, 1928, pp. 96–98) ordered the railroad to disband its company union and to deal with the brotherhood "until such time as these employees by a secret ballot, taken in accordance with the further direction of the court, and without the dictation or interference of the railroad company and its officers, should choose other representatives."

The temporary injunction against the railroad was later made permanent. Thereupon an appeal from such order was taken by the railroad company to the Circuit Court of Appeals for the Fifth Circuit (see Labor Review, October, 1929, pp. 78–80), and there the decree of the district court was affirmed, holding that the injunction was properly granted.

The railroad company thereupon carried the case to the United States Supreme Court. The contention relied upon by the railroad company was that paragraph 3 of section 2 of the railroad labor act conferred merely an abstract right not intended to be enforced by legal proceedings; that the act, in so far as it attempted to prevent either party from influencing the other in the selection of representatives, was unconstitutional, because it sought to destroy a right guaranteed by the first and fifth amendments of the United States Constitution.

Whether the statute imposed a legal duty upon the railroad company, enforceable by judicial proceedings, the United States Supreme Court in an opinion by Mr. Chief Justice Hughes said, was the important question of law for the court to consider. The court, after reviewing two prior cases (Pennsylvania Railroad Co. *v.* U. S. Railroad Labor Board (261 U. S. 72) and Pennsylvania Railroad System and Allied Lines Federation No. 90 *v.* Pennsylvania Railroad Co. (267 U. S. 203)) decided by the court, and a brief discussion of events which led to the enactment of the railroad labor act of 1926, said that—

It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitra-

tion of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings. The question before us is whether a legal obligation of this sort is also to be found in the provisions of subdivision 3 of section 2 of the act (45 U. S. C. A., sec. 152, subd. 3) providing that, "Representatives, for the purpose of this act, shall be designated by the respective parties * * * without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules, and working conditions, and to settle disputes with all expedition in conference between authorized representatives, but added this distinct prohibition against coercive measures. This addition can not be treated as superfluous or insignificant, or as intended to be without effect. * * * While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation can not be disregarded. The intent of Congress is clear with respect to the sort of conduct that is prohibited.

In reaching the conclusion as to the intent Congress had in mind the court said that—

Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. There is no impairment of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is of the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safeguarded. The definite prohibition which Congress inserted in the act can not therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated.

The Supreme Court cited several cases to emphasize the fact that there was no doubt as to the constitutional authority of Congress to enact the prohibition of the statute, and continuing declared that—

Exercising this authority, Congress may facilitate the amicable settlements of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual condi-

tions and to address itself to practicable measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. (American Steel Foundries *v.* Tri-City Central Trade Council, 257 U. S. 184, 209, 42 Sup. Ct. 72.) Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.

The railroad labor act of 1926, the court said, does not interfere with the normal exercise of the right of the carrier to select or discharge its employees, and—

The statute is not aimed at this right of the employers, but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the act have no constitutional right to interfere with the freedom of the employees in making their selections, they can not complain of the statute on constitutional grounds.

The United States Supreme Court, in concluding the opinion, referred to a minor point raised by the railroad company relative to the granting of the injunction in violation of section 20 of the Clayton Act (29 U. S. C. A., sec. 52). The section provides that no injunction should be granted in any case involving employment disputes, unless an irreparable injury to property or a property right was threatened. The court, however, was of the opinion that it was not necessary to pass upon this point—

For if it could be said that it was necessary in the present instance to show a property interest in the employees in order to justify the court in granting an injunction, we are of the opinion that there was such an interest, with respect to the selection of representatives to confer with the employer in relation to contracts of service, as satisfied the statutory requirement.

The decree of the lower court was therefore affirmed.

LABOR ORGANIZATIONS—INDUCING BREACH OF CONTRACT—OPEN-SHOP CONTRACT—*Moore et al.* v. *Whitty et al., Supreme Court of Pennsylvania (January 6, 1930), 149 Atlantic Reporter, page 93.*—The W. P. Whitty Co. had a contract for the erection of certain apartments in the city of Philadelphia. The William Moore Co.,

being engaged in the business of supplying materials and labor for the installation of tile and marble in buildings, submitted estimates for the furnishing and equipping of the bathrooms in the buildings. Contracts were drawn on printed forms, which contained clauses to the effect that all work should be done by union labor. Moore called Whitty's attention to the fact that, when they were asked to estimate on the work, Whitty was told they would not do so unless they could perform the contract "under open-shop principles." Moore stated, however, that they had worked with nonunion men on other buildings where union men were employed without having trouble and believed they could do so on these buildings. The clause regarding union labor was then stricken out of both contracts before being signed. Subsequently it appeared the labor union threatened to call a strike if the William Moore Co. was permitted to proceed with its work by nonunion men. The W. P. Whitty Co., yielding to the union's demands, refused to permit the William Moore Co. to proceed with the contract and arranged to have the work done by employers of union labor.

Action was instituted in the Philadelphia County court of common pleas to recover damages for the breach of the contract, and the court rendered a judgment in favor of the William Moore Co., refusing to hold that the change in labor condition was sufficient to excuse the breach of the contract by the W. P. Whitty Co.

The case was appealed to the Supreme Court of Pennsylvania, where the judgment of the lower court was affirmed. The court said that the general rule is that mere inconvenience, though it works a hardship on a party, does not excuse him from the performance of an absolute and unqualified undertaking to do a thing which is both lawful and possible. Continuing, the court said:

> The fact that the clause requiring employment of only union workmen was stricken out of the contracts indicates the parties intended to eliminate this condition, and left plaintiffs free to employ whatever labor they saw fit.
>
> Both parties to the contract realized the uncertainty of the labor situation and the possibility of difficulties arising when union and nonunion men were expected to work on the same building. They, in fact, discussed the matter, and plaintiffs' position as employers of nonunion men was made clear. Their bid was given with the understanding that they operated an open shop and, even though they stated at the time the contract was signed that they had worked on union jobs with nonunion men and had no difficulty, such statement can not be construed as a guaranty on their part that they assumed responsibility of labor difficulties arising under the contract in question. Defendants were fully informed of all the circumstances and agreed to omit the clause requiring the employment of union workmen. Having failed to provide against the very contingency which both parties were aware might occur, the happening of such con-

tingency can not be set up as an excuse for failure to perform. Furthermore, there is no such impossibility of performance as is required within the rules governing such defense. There was no evidence to show inability to complete the work without the aid of union men, or even to show that it would have been impossible to complete it with union labor working with nonunion employees.

LABOR ORGANIZATIONS—INJUNCTION—AGAINST BREACH OF CONTRACT—RIGHT TO INJUNCTION—*Ribner* v. *Racso Butter & Egg Co. (Inc.), Supreme Court of New York, Special Term (December 20, 1929), 238 New York Supplement, page 132.*—On the 28th of March, 1929, Ribner, acting on behalf of the Retail Dairy and Grocery Clerks' Union of Greater New York, Local No. 338, entered into an agreement with the Racso Butter & Egg Co. (Inc.), regarding dealings with their employees. The agreement contained conditions and stipulations covering hours of work, wages, and other conditions of employment, including an agreement that the company would be run on a union basis and all employees be members of Local No. 338.

In September, 1929, three employees were suspended by the union for failure to pay their dues and fines. The company was notified of the expulsion from membership in the union and was requested to discharge the three employees. Upon the failure of the company to comply with this request, the union brought action requesting an injunction to compel the company to carry out the terms of the agreement. The union also alleged that the company had employed as dairy and grocery clerks persons who were not members of the union.

The company defended this action by contending that the union was not entitled to an injunction to force them to carry out the contract but should sue for the breach of the contract and recover money damages. The court granted injunctive relief and said that in a court of justice the employer and the employee stand on an exact equality, each case to be decided upon the same principles of law impartially applied to the facts of the case, irrespective of the personality of the litigants, and as the court would render assistance to the employer in such a case the employees should be rendered the same assistance by the court.

Continuing, the court said:

The plaintiff in the instant case seeks like relief, namely, that the defendant be restrained from breaching the contract under which the defendant agreed to employ only members of the plaintiff union in good standing for one year from the 29th day of March, 1929. I am of the opinion that equity affords the only adequate remedy in the premises. The injury is irreparable and continuous. To

deny to the plaintiff union the right to invoke the aid of a court of equity to prevent an unlawful violation of its contract, it must necessarily follow that the right of collective bargaining will be seriously impaired, leaving the labor union to resort solely to strikes and picketing, which would entail not only serious financial loss but also protracted and needless friction and possible breaches of the public peace and security.

Legislatures and courts recognize the right of labor unions to enter into lawful contracts on behalf of its [their] members with the employer for the purpose of promoting the welfare of their members, and in furtherance thereof such agreements should be clothed with legal sanction and afforded the mutual protection of the law. It is in the interest of good government that labor unions and employers should be afforded this reciprocal protection in their lawful contractual undertakings. It is proper and praiseworthy that a union, as in the instant case, having entered into a contract with the employer and feeling aggrieved because of an alleged breach thereof by the employer, should come into a court of equity and there seek the protection of its rights rather than to resort to picketing and strikes to redress its wrongs, with the resultant effect upon the orderly conduct of business and inconvenience to the public. Under the terms of the contract here presented there is mutuality of obligation. There should be mutuality of remedy. The contract is valid. The power of a court of equity to issue an injunction to prevent such alleged violation is well established.

LABOR ORGANIZATIONS—INJUNCTION—AGAINST SECONDARY BOYCOTTS—BREACH OF CONTRACT—COERCION—*Edelstein* v. *Gillmore et al., District Court, Southern District of New York (January 25, 1929), 36 Federal Reporter (2d), page 81.*—William Edelstein acted as the personal representative of actors and actresses. His duties as such included furnishing advice to his clients and assistance in a variety of matters, such as obtaining employment, procuring proper publicity, smoothing out troubles with managers and producers, etc. He received as compensation for such service a percentage of the earnings of the artist under contracts lasting sometimes as long as 10 years. The Actors' Equity Association is a labor union having almost absolute control of the supply of actors and actresses in New York City. On September 21, 1928, the Actors' Equity Association adopted the following resolution:

Resolved, That on or after the 9th day of October, 1928, any member securing an engagement in the legitimate and musical comedy fields through any employment agent in New York City or environs and who pays any commission to any employment agent who does not hold a permit from Equity to do his business as such with our members, or who pays, directly or indirectly (i. e., either in money or in kind), more than the commission set by the association is guilty of an act prejudicial to the welfare of the association

and will in the discretion of the council be either censured, suspended, expelled from membership, or otherwise punished.

This resolution is not to be construed as affecting agreements made prior to the date named in the above resolution with agents or personal representatives who do not take out our permits.

Edelstein filed suit against Frank Gillmore, individually and as executive secretary and treasurer of the Actors' Equity Association, seeking an injunction to prohibit the association from enforcing the resolution. There was conflict in the evidence as to whether or not the resolution as adopted contained the last paragraph quoted above. However, it was the threatened enforcement of the entire resolution that resulted in this suit.

Edelstein contended that the resolution would deprive personal representatives of any new business in the legitimate and musical comedy fields unless they surrendered their rights under old contracts, because in the absence of a license neither artists nor producers would dare deal with him as to new business.

Gillmore sought to justify the action of the association on the ground that its members had the right to agree among themselves not to patronize a personal representative who did not comply with their requirements, provided their purpose was merely to benefit themselves and not to injure him even though injury to him might indirectly result.

District Judge Frank J. Coleman, in rendering the opinion of the court granting a preliminary injunction, said in part:

It is apparent to me that the purpose which the Actors' Equity Association has in mind is not merely to regulate the future agreements between its members and personal representatives but also by coercion to compel personal representatives to agree to abandon previously made contracts, and the means of coercion is the threat of exclusion from new business.

Consider the case of a personal representative who may be entirely qualified to act as such and willing to abide by the association's regulations as to new business, but who refuses to give up his legal rights in old contracts. Can it be said that a combination to deprive him of new business because of his refusal is not punitive and not directed primarily to the purpose of injuring him? His refusal would not make him less serviceable to new clients and to the profession generally, nor would it make the terms upon which his services might be procured in the future less advantageous than they otherwise would have been. In such a case the purpose of the combination would be to extort from him an abandonment of rights which the law secures to him. This I find was actually one of the purposes of the Actors' Equity Association in adopting the resolution and the measures under it, and for that reason, if for no other, the preliminary injunction should issue. Defendant's contention that, however unlawful the conduct of the association, they individually should not be restrained because they are acting only in a representative capacity is entirely meritless.

LABOR ORGANIZATIONS—INJUNCTION—AGAINST STRIKES—*Willson & Adams Co. et al.* v. *Pearce et al., Supreme Court, New York (August 10, 1929), 237 New York Supplement, page 601.*—The Willson & Adams Co. and 27 other dealers in building material, conducting business in Westchester County, N. Y., brought this action against Pearce individually and as business agent of Local No. 456 of the International Brotherhood of Teamsters, etc., of America, and also against the local agents of the unions of other building trades. This action was for an injunction to restrain alleged unlawful acts of the unions. The companies charged:

(1) That the council, acting for all defendants and union members has called strikes of all trades of building operations to which plaintiffs, through nonunion drivers or chauffeurs, have delivered materials, regardless of the fact whether such trades used the delivered materials or not; (2) that in some instances strikes have been called upon other jobs of a given contractor, even though such material handled by nonunion drivers had not been delivered to the other jobs; (3) that threats have been made to persons conducting building operations that strikes would be called of all trades thereon if materials furnished by a given plaintiff were used in the operations, this because the delivery agencies of the given plaintiff were nonunion in character; (4) that willful attempts have been made to induce breaches of contracts for materials between plaintiffs and their customers, builders; and (5) that defendants have tied up operations in instances where builders have not complied with the defendants' attempts asserted by plaintiffs to be unlawful.

It appeared that between 1923 and 1925 the agents of the unions called strikes of all trades on various jobs to which there were nonunion deliveries by persons other than those connected with Willson & Adams Co. and the other companies in the suit. In 1925 employees on certain jobs to which certain of the above-mentioned companies were supplying materials struck because of nonunion deliveries. Following this a meeting was called and the union agents stated that these strikes were mere incidents in a general plan to force unionization of all the yards in the county and that the employers must organize them, and it was indicated that if necessary the union would injure the companies' business in order to compel them to unionize their yards. Following this meeting the companies applied to the court for injunctive relief.

In discussing the question as to whether the acts of the union done or threatened as they appeared in the evidence, are countenanced by law, the court said in part as follows:

Upon the whole case I determine (*a*) that, whatever may have been their secondary purpose, the primary purpose of the defendants, acting in concert in their said activities, was wholly unlawful; (*b*) that their real object was to injure and to threaten to injure, to destroy and to threaten to destroy, the business of the plaintiffs by making it

undesirable for plaintiffs' customers to do business with plaintiffs—all to the end that the plaintiffs, in order to relieve themselves and their property rights from the detrimental consequences of such acts, would compel, as demanded by the defendants, the teamsters and other persons in plaintiffs' employ handling goods to join Local No. 456, the teamsters' union; and (*c*) that the existence of such primary purpose and of such object make this a proper case for a permanent injunction restraining the defendants from prosecuting further their said illegal activities.

The court also quoted from the case of National Protective Association of Steam Fitters and Helpers *v.* Cumming (170 N. Y. 315, 63 N. E. 369) wherein the law relating to what the workingman may properly do and refrain from doing is stated in part as follows:

Either employer or workman, where the employment is for no fixed period, may terminate the contract; the workman's right to quit is absolute; no one may demand a reason therefor; what he may do alone he may do in combination with others provided they have no unlawful object in view; workmen have a right to organize to secure higher wages, shorter hours of labor, and to improve their relations with their employers; they have the right to strike, if the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves; a peaceable and orderly strike, not to harm others, but to improve their own condition, is not illegal.

In conclusion the court said:

In the conceded or proved acts of the defendants herein, as I have found them above, the defendants had not the immediate and primary purpose and object of higher wages, shorter hours, improvement of relations and conditions, or betterment of terms of employment of the teamsters of the plaintiffs. The several general strikes which were actually called, as well as the numerous others which were threatened by the defendants, were for the sole purpose and with the one object of coercing the plaintiffs to unionize their yards. Such purpose and such object were to be attained and accomplished by the infliction of actual, and the threat of further, injury and harm upon the plaintiffs, whose customers, in effect, were to be induced to leave the plaintiffs for persons having union yards and making union deliveries. In law the acts of the defendants were wanton and malicious. They were not done in good faith. High authority has declared such acts to be illegal and restrainable by injunction.

Judgment was therefore rendered in favor of the Willson & Adams Co., and other employers; however, the court said, "nothing in the judgment about to be directed will be construed as hampering the labor unions involved from in any way pursuing activities which the courts have declared legal."

In a Maryland case the court decided that employees have the right to organize labor unions and of their own free will to engage in a strike for the purpose of organization and during the process of such strike peacefully to picket and persuade the remaining employees to join them, "but the law does not permit either employer or employee to use force or threats of violence.

intimidation, or coercion." It was held that an injunction against a labor union, though broad and general in its terms, would be proper if it prohibited only specific unlawful acts; however, if the terms were so broad that it might appear that all picketing, whether peaceful or otherwise, was prohibited, the injunction would require modification. (International Pocketbook Workers' Union *v.* Orlove (1930), 148 Atl. 826.)

LABOR ORGANIZATIONS—INJUNCTION—LOCKOUT—INDUCING BREACH OF CONTRACT—*David Adler & Sons Co.* v. *Maglio et al., Supreme Court of Wisconsin (December 3, 1929), 228 Northwestern Reporter, page 123.*—The David Adler & Sons Co. had for many years been a manufacturer of men's ready-made clothing. For some years the relation of the union employees of the company had been regulated by contracts made with the Amalgamated Clothing Workers of America. The last of these contracts by its terms expired on April 30, 1928.

As early as January, 1928, the company had determined not to renew the contracts with the union but to conduct its business as an open shop. It kept this decision secret, realizing that such a step would probably be followed by a controversy with organized labor. It prepared to meet such a struggle by contracting to have a part of its clothing manufactured elsewhere. Soon thereafter it dismantled one of its shops and shipped the machinery used therein to another city, where it was used in manufacturing clothing. It discharged over 300 workers, refused to rotate workmen or to attempt to equalize work among its employees as it was required to do by its contract.

The employees became restive because of the refusal of the company to abide by the terms of the contract, and finally, after the officers of the union had tried in vain to secure redress from the company, a meeting of the employees was held on April 16, 1928.

The company did not await the outcome of this meeting. It sought to make the meeting a justification for locking out all of its employees regardless of whether they had participated in this meeting or not. It immediately notified the officials of the Amalgamated Clothing Workers that the existing contract with the union was terminated upon the sole claim that participation by some of the company's employees in this meeting constituted a "walkout" and "a serious and substantial breach of the contract."

This resulted in a general strike, followed by action in the circuit court for Milwaukee County. The case was appealed to the Supreme Court of Wisconsin, both parties seeking to reverse portions of an interlocutory judgment which enjoined the union from interfering with property and property rights of the company and determined

that the company was liable to its former employees for their wrongful discharge.

After reviewing the acts of the company the court said that—

It began a course of deliberate and systematic breaches of the contract then in existence, with the apparent purpose of inducing its employees to take some action that would throw upon them the onus of having precipitated this labor controversy.

Continuing, the court said:

The plaintiff had the undoubted right to determine that its business should be run as an open shop, just as the employees had undoubted right to refuse to sign the proposed contract and to insist upon their rights under the existing contract. But neither the plaintiff nor its employees had a right to resort to violence or unlawful means to secure the result desired by them.

Had plaintiff exercised its legal right to determine that its business would be conducted as an open shop, and at the same time refrained from breaking its contract, and from wrongfully locking out its employees, a different question would have been presented. Had plaintiff not pursued a course of conduct naturally calculated, if not deliberately intended, to bring about the very conditions which led it to appeal to the courts, equity would entertain jurisdiction and exercise its extraordinary powers, so far as essential to protect the rights of the plaintiff.

The things from which plaintiff seeks relief are clearly the fruit of its own wrongful course of conduct. The whole controversy arises out of the disturbance of its relations with its former employees, which was interfered with and finally completely severed because of the wrongful conduct of the plaintiff. Plaintiff started this controversy at a time when the employees were making no demands of any kind. When they were locked out, they asked no more than that the plaintiff do those things which it had contracted to do.

In conclusion, the court said:

It is clear, as found by the trial court, that these "acts and breaches of contract on the part of the plaintiff * * * in an appreciable manner affect the equitable relations subsisting between the parties and are intimately connected with the other matters in issue herein." This finding brings the case within the rule stated in Huntzicker *v.* Crocker (135 Wis. 38, 115 N. W. 340). If, as plaintiff asserts, it has kept within its legal rights in all that it has attempted to accomplish, the fact remains that in so doing it has pursued a course of conduct which is such as will lead a court of equity to leave the plaintiff to the remedies which the law affords to it. Under the facts as established by this record, the plaintiff is not entitled to relief in equity.

Judgment of the lower court was reversed.

LABOR ORGANIZATIONS—INJUNCTION—WAGES—VALIDITY OF LABOR UNION RULES—*Barker Painting Co.* v. *Local No. 734, Brotherhood of Painters, Decorators and Paperhangers of America et al., Circuit*

Court of Appeals, Third Circuit (August 12, 1929), 34 Federal Reporter (2d), page 3.—The Barker Painting Co., a corporation of New York, with its home office in New York City, had a contract for painting at Somerville, N. J. The job was about 30 per cent completed when the union called off its men by force of the offending rules which required a contractor to pay the wage rate of his home district or that of the locality of the work, whichever is higher. The Barker Co. filed a bill in equity and the trial judge issued a preliminary injunction restraining the workmen from observing the union rule and from not returning to work. However, all the men save one returned to work and completed the job. The work was completed before the United States District Court for the New Jersey District entered a final decree dissolving the injunction and dismissing the bill. The Barker Painting Co. appealed the case to the Circuit Court of Appeals, Third Circuit.

The court found this case practically the same as the case of Barker Painting Co. *v.* Brotherhood (15 Fed. (2d) 16), in which this court dismissed the bill challenging the validity of the rules prescribed by the union. Regarding the two cases the court said:

We heard the argument at length. On our study of the record we of course found the facts in this case different from those in the Pennsylvania case as to place of work, personnel, dates, etc., but similar in character and action, and found no new facts which differentiate this case from the other or raise any new question of law. The same questions run through both cases as indeed they do in all the reported cases on the subject, whether decided on interlocutory or final decree. * * * [Cases cited.] While we should be more than satisfied to have this controversy between employer and organized labor finally decided by the higher court, we are constrained, until then, to stand by the decision which we made not casually but after serious study and, we confess, much mental disturbance.

In continuing the opinion the court affirmed the decree of the district court, as follows:

Thus it is clear the questions which the plaintiff has raised are moot because, having been saved from injury throughout the work by the preliminary injunction, it has sustained no damage by the defendants' abortive enforcement of its rules. While as a matter of fact, or perhaps, a matter to be inferred from the averments of the bill or from their past practices, the defendants propose to continue to enforce their rules, it does not follow necessarily that they will enforce them against the plaintiff or that the plaintiff will continue in business, or that, continuing in business, it will suffer by the rules' enforcement. It is just here that two odd things occurred, one that, though it suffered no damage through the operation of the brotherhood rules, the plaintiff wants us to review this case and reverse our decision in the former case for its protection in the future, and the brotherhood, not satisfied with one pronouncement by this court sustaining its rules, remained silent (until aroused by

the court) as to the moot aspect of the case, with the evident desire that its rules be further strengthened by another decision to the same effect.

The case was carried to the United States Supreme Court where the decree of the circuit court was affirmed on May 19, 1930 (50 Sup. Ct. 356). Mr. Justice Holmes delivered the opinion of the court and said:

If the case had needed to be considered on its merits it would have been likely to involve a discussion more or less far reaching of the powers of the union, but the plaintiff could not impose a duty to go into that discussion when before the time for it the resistance had been withdrawn and the job had been done.

LABOR ORGANIZATIONS—INTERFERENCE WITH EMPLOYMENT—PICKETING—VIOLATION OF INJUNCTION—*Wil-Low Cafeterias (Inc.) v. Kramberg et al., Supreme Court, New York County, New York (May 7, 1929), 237 New York Supplement, page 77.*—The Wil-Low Cafeterias (Inc.) owned and operated 22 cafeterias in New York City; 7 of these were located in or about that section known as the garment center. An action was brought by the Wil-Low Cafeterias (Inc.) against the officers of the Hotel, Restaurant, and Cafeteria Workers' Union, an unincorporated association, which claimed to be a branch of the Amalgamated Food Workers' Union, as a result of a resolution passed on April 3, 1929, in favor of a general strike of all cafeteria workers in the garment section.

On April 4, without notice to the owner, a group of about 15 in number entered the Traffic Cafeteria, which belonged to the Wil-Low Cafeterias (Inc.), as though they were intended customers. They announced in a loud voice that the place was "on strike" and that everybody must get out; they pursued the employees into the basement, threatened them if they did not cease work, and used tactics calculated to strike terror. They ordered everyone out, threw plates on the floor, scattered food, overturned chairs and tables, and created considerable havoc. Similar, though less serious, altercations and damage occurred in other cafeterias. After the announcement of the strike the union continued to picket the cafeterias. This resulted in a large number of arrests each day, charging members of the union with assault, disorderly conduct, and the violation of section 600 of the Penal Code. Upon release these members returned and continued the picketing.

The Wil-Low Cafeterias (Inc.) brought this action asking for an injunction to prohibit such conduct by the members of the union. They claimed that a part of the union's program was to put the Wil-Low Cafeterias out of business in order that the field might be

left free to cafeterias operated by the union; they further claimed that the union had violated past orders of the court.

The union asserted that their undertaking was to organize the employees of cafeterias and that this strike was to the end that better conditions and shorter hours might be obtained. The case was tried before the Supreme Court of New York, in New York County, on May 7, 1929, and a decree was rendered in favor of the Wil-Low Cafeterias (Inc.), granting an injunction restraining the members of the Hotel, Restaurant, and Cafeteria Workers' Union from the continuance of such acts.

In the course of the opinion the court quoted from the case of the Exchange Bakery & Restaurant (Inc.) *v.* Rifkin (245 N. Y. 269, 157 N. E. 130):

Where unlawful picketing has been continued, where violence and intimidation have been used. and where misstatements as to the employer's business have been distributed, a broad injunction prohibiting all picketing may be granted. The course of conduct of the strikers has been such as to indicate the danger of injury to property if any picketing whatever is allowed.

The court concluded the opinion as follows:

The method by which this strike was started, the violence which has followed, despite the numerous convictions in the magistrate's court of those who have continued to participate, defendants' undenied purpose of crushing plaintiff's restaurants so they may supplant them with restaurants of their own, and the high-handed methods generally used by defendants, all indicate that the picketing which the court is now urged to sanction is designed to be and is in its very nature malicious in purpose, nonpeaceful, and calculated to continue and provoke further violent altercations. If defendants had set out to accomplish a justifiable end by peaceful picketing, there would have been no occasion for the resort to the violence with which they initiated their campaign. The picketing shown by the papers before me constitutes an unjust invasion of plaintiff's rights in the legitimate carrying on of its business. Under the well-settled law of this State plaintiff is entitled to an order restraining pendente lite these defendants from the continuance of such acts.

LABOR ORGANIZATIONS—PICKETING—INJUNCTION—*Joe Dan Market (Inc.)* v. *Wentz et al., St. Louis Court of Appeals (October 8, 1929), 20 Southwestern Reporter (2d), page 567.*—Daniel Kohn, owner and operator of the Joe Dan Market (Inc.), brought this suit against Local Union No. 88 of the Amalgamated Meat Cutters' and Butchers' Workmen of North America to prevent the picketing of his place of business. Kohn had been operating a butcher shop in St. Louis for some 25 years and for several years had operated the Joe Dan

Market. In June, 1924, he incorporated his business, the incorporators being Daniel Kohn, his wife, and Arthur O'Donnell, who had been a meat cutter in the employ of Kohn since January, 1924, at a wage of $45 per week. The union scale of wages was $37.50 per week. O'Donnell was not a member of the union. The union resented the employment of O'Donnell by Kohn, also the fact that he opened his shop earlier in the forenoon and closed it later in the evening than was provided for in union contracts; however, Kohn had never entered into a contract with the union.

On May 24, 1924, suddenly and without any warning, Wentz and other representatives from the union appeared on the sidewalk in front of the market and began picketing. This action resulted in several acts of violence. Kohn was assaulted by one of the union men, his customers were driven away, handbills distributed requesting people not to continue trading with Kohn, and other acts of intimidation committed.

On July 31, 1924, upon the hearing of a petition filed by Kohn, a temporary restraining order was issued, and on June 1, 1925, upon final hearing, judgment was given perpetually enjoining the picketing, and from this judgment the union appealed. This appeal was taken to the St. Louis court of appeals by the union, contending that the judgment was unfair because the decree restrained the picketing of the market even though the picketing be conducted without intimidations, threats, violence, or coercion. Regarding this contention the court said:

This insistence is untenable. The picketing conducted by defendants consisted of one continuous transaction, involving unlawful acts on the part of defendants, and showing, by a systematic course of conduct and concerted action, their intention to accomplish their purpose by unlawful means. In such case equity will do complete justice by enjoining the whole of the unlawful proceedings. Picketing conducted as this was, accompanied by intimidation, threats, violence, and coercion, soon becomes current in the neighborhood, so that a continuation of the picketing, even though conducted peaceably, would probably, if not necessarily, result in intimidation.

The union also contended Kohn was not entitled to equitable relief because he did not come into court with clean hands, as he had published bulletins and handbills stating his side of the controversy, which bulletins were, in part, couched in language that was offensive and contained offensive epithets. The court did not uphold this contention of the union and concluded the opinion by saying:

We are unable to accept this view. Some charity should be indulged in favor of one who, finding his little business in process of destruction by the unlawful picketing of a large and powerful labor organization, exhibits a spirit of resentment which leads him to the use of intemperate language in his efforts to combat and break the

force of the picketing. Moreover, the posting of bulletins and the issuance of handbills occurred only on one day, six or seven weeks before the temporary injunction was issued herein, but the unlawful picketing continued throughout that period.

The judgment of the circuit court was therefore affirmed.

The District Court (Southern District of New York) dismissed a bill filed by the Aeolian Co. against Fischer and the Piano, Organ, and Musical Instruments Workers' International Union of America, as they found no evidence sufficient to justify a finding that the unions whose members refused to work on the premises where nonunion organ workers were employed were compelled or coerced to do so against their own desires and interests. The court also held that it was not illegal for the organ workers' union to call to the attention of other trades the presence of nonunion organ workers and to persuade them, without coercion, to refuse to work side by side with nonunion men. (See 29 Fed. (2d) 679, also B. L. S. Bul. No. 517, p. 144, for denial of preliminary injunction.) (Aeolian Co. et al. *v.* Fischer et al. (1929) 35 Fed. (2d) 34.)

LABOR ORGANIZATIONS—PICKETING—INJUNCTION—CONSPIRACY—*Commercial House & Window Cleaning Co. (Inc.)* v. *Awerkin et al., Supreme Court of New York, Special Term (March 25, 1930), 240 New York Supplement, page 797.*—The Commercial House & Window Cleaning Co. (Inc.) maintained an open shop in employing laborers for cleaning windows and had secured window cleaning contracts from various customers for definite periods of time. The Window Cleaners' Protective Union, Local No. 8, a voluntary unincorporated association, placed pickets in front of these customers' places of business carrying placards to the effect that the company was employing nonunion labor, thereby giving the customers undesirable publicity and coercing them to break contracts with the window cleaning company.

The company brought action against the union alleging that the members of the union unlawfully and maliciously agreed together, combined, and formed a conspiracy the purpose of which they are proceeding to carry out—namely, to cause the customers of the company to break their contracts with it and to discontinue their employment of it unless and until the company shall unionize its business. The company also alleged that it had always maintained an open shop and had never discriminated against union labor and that it paid its laborers a weekly wage equal to that paid by the union.

On the other hand, the union answered and claimed that—

They should have the right to continue this method of picketing, maintaining that the place of work and the necessity for the work are created by the buildings of the said customers, and that therefore these buildings should be considered as the place of business

of the plaintiff because the work is carried on there. Furthermore, the defendants point to the decision of the court of appeals in Exchange Bakery & Restaurant Co. *v.* Rifkin, 245 N. Y. 260, 263, 157 N. E. 130, 132, in which the court held, among other things, that the unions "may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. * * * Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured."

In comparing this case with the Rifkin case, supra, the court said that in the case at bar there was no strike or picketing of the company's place of business, and hence the Rifkin case did not apply. The court said the activities of the union complained of constituted an alleged secondary boycott, and the courts of New York have consistently maintained that a secondary boycott will not be tolerated.

The court, therefore, granted the permanent injunction restraining the union from the alleged activity in their attempt to unionize the company's business.

LABOR ORGANIZATIONS — PICKETING — INJUNCTION — INTERFERING WITH EMPLOYMENT—*New England Wood Heel Co.* v. *Nolan et al., Supreme Judicial Court of Massachusetts (June 28, 1929), 167 Northeastern Reporter, page 323.*—The New England Wood Heel Co. manufactures heels which it sells to shoe manufacturers. The company had an agreement with the Shoe Workers' Protective Union prior to January 1, 1929, under which the company hired only members of said union as employees in its factory. This agreement expired on December 31, 1928, and after negotiations for renewal failed, the company opened its plant under nonunion conditions. The employees were paid in full and notified of the change in policy. The union called a strike, which was followed by picketing. The union had a contract with the shoe manufacturers in which it was agreed that the manufacturers would not work upon any product coming from a plant where a strike was then in progress. The manufacturers were notified of the strike within the plant of the New England Wood Heel Co.

The heel company sought injunctive relief and asked the court to enjoin the union from interfering with the business of the company, either by intimidating its employees or by persuading or compelling its customers not to purchase goods from the company. The injunction was granted by the superior court, Essex County, and the union appealed to the Supreme Judicial Court of Massachusetts.

The trial judge ruled that the strike, called by the union at the company's plant, which resulted in picketing, intimidation of the em-

ployees, and an attempt to drive away customers was an unlawful strike.

Regarding the contention of the union "that the plaintiff does not come into court with clean hands in that it had knowledge of the prior contract of members of the union not to enter into individual contracts of employment and notwithstanding such contracts maliciously induced said members to break them," the trial judge found "upon the evidence that the officers of the plaintiff hired such of its former employees known to them to be members of the union as voluntarily sought employment, aware that such individual contracts of employment were in violation of their union obligations." He stated:

But I am unable to find from the evidence that the plaintiff maliciously sought to procure or induce such members of the union to leave the union or otherwise to violate their union obligations.

The union cited article 1, section 3, of the constitution of the Shoe Workers' Protective Union which provides:

The approval of an application for membership and the initiation of the applicant as a member of the Shoe Workers' Protective Union constitutes a contract between said member and the said Shoe Workers' Protective Union and his local union, and between said member and every other member of the said Shoe Workers' Protective Union, whereby, in consideration of the benefits and advantages secured to him by reason of his membership therein, he agrees: (1) That he will remain a member of the Shoe Workers' Protective Union until he is expelled. (2) That he will not violate any of the provisions of this constitution or of the by-laws of his local union nor the trade rules of the locality in which he works. (3) That he will not enter into or sign any individual contract of employment with any person, firm, association, or corporation or any contract or agreement which provides that he will not become or remain a member of the Shoe Workers' Protective Union or any local union thereof.

It appeared in evidence "that the officers of the plaintiff knew of this provision. While there are provisions for expelling a member, nonpayment of dues is not stated as a ground for expulsion."

Upon appeal the Supreme Judicial Court of Massachusetts found there was no evidence of any attempt to induce a breach of contract, and therefore the company was not in court with unclean hands. The court, in sustaining the lower court, said in part:

Viewing the findings of the judge as a whole, and particularly that part wherein he finds "I am unable to find from the evidence that the plaintiff maliciously sought to procure or induce such members of the union to leave the union or otherwise to violate their union obligations," we infer that the judge believed, and therefore found, that the evidence warranted no stronger conclusion than that the plaintiff employed members of the union under individual contracts which they solicited; that the plaintiff employed them only when such members voluntarily sought employment; and that the plain-

tiff did not intentionally induce or procure such members to enter into individual contracts with it in violation of their duty to the union. We have read the evidence and considered the contentions of the defendants in this respect with great care, and we can not find that such conclusions of fact were clearly wrong. It results that the plaintiff can not be said to be before the court with unclean hands, and because of that supposed fact is not entitled to equitable relief.

On the facts found the trial judge ruled rightly that the strike was unlawful. This ruling was not based upon any findings that the purpose of the strike was to compel the plaintiff to operate a closed shop; as to which see A. T. Stearns Lumber Co. *v.* Howlett (260 Mass. 45, 60, 61, 157 N. E. 82) and cases cited. It is plain, in the circumstances, that it was not lawful for the defendants to call a strike at the plaintiff's factory (1) to prevent the recalcitrant union member from demoralizing the entire personnel of the union by working for a less rate than they themselves had participated in adopting as proper; (2) to prevent the plaintiff from aiding and abetting those members from carrying out that design; or (3) to compel the plaintiff to restore to the union members the standard union rates. [Cases cited.]

LABOR ORGANIZATIONS—STATUS AND POWER—CONSTITUTIONALITY OF STATUTE—INJUNCTION—*Ruark et al.* v. *International Union of Operating Engineers, Local Union No. 37, et al., Court of Appeals of Maryland (June 25, 1929), 146 Atlantic Reporter, page 797.*—The General Assembly of Maryland passed a statute known as chapter 94 of the Acts of 1910, of which sections 2 and 3 constitute that portion of the charter of the city of Baltimore, which is as follows:

516. That eight hours shall constitute a day's work for all laborers, workmen, or mechanics who may be employed by or on behalf of the mayor and city council of Baltimore, except in cases of extraordinary emergency which may arise in time of war or in cases where it may be necessary to work more than eight hours per calendar day for the protection of property or human life: *Provided*, That in all such cases the laborer, workman, or mechanic so employed and working to exceed eight hours per calendar day shall be paid on the basis of eight hours constituting a day's work: *Provided further*, That the rate of per diem wages paid to laborers, workmen, or mechanics employed directly by the mayor and city council of Baltimore shall not be less than $2 per diem: *Provided further*, That not less than the current rate of per diem wages in the locality where the work is performed shall be paid to the laborers, workmen, or mechanics employed by contractors or subcontractors in the execution of any contract or contracts in any public work within the city of Baltimore.

516A. That all contracts hereinafter made by or on behalf of the mayor and city council of Baltimore with any person or persons or corporation for the performance of any work with the city of Baltimore shall be deemed and considered as made upon the basis of eight hours constituting a day's work, and it shall be unlawful for any such person or persons or corporation to require or permit any

laborer, workman, or mechanic to work more than eight hours per calendar day in doing such work, except in the cases and upon the conditions provided in section 516 of this article.

This statute further provided a fine of not less than $10 nor more than $50 for every violation of its provisions.

The present case arose when the mayor and city council of Baltimore found it necessary to provide extensive sewers and drains in various sections of the city. They entered into eight contracts with independent contractors for the construction of this public improvement. The contracts provided that the promisors should indemnify and protect the municipality, its officers, agents, and servants against any claim or liability growing out of the violation of the statute.

The contractors began the building of the sewers, and while the work was being done this bill of complaint was filed against the municipality, its engineers, and the eight contractors:

The bill of complaint alleges that it would be some time before the drains and sewers would be completed, and that, in disregard of the statute and the terms of the contracts, the municipality, its engineer of sewers, and the eight other defendants were permitting and requiring the laborers, workmen, and mechanics while employed in the building of the several drains and sewers, to work more than eight hours per calendar day without there being any emergency arising in time of war or a necessity to protect thereby property or human life. The plaintiffs further aver that the defendants, although asked to stop, have continued in this violation of the statute; and that it is the intention of the defendants "so to disregard and violate said provisions and requirements of said sections of the charter of Baltimore city and to disobey, nullify, and set the same at naught," unless restrained by the chancellor.

The defendants thereupon objected. The objections were overruled and an injunction issued. Appeals were taken from this decree by the municipality, its engineers, and others.

The court of appeals said that—

The two major questions brought up on these appeals are the constitutionality of the statute and the right of the plaintiffs for relief by way of injunction. As each of these questions goes to the maintenance of the complaint in equity, they alone will be discussed.

This court held the statute was constitutional, since it prescribed a definite standard of conduct which indicates with certainty, to any reasonable person, what acts will constitute the crime denounced.

The court proceeded to define the terms used in the statute, "current rates" as used therein meaning charge for or valuation of daily labor in question according to standard generally received or established by common consent or estimation; "locality" defining a region, with the public undertaking as an axis or focal point, throughout which region the daily wage of the particular class to which the worker belongs is uniform.

In regard to the injunction the court said, in part:

An injunction should never issue except with care and caution (Miller's Equity, sec. 544), and the necessity for the exercise of this restraint is accentuated by the novelty of issuing an injunction on the sole ground of a prospective violation of the criminal law in the performance of the labor incident to the completion of a public improvement under a duly authorized and valid contract. Upon principle and on authority there is a distinction drawn between the prevention of public officials from doing a primary act, which is ultra vires or unlawful, as the making of a contract, of an assessment of property, of a levy of taxes, or an appropriation of funds, and the occurrence of secondary errors, irregularities, or criminal conduct in the course of the performance of a valid contract or of an authorized municipal function. The latter acts fall into a different category and generally do not justify the issuing of an injunction since they are not of a fundamental character and may be controlled or compensated by other remedies, and because equity has no supervisory power over public corporations and their officers.

In concluding the opinion the court said:

The plaintiffs, therefore, have no legal right, and the defendants are under no legal liability to the plaintiffs at law or in equity, so the bill was bad on demurrer and should have been dismissed so far as the appellants are concerned.

LICENSING BUSINESS, OCCUPATIONS, ETC.—PHARMACISTS—POWERS OF BOARD TO REVOKE LICENSE—*Cavassa* v. *Off et al., Supreme Court of California (January 29, 1929), 274 Pacific Reporter, page 523.*—H. A. Cavassa was a registered pharmacist in the city of San Francisco and was convicted for the third time of the violation of the act (Gen. Laws 1923, act 5886) regulating the practice of pharmacy in California. The California State Board of Pharmacy requested him to appear before them and show cause why his license should not be revoked. He did not appear before them as requested, but instituted proceedings against the board questioning their authority to revoke his license to practice pharmacy. The sections of the act to regulate the practice of pharmacy involved in the controversy were sections 6 and 12, which are in part as follows:

SEC. 6. It shall be the duty of the secretary of the board to erase from the register the name of any registered pharmacist or assistant pharmacist, * * * who in the opinion of the board has forfeited his right under the law to do business in this State.

SEC. 12. * * * Any person violating any of the provisions of this act, when no other penalty is provided, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be liable to punishment by a fine of not less than twenty dollars and not more than one hundred dollars, or by imprisonment of not exceeding fifty days, or by both such fine and imprisonment. All fines recoverable under this act shall be paid by the magistrate receiving the same to

the State board of pharmacy. Any person convicted of violating the provisions of this act the third time shall in addition to the penalties hereinbefore mentioned have his or her registration as a pharmacist canceled.

In maintaining the rights of the board the attorney general said that "section 12 of the act itself revokes the license of a pharmacist who has been convicted of violating the provisions of the pharmacy act the third time, and the requirement that the registration of such pharmacist be canceled calls for nothing more than a ministerial act upon the part of the board, and its provisions are mandatory." However, the California Supreme Court did not fully agree with this position and said in the opinion as follows:

The right of a person to practice the profession for which he has prepared himself is property of the very highest character. (Hewitt *v.* Board of Medical Examiners, 148 Calif. 590, 84 Pac. 39.) Due to the severe and exacting tests now generally required before a person can legally follow a profession at the present day, this right can only be acquired after years of arduous effort and closest application. It is generally the only means of the holder thereof whereby he may support himself and family, and it usually affords such holder the best opportunity to become a useful and sustaining member of the community in which he resides. This right should not be taken from one who has thus acquired it, except upon clear proof that he has forfeited the same and then only in strict conformity to the statute authorizing its forfeiture. We are satisfied, for the reasons given herein, that the board of pharmacy has no authority under the proceedings instituted by it to revoke petitioner's license nor to cancel or erase his name from the list of registered pharmacists kept by it in the office of its secretary.

In our opinion section 12 of the act relates only to the authority of the court in which the third conviction may be had, giving it power to revoke the license of a registered pharmacist upon his third conviction, and it should not be construed to give to the board of pharmacy this same power, as there is nothing in the section, or in any other part of the act, which directly or by reasonable implication confers such power upon said board.

LICENSING BUSINESS, OCCUPATIONS, ETC.—PLUMBER—INJUNCTION—AGAINST INTERFERING WITH EMPLOYMENT—*City of San Benito et al.* v. *Hays & Sons, Court of Civil Appeals of Texas (March 13, 1929), 15 Southwestern Reporter (2d), page 99.*—J. H. Hays, H. H. Hays, and E. H. Hays were engaged in the plumbing business under the partnership name of Hays & Sons. They were master plumbers located in the city of San Benito, Tex., where the licensing of journeyman plumbers is required. Ed Warren, a journeyman plumber, in their employ, was fully qualified in plumbing and had worked at this calling for about two years. When examined for a license in

August, 1928, there were only three of the five examiners present, one of these was a competitor of Hays & Sons, and another was a man in his employ. The license was denied, even though Warren answered the questions correctly. The facts show that Hays & Sons were dependent upon Warren's work to complete their contracts, and they instituted this suit to compel them to issue a license to Warren. The order was granted by the district court, Cameron County, Tex., and the city of San Benito appealed to the Court of Civil Appeals of Texas, contending that Hays & Sons were not the proper parties to sue for an order commanding the issuance of a license to a journeyman, even though he was in their employ. The court held otherwise and, in affirming the judgment of the lower court, said in part:

His interests were so intermingled with those of his employers, and he was so absolutely necessary to them in the prosecution of their work, that a refusal of the license worked greatly to their damage, and they in their own interest had the right to apply to a court to compel the granting of the license. The evidence showed affirmatively that appellees could not employ another plumber who could do the work of Warren as he could. The appellees had all necessary licenses to engage in plumbing at San Benito and were so recognized by the board of examiners and city authorities. The contention that Warren did not pay the fee of his license seems without force, in view of the fact that the board of examiners refused the license. While the license is granted for only one year, it will be renewed from time to time on application. No discretion is devolved upon the board for renewals, but they must be issued upon application. The court did not command any one to issue a permanent license to Warren or any one else. It is the boast of the citizens of this great Republic that this is a land of equal opportunity for all classes and conditions of men, and that every man is guaranteed the right to prosecute unhindered the vocation he follows to obtain a livelihood. It is far better to encourage and protect men in laboring to obtain the necessaries of life than to arbitrarily and tyrannically place unnecessary obstructions in their way, when they are seeking an honest livelihood, and to oppress them and drive them into crime. This is a time in our history when high standards of living are fixed, and the high price of the necessaries as well as the luxuries of life have become more burdensome than ever before, and rather than throw obstacles in the pathway of any citizen desiring to earn an honest livelihood, he should be encouraged and have the door of opportunity thrown wide open to him. In this case appellees have done everything the law has required at their hands, and their competitiors, placed in places of power, should not be permitted to exercise that power in an arbitrary or corrupt manner. Not only have the competitors of appellees on the examining board, in the face of a majority of the board approving the examination of Warren, denied the license, but in the face of the command of the city commission no license was issued, and the city marshal notified appellees that Warren would not be permitted to work. To cause

these high-handed, unwarranted measures to cease, and to extend to appellees the right to pursue their vocation under the law, the district court was appealed to and gave relief.

REMOVAL OF RAILROAD SHOPS—INJUNCTION—INTERFERING WITH INTERSTATE COMMERCE—JURISDICTION—*Lawrence et al.* v. *St. Louis-San Francisco R. Co., Supreme Court of the United States (January 2, 1929), 49 Supreme Court Reporter, page 106.*—The question involved in this case was the right of the St. Louis-San Francisco Railway Co. in removing their workshops and division point from Sapulpa to West Tulsa, Okla. In 1916, when the railway made plans to remove their shops to West Tulsa, the citizens of Sapulpa requested the corporation commission of Oklahoma to issue an injunction to prevent the removal. This injunction was issued by the commission. Some years later the injunction was renewed and a date set for a hearing. Before the date set for the hearing, however, the railway secured an interlocutory injunction from the District Court of the Northern District of Oklahoma, restraining the State corporation commission from interfering with the removal of its shops. The case was carried to the Supreme Court of the United States (47 Sup. Ct. 720), but before the decision of the Supreme Court was rendered the railway completed the removal of the shops and division point to West Tulsa. The Supreme Court reversed the decree of the district court and reversed the interlocutory injunction. Promptly after this decision, Lawrence, acting for the employees of the railway and the citizens of Sapulpa, applied to the district court for an order requiring that forthwith, and before any further proceeding be taken in the cause, the railway restore the conditions with respect to its shops and division point existing prior to the issue of the injunction. The district court denied the motion and instead issued an order that the railway company "as a preliminary step to further hearing of this cause" apply to the corporation commission of the State to dissolve the restraining orders theretofore made by it, restraining removal of the shops and division point, and to ratify the removal which had been effected.

The commission sustained the objection of Lawrence that the railway company acted in contempt of the commission and should not be heard by the commission until the shop was returned to Sapulpa. The case went to the district court for a final hearing upon this question, and that court held the railway did not act in contempt of the commission and had the right to request a permanent injunction allowing the shops to remain in West Tulsa. Lawrence again carried the case to the Supreme Court of the United States.

Mr. Justice Brandeis delivered the opinion of the court and said, in part, as follows:

"The interlocutory decree," as we have said, "set the railway free to remove the shops before the case could be heard on final hearing." (274 U. S. 588, 594, 47 Sup. Ct. 720.) The district court had, when it issued the injunction, jurisdiction of the parties and of the subject matter; and it has never relinquished its jurisdiction. It is true that this court has held that the interlocutory decree was improvidently granted. But it did not declare that the decree was void.

Thus, the interlocutory decree relieved the railways from any duty to obey the restraining order of the commission. Because such was its effect, the lower court required the railway to furnish the $50,000 bond. By availing itself of the liberty given to remove the shops and division point, the railway assumed the risk of being required to restore them if it should be held that the interlocutory injunction was improvidently granted, see Bank of United States *v.* Bank of Washington (6 Pet. 8, 17, 8 L. Ed. 299), Arkadelphia Co. *v.* St. Louis Southwestern R. Co. (249 U. S. 134, 145–146, 39 Sup. Ct. 237), and also the risk of having to compensate the appellants, to the extent of $50,000, for any damages suffered by reason of the removal. But it was clear that, upon final hearing, the railway might prove that it was entitled to a permanent injunction; and the district court was not obliged to order restitution meanwhile.

Regarding the authority of the district court, Mr. Justice Brandeis said:

Although it required the bond, and this court held that the interlocutory injunction had been improvidently issued, the district court could, in its discretion, refuse to assess the damages until it should, after the final hearing, have determined whether the plaintiff was entitled to a permanent injunction. (See Redlich Mfg. Co. *v.* John H. Rice & Co. (D. C.) 203 Fed. 722.) It might then refuse to allow recovery of any damages, even if the permanent injunction should be denied.

After pointing out the expense of returning the shops to Sapulpa and the definite advantages of the new location to the employer, the employees, and the public in general, the court said it must have seemed probable to the district court that upon final hearing a permanent injunction would be issued and that to order restitution meanwhile would have been not merely an idle act but one imposing unnecessary hardships on the railway and the public. Mr. Justice Brandeis concluded the opinion by saying:

The railway was not in contempt. The terms of the restraining order had been superseded by the interlocutory injunction. To refuse to hear the application, which the district court had directed the railway to make, was an attempt to inflict punishment for an innocent act.

The judgment of the district court was therefore affirmed.

RETIREMENT OF CIVIL EMPLOYEES—RETIREMENT SYSTEM—PRIOR SERVICE—*In re Caldwell, Supreme Court of New York, Special Term (April 7, 1930), 241 New York Supplement, page 1.*—Since January 1, 1926, Charles P. Caldwell had been a justice of the court of special sessions in the city of New York, and from January 14, 1926, he had been a member of the New York City employees' retirement system, as provided in chapter 26 of the Greater New York charter. Prior to his appointment as justice he served as a Representative in Congress from the State of New York from March, 1915, to March, 1921. He made application in June, 1929, for a prior service certificate from the retirement system, claiming credit under the law for his congressional service from 1915 to 1920. This prior service certificate was refused.

The Greater New York charter (Laws 1901, ch. 466, sec. 1703, added by Laws 1920, ch. 427, amended by Laws 1923, ch. 142, and Laws 1929, ch. 415) provides for the issuance of a prior service certificate to members of the employees' retirement system certifying the service rendered before October 1, 1920, as city or State official or "service in the civil service of the United States Government." In 1928 the New York charter was amended (Greater New York charter, Laws 1901, ch. 466, sec. 1703–a added by Laws 1928, ch. 786) to allow credit for prior service to all persons now in the city's service who had become members of the employees' retirement system before July 1, 1928.

The New York Supreme Court said that as Caldwell had been a member of the retirement system prior to July 1, 1928, he should not have been refused the prior service certificate for which he made application. It was contended that, according to the charter (sec. 1703), an "allowance may be made for prior service only to those who have rendered city service before October 1, 1920, and within five years prior to the date upon which he renders the service." In other words, a member in order to get credit must have joined the system on October 1, 1920, or become a member within five years after cessation of previous city service.

The court, however, held that Caldwell came within those employees included in section 1703–a which provides for "credit for all prior service" to any person who was a member of the retirement system on or before July 1, 1928, notwithstanding the provisions of section 1703, and "'prior service' is not limited to 'city service,' but shall be for 'all prior service' and necessarily includes the legislative provision, 'service in the civil service of the United States Government.'"

The court therefore ordered that a prior service certificate be issued.

SEAMEN—ASSAULT—NEGLIGENCE—*Jamison et al.* v. *Encarnacion, Supreme Court of the United States (May 26, 1930), 50 Supreme Court Reporter, page 440.*—William A. Jamison, a longshoreman, was employed by Valentin Encarnacion as a member of a crew loading a barge lying in navigable waters at Brooklyn, N. Y. One Curren was the foreman in charge of the crew. While Jamison was upon the barge engaged with others in loading it, the foreman struck and seriously injured him. Following his death, Inez M. Jamison, executrix, filed an action in the Supreme Court of New York against the employer to recover damages. The evidence showed that the foreman was authorized to direct the crew and to keep them at work. There was also evidence that he assaulted Jamison without provocation. The trial judge instructed the jury that—

The defendant would not be liable if the foreman assaulted plaintiff by reason of a personal difference but that, if the foreman, in the course of his employment, committed an unprovoked assault upon plaintiff in furtherance of defendant's work, plaintiff might recover.

A judgment for $2,500 was rendered in favor of the executrix. The case was thereupon appealed to the appellate division of the New York Supreme Court, which court held that Jamison's injury was not the result of any negligence within the meaning of the Federal employers' liability act (45 U. S. C. A., secs. 51–59) and reversed the judgment. Following this the New York Court of Appeals held that the Federal employers' liability act applied, and after quoting from International Stevedoring Co. *v.* Haverty (47 Sup. Ct. 19), said:

As the word "seamen" in the act (sec. 33, merchant marine act) includes "stevedores," so the word "negligence" (sec. 1, Federal employers' liability act) should * * * include "misconduct."

The court of appeals reversed the judgment of the appellate division and affirmed the decision of the New York Supreme Court. The case was then appealed to the United States Supreme Court for review. The court quoted section 33 of the merchant marine act (46 U. S. C. A., sec. 688), which provides:

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

Also section 1 of the Federal employers' liability act (45 U. S. C. A., sec. 51), which reads:

That every common carrier by railroad while engaging in (interstate) commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such com-

merce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. * * *

In determining whether "negligence" as there used included the assault in question in this case, Mr. Justice Butler said in part as follows:

"Negligence" is a word of broad significance and may not readily be defined with accuracy. Courts usually refrain from attempts comprehensively to state its meaning. While liability arises when one suffers injury as the result of any breach of duty owed him by another chargeable with knowledge of the probable result of his conduct, actionable negligence is often deemed—and we need not pause to consider whether rightly—to include other elements. Some courts call willful misconduct, evincing intention or willingness to cause injury to another, gross negligence. * * * While the assault of which plaintiff complains was in excess of the authority conferred by the employer upon the foreman, it was committed in the course of the discharge of his duties and in furtherance of the work of the employer's business. As unquestionably the employer would be liable if plaintiff's injuries had been caused by mere inadvertence or carelessness on the part of the offending foreman, it would be unreasonable and in conflict with the purpose of Congress to hold that the assault, a much graver breach of duty, was not negligence within the meaning of the act.

The judgment of the court of appeals holding the Federal employers' liability act applied to the case at bar was therefore affirmed.

The United States Supreme Court also held that an assault on a seaman by his foreman, reprimanding him for tardiness, and compelling him to work was "negligence" within the Federal employers' liability act, section 1 (45 U. S. C. A., sec. 51), and the merchant marine act, section 33 (46 U. S. C. A., sec. 688). (Alpha S. S. Corporation et al. *v.* Cain (1930), 50 Sup. Ct. 443.)

SEAMEN—NONPAYMENT OF WAGES—INSOLVENCY—*Collie et al.* v. *Fergusson et al., Supreme Court of the United States (February 24, 1930), 50 Supreme Court Reporter, page 189.*—The *Dola Lawson*, a power boat licensed for coastwise trade, and Fergusson, her owner, were court libeled for repairs and materials supplied to the vessel. The vessel was sold by order of the court and the proceeds, insufficient to satisfy the claims allowed, were paid into the registry of the court to the credit of the cause.

The employment of two of the seamen was terminated by the seizure of the vessel. They filed claims in the United States District Court of Eastern Virginia for their wages and claimed double wages for waiting time under section 4529 of the Revised Statutes (46 U. S. C. A., sec. 596), which provides in part as follows:

The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination

of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens. * * * Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed, * * * which sum shall be recoverable as wages, in any claim made before the court. * * *

The District Court of Eastern Virginia denied the petition of the seaman for double wages for waiting time, but allowed the payment of wages due, with interest, as prior liens. The seamen first carried the case to the United States Circuit Court of Appeals, which affirmed the decision of the lower court, and then to the Supreme Court of the United States. They contended that a claim for double wages, when valid, is by the terms of the statute "recoverable as wages." They argued that the statutory allowance was compensatory, that it accrued upon the mere delay in payment of wages and should be included in the lien for wages.

Mr. Justice Stone, in delivering the opinion of the court, said the statute must be determined in the light of the purpose of the act, also that the phrase "without sufficient cause" must be taken to embrace something more than a valid defense to the claim for wages, for otherwise it would have added nothing to the statute.

He concluded the opinion holding that the insolvency of the owner and arrest of the vessel was sufficient cause for nonpayment of seamen's wages and would avoid liability for double wages for waiting time, by saying in part as follows:

The words "refuses or neglects to make payment * * * without sufficient cause" connote, either conduct which is in some sense arbitrary or willful, or at least a failure not attributable to impossibility of payment. We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible. Hence we conclude that the liability is not imposed regardless of the fault of the master or owner, or his retention of any interest in the vessel from which payment could be made. It can afford no such protection and exert no effective coercive force where delay in payment, as here, is due to the insolvency of the owner and the arrest of the vessel, subject to accrued claims beyond its value. Together these obstacles to payment of wages must be taken to be a sufficient cause to relieve from the statutory liability.

The decree of the lower court was therefore affirmed.

SEAMAN—RELEASE—WORKMEN'S COMPENSATION LAW—CONTRIBUTORY NEGLIGENCE—*W. J. McCahan Sugar Refining & Molasses Co.* v. *Stoffel*, *Circuit Court of Appeals, Third Circuit* (*May 27*,

1930), *41 Federal Reporter* (*2d*), *page 651.*—John Stoffel, a stevedore, engaged in unloading cargo from a ship in navigable waters at Philadelphia, Pa., and a "seaman" within the meaning of the law, filed suit against his employer, the W. J. McCahan Sugar Refining & Molasses Co., to recover damages for personal injuries.

The United States District Court for the Eastern District of Pennsylvania rendered a judgment in favor of the employee in the sum of $3,750. The company appealed to the Circuit Court of Appeals, Third Circuit, contending that Stoffel was guilty of contributory negligence; that the hoisting of the draft before signal was given was not the proximate cause of the injury; and that an agreement between the employee and employer whereby the employee agreed to accept compensation in accordance with the Pennsylvania workmen's compensation law was valid.

The appeals court held that, as Stoffel did nothing but "wait for the truck to come by," his action was purely negative and he was not guilty of contributory negligence. The court also said that "in starting the draft before receiving a signal the winchman violated his duty and, therefore, was guilty of negligence that was the proximate cause of the injury."

The court turned its attention to the agreement under the workmen's compensation law of Pennsylvania and declared it void for the following reasons: (1) Because it was indefinite and incomplete, a number of blanks had not been filled in, among which was the number of weekly payments; (2) because of lack of mutuality; (3) because it depended upon a supplemental agreement "to be approved by the workmen's compensation board" or upon final payment on that board's order, neither of which had been made; (4) because it was against public policy. Regarding this fourth reason the court said:

> The law regards a longshoreman or stevedore, injured while engaged in maritime service aboard a ship lying in navigable waters, as a seaman with all his peculiar rights and immunities. There has been more or less protected legislative—and judicial—effort to bring such seamen, who under Federal admiralty acts are entitled to sue for compensation for injuries in Federal courts, within the scope of State compensation acts. The Supreme Court, reviewing from time to time the position of seamen, the policy of preserving a uniform maritime law, and the impolicy of bringing seamen under diverse laws of States, has held such efforts unconstitutional as destroying the characteristic features of the general maritime law, contravening its essential purposes, encroaching upon the paramount power of the Congress to enact national maritime laws, and invading the jurisdiction which the Congress has conferred upon courts of admiralty.

In the case in hand the respondent tried to do what the Supreme Court has said State legislatures can not do. The attempt was, pari ratione, equally void. If this contract were otherwise good, it would still be bad because opposed to public policy. But aside from this vital defect, the contract, with the ingrafted release, is void for the three reasons first stated.

The decree of the lower court was therefore affirmed.

SUNDAY LABOR—CONSTITUTIONALITY OF LAW—*State* v. *Blair*, *Supreme Court of Kansas* (*June 7, 1930*), *288 Pacific Reporter, page 729.*—Sam Blair was arrested and convicted of violating the statute prohibiting the sale of goods, wares, and merchandise on Sunday and also the performing of Sunday labor. The offense committed was the keeping open for business of the Blair Theater in the city of Mankato, Kans. Section 21–952 of the Kansas Revised Statute reads:

Every person who shall either labor himself or compel his apprentice, servant, or any other person under his charge or control to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding $25.

The Jewell County district court convicted him, and Blair appealed to the Kansas Supreme Court, contending that the statute was unconstitutional in that it denied him the religious freedom granted by the Constitution of Kansas and of the United States, in that it compelled him to accept Sunday as a day of rest. He also contended that the sale of theater tickets did not constitute a sale of "goods, wares, or merchandise" as was contemplated in the Kansas statute. In upholding the constitutionality of the statute the supreme court said:

The constitutionality of statutes similar to the one here under consideration has been before the courts of this country for consideration on a number of occasions, and nearly always those statutes have been held to be constitutional and not to violate any right of religious freedom. [Cases cited.]

We are not without decisions of this court which, although not directly in point, are persuasive that the statute under consideration does not violate any constitutional provision. [Cases cited.]

In answering the second contention of Blair the court looked to the purpose of the statute and said:

Its purpose is to prohibit any person from selling or exposing for sale any kind of property except those articles mentioned in the succeeding section which includes drugs, medicines, provisions, and other articles of immediate necessity. Theater tickets are personal property which can be sold. Their value is not in the ticket but is in

the right that the ticket gives to the holder, the right to be entertained in the theater at the time and place specified in the ticket. The terms "goods, wares, or merchandise" have been held to include lottery tickets. (Yohi *v.* Robertson, 2 Whart. (Pa.) 155, 162.) For the purpose of this case, it is not advisable to attempt to define more specifically the words "goods, wares, or merchandise," nor to attempt to state all that is comprehended by them. All that is necessary is to determine whether or not tickets to "a public moving and talking picture show and theater" come within the expression "goods, wares, or merchandise." The majority of the court, after consideration of the matter, is of the opinion that the words used in the statute include, within their meaning, theater tickets such as are described in the third count of the information on which the defendant was tried.

The judgment of the lower court was therefore affirmed.

SUNDAY LABOR—VIOLATION OF STATUTE—"MERCANTILE ESTABLISHMENT"—*People ex inf. Hertzberger* v. *John R. Thompson Co., Supreme Court of New York, Appellate Division, First Department (June 23, 1930), 243 New York Supplement, page 618.*—The John R. Thompson Co. was convicted of violating the labor law (Laws 1921, ch. 50, sec. 161, subd. 3) on the complaint of Nathaniel Hertzberger. Section 161 provides that an employer operating a factory, mercantile establishment, or freight or passenger elevator, with certain exceptions, must allow every employee at least 24 consecutive hours of rest in any calendar week. Subdivision 3 provides that before operating on Sunday the employer shall conspicuously post on premises a schedule containing a list of employees permitted to work on Sunday and designating a day of rest for each and shall file a copy of such schedule with the commissioner and that no employee shall be permitted to work on his designated day of rest.

The John R. Thompson Co. operated a restaurant on Sunday, and one Ivan Bureau, an adult, worked in this restaurant on Sunday, and no schedule was posted and filed with the State industrial commissioner containing the name of this employee and designating a day of rest for him. Upon being convicted in the court of special session of the city of New York, the company appealed to the New York Supreme Court, contending that a restaurant was not a "mercantile establishment" and therefore not included in the act. The court said that—

A reading of this section would seem to show that a restaurant does not fall within the definition of mercantile establishment as that term is defined in this same law. As showing that the legislature did not intend to include "restaurant" in its definition of mercantile establishment we note other sections of this same labor law. By section 180, of chapter 50, Laws 1921 (the labor law), the legislature provided that no child under the age of 16 years should

be employed "in connection with any mercantile establishment, business office, telegraph office, restaurant," thus showing that the draftsmen of this law differentiated between a mercantile establishment and a restaurant. In the same way, in section 150, with reference to a sufficient number of suitable seats for female employees, it is provided that they shall be "maintained in every factory, mercantile establishment, freight or passenger elevator, hotel, and restaurant."

As to the contention that restaurants were included in the act because they are not expressly exempt, as are hotel employees, the court said that "no failure to expressly exempt all those not affected by the section can be held to include those not exempted by the terms of the statute."

In conclusion the court said "it would therefore seem clear that an employer engaged in the restaurant business under the present statute is not affected by section 161 of the labor law."

The decision of the lower court was therefore reversed.

WAGES—ASSIGNMENTS—INJUNCTION—TO PROTECT PUBLIC WELFARE—*State ex rel. Smith, Attorney General, et al.* v. *McMahon et al., Same* v. *Harcourt et al., Supreme Court of Kansas (October 5, 1929), 280 Pacific Reporter, page 906.*—The attorney general of the State of Kansas sought by court action to stamp out the business of usurers who prey upon the poorer classes of working people in the State, exacting from them yearly rates of interest ranging from 240 per cent to 520 per cent. Accordingly, a petition was filed by the attorney general in the district court of Wyandotte County, Kans., to suppress the evil. Among the several allegations set forth in the petition of the attorney general were the following: (1) That the usurers purposely selected poor and necessitous wage earners as their customers for the purpose of compelling them to renew their usurious loans from pay day to pay day, so that once obtained as customers they would, for a long period of time, be compelled to pay the exorbitant rates of interest; (2) that the borrowers were compelled to pay the high rate and forced to sign the pretended wage assignments for fear of losing their jobs; (3) that threatened garnishment disturbed the peace of mind of the borrowers and jeopardized their standing in the eyes of the employer, thereby depriving them of "rights to peacefully follow their respective lawful occupations without annoyance or injury"; (4) that the loan business carried on in the State was "repugnant to good conscience and good morals and against public policy," and the exaction of the excessive rate of interest was in direct violation of the provisions of the law of Kansas.

The petition concluded by requesting that temporary and permanent injunctions be granted, restraining the usurers "from loaning money in small sums to laboring men at rates of interest in excess of 10 per cent per annum."

The district court denied the petition and the State of Kansas, through the attorney general, appealed to the supreme court of the State. The contention of the loan agencies was that the exaction of usurious interest was of no concern to third parties, even to the State itself, and that if any of the borrowers were aggrieved they had a plain and adequate remedy at law.

The State statute (Rev. Stat. 41–102) provided in part that any person so contracting for a greater rate of interest than 10 per cent per annum shall forfeit all interest so contracted for in excess of such 10 per cent. The attorney general maintained that the statute was annulled by the money lenders and made ineffective until invoked in some lawsuit. The wage earner, the State maintained, due to his condition, "has no time to attend court nor means to employ a lawyer to invoke the defense to the usurer's claim accorded by this statute."

The State's right to maintain the suit was upheld by the supreme court, which stated that—

> The long-continued subjection of hundreds of indigent debtors to the usurious exactions of defendants by keeping them in fear of losing their jobs if they should have the temerity to assert the rights accorded them by the beneficent statutes of this Commonwealth presents a situation which can not be tolerated, and one which quite justifies the institution of this litigation by the State itself.

The court reviewed several cases in which it was held that the State had the right to initiate litigation over matters primarily of private concern but secondarily of far-reaching consequence to the public, and Judge Dawson in his opinion said:

> The courts are not helpless to put a stop to such a nefarious business as that of which plaintiff complains when that business has reached the widespread prevalence it has attained in the principal industrial communities of the State.
>
> From the foundation of our Commonwealth it has been a matter of civic pride that one of this State's primary concerns has been that the poor man shall have a fair chance to better his material condition. To that end we have made the family homestead immune to judicial process in invitum. The household goods of the family, the tools of the workmen, and the needful agricultural chattels of the husbandman are generously exempted from execution sale.

The court, continuing, said that precedents for the particular form of redress sought by the State of Kansas to suppress the evil were rare, but referred to a New Jersey case (State *v.* Martin, 77 N. J. Law, 652), in which it was held that although the taking of usurious interest was not a criminal offense in New Jersey, yet interest in

excess of 6 per cent per annum was forbidden and a loan office where "the exaction of such usurious interest was systematically practiced was a disorderly house, for the maintenance of which the usurer could be indicted and punished."

After reviewing the Kansas statute prohibiting usury, the court reversed the judgment of the district court and concluded in part as follows:

It will thus be seen that the exaction of usurious interest has been denounced as unlawful and penalized by our legislature although it is not one of the specific offenses enumerated in our crimes act. It is not only illegal but it is a grievous antisocial iniquity and, when its practice assumes the proportions and prevalence alleged by the plaintiff, a court of equity should not hesitate to suppress it. * * *

The Kansas statute does prohibit usury and does prescribe penalties (civil penalties inuring to the debtor), and the practice of usury being unlawful in this State, upon sufficient aggravation, it may be suppressed by injunction.

WAGES—COMMISSIONS—REFUSAL TO PAY—DISCHARGE AS AFFECTING RIGHT TO PAYMENT—*Monroe* v. *Grolier Society of London, Supreme Court of California (October 28, 1929), 281 Pacific Reporter, page 604.*—The Grolier Society of London, publishers of an encyclopedia, appealed from the decision of the superior court, Los Angeles County, Calif., awarding $2,180.68 to Monroe, a former general agent of the society. The action was based upon a contract entered into by the parties on June 23, 1922, while Monroe was employed by the society. The contract provided that Monroe should receive 2 per cent commission on all business booked subsequent to and 4 per cent on that booked prior to October 1, 1921. The subject of dispute in this action was whether Monroe was entitled to the 2 per cent of net collections, irrespective of whether collections were made by him or by some one else, after his employment had terminated. The superior court decided the agent was entitled to all commissions, and the society appealed the case to the Supreme Court of California, contending that Monroe had the duty of making collections as well as making sales and the right to commissions was dependent upon collections.

The court quoted 13 Corpus Juris, 625, section 486, in holding that a contract "must be construed as a whole and the intention of the parties is to be collected from the entire instrument and not from detached portions * * *." Continuing the court said in part as follows:

If it had been the duty of the plaintiff only to make sales, then this construction might be held permissible, but, in view of the fact that the plaintiff had a double duty to perform as manager of the company, we conclude that sales and collections were joint duties and

obligations, and began and ended with the beginning and termination of the contract of employment.

The court cited several cases holding that contracts for payment of commissions did not give to the person employed any right to dues collected after termination of the contract, and concluded the opinion by saying:

The contract we have to consider relates to the performance of the duties which we have herein specified, and when read in the light of the duties to be performed, we conclude that there is no ambiguity in the instrument relating to the plaintiff's compensation, and that he was to be compensated for the duties performed by him, and not for the duties left unperformed; that is, his failure to make collections during the term of his employment. This is further evidenced, as we have hereinbefore said, by the fact that the plaintiff was employed to perform duties left unperformed by his predecessor, and paid a separate compensation therefor.

It follows from what has been said that, the error of the trial court consisting only of a misconstruction of the contract, no further proceedings need be had.

The foregoing consideration of the cause impels a reversal of the judgment and a direction to the trial court to enter judgment in favor of the defendant for the amount of its counterclaim set forth in its answer, to wit, in the sum of $769.10, and costs.

WAGES—DEDUCTIONS BY EMPLOYERS—PAYMENT ON DISCHARGE—*People* v. *Porter*, *Appellate Department*, *Superior Court*, *Los Angeles County*, *Calif.* (*January 29*, *1930*), *288 Pacific Reporter*, *page 22*.—Charles L. Porter was charged with a violation of section 6 of the California Acts of 1919, page 294, regarding the payment of wages. This section of the act makes it a misdemeanor for an employer, under the conditions and intent therein mentioned, to refuse to pay the wages of an employee when due and demanded.

It appears that Porter employed a Mrs. Gerrity as manager of an apartment house under an agreement by which she was to receive $25 per month and the use of an apartment, and charges for her laundry, ice, milk, and other articles were to be deducted from her wages. When she quit, Porter made a settlement with her, as a result of which he gave her a check for $15.57 on which he later stopped payment.

At a hearing before the labor commissioner some further deductions were made, and the commissioner found that the amount due was $12.57, nonpayment of which was the basis of this suit. The Los Angeles municipal court convicted Porter and he appealed the case to the appellate division, superior court, Los Angeles County, contending that the court should take into consideration certain amounts owed him by Mrs. Gerrity. The municipal court held that—

No offset against wages due can be shown under this act and in especial reliance on section 5, which provides a penalty collectible by the employee for failure to pay wages "without abatement or reduction."

The superior court held that the trial court erred in this ruling. The court said:

The case was not prosecuted under section 5, but under section 6, which does not contain the words "without abatement or reduction." But, even if we assume that section 5 throws some light on the purpose and meaning of section 6, it has been held that the words "without abatement or deduction" in a statute similar to section 5, means merely "without discount on account of payment thereof before the time they were payable according to the terms of the contract of employment," that they do not prevent the deduction of damages caused by the employee's breach of contract where he quits prematurely, or of credits to the employer on account of money or property given to the employee in part payment of his wages and that, if the statute were construed to forbid such deductions, it would be unconstitutional.

We think a rule must be applied to cases arising under section 6, whereby the employer may show in his defense that he has valid offsets or counterclaims to the wages the nonpayment of which is the basis of the charge against him.

Since the ruling of the court below denied the defendant that right, the judgment must be reversed, and the cause remanded to the municipal court for a new trial.

WAGES—INJUNCTION—INTERFERING WITH EMPLOYMENT—ASSIGNMENT OF WAGES—*Bowen* v. *Morris et al.*, *Supreme Court of Alabama* (*June 27, 1929*), *123 Southern Reporter*, *page 222*.—M. E. Bowen had been employed for about 16 years as a trainman by the Louisville & Nashville Railroad Co. For about 11 years he had been employed as a locomotive fireman.

From the facts in the case it appears that Bowen borrowed $8 from Morris, giving a note for $10. Semimonthly thereafter he paid $6 for five and one-half months on account of such loan and a further payment of $15. Notwithstanding the loan was long overpaid Morris presented a bill through a justice of the peace for $91 and induced Bowen to execute a new note, carrying an assignment of wages as security. A strict rule of the railroad company was to discharge any employee whose wages are garnished for the third time. Bowen's wages had already twice been garnished and a third would result in his discharge. The present action was by Bowen to restrain Morris from garnishing his wages and causing a consequent loss of employment. In the circuit court of Morgan County, Ala., it was contended that Bowen had an adequate remedy at law, and the court dismissed the case. The question involved on the subsequent

appeal to the Supreme Court of Alabama was whether the wrongful action threatening the relation between Bowen and his employer justified resort to an injunction. The supreme court held that Bowen was entitled to injunctive relief.

The court in determining whether there was a case for injunctive relief said:

If respondent's claim is spurious, if his present note and security was acquired without consideration and pursuant to the oppressive methods of the "loan shark" as averred, complainant can show such facts and defeat the garnishment suit, as well as sue on the garnishment bond or in case for legal damages. The controlling question is, Does the wrongful action threatening the relation between the complainant and his employer justify resort to injunction?

The right to conduct one's business without the wrongful interference of others is a valuable property right which will be protected, if necessary, by injunctive process. (Hardie-Tynes Mfg. Co. *v.* Cruise, 189 Ala. 66, 66 So. 657.)

In another case (Tallassee Oil & Fertilizer Co. *v.* H. S. & J. L. Holloway, 200 Ala. 492, 76 So. 434) the supreme court declared that "a competition in business injuriously affected by a course of business pursued by his rival in violation of a duty to the public is entitled to injunctive relief," and again in the case of United States Fidelity & Guaranty Co. *v.* Millonas (206 Ala. 147, 89 So. 732) this court said that "one's employment, trade, or calling is likewise a property right, and the wrongful interference therewith is an actionable wrong."

The court also quoted from court decisions in other jurisdictions and said that "on these authorities and the sound principles underlying them, we are at the conclusion the remedy at law for the wrongful acts here complained of is not full, complete, and adequate."

The court continued:

Necessarily, the actual damages resulting from a discharge of this complainant by his employer, severing his long relations, and putting him to the task of finding a new job, may be one for which he is untrained, is quite indefinite. This is rendered more uncertain because of no fixed tenure of employment. Moreover, we have held that wounded feelings, the humiliation, and anxiety to result from such wrongful act of respondent is proper matter of damages. But such damages are not subject to any pecuniary standard of measurement. This fact is one recognized as a basis for injunctive relief. (32 C. J. 136, sec. 181.)

The decree of the lower court was therefore reversed.

WAGES—MECHANICS' LIEN—SECURITY FOR PAYMENT—*Dodd* v. *Horan* (*Beeson-Moore Stave Co., Intervener*), *Supreme Court of Louisiana* (*November 4, 1929*), *126 Southern Reporter, page 225.*—

D. D. Dodd filed suit against J. C. Horan, a stave manufacturer, for $350 claimed as the balance of a monthly salary for services rendered in the stave mill. Dodd claimed a lien on the staves manufactured during the term of his employment, and he asserted the laborer's lien and privilege upon all of the staves manufactured during the period of his employment with Horan and provisionally seized all staves then in the mill yard.

The Beeson-Moore Stave Co. intervened and opposed the seizure, claiming that it had bought the staves from Horan without the knowledge of the claim of Dodd, and also contended that Dodd was employed by Horan as a bookkeeper only and therefore had no lien on the staves. The district court found that the stave company had not bought the staves but had merely advanced money to Horan to enable him to manufacture them and recognized Dodd's lien on the staves and ordered them sold to satisfy the judgment.

Horan did not appeal, but the stave company carried the case to the Louisiana Court of Appeal, which held that Dodd was employed only as a bookkeeper at the mill and therefore had no lien on the staves and ordered the staves released from the provisional seizure.

Dodd carried the case to the Louisiana Supreme Court contending that inasmuch as Horan had not appealed from the judgment against him the court of appeal was without authority to reverse the judgment which the district court had rendered in favor of Dodd.

The Supreme Court of Louisiana affirmed the judgment of the court of appeal, but on a rehearing remanded the case to the court of appeal with instructions to decide whether the Beeson-Moore Stave Co. bought the staves which were seized. If the court found that the stave company did not buy the staves from Horan previous to the seizure, the court of appeal was instructed to affirm the decision of the district court.

WAGES—REFUSAL TO PAY—DISCHARGE AS AFFECTING RIGHT TO PAYMENT—*Whitehead* v. *E. J. Deas Co.* (*Inc.*), *Court of Appeal of Louisiana* (*June 28, 1928*), *118 Southern Reporter, page 856.*—George S. Whitehead was employed by the E. J. Deas Co. (Inc.) as night operator of a machine used in excavation work for three nights of 10 hours each, at the rate of 90 cents per hour. After the third night Whitehead was discharged. The company refused to pay the $27 due, and Whitehead brought suit. Upon suit being filed the company offered to pay Whitehead a reasonable sum for the work done, but he refused to accept any sum less than $9 per day from the date of the employment.

The first judicial district court, Parish of Caddo, La., awarded judgment in favor of Whitehead for the amount of the wages claimed and penalties to the date of the judgment, as provided in the Louisiana Act No. 150 of 1920. This act provides that if an employer, upon discharging an employee, refuses to pay the wages due upon demand he shall be liable for his full wages from that time until the wages are paid. The district court awarded a judgment in this case aggregating $1,053, and from this the Deas Co. appealed.

The company alleged that Whitehead was hired under the express agreement that he was competent to operate the machine, but that it had developed he was incompetent and had not worked for the full period of 10 hours per day, and while operating the machine had damaged it to the extent of more than $2.50; that they had offered to pay him a reasonable sum, but he had refused to accept this payment.

Judge Webb, of the court of appeal, speaking for the court in regard to the above facts alleged by the company, said, in part, as follows:

We are of the opinion that, while it established that plaintiff's employment was on trial and dependent upon his ability to operate the machine efficiently, yet it shows that the amount of wages to be paid was agreed upon and it does not establish that plaintiff had damaged the machine, or that he had not put in full time, and although the evidence shows that he was not thoroughly familiar with the machine, and did not operate it efficiently, he was entitled to receive the wages agreed upon for the time he worked, and that he was under the statute entitled to demand the penalties for nonpayment; however, on trial it was shown that, after the suit had been filed, defendant offered to pay the full amount of wages claimed, and that plaintiff would not accept the amount due for wages without the payment of the penalties.

The statute must be strictly construed as to the right to recover penalties, against which equitable defenses may be interposed (Deardorf *v.* Hunter, 160 La. 213, 106 So. 831), and the evidence showing that the defendant, although urging that the employee was not entitled to be paid the wages claimed, offered to pay same, we think that the offer should have been accepted and further accumulation of penalties stopped.

The judgment of the lower court was annulled and set aside and a judgment given to Whitehead in the sum of $27, the amount of wages, and $54 for penalties, or a total sum of $81 with legal interest.

WAGES—SCRIP—FORCING EMPLOYEES TO TRADE AT COMMISSARY—*Hackney* v. *Fordson Coal Co., Court of Appeals of Kentucky (June 21, 1929), 19 Southwestern Reporter (2d), page 989.*—The Fordson

Coal Co. operated mines in Pike County, Ky., and in connection with the mines operated a commissary. Anderson Hackney was engaged in running a general store in the same locality but was in no way connected with the Fordson Coal Co.; in fact, he competed with the commissary for the trade of the employees. On September 1, 1927, the Fordson Coal Co. notified their employees that it would thereafter issue scrip up to an amount not exceeding 70 per cent of each employee's earnings. The notice concluded that "Any employee passing scrip to an outsider, so that it will require the company to redeem the same, will be discharged."

Hackney brought this action against the Fordson Coal Co., alleging damages as a result of his loss of trade due to this ruling of the company. As a basis for this claim he relied upon section 2738s1 of the Kentucky Statutes, which provides in part that—

It shall be unlawful for any of such employers as described in the first section to exclude from work or to punish or blacklist any of said employees for failure to deal with any other or to purchase any article of food, clothing, or merchandise whatever from any other or at any place or store whatever.

Section 466 of the statutes provides that a person injured by the violation of any statute may recover from the offender the damages he has sustained.

The circuit court of Pike County rendered a judgment in favor of the coal company and Hackney appealed to the Kentucky Court of Appeals. This court affirmed the judgment of the lower court in holding section 466 applied only to those persons for whose benefit the statute was passed. In regard to section 2738s1, the violation of which gave rise to the complaint, the court said that section—

Was passed for the benefit of employees, to the end that they should not be coerced into trading at the commissary of their employer, where they might be subject to extortion and all manner of unfair dealing. The section was never intended to protect those merchants who were in competition with the employer for the trade of his employees. Therefore, although an employee of the appellee may have a right of action for the violation of this statute, if it has been violated, a point we need not determine, yet, as the appellant was not an employee or one for whose benefit the statute was passed, he has no cause of action for its violation.

WAGES—SCRIP, TOKENS, ETC.—PAYMENT TO THIRD PERSON—*Western Kentucky Coal Co.* v. *Nall & Bailey, Court of Appeals of Kentucky (February 19, 1929), 14 Southwestern Reporter (2d), page 400.*—The West Kentucky Coal Co. operated a coal mine employing more than 20 persons as laborers. In payment for labor it issued to its miners brass disc orders ranging in amount from 5 cents to $1.

Nall & Bailey were merchants located in the same town and running a mercantile establishment in competition with the coal company's store. They brought this suit against the coal company to recover $2,050.50, the amount of the metal discs issued by the coal company to its employees, which they had taken in at their store in payment for merchandise. They complied with the provisions of the act by keeping an accurate record of the amount of scrip purchased and the name of each person from whom it was purchased, the date thereof, etc., and presented this record when demanding payment.

The circuit court, Webster County, Ky., rendered a verdict in favor of Nall & Bailey and the coal company appealed to the Kentucky Court of Appeals, insisting that before the mercantile store could maintain their action they must show that the parties from whom they purchased the metal discs were employees of the company. Holding this contention untenable, the court said:

The statute plainly does not confine the right of action to the person who buys from the laborer. For the legislature well knew that it is notorious that the laborers about a coal mine frequently pass these discs to others; in fact, they furnish a large part of the currency used there. For this reason the statute requires the employer to redeem same, at least once in each month, on a regular pay day, from any person or persons who may present same for payment, and further provides that any person or persons buying the scrip which has been issued to employees for labor shall be entitled to sue the person or firm or corporation issuing the same if payment is refused. In other words, the statute clearly gives the person who may present the discs for payment a right to sue the employer thereon, if not paid.

As the discs were used in making change it was further insisted that the discs offered for redemption were not the identical discs taken in exchange for merchandise, as shown by the record. The court held this contention without merit, saying:

The clear purpose of the statute was to protect the employees from having to buy at the company's store. The provision that the employee might be credited by the balance, when the person presenting the scrip had not paid par for it, has no application here, because the undisputed testimony is that the plaintiffs paid par in merchandise for all the scrip they bought. This provision for the protection of the laborer in no manner affects the right of the purchaser to sue for the full amount of the scrip, where he has paid par for it to the person from whom he bought it. The statute must be fairly construed to carry out the legislative purpose as expressed in the act.

The court concluded the opinion by saying:

It is contended that the purpose of the statute was to protect the wage earner against scalpers, who buy trade checks at large discount, and that the act should be construed to require the purchaser, not only to make a record of the name of the one from whom he purchased, but that he should require also a like list to be furnished him by the seller, if the seller was not himself the laborer who drew the

check, and, further, when a party purchases from another party who purchased checks, and the seller did not make a list of the names of the laborers from whom he purchased and deliver it, along with the checks, to the last purchaser, the act would be violated. But we are unable to sustain this contention. There is nothing in the statute from which that construction could be deducted.

The judgment of the circuit court was therefore affirmed.

WAGES — "STRAIGHT TIME" CONTRACT — OVERTIME — ADAMSON ACT—*Plummer* v. *Pennsylvania R. Co., Circuit Court of Appeals, Seventh Circuit (December 7, 1929), 37 Federal Reporter (2d), page 874.*—In January, 1921, Andrew D. Plummer began his employment "to ride and assist in the operation of the trains of the Pennsylvania Railroad, in interstate commerce, and to watch, protect, and guard said trains and the goods, merchandise, and passengers transported thereby from loss or injury at a compensation of $180 per month." In May, 1927, when he discontinued working for the Pennsylvania Railroad, he brought action against the railroad under the first section of the Adamson Act (45 U. S. C. A., sec. 65), to recover for services rendered in excess of eight hours a day for the period of six years. The applicable part of section 1 of the Adamson Act provides—

> That beginning January 1, 1917, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, * * * and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads. * * * (39 Stat. 721 (45 U. S. C. A., sec. 65).)

The United States District Court for Eastern Illinois rendered a verdict in favor of the railroad company and Plummer appealed to the Circuit Court of Appeals, Seventh Circuit. The company contended that a special officer or train rider did not fall within the provisions of the section; that the section does not fix wages; and that compensation for time served in excess of eight hours daily can not be recovered unless contracted for.

In deciding this case the Circuit Court of Appeals cited the decision of the Supreme Court sustaining the constitutionality of the act (Wilson *v.* New, 243 U. S. 332, 37 Sup. Ct. 298), in which case the court held that the first section permanently established an 8-hour day in the specified employments, but that it did not undertake to limit the hours of service or to fix wages therefor. It thus remained within the right of employers and employees to agree between themselves upon hours to be served and the wages to be paid therefor.

(Cases cited.) In concluding the opinion affirming the judgment of the lower court denying recovery for the overtime, the court said:

If these parties had agreed in writing that the service should be 12 hours daily, and the pay therefor $180 a month, or should be at the rate of $120 a month for an 8-hour day, and $180 a month for a 12-hour day, it could not more definitely appear that such was the contract, than does appear from the fact that appellant, for more than six years, worked 12 hours daily for this employer, and received therefor $180 for each month worked. From this long uniform practice there is no room for any other conclusion than that the minds of the parties met on an undertaking by appellant to serve 12 hours daily and appellee to pay in full for such 12 hours of daily service $180 each month.

WORKMEN'S COMPENSATION—ACCIDENT—COURSE OF EMPLOYMENT—*Neudeck* v. *Ford Motor Co., Supreme Court of Michigan (March 6, 1930), 229 Northwestern Reporter, page 438.*—Louis Neudeck was employed by the Ford Motor Co. in the latter part of July, 1928, and immediately upon being employed he was ordered by the officials of the Ford Motor Co. to be vaccinated. He was vaccinated thereupon at the company's plant, by a doctor employed by the Ford Motor Co. As an effect of the vaccination Neudeck incurred a streptococcus poisoning, the focus of infection being the vaccinated arm, and as a consequence he died September 3, 1928.

Delia Neudeck, the widow, was totally dependent on the deceased and soon after his death filed claim for compensation. The Michigan Department of Labor and Industry awarded compensation to the widow and the Ford Motor Co. appealed the case to the Supreme Court of Michigan, contending that the injury was not accidental and not in the "course of employment." They cited the case of Krout *v.* J. L. Hudson Co. (200 Mich. 287, 166 N. W. 848) in which an employee was vaccinated by a physician from the city board of health and later contracted infection, the court held it was not a compensable accident. However, the court distinguished the case at bar from the Krout case by saying:

There the vaccination was by a public agency, independent of the employer and employment. Here the vaccination was performed by defendant's physician, was suffered by the employee under direct order of defendant, neither the employee nor defendant was under the compulsion of public authorities, but defendant was acting in a merely discretionary compliance with a request. The vaccination occurred in the course and out of the employment.

The court concluded the opinion, affirming the award of compensation, by saying:

It may be conceded that the vaccination wound was not an accident because it was not an "unforeseen event." But vaccination is

usually harmless, and, under the above authorities, infection therefrom is an accident. Of course, no one could testify that he saw a germ enter the wound. The most that could be done would be to tell the condition which would render infection probable or possible. No testimony was introduced to indicate how or when the infection did or could have occurred or its cause. The only cause, time, and place indicated in the record are found in the concession in the statement of facts, that the infection was an effect of the vaccination. This concession ties the accident of infection to the act of vaccination as occurring in the course of the employment.

WORKMEN'S COMPENSATION—ACCIDENT—COVERAGE—FAILURE TO GIVE NOTICE—*Sears-Roebuck & Co.* v. *Starnes, Supreme Court of Tennessee (April 5, 1930), 26 Southwestern Reporter (2d), page 128.*—Lois Starnes filed suit against her employer, Sears-Roebuck & Co., to recover compensation for an alleged injury. The injury for which compensation was sought resulted from an infection following the formation of a callous upon the employee's finger tip. This callous in turn was occasioned by the operation of a listing machine, which worked with considerable stiffness, and on which the employee was required to make about 10,000 operations daily. She had been operating the machine about five weeks when there developed an infection upon her finger, and this necessitated a minor operation and brought about the disability, which in the opinion of the physician was likely to be permanent.

The Shelby County circuit court rendered a verdict in favor of the employee, and Sears-Roebuck & Co. appealed to the Tennessee Supreme Court. The appeal presented three questions for consideration:

1. Was the trial court warranted in holding that the appellant came within the application of the compensation act, there being no direct proof offered to establish the allegation that it employed as many as five persons?
2. Was the employee's injury compensable?
3. Were the circumstances of the case properly held to have excused the employee from giving the written notice directed by the statute?

The supreme court answered the first question in the affirmative, as the proof showed that the employer operated a department store and maintained numerous divisions, and also that it maintained a hospital for the treatment of the employees and that a practicing physician and a nurse were employed as a hospital staff. From this evidence the natural and common-sense inference was that the company employed more than five employees, and the court held that the employees came within the compensation law.

The employer admitted that the injury arose out of and in course of the employment, but contended that it was not an "accident" within the meaning of the act. The court cited cases in which this court and other courts had held that unexpected or unusual events were "accidents," and said:

It is not a far cry from the doctrine thus announced to an allowance of compensation in the case before us. In the instant case the employee might have expected a callous to appear on her finger tip, just as callouses often do upon the finger tips of stenographers and violinists, but the appearance of an infection therefrom was something fortuitous, not to be expected, an unusual event or result, and therefore accidental.

If it be said that the callous required too long to develop to be regarded as an accident, it may be answered that it is not the callous but the superadded infection which constitutes the injury, and that this manifested itself suddenly, albeit not instantaneously.

Regarding the failure to give notice, the court said that was a matter left to the discretion of the trial judge by the statute, and in this case the trial judge evidently thought that when the employer sent the employee to the hospital, operated on her finger, and inquired concerning it the employee was under all the circumstances not unnaturally of the opinion that sufficient notice had been given.

The decision of the circuit court awarding compensation was therefore affirmed.

WORKMEN'S COMPENSATION — ACCIDENT — HERNIA — PREEXISTING CONDITION—*Carr* v. *Murch Bros. Construction Co. et al., St. Louis Court of Appeals (December 3, 1929), 21 Southwestern Reporter (2d), page 897.*—Abner J. Carr, an engineer employed by the Murch Bros. Construction Co., suffered a strangulation of a preexisting hernia while reaching up to turn off a steam valve of an engine. The Industrial Commission of Missouri awarded compensation and held that—

Where a preexisting hernia is aggravated and accelerated by an accident the employer and insurer are liable for the loss of time occasioned thereby and also for an operation and necessary hospital and medical cost not exceeding $250.

This is not a claim for compensation for hernia under section 17 (b) of the act. It is a case of accidental strangulation of a preexisting hernia, which made an operation immediately necessary to save the employee's life. If an accident hurts a hernia there is no more reason for denying compensation than if any other sound or unsound part of the body is hurt. It is merely an aggravation of a preexisting condition and is compensable as other aggravations.

The St. Louis circuit court affirmed the award of the commission, and the employer and insurance carrier appealed the case to the

St. Louis court of appeals. On appeal it was contended that the evidence did not show that there was an accident resulting in hernia and that the hernia did not exist in any degree prior to the injury. Section 7 was cited, showing that the word "accident" as used in the compensation act meant "an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury." It was argued that the "unexpected or unforeseen event" as used in the definition meant some unusual event or unintentional act or movement of the claimant or other person or thing such as a slip, a fall, or a blow, or an explosion, or a breaking down, or some unusual performance of machinery or appliances.

The appeals court said, however, that such a construction was out of accord with both the language of the statute and its manifest purpose. The court concluded by saying that "the unexpected or unforeseen event" as used in the statute included an unexpected or unforeseen event (result) ensuing from a usual and intentional act or movement of the claimant done in the ordinary course of his employment.

The judgment of the circuit court sustaining the award of the commission was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT—HERNIA—RELEASE—*Guillod* v. *Kansas City Power & Light Co., Kansas City Court of Appeals (June 10, 1929), 18 Southwestern Reporter (2d), page 97.*—R. W. Guillod, in the course of his employment with the Kansas City Power & Light Co., picked up a coil of wire, weighing approximately 100 pounds, in an effort to place it in a service truck. He felt a sharp pain in his right side and immediately let the coil drop to the ground. He continued to work all that day, which was Saturday, and all of the following Monday (February 7, 1927), when at about 5 o'clock he called upon Dr. Clarence McGuire, who diagnosed the case as right inguinal hernia at the same place where, in December, 1924, this doctor had operated upon Guillod for the same trouble. In 1924, Guillod executed a release to the company for any claim he might have had from said rupture, in consideration of $100.

Upon filing claim for compensation the Missouri Compensation Commission allowed him the sum of $250 for medical aid and for temporary total disability of $20 per week for nine weeks. An appeal to the circuit court of Jackson County, Mo., resulted in a judgment sustaining the award. The power company carried the case to the Kansas City court of appeals, where it was contended the facts found by the commission and sustained by the trial court did

not support the award and that there was not sufficient competent evidence in the record to warrant the conclusions reached.

The first contention was that the injury did not result from an accident. Regarding this point the court cited several cases in which this question was raised. In the case of Manning *v.* Pomerene (101 Nebr. 127, 162 N. W. 492) the Nebraska Supreme Court discussed the objective symptoms necessary for "an accident," saying in part as follows:

We are of opinion that the expression has a wider meaning, and that symptoms of pain and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute.

The court continued the opinion by saying:

In the case at bar claimant testified that when he first lifted the coil of wire there was a sharp pain in his side; that he was nauseated; that he had recurrent nausea over Sunday and Monday following, and on the last-named day he went to Doctor McGuire, who examined him and pronounced his trouble inguinal hernia. And, as in the Nebraska case, the trial court sitting as a jury found the facts established the occurrence of an accident. We think there was no error in so holding.

The second contention made by the company was that the injury was not compensable as Guillod had failed to prove all the things required in section 17 (b). The court, however, ruled that section 17 (b) applied only to permanent partial disability, and as Guillod was not asking and was not awarded any compensation for permanent partial disability section 17 (b) did not apply. The company also contended that the release secured in 1924 was a bar to any claim for the recurred hernia, which occurred February 5, 1927. The court did not uphold this contention, saying in part:

It is defendant's contention that the release of December 24, 1924, bars recovery herein because the hernia upon which the award was made was a recurring one. We are not in accord with defendant's view in this respect. In making the award the commission pointed out there is a distinction between a claim for hernia resulting from an accident and one for aggravation of an existing hernia caused by an accident. The one is for hernia itself and the other for an injury to the hernia already existing. * * * In an action for negligence a release amounting to a contract against future negligence, of course, would be void as applied to another or independent injury. Contracts against liability imposed by the common law, or by statute, are held to be void. (Hartman *v.* Railway, 192 Mo. App. 271, 182 S. W. 148.) It is said in Railroad *v.* Kerrick (178 Ky. 486, 199 S. W. 44) "The law is that one may recover for an injury which aggravates an existing one, or develops a latent one so as to increase the pain and suffering or results in permanent impairment of the injured

person." It was held in that case that one who had a hernia may recover where another accident caused a new hernia, or greatly aggravated the first.

The judgment of the circuit court affirming the award of the workmen's compensation commission was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT—HERNIA—TEMPORARY TOTAL DISABILITY—*Drecksmith* v. *Universal Carloading & Distributing Co. et al., St. Louis Court of Appeals (June 4, 1929), 18 Southwestern Reporter (2d), page 86.*—On March 14, 1927, Edward Drecksmith was in the employ of the Universal Carloading & Distributing Co. as a laborer, and while lifting a box from the floor he felt a sharp pain. The box weighed around 130 pounds, and Drecksmith, assisted by a fellow employee, had lifted it about 3½ feet high when he felt the sharp pain. He stated that he did not slip in any way and that he lifted "just as he always did." Drecksmith continued to work until noon, and after lunch, about 2.30 p. m., he consulted a doctor, who found he was suffering from a hernia, the result of a preexisting condition aggravated by the accident.

He filed claims for compensation and was awarded an amount to cover the temporary disability resulting from an operation for the hernia. The circuit court of St. Louis later affirmed the award, and the company appealed to the St. Louis court of appeals, contending (1) that the injury was not the result of an accident, and (2) according to the statute it was not compensable, even though the court might find it resulted from an accident. As to whether the injury resulted from an accident, the court said in part as follows:

In the present case the employee was not aware that he was predisposed to hernia, and could not have been expected to anticipate that the act of lifting the box would bring about the protrusion which resulted. So far as he was concerned, there were present all the elements constituting an accident within the terms of the statute as defined therein.

In the case of Puritan Bed Spring Co. *v.* Wolfe (120 N. E. 418) the court said:

"We recognize that there is a line of compensation cases in other jurisdictions which give to the word 'accident' used in the respective compensation acts, a restricted meaning which in a measure justifies appellant's contention, but the weight of authority and the better reason, we think, favors the adoption of the popular meaning of said word, which includes 'any unlooked-for mishap or untoward event not expected or designed.' This court has given to said word the popular meaning indicated." [Cases cited.]

In considering whether the injury was compensable the court cited the recently decided case of Von Cloedt *v.* Yellow Taxicab Co. et al. (18 S. W. (2d) 84), in which this court held that—

Under our statute hernia resulting from injury arising out of and in the course of the employment is compensable upon the same conditions as are other compensable injuries, excepting as to compensation for permanent partial disability, in which cases the legislature has seen fit to provide as a prerequisite to recovery that there shall be proof made as provided for in subsection (b) of section 17.

WORKMEN'S COMPENSATION—ACCIDENT—HERNIA—TEMPORARY TOTAL DISABILITY—*Lawrence* v. *Stark Bros. Nurseries & Orchards Co. et al., St. Louis Court of Appeals (June 4, 1929), 18 Southwestern Reporter (2d), page 89.*—On May 13, 1927, Charles E. Lawrence filed with the Missouri Compensation Commission a claim for compensation for what he designated as an injury to his abdomen but which was shown to have been a hernia alleged to have been sustained by him on March 25, 1927, while he was engaged in piling up a rick of grapes in the packing house of his employer, Stark Bros. Nurseries & Orchard Co., at Louisiana, Mo.

The commission awarded Lawrence as compensation the sum of $175 for medical aid and $10 a week for 12 weeks for temporary total disability together with an allowance of $60 for attorney's fees.

The rulings of law handed down by the commission were two in number:

First, that, where an accident so aggravates a preexisting hernia as to make an operation necessary, no compensation is payable under section 17, paragraph (b), of the act, for permanent partial disability, but that compensation is payable under other sections of the act for the consequences of the aggravation, including the cost of the operation, temporary total disability caused thereby, and any temporary total disability caused by the aggravation; and, second, that where the employee is unable to work by reason of the attempts of the insurer to treat a hernia by means of a truss, compensation for temporary total disability should be paid during such period.

The award was affirmed by the Pike County circuit court (Missouri) and the employer and insurer appealed to the St. Louis court of appeals. The employer denied that an accident as defined by the statute had occurred, and denied generally that the claim had set forth facts which made the injury compensable. It was further contended that the subsection (b) regarding hernia in section 17, pertaining to permanent partial disability, by its own terms referred to "all claims for compensation for hernia resulting from injury arising out of and in course of the employment."

In answering these contentions the court cited the case of Von Cloedt *v.* Yellow Taxicab Co. (18 S. W. (2d) 84), wherein the iden-

tical questions were presented and upon the authority of this case the court said in concluding the opinion:

We have held that hernia, or an aggravation of existing hernia, sustained by accident arising out of and in the course of the employment, is compensable, absent a limitation in the act as to a recovery therefor; that the limitation provided by section 17, paragraph (b), was intended to, and does, extend only to claims for compensation for permanent partial disability; and that as to the award for medical, surgical, and hospital treatment covered by section 13, and as to compensation for temporary total disability under section 15, a hernia stands upon exactly the same footing as any other injury that has been made compensable under the act.

The St. Louis court of appeals therefore affirmed the award of the lower court and the industrial commission granting compensation.

WORKMEN'S COMPENSATION—ACCIDENT—PREEXISTING CONDITION—EVIDENCE—*In re Larson, Larson et al.* v. *Blackwell Lumber Co. et al., Supreme Court of Idaho (July 29, 1929), 279 Pacific Reporter, page 1087.*—Andrew Larson was employed by the Blackwell Lumber Co. as a laborer. On April 19, 1927, after lifting some tackle, weighing about 110 pounds, into a wagon and attempting to put a burr on a bolt underneath the wagon, a latent physical defect, aneurism, was accelerated or aggravated. He left his place of employment and walked home, a distance of 1½ miles. His condition grew worse and he died on the morning of April 21, 1927.

The widow filed claim with the Idaho Industrial Accident Board and was denied compensation. This was affirmed by the district court, Kootenai County, Idaho, and the widow and administratrix appealed to the Supreme Court of Idaho.

The lumber company received the judgment in the lower court on the grounds that the injury (1) was not an accident but a "personal injury" and (2) was due to an undisclosed preexisting defect. Regarding the first of these findings by the industrial commission, the court said, in part, as follows:

The evidence shows without dispute that deceased had been lifting, that the pain in his chest was simultaneous with his attempt to put the burr on the bolt, and that the strain deceased was subjected to caused the happening of the unforeseen event, namely, the dissection of the wall of the aorta spreading farther. Deceased was unable to complete what he attempted to do, in the course of his employment. What he attempted to do, if it did not cause the aneurism, accelerated or aggravated it, and was an accidental injury.

In dismissing the second finding of the commission the court said:

While there are authorities to the contrary, the weight of authority and the better reasoned cases lay down the rule that, although a

laborer may have had an injury or a preexisting physical weakness which reduces his ability to work below that of a normal man, and be thereby more susceptible to injury, yet if he is able to do some work and is employed, and in the course of his employment receives an injury, he is entitled to an award notwithstanding the former injury. [Cases cited.]

The court cited the case of Hillhouse's Estate (271 Pac. 459), in which it was held that there must be competent and substantial evidence to support the findings of the board and district court, and if such findings are clearly unsupported as a matter of law, it is within the province of the supreme court to set aside said findings and decision. Upon the authority of this case, the court concluded the opinion as follows:

We have reached the conclusion that there is no such conflict in the evidence as to warrant a holding that the findings of the board and the court must be upheld, and we are clearly satisfied that the great weight or preponderance of the evidence is against the findings and the decision, and that there is no substantial evidence to support them.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ACT OF PERSONAL CONVENIENCE—EVIDENCE—*Bushing* v. *Iowa Railway & Light Co., Supreme Court of Iowa (September 24, 1929), 226 Northwestern Reporter, page 719.*—August Bushing was employed by the Iowa Railway & Light Co. as a fireman in the company's power plant located at Marshalltown, Iowa. His duties were the general and ordinary duties of a fireman, and he also disposed of ashes and shoveled coal in the yard. On the afternoon of December 8, 1917, Bushing went to his work at the usual time and put in about two hours shoveling coal in the yard. Some time after 4 o'clock of that day he was missed. A search was instituted, but he was not found until the following morning about 7.30 a. m. His body was found on the balcony above the boiler room, lying in a position of rest and gave no evidence of any struggle. A short circuit was found in a wire near by and the physicians who performed an autopsy on the body were of the opinion that Bushing had died from an electric shock. The widow filed claim for compensation and the employer denied liability. The matter was referred to an arbitration committee as provided by the Iowa compensation law. This committee found that the death occurred at a place where his employment did not require him to be, and that he was apparently doing something that he was not employed, authorized, or expected to do and therefore the widow was not entitled to compensation.

On June 24, 1918, a petition for review was filed, but due to a failure to furnish a copy of the evidence before the arbitration committee, the hearing was delayed until August 9, 1928. The commissioner

reversed the decision of the committee, and awarded compensation for a period of 300 weeks. The award of $2,595 was affirmed later by the district court on the ground that the death arose out of and in the course of employment. The railway company carried the case to the Supreme Court of Iowa. Among the errors relied upon by the company was the finding that the injury arose out of his employment, and they contended that the decision was based upon inference having no evidence to support it. These contentions were answered by the supreme court in part as follows:

The evidence in this case is ample to show that Bushing's presence on the gallery was not in violation of any rules of the employer, and that if he had desired to open or close the windows, it was his privilege to do so. An accident to an employee may arise in the course of his employment, although he is not actually working at the time of the injury. Holland-St. Louis Sugar Co. *v.* Shraluka (64 Ind. App. 545, 116 N. E. 330). There is nothing in the record which would tend to show that Bushing intended to abandon his employment, or that his presence on the gallery was for purposes other than those for which he may have rightfully gone there. We must hold then that the injury, whatever its cause, occurred in the course of his employment. The death was evidence enough of the injury having occurred, and the record disclosed sufficient evidence that the death was caused by an electric shock. The next question is whether such injury arose out of the employment. The fact that there were burns on the left hand and those burns had the appearance of being from an extreme heat, and that, in the absence of any evidence to the contrary, the only manner in which the burns could have been caused was through an electric current. There is the further evidence that at and near the place where the body was found there existed a short circuit of an electric current of high voltage, which leads to a reasonable inference that the injury was caused by his coming in contact with such short-circuited electric current.

We have here a workman at a place where he had a right to be, and an injury occurred from a source which, by reasonable inference, was the only source which could have produced such an injury. Therefore the question as to just what Bushing was doing at the moment he received the injury is not material to the point. In view of the record before us, we must hold that there was sufficient competent evidence to support the commissioner's finding that the injury did arise out of and in the course of his employment.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASPHYXIATION—*Adler* v. *Interstate Power Co. et al., Supreme Court of Minnesota (April 17, 1930), 230 Northwestern Reporter, page 486.*—On September 27, 1928, Edward F. Adler was in the employ of the Interstate Power Co., in its plant at Rochester, Minn., as a stoker. He commenced work at 1 o'clock in

the afternoon and his first work was the pulling out of a charge from one of the upper retorts. The evidence showed that this retort was more difficult to handle, and that Adler was subjected to the fumes of the coal and coke, perhaps more so than usual. When he got the charge out and was about to refill it, he complained of a pain in his head and across his chest, and he felt sick and vomited severely. A few hours later he was taken home and shortly thereafter he died.

Louise Adler, the widow, filed claim for compensation and the Industrial Commission of Minnesota denied an award. Thereupon she appealed the case to the Supreme Court of Minnesota. The commission denied compensation on the ground that the claimant failed to prove the cause of her husband's death. The Minnesota Supreme Court said that while "it is true that the doctor could not testify as to an exact certainty regarding the cause of the death," however, "in the practical administration of the compensation act, the unassailed opinion of the doctor, with the uncontradicted circumstances attending supporting it, should be taken as a correct statement of the cause." The doctors agreed that the cause of his death was the inhalation of the poisonous gas and the conclusion of the doctor was not disputed.

The next question before the court was whether the inhalation of this gas was an accident. The court quoted the definition of an accident as given in the statute, as follows: "An unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time injury to the physical structure of the body." (Gen. Stat. 1923, sec. 4326, (h).) The conclusion of the court was that the evidence in this case showed this was an accidental injury.

The order of the industrial commission, denying compensation, was therefore reversed.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASPHYXIATION—*Jackson et al.* v. *Euclid-Pine Investment Co. et al., St. Louis Court of Appeals (January 7, 1930), 22 Southwestern Reporter (2d), page 849.*—James H. Jackson was employed by the Euclid-Pine Investment Co. in a garage erected as an adjunct to the Guild Hall Apartments in the city of St. Louis, Mo. He was a night employee and was the only person on duty through the night. His duties required him to serve as general caretaker and night watchman for the garage, to wipe, clean, and wash cars, and to move cars about from place to place inside the garage.

On December 6, 1927, shortly before 7 o'clock, Moore, the day man, came on duty and found Jackson sprawled out in the back seat of an

automobile and barely breathing. Moore summoned help, but Jackson died within a very short while. Later an autopsy was performed and the cause of the death was found to have been carbon-monoxide poisoning.

The Workmen's Compensation Commission of Missouri awarded compensation and the St. Louis circuit court affirmed the award. The employer appealed to the St. Louis Court of Appeals, contending that the accident did not arise out of nor in the course of the employment.

The owner of the car in which Jackson was found testified that—

He brought the car to the garage between the hours of 10 o'clock and midnight on the evening of December 5, and he himself parked it in his allotted parking space, where it was standing the next morning when he returned to the garage to take it out for the day. Just before bringing the car to the garage he had put 10 gallons of gasoline in the tank, and after he had placed the car in the proper space he shut off the motor. When he returned to the car the following morning he found that the motor was not running, although the ignition was on; that the gasoline tank was practically empty, so that he was obliged to put an additional 10 gallons of gasoline into it; and that the motor was warm, with the heat indicator showing a temperature for regular driving speed. He testified, further, that the heater was probably open in the car; that it had a tendency to throw out an odor when in use; and that when he drove into the garage the night before he had refused to permit the deceased to park his car, and had expressly ordered him to leave the car alone.

The court reviewed the evidence and said in part as follows:

There is no doubt in this case that it was the duty of the deceased to clean cars stored in the garage, including the very car in which his body was found; and the showing that he had the dust cloth and the whisk broom with him in the car warrants the legitimate inference that he had got inside the car for the primary purpose of cleaning it.

In the determination of the case, let us adopt appellants' theory for argument's sake, and proceed upon the basis that the deceased did start the motor for the purpose of generating heat to warm himself while he was engaged in the work of cleaning the automobile. Even so, we can not believe that such conclusion would warrant the finding that death was not by accident arising out of and in the course of his employment.

Certainly the hazard arising from the presence of carbon-monoxide gas is one incidental to employment in a garage, and especially is this true in winter, when a denser smoke comes from the exhausts of the automobiles, and when the doors of the building must of necessity be kept closed.

The court concluded, therefore, that in this case there was a sufficient causal connection shown between the nature of the employment of the deceased and the hazards which produced his death to warrant

the finding that his death was by accident arising out of and in course of his employment. The judgment of the circuit court sustaining the award of the commission was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSAULT—*Crippen* v. *Press Co. (Inc.) et al., Supreme Court of New York, Appellate Division (January 15, 1930), 239 New York Supplement, page 102.*—Robert H. Crippen was a printer for the Press Co. (Inc.), of Albany, N. Y., and was working with others in the place of the regular men who had gone out on a strike. He was injured in an assault made on him while on the street in Albany, presumably by a striker. At the time of the assault he and his wife were returning from a restaurant, where they had been for their evening meal.

Crippen filed claims for compensation with the State Industrial Board of New York, and an award was made in his favor. The employer appealed to the New York Supreme Court, appellate division, contending that the accident did not arise in the course of the employment.

It appeared that the men were housed at a hotel near the plant. A representative of the employer was there at all times to send men to work as needed. The men were called from their rooms or from wherever they might be, at all hours, and were allowed to go out only for meals. Crippen was still subject to call when he went with his wife to the restaurant, as the men were under the control of the employer and must be available to go to work whenever the employer wanted to call them. For this reason Crippen contended the accident arose out of and in the course of the employment.

The appellate division of the New York Supreme Court said, in the course of the opinion, that it was evident that the employer regarded these men in its employ during a 24-hour day and retained direction and control over them. "Their employment did not cease," said the court, "when they left the plant; they were merely at rest. It is not difficult, therefore, to reach the conclusion that the accident arose out of and occurred in the course of claimant's employment."

The award of the State industrial board was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSAULT—*Indian Territory Illuminating Oil Co.* v. *Jordan et al., Supreme Court of Oklahoma (December 10, 1929), 283 Pacific Reporter, page 240.*—Doyle Jordan was engaged

in a hazardous occupation in the employ of the Indian Territory Illuminating Oil Co. in Oklahoma. On November 28, 1929, a fight between Jordan and another employee arose over a wrench for which Jordan had been sent by his foreman. Prior to the fight an ill feeling had existed between the participants arising out of matters not connected with the employment. Jordan filed claim for compensation for the personal injury sustained as a result of the fight, and was awarded $10.39 per week for temporary total disability and $400 for permanent disfigurement to his left ear.

The employer appealed to the Supreme Court of Oklahoma contending that the accident did not arise out of nor in the course of his employment. The court quoted from the case of Stasmos *v.* State Industrial Commission (80 Okla. 221, 195 Pac. 762), in which they held that—

> Injury resulting from an assault by a workman upon a fellow workman while the latter is engaged in the work of the master is an "accidental personal injury arising out of and in the course of employment" within the meaning of the term as used in section 1 (art. 2) of the workmen's compensation act.
>
> The test of liability under the workmen's compensation law for injuries arising out of and in the course of employment is not the master's dereliction whether his own or that of his representatives acting within the scope of their authority, but is the relation of the service to the injury, of the employment to the risk.

The decision in the case cited above settled the law in Oklahoma concerning such a controversy as presented in this case. The decision in that case was based upon section 7285 of the Oklahoma statutes of 1921, which provides in part:

> Every employer subject to the provisions of this act shall pay, or provide as required by this act, compensation according to the schedules of this article for the disability of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about injury to himself or of another. * * *

The court said, "The one fact, in a situation of this nature, that will relieve the employer is that the injured workman was the aggressor." That fact, however, in the case at bar was found in favor of Jordan, the court saying in part as follows:

> A close scrutiny of the finding of the commission reveals that the assault arose over a wrench for which the injured claimant had been sent by his foreman, and, while it is true that the commission found that there existed ill will between the participants in the fight, which ill will arose from matters not connected with the employment, it is obvious that the difficulty was not wholly disconnected

from matters pertaining to the employment, but actually grew out of the scope of and in pursuit of the employment of respondent.

The order of the State industrial commission awarding compensation to Jordan was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSUMPTION OF RISK—ASPHYXIATION—*White Star Motor Coach Lines of Illinois* v. *Industrial Commission et al., Supreme Court of Illinois (June 19, 1929), 168 Northeastern Reporter, page 113.*—Henry Baker, a motor-bus driver employed by the White Star Motor Coach Lines in Illinois, died on December 11, 1926, as a result of being asphyxiated with carbon-monoxide gas in the company's garage in Peoria, Ill. On the afternoon of December 10, 1926, while making his return trip to Henry, the bus which Baker was driving became disabled. He communicated with the company's mechanic in Peoria and late that night the mechanic arrived. They were unsuccessful in making the repairs and about 2.30 a. m. the following morning they returned to Peoria, so that Baker could secure one of the emergency busses and return to Henry to resume his schedule at 7.30. They arrived at the company's garage at about 4.50 a. m. and decided to rest an hour before the return trip. They started the engine in one of the busses, apparently to keep warm. At 7.40 they were found dead.

The widow and minor daughter of Baker filed claims for compensation with the industrial commission and an arbitrator made an award of $15 per week for 273⅓ weeks, which was affirmed upon review before the industrial commission. The circuit court of Peoria County refused to review the order of the commission and the case was brought before the Supreme Court of Illinois by the company. The motor coach company contended the accident was not one arising out of and in the course of the employment and the court, after reviewing the evidence, decided the case in its favor, reversing the decision of the lower court and the industrial commission.

In rendering the decision the court said that—

Without any knowledge or acquiescence on the part of his employer, Baker chose a place to rest and sleep which under all the circumstances was an unreasonably dangerous place, and by so doing he exposed himself to an unnecessary risk. He voluntarily incurred an additional risk not within the contemplation of his contract of service. An employee can not accept such unnecessary risk and danger without taking him outside the scope of his employment.

In our opinion, by going into the unnecessarily dangerous place and incurring such additional risk Baker went outside any reasonable requirement of his employment, and compensation should not be allowed for his accidental death.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—CASUAL EMPLOYMENT—BURNS—*Soares's Case, Supreme Judicial Court of Massachusetts (January 6, 1930), 169 Northeastern Reporter, page 414.*—Israel Pokross was engaged in the real-estate business. He built houses and owned several apartment houses which were rented to tenants. Manuel Soares was employed by Pokross as repair man "to do what was necessary around the property; carpentry, plumbing, and general work." In addition to this employment Soares worked in a textile mill as a doffer.

It appears that Pokross gave a gasoline torch to Soares "so that he would have everything necessary to take care of things that happened in the wintertime on the buildings, such as bursting pipes." On one cold night Soares was fixing the torch in the kitchen of his home, as he anticipated the pipes would freeze and he would need the torch the next morning. While working on the torch the gasoline exploded, causing burns to Soares resulting in his death.

Mary Gloria Soares, the widow, filed claim for compensation. Following an award of the Massachusetts Industrial Accident Board in her favor, an appeal was made to the superior court, Suffolk County, Mass., which court upheld the award. The insurance carrier, the Maryland Casualty Co., appealed to the Supreme Judicial Court of Massachusetts, objecting to the payment of compensation because the accident did not arise out of and in the course of deceased's employment. Also the insurer objected because the employee was not employed by the subscriber, nor covered by the policy issued to the employer.

The court did not agree with the objection made by the insurance carrier and in affirming the decisions of the lower court and the industrial accident board the court said:

The policy covered "all carpentry" work, all "masonry," "excavation—for cellars," "plumbing," "plastering," "grading." It could have been found that the employee was engaged in the usual course of trade, business, or occupation of Pokross. A part of his business was the renting of tenements and the care of them. In Olsen's case (252 Mass. 108, 147 N. E. 350) and Van Deusen's case (253 Mass. 420, 149 N. E. 125), relied on by the insurer the employee was outside of the employer's regular business when injured. Here the employee was engaged in what was or could be found to be a regular part of his business; he worked on the houses in process of construction as well as repaired the ones which were ready for occupation. * * * In this branch of the case there was evidence to support the findings of the board. Under the classifications of the policy, plumbing, as well as carpenter and mason work, was covered. Soares had been employed at this kind of work, and it could be found that in thawing the pipes or preparing for this work, he was engaged in the employment of plumbing and that his injury arose out of it. (See Cox's Case, 225 Mass. 220, 224, 225, 114 N. E. 281.)

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—CAUSAL CONNECTION—DISEASE—*Bass et al. v. Weber King Manufacturing Co. (Inc.), Court of Appeal of Louisiana (December 30, 1929), 125 Southern Reporter, page 456.*—Mose Bass was employed as a log scaler by the Weber King Manufacturing Co., in Louisiana. On the morning of September 26, 1927, while riding to his work on a trailer attached to a train, the trailer was partially wrecked. Bass did not complain of any injury at the time of the accident but proceeded to the performance of his duties, worked as usual and, in the afternoon, after completing his day's labor, he climbed into a caboose behind the train to return home. On the way home, while riding in the caboose, he lay down on a wooden bench from which he rolled to the floor and died shortly thereafter.

The widow filed suit for compensation in the district court, Parish of Vernon, La., and an award was returned in her favor. Thereupon the Weber King Manufacturing Co. appealed the case to the Court of Appeal of Louisiana.

From the evidence it appears that Bass had been suffering from angina pectoris for some time, and had complained of pains around his heart all through the day of his death. He smoked cigarettes incessantly and often indulged in the excessive use of alcoholic beverages. The evidence also showed that he was inebriated on the two days prior to the day of his death.

The cause of his death was shown conclusively to have been an acute attack of angina pectoris and the majority of the physicians who testified were of the opinion that the wrecking of the trailer had not contributed to his death. Others thought that the mental shock might have contributed to the death of Bass.

The conclusion reached by the court of appeal was that Bass did not die as the result of any injury by accident arising out of and in the course of his employment, but that he died from a natural cause, which in no manner was produced, brought into action, or aggravated as a result of his employment. The judgment of the district court was therefore reversed and judgment was rendered in favor of the Weber King Manufacturing Co.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—CONSTRUCTION OF STATUTE—INTENTIONAL AND WILLFUL ACT—*Sullivan's Case, Supreme Judicial Court of Maine (October 15, 1929), 147 Atlantic Reporter, page 431.*—Albert S. Sullivan, a boy about 18 years of age, had been employed in a woolen mill in Maine as a general helper for about four weeks. His

duty was to carry cloth from one place to another and to assist any of the operatives who might need him. In one of the mill rooms was a machine used to shear nap from cloth, and operated by one Taber. The cloth on this machine ran from a rack up over the front of the machine, under a rapidly revolving cylinder of knives about 4 or 5 feet from the floor, and came out into a rack from the back of and under the machine. When these cuts of cloth were removed from the last rack it was necessary for the operator to have some one to assist him. Sullivan had, during the day before, been asked by Taber several times to assist him and had done so, standing at the back of the machine. He had seen the blanket of cloth moving up under the cylinder and knew that the cylinder had knives.

About 8 o'clock in the morning Sullivan walked over to ascertain whether Taber desired help in removing a cut of cloth from the machine. As he stood there waiting to be of some assistance he placed his hand on the blanket "just out of curiosity," "trying to see how it felt moving along." He could not explain just what did happen, but his hand was carried quickly to the knives and four fingers and part of the thumb severed.

He filed claim for compensation for personal injuries. The Industrial Accident Commission of Maine agreed with the decision of the single member in denying compensation, and Sullivan thereupon appealed to the Maine Supreme Judicial Court. This court affirmed the decree and, regarding the interpretation of the statute, said in part as follows:

It was early held by this court that these words "arising out of" the employment mean there must be some causal connection between the conditions under which the employee worked and the injury which he received, * * * that the injury must have been due to a risk "because employed."

It was also held in the same two cases that the words "and in the course of" the employment refer to the time, place, and circumstances under which the accident takes place. Westman's Case, supra (118 Me. 142, 106 Atl. 532); [holds] that the injury must have been due to a risk "while employed."

The court also agreed with the commissioner in his finding—

That Sullivan's extending his hand to touch the moving cloth was his own voluntary act, and, as admitted by Sullivan, done for the sole purpose of satisfying his curiosity. This finding of fact is conclusive.

From these findings of fact it would follow as a necessary conclusion that the injury was the result of Sullivan's own voluntary act, done only out of curiosity, entirely independent of any duty required to be performed or incidental thereto, and consequently not in the course of the employment, and therefore not arising out of the employment.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—CONSTRUCTION OF STATUTE—SERVANT TRANSPORTED TO CHURCH IN MASTER'S AUTOMOBILE—*O'Mara* v. *Kirch et al., Court of Errors and Appeals of New Jersey (October 14, 1929), 147, Atlantic Reporter, page 511.*—Terrence O'Mara was employed by Morgan Cowperthwaite as a groom and caretaker at $110 per month, with free rent, vegetables, light, fuel, uniform or livery, and with an agreement to transport him to and from church on Sunday. While being so transported on Sunday, August 10, 1924, in the master's car and driven by the master's chauffeur, O'Mara was killed in a collision with another car. This action was brought to recover damages under the New Jersey death act (2 Comp. Stat. 1910, p. 1907, sec. 7 et seq.).

It was contended by the defendant, Morgan Cowperthwaite, that O'Mara met his death from injuries arising out of and in the course of his employment; on this ground the motion for the direction of a verdict in his favor was granted by the trial court. The case was appealed to the New Jersey Court of Errors and Appeals, where the verdict was affirmed.

The court in rendering the decision said, in part, as follows:

The problem presented to us for solution is to find or delimit the bounds of the workmen's compensation statute (P. L. 1911, ch. 95, p. 134, as amended). This is not an easy task. It can not be marked or defined by any formal rule. It must be fixed by concrete cases, as they arise; some within, and some just outside of, the bounds or lines of the statute. It was said, in the case of the Mayor, etc., of Jersey City *v.* Borst (90 N. J. Law, 454, 101 Atl. 1033), that the workmen's compensation statute is a remedial law of prime import. It should be liberally and broadly constructed.

In supporting the ruling of the trial court, the court cited an English case, viz, Richards *v.* Morris (L. R. (1915) 1 King's Bench, 221).

In that case, a workman was employed as a farm laborer, on the island of Ramsay, at yearly wages and board and lodgings. It was part of his contract of service that he should be allowed at reasonable hours to cross to the mainland to visit his wife, and be taken across in his employer's boat for that purpose. He met with an accident on Sunday, whilst in the boat on his way home, from the effects of which he died. It was held that the accident arose " out of " as well as " in the course of " the employment, and that his widow was entitled to compensation under the workmen's compensation act.

In conclusion the court said:

The appellant argues in the brief, as O'Mara was killed on Sunday, and because some of his work was to be performed on Sunday, compensation could not be awarded under the workmen's compensation statute, invoking as authority therefor the vice and immorality

act, with reference to Sunday labor or travel. (4 Comp. Stat. 1910 of N. J. p. 5712, sec. 1.) But that act expressly provides: "Provided always that no person going to or returning from any church or place of worship, within the distance of 20 miles, * * * shall be considered as traveling within the meaning of this act." Hence the statute has no application to this case.

The judgment of the supreme court was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEATH RESULTING FROM FALL ON WET FLOOR—EVIDENCE—*Industrial Commission of Ohio* v. *Tripsansky, Court of Appeals of Ohio, Cuyahoga County (May 14, 1928), 167 Northeastern Reporter, page 373.*—Gaza Tripsansky, on July 7, 1925, was working for Theodore Gutscher Co., of Cleveland, Ohio, as a butcher. While he was moving a barrel toward the "stuffer," a machine used for the filling of sausage in links, he was seen to lean against the machinery, and fall backward to the floor, receiving injuries on the head from which he died in a very short time. The evidence shows the floor was slippery at that time.

The widow proceeded under the Ohio workmen's compensation act and an award was made in her favor. From the decision of the industrial commission the employer appealed to the court of common pleas of Cuyahoga County where a judgment was rendered awarding compensation under the provisions of section 1465–68 of the General Code of Ohio, relating to compensation of employees for injuries received in the course of their employment. The case was thereupon taken to the Court of Appeals of Ohio.

The question was whether death resulted from an injury which Tripsansky received in the scope of his employment. In rendering the decision of the court Judge Sullivan said in part:

Under the evidence in the case it is clear that immediately prior to the death the decedent was acting in the scope of his employment, and there is reasonable ground for the inference that as a direct result of his employment the injury and death occurred. This is a plain, reasonable, and logical inference, and under the rules of liberality of construction, we are bound to follow the verdict of the jury, on the facts, and the judgment of law pronounced thereon by the court.

Under section 1465–61, General Code, there is a specific provision that every employee who is injured and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, shall be entitled to receive compensation as provided in section 1465–69, General Code. We think the evidence in this case warrants application of these provisions of the statute.

The judgment of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EMPLOYMENT STATUS—GOING TO AND FROM WORK—*Shegart et al.* v. *Industrial Commission et al.* (*October 19, 1929*), *Supreme Court of Illinois, 168 Northeastern Reporter, page 288.*—George Kraft was injured when a train of the Illinois Central Railroad struck a truck in which he was riding. Kraft was en route to a place where the P. E. Shegart Construction Co. was engaged in building an additional embankment along the right of way of the Illinois Central Railroad, and Funk & Griesbaum, subcontractors, were engaged in putting tile culverts into the embankment. The truck in which he was riding belonged to the contractors. The application for compensation was filed against the principal contractors under section 31 of the Illinois workmen's compensation act because Funk & Griesbaum, subcontractors, who it was claimed employed Kraft, had not insured their employees under the workmen's compensation act. The arbitrator before whom testimony was taken found Kraft to be wholly and permanently incapable of work, and held the principal contractor as well as the subcontractor liable. However, upon a review before the Illinois Industrial Commission liability was found only in the subcontractors.

The subcontractors thereupon carried the case to the circuit court, and this court found that at the time of the injuries complained of Kraft was not an employee of either the subcontractors or the principal contractors, and that the industrial commission was without jurisdiction to entertain the application. Kraft took the case before the Supreme Court of Illinois. The question involved was whether the injuries arose out of and in the course of the employment. Kraft contended he had been employed for $4.50 per day. Funk contended he did not employ Kraft but told him if the work suited him he could take it. The matter of wages was not discussed, and the injury occurred before they reached the place where the work was to be done.

In affirming the decision the supreme court said:

It is undisputed that the truck in which plaintiff in error was riding had not yet reached the place of the employment. The general rule is that employment does not begin until the employee reaches the place where he is to work or the scene of his duties, and does not continue after he has left. * * * In this case, even though it be said that the commission were justified in finding that Kraft had been employed by Funk & Griesbaum, there is no evidence that he had reached the place of employment at the time of his injury, and the circuit court was therefore right in setting aside the award.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EMPLOYMENT STATUS—LOSS OF EYE—*Lampi* v. *Koponen et al., Supreme Court of Minnesota (July 5, 1929), 226 Northwestern Reporter, page 475.*—In the spring of 1928 Koponen and Nevala were engaged in getting out forest products in St. Louis County, Minn. John Lampi agreed with Koponen to cut and pile timber on part of the land. Koponen furnished the tools, and a house free of rent, in which Lampi and two of his friends who were helping with the work, lived. Payment was made on the basis of an agreed amount per piece of timber cut and piled. Koponen counted and inspected the timber and paid each man for the work which he did.

Lampi claims that on April 14, 1922, while chopping, a twig hit him in the eye and the injury resulted in its subsequent loss. He filed claim for compensation and the Minnesota Industrial Commission rendered an award. This order of the commission was appealed to the Supreme Court of Minnesota. The court affirmed the decision of the industrial commission, saying in part as follows:

There is nothing in the evidence requiring a finding that Lampi was an independent contractor, furnishing the men and agreeing to cut the timber from the whole 80, nor that the three jointly undertook the work as independent contractors. * * * Nor does the evidence require a finding that Lampi, in what he did personally, was an independent contractor. * * * The finding of the commission that Lampi was an employee is sustained and was the one proper to be made.

The court also held that the evidence sustained the finding of the commission that the employee sustained an injury to his left eye which arose out of and in the course of his employment.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EVIDENCE—*Higley* v. *Industrial Commission et al., Supreme Court of Utah (January 24, 1930), 285 Pacific Reporter, page 306.*—The International Smelting Co. owned and operated an aerial tramway extending from Bingham, Utah, over the mountains westerly to its smelters near Toole. There was a control station located in a desolate place midway between, where two men were employed by the company. These men were furnished a place to live by the company, and the apartments were fully equipped with furniture. In the room occupied by Larson, one of the employees, a 30-30 Winchester rifle was hanging over the door. It was the property of the company and had been brought there by the company a number of years before during some labor troubles at Bingham.

On May 20, 1927, three repairmen, including one Glen Higley, stopped at the station to repair a worn cable near the station. Higley did not proceed with the other two men directly to the place where the work was to be done, but advised them that he was "going down to the house a minute." The men waited some 45 minutes and as he did not show up they began to search for him. Higley was found in Larson's apartment, lying near the rifle with a bullet wound over his left eye. There was no witness to the accident and no one talked with Higley after he left his two companions.

Vera A. Higley, as guardian, filed claim for compensation, which was denied by the Industrial Commission of Utah. The commission found—

(1) That "the injury which resulted in the death of the deceased" was not an accidental injury but was intentionally self-inflicted; and (2) that at the time the deceased sustained the injury which resulted in his death he had departed from the course of his employment and was engaged in a venture not connected with or arising out of his employment.

The case was appealed to the Supreme Court of Utah, which court held that the only question presented for their determination was whether there was any substantial competent evidence to support the findings of the commission.

The court said:

This court has frequently and uniformly held that if there is "some substantial competent evidence" to support the findings and conclusions of the commission on questions of fact within its jurisdiction, such findings are final and may not be disturbed by this court. The only purpose of review in such cases—and our authority on review in such case is so limited—is to ascertain whether the findings are supported by any such evidence.

Regarding the evidence the supreme court said it was the burden of the guardian to show by a preponderance of the evidence that the fatal gunshot wound received by the deceased arose out of or was sustained in the course of his employment. The court pointed out that Higley left his fellow workmen as they were actually in progress to where the work was to be done, and that there was absolutely no evidence to support the contention that Higley was engaged in removing the shells from the gun, thereby rendering the place safe for employees living in the apartments.

The court concluded:

The lineman did not have access to the apartment except upon the invitation of those who lived there. He said nothing about the gun being dangerous to any of the men in the control station. He made no statement to any of the men as to his intention, if any he had, to go to the house for the purpose of removing the shells from the gun. If, as it is assumed by the plaintiff's brief, the deceased went to the

house to remove the shells from the gun, his conduct in that regard can only be looked upon, in the light of the facts before us, as an effort to arrogate to himself duties which he was neither engaged nor authorized to perform. It is certain that he went to the house on his volition, and if he chose to step outside the sphere of his employment and to do something he was not expected or requested to do, he did so at his own risk and was not under the protection of the compensation act.

A fair and impartial consideration of the evidence, together with the situation of the parties, the character of the employment, and the reasonable inferences which may be drawn from the evidence, leads to the conclusion that this finding of the commission must be sustained.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EVIDENCE—ASPHYXIATION—*Bissinger & Co. et al.* v. *Industrial Accident Commission et al., District Court of Appeal, First District, Division 2, California (May 1, 1930), 287 Pacific Reporter, page 540.*—Walter Carpenter was employed by Bissinger & Co. as a traveling salesman. On September 10, 1929, and for a short time prior thereto, he had possession of, and was entitled to use, an automobile owned by his employer. His employer paid for the upkeep and repairs on the car but permitted Carpenter to use the car for his private uses as well as for business, and to keep the car in his garage. While out riding with his wife on September 10 Carpenter told her he would have to fix the gasoline gauge and the motormeter before starting on another trip as they were not working properly. That night, after his wife had retired, about 12.20 o'clock, he went into the basement where the car was kept. He was found sitting in the car the next morning with the engine of the automobile running and the lights turned on. The garage was filled with gas and Carpenter was dead at the time of the discovery.

Mrs. Carpenter presented her claim to the Industrial Accident Commission of California and an award was made in her favor. Thereupon the employer and insurance carrier instituted action in the District Court of Appeal, First District, Division 2, California, contending there was no evidence showing that Carpenter's death arose by reason of an accident "arising out of his employment when overcome by monoxide gas while working on his employer's automobile."

The evidence showed the deceased had taken off his coat and vest; that a screw driver, theretofore kept upstairs, had been taken down into the basement; and that the deceased had a spot of dirt on his arm. The inference drawn from these facts was that he had been

working with the car. The court said, however, that the real question was whether the death was caused by accident or by natural causes. In answering this question the court said:

The decedent went into his garage and started the engine in motion. That is a proper and legal inference. Thereafter large quantities of monoxide gas accumulated. When discovered, the decedent was dead. As there was no evidence of a post-mortem examination or any other evidence to the contrary, it will be presumed that things happened according to the ordinary course of nature. (Code Civ. Proc., sec. 1963, subd. 28.) Therefore, as his dead body was found enveloped in a deadly gas, it will be presumed that he was asphyxiated by that deadly gas. If the petitioners believed that death followed natural causes, they should have introduced evidence rebutting the foregoing evidence.

He was not in the act of taking a drive, because the doors of the garage were closed. He was not there to amuse himself, because that act at that time of day was not "the usual propensity" of men, nor was it shown to be "the particular propensity" of the decedent. Therefore he must have been making adjustments to the car. When there are two different inferences which may be drawn, one of which will support and the other of which will overthrow the judgment, in support of the judgment we must presume the fact-finding body adopted the former and not the latter.

The court did not discuss the question whether Carpenter's acts, in the nature of making adjustments to automobiles at midnight, came within his employment, as that question was not presented to the commission.

The award of the industrial commission was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EVIDENCE—INFERENCE—*Farwell's Case, Supreme Judicial Court of Maine (August 19, 1929), 147 Atlantic Reporter, page 215.*—Marie Farwell was injured while employed as a waitress by the Belgrade Hotel Co., Belgrade, Me. In addition to her work as waitress she was required to do such work as cleaning floors, carrying laundry, and doing errands. On the night of August 5, 1927, upon completing her work in the dining room about 9 o'clock, she went to her room in a cottage near the hotel and from there to the drug store and the post office on a personal errand. While passing the hotel in returning to her room, the manager called her and requested that she locate the watchman. On her way to find him she fell into a coal chute and fractured her leg. She filed claim for compensation under the Maine workmen's compensation act, but by a decision of the legal associate member of the industrial accident commission, her petition was dismissed, upon the ground that the accident did not arise out of and in the course of her employment. Upon

appeal, the court held the commissioner "misunderstood and misstated the testimony of the claimant in an important respect, and upon the misunderstanding based his decision denying compensation."[1] Rehearing was had and a second decision of the commissioner ordered the petition dismissed.

The case was then taken to the Supreme Judicial Court of Maine for review. The decision of this court was rendered by Mr. Justice Barnes, who said in part as follows:

As the legislature has prescribed, in the absence of fraud, the decision of the commissioner upon all questions of fact shall be final. (Rev. Stat., ch. 50, sec. 34 (as amended by Laws, 1919, ch. 238, sec. 34).) His decision, however, must be based on facts proven by evidence and on natural inferences logically drawn therefrom.

"There must be some competent evidence. It may be 'slender.' It must be evidence, however, and not speculation, surmise, or conjecture. * * * While no general rule can be established applicable to all cases, certain principles are clear. If there is direct testimony which, standing alone and uncontradicted would justify the decree, there is some evidence, notwithstanding its contradiction by other evidence of much greater weight. Whether the finding of fact is supported by legal evidence is the limit of passing in review."

If the commissioner's conclusion is one of fact, it must be of facts deduced by him, for the only ground on which the decree can rest is that on the evidence the commissioner drew the deduction that the errand on which the petitioner was busied was a gratuitous accommodation, an act to which she was urged by feelings of humanity, and not a service which she had contracted to perform.

If logical inferences from the testimony could be drawn to substantiate such a conclusion, the decree should stand.

But the case affords no evidence to support the decree and none from which a rational mind, functioning logically, may infer that the service rendered at the time of the accident did not arise out of and within the course of petitioner's employment.

The appeal was therefore sustained, the decree of the lower court reversed, and the case remanded to the industrial accident commission.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—FAILURE TO OBEY INSTRUCTIONS—*Gill* v. *Belmar Construction Co. et al., Supreme Court of New York, Appellate Division, Third Department (September 19, 1929), 236 New York Supplement, page 379.*—James Gill was employed by the Belmar Construction Co. as chauffeur and was from time to time assigned to other work. On May 8, 1928, he was directed to assist the foreman who had charge of blasting work. The foreman ordered him to bring some sticks of dynamite and caps to the place of work. He had picked up a number of sticks of dynamite and six caps when he

[1] See U. S. Bureau of Labor Statistics Bul. No. 517, p. 409.

noticed that one of the caps did not have the usual wire attached. He informed the foreman, who told him to bring it over. Since his hands were full the foreman told him to put it in his pocket. When he delivered the dynamite and other caps, he neglected to deliver the one in his pocket. He continued to work in the afternoon, and then went to the hotel where the men were boarding.

The next morning, when dressing, he put his hand in his pocket, where the cap still was, to take out a safety pin. The pin came in contact with the cap in such a manner that an explosion occurred and injuries were sustained.

He filed a claim for compensation under the workmen's compensation law of New York, and the State industrial board made an award. The employer and insurance carrier appealed to the Supreme Court of New York, appellate division, third department, contending the accident did not arise out of or in the course of employment.

The New York Supreme Court reversed the award of the industrial board and dismissed the claim, saying in part as follows:

When claimant reached the hotel, his employment ended. * * * He was not then in the course of his employment when injured, unless because of the fact that he still had the dynamite cap in his pocket. This fact, we think, did not extend the field of his employment to include the hotel room in which he slept and was dressing. The cap was in his pocket solely because he failed to obey the instructions given him, and forgot to deliver the cap at the job, as he did the sticks of dynamite and other caps. His employment was not the cause of carrying it to his boarding place; but, the cap absent, there would have been no accidental injuries. The risk was not related to his employment, or to any service being rendered to his employer. (See Marks' Dependents *v.* Gray, 251 N. Y. 90, 167 N. E. 181.) * * * By carrying it to the hotel he was rendering no service to, or in the interest of, his employer. The injuries did not arise out of or in the course of his employment.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—FREEZING AS ACCIDENTAL INJURY—LOSS OF USE OF MEMBER—*Eagle River Building & Supply Co. et al.* v. *Peck et al., Supreme Court of Wisconsin (June 4, 1929), 225 Northwestern Reporter, page 690.*—James W. Peck, aged 70, was employed by the Eagle River Building & Supply Co. to load bolts into a sleigh. He was required to perform his work outside in the open on a cold day, with the temperature ranging from 9 to 27° below zero. While so employed he accidentally froze his left foot and made claim for compensation to the Industrial Commission of Wisconsin. An award was made to Peck. The Eagle River Building & Supply Co. brought an action and the award of the industrial commission was set aside

by the circuit court for Dane County, Wis., on the ground that the risk was common to all persons who were employed out of doors in that locality at that time of the year. Peck appealed the case to the Supreme Court of Wisconsin.

The court, in rendering its opinion, cited the case of Hoenig *v.* Industrial Commission (159 Wis. 646, 150 N. W. 996), saying in part as follows:

In that case the industrial commission found as facts that the deceased was not exposed to a hazard from lightning stroke peculiar to the industry or differing substantially from a hazard from lightning stroke of any ordinary outdoor work, and that his death was not proximately caused by accident within the meaning of that term as used in the act. The commission and the court came to that conclusion largely by giving the language of our act in that respect the same meaning as in the English act, which compensated injuries which grew out of the employment, basing such construction on the report of the interim legislative committee's report in which the bill as enacted was presented. That committee reported: "Compensation is paid whenever three facts appear, namely: (1) The employee was injured; (2) such injury grew out of and was incidental to his employment; (3) such injury was not caused by willful misconduct. It makes no difference whose fault it was or who was to blame; it is sufficient that the industry caused the injury."

The court also cited the case of Schroeder & Daly Co. *v.* Industrial Commission (169 Wis. 567, 173 N. W. 328), where a salesman was injured when he slipped on the public street. The commission awarded compensation and the case was appealed to the supreme court; it was contended the hazard was not peculiar to the industry but was common to all walking on the streets. The court affirmed the award, saying, "It is not the nature of the hazard that is the determinative thing, but rather whether or not it is a usual or necessary incident to the employment."

In conclusion the court said:

From the foregoing it is clear that we can not reconcile all that has been said on the subject, and that confusion remains; therefore, it is well to go back to first principles. The report of the legislative committee, cited as interpretative of the act in the Hoenig case, says that liability attaches where the "injury grew out of and was incidental to the employment." This is what was held in the Hoenig case, and it was the exact holding in the Schroeder & Daly case, when applied to the facts of that case. We think that is the fundamental idea of the compensation act. The injury is compensable when it results from a hazard incidental to the industry.

The injury in the instant case clearly grew out of and was incidental to the employment. It makes no difference that the exposure was common to all out-of-door employments in that locality in that kind of weather. The injury grew out of that employment and was incidental to it. It was a hazard of the industry.

The judgment of the circuit court was reversed with directions to sustain the award of the commission.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO AND FROM WORK—*Greer* v. *Industrial Commission of Utah et al., Supreme Court of Utah (July 13, 1929), 279 Pacific Reporter, page 900.*—H. C. Greer was an employee of the Union Stockyards at Ogden, Utah, as foreman and carpenter. It was his duty to look after the tools and see that they were kept sharpened. It was Mr. Greer's custom to take the company's saws to his home and there sharpen them and bring them back to the stockyards the next morning. He was proceeding to the company's place of business one morning, following the usual course of travel, and carrying a saw belonging to the company. He was offered a ride by a fellow workman in an automobile and while crossing from the pedestrians' walk to the waiting automobile he was struck by a truck and severely injured, resulting in his death the following day.

The widow, Mrs. Emma Greer, filed claims with the Industrial Commission of Utah for an award, which was denied by the commission on the ground that she failed to prove the accident arose out of or in the course of his employment.

The case was carried by the widow to the Supreme Court of Utah for review. This court affirmed the findings and conclusion of the industrial commission and held that even though the deceased was carrying the saw belonging to the company he did not come within the exceptions to the general rule that one is not covered by the compensation act while traveling from his home to his place of business. The authority for this decision was the case of London Guarantee & Accident Co. *v.* Industrial Accident Commission et al. (190 Calif. 587, 213 Pac. 977), which said in part as follows:

Exceptions to the general rule are cases where an employee, either in his employer's or his own time, is going to or from his place of employment on some substantial mission for his employer growing out of his employment. In such cases it is held that the employee is within the protection of the act. But the mission must be the major factor in the journey or movement and not merely incidental thereto; that is to say, if incidental to the main purpose of going to or from the place of employment, it would not bring such person under the protection of the act. If, on the other hand, the main purpose of going or coming was to perform some act arising out of his employment, he would be under the protection of the act although, incident to the performance of such duty, he might be going or coming from his home.

Continuing the opinion, the court said in part as follows:

Under the facts in the instant case, it is clear that the deceased was not upon any special mission for his employer at the time of the accident. There was nothing that he was doing for his master at the time which exposed him to the perils of the street. He was merely going from his home to his place of employment. The fact that he was carrying the saw was merely incidental. The employee did not come within any of the exceptions to the general rule.

In this case the deceased was not injured while sharpening the saw at his home. The accident did not occur while he was actually engaged in the performance of a duty for the employer. The dangers of the street between his home and the stockyards were not incident to his employment, but were dangers common to all.

The order of the industrial commission denying compensation was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO AND FROM WORK—*Krapf* v. *Arthur et al., Supreme Court of Pennsylvania (July 1, 1929), 146 Atlantic Reporter, page 894.*—Benjamin M. Arthur conducted a wholesale lumber business at Lansford, Pa., where Andrew L. Krapf was employed as a bookkeeper and salesman at a salary of $150 per month, with an additional allowance of $10 per month for his trolley fare between Lansford and Tamaqua, his home. His office hours were from 8 a. m. to 5 p. m. whenever he worked as a bookkeeper in the office. He usually left Tamaqua for Lansford on the 7 a. m. trolley. He received instructions from time to time as to what he was to do each day.

Pursuant to instructions received from his employer at the office of the latter on October 27, he left his home at Tamaqua on the morning of October 28 on a 2-day selling trip. After soliciting business in numerous towns on October 28 and 29, he returned to his home at Tamaqua about 7.30 p. m. on October 29 and spent the night. The next morning he took the 7 a. m. trolley for Lansford to report the results of his trip and to receive further instructions. While on his way to Lansford he was accidently injured in a collision between two trolley cars.

Krapf claimed compensation under the Pennsylvania workmen's compensation act and the board affirmed the award of the referee concluding that claimant sustained injuries while "in the course of his employment." The employer and insurance carrier appealed the case to the Court of Common Pleas of Pennsylvania, where the award was reversed. Later the Pennsylvania Superior Court reversed the decision of the common pleas court. The employer and insurance carrier then carried the case to the Supreme Court of

Pennsylvania. In rendering the decision this court quoted the opinion of the superior court, in part, as follows:

We are of the opinion that the claimant's trip was not ended when he returned to Tamaqua. He was employed by the defendant to perform a dual service. When he worked as a bookkeeper he had regular hours of employment on the defendant's premises, but when he went out to sell lumber he did not have regular hours of employment. We agree with the court below that, if the claimant had been hurt in a similar collision on his way home to Tamaqua after leaving the premises of the defendant on October 27, it could not be held that he was hurt in the course of his employment. * * * But when he started from Tamaqua the next morning, on his 2-day trip, his status was not that of bookkeeper, an employee with fixed hours of service, but that of a salesman who was in the course of his employment until he returned to the defendant's place of business at Lansford and reported the results of his trip to his employer, unless in the meantime he temporarily departed from his employer's service.

The supreme court concluded the opinion by stating that it agreed with the ultimate conclusion—

That plaintiff, who had been sent on a business trip, had not completed his mission at the time of the accident; when injured, he was on the way to his employer's office, traveling at the latter's expense, to report the result of his work.

The judgment of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO AND FROM WORK—*Wiest* v. *Bolduc et al., Supreme Court of Minnesota (October 18, 1929), 227 Northwestern Reporter, page 48.*—Bolduc & Co. were engaged in constructing a bridge at Saga Hill, Minn., some 26 or 28 miles west of Minneapolis. They had a small crew and only the fireman and engineer stayed at night. The others rode to and from Minneapolis with the foreman. Wiest was hired on August 11, 1928, and the arrangement was that he should go to and from work in Bolduc's car. The third day of Wiest's employment Bolduc had to go to Chicago and he made arrangements with the county bridge inspector to take Wiest out and back. In returning on the afternoon of Saturday, August 18, the automobile went into a ditch and Wiest was injured.

Wiest proceeded under the Minnesota workmen's compensation act and was allowed compensation by the industrial commission. The case was then taken to the Supreme Court of Minnesota for review.

The court quoted the provisions of the General Statute (Gen. Stat. 1923, sec. 4326 (j), as follows:

(j) Without otherwise affecting either the meaning or interpretation of the abridged clause "personal injuries arising out of and in the course of employment" it is hereby declared:

Not to cover workmen except while engaged in, on, or about the premises where their services are being performed, or where their services require their presence as a part of such service, at the time of the injury, and during the hours of service as such workmen; *Provided*, That where the employer regularly furnishes transportation to his employees to or from the place of employment, such employees shall be held to be subject to this act while being so transported, but shall not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him, and not directed against him as an employee, or because of his employment.

After reviewing the evidence the court concluded that—

It sustains the finding of the commission that transportation was regularly furnished within the meaning of the statute, as a part of the contract of employment; that while being so transported Wiest was injured; and that his injury arose out of and in the course of his employment.

The order was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO AND FROM WORK—SAFE PREMISES—*Morucci* v. *Susquehanna Collieries Co.*, *Supreme Court of Pennsylvania* (*September 30, 1929*), *147 Atlantic Reporter, page 533*.—One Morucci was employed by the Susquehanna Collieries Co. to work in its colliery, located 1 mile from Glen Lyon, Pa. A special trip of empty cars was provided by the company each morning to transport, over its narrow-gauge railroad, the 50 employees from that place to their work. They could return home by a footpath which led from the mouth of the colliery to Glen Lyon. Permission was not given the employees to ride on the loaded cars en route to Glen Lyon, yet the company issued no orders not to ride on these cars, and it was the custom of the employees to ride home on the loaded cars.

Morucci was riding home from work on one of such trips when an accident occurred. The train had proceeded about 1,700 feet when the car on which he was riding became derailed, throwing him to the track, causing injuries from which he died. A claim was filed by the widow, under the Pennsylvania compensation act (Pa. Stat. 1920, sec. 21916 et seq., as amended) and allowed by the referee and the board. On appeal to the court of common pleas of Luzerne

County, Pa., the award was refused. The case was appealed to the Supreme Court of Pennsylvania.

This court, in disposing of the case, said in part:

As said by the court below, in a case arising from the same accident, "The employee Stashak had ceased work and was returning to his home. He was not then engaged in the furtherance of the business or affairs of his employer; the accident did not happen upon his employer's premises within the meaning of the act (Shickley *v.* Phila. & Reading C. & I. Co., 274 Pa. 360, 118 Atl. 255); it happened upon other property of the defendant, occupied, under the control of and on which the employer's business was being conducted. To sustain the award under these circumstances, it is necessary to find that the employee's presence upon the loaded coal car was required by the nature of his employment. (Rotola *v.* Punxsutawney Furnace Co., 277 Pa. 70, 72, 120 Atl. 704.) We are forced to the conclusion, therefore, that the accident did not occur in the course of employment, for the accident clearly occurred at a point distant about a thousand feet from the employer's premises—the No. 1 drift, where plaintiff was employed—and the presence of plaintiff was not required upon the loaded coal cars by the nature of his employment. When the employee placed himself upon the loaded coal car, he became a mere licensee or trespasser and the relation of master and servant ceased to exist, although still upon the employer's property, and the fact that he was accustomed to thus do, could not alter the situation." We concur in the finding.

Judgment was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—HORSEPLAY—EVIDENCE—*Talge Mahogany Co.* v. *Beard, Appellate Court of Indiana (January 15, 1930), 169 Northeastern Reporter, page 540.*—On November 13, 1928, Jeremiah Beard, while in the course of his employment by the Talge Mahogany Co., received an injury for which he was awarded compensation. At the hearing before a single member of the Indiana Industrial Board an employee of the mahogany company was present, but not being an attorney was not allowed to appear on behalf of the company. The company did not file an answer of denial to the application for compensation as provided by rule 10 of the industrial board. Rule 10 also provides that if a special defense, such as willful misconduct, violation of a statute, or intoxication is to be relied upon, such special defense shall be pleaded by an affirmative answer at least five days before the date set for the hearing. No such answer was filed in this case.

On April 23, 1928, the employer filed an application for a review by the full board and that permission be granted to produce evidence showing that Beard at the time of the accident was engaged in

horseplay, and that in a scuffle over a board he fell off a pile of lumber and was injured. This was denied, as the employer had not complied with rule 10 regarding a special defense, and on June 7, without hearing further evidence the full board made and entered the award of compensation.

The employer thereupon appealed to the Appellate Court of Indiana contending that he was entitled to introduce and have considered the evidence which tended to establish that Beard's injuries did not arise out of his employment, but were the result of horseplay and were received while he was engaged in a fight, thereby committing a misdemeanor and violating the law.

The court found the decision of the industrial board was in error and the award was reversed, the court saying:

An injury, in order to be compensable, must not only arise in the course of the employment, but it must also arise out of the employment. The burden in the instant case was on appellee to prove that his injuries arose out of as well as in the course of his employment. It is not necessary for an employer to file a special answer to an application for compensation in order to entitle him to introduce evidence to show that the injury did not arise out of the employment. A special answer is only required under rule 10 when the employer confesses or admits that the injury arose out of and in the course of the employment. If an employee is injured in the course of his employment, in a fight which did not arise out of the employment, such injury is not compensable. (Mercantile-Commercial Bank, Rec., *v.* Koch (1925), 83 Ind. App. 707, 150 N. E. 25; Mueller *v.* Klingman (1919), 73 Ind. App. 136, 125 N. E. 464.)

In order to determine whether an injury arises out of the employment it is not only proper, but it is necessary, to know all the facts and circumstances connected with the transaction. In proceedings by an employee for compensation, the employer is not required to file a special answer in order to warrant the introduction of evidence to show that the injury to the employee grew out of a fight which did not grow out of or was not connected with the employment.

The application for compensation in the instant case was heard by the single member and by the full board upon the theory that evidence tending to show that appellee's injury was caused by a fight not arising out of his employment was not admissible without a special answer. This was error. Parties to a proceeding for compensation are entitled to a hearing on a correct theory.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—HOTEL EMPLOYEE—DUTIES—*Sprayberry* v. *Independence Indemnity Co. et al., Court of Appeals of Georgia (February 15 1930), 152 Southeastern Reporter, page 125.*—Mrs. Birdie Sprayberry was employed as housekeeper by the General Oglethorpe Hotel Co. of Savannah, Ga. She was required to live

in the hotel and received as a salary $100 per month and room and board. On the night of December 13, 1927, she attended a "party" in the rooms of guests of the hotel, where intoxicating liquors were served. It did not appear that Mrs. Sprayberry partook of the refreshments. After remaining in these rooms for about two hours, she left with the intention of returning to her room. She entered the service elevator of the hotel, which she was permitted to use at all times when in the discharge of her duties as housekeeper for the hotel. She was allowed to operate the elevator herself in the absence of the operator. The elevator stuck between the floors, and in attempting to leave it she fell and received injuries for which she claimed compensation.

The claim for compensation was denied on the ground that the accident did not arise out of nor in the course of her employment. The Chatham County superior court (Georgia) affirmed the order of the industrial commission, and the case was appealed to the Court of Appeals of Georgia, where the judgment was reversed, the court holding the injury arose out of and within the course of the employment. The appeals court said that it has been repeatedly held that an employee who has temporarily abandoned the employer's business and gone off on business of his own is, when legitimately returning to work and reentering the employer's premises by a route for that purpose, still in the discharge of his duties, and an injury received by him when thus returning to work arises out of and in the course of his employment.

Judge Stephens, in continuing the opinion of the court, said in part as follows:

There is nothing in the evidence, other than the fact that Mrs. Sprayberry was present in a room in the hotel in company with the manager's wife and two gentlemen guests where intoxicating liquors were being served, which could authorize an inference that Mrs. Sprayberry, during her presence in the room, while these festivities were going on, was not still on duty as housekeeper of the hotel, and was not there in the discharge of her duties as housekeeper. Since the duties of a housekeeper of a hotel may require her presence in the discharge of her duty in a guest room of the hotel at any time, the mere fact that she is present in a guest room of the hotel while festivities are going on there, in which she participates, does not of itself, without more, take her without the scope of her duties as housekeeper and render her status, while in the room participating in the festivities, as that of an employee who has abandoned her employer's business.

There is no evidence to authorize the inference that Mrs. Sprayberry went to these rooms in the hotel for the purpose of attending this party or for the purpose of doing anything other than attending to her duties as housekeeper. She herself testified that her pres-

ence there was in response to a request from the guest inviting her to come to the room on a matter which was clearly within the scope of her duties as housekeeper.

The situation is the same as if the liquor was nonintoxicating or only food was served in the rooms. The test is whether her conduct was such as to deprive her while in the rooms of her status as housekeeper of the hotel. * * * If, while she was in the rooms, her conduct with respect to the liquor could be considered as in violation of law, its criminal character certainly could not effect a denial of what otherwise is a fact that she was at the time on duty as the housekeeper of the hotel.

The judgment of the superior court was therefore reversed.

The judgment of the court of appeals was reversed by the Supreme Court of Georgia in 1931. (Industrial Indemnity Co. et al. *v.* Sprayberry, 156 S. E. 230.)

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—INTENTIONAL AND WILLFUL ACTS—*Bullard* v. *Cullman Heading Co., Supreme Court of Alabama (May 30, 1929), 124 Southern Reporter, page 200.*—Cohan Bullard was injured while employed by the Cullman Heading Co. He proceeded under the Alabama workmen's compensation act and was denied compensation. Upon appeal the circuit court of Cullman County, Ala., rendered judgment in favor of the Heading company, and Bullard carried the case to the Alabama Supreme Court for review. The sole question presented for review was whether or not Bullard was injured by an accident "arising out of and in the course of his employment."

The facts of the case showed Bullard was employed to "bear off heading from a heading machine." He took the heading from the "conveyor" and handed it to a fellow employee to be stacked. Bullard requested his foreman to allow him to exchange jobs with a fellow employee, whose duties were to clean the floors in the plant. After Bullard had been cleaning the floors a short time, he, without any authority, knowledge, or acquiescence upon the part of the company or foreman, left his job and began to operate a bolting saw, and within a few minutes was injured.

As the evidence was undisputed, the Supreme Court of Alabama was in accord with the conclusion of the lower court and affirmed its decision, that such a departure from his regular work removed him from the protection of the workmen's compensation act.

The case was denied a rehearing because the Supreme Court of Alabama had repeatedly held that the findings of the trial court would not be disturbed where there was any legal evidence in support of the conclusion, and this rule applied to cases where the award was denied as well as to cases where there was a judgment favorable to the plaintiff.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—INTERSTATE COMMERCE—JURISDICTION—*Hart* v. *Central Railroad Co. of New Jersey, Supreme Court of New Jersey (November 7, 1929), 147 Atlantic Reporter, page 733.*—Stanley Hart, a car inspector employed by the Central Railroad Co. of New Jersey, was killed while in the performance of his duty. His widow filed claim under the New Jersey workmen's compensation act and was awarded compensation which was affirmed in the Hudson County court, and was taken to the Supreme Court of New Jersey for review.

The facts indicated that Hart was killed by the movement of a string of empty baggage cars on track No. 2. On this track were cars of the Baltimore & Ohio Railroad Co., the Reading Railroad Co., and of the Central Railroad Co. None of these cars were in actual service, however, one was marked to show that repairs were needed and it was in the vicinity of this "crippled" car that the deceased was last seen with tools in his hands. The fundamental question for determination was whether Hart was engaged in interstate or intrastate commerce at the time of the accident. The railroad company contended that as the major part of these cars belonged to the Baltimore & Ohio Railroad and the Reading Railroad companies, corporations of other States, the cars were permanently devoted to interstate service. The court held, however, that the cars had not been assigned to work in either interstate or intrastate commerce and said that it is settled "that movable rolling stock that is not in course of interstate service is not engaged in that service, and the rights of the employees are in such case remitted to the workmen's compensation law of the State."

Regarding the question of interstate and intrastate commerce, the court said:

We think the result reached below should not be disturbed. Hart was a car inspector, employed by the prosecutor, whose duty it was to inspect cars that came into the yard of the Central Railroad Co. in Jersey City. When killed, it could be inferred that he was inspecting, or was about to inspect, cars which came into the yard, and which might be used in interstate or intrastate service or both.

In the present case these cars were not in any actual service, nor were they in contemplation of actual service; none of them had been segregated for a service in either; none of them had been assigned to a train in contemplation of movement, though liable thereto, nor left off of a train, intending to complete later a journey already begun. We do not understand that mere liability of a car at rest to be called into either service is therefore impliedly in interstate commerce, and, if not, it necessarily has only an intrastate relation to the workmen.

In addition, it must be recognized that the present action is not against either of these foreign companies, but against the Central Railroad Co., a corporation of this State, by whom deceased was

employed, and the cars in question were on its tracks. If the petitioner has shown, as we think she has, that the cars on these tracks were not in interstate operation, her rights under the compensation laws accrued, and she was entitled to recover thereunder.

The judgment was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—INTOXICATION—PROXIMATE CAUSE—*City Ice & Fuel Co.* v. *Karlinsky, Court of Appeals of Ohio, Cuyahoga County (April 22, 1929), 168 Northeastern Reporter, page 475.*—One Karlinsky was employed by the City Ice & Fuel Co. While Karlinsky was driving a team of horses attached to a coal wagon and making the return trip after delivering some coal, one of the wheels of the wagon went into a hole in the street, startled the horses and threw him from his seat. He struck his head on the pavement, broke his arm, became unconscious, and died shortly thereafter.

It was shown that Karlinsky was intoxicated when the accident occurred.

A claim was made for compensation by the widow, Anna Karlinsky, and was denied on the ground that the death of the husband resulted from alcoholism and not from an injury. Upon appeal, this decision was reversed in the Ohio Common Pleas Court and the company then carried the case to the Court of Appeals of Ohio, Cuyahoga County. This court affirmed the decision of the lower court and said in part as follows:

We think the question in this case is whether this man received his injury while in the course of his employment. Now, upon that point there can be but one answer, and that is that he was employed to deliver coal for the plaintiff in error company, and was returning with their team and wagon from delivering coal when the accident occurred. Whether that injury resulted in his death might be questionable, but as to the question of receiving an injury while in the course of his employment there can be but one answer, and that to the effect that he did receive such an injury; and, even though he was intoxicated, that would not make him any the less an employee of the company, nor would it make him any the less entitled to compensation.

We think there was evidence in this record that would warrant the judgment that was rendered in the common pleas court. We think that the record shows that this man died from the injuries that were received while he was in the course of his employment, and that the defendant in error was a dependent and filed her claim in the proper manner, and, that being refused, a proper appeal was taken to the common pleas court. The case was properly tried, and we can see no error in the judgment rendered.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—JURISDICTION—PREEXISTING CONDITION—*Hahn* v. *Industrial Commission et al., Supreme Court of Illinois (October 19, 1929), 168 Northeastern Reporter, page 652.*—Clyde C. Hahn was employed by the Yellow Sleeve Valve Engine Works (Inc.) as a pipe fitter. On January 4, 1925, Hahn was standing on top of a ladder with a chisel in one hand and a hammer in the other, and with both hands above his head he was cutting a groove in a post in which to place a wire. He fell from the ladder, struck the guard rail around a lathe, and his body landed on the floor between a post and the lathe. There was a scalp wound in his head about 1 inch long, from which blood flowed. He was carried into the hall entrance where he died.

The widow, Eunice R. Hahn, applied for compensation under the Illinois workmen's compensation act and an award was denied by the arbitrator. The Industrial Commission of Illinois affirmed the finding of the arbitrator denying compensation after the body of the deceased was exhumed and an autopsy held. The case was reviewed by the circuit court of Rock Island County, Ill., and the decision of the commission confirmed. The case was then taken to the Supreme Court of Illinois.

The contention of the employer and the industrial commission was that Hahn did not fall from the ladder as the result of an accident or on account of anything which he did in the prosecution of his work, but that he died from natural causes and fell because he was struck by death.

The widow contended, however, that while Hahn was prying with the chisel, he exerted enough force to tip the ladder and that his death was the result of the fall rather than heart failure as suggested by the employer.

The court adopted the opinion reported by Commissioner Partlow, which concluded as follows:

The burden of proof was upon the plaintiff in error to prove by the preponderance of the evidence that the death was the result of an accident which occurred in the course of the employment. The same rules govern the admission of evidence and the burden of proof before the industrial commission as are applied in courts of law. (Inland Rubber Co. *v.* Industrial Com., 309 Ill. 43, 140 N. E. 26.) The findings of the commission on the facts will not be disturbed by this court unless such findings are against the manifest weight of the evidence. (County of Cook *v.* Industrial Com., 327 Ill. 79, 158 N. E. 405.) If a workman dies from a preexisting disease which is accelerated under circumstances which can be said to be accidental, his death is the result of accidental injury. The liability of an employer under the compensation act (Smith-Hurd Rev. Stat. 1929, ch. 48, secs. 138–172) can not be based on a choice between two views equally

compatible with the evidence, but the liability must be based upon facts established by the evidence, and, where the cause of the injury or death is equally consistent with an accident and with no accident, compensation will be denied (Ryan *v.* Industrial Com., 329 Ill. 209, 160 N. E. 353).

The arbitrator, the industrial commission, and the circuit court each found that this death was not the result of the accident. When the evidence is considered in its entirety, we can not say that such findings are contrary to the manifest weight of the evidence, and the judgment will be affirmed.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—LOSS OF EYE—*Levchuk* v. *Krug Cement Products Co. et al., Supreme Court of Michigan (June 3, 1929), 225 Northwestern Reporter, page 559.*—The Krug Cement Products Co. operated a plant in the city of Detroit, where cement blocks were manufactured and it also owned and operated a gravel pit several miles north of Detroit. Makary Levchuk was employed by the company to take charge of the gravel pit and assist in loading the trucks. In accordance with directions given to him by his employer on the previous day, Levchuk on January 24, 1928, went to the Detroit plant at 7 o'clock in the morning, where he was to be picked up and taken to the gravel pit by one engaged in hauling gravel for the Krug Co. Levchuk was riding on the right-hand side of the front seat when a fowl of some kind, probably a pheasant, flew against the windshield of the truck. The impact was sufficient to shatter the glass and a portion of it struck and injured Levchuk's left eye. He filed claim for compensation under the Michigan workmen's compensation act.

The Michigan Department of Labor and Industry denied the claim on the ground that the accident did not "arise out of the employment." The employee carried the case to the Supreme Court of Michigan for review.

In rendering the opinion of the court Chief Justice North cited the case of Hopkins *v.* Michigan Sugar Co. (184 Mich. 87, 150 N. W. 325), which held that—

> The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

He also quoted California C. I. Exch. *v.* Industrial Acc. Comm. (190 Calif. 433, 213 Pac. 257) in part as follows:

> There must be some causal connection between the employment and the injury in the sense that, by reason of the employment, there

was an unusual or additional exposure of the injured party to the kind or character of hazard and danger, * * * which caused the injury.

In this case, however, it was found that Levchuk was not at the place of his employment at the time of the accident. He was merely on his way. It was of no consequence to the Krug Co. whether the plaintiff walked to the gravel pit, rode a bicycle, or went in a truck, but because he happened to be in the truck he sustained his injury. No part of his work took him out upon the highway and the ordinary risks of the street were not made incidental to his employment. In view of these findings the court concluded as follows:

The commission was right under the undisputed facts in this case in holding that plaintiff's injury did not arise out of his employment and in denying him an award of compensation.

The determination of the commission was affirmed. The decision was rendered by a divided court, however, and Mr. Justice McDonald rendered a dissenting opinion calling for a reversal of the award, saying in part as follows:

It is conceded that the accident to the plaintiff arose in the course of his employment, but it is insisted that it did not arise out of his employment. My brother argues that it did not arise out of his employment, because the danger to which he was exposed in this truck on the highway was no greater or different than that of other members of the general public similarly situated. He quite overlooks the fact that it was a condition of the plaintiff's employment that he should be there on the highway at that time. His employer sent him from the factory to a gravel pit. He could not go as he pleased. The vehicle in which he was to ride was selected for him. He was required to ride on this truck, and while thus riding he was performing his master's business as truly as he would have been had he been working in the factory or the gravel pit. So, whatever were the hazards to which he was then exposed, they were connected with his employment and incidental thereto. In this sense there was a causal connection between the injury and the employment.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PERSONAL ERRAND—*Guivarch et al.* v. *Maryland Casualty Co., Circuit Court of Appeals, Fifth Circuit (January 30, 1930), 37 Federal Reporter (2d), page 268.*—Louis Guivarch was an employee of the Jacobson Dredging Co., which was engaged in dredging work in Mobile Bay, Ala. He was employed as a leverman on the dredge *Matagorda*, stationed in the waters of the bay 400 or 500 yards from the land. The employer maintained a houseboat about 100 yards from the dredge, on which the employees took their meals and slept. While off duty Guivarch went to visit

his wife in Mobile, using his skiff in going to and from the shore. While returning to the houseboat, he was drowned in Mobile Bay.

Ella Guivarch filed claim under the Texas workmen's compensation law to recover compensation for the death of her husband. Compensation was denied by the industrial board, and the widow filed suit in the district court to recover compensation from the insurer. The United States District Court for the Southern District of Texas rendered a verdict in favor of the insurer and the widow appealed the case to the Circuit Court of Appeals, Fifth Circuit, contending that the death of the deceased was due to a risk incident to his employment by reason of the fact that the injury resulting in his death was sustained at a place furnished by the employer for use by employees in getting to and from their place of work. Judge Walker, in delivering the opinion of the circuit court, said that the widow was not entitled to the relief sought unless the deceased came to his death as a result of an "injury sustained in the course of employment" which included "injuries of every kind and character having to do with and originating in the work, business, trade, or profession of the employer, received by the employee while engaged in or about the furtherance of the affairs or business of his employer whether upon the employer's premises or elsewhere."

In concluding the opinion, affirming the judgment of the district court, Judge Walker said:

The waters of the bay between the shore and the employer's dredge can not properly be regarded as having been furnished by the employer for the use of its employees, and were not for use of employees only, but were open to the public generally for use. Where an employee is injured while he is not engaged in the work or business of his employer or in or about the furtherance thereof, and at a place not provided by his employer for use of employees only, the injury is not one sustained in the course of employment, though at the time it was sustained the employee, using his own vehicle or means of conveyance and a route chosen by himself, was going to or from his place of work. [Cases cited.]

We conclude that the evidence adduced had no tendency to prove that the death of the deceased was due to an injury sustained in the course of his employment. It follows that the claim asserted by the appellants was not sustainable.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PERSONAL ERRAND—*Ohmen* v. *Adams Bros. et al., Supreme Court of Errors of Connecticut (July 10, 1929), 146 Atlantic Reporter, page 825.*—Alfred Ohmen was a carpenter who worked for Adams Bros. off and on for some four years. The employees of Adams Bros. had no fixed place of employment, but went

to such points as their employers instructed them to go, and where they had work for them. It was Ohmen's custom, during the entire term of his employment, to go from his residence to such points as his employment called him. His wages began at 8 a. m. whether he had reached the job or not. During his employment with Adams Bros. Ohmen had asked and received permission from them to go to Warren village to attend all elections and town meetings. October 3, 1927, was the annual town meeting day in Warren and the employer had given Ohmen permission to go there to vote. On this morning Ohmen went from his home to the village of Warren, was the first voter of the day, and immediately thereafter proceeded toward the place of his employment in Washington Green some 6 or 7 miles away. While making this trip, at about 9.20 a. m., a car collided with Ohmen's car, wrecking it and inflicting serious injuries upon Ohmen.

He filed a claim under the Connecticut workmen's compensation act and the commissioner found Ohmen had sustained a personal injury arising out of and in the course of his employment and made an award. The award was later affirmed by the Superior Court of Connecticut and Adams Bros. then carried the case to the Supreme Court of Errors of Connecticut, where the decree was again affirmed. The court said in part:

While the plaintiff was proceeding from his home to vote by the permission of his employer, he was serving his own purposes, although doing this with his employer's express consent and after his day's pay had begun, and could not recover compensation for an injury then suffered. As to whether he was in the course of his employment from the time he left the village of Warren after voting up to the time he reached the junction of the main highway with the branch road leading to his residence we have no occasion to express an opinion upon. From the time he reached the main highway and was proceeding to his place of work he was in the course of his employment. It was then past the hour when his pay began. He was going by the direction of his employers to his work, in a customary conveyance of which they had knowledge, and by a route which was the shortest route to the place of his work, and one which it was reasonable for him to take. * * * If, then, the injury arose in the course of the employment, did it arise out of it? The injury was the result of a risk incident to plaintiff's employment, and was literally within the terms of his contract of employment.

While the general rule is undoubted that an employee injured upon a public highway while going to and from work at a fixed place of employment is not entitled to compensation, we point out in Whitney *v.* Hazard Lead Works (105 Conn. 513, 136 Atl. 105), that the rule is subject to many exceptions. The instant case falls within the fourth of the named exceptions: "Where the employee is using the highway in doing something incidental to his employment, with the knowledge and approval of the employer." * * * The injury was the result of a risk incident to a condition of the employment under which it was required to be performed.

The judgment of the superior court affirming the award and dismissing the appeal was fully justified.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PERSONAL ERRAND—*Pflug* v. *Roesch & Klinck (Inc.) et al., Supreme Court of New York, Appellate Division (March 27, 1930), 240 New York Supplement, page 740.*—Edward Pflug was a salesman in the employ of Roesch & Klinck (Inc). On June 4, 1929, he was given permission to take an automobile, left at the garage by a customer to be resold, and to demonstrate it, and to make a sales contract with a certain prospect by the name of Lopez, who lived at Blasdell, 4 miles south of Buffalo, N. Y. Pflug visited Lopez and made a contract for the sale of the car. The contract was, however, subject to the approval of the company and the owner of the car.

Instead of returning to Buffalo, Pflug went in the opposite direction, to Hamburg. There he went to a "speak-easy" and met a friend with whom he visited for about an hour and a half. He took the friend to ride in order to demonstrate the car to him. They had not proceeded a mile when, apparently through reckless driving on the part of Pflug, there was an accident in which Pflug was killed.

Anna M. Pflug, mother of the deceased, filed claim for compensation, claiming the accident arose out of and in the course of the employment as Pflug was demonstrating the car to his friend when the accident occurred. The New York State Industrial Board made an award and the employer appealed the case to the New York Supreme Court, appellate division. The court held that the accident did not arise in the course of the employment as the work created no necessity for his visit at Hamburg. The court said that the errand which had taken him from Buffalo in the car he was permitted to use had been discharged when he made a contract with Lopez and the risk on his visit to Hamburg, which was for pleasure and social enjoyment, was personal.

In reversing the decision of the State industrial board the court also said that in workmen's compensation cases referees sit in a quasi judicial capacity to determine facts and to interpret to some extent the law, and during hearings their minds should be open and their attitude impartial in order that substantial justice may be done between contending parties.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PERSONAL ERRAND—*Wickham* v. *Glenside Woolen Mills et al., Court of Appeals of New York (October 15,*

1929), *168 Northeastern Reporter, page 446.*—Charles J. Wickham was employed as helper in the spinning department of the Glenside Woolen Mills. Among other duties, he carried spools from the spinning room to the card room. On the day of the accident he had carried some spools and left them in their proper place. On the way back to his starting point, he stopped to ask a fellow employee for a chew of tobacco. This errand took him a few feet out of his direct course. After he had spoken to the man he started to go on and slipped on a greasy floor. As a result of the fall his arm was caught in a machine and his hand amputated. An award of compensation by the New York State Industrial Board was affirmed by the New York Supreme Court, appellate division (225 App. Div. 838, 232 N. Y. Supp. 917), and the employer and insurer appealed. The award for compensation for the loss of a hand was affirmed, the court of appeals saying in part as follows:

> An accident befalls a man "in the course of" his employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing. (Moore *v.* Manchester Liners (1910), A. C. 498, 500.)
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> Workmen situated as claimant was may reasonably be expected to chew tobacco and to ask their fellow workmen for tobacco for that purpose. The practice is nothing to which the employer would ordinarily object. * * * Claimant's employment did not cease when he went out of his way a few feet to ask for a chew. In a sense, the act was done for "his own purpose," but it was none the less something which he was free to do in the course of his employment, at least in a shop where, as in this case, no objection was made to the practice.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—STREET ACCIDENT—*Pelletier's Case, Supreme Judicial Court of Massachusetts* (*December 31, 1929*), *169 Northeastern Reporter, page 434.*—Michael Pelletier, an employee of James Charamella, who conducted a wholesale fruit and produce business, met his death February 28, 1929, while riding in his own automobile, operated by the employer's son. Pelletier's duties consisted of covering, in his own automobile, a certain designated territory while soliciting orders for his employer. He was paid a fixed sum each week plus an additional weekly sum for the use of his automobile. The employer gave Pelletier instructions as to when he should go over a certain route, but gave no instructions as to the manner in which he should operate the automobile.

The employer's son, somewhat over 16 years of age, had been employed at times by the insured to help salesmen in soliciting orders. The day before the accident the employer had told Pelletier

to give his son instructions in running the automobile and requested him to take the son with him on the following day. Pelletier drove the automobile during the first part of the trip and then after making a call on a customer, permitted the son to operate it. The ground was covered with snow and when the son attempted to put on the brakes to avoid hitting a wagon an accident occurred, resulting in Pelletier's death.

Claim for compensation was filed and a single member of the board found that—

The employee's death was caused by the overturning of the automobile driven by a fellow employee, who went with him under instructions from the employer "to learn the business," including the running of the automobile used by Pelletier in furtherance of his employer's business; that the automobile skidded and got out of the control of the fellow employee, ran wild over an embankment, and dropped with its occupants into a river 30 feet below, causing the death of Pelletier by drowning, and that he was at the time of his fatal injury engaged as a salesman in soliciting orders for his employer.

Compensation was awarded by the Industrial Accident Board of Massachusetts and the award was later affirmed by the superior court, Suffolk County, Mass. Thereupon the insurer appealed to the Supreme Judicial Court of Massachusetts, where the decision of the lower court was upheld, the court saying in part as follows:

The findings of the member of the board that Pelletier's injury arose out of and in the course of his employment, and that at the time he was in the course of his duty for the employer, were warranted on the evidence. The skidding of the automobile under the circumstances could have been found to be an ordinary risk of the street. Pelletier was actually engaged in the business and undertakings of his employer, and, although he owned the automobile, it was being operated at the employer's request by the son to teach him to run it for the benefit of the employer's business. The automobile, under these circumstances, could have been found to be an appliance of the employer's business being used in his behalf. (Mannix's Case, 264 Mass. 584, 585, 163 N. E. 171.) The facts in this case distinguish it from the cases in which the employee in operating his own automobile was not a servant of the employer, but an independent contractor (Pyyny *v.* Loose-Wiles Biscuit Co., 253 Mass. 574, 149 N. E. 541; Khoury *v.* Edison Electric Illuminating Co. (Mass.), 164 N. E. 77), and bring it within the terms of statutes, 1927, chapter 309, section 3, which authorizes compensation in a defined class of cases where the injury arises from ordinary street risks.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—STREET ACCIDENT—*Webb* v. *North Side Amusement Co., Supreme Court of Pennsylvania (November 25, 1929), 147 Atlantic Reporter, page 846.*—Earl C. Webb was in the

employ of the North Side Amusement Co. in Pittsburgh, Pa. He had a dual employment since he was hired as a chauffeur by the amusement company and as a private driver and houseman by its general manager, Nathan Friedberg. On July 25, 1928, Friedberg with Amdur, the assistant manager, and another were driven by Webb to New York City in the general manager's car. It was a business trip made by the two managers for the purpose of inspecting talking motion pictures with a view of later installing them in the theater which the company operated. When this inspection was completed, on Friday, July 27, the party drove to Atlantic City for purely recreational purposes. They remained until the following Sunday when Friedberg, with Webb acting as chauffeur, began the homeward journey from Atlantic City to Pittsburgh. En route both were killed.

Lillian E. Webb, the widow, was awarded compensation and the court of common pleas, Allegheny County, Pa., affirmed the award. The employer thereupon appealed the case to the Supreme Court of Pennsylvania, contending that—

The trip to Atlantic City constituted a deviation from defendant's business or employment. This operated as a suspension or abandonment of the deceased's employment with defendant. The deceased's relationship as employee of defendant was still under suspension at the time of his death, [so that] the deceased was not in the course of his employment with defendant corporation at [that] time.

Regarding this contention that the excursion to Atlantic City was not at an end when Webb and the manager started home, the court said:

In this connection it is to be noted, as pointed out in the opinion of the compensation board, that, "even though Atlantic City is not on the shortest and most practicable route for a return trip [from] New York to Pittsburgh, it so happened that when the accident occurred he [Webb] was on the most used and possibly the shortest motor car route between [those two points]." The homeward trip was a necessary part of the business excursion and, since there is nothing in the facts here presented indicating that the general manager, who was in charge of the trip, intended that the journey home be otherwise than the final step of the business expedition, we have been shown no reason which would require the finders of facts to interpret it as a continuation of the recreational deviation to Atlantic City.

The judgment of the lower court sustaining the award was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—STREET ACCIDENT—*Wynn et al.* v. *Southern Surety Co., Court of Civil Appeals of Texas (March 13, 1930)*,

26 Southwestern Reporter (2d), page 691.—H. D. Wynn was employed as field man for the Laney Creamery Co. (Inc.), of San Antonio, Tex., his duties being to visit creameries located in a certain territory in Texas. He was employed on a salary of $125 a month and expenses and was furnished an automobile in which to cover his territory. On March 6, 1926, he arrived in Waco, Tex., and due to bad roads and heavy rain was required to remain there. Under the terms of his employment Wynn was expected to work on Sunday when necessary. There were two customers in Waco that he was expected to see while there, namely, the M. B. Ise Kream Co. and the Purity Ice Cream Co. On Saturday afternoon he called the M. B. Ise Kream Co. to ascertain if it would be open on Sunday, and was told that it would be. Nothing further is known about Wynn's movements until 6.30 Sunday afternoon, March 7, at which time he secured his evening meal at a restaurant on South Sixth Street in Waco. In attempting to cross Sixth Street, going toward the hotel where he was registered, he was struck by an automobile and killed.

The Industrial Accident Board of Texas awarded compensation to Pearl S. Wynn, the widow, and the employer's insurer immediately instituted suit to set aside the award on the ground that the accident did not arise in the course of the employment. The district court, McLennan County, Tex., rendered a judgment in favor of the insurer, the Southern Surety Co. Thereupon the widow appealed to the Court of Civil Appeals of Texas.

The court reviewed a number of cases where the injury occurred after the employee left the premises of his employer and was upon the street or highway not in any way under the control of the employer, and found that the courts have uniformly held that any injury which the employee might receive as a result of accidents that are common to the general traveling public is not received " in the course of his employment." Continuing, the court affirmed the judgment of the lower court, saying in part as follows:

> A traveling salesman, while eating his meals or sleeping at hotels, or attending church or theaters or going on picnics or private errands for his own pleasure or profit, is not, within the contemplation of the workmen's compensation act, engaged in his employer's business, and an injury received by him while performing said acts or engaged in said recreations is not, within the purview of said law, an injury received " in the course of his employment."
>
> We do not think it could be presumed that, because Mr. Wynn was a traveling salesman, away from home, during Sunday, and especially between 6 and 7 o'clock Sunday evening, he was doing any act in the course of his employment or performing any services for his employer. Under the undisputed facts in this case, we think the trial court properly instructed the jury to return a verdict for appellee.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—WILLFUL MISCONDUCT—CONSTRUCTION OF STATUTE—*Stearns Coal & Lumber Co. et al.* v. *Smith, Court of Appeals of Kentucky (October 25, 1929), 21 Southwestern Reporter (2d), page 277.*—Inman Smith was injured while employed by the Stearns Coal & Lumber Co. The accident occurred in the morning when he was preparing to enter the mine for the purpose of performing his duties. It was the custom of the miners to arrange with the motormen in charge of mine cars to carry into the mine articles used in connection with their work. Smith attempted to board a motor car that was passing into the mine, for the purpose of requesting the motorman to carry his dinner bucket, which he had left at the mouth of the mine. In attempting to board the car his foot slipped out of the stirrup, which was bent, and he fell under one of the wheels. His foot was so badly mangled that it was necessary to amputate it. He filed claim for compensation and the Workmen's Compensation Board of Kentucky found that he was guilty of willful misconduct and further that the accident did not arise out of and in the course of his employment, therefore compensation was denied. A petition for review was filed in the circuit court, McCreary County, Ky., and that court set aside the judgment and remanded the case to the compensation board. The company and the board thereupon appealed to the Kentucky Court of Appeals. This court held the accident did arise out of and in the course of the employment, saying, in part:

Here the appellee was on his master's premises, and was making preparations incident to his work during the day. It was just as necessary for him to provide himself with food to eat during the noon hour in order to further his master's business as it was to equip himself with proper tools with which to work. In arranging for a motorman to carry a bucket containing his food to a place in the mine where he was to work, he was not doing an act wholly for his own benefit, but one which was necessary to enable him to perform his duties properly, and hence was an act designed to promote the work of his employer.

Regarding the willful misconduct alleged, the appeals court quoted from the case of Big Elkhorn Coal Co. *v.* Burke (206 Ky. 489, 267 S. W. 142), as follows:

It seems clear to us that the legislature meant to provide that the intentional violation of a safety rule should not amount to such willful misconduct as to defeat recovery under the act, or to take the employee out of the course of his employment, but only to require the diminution of the compensation awarded by the 15 per cent provided for.

The court concluded the opinion by saying:

It may be that appellee's act in attempting to board the motor car amounted to gross negligence, but to constitute willful misconduct

within the meaning of the act it must have amounted to something more than gross negligence. * * * There is some conflict in the evidence as to whether or not the appellee intentionally violated a lawful rule of appellant for the safety of its employees, but this is a matter for the determination of the board, if the diminution of the compensation by 15 per cent is sought.

Being of opinion that the judgment of the circuit court reversing the award of the compensation board is correct, it is affirmed.

WORKMEN'S COMPENSATION—ADDITIONAL AWARD—PARTIAL DISABILITY—DOUBLE RECOVERY—*Welden* v. *Edgar Zinc Co., Supreme Court of Kansas (January 11, 1930), 283 Pacific Reporter, page 618.*—Welden, an employee of the Edgar Zinc Co., was injured on June 9, 1925, while in the course of his employment. He was paid full compensation until he returned to work on September 1, 1925. Upon his return he was employed at the same class and kind of labor he was doing before the injury and continued to do that work until October, 1927, for which he was paid the wages which he had formerly received. He did his work during that period with some discomfort and more or less pain, and after the compensation period had elapsed he asked for additional compensation for the 2-year period because he had done the work with discomfort and pain. Additional compensation was denied and the case was appealed to the Supreme Court of Kansas.

In discussing the difference between a recovery under the workmen's compensation act and a recovery of damages for negligence, the court said:

The fact that he did this work with some discomfort and pain might have been an element of recovery in an ordinary action to recover damages for negligence. The compensation law is a marked departure from the theory of actions based on the wrongs or negligence of employers. It is based on the theory of taxing the industry for the loss sustained by accidental injury to a workman while employed in such industry, and compensation is to be paid regardless of the negligence of the employer or even the fault of the workman. The theory is that the compensation is to be measured, not as damages for pain and suffering, but for the loss sustained by the incapacity of the workman resulting from the accidental injury. In general it may be said that the test to be applied is the difference between average earnings of the workman before the accident and his average earnings after the accident. The statute schedules the amount of compensation for certain injuries, and fixes minimum and maximum limits of recovery in other cases. The industry is not to be taxed for accidental injuries beyond the workmen's loss of earning capacity measured as the statute provides. Here the workman earned and has received full wages for the entire period for which

compensation is sought. He has received more even than he would have been paid if he had not returned to work.

Several cases were cited in which the Kansas Supreme Court had awarded additional compensation, but the court said:

These and like cases where work was done and a regular wage earned by the help of others or by the use of tools especially designed, to enable him to overcome permanent defects, where the compensation period had not elapsed and where the getting and holding of a job at full wages was problematical, are not deemed to be applicable to the case at hand.

Regarding this case the court said:

Here the period of compensation had elapsed within which any compensation was or could be claimed. The work had been done and full wages had been paid for it. There was nothing uncertain about the workman's condition or his future earning capacity. The work, it is true, was done with discomfort and some pain for a period of two years, but that did not diminish his earning capacity. The back pay asked by plaintiff because of discomfort and pain would be more than the loss of earning capacity, something more than the compensation provided by the act. An allowance for pain and suffering would be something in the nature of damages for the negligence or wrong of the defendant, which is inconsistent with the substituted remedy of compensation.

The decision of the lower court denying an additional award was therefore affirmed.

WORKMEN'S COMPENSATION—AGRICULTURAL WORKER—INTERPRETATION OF STATUTE—REVIEW—*Boyer* v. *Boyer et al., Supreme Court of Minnesota (November 29, 1929), 227 Northwestern Reporter, page 661.*—John H. Boyer lived with his parents upon a farm, but he did not own or operate the farm. He owned a threshing machine, a silo cutter and filler, and other farm machinery, and characterized his business as that of a commercial thresher. Joseph L. Boyer was employed by him on August 1, 1928, to help in this work. On October 29, 1928, Joseph Boyer was sent to a farm where his employer had secured a job of silo filling and during that afternoon, in the operation of the machine, his left hand accidentally got caught in the cutter, resulting in the maiming of two fingers.

Joseph Boyer filed claim for compensation and the award was denied by the Minnesota Industrial Commission. The accidental injury was found to have arisen out of and in the course of his employment in operating the silo filler, but as a conclusion of law the commission held that he was a farm laborer at the time of the injury and compensation was denied.

The employee took the case to the Supreme Court of Minnesota for review. In rendering the opinion the court quoted part of sub-

division (m) of section 4326, Gen. Stat. 1923 Minnesota (sec. 4326, Mason's Minn. Stat. 1927), chapter 91, Laws 1923, as follows:

(m) The term "farm laborers" shall not include the employees of commercial threshermen or of commercial balers. Commercial threshermen and commercial balers are hereby defined to be persons going about from place to place threshing grain, shredding or shelling corn, or baling hay or straw, respectively, as a business. * * *

In view of this definition the court concluded:

Relator [Joseph L. Boyer] was the employee of a commercial thresherman. The employer so designates himself and the evidence is conclusive that that was his business, and that relator on the morning of the very day of the accident worked as a thresher. It is also to be noted that the employer here by merely ceasing the work of threshing did not withdraw his employees from the compensation act under the definition above given. He was a contractor, going from place to place "threshing grain, shredding or shelling corn" as a business. He owned and operated a shredder, and we may take notice of the fact that the season for operating corn shredders is not through by October 29. In our opinion relator was not a farm laborer at the time of his accidental injury, since his employer was in a business which excluded the employees from that designation.

The decision of the industrial commission was therefore set aside, with directions to award compensation.

WORKMEN'S COMPENSATION—ASSAULT, HORSEPLAY, ETC.—ARISING OUT OF EMPLOYMENT—*Pacific Employers' Insurance Co. et al.* v. *Division of Industrial Accidents and Safety et al., Supreme Court of California (June 26, 1930), 289 Pacific Reporter, page 619.*—Joseph Fiore was employed as a sewing-machine operator in a tailoring establishment. In the same room the "cutter" was located at a counter to which the machine operator went for the materials for his work. A salesman for the employer had left his bag of golf sticks in the room. In an idle moment the "cutter" was practicing swinging one of these golf clubs at a place close to the table where he did the cutting. As Fiore approached the cutting table for materials, the swinging club struck him in the face, inflicting serious injury, for which the California Industrial Accident Commission awarded compensation.

The insurance carrier appealed to the Supreme Court of California, contending that the accident did not "arise out of the employment" as the employees were indulging in "horseplay." The court annulled the award, saying that Fiore was exposed to no greater danger of being struck by this golf club, because of his employment than would have been any customer or acquaintance of the employer who might have visited the place of business. The accident therefore did not

arise out of the employment and was not compensable. The court quoted from the case of Coronado Beach Co. *v.* Pillsbury (158 Pac. 212), in which the court said:

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. * * * It "arises out of" the occupation when there is a causal connection between the conditions under which the servant works and the resulting injury. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

The award was therefore annulled.

Where two employees on a ranch, who had been directed to count cattle and shoot any coyotes or dogs which might be found running the stock and while returning to the bunk house drew their guns in fun to see which one could draw faster, one shot the other, the Supreme Court of Colorado held that it was not an "accident arising out of the employment" so as to make the master liable under the workmen's compensation law. (McKnight *v.* Houck et al. (1930), 286 Pac. 279.)

The Minnesota Supreme Court held that an employer who intentionally and maliciously assaults and beats an employee, while engaged in the employment, inflicting injuries which disable, could not avoid his liability for damages on the ground that compensation was available. (Boek *v.* Wong Hing (1930), 231 N. W. 233.)

WORKMEN'S COMPENSATION — AWARD — ASSIGNMENT — *Gregg* v. *New Careyville Coal Co., Supreme Court of Tennessee (October 18, 1930), 31 Southwestern Reporter (2d), page 693.*—D. L. Gregg, an employee of the New Careyville Coal Co., was injured. The coal company recognized its liability to its injured employee but expected the insurance company carrying its compensation insurance to settle the claim. Gregg understood this and also that the insurance company was delaying the settlement. Pending settlement, Gregg needed supplies for himself and family but was unable to obtain credit. In order to obtain the supplies needed, he entered into a written agreement with his employer that when the amount of his compensation was fixed, any sum then due for goods purchased by him should be deducted from the award. Upon the faith of this agreement Gregg bought goods and was extended credit by the coal company for the sum of $285.05. He also agreed that the company should deduct from his compensation so awarded the further sum of $28.90 on account of supplies furnished before the injury.

Unable to adjust the claim of compensation with the insurance company, he filed suit against the coal company. After the suit was

commenced the insurance company agreed to an adjustment of the claim and compensation was fixed at $900. As $228 had been paid to Gregg prior to the adjustment a judgment for the lump sum of $672 was entered in Gregg's favor. From this amount the sums of $285.05 and $28.90 were deducted by the employer according to the agreement.

Gregg filed suit to recover these deductions, as being a violation of section 18 of the workmen's compensation act. Section 18 reads as follows:

No claim for compensation under this act shall be assignable, and all compensation and claims therefor shall be exempt from claims of creditors.

The decree of the chancery court, Campbell County, Tenn., dismissing the suit, was reversed by the court of appeals and both deductions allowed. The case was carried to the Supreme Court of Tennessee, where the decision of the appeals court was modified. The Tennessee Supreme Court said, in part as follows:

The compensation act does not forbid the employer and employee from contracting in good faith, pending a settlement for the claim for compensation, for advancement by the employer to the employee either in money or merchandise, nor does it forbid them contracting that such advancement shall be deducted from the amount of compensation when awarded. But such an agreement and assignment could not cover antecedent debts of the employer [employee] without violating the letter and the spirit of the compensation act.

To the extent that the agreement covered complainant's antecedent debt of $28.90, it was in direct contravention of the compensation law and void. But to that extent only. The employee could not be permitted to obtain money or necessary supplies in the form of advancements upon the faith of a written agreement that the employer should deduct the advancements so made from the sum of compensation when awarded and then avoid the payment by resort to the provision of the act referred to and above quoted. Complainant's recovery, therefore, must be reduced to $28.90, being the amount of the antecedent debt which his employer deducted from the award.

As modified, the judgment of the court of appeals is affirmed.

WORKMEN'S COMPENSATION—AWARD—COMPUTATION OF EARNINGS—"AVERAGE WEEKLY WAGE"—*O'Loughlin's Case, Supreme Judicial Court of Massachusetts (February 4, 1930), 169 Northeastern Reporter, page 907.*—Patric O'Loughlin was injured on January 31, 1929, while piling sugar in the Boston, Mass., storehouse of the American Sugar Refining Co. The evidence showed that he worked for the company when the boats came in and had been doing this work for 16 or 17 years, "but not steady"; and when not working for the refining company "he did other work as a longshoreman

wherever he could get work." During the 52 weeks preceding the date of the injury the employee worked 10 weeks for the refining company and earned during the 10 weeks $119.50 or an average of $11.95 a week. A fellow employee doing the same work for the refining company as O'Loughlin worked 46 weeks during the 52-week period and earned $738.14 or an average of $16.05 per week.

The Massachusetts workmen's compensation statute (Gen. L., ch. 152, sec. 1 (1)) provides that the "average weekly wage" is—

The earning of the injured employee during the period of 12 calendar months immediately preceding the date of injury, divided by 52; but if the injured employee lost more than 2 weeks' time during such period, the earnings for the remainder of such 12 calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer, or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the 12 months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

The single member of the Massachusetts Industrial Accident Board found that the employee's weekly wages could not be determined under the first part of section 1, paragraph 1, because the employment by the refining company was for too short a period. He further found that—

Coyne, a fellow employee of O'Loughlin, who was employed at the same grade of work, lost 1,356¼ hours during the year immediately preceding the claimant's injury; that 54 hours constituted a normal working week; that the 1,356¼ hours represented 25.11 weeks' lost time; that Coyne's average weekly wages based on this computation were $26.99; that O'Loughlin's average weekly wages were the same, that is, $26.99, and awarded compensation at the rate of $17.99 a week.

This finding was affirmed by the industrial accident board. The case was then carried to the superior court, Suffolk County, Mass., where a decree was entered that the average weekly wages of O'Loughlin were $16.05 and that compensation was due him at the rate of $10.70 a week and as he had been paid compensation at the rate of $12 a week no further compensation was due him.

The employee appealed from the decree of the superior court modifying the award of compensation, to the Supreme Judicial Court of Massachusetts, which court affirmed the decree of the lower court, saying in part as follows:

The industrial accident board did not act in accordance with the statute in awarding compensation. Assuming the board was right

in finding that compensation was not to be determined by the first sentence of section 1 (1) of Gen. L., ch. 152, but was to be determined according to the sentence following, which enacts, if because of the shortness of the time of the employment or because of its nature or terms it is impracticable to compute wages according to the first sentence of the statute, regard may be had to the average weekly amount earned during the previous 12 months by a person in the same grade employed at the same work by the same employer. Coyne was employed at the same work by the same employer in the same grade as O'Loughlin and Coyne's average weekly wages, if adopted as the standard, could not be measured by hours and 54 hours taken as a normal week. There is nothing in the statute allowing this division. Coyne's wages were to be taken week by week; a standard of what constituted a week divided into hours could not be adopted. The total amount received by Coyne during the year should be divided by the number of weeks he worked; this is required by the statute and is the definition adopted by it. This rule was followed and approved in Bartoni's case (225 Mass. 349, 114 N. E. 663). It was followed by the superior court in entering the decree. The judge ascertained the total amount earned by Coyne during the 12 months preceding the injury of O'Loughlin and divided this amount by the number of weeks he worked, with the result that O'Loughlin's average weekly wages were found to be $16.05 and his compensation allowed at $10.70 a week. This computation was sufficiently favorable to the employee. He was not entitled to the compensation allowed him by the industrial accident board.

WORKMEN'S COMPENSATION—AWARD—CONCURRENT EMPLOYMENT—*Perry Canning Co. et al.* v. *Industrial Commission et al., Supreme Court of Utah (August 26, 1929), 281 Pacific Reporter, page 467.*—J. H. Ward was employed by the Perry Canning Co. of Perry, Utah, and the Brigham City Canning Co., located about 3½ miles south of Brigham City. His duties were to inspect crops of fruit and to solicit contracts to purchase them for both companies. He was injured on the public highway while in the course of his employment, when his automobile overturned. The Utah Industrial Commission made an award against the Perry Canning Co., but not against the Brigham City Canning Co. The Perry Canning Co. brought this action for a review claiming that the finding and conclusion made by the commission that Ward "at the moment of the injury" was engaged solely in a duty performed for and on behalf of the Perry Canning Co. were against and not supported by the evidence and that the evidence without substantial conflict showed that the injury resulted in the course of his employment with both companies and hence the award ought to have been made against both.

The award of the commission was based upon the fact that Ward was on his way to see a particular fruit grower at the suggestion of

the Perry Co., when the accident occurred. However, the court thought this was unimportant and not a determinative factor, justifying splitting, or segregating the applicant's employment, which, as found by the commission, was a joint employment with both companies.

To uphold this opinion the Utah Supreme Court pointed to the fact that Ward had made contracts for the Brigham City Canning Co. on the morning of the day of the accident, and even though the Perry Co. suggested that he call on the fruit grower it was quite possible that the grower would have made a contract with the Brigham City Canning Co., as it could not be told whether the grower would have contracted with the one company or the other or with both or with neither.

The court, therefore, concluded that the award ought to have been made against both companies and the case was remanded to the commission to make such an award.

WORKMEN'S COMPENSATION—AWARD—FAILURE OF EMPLOYER TO COMPLY WITH STATUTE—"SURPLUS FUND"—CONSTRUCTION OF STATUTE—*State ex rel. Croy* v. *Industrial Commission of Ohio, Supreme Court of Ohio (March 5, 1930), 170 Northeastern Reporter, page 644.*—John H. Croy, while employed in the remodeling of a building jointly owned by Harry Thew and Joseph Askins, was injured on October 12, 1925, while in the course of his employment. Thew and Askins did not carry State insurance, although they were employing five or more workmen at the time of the accident. In due course Croy filed his claim for compensation with the Industrial Commission of Ohio against Thew, and upon its being discovered later that Askins was a joint owner of the premises with Thew, the commission made Askins a joint defendant in the case and notified him of the proceedings.

On September 15, 1926, the commission awarded Croy a total sum of $894.72 for compensation and for hospital and medical expenses. Thew and Askins, having failed to pay the award, the commission certified the award for collection to the attorney general of the State. More than six months later the attorney general brought suit for the amount of the award and accrued interest against both Thew and Askins. In that action Thew filed his answer denying liability, and shortly thereafter filed his petition in bankruptcy in the Federal court, where he was adjudged a bankrupt on January 21, 1928. Askins also filed his answer wherein he denied the facts pleaded against him. In February, 1929, a judgment was obtained against Askins, granting Croy the amount of his compensation, and later a new trial was granted.

In 1928 Croy filed application for additional compensation and on October 4, 1929, the commission made an award of a further sum, compensating him for the total loss of his right leg at the rate of $17.87 per week for a period of 175 weeks and ordered the amount of that award certified to the attorney general for collection.

John H. Croy petitioned that a writ of mandamus be issued compelling the industrial commission to pay the full amount of the sums awarded him under the several orders of the commission.

The attorney general urged two reasons why this relief should not be granted. First, he contended that an employee who had obtained an award against a noncomplying employer was not entitled to payment of the award out of the surplus fund before a court or jury has affirmed the finding of the commission. He based this contention upon the last paragraph of section 1465–74, General Code, which reads as follows:

> The payment of any judgment recovered in the manner provided herein shall entitle such claimant to the compensation provided by this act for such injury, occupational disease, or death. The attorney general shall, as soon as the circumstances warrant, and not more than two years after the date of such award made by the commission, certify to the commission the result of his efforts to recoup the State insurance fund as herein provided, and if he certifies that such award can not be collected in whole, the award shall be paid from the surplus created by section 1465–54, and any sum then or thereafter recovered on account of such award shall be paid to the commission and credited to such fund as the commission may designate.

The court did not agree with the attorney general in this view, and said:

> We are unable to arrive at that conclusion. The payment of the judgment certainly entitles the claimant to compensation; so also does the nonpayment of the judgment, or a certificate that the award can not be collected, equally entitle the claimant to compensation, for the statute explicitly states that, upon the making of such certificates, "the award shall be paid from the surplus created by section 1465–54." The payment of the award is not made contingent upon the securing of a judgment by the State, but upon its payment, or upon a certificate of noncollectability made within two years after the date of the award. The ultimate purpose of the State's suit is the recoupment of the surplus fund, and any sum, whether "then or thereafter recovered," is to be paid into and credited to that fund.

Second, the attorney general pleaded that section 1465–74, General Code, did not authorize the commission to pay any portion of the award at the present time. Regarding this contention the court said:

> The statute clearly provides that the award can not be paid from the surplus until payment of a judgment, or until certification is made by the attorney general; but it is equally clear that he must

make such certificate within two years after the date of the award: if he fails to so certify, within his legal time limit, his failure should not inure to his benefit nor deprive the injured workman of his just right to compensation.

The court granted the writ of mandamus in part and concluded the opinion by saying:

We are of the opinion therefore that mandamus will not lie to compel the commission to pay the award out of the surplus fund, unless (*a*) the attorney general has certified that such award can not be collected in whole, or (*b*) more than two years have elapsed and no certification has been made to the commission during that period as required by law.

In the following cases this court awarded the writ where two years or more had elapsed since the date of the award: State, ex. rel, Davis *v.* Industrial Commission, 118 Ohio Stat. 340, 161 N. E. 32; State, ex rel. Thompson *v.* Industrial Commission, supra.

Since the first award of the commission was made on September 15, 1926, more than two years prior to the bringing of this action, a writ of mandamus will be issued compelling the commission to pay the amount of that award. However, since we are unable to determine from the petition its exact amount, if counsel can agree the amount may be incorporated in the journal entry. Since two years have not elapsed from the date of the second or additional award, this action to compel its payment is prematurely brought, and a writ compelling the commission to pay the amount of that award at the present time will be denied.

WORKMEN'S COMPENSATION—AWARD—MEDICAL SERVICE—NEGLIGENCE—TEETH EXTRACTION—*Gunnison Sugar Co. et al.* v. *Industrial Commission of Utah et al., Supreme Court of Utah (February 20, 1929), 275 Pacific Reporter, page 777.*—William Duffin, an employee of the Gunnison Sugar Co., received, in the course of his employment, an injury to his back. Neither he nor the employer thought the injury of much consequence. Duffin laid off for about three days and then went back to work. However, he continued to suffer with pains in his back and consulted a physician, who gave him treatments. He continued his employment but gradually grew worse and, as the physician who had treated him had moved to another State, he consulted another physician. This physician diagnosed Duffin's condition as that of rheumatism, which he told the employee was due to his teeth. In obedience to the advice of this doctor, he had all of his teeth extracted. They were all in a good and healthy condition and, as later proved, were in no manner the cause of his condition. He was examined at a clinic and was found to be suffering from a dislocated joint, and was operated upon and cured.

He filed claim for compensation with the Industrial Commission of Utah and in addition to the compensation awarded him for the

injury to his back he was awarded $777 for the loss of time, for the disfigurement, and the cost of having his teeth extracted. From this part of the award the sugar company appealed to the Supreme Court of Utah. This court affirmed the award of the industrial commission and held that the employer was liable for such injury to the employee. In the opinion, the court said in part as follows:

The question thus is whether, under the circumstances, the loss sustained by the employee because of the extraction of his teeth may be attributable to the accident and injury thereby sustained by him. Under our compensation act (Comp. L. Utah, 1917, sec. 3138, as amended by Laws Utah 1919, ch. 63), the commission was authorized to allow compensation for disability, disfigurement, and loss of bodily function. By section 3147 (as amended) an employer, or his insurance carrier, in addition to other compensation, is also required to pay a reasonable sum for medical, nursing, and hospital service, and for medicines, etc. Such obligation is an affirmative one on the part of the employer or his insurance carrier to provide and furnish an injured employee with such service. When the employer neglects or fails to do so, the employee may procure such service, and the employer or insurance carrier becomes liable for the reasonable value thereof. (Schneider, Workmen's Comp. L., p. 1231.)

The assistant superintendent of the sugar company, under whose direction the employee worked, within a few minutes after the accident, was informed of it and the manner in which it occurred. He also knew that the injury necessitated intermittent periods of loss of time by the employee for several months. On the record it is also inferable that he knew that the employee had sought medical treatment and was being treated for his injury. No offer was made by the employer to furnish or provide the employee with any treatment.

Had the employer furnished and provided the physician who wrongfully diagnosed the employee's condition as that of rheumatism, and because of negligence or unskillfulness of such physician the injury or condition of the employee was aggravated (without any negligence on the part of the employee) we think the employer under such circumstances would be liable therefor even though he had not been negligent in employing or furnishing the physician.

So, though it be assumed that the physician who diagnosed the employee's condition as that of rheumatism was negligent or unskillful, or incompetent, and that in consequence thereof the employee's teeth were extracted, yet, inasmuch as no claim is made that the employee was negligent in seeking or employing such physician, the aggravated loss or condition of the employee so occasioned by the negligence or unskillfulness of such physician can not be said to be due to an independent and intervening cause but must be held attributable to the accident resulting in injury which as a primary cause set in motion a train of events from which the aggravated condition resulted.

WORKMEN'S COMPENSATION—AWARD—RELEASE BY CONTRACT—*Walker* v. *State Compensation Commissioner et al., Supreme Court of Appeals of West Virginia (September 10, 1929), 149 Southeastern Reporter, page 604.*—Henry Walker, now totally blind, attributed the loss of his sight to a piece of coal which struck him in the right eye while he was engaged in a coal mine. After a delay of almost a year and when he had practically lost his vision, a report was made by his employer to the West Virginia compensation commissioner, and after some investigation an award of "total disability" for life was entered. Thereupon the employer protested and subsequent payments were suspended pending further investigation. No further payments being made, the employee placed his claim before the appeal board.

A letter from the compensation commissioner to the board of appeals explained the situation as follows:

Evidence was taken and filed in the matter of protest, and later, attorneys representing the claimant and the employer appeared at the department and stated that an agreement had been reached between the parties, by which if claimant were paid compensation for the months of June to October, both inclusive, his claim for compensation would be considered adjusted and settled. He had previously been paid compensation for the month of May. Pursuant to this agreement, there was issued on November 5th, check for $315.38, paying compensation for the period indicated, for which claimant executed and signed a receipt.

The appeal board determined upon an amount of $500 as justly due in addition to the sums paid Walker. Thereupon Walker brought action in the Supreme Court of Appeals of West Virginia to have this order set aside and an order entered directing the compensation commissioner to pay him according to the terms of the life award. He pointed out that the original finding of total disability had never been set aside and that it still remained in force. In reversing the decision of the compensation appeal board, the court said in part as follows:

To allow an agreement to close the account to stand in such cases might in many cases prove very disadvantageous to the claimant. An employer, by threats of having a case reopened and of statements of what he expected to prove, might cause many a timid and worthy claimant to accept a lesser sum rather than run a possible chance of losing all. Neither will the fact that payment was received prejudice a claimant's rights of appeal. (McShan *v.* Heaberlin, 105 W. Va., 447, 143 S. E. 109.)

Inasmuch as the agreement before the commissioner is of no legal effect, the action of the appeal board based thereon likewise falls. The order of the appeal board, therefore, will be set aside, and the claimant left to his legal remedy to collect the amount now accrued, over and above the $1,285.38 actually paid him, and such amount as

may become due pending future rulings of the compensation commissioner on the evidence now or hereafter brought before him; the jurisdiction of the compensation commissioner in such cases being continuing.

WORKMEN'S COMPENSATION—AWARD—REVIEW—SETTLEMENT AND RELEASE—*Wisconsin Mutual Liability Co. et al.* v. *Industrial Commission of Wisconsin et al., Supreme Court of Wisconsin (November 11, 1930), 232 Northwestern Reporter, page 885.*—An action was brought in the circuit court of Dane County, Wis., by an employer and its insurer to vacate an award made to the widow of an employee by the Industrial Commission of Wisconsin under the workmen's compensation act (Stat. 1929, sec. 102.01 et seq.). The employee, Gervase Hannon, was in the employ of a circus organization which was about to move from Manitowoc, Wis. Its equipment was dismantled and loaded on wagons. Tractors were pulling the wagons to the railroad for loading on flat cars, when a tractor ran over Hannon and killed him.

Two contentions were made by the insurer: (1) That Hannon was not performing any service at the time of the accident and (2) that a settlement entered into by the widow barred recovery in excess of the amount stipulated, which was less than the amount of the award.

The award was sustained by the circuit court and the case was appealed to the Wisconsin Supreme Court. Regarding the first contention made by the insurer, the latter court said:

Hannon's duty was to load equipment on a wagon, see that the wagon was taken to the train, and stay with the wagon until it was loaded on the train. He was seen beside his wagon shortly before he was run over, waiting for it to be taken. He had probably lain down near it and gone to sleep and was run over while so lying. It seems plain enough that Hannon was on duty when injured, and, if he was on duty, he was performing service incidental to his employment. Under such circumstances "he also serves who only waits."

The facts regarding the settlement entered into by the widow are as follows:

On November 23, 1927, the widow, the show company, and its insurer entered into a stipulation for settlement. It provided that by way of settlement the second parties offer and the first party agrees to accept $1,650 in full payment and discharge, and states that all parties request the industrial commission to affirm the settlement and make an award thereon. Payment was not made pursuant to the stipulation. The stipulation was received by the commission shortly after December 1. The commission on January 30, 1928, wrote the insurer that they wanted further information before acting on the stipulation, and on July 30 wrote that on their present information they could not approve the award. They made further investigation, however, and on February 23, 1929, the chairman of the com-

mission wrote the insurer that "on Saturday last the commission gave consideration to the proposed compromise and unanimously agreed that it should not be affirmed," and citations for hearing to conclude the proceedings were thereupon issued. The insurer objected to further proceedings because of failure of the commission to approve or reject the compromise within one year from its receipt.

In support of the second contention, the insurer relied upon section 102.16, Wisconsin Statutes, which provides that compensation "shall be subject to be reviewed by, and set aside, modified, or confirmed by the commission within one year from the date that such compromise is filed with the commission, or from the date an award has been entered, based thereon." The court, however, said the case at bar differed from the stipulations outlined in the statute. The court said:

The parties did not treat it as an absolute settlement. They did not make and accept payment in accordance with it. They requested the commission to "affirm the settlement." These two things indicate that it was not intended as a settlement unless the commission should approve it, that it would become effective only in such case; in other words, that it was a conditional rather than an absolute settlement. The letter of July 30, above referred to, clearly indicated that the commission had considered and taken action on the stipulation and that they did not "affirm" it and would not do so unless they received further information to cause a change of mind and reversal of action. We are of opinion that this was in effect a "review" and a "setting aside" of the stipulation within the meaning of the statute. Actions of the commission should be liberally construed to bring them within the purview of the statute and as effecting its purpose. The commission's action, "though somewhat informal in manner, was nevertheless action by" the commission.

The decree affirming the award was therefore affirmed.

WORKMEN'S COMPENSATION—AWARD—TEMPORARY TOTAL DISABILITY—LOSS OF MEMBER—*Lundgren* v. *Industrial Commission et al., Supreme Court of Illinois (December 20, 1929), 169 Northeastern Reporter, page 161.*—On March 23, 1922, Edward M. Iverson, while employed by Carl A. Lundgren, received an accidental injury which arose out of and in the course of his employment. The injury consisted of a fracture of the left femur. Iverson received medical treatment over a period of several years, but no cure was effected and he continued to have very little use of the injured leg. Although he was unable to resume his former occupation, he was able to do work which did not require the use of his injured leg.

Lundgren voluntarily paid compensation to Iverson at the rate of $17 per week for 250 weeks or until $4,250 had been paid, this amount being the maximum amount which could have been recovered as a death benefit.

On January 31, 1927, Iverson made application to the Illinois Industrial Commission for further compensation. The decision of the arbitrator denying further compensation was reversed by the commission and compensation was allowed for the permanent and complete loss of the use of his left leg. The case was appealed to the superior court, Cook County, and on August 9, 1927, while the case was pending, Iverson died. The superior court confirmed the award but reduced the amount to $17 a week from January 12, 1927, to August 9, 1928.

The case was appealed to the Supreme Court of Illinois by the employer, and in considering the question involved the court said:

Did the act of 1921 provide further compensation under paragraph (e) of section 8 where the employee had received, as temporary total compensation, an amount equal to the maximum award which could have been allowed as a death benefit under the act, if the employee had died as a result of the injury at the time thereof?

Paragraph (e) of section 8 of the act of 1921, under which the claim for additional compensation was brought, provides as follows:

"For injuries in the following schedule the employee shall receive, in addition to compensation during the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraphs (a) and (b) of this section, compensation for a further period, subject to the limitations as to time and amounts fixed in paragraphs (b) and (h) of this section, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provisions of this act."

The Supreme Court of Illinois held that the compensation act limited the amount of compensation payable for an injury such as Iverson received. The court in reversing the judgment of the superior court and rendering a judgment denying further compensation said:

The total amount which an employee may receive is limited to the amount which could have been recovered as a death benefit if he had died as a result of the injury at the time thereof. In this case the maximum amount which Iverson's heirs could have recovered, if he had died at the time of the injury, was $4,250.

The intent of the legislature to limit the total amount which an employee could recover to the maximum amount of the death benefit, except in the one case of permanent total disability, is manifested throughout the act, and particularly in paragraphs (a) and (d) of section 7, where it is provided that any compensation payments other than medical, etc., shall be deducted in ascertaining the amount payable at death. The policy of the act to limit the amount which an employee may recover to the amount which could be recovered as a death benefit, if the employee had died, is further evidenced by the fact that there is only one specific exception made in the act; that one being in the case of an award for total permanent disability under paragraph (f) of section 8. If the legislature has specifically

provided for this one exception in the entire class of injuries, the injuries not so excepted must be deemed to be in the general class, and all other situations are limited to the amount of the death benefit. We think the intent of the legislature to limit the amount which an employee can recover to the amount which could be recovered as a death benefit in case the employee had died is clearly apparent throughout the act, and we are of the opinion that an employee having recovered the maximum amount as temporary total disability can not recover a further award under the schedule of specific losses provided in paragraph (e) of section 8. In this case, the employee, Iverson, had been paid the maximum amount which he could have recovered under paragraph (b) of section 8. He was clearly not entitled to a pension for total permanent disability under paragraph (f) of section 8. Having received the full amount which he could recover under the limitations of paragraph (b), he was not entitled to any further award.

WORKMEN'S COMPENSATION—AWARD—TOTAL PERMANENT DISABILITY—PREEXISTING CONDITION—CAUSAL CONNECTION—*Reynold's Case, Supreme Judicial Court of Maine (March 21, 1929), 145 Atlantic Reporter, page 455.*—On December 3, 1927, one Reynold, employed as a carpenter, fell while performing a part of his duties and injured his left arm and shoulder. Following this injury he received compensation until June 2, 1928, when he signed a "settlement receipt" with the insurance carrier, which was duly approved by the Maine Industrial Commission. Reynold, thereupon, returned to work and attempted to take up the lightest and simplest of carpentry. Two weeks later he petitioned for further compensation as he was unable to perform any work involving the use of his left arm. The fracture of his left arm had resulted in an abnormal condition causing pressure on nerve centers of the brain, and prevented his using his limbs or fingers to such a degree that he could not do carpenter's work. This mental deficiency was termed by experts "cerebral congestion." The Maine Industrial Commission awarded further compensation for disability as a result of Reynold's mental condition and the case was appealed to the Supreme Judicial Court of Maine.

This court held that the mental disability of an employee, which is the sequence or effect of injury received in the course of his employment and arising out of it, and which incapacitates him to do the work of his employment, is compensable. The judge held that the mental abnormality was either caused by the injury or that a preexisting state of mental abnormality was excited and caused to flame up with overpowering vigor as a result of the injury, and that compensation should be paid for such a disability.

WORKMEN'S COMPENSATION—AWARD—VOLUNTARY PAYMENT—"WAGES"—*Sullivan* v. *G. B. Seely Son (Inc.) et al., Supreme Court of New York, Appellate Division, Third Department (September 19, 1929), 236 New York Supplement, page 377.*—Lawrence T. Sullivan was injured September 20, 1928, in the course of his employment with G. B. Seely Son (Inc.). During the entire time Sullivan was disabled the employer continued to pay him his full salary of $60 per week. He therefore met with no economic loss during the period he was unable to work. Under the compensation law his weekly allowance would have been $25. Sullivan filed claim with the State industrial board for an award under the New York workmen's compensation law. The board awarded him $25 per week as compensation on the ground that the wages paid to him by the employer were a "gift," and the employer, G. B. Seely Son (Inc.), and the insurance carrier appealed to the Supreme Court of New York, appellate division, third department.

After reviewing the evidence the court found it was quite evident that the purpose of the employer was to continue to pay the employee wages as a matter of justice in pursuance of its general policy. The court dismissed the contention that the payment was purely a "gift" because the employee rendered no service for the weekly wages paid, by saying it was for the employer to determine whether it received a benefit in good will and loyal service when it adopted the policy "to continue to pay the man his wages."

In conclusion the court said:

> It is sufficient to say that the employer, for reasons of its own, continued to pay the employee weekly wages, and therefore the latter has suffered no loss of earnings. Having freely consented to accept a substantial benefit from his employer, all equitable rules would hold the claimant estopped from recovering another sum, not based on a loss arising during the term of disability.

The award of compensation for disability was reversed and the claim dismissed.

WORKMEN'S COMPENSATION—AWARD AS VESTED RIGHT—DEATH FROM INTERVENING CAUSE—*Southern Surety Co.* v. *Morris, Court of Civil Appeals of Texas (January 8, 1930), 22 Southwestern Reporter (2d), page 1098.*—On October 12, 1927, O. E. Morris was in the employ of the Kroeger-Brooks Construction Co., and while acting in the course of employment in San Antonio, Tex., he sustained an injury to his right eye which resulted in the total loss of the sight of his eye. The employer was a subscriber under the Texas workmen's compensation act and the Southern Surety Co. had issued a

compensation policy covering the employees, which was in force at the time of the injury.

Claim for compensation was duly filed but before the Texas Industrial Accident Board rendered its decision Morris died, the death occurring February 21, 1928, and being from natural causes in no way connected with the injury to the eye. Thereafter the industrial board duly rendered its judgment and awarded compensation for 100 weeks at the rate of $20 per week.

The Southern Surety Co. appealed to the courts to set aside the award of the board, contending that as Morris had continued to work as usual after the injury and received his usual wage up to the date of his death, no compensation payments were necessary, and that the death of Morris from causes not resulting from said injury terminated its liability to pay compensation to the heirs of the deceased. The case was tried by the Bexar County district court of Texas and on the authority of Moore *v.* Lumbermen's Reciprocal Ass'n (258 S. W. 1051) judgment was rendered in favor of Mrs. O. E. Morris for compensation for 100 weeks at $20 per week.

The insurer appealed the case to the Texas Court of Civil Appeals, where the judgment was reversed, the court saying in part as follows:

As said in Southern Casualty Co. *v.* Morgan (Tex. Com. App., 12 S. W. (2d) 200, 201): "The workmen's compensation law consists in agreement (*a*) of the employer, (*b*) the employee, and (*c*) the insurer. (Middleton *v.* Texas Power & Light Co., 108 Tex. 96, 185 S. W. 556.) * * * A proceeding for compensation, brought against an insurer in respect to a policy issued to a subscriber duly authorized by the statute, is at bottom and in essence a suit upon a contract."

The many cases presented in the briefs, when accessible, have been carefully examined, and they confirm us in our belief and conviction that the judgment of the trial court is wrong. We follow the opinion of Judge Pleasants in United States Fidelity & Guaranty Co. *v.* Salser (Tex. Civ. App., 224 S. W. 557), which is directly in point and is supported by good authority, and properly construes our statute.

This leads to a reversal of the judgment and it is ordered that Mrs. Morris take nothing by her suit.

WORKMEN'S COMPENSATION—AWARD, BASIS OF, ETC.—DEPENDENCY—*Heughan's Case, Supreme Judicial Court of Maine (February 24, 1930), 149 Atlantic Reporter, page 151.*—Kenneth Heughan was killed on August 29, 1928, in an accident arising out of and in the scope of his employment. The mother and father of the deceased filed claim for compensation as partial dependents. At the hearing before the Maine Industrial Accident Commission it was found that the claimants were partially dependent on the de-

ceased son, a minor 17 years of age. It was agreed between the counsels and so found by the commission that during the year preceding the death, the deceased employee's cash earnings were $350, all of which, with the exception of $75 expended by him for clothing and spending money, was turned over to his parents to be used toward the support of the family. The commission awarded compensation for partial dependency at the rate of $9.95 per week for 300 weeks. It was later agreed that the amount should be reduced to $8.10 per week to take into account a period of 193 days the deceased lived with his parents without paying board.

The case was carried to the Supreme Judicial Court of Maine to decide whether or not in determining the amount contributed to the parents there should be deducted from the total sum the cost of the deceased employee's board during the 193 days he lived at his parent's home and paid no board.

In answering this question the court cited several cases from the State of Massachusetts, a State having the same provisions in the compensation act as those in the Maine act. The court in the former State held, in reaching the amount of compensation, that the cost of the deceased son's maintenance should not be deducted from the amount contributed by him to the dependents.

In concluding the opinion the Maine court said:

> We agree with the reasoning and words of Loring, J., in Gove's Case (111 N. E. 702), where he says: "Where the claimant is wholly dependent upon the deceased it is of no consequence whether he contributed all his wages or only a fraction of them to the dependent, and it is of no consequence whether the deceased did or did not receive any benefit from the dependent. The sum to be paid is measured by the wages of the deceased, not by the injury done to the dependent. Where the dependents were only partly dependent upon the earnings of the deceased the amount to be paid is a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee (to such partial dependents) bears to the annual earnings of the deceased at the time of his injury. (The same language essentially as in the Maine act.) The amount to be paid in case the dependent was partly dependent * * * only is to be a portion of that paid in case of those wholly dependent and the amount is to be determined on the same basis—that is to say, it is to be measured not by the injury done the dependent, but by that portion of the average weekly wages of the deceased which the amount of the wages contributed by him to the dependents bore to the amount of his annual earnings, without regard to the benefits, if any, received by the deceased from the dependents."
>
> We therefore hold in this case that, in determining the amount "contributed to dependents," no deduction of the cost of the deceased employee's board, while living at his parents' and paying no board, should be made.

WORKMEN'S COMPENSATION—AWARD, BASIS OF, ETC.—LUMP SUM—CONSTRUCTION OF STATUTE—*United States Fidelity & Guaranty Co. v. Nettles, Court of Civil Appeals of Texas (October 3, 1929), 21 Southwestern Reporter (2d), page 31.*—Mrs. W. R. Nettles was injured on May 25, 1927, in the course of her employment with the Goldstein-Migel Co. of Waco, Tex. The claim was duly presented to the Texas Industrial Accident Board and an award was made by the board. The insurer, the United States Fidelity & Guaranty Co., appealed to the district court, McLennan County, Tex. The jury found Mrs. Nettles had suffered injuries resulting in total permanent incapacity and that this was a special case in which manifest hardship and injustice would result if her compensation were not paid in a lump sum. The court thereupon entered judgment for Mrs. Nettles for $4,602.22, allowing a discount of 6 per cent on future payments in arriving at the amount to be paid in a lump sum. The insurance carrier then appealed to the Court of Civil Appeals of Texas, contending there was no evidence to support the verdict awarding compensation for total and permanent incapacity. The court reviewed the evidence showing Mrs. Nettles had been disabled for two years and had suffered severe pains as a result of the injury; reviewed the testimony given by four doctors that Mrs. Nettles was permanently disabled, and dismissed this proposition by saying that—

We have not set out all the evidence favorable to the appellee upon the issues here involved, but sufficient, we think, not only to show the issue of fact, as to whether appellee was totally and permanently disabled, was made by the evidence, but we think the finding of the jury that she was so disabled is sufficiently supported by the evidence, and we can not say said finding is against the overwhelming weight and preponderance of the evidence. [Cases cited.]

The next proposition in which the insurer contended the court erred was in rendering a verdict for a lump sum as there was no way the court could determine the correct method of discount for future maturing installments, and furthermore, the evidence did not show this to be a case where manifest hardship and injustice would result in case lump-sum settlement was not allowed.

Regarding the first of these contentions the court said, in part:

There is no complaint of the action of the trial court in reading into the contract sued upon said statutory provisions, resulting in appellant being charged with 6 per cent on the past-due installments. This is admittedly correct. We think the court was equally correct in discounting the future maturing installments at the same rate. It was certainly equitable and just for the rights of both parties to be determined by the same standard of measurement.

The court also dismissed the second contention by saying:

The record shows that appellee is a widow, has two sons and an orphan child dependent upon her for support and education; that she

owes $5,000 on her home; that her only means of support was her wages and what she could make from renting rooms; that since her injury she has not been able to work either for wages or in keeping roomers. The jury found that this is a case in which manifest hardship and injustice would result if a lump-sum settlement was not allowed. We think this finding of the jury is amply supported by the evidence, and hence this court has no right to interfere with such finding. [Cases cited.]

The court considered the other contentions made by the insurance carrier regarding the testimony and questions asked in the course of the trial and sustained the ruling of the trial court regarding them.

The court, having considered all of appellant's propositions and found no reversible error, overruled the same and affirmed the judgment of the district court.

WORKMEN'S COMPENSATION—AWARD, BASIS OF, ETC.—MULTIPLE INJURIES—PERMANENT TOTAL DISABILITY FOLLOWING TEMPORARY TOTAL DISABILITY—*Aetna Life Insurance Co.* v. *Bulgier et al., Court of Civil Appeals of Texas (June 8, 1929), 19 Southwestern Reporter (2d), page 821.*—The Aetna Life Insurance Co. brought this action in the Texas Court of Civil Appeals against Mrs. Ida Mae Bulgier and her husband to set aside an award made by the Texas Industrial Accident Board.

The facts in the case show that in August, 1926, Mrs. Bulgier, while in the employ of the Marcy Lee Manufacturing Co., of Dallas, Tex., accidentally fell and fractured her right arm. She remained at home under medical treatment until March, 1927, when she returned to the same character of work for her employer. In August, 1927, she again ceased work until November, 1927, when she returned to work in her regular employment until January, 1928. After that time she did not perform any work except "light work" for about one week for another employer. The industrial board awarded her $7 per week for 29 weeks as compensation, covering the period from the time she was injured until she again resumed work. In that claim the injury was described as a fracture of the arm, and no further damage alleged. She later claimed as damages the maximum allowance of 400 weeks for total permanent incapacity, alleging that as a result of the injury and the impingement and injury to the nerves radiating from her wrist and arm she suffered injury to her shoulders, back, and spine, as a result of which she became totally and permanently disabled from doing any kind of physical labor.

The Aetna Life Insurance Co. made the defense that in paying compensation from the time of the injury until the time she returned to work they had fully satisfied all legal demands upon them. Furthermore, the injury described by Mrs. Bulgier was an injury to the

arm and the compensation act provided that no compensation could be paid for such an injury to the arm for a longer period than 150 weeks. In regard to this latter defense, the court said:

We overrule appellant's contention that appellee, having given notice to appellant and to the accident board of a specific injury, to wit, an injury affecting the right arm, in that there were fractures on the bones of said arm in and around the wrist, that she is held, under the workmen's compensation law (Rev. Stat. 1925, arts. 8306–8309), to a claim for only a specific injury to the arm. We do not understand this to be the construction given the law by our higher courts in cases where the ultimate result of such injury was not confined to the injured member. The intention of the law is to give full remuneration under its schedule of allowances for the injury actually received, and the results actually flowing from such injury.

The testimony of appellee and one or two physicians was to the effect that a total incapacity to perform any kind of manual labor, resulting to appellee on account of her injury, was not confined to the arm, but involved other portions of her body, including her shoulders, back, and spine, because of the diseased condition of certain nerves caused by the injury. While this evidence was sharply contradicted by other competent medical testimony, it is a sufficient warrant for the jury's finding that the result of the injury totally disabled appellee for a period of 300 weeks.

The court continued the opinion:

Did the fact that appellee resumed the work of her previous employment after the elapse of 30 weeks from the date of her injury, and did this work for a number of weeks, establish the fact, as a matter of law, that her total incapacity to labor ended on the date she resumed such work? We do not think so, for the evidence in this case, in our opinion, clearly raised a jury issue on this question. * * * The circumstances under which appellee testified that she did this work was to the effect that her husband was an invalid and unable to work; that she had at home two small children and did not own a home, but had to pay rent; that under such circumstances she endured the pain and suffering attending the work, and attempted to earn money necessary for a living. The test is: Was her physical condition so impaired by the injury as that she is unable to secure and hold employment for physical labor? This evidence certainly raised the issue as to her legal incapacity to work during the time she did perform the labor mentioned above, and that she is unable to hold employment.

The court therefore overruled all assignments of error and affirmed the decision of the district court awarding compensation for 300 weeks in the sum of $7 per week.

WORKMEN'S COMPENSATION—"BUSINESS FOR GAIN"—COVERAGE—JURISDICTION—*Maryland Casualty Co. et al.* v. *Stevenson et al.*, *Supreme Court of Oklahoma (June 3, 1930), 288 Pacific Reporter, page 954.*—On September 21, 1928, Joe W. Stevenson suffered a per-

sonal injury while in the employ of the Lincoln Park Golf Club Co. The injury resulted in the total loss of the right eye. The State Industrial Commission of Oklahoma rendered an award of compensation and the insurance carrier appealed to the Oklahoma Supreme Court, contending that the golf club was not carried on for pecuniary gain and therefore was not covered by the workmen's compensation act. Regarding this, the court said:

If the golf club is carried on for pecuniary gain, then the industrial commission had jurisdiction to make the award. If, however, it is not carried on for pecuniary gain, then it did not have such jurisdiction. The land is owned by Oklahoma City. The golf club is owned and operated by a private corporation. Mr. Jackson, the secretary and manager of the Lincoln Park Golf Club Co., testified that the club was incorporated as a nonprofit organization. A fee is charged for the privilege of playing golf. The evidence discloses there never has been any real surplus in the treasury. All the money collected, after paying the salaries and all charges, is put back in improvements on the golf course. The testimony of Mr. Jackson that the club was operated as a nonprofit organization is more or less a conclusion. Nevertheless, it is not denied, and there is no evidence in the record to indicate that the club is organized and operated for pecuniary gain.

While it is our duty to give the compensation laws of this State a liberal construction, this does not relieve the claimant from proving facts sufficient to bring his cause within the meaning of the act. Under the facts as disclosed by this record, and under the rule announced in the above cases, we do not think the Lincoln Park Golf Club Co. is operated for pecuniary gain. Since we have reached that conclusion, it necessarily follows that the industrial commission had no jurisdiction to make the award. The order granting the award is vacated, with directions to dismiss the cause.

The award was therefore vacated.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—CONTRACTOR—JURISDICTION—*Le Blanc* v. *Nye Motor Co. et al., Supreme Court of Vermont (October 1, 1929), 147 Atlantic Reporter, page 265.*—Wilfred Le Blanc began work for the Nye Motor Co. in April, 1925, under an oral contract, by the terms of which he was to sell both new and used automobiles on a commission basis. He was a stonecutter by trade, and it was understood that he could work at his trade during the usual working hours and that under this arrangement he would work for the motor company only "after hours," Sundays, and holidays. On June 13, 1926, "while so employed," he was demonstrating a car on a highway, near a one-way bridge. As he approached this bridge he saw a car coming from the opposite direction and stopped on the right hand side of the road to allow the car to cross the bridge first. It crossed the bridge at a rapid speed and collided with his

car, causing the injuries for which compensation was sought. Le Blanc proceeded under the workmen's compensation act of Vermont and the commissioner held Le Blanc was at the time of the accident an employee of the motor company, that his employment was not purely casual, and that the accident arose in the course of such employment. From this holding the company appealed to the Supreme Court of Vermont.

After restating the facts, Mr. Justice Slack delivered the opinion of the court, saying in part as follows:

On these findings it can not be said that the commissioner erred in holding that claimant was an employee of the motor company. The master test in determining whether one who is performing work for another is a servant or an independent contractor is the right of the latter to control the work, to direct the means and methods by which it shall be done. [Cases cited.] But it is said in the former case, and cases there cited, that it is the right to control the work that determines, actual interference being unnecessary. The motor company, as we have seen, had complete control respecting the terms of all sales, unless, perhaps, sales for cash. While it appears that it exercised no control over claimant's work in other particulars, it does not appear that it did not have the right to do so.

The second holding of the commissioner which is challenged by defendants' appeal was erroneous. Whether employment is "purely casual" within the meaning of our statute is to be determined by the contract for service.

It is the uncertainty and irregularity of claimant's service under this contract, as it appears, and not the fact that what he might do would be done outside the hours he worked at his trade, that characterizes the nature of his employment. Nor does the fact that the accident occurred more than a year after the contract was entered into change the situation, since there is no finding respecting the regularity of his services in the meantime. While it may be difficult in some instances to determine whether service is purely casual or otherwise, in order to entitle a claimant to any standing under our statute something more concerning the regularity and certainty of the service must appear than is disclosed in the instant case.

Since claimant's employment was purely casual, the commissioner was without jurisdiction to make the other rulings appealed from, therefore they are not considered.

The order was therefore vacated and the proceedings dismissed.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—POWERS, ETC., OF COMMISSION—PROCEDURE—*Ingram et al.* v. *Department of Industrial Relations, Division of Industrial Accidents and Safety et al., Supreme Court of California (January 6, 1930), 284 Pacific Reporter, page 212.*—J. A. Stoolfire, an independent contractor engaged in carpentry work, was employed by J. E. Ingram, a lawyer, to perform certain finish carpenter work on the inside of a house. The

house was not Ingram's home, but it was acquired by Ingram and his wife, and the title was taken in the name of the wife. They owned no other similar property and it was their purpose to repair and improve the place for rental or for sale.

It was necessary that Stoolfire await the completion of the lathing and plastering before he could commence his inside carpentering work. In the meantime he was engaged by Ingram to do odd jobs outside of the house and about the place at 75 cents per hour. While Stoolfire was painting the roof of the house at Ingram's request, he fell and received an injury, for which compensation was sought.

The California Industrial Accident Commission made an award in November, 1926, whereupon Ingram filed a petition for rehearing, which was denied in January, 1927. In February he filed a "Petition to set aside order denying rehearing and for rehearing and for order under section 16, workmen's compensation act." The commission granted this petition, referring in its order to the petition as one for a "rehearing." Following this "rehearing" the award theretofore made was rescinded and annulled, and a final decision and award made on July 27, 1928. Minnie H. Ingram, the wife, then filed a petition for a rehearing of this award and the petition was denied by the commission on August 20, 1928. Her husband did not petition for a rehearing at this time.

J. E. Ingram and his wife appealed to the Supreme Court of California to annul the final award made by the commission. The court first considered the question of procedure to determine whether the court had jurisdiction of the case. The court concluded that where the commission treated a petition to set aside an order denying a rehearing as a petition for rehearing, the petitioner could petition for review, though he did not file a petition for rehearing following the final decision. This holding allowed both husband and wife to petition the court for review.

The next point urged by Ingram was that the employment of Stoolfire was both casual and not in the course of the trade, business, profession, or occupation of the employer. The court cited the Rissman Case holding that the employment must not only be casual but also not in the business, etc., of the employer in order that the employee be excluded from the benefits of the act. The court said:

It was therein said, at page 622 of 190 Calif., 213, Pac. 992: "The defense of casual employment is not available unless the employment was not only casual as defined by the act, but also not in the trade, business, profession, or occupation of the employer. If either of these conditions be present, the employee comes within the provisions of the act." Therefore, when the commission, as here, found on sufficient evidence that the employment of Stoolfire was not casual,

the fact that his employment did not tend toward the preservation, maintenance, or operation of the business, business premises, or business property of his employer did not necessarily exclude him from the benefits of the act.

Finally it was contended that the claim was barred as against Minnie H. Ingram by limitation of time under section 11 of the act. Stoolfire had, within six months, filed his claim against J. E. Ingram alone, and not until a later date was the wife's name added.

This contention was upheld by the court and Minnie H. Ingram was relieved of liability. However, the award against J. E. Ingram was affirmed, the court saying in part as follows:

The petitioner, Minnie H. Ingram, was guilty of no act of commission or omission prior to the running of the statute in her favor by which the status or rights of the employee or the authority of the commission were in any wise prejudiced, and at no time has she waived her rights under the statute. When she was ordered into the proceeding as a party, she interposed the bar of the statute, and has at all times relied upon the same. "The general rule is well settled that, when new parties are brought in by amendment, the statute of limitations continues to run in their favor until thus made parties. The suit can not be considered as having been commenced against them until they are made parties." (37 Cor. Jur. 1066, and cases therein cited.)

It is assumed that, on the facts as they developed during the additional hearings before the commission in this matter, the petitioners herein were subject to a joint and several liability on account of the injury. Satisfaction from one would therefore be satisfaction as to both. Consequently this is not a case where the bringing in of an additional party is essential to a recovery against the person already a party. The claim for compensation is against the employer or employers if there be more than one. In a case of this sort the statute affords the claimant 6 months to proceed against his employer, and the words "further claims" do not relate to an additional employer, but to additional claims against the same employer.

From what has been said it follows that the award as to Minnie H. Ingram must be annulled, and that the award as to J. E. Ingram must be affirmed.

WORKMEN'S COMPENSATION—CAUSAL CONNECTION—ACT OF GOD—COMMON HAZARDS—*Kennedy* v. *Hull & Dillon Packing Co. et al., Supreme Court of Kansas (March 8, 1930), 285 Pacific Reporter, page 537.*—Samuel G. Kennedy was employed as a traveling salesman by the Hull & Dillon Packing Co. and given as his territory towns in certain counties of Kansas, Oklahoma, and Missouri. He lived in Pittsburg, Kans., where the packing company was located, and covered his territory in an automobile. On the morning of June 20, 1928, he started on a trip from Pittsburg, expecting to make his first call at Crestline in Cherokee County, Kans. When

he reached a point 8½ miles south of Pittsburg, he ran into an electric wire which had been thrown across the road in a storm, and was killed.

His widow made a claim for compensation and was allowed compensation in the amount of $4,000 and the sum of $150 for funeral expenses. The employer and insurance carrier appealed to the district court, Cherokee County, and the court affirmed the award of the commission. The case was then appealed to the Supreme Court of Kansas by the employer, who contended that Kennedy's death did not arise out of and in course of his employment in that he was on his way to assume the duties of his employment but had not reached the first stopping place on the trip. The Kansas Supreme Court held that Kennedy should be regarded as within his territory and in the course of his employment when the accident occurred. The court said his work differed from one employed in a factory who might have been injured on his way to the factory where his work was to be performed. In such a case the worker would not be entitled to compensation, but the present case differs, in that—

Kennedy's work required that he travel from place to place in the allotted territory in an automobile, calling on regular customers and in seeking to procure new ones. It was left to him to determine the roads he would travel over in doing his work. He was expected to keep in touch with the plant in Pittsburg, and to promptly phone in orders obtained. While out canvassing the territory he was under the supervision of the defendant, and subject to its orders. The place of work was not the boundaries of towns where orders were solicited or collections made. All contemplated that travel was necessary for the performance of his duties, and that it would take him through the counties named.

It was also contended that the employer should not be liable as the death of Kennedy was caused by "an act of God." The court said, however, that Kennedy was not killed during the storm or exclusively by the violence of nature; he came to his death by coming in contact with high-voltage wires, an instrumentality of human agency.

In concluding the opinion the court affirmed the judgment of the lower court and held that there was a causal connection between the employment of Kennedy and the injury.

The court said:

It is said that the hazard was one common to all persons using the highway. His work involved daily traveling over the highways in the performance of his duties, and it became his place of work. His employment enjoined upon him traveling from place to place within his territory almost continuously in the discharge of his duties. He was using the highway in his employer's service when he was injured and was much more exposed to its hazards than people generally. We think that the service and injury was clearly an incident of his employment.

WORKMEN'S COMPENSATION—CAUSAL CONNECTION—ACT OF GOD—TORNADO—*American Shipbuilding Co.* v. *Michalski et al., Court of Appeals of Ohio (September 28, 1928), 164 Northeastern Reporter, page 123.*—On June 28, 1924, a destructive tornado passed over the city of Lorain, Ohio, doing great damage and causing the death of more than 70 persons. On that day Joseph Michalski was in the employ of the American Shipbuilding Co. as a fireman, and was working in the power house at the time the tornado passed over the plant. As the wind began to blow unusually hard, the foreman of Michalski directed him to close one of the large steel doors in the front of the power house. While the foreman started toward the rear door with the intention of closing that himself, but before it was accomplished, he realized that it was especially dangerous for Michalski to attempt to close the front door, and thereupon attempted to call Michalski back but was unable to make him hear. The wind blew out a portion of the side of the building where Michalski was sent to close the door, and he was killed during the storm. After the tornado had passed, Michalski was found some 200 feet away from the building. The foreman who gave the order was not injured, and if Michalski had remained where he was when the order was given he probably would not have been injured.

The Ohio Industrial Commission denied compensation to Sophia Michalski, the widow. She thereupon appealed to the Court of Common Pleas of Ohio, where she was awarded compensation. The company then appealed the case to the Court of Appeals of Ohio, Lorain County, claiming that Michalski was killed by the forces of nature and not by a cause which arose out of or was connected with his employment. As authority they cited the case of Slanina *v.* Industrial Commission (117 Ohio St. 329, 158 N. E. 829), wherein the Ohio Supreme Court stated the law to be:

In case an employee, in the discharge of the duties of his employment, is injured as a result of the unexpected violence of the forces of nature, to wit, "a destructive tornado," where his duties do not expose him to a special or peculiar danger from the elements which caused the injury, greater than other persons in the community, such employee is not entitled to compensation under the workmen's compensation act.

The court considered this case different from those cited by the counsel for the company and after a discussion of the questions involved in the case, concluded the opinion by saying:

We have reached the conclusion that, upon principle, the holding should be that the giving of said order, under the circumstances indicated, exposed Michalski to danger in such a way that his employment had a causal connection with his death; that he was not merely present at the place of the accident because of his employment,

but was exposed to a special danger to which his fellow employees and other persons in the community were not exposed.

We hold that where, during a tornado, an employee, by specific order of the master, is directed to go to a place of increased danger for the purpose of preserving the master's property, and while obeying such order is injured by such tornado, such injury constitutes an accident arising out of his employment, within the meaning of the workmen's compensation act, and that the trial court reached the correct conclusion in this case when compensation was awarded. The judgment is therefore affirmed.

WORKMEN'S COMPENSATION—CAUSAL CONNECTION—COURSE OF EMPLOYMENT—HEART DISEASE—*Cronin* v. *American Oil Co., Supreme Court of Pennsylvania (November 25, 1929), 148 Atlantic Reporter, page 476.*—On August 28, 1928, J. A. Cronin was employed as a service station attendant by the American Oil Co. His hours of labor were from 3.30 p. m. to midnight. He collected the proceeds of sales made and a safe was provided at the station for their deposit; the company also carried burglary insurance. No order required that he keep the funds in his own charge after hours, though the evidence showed that ordinarily he carried the day's receipts to his home, returning with them the next afternoon. This custom was neither expressly approved nor dissented from by the company.

On the night in question within a few minutes after closing time Cronin left for his home, carrying funds of the company amounting to $1.85. When he had gone 10 or 11 blocks from the station he was robbed by three men. There was no evidence that the highwaymen were aware that Cronin was an employee of the oil company or that he was accustomed to carry cash belonging to the oil company. Others arrived at the scene and the assailants fled. Cronin ran into the street and fell in the middle of the car tracks bruising his left side.

He reported at work the next day and continued his occupation without interruption until September 30, then left and returned on October 24. His service lasted until December 16, when he became incapacitated and was taken to the hospital, where he died on February 24 following. No claim for compensation was made during his lifetime, but thereafter the widow demanded payment and petitioned for an award. The Pennsylvania Workmen's Compensation Board awarded compensation to the widow and the award was approved by the Allegheny County court of common pleas. The employer appealed to the Supreme Court of Pennsylvania, contending that the injury was not in the course of the employment and, further, that no adequate proof was shown of a causal connection between

the employment and the death, which the employer contended was the result of heart disease.

In reversing the decision of the lower court and denying compensation the Pennsylvania Supreme Court said in part:

Cronin was a mere volunteer in carrying the money of the company, another place for its deposit having been provided, and his employment ceased when he left the filling station. The practice to act as he did, though it may have been known to defendant, does not constitute an extension of the course of employment, so as to cover the intermediate distance to his home, and what would necessarily follow.

It may further be noted that there is nothing to show that the deceased was attacked by the robbers 10 or 11 blocks from his place of work because of their knowledge that he carried the company's funds or might have such in his possession. He was set upon, as might have been any other pedestrian passing on the highway. Though the defendant, upon whom the burden of proof rested, failed to show affirmatively that the injury was inflicted as a result of personal enmity toward the one assaulted, thus excusing the employer * * * yet the evidence does disclose that the robbery had no relation to the employment of the deceased and that he was not at the time in the course of his regular service. The hold-up was unconnected with the allotted duty of Cronin. His presence on the street after midnight, occasioned by his hours of service, gave convenient opportunity for its commission, but his employment was not the cause of the wrongful act. At the time of the injury he was no longer engaged in furtherance of the master's business. It follows, from what has been said that no award can be made in the present case.

The Supreme Court of Michigan held that the death of an oil station employee as the result of an accidental discharge of a revolver in the hands of a fellow employee did not arise out of the employment within the Michigan workmen's compensation act (Comp. L. 1915, secs. 5423–5495), in view of evidence that it was not the employer's policy to permit employees to keep firearms at such stations, that they were instructed not to resist hold-ups, and that the employer did not know the employees had a revolver at the station. (Bull et al. *v.* Wayco Oil Corporation et al. (1930), 229 N. W. 597.)

WORKMEN'S COMPENSATION—CAUSAL CONNECTION—EVIDENCE—*Francis* v. *Swift & Co., Court of Appeal of Louisiana (March 10, 1930), 126 Southern Reporter, page 699.*—George Francis filed suit against Swift & Co., alleging that on February 25, 1928, he was engaged in sweeping oil from the bottom of an oil-tank car belonging to Swift & Co. and that due to the slippery condition of the tank car he fell, and in some manner his right leg was caught in a series of coils into which steam had been pumped, and that before he could extricate his leg it was severely burned.

From the evidence it appeared that following the accident the company paid him compensation at the rate of $8.13 per week from the date of the accident until July 14, 1928, when further compensation was refused him.

Francis contended that as a result of the burns which he received on his right ankle an injury had been caused to his nerve and muscle structure, causing him to be totally disabled from doing work of any reasonable character. The Twenty-fourth Judicial District Court of Louisiana rendered a verdict in favor of the company and dismissed the suit. Thereupon Francis appealed to the Court of Appeal of Louisiana. Swift & Co. contended that Francis had entirely recovered from his injury and that there was no connection between his present condition and the injuries received while working in the tank car.

The appeal court in affirming the decision of the lower court denying compensation, said in part as follows:

Not one of the four or five medical experts, whose testimony appears in the record, appears very certain as to the reality of the pain of which the plaintiff complains; but, assuming his condition to be as serious as he contends, the evidence is overwhelmingly to the effect that sciatica, neuritis, etc., could not have been caused as a result of the burn on his right ankle. In the first place, an injury to the nerve in the region of the ankle can not affect the sciatic nerve in the hip, since the doctors explain that nervous degeneration takes place from the nerve center and not to it, the anatomical construction of the nerves being such that impulses go from above downward. Nor is there any support in the record for the theory advanced by plaintiff's counsel to the effect that the injury to plaintiff's ankle served to awaken into activity a dormant disease which manifested itself in this case in the form of sciatica.

We are asked to disregard the medical testimony in the record, though it is admittedly given by men of the highest standing in their profession, and to consider only the fact that prior to the injury plaintiff had no sciatica and subsequently thereto he developed this trouble without any apparent reason. * * * In the case at bar it has been demonstrated to our entire satisfaction that whatever malady affects the plaintiff, whether permanent or otherwise, it has nothing to do with the original accident, the burn to plaintiff's ankle, and there can be no liability on defendant's part except for the consequences of the injury received in the course of plaintiff's employment. In cases of this kind we must to a great extent rely upon the testimony of medical experts.

WORKMEN'S COMPENSATION—CAUSAL CONNECTION—EVIDENCE—*Republic Box Co.* v. *Industrial Commission et al., Supreme Court of Illinois (October 19, 1929), 168 Northeastern Reporter, page 300.*—Oscar Williams, on October 20, 1925, while in the course of his employment with Republic Box Co., ran a sliver into his hand, from which an infection followed. Williams died on May 19, 1926. The

widow and children of the deceased filed application with the Illinois Industrial Commission. The arbitrator recommended that no award be made, but on review the industrial commission awarded compensation. The case was taken to the circuit court, which court "reversed the commission and remanded the cause for further hearing on the question of the causal connection between the death of the deceased and the accident. On rehearing an award was reentered by the commission and another review sought by certiorari in the circuit court. On this hearing the court set aside the award on the ground that the records did not show the happening of an accident."

Following this action the case was taken to the Supreme Court of Illinois for review and attention was called to the report made by an insurance company as sufficient proof of the accident.

In rendering the opinion of the court, Mr. Justice Stone said:

The record here presents two questions: (1) Whether the death of the deceased is shown to have been caused by the accident claimed to have occurred; and (2) whether the report of the insurance company to the industrial commission is competent evidence and may be taken as prima facie evidence of the occurrence of the accident.

To sustain the award for compensation entered there must be evidence in the record showing that the death was traceable to an injury which arose out of and in the course of the employment of the deceased. An award may not be based upon imagination, speculation, or conjecture, but must be based upon facts established by a preponderance of the evidence. [Cases cited.] In this case, though it be assumed that an accident to the hand of the deceased occurred on October 20, 1925, which arose out of and in the course of the employment of the deceased with defendant in error, there is no evidence that that injury caused or contributed to the death of the deceased. The only expert testimony which could be said to in any way tend to establish causal connection between the death and the injury was the statement that myocarditis might have been caused by this infection to the hand. There is no evidence here that in any way tends to show that it was so caused. The deceased died of myocarditis seven months after the alleged injury, and, as the evidence shows, more than six months after infection to his hand had entirely healed without glandular involvement. It is also shown that myocarditis may arise from one of many causes. To say that it arose from an infection to the hand received on October 20, 1925, in the face of the testimony that the hand was completely cured of the infection by November 16, when the deceased returned to work, would be to base the cause of death on mere conjecture. This the commission is not permitted to do. The award is without foundation in the evidence.

Since for this reason the award can not be sustained, it is not necessary to determine the admissibility of the report of the insurance company to the industrial commission as evidence of the occurrence of the accident.

The judgment of the circuit court is affirmed.

WORKMEN'S COMPENSATION—CAUSAL CONNECTION—FAILURE TO USE SAFETY DEVICE—EYE INJURY—*Pino* v. *Ozark Smelting & Mining Co., Supreme Court of New Mexico (July 17, 1930), 290 Pacific Reporter, page 409.*—On September 1, 1926, Lorenzo Pino received an injury to his eye while in the course of his employment. The eye was hit and abrased by a piece of rock flying from a hammer with which he was breaking ore. A cataract formed and later caused total blindness. As both the employer and employee were covered by the New Mexico workmen's compensation act, compensation was awarded to the injured employee. Suit by the company followed in the Socorro County district court, where the award was affirmed. Both parties appealed the case to the Supreme Court of New Mexico, the employer contending there was no causal connection between the injury and the cataract. Regarding this, the court said:

Perhaps, upon the opinion evidence alone, there would be warrant for defendant's contention that it would support only a conjecture as to the cause of the cataract. But there were other facts which the jury might consider. Traumatic cataract is of frequent occurrence. No one suggested any cause for this cataract other than the wound. The time sequence is favorable to plaintiff's theory. He testified that he had suffered no other injury, had never previously had trouble with the eye, and that, so far as he knew, it was normal, and that he hadn't "seen anything with it" since the injury, that it pained him a good deal, and required covering with bandage or dark glass for three months. One physician was of opinion that such facts indicated infection. If the jury believed plaintiff's testimony it could not reasonably reach any different conclusion than it did.

The employee also appealed from that part of the judgment providing for a 50 per cent reduction in compensation because he failed to use a safety device furnished by the company. As to this, the court said in part:

Plaintiff contends finally that the evidence does not warrant holding the goggles to have been a reasonable safety device. There was evidence that the men refused to wear them in the belief that the glass increased rather than lessened the hazard; that in one instance a glass had been broken, though no injury resulted; that soon after plaintiff's injury the use of glass goggles was abandoned for wire goggles. But there was also evidence that the use of the goggles was well calculated to prevent such injuries as that suffered by plaintiff; that the real reason the men objected to them was that they were hot, would sweat and interfere with vision; that the goggles were so constructed that upon the breaking of the glass it would fall outward and cause no injury. Certainly the purpose of furnishing them was to promote safety, and the court, in concluding that it was a reasonable requirement, is well within the evidence.

The decision of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION—CAUSAL CONNECTION—LATENT DEFECT—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Patrick* v. *Grayson & Yeary et al., Court of Appeal of Louisiana (March 24, 1930), 127 Southern Reporter, page 116.*—Ivan Patrick began work for Grayson & Yeary about the 1st of February, 1929, and on the 5th of March, while attempting to crank an engine used to operate a pump which furnished water for the sawmill and planer, he felt a severe pain in his back. He was forced to sit down and remain there about 10 minutes before he could get up. As soon as he was able to do so he returned to the mill, a distance of approximately a half mile, and reported to Mr. Yeary, one of the partners, who was in charge of the mill, that he had hurt his back trying to start the engine. About a week or so after the accident, Patrick, on his own accord, visited a physician, who doctored him and diagnosed his trouble as a sprain of the sacroiliac joint. His back continued to hurt him and on May 10, 1929, he quit work. He stated that he "worked under difficulty and did not do any more than he had to," that other men in the mill assisted him in his work, and that he really was not able to carry on the work. There was evidence, however, that Patrick was suffering from arthritis of longer duration than the time of the injury.

The first judicial district court, Parish of Caddo, La., awarded compensation to Patrick in the sum of $15 per week for a period of not exceeding 300 weeks. From this judgment the employer appealed to the Court of Appeal of Louisiana, contending that "one who suffers an injury at a time he is suffering from a disease or disability must show to what extent the injury received by him in the course of his employment and growing out of it increased the disability." The case of Bauman *v.* Newman (5 La. App. 119) was cited as authority.

The court, however, citing cases holding "that the compensation paid injured workmen under the workmen's compensation act is based upon disability, and that it is immaterial whether the injury alone, or in conjunction with a latent systemic infection, caused the disability," concluded, "we see no good reason for adopting the rule in the case of Bauman *v.* Newman which, we think, is erroneous, and will adhere to the well-settled jurisprudence of this State on this point."

The counsel for the employer also contended that the injury received by Patrick was not due to any accident such as is contemplated by the Louisiana Act No. 20 of 1914; that there was no specific strain sufficient to cause injury or accident as provided by the compensation act. In answering this contention the court quoted

from the case of McMullen *v.* Louisiana Cent. Lumber Co. (2 La. App. 773), in which case the court said:

The term "accident," as employed in the compensation acts, is broad enough to include an injury from muscular strain or physical overexertion, such as hernia or rupture or bursting of blood vessels. This is true although the physical condition of the employee is such as to predispose him to the injury. But it has been held there must be a definite, particular occurrence to which the injury can be attributed. * * *

Acceleration of a diseased bodily condition may constitute a personal injury, and an injury may be by accident, although it would not have been sustained by a perfectly healthy individual.

The court felt that this decision and others cited were decisive of the issue and that Patrick was injured by accident as contemplated in the compensation act. The court therefore affirmed the judgment of the lower court.

WORKMEN'S COMPENSATION—CAUSAL CONNECTION—LIMITATIONS—INJURY RESULT OF ELECTRIC SHOCK—*Travelers' Insurance Co. et al.* v. *Ohler, Supreme Court of Nebraska (November 14, 1929), 227 Northwestern Reporter, page 449.*—On October 3, 1926, while Harry C. Ohler was in the performance of his duties as an employee of the Patriot Manufacturing Co. he received an electric shock. He received treatment on two occasions shortly thereafter from his employer's physician. He did not consider the injury very serious at the time, but continued his work with slight interruptions until October 29, 1927, when he voluntarily quit work because of his alleged incapacity to perform his duties.

He filed a claim for compensation under the Nebraska workmen's compensation law, alleging that as a direct result of the accident he had suffered a loss in weight, suffered severe and continuous headaches, and was incapable of concentrating his mind upon his work. The district court for Lancaster County, Nebr., denied the compensation on the grounds—

(1) That the disabilities of appellant were not caused nor contributed to by the accident; (2) that no notice of claim for compensation was given within six months from the date of injury; and (3) that no action was commenced by filing a claim before the compensation commissioner until more than a year had elapsed from the date of the accident.

From this decision Ohler appealed the case to the Nebraska Supreme Court. The supreme court had ruled in previous cases that the findings of the trial court would not be disturbed in compensation cases if supported by competent evidence. After reviewing the evidence, the court said in part as follows:

We are required, therefore, to determine whether the finding of the trial court is supported by sufficient competent testimony, or whether it is clearly wrong. There is no conflict in the record that appellant suffered an electric shock, nor of the fact that thereafter he became afflicted in the manner above indicated, and that he is now practically disabled from performing his ordinary duties. The only conflict is as to whether that condition is the result of the electric shock. Upon a consideration of the entire record, we think that the great weight of the testimony indicates very clearly that appellant's disability is a result of the electric shock which he received in October, 1926. Indeed, one of the experts called by appellees admitted that his condition was in part due to the electric shock. An examination of the entire record convinces us that the finding of the trial court is not sustained by sufficient evidence and is so contrary to the weight of evidence as to be clearly wrong.

Having determined that Ohler had sustained a compensable injury, the court considered whether he should be deprived of compensation because of his failure to give notice of claim and to commence his action within the time prescribed by the statute. After citing several cases the court said:

The record in the present case discloses that the injury received by appellant was of a latent character and did not develop so that he was aware of the fact that he had a compensable injury until long after the time for filing claim and commencing action, by the strict letter of the statute, had expired. We think the facts presented in this case bring it within the rule announced in the authorities just cited, and that the defense that notice of claim was not given, or the action commenced within the statutory period, is not available to the appellees in this case.

The judgment of the district court was reversed, with directions to award compensation according to the statute.

WORKMEN'S COMPENSATION — CAUSAL CONNECTION — OCCUPATIONAL DISEASE—*Galuzzo* v. *State et al., Supreme Court of Errors of Connecticut (March 31, 1930), 149 Atlantic Reporter, page 778.*— Vincenzo Galuzzo was in the employ of the State highway department on March 5, 1928. He was a regular and energetic worker and had lost but two or three days' time during his five years' employment. On March 5, 1928, after working in the open air along the highway where the temperature was about 28°, at 3 o'clock in the afternoon he became sick. The foreman took him home and a physician was called the following morning, who found "a beginning pneumonia" which progressed and caused his death on the 13th. The widow filed claim under the Connecticut workmen's compensation law for compensation, contending that the deceased suffered a compensable injury—pneumonia—caused by the exposure to which deceased was subjected on the previous day while work-

ing on his job and therefore it arose out of and in the course of his employment. The commissioner decided adversely to this claim and denied compensation, saying that if the pneumonia were traceable in any degree to the employment it could only be traced through weakened resistance and lowered vitality. It therefore came within the prohibition of chapter 307, section 7, of the Public Acts of 1927 of Connecticut providing that "A personal injury shall not be deemed to arise out of the employment unless causally traceable to the employment other than through weakened resistance or lowered vitality."

The conclusions of the commissioner were unsuccessfully attacked upon the appeal to the superior court, New Haven County, and the widow appealed to the Supreme Court of Errors of Connecticut, on the ground that they were not only inconsistent with the subordinate facts but unreasonable and unsound. In discussing the widow's right to recover, the court said:

First, it should be noted that pneumonia is not an "occupational disease" within the meaning of the act, for the latter is "a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such." (Gen. Stat. sec. 5388, amended by Pub. Acts 1919, ch. 142, sec. 18, by Pub. Acts, 1921, ch. 306, sec. 11, and Pub. Acts 1927, ch. 307, sec. 7.) Since compensation is now given only for personal injury and occupational disease, the claimant's right to compensation in this case must therefore rest upon proof that the deceased suffered a "personal injury," and this must be "only accidental injury which may be definitely located as to the time when and the place where the accident occurred." (Pub. Acts 1927, ch. 307, secs. 2 and 7.)

The court cited several cases previously decided wherein they allowed compensation not only for occupational diseases but for any disease arising out of and in course of the employment, even though it was not traced to a definite happening or event. The court said, however, that these cases were decided according to the amendment of 1919 and were therefore inapplicable to the case at bar as the amendment of 1927 applied.

After reviewing the medical testimony regarding pneumonia, the court concluded the opinion in part by saying—

We interpret the consensus of these medical views to be that a lessened vitality and an increased susceptibility to infection could have been the direct and contemporaneous result of the exposure; that this lowered resistance permitted the pneumococcus germ to gain a foothold and thereafter resulted in the disease of pneumonia. "* * * The contemporaneous consequences of the decedent's exhaustion was not a localized injury, but a general or systemic condition of weakened resistance to disease, from which pneumonia developed in the ordinary course and without the intervention of a localized injury contemporaneously caused by the conditions of his

work." (Dupre *v.* Atlantic Refining Co., 98 Conn. 650, 651, 120 Atl. 288, 290.)

It appears quite conclusively that the pneumonia was not a contemporaneous result of the exposure and that the only contemporaneous result which could have been caused was a weakened resistance and a lowered vitality.

We hold therefore that the conclusion of the commissioner that the pneumonia in this case "could only be traced through weakened resistance and lowered vitality" of the deceased was a sound and reasonable one.

The statute of 1927 forbids compensation where the injury is causally traceable only "through weakened resistance or lowered vitality," and we must concur with the commissioner and the trial court in holding that this is not a case of compensable injury.

In a case where claimant's husband died of pneumonia resulting from unusual exposure during the course of his employment in the Lehigh Valley coal mine, the Supreme Court of Pennsylvania held that an injury following an extraordinary exposure to wet and cold may be compensable under the workmen's compensation statutes on the same principle as a prostration resulting from heat, as may death from pneumonia caused by an injury or unusual exposure. (Broch *v.* Lehigh Valley Coal Co. (1929), 147 Atl. 899.)

WORKMEN'S COMPENSATION—CAUSAL CONNECTION—POWERS, ETC., OF COMMISSION—MEDICAL FEES—*Souza's Case, Supreme Judicial Court of Massachusetts (December 31, 1929), 169 Northeastern Reporter, page 425.*—On August 6, 1919, Emili Souza, an employee of the Globe Yarn Mill at Fall River, Mass., sustained an injury to her thumb by having it drawn into a calender roller. At a hearing before a member of the Massachusetts Industrial Accident Board it was decided, on conflicting evidence, that the employee as the result of her accident was suffering from hysterical paralysis of the right extremities. This was approved by another member at a later date and compensation was awarded.

On October 1, 1926, the employee requested a hearing by a member of the industrial board upon the petition of several doctors asking that the insurer be charged with the payment of their bills for medical services rendered her as a result of the injury. The member of the board decided that the insurer should not be charged with the payment of these bills.

On October 27, 1927, on request of the employer for approval of the hospital bill, a hearing was had on the question "whether or not this is an unusual case" as referred to under Gen. L., Massachusetts, chapter 152, section 30. The board decided that this was not such a case and declined to approve the hospital bill. The decision of the board was affirmed in the superior court, Bristol County, Mass., and an appeal was taken from that decree by the employee to the

Supreme Judicial Court of Massachusetts. This court upheld the decision of the lower court affirming the decree of the board, and said in part:

The testimony given at the hearings before the single members, in connection with the additional testimony which was before the industrial accident board on the petition of October 21, 1927, was sufficient to warrant the finding of the board that this is not an unusual case under Gen. L., chapter 152, section 30. More specifically, the testimony of the physician for the insurer, the testimony of the impartial physician, and that of the physician called by the employee on cross-examination, warranted the board in finding that the employee had been hysterical all her life; that she was suffering from hysterical paralysis of the right side of her body; that that condition was not primarily caused by the injury to her thumb; that the injury itself was only of a slight nature; and that her condition at the time of the hearing was not causally related to her accident.

WORKMEN'S COMPENSATION—CHANGE OF CONDITION—IMPAIRMENT OF FUNCTIONS WITHOUT WAGE LOSS—TERMINATION OF AWARD—*Warner* v. *Michigan Electric Railway Co., Supreme Court of Michigan (October 7, 1929), 226 Northwestern Reporter, page 887.*—Roy Warner was injured on May 20, 1927, while at work for the Michigan Electric Railway Co. as a motorman on an interurban passenger car. His left arm was broken near the shoulder and he was otherwise injured. At that time he was earning 54½ cents per hour. He was paid compensation until September 10, 1927, when he went to work as foreman of a gang of men and as such earned greater wages than when injured. Thereupon the railway company filed a petition to discontinue the compensation, but the commissioner denied this relief and ordered the compensation continued for total disability. This was upheld upon review before the Michigan Department of Labor and Industries. The company carried the case to the State supreme court, contending that—

(A) The plaintiff was not a skilled workman engaged in skilled employment at the time of his injury, but was a common laborer, and subsequently obtained employment as a common laborer with earnings as great as he was receiving at the time of his employment; and (B) that plaintiff is not in fact disabled from performing the labor or the work of an interurban motorman.

In rendering the opinion the court cited a previous case in which it held—

Evidence that claimant, at the time of hearing had been able during his employment by defendant railway company, after his injuries, to earn about as much as before, and that he had been employed at other labor after losing his position and had earned as

much as he had prior to the accident, did not preclude the board from granting the additional award, under testimony of his earning capacity.

Regarding the contention that a motorman is a common laborer, the court cited the opinion of Justice Steere in Leitz *v.* Labadie Ice Co. (211 Mich. 565, 179 N. W. 291), as follows:

In that case plaintiff when injured was a motorman on defendant's railway, running an electrically propelled car in the city of Detroit, an employment of responsibility in the business of railroad transportation of passengers, presumably requiring training, skill, and judgment beyond that of a common laborer.

The court then referred to the statute (Mich. Comp. Laws 1915, sec. 5441) which provides that the loss of wages suffered by an injured employee is to be measured by " the impairment of his earning capacity in the employment in which he was working at the time of the accident," and according to the court this rule was correctly applied in this case.

The order, denying the company's application to be relieved from making further payments on the award, was therefore affirmed.

WORKMEN'S COMPENSATION—CLAIMS—CHANGE OF CONDITION—INJURY TO EYE—*Murphy* v. *W. O. Cook Construction Co. et al., Supreme Court of Kansas (March 8, 1930), 285 Pacific Reporter, page 604.*—J. C. Murphy was employed as a laborer about a cement mixer operated by the W. O. Cook Construction Co. in Topeka, Kans. On January 19, 1929, while he was dumping cement into the mixer a gust of wind blew some cement into his eyes. The right eye was blinded within a few hours and was removed by a surgical operation. On February 23, 1929, the workman filed an application for compensation for the injury and loss of his right eye. In the hearing before the Kansas compensation commissioner all the pertinent facts were amicably stipulated by the workman, his employer, and the insurance carrier, and an award for the loss of the eye was made in accordance with the statutory schedule.

On May 25, 1929, Murphy filed another application for compensation alleging that his left eye had also been injured in the same accident. The commission denied the application, and Murphy appealed to the district court of Shawnee County, Kans., which court dismissed the case. Thereupon Murphy appealed to the Supreme Court of Kansas, where the decision of the district court was affirmed. The court said the propriety of the judgment of the district court could readily be seen by noting that the accident and injury occured on January 19, 1929, and that the present application

was made on May 25, 1929, four months and six days after the accident. The court pointed out that the compensation statute explicitly stated that proceedings for compensation shall not be maintainable unless a claim for compensation has been made within three months after the accident. If Murphy had made a timely claim for compensation for injury to his left eye and some award had been made therefor and not paid in full, it might very well be shown by lapse of time and subsequent developments that such award was insufficient and ought to be increased; but such was not the case before the court. On the belated date, May 25, 1929, for the first time, Murphy made a claim for compensation for an injury sustained four months and six days before; therefore the statutory provisions for the modification of a prior award were not applicable to the case.

WORKMEN'S COMPENSATION—CLAIMS—"EMPLOYEE"—MEMBER OF FIRM, ETC., AS EMPLOYEE—*Emery's Case, Supreme Judicial Court of Massachusetts (March 26, 1930), 170 Northeastern Reporter, page 839.*—Alberta Emery was treasurer of the National Wood Heel Co. and owned 74 shares of the company's stock. She worked in the company's office up to June, 1928. In the latter part of that month, on account of business conditions, she went to the "turning room" and ran a "hand-concaving machine," and while operating this machine she received an injury. She filed claim for compensation before the Massachusetts Industrial Accident Board and the findings of the reviewing board upon this issue were as follows:

Alberta Emery was an employee of the corporation, * * * of which she was a stockholder; * * * she was expressly included within the terms of the policy of insurance; * * * toward the latter part of June, 1928, she took upon herself the duties of a "workman" within the meaning of paragraph A of the policy of insurance, working in the "turning room" on a hand-concaving machine until September 19, 1929 (during which time she was carried on the books of the corporation as a "workman" at a weekly wage of $30), when the knife connected with the machine took off the end of her left middle finger; * * * this injury arose out of and in the course of her employment. * * *

The industrial accident board ordered payment of compensation for partial incapacity and the superior court, Essex County, Mass., affirmed this award. The insurer appealed the case to the Supreme Judicial Court of Massachusetts, contending that a stockholder or officer of a corporation should not be included among its employees and, as her remuneration was not considered in determining the premium to be paid, she should be excluded from the policy.

The court cited cases holding that "in the absence of special circumstances, a stockholder or officer of a corporation in its service is 'in the service of another' within the meaning of the statute, since the corporation is a legal entity distinct from any of its stockholders or officers."

In concluding the opinion the court upheld the decree of the lower court affirming the award of compensation by the industrial accident board and said in part as follows:

The report of the accident gave her occupation as "treasurer of the corporation," but there was no other testimony to this effect. From this and other evidence the inference was warranted that the claimant, when injured, was running the machine as an "employee" of the corporation, and that her weekly wage was paid to her as such "employee" and not as a stockholder or officer. The evidence does not show special circumstances which preclude a finding that she was an "employee." This is true even if the statement in the report of the accident that she was treasurer of the corporation is accepted as correct.

No estimate of remuneration for the treasurer as "workman" was included in the policy as issued, and, according to the claimant's testimony, remuneration for her was excluded from the audit of May, 1928, upon which the estimated premium was based. It did not follow, however, from the exclusion of remuneration for her from this audit and from the estimate that if she later performed the duties of a "workman" her wages therefore were to be excluded from the remuneration actually earned, upon the basis of which the premium was to be adjusted at the end of the period covered by the policy. According to the evidence her wages as a "workman" were included in the corporation pay roll. At the time of the hearing no audit for the purpose of adjusting the premium had been made, but it could have been found that, according to the terms of the policy, in such an adjustment her wages should be included in the remuneration actually earned, and that she was covered by the policy.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF LAW—"BUSINESS FOR GAIN"—APPEAL—*Brooklyn Children's Aid Society* v. *Industrial Board of Department of Labor of State of New York et al., Supreme Court of New York (February 15, 1930), 240 New York Supplement, page 70.*—Following an amendment to the New York workmen's compensation law (Laws of 1928, ch. 755) the department of labor directed the Brooklyn Children's Aid Society to take out compensation insurance. The society is a charitable corporation engaged in philanthropic services and not operated for pecuniary gain. Upon receiving this notice the society filed suit against the industrial board attacking the constitutionality of the amendment as interpreted by the board. The compensation law in force before the amendment defined the term "employment" as employment

"only in a trade, business or occupation carried on by the employer for pecuniary gain" (sec. 2, subd. 5). The amendment under consideration reached beyond these enumerated groups, extending generally to "all other employments," and brought all charitable corporations within the compensation act, according to the interpretation placed upon it by the industrial board.

The society relied upon the proviso to the constitutional amendment: "That all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

Upon appeal to the New York Supreme Court that court held that the proviso was inserted as a permission to a private employer to offset any claim that his property was being taken without due process and was not an underlying or fundamental principle of the constitutional amendment. The court pointed out that the word "business" should be used with a broad and liberal meaning, as "the business of the conduct of its philanthropic activities." The court cited Bailey *v.* School District No. 5, Town of Leicester, Cuylerville (198 N. Y. Supp. 247), in which Mr. Justice Hinman said, in reference to a provision of the workmen's compensation law which definitely dispensed with any requirement that the State should be in business for pecuniary gain, "No good reason can be urged for interpreting that clause of our State constitution as meaning a limitation on the otherwise paramount power of the legislature to allow a compensation claim against the State or any subdivision thereof, which in good morals ought to be allowed if it requires it of a private employer under similar circumstances."

The court said the case under consideration was simply another application of the same logic to hold that the legislature may constitutionally dispense with that requirement as to charitable organizations so far as concerns employees engaged in hazardous work.

Judgment was therefore rendered in favor of the industrial board.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF LAW—SETTLEMENT AND RELEASE—*Staten Island Rapid Transit R. Co.* v. *Phoenix Indemnity Co., Supreme Court of the United States (March 17, 1930), 50 Supreme Court Reporter, page 242.*—Joseph Perroth, in the course of his employment by one Anderson, was killed through the negligence of the Staten Island Rapid Transit Railway Co. Perroth left surviving him his widow. The administratrix of Perroth brought an action against the Rapid Transit Railway Co. to recover damages caused by Perroth's death, and

the claim was settled by the payment of an amount in excess of that which the dependent would have been entitled to receive under the New York workmen's compensation law. Under these circumstances there was no right of recovery by the dependent of Perroth against his employer, as subdivisions 8 and 9 of section 15 of the workmen's compensation law apply.

This section provides that the employer or insurance carrier shall pay to the State treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of $500. Under this provision the Phoenix Indemnity Co., the employer's insurer, paid to the State treasurer the amount of two awards of $500 each. The indemnity company then brought suit to recover this amount from the railway company which had wrongfully caused the death, under section 29 of the workmen's compensation law, which provides—

In case of the payment of an award to the State treasurer in accordance with subdivisions 8 and 9 of section 15, such payment shall operate to give the employer or insurance carrier liable for the award a cause of action for the amount of such payment, together with the reasonable funeral expenses and the expense of medical treatment, which shall be in addition to any cause of action by the legal representatives of the deceased.

The case was tried before the Supreme Court of the State of New York and that court held that the State treasurer was entitled to the awards made in his favor and paid by the insurance carrier; and that the Phoenix Indemnity Co. was entitled to recover the amount paid the treasurer from the railway company by reason of section 29 of the compensation law. The court of appeals affirmed the decision and the case was carried to the Supreme Court of the United States. The contention was made that section 29 of the workmen's compensation law violated the fourteenth amendment to the Constitution in that it denies due process of law and equal protection of the laws.

Mr. Chief Justice Hughes rendered the opinion of the court declaring that section 29 did not violate the Constitution. He said in part as follows:

There is no question here as to the validity of the provisions for the creation of the special funds in the hands of the State treasurer, in order to provide additional compensation to employees in cases requiring special consideration, or as to the validity of the requirement of payment by employers and their insurance carriers in order to maintain such funds. The constitutionality of these statutory provisions has been sustained by this court. (R. E. Sheehan Co. *v.* Shuler, 265 U. S. 371, 44 Sup. Ct. 548; New York State Railways *v.* Shuler, 265 U. S. 379, 44 Sup. Ct. 551.) These provisions were an appropriate part of the plan of the workmen's compensation law. It was not considered that the due-process clause was violated

because the additional compensation, to be made in the described classes of cases, was not paid to the injured employees by their immediate employers or because payment was to be made out of public funds established for the purpose. (R. E. Sheehan Co. *v.* Shuler, supra.) Thus, the respondent is in no proper sense a stranger to the wrongful act of the appellent. The respondent under the law of the State insured the employer of the deceased, and, as insurer, was required by the statute to make the payments in question to the State treasury. As these payments became obligatory because of the death caused by the appellant's wrongful act, the indemnification of the respondent was a natural and reasonable requirement in consequence of that act. In creating the cause of action in order to obtain this indemnification, there was no lack of due process of law, as there was none in the means afforded by the State for enforcing the liability.

Nor do we find any sufficient ground for the contention that the statutory provisions in question denied the equal protection of the laws. The classification is attacked as arbitrary because is is said to rest on the circumstance whether or not there are persons entitled to compensation under the statute in the particular case, and that this depends on the further circumstance whether there are dependents, and if there are, whether they recover at least as much as the compensation for which the act provides. But this is the classification with respect to the requirement of the payments by the employer of his insurer for the maintenance of the special funds. That can not be said to be an unreasonable classification, as it provides for those cases where there are no persons entitled to compensation under the act, and thus the immediate employer and his insurer are relieved of the obligation to pay compensation.

The decision of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION—CONSTRUCTION OF STATUTE—EMPLOYMENT STATUS—MEMBER OF FIRM AS EMPLOYEE—*Columbia Casualty Co.* v. *Industrial Commission of Wisconsin et al., Supreme Court of Wisconsin (November 5, 1929), 227 Northwestern Reporter, page 293.*—Joseph Batranek owned 76 shares of the stock of the Muench Co.; the remaining 31 shares were owned by his son. Joseph Batranek was secretary and treasurer and his son president of the company, engaged in the wholesale oyster business. In the course of his work Batranek helped with the books, made out bills, and did selling and buying for the company—did anything and everything in connection with the business and its work, as occasion required. He was injured while running a can-capping machine and filed claim for compensation. The Wisconsin Industrial Commission made an award which was upheld by the circuit court.

The insurance carrier appealed the case to the Supreme Court of Wisconsin for review, contending that Batranek was a member of the firm and not an employee as defined under the compensation act.

The supreme court compared this case with a case previously decided (Leigh Aitchison (Inc.) *v.* Industrial Commission, 188 Wis. 218, 205 N. W. 806), but concluded that the former ruling would not apply, as the organization of the company was different; also the duties of the injured parties differed. Batranek was not the whole corporation, although he owned a majority of the stock. The court held in this case Batranek was a workman, he was injured while performing his work, and the fact that he was secretary and treasurer did not exclude him from classification as an employee. He was performing the duties ordinarily undertaken by superintendent, foreman, or workman, and the insurer was entitled to include his salary in the aggregate on which the premium was based and should be estopped from claiming that he was not entitled to compensation.

The judgment of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION—CONSTRUCTION OF STATUTE—EXTRAHAZARDOUS EMPLOYMENT—PUBLIC EMPLOYMENT—*Village of Chapin* v. *Industrial Commission et al., Supreme Court of Illinois (October 19, 1929), 168 Northeastern Reporter, page 286.*—Guy Grady was employed by the village of Chapin, Ill., to haul dirt and fill up holes in the streets. He furnished his own team and received 50 cents an hour for his work. He worked under the immediate direction of Allen and Smith, members of the village board of trustees, who directed him where to work. Smith worked with him most of the time, and was doing so on April 4, 1927, when Grady was thrown from the wagon, breaking his leg.

He proceeded under the Illinois workmen's compensation act and was awarded damages by the State industrial commission. This award was set aside by the circuit court of Morgan County, Ill., and Grady brought the case before the Supreme Court of Illinois.

The question in the case was whether the village was under the compensation act by virtue of the provisions of section 3.

The workmen's compensation act, after the amendment of 1917, applied automatically to the State and the various municipal corporations and their employees only engaged in the extrahazardous occupations mentioned in section 3. The general assembly in 1919 (Laws, 1919, p. 538) again amended section 3 by inserting in the section as amended in 1917 the State and the various municipal corporations included in the statutory definition of "employer" contained in section 4, so as to make section 3 read: "The provisions of this act hereinafter following shall apply automatically, and without election to the State, county, city, town, township, incorporated village, or school district, body politic or municipal corporation, and to all employers and their employees, engaged in any of the following enterprises or businesses which are declared to be extrahazardous,

namely," followed by eight subparagraphs in the same language as the amended section 3 of 1917, except that to subparagraph 3, which in the amendment of 1917 read: "Carriage by land or water and loading or unloading in connection therewith," was added, "including the distribution of any commodity by horse-drawn or motor-driven vehicle where the employer employs more than three employees in the enterprise or business, except as provided in subparagraph 8 of this section."

It is argued that the act clearly distinguishes between State, county, village, etc., as employers and all other employers "by providing that employers other than State, county, village, etc., are not under the act automatically and without election unless engaged in some department of the enterprises or businesses enumerated in paragraphs 1 to 10, inclusive, of section 3."

The court answered this contention by saying:

There certainly was no such classification in the amendment of 1917, which declared the act should apply automatically and without election to all employers and their employees engaged in the described occupations declared to be extrahazardous.

By the amendment of 1919 there is no change in this part of the section except to name specifically the State and municipal corporations which were included in the general language of the section before its amendment. This change would have made no difference in the meaning of the section.

In conclusion the court said:

The case of McLaughlin *v.* Industrial Board, supra, holds that a common dirt road is not a "structure" within the meaning of that term as used in paragraph (b) of section 3 of the workmen's compensation act, and the making or maintaining of such a road in the ordinary way is not a dangerous or extrahazardous occupation. The employment of the plaintiff in error was not such as brought him within the terms of the workmen's compensation act.

The judgment of the circuit court was therefore affirmed.

WORKMEN'S COMPENSATION—CONSTRUCTION OF STATUTE—GOING TO AND FROM WORK—REVIEW BY COURTS—*Krebs* v. *Industrial Commission et al., Supreme Court of Wisconsin (November 5, 1927), 227 Northwestern Reporter, page 287.*—W. D. Krebs, an employee under the Wisconsin workmen's compensation act, was injured when he was about 20 feet from the employer's plant at which he worked. He was walking on the sidewalk adjacent to the plant on his way to check in for work, when he was struck by a motor cycle driven by a boy, not an employee, who was bringing an employee to work. He filed a claim for compensation under the Wisconsin workmen's compensation act and the industrial commission denied compensation on the ground that Krebs was not covered by the act when

injured. The circuit court for Dane County, Wis., affirmed the order of the industrial commission denying compensation. Krebs then appealed to the Supreme Court of Wisconsin, contending that the amendment to the compensation act (Stat. 1927, sec. 102.03) covered employees going to and from work.

Section 102.03 of the Wisconsin act provides that an employee going to or from his employment in the ordinary and usual way, while on the premises of the employer shall be deemed to be performing service growing out of and incidental to his employment, and therefore would be covered by the workmen's compensation act.

As Krebs was going to work in his "ordinary and usual way," the sole question was whether he was on the employer's premises when injured. In affirming the judgment of the circuit court denying compensation, the Wisconsin Supreme Court said in part:

Originally the act did not provide for injuries to employees received on the employer's premises while going to or from work. Injuries so received had to be recovered for by common-law action, if at all. The provisions under which plaintiff claims, was [were] by amendment added at the end of the section as it originally stood. The precise question for determination is: Was the place of injury within the purview of the amendment? The purpose of the amendment apparently was to relieve both the workman and the employer from the hazards of a common-law action. The one was subject to the hazard of defeat by reason of the defenses permissible in the common-law action, and the other to the hazard of a much greater payment than the act provides and the risk under the amendment would be covered by the liability insurance provided for by the act. The terms of the amendment should not be stretched by forced construction to include situations not clearly within their intendment. No recovery existed to plaintiff at common law under the situation here involved, and none is given by the amendment.

WORKMEN'S COMPENSATION — CONTRACTOR — ELECTION — THIRD-PARTY LIABILITY—*Taylor* v. *Haynes, Court of Civil Appeals of Texas* (*June 19, 1929*), *19 Southwestern Reporter* (*2d*), *page 850.*— J. M. Taylor was employed by the Gunter Hotel Co., a corporation owning and operating the Gunter Hotel in the city of San Antonio, Tex. J. P. Haynes was engaged in repairing, remodeling, and renovating the hotel building. As a result of Haynes's alleged negligence in doing the work, Taylor, while in the performance of his duties, received injuries and the Texas Industrial Accident Board awarded him compensation as an employee of the hotel corporation. He subsequently filed suit against Haynes to recover damages under the common law in addition to his compensation under the workmen's compensation act.

The district court, Bexar County, Tex., found that Haynes was not an independent contractor but was an "agent" of the hotel company, and therefore rendered judgment denying any recovery to Taylor. He appealed to the Court of Civil Appeals of Texas. The sole question raised in the appeal was whether Haynes was agent, servant, or employee of the hotel company or whether he was an independent contractor.

The facts show that Haynes was being paid a weekly salary of $200 and that the men working for him were paid direct by the company, and because of this he contended that he was an "agent, servant, or employee" of the hotel company and that under the provision of article 8306, section 3, Texas Revised Statutes, he was exempt from liability for injuries to the hotel employees. However, the higher court found that this did not make him an agent or employee of the company. The opinion, in part, is as follows:

> The excavation work was for the time being an independent undertaking by appellee as a contractor, having exclusive control and management of the undertaking, freed of any intervening right or duty of the hotel company's agents or officials over those actually doing the work, who were in fact employed, directed, and controlled by appellee, and performed their duties under his exclusive direction. The fact that appellee was paid a weekly salary, instead of a lump sum for the work in hand, and that his employees were paid directly by the owner, instead of through appellee, does not have the effect of distinguishing his status from that of an independent contractor, and did not make him an agent, servant, or employee of the "subscriber," as contemplated in article 8306, section 3.

The opinion of the district court was therefore reversed.

WORKMEN'S COMPENSATION—CONTRACTOR—EMPLOYERS' LIABILITY—SUBCONTRACTOR—*Johnson et al.* v. *Mortenson et al.*, *Supreme Court of Errors of Connecticut* (*November 7, 1929*), *147 Atlantic Reporter, page 705.*—Oscar L. Johnson, a general contractor, in 1927 took a contract to build a house in West Hartford, Conn., and Chris Mortenson held a subcontract to do certain work, including the digging of a trench for sewer connection. Antonio S. Pascoal had a contract of employment with Mortenson, and while he was engaged in digging the sewer trench, it caved in, causing his death. In consequence the Connecticut compensation commissioner made an award in favor of the dependent widow and minor children of Pascoal against both Johnson and Mortenson and this award was affirmed on appeal. The premium on the compensation insurance held by each was based upon his pay roll. The pay roll on which the premium on Mortenson's insurance was based included Pascoal, but that on which Johnson's was computed did not. This action is by

Johnson against Mortenson for a judgment determining the rights and liabilities between the parties. The case was reserved by the superior court of Connecticut for the advice of the State supreme court of errors.

The claim made by Johnson was that—

Although he as general contractor and Mortenson as subcontractor are both, without distinction as between them, liable for compensation on account of Pascoal, yet, except in favor of such employee, the obligation to pay compensation is primarily that of Mortenson, the immediate employer of the injured workman, and the situation of the general contractor is such as to entitle him to reimbursement by such immediate employer, for compensation payments to which he is subjected by reason of the award.

In answering this contention the court said in part as follows:

As we have seen, section 5345 has been construed as recognizing no distinction between principal contractor and subcontractor as to liability to a claimant for compensation, but as making both primarily liable to him. The better view and practice of the compensation commissioners appears to have been to regard their jurisdiction as limited to determination of the right of the employee to compensation and as to who is liable therefor to such claimant, leaving the rights and liabilities between those held jointly liable to the claimant "to be worked out in such proceedings, among themselves, as may be brought for the purpose."

Pascoal's contract of employment with Mortenson gave him no right to recover wages from Johnson, and the latter had no power of direction over him. The presence of section 5345 in the act evinces, of itself, that no relation exists between a contractor and the employee of a subcontractor which, unaided by the provisions of this section, would involve any right to compensation from the contractor as an employer of the claimant.

As between Johnson and Mortenson, the liability of the latter should be regarded as primary and that of the former as secondary only.

"There is always at least an implied contract between the parties which obliges a principal to reimburse his surety when the latter has paid the debt; he then becomes a creditor of the principal, and, the debt having matured and become due, is entitled to recover from the latter the amount so paid."

In conclusion the court said:

The plaintiffs are entitled to recover from the defendants any sums which they have paid or may pay, in good faith, upon matured obligations, or have been forced to pay or may hereafter be forced to pay toward the satisfaction of the award referred to in the complaint.

WORKMEN'S COMPENSATION—CONTRACTOR—EMPLOYMENT STATUS—DEATH—*Habrich et al.* v. *Bent et al., Supreme Court of Wisconsin (December 3, 1929), 227 Northwestern Reporter, page 877.*—Joe

Habrich was general manager of Forest Lake (Inc.), a corporation owning the land surrounding Forest Lake in Vilas County, Wis. He entered into a contract with the corporation to build a road around the lake and three roads leading from this main road to the shore of the lake at specific points. He sublet the contract of building the main road to Walter Bent, who was a contractor and was equipped with heavy machinery necessary for the building of roads. According to Habrich's testimony, after Bent completed the main road, Habrich—

Asked Bent if he would go in with his men and machinery and finish these branch roads for him. It was not necessary for me to have any supervision as to how it was built, because he was considered a better man than I was, as far as the actual building goes. It wasn't [because] I knew that he was an expert in building roads, that I wanted him to go in and build the roads; it was because he was there with his equipment. He was actually in control and supervised the work. That was because I felt that he knew more about building roads than I did.

On June 2, 1927, while completing the work on the branch road Bent sustained injuries while blasting, resulting in his death. The Industrial Commission of Wisconsin made an award in favor of his widow, Etta Bent, under the provisions of the State workmen's compensation act. (Stat. 1927, secs. 102.01–102.41.) Upon appeal the circuit court for Dane County affirmed the award of the commission and the case was carried to the Supreme Court of Wisconsin by Habrich, who contended that Bent was not acting as an employee at the time of the accident, but that he was an independent contractor. In sustaining the judgment of the lower court affirming the award of the industrial commission, the court said in part:

We see very little in this evidence to indicate that Bent was an independent contractor. He was on the job to do whatever Habrich told him to do. He was not there to complete any certain piece of work. He was not there to work any given length of time. He had no control over the details of the work which it was not within the power of Habrich to veto. That was evidently the understanding of Habrich, and we discover nothing in the oral testimony relating to what this contract was that seems to deprive Habrich of that power. Habrich did not exercise it because he did not deem it necessary. He felt that Bent knew more about the work than he did, and he had confidence in him. The question is not, however, whether he exercised it but whether he had the right to exercise it. Habrich says he thought he had that right, and it seems clear to us that there was nothing in the contract which deprived him of the right. We discover no reason for disturbing the conclusion of the industrial commission that at the time of the accident Bent was an employee of Habrich.

Regarding the contention that there was no competent evidence before the commission by which it could determine whether Bent was an employee or an independent contractor, the court said:

The workmen's compensation act is a beneficent law enacted for a beneficent purpose. The accomplishment of that purpose is not promoted by imposing upon the dependents of one who has come to his death in the service of his employer the burden of proving the exact terms of the contract under which the services were performed. In cases such as this the favorite of the law might well become the victim of a rule of evidence. Such a result would illy comport with the purposes of the workmen's compensation act. The law should be consistent. It should not offer compensation with one hand and withdraw it with the other. When the inquiry has proceeded to the point where it appears that a workman has been injured while rendering service for his employer, let it be presumed that he rendered such service in the character of an employee and let the burden of proving otherwise rest upon the one who would defeat the right to compensation.

WORKMEN'S COMPENSATION—CONTRACTOR—EMPLOYMENT STATUS—REVIEW BY COURT—*Badger Furniture Co. et al.* v. *Industrial Commission et al., Supreme Court of Wisconsin (November 5, 1929), 227 Northwestern Reporter, page 288.*—John Brisbane, under contract with the Badger Furniture Co. to sell furniture on commission, was killed in a collision between his automobile and an engine on the railroad track near Sun Prairie, Wis.

His widow, Julia Brisbane, made a claim before the Wisconsin Industrial Commission for compensation under the State compensation act. The commission awarded compensation to the widow, and the Badger Furniture Co. and its insurance carrier brought an action in the circuit court to review the award of the commission. The circuit court set aside the award and the industrial commission appealed to the supreme court of the State.

The facts were not in dispute; the sole question was whether Brisbane was an employee of the Badger Furniture Co. or an independent contractor. In answering this question the court said:

Whether or not a person is an independent contractor or a servant depends upon the right of control by the principal over the person engaged to do the work. The mere fact that the principal exercises such control is not significant, if he has no right of control.

In this case the contract was oral, and we have only the testimony of one party to the contract; hence it is important to consider the course of conduct of the parties to determine the control actually exercised by the Badger Furniture Co. in construing the contract.

After examining the letters written Brisbane by the Badger Furniture Co., the court said:

It is clear from these letters that the Badger Furniture Co. did not attempt to exercise control over the deceased, but that it gave him from time to time advice of mutual concern.

The supreme court also found from the correspondence that it clearly appeared that Brisbane, while on his way to Lake Geneva, was on his own business, according to his own arrangements. The court continued the opinion, in part, as follows:

The testimony is undisputed that deceased furnished his own car in traveling from place to place; that he paid his own expenses, and his compensation was based only upon commission on sales he made. Further, it appears without dispute that he was at liberty to take on other lines of goods, and that during a portion of the time, at least, he did have other lines of goods, and that he did represent other independent concerns in selling other lines of goods. He therefore furnished his own instrumentalities for doing his work, and his place of work was wholly away from the location of the Badger Furniture Co., and where the furniture company could exercise but little supervision or control, if it chose to do so. It is likewise clear that the parties themselves did not intend to create the relation of employer and employee.

The judgment of the circuit court was therefore affirmed.

WORKMEN'S COMPENSATION—CONTRACTOR—LOSS OF EYE—*Jacobson v. Weidman Lumber Co. et al., Supreme Court of Michigan (March 29, 1929), 224 Northwestern Reporter, page 355.*—The Weidman Lumber Co. was constructing a bed for a logging railway; and Magnus Jacobson, together with three companions, took the job of clearing and grading about 1,300 feet of the way at $13 per 100 lineal feet and agreed to pay $1 per day for board and lodging at the lumber company's camp. The first day, while Jacobson was working on the job, a chip from a tree he was chopping struck his right eye. He received treatment and the injury healed with a retention of only 10 or 20 per cent vision in the eye.

Jacobson filed claim for compensation under the Michigan workmen's compensation act and the department of labor and industry awarded him compensation for the loss of an eye. The lumber company carried the case to the Supreme Court of Michigan for review, claiming that Jacobson was an independent contractor, and that he had not suffered the complete loss of an eye.

After reviewing the facts the Supreme Court of Michigan vacated the award and found Jacobson to be an independent contractor rather than an employee of the lumber company. The court em-

phasized the fact that he was "master of his own time in performing the work," and the inspection of the work or the furnishing of tools by the lumber company did not change his relation to that of master and servant.

WORKMEN'S COMPENSATION—COVERAGE—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—POWERS OF COMMISSION—*Kraft* v. *Industrial Commission et al., Supreme Court of Wisconsin (April 1, 1930), 230 Northwestern Reporter, page 36.*—Maynard Schuh lived in the vicinity of Elcho, Wis. Some time in December 1926, he received a letter from a Mr. Shepard who was superintendent of an estate owned by J. L. Kraft, at the same place. The letter read as follows:

If you have nothing definite on hand maybe you would be interested in my offer. I am getting ready to fill in more dirt in the swamp here we covered last year and if you care to come to work I will pay you $3.50 per day and you can live in our house on the farm and have your wood and house rent free until the 1st of April and from then on you can work by the month as we talked of this fall. Please let me know at once, as I would like to get started as soon as possible.

Schuh accepted this offer and he and his wife moved on the place, which consisted of about 250 acres. About 16 acres were under cultivation and the rest was used by Kraft for his summer outings. Schuh was engaged to build a road across a swamp on the estate. However, as spring came on there was no change in the contract, and Schuh continued to work by the day under the direction of Shepard at whatever he was required to do. Sometimes he worked at cultivating the land and at other times he worked around the cottages.

The firewood furnished Schuh was not cut stove length, so it was necessary for it to be cut. On October 24, 1927, in the evening after supper, Schuh was using a sawing machine to cut up poles into wood of stove length, when he was injured by reason of a pulley breaking and striking his leg.

Upon filing claim for compensation two questions arose: (1) Were the parties under compensation and (2) was Schuh performing services growing out of and incidental to his employment? It was contended that Schuh was employed at farm labor and because of that he was not covered by the compensation act. The Wisconsin Industrial Commission found that Schuh was engaged otherwise than in farm labor, and was covered by the compensation act. The circuit court, Dane County, Wis., made the same finding upon appeal, and sustained the award. The case was appealed to the

Wisconsin Supreme Court, which court, regarding the question of farm labor, said:

This question seems to be strictly one of fact, and if so, the determination of the industrial commission is final. Schuh testified that the greater part of his work was not farm labor, and that he was not hired as a farm laborer. It is clear from the letter employing him that he was not engaged for farm labor, and there seems to be credible evidence that the dominant part of his employment was other than what would be considered farm labor. * * * On this question we think the finding of the industrial commission must prevail.

It was also contended that Schuh was not injured while in the course of his employment or incidental thereto. This question hinged upon the interpretation of the contract regarding "free wood." The court said:

The real question is whether or not the contract to furnish free wood meant wood prepared for the stove. If the contract can be reasonably so interpreted to include stove wood, ready for use, then it must be held that although working after hours, he was working for his employer at the time he was injured, and is entitled to compensation. It is the function of the commission to draw the proper inferences from the facts.

The employee was to have "wood and house rent free." "House rent free" undoubtedly meant a house ready and fit for occupancy, and it is equally reasonable to hold that "free" wood meant wood ready for the use and purpose for which it was intended. That would be wood properly cut, delivered at the house. That being so, when Schuh was cutting the wood he was doing work for his employer at the time.

The decision of the lower court sustaining the award of the commission was therefore affirmed.

However, in proceedings for compensation by a superintendent of a mining company, for an injury to his thumb while splitting wood to be used in preparing the evening meal, the Supreme Court of Idaho held that the splitting of wood did not constitute part of his employment even though the company had agreed to furnish the employee with wood, water, lights, and dwelling. The court drew a distinction between the agreement to "furnish" wood and the "splitting" of wood by the employee. (Stewart *v.* St. Joseph Lead Co. et al. (1930), 286 Pac. 927.)

WORKMEN'S COMPENSATION—COVERAGE—CASUAL EMPLOYMENT—*Sturman* v. *Industrial Commission of Wisconsin, Supreme Court of Wisconsin (November 11, 1930), 232 Northwestern Reporter, page 864.*—One Sturman was engaged in the business of operating a soft-drink parlor and for several years had employed George Klobucnik as a bartender and handy man. Occasionally Klobucnik was required to do some repairing or cleaning of some of the five houses

which his employer owned and rented during the years 1925–1927. On August 2, 1927, he was injured while helping another man to do some painting at one of these houses. He applied for compensation under the Wisconsin workmen's compensation act and the industrial commission, concluding that he and the employer were subject to the provisions of the act, awarded compensation.

The award was sustained by the circut court of Dane County and the case was appealed to the Supreme Court of Wisconsin. It was contended that Sturman came under the compensation act by reason of having had four persons in his employment in painting and repairing the houses in 1926. Regarding this evidence the court said:

The evidence admits of a finding that four persons had been employed by plaintiff for several days to do that work. The fact that he then had three or more employees would, by virtue of section 102.05 (2), Stats., have brought him within the terms of the act (in the absence of his filing, in accordance with its provisions, a notice not to come under its terms), unless their employment was not "in the course of a trade, business, profession, or occupation" of the plaintiff. (Sec. 102.07 (4), Stats.) None of these employees, with the exception of Klobucnik, were engaged in plaintiff's soft-drink business. He might, of course, have had some other trade, business, profession, or occupation, as to which he could have come automatically under the act, upon employing three or more persons in a common employment in such trade, business, profession, or occupation.

However, the court found that the evidence did not establish that Sturman was ever engaged in any other trade, business, or profession than his soft-drink business, and work other than this was casual employment. In reversing the decision of the lower court, the Wisconsin Supreme Court said:

The occasional cleaning and repairing of his own houses did not constitute a trade, business, profession, or occupation of the plaintiff, and the casual or fugitive employment of three or four men for a few days to do such repairing did not constitute employment in the course of a trade, business, profession, or occupation of the plaintiff, within the contemplation or purview of the compensation act. Consequently, the plaintiff was not within the act, and was entitled to have the award to Klobucnik vacated and set aside in this action.

Judgment of the lower court was therefore reversed and the award of the industrial commission set aside.

WORKMEN'S COMPENSATION—COVERAGE—CASUAL EMPLOYMENT—FARM LABOR—*Peterson* v. *Farmers' State Bank of Eyota, Supreme Court of Minnesota (March 28, 1930), 230 Northwestern Reporter, page 124.*—Julius Peterson, by trade a carpenter, was employed by

the Farmers' State Bank of Eyota to repair the buildings on a farm owned by it, and while so engaged he sustained an accidental injury.

Compensation was sought under the Minnesota workmen's compensation act and the State industrial commission made an award in Peterson's favor. The employer appealed the case to the Supreme Court of Minnesota, contending that Peterson was a farm laborer at the time of the injury and that such laborers have no protection under the compensation act.

The Minnesota Supreme Court held, however, that a workman is not a farm laborer simply because, at the moment of the accident, he is doing work on a farm; nor because the task on which he is engaged happens to be what is ordinarily considered farm labor. The court said:

> Neither the pending task nor the place where it is being performed is the test. The whole character of the employment must be looked to to determine whether he is a farm laborer. That is what is meant by the statement that it is "the character of the work which the employee is hired to perform, which is the test of whether the employee is a farm laborer." (Austin *v.* Leonard, 177 Minn. 503, 225 N. W. 428.)

Peterson was employed by the bank to repair the buildings on a farm owned by it, this was necessary to meet the requirements of the tenant and therefore the employment was not casual. The court said that Peterson was employed to work on a farm but he was not employed "to perform the work ordinarily done there," and he was no more a farm laborer while plying his special trade on the farm than would have been a garage mechanic specially employed to repair or adjust the farm tractor.

The order awarding compensation was therefore affirmed.

WORKMEN'S COMPENSATION—COVERAGE—EMPLOYMENT STATUS—MINOR—*Schanen* v. *Industrial Commission et al., Supreme Court of Wisconsin (January 7, 1930), 228 Northwestern Reporter, page 520.*—On December 18, 1926, Clarence Rilling was engaged in setting pins up on the bowling alley, owned and operated by N. J. Schanen, and sustained accidental injuries to his right thumb necessitating its amputation at the distal joint. He filed claim for compensation, and it developed, upon the hearing before the Wisconsin Industrial Commission, that the principal question in the case was whether or not Schanen had three employees in common employment, thereby placing him within the State workmen's compensation law.

The commission found Schanen had three such employees and awarded compensation. Action was begun in the circuit court for

Dane County, Wis., to review the award of the industrial commission, and in disposing of the question raised the trial court said:

While the evidence as a whole in this case is such that the commission might well have found in favor of the contention of the employer that he never had three employees in common employment, yet there is credible evidence in part set forth in detail in the attorney general's brief, enabling the commission, under the liberal rules established for its guidance, to find an award as it has; and, in accordance with the law as abundantly set forth in the decisions, this court is not permitted to interfere with the commissioner's opinion on the evidentiary facts where there is any evidence which furnishes a basis for such opinion.

The case was appealed to the Supreme Court of Wisconsin by Schanen, who contended he had only two employees for, on the night in question, in addition to Rilling, one other boy was setting pins. The pin setting was done among a group of six or seven boys who lived in the neighborhood, no one boy being regularly employed. The facts regarding the alleged third employee were as follows:

About a month before the happening of the accident, the plaintiff was at the poorhouse and there met one Nic Schlim, whom he had known for 25 years. Schlim was 68 years of age, not competent to do hard work, and begged the plaintiff to take him along and let him stop at his home while he looked for a job. There was no agreement as to compensation or for the performance of any services. Schlim did come to the plaintiff's place of business, and while there he at different times performed slight services, such as cleaning spittoons and tending the furnace fire. Prior to the date of the injury to plaintiff, Schlim had left to work for one Gust Wegner at Grafton; he worked for Wegner a couple of weeks and again returned to the plaintiff's home; he would then look for another job and would be away as long as the job lasted. He had borrowed money from the plaintiff, and at the time of the hearing owed him $10 or $15 and had nothing with which to pay him.

The Wisconsin Supreme Court, after reviewing the facts in the case concluded that Schlim was not an employee within the workmen's compensation act, and in reversing the judgment of the trial court sustaining the award of the industrial commission, the court said in part as follows:

A careful study of the record convinces us that Schlim was not an employee in the sense in which that term is used in the statute. He did not come to the plaintiff's premises at the request of the plaintiff; he did no work in or about the premises at the request of the plaintiff. He was an old acquaintance and friend who had fallen into misfortune and begged to be taken out of the hands of the public authorities and to be permitted to come and stay with the plaintiff until he could find a job. He not only earned no money, but he borrowed money; he had no assigned duties; he came and went as he pleased; he was no part of the establishment; when he was gone, it went on exactly as it had before he left. The evidence

discloses that at the time Schlim left the poorhouse to go with the plaintiff to the home of the plaintiff, the relationship which existed between the parties was that of host and guest, and there is no evidence to the contrary. * * * There was no contract of hire, express or implied. It is true that the plaintiff testified that it was understood that he was to work for his board, but the only understanding that was had in regard to it was the fact that he came there under the circumstances indicated; that nobody expected him to pay board; and that whatever he did was done of his own accord. In that sense and no other he worked for his board. If Schlim had fallen and injured himself while living with the plaintiff, would he have been entitled to compensation as an employee? We think not. A mere charity should not be held to impose liability upon the plaintiff. Upon the whole case, it is considered that Schlim was not an employee within the meaning of that term as used in the workmen's compensation act.

WORKMEN'S COMPENSATION—COVERAGE—EMPLOYMENT STATUS—POWERS OF COMMISSION—*Stiles* v. *Des Moines Council, Boy Scouts of America et al., Supreme Court of Iowa (March 18, 1930), 229 Northwestern Reporter, page 841.*—The Des Moines Council of Boy Scouts conducted a summer camp located in Boone County, Iowa, where all boy scouts were permitted to go upon payment of a small fee. A staff composed of the executives of the Des Moines council, together with boy scouts of the higher ranks, was organized each year to take charge of the camp. Ray C. Stiles, jr., a scout of the highest rank, voluntarily joined the staff of workers and was willing to go with the junior staff, receiving no salary but given board and lodging while at camp. On June 7, 1928, he, with other boy scouts, went to the camp to prepare for the reception of the regular boy scout visitors. Among the other duties to which Stiles was detailed by the staff was the exercising of the horses; the purpose being to "gentle" the animals for use by the younger scouts. On June 8, 1928, while engaged in riding a horse, Stiles received an injury by being kicked by a horse in charge of another scout.

A petition was filed before the Iowa industrial commissioner, seeking compensation for his injury, and an award was made by the deputy industrial commissioner. The case was carried to the district court, Boone County, Iowa, by the Des Moines council, contending that at the time of the injury Stiles was in pursuit of pleasure, recreation and self-development, and therefore could not secure compensation for the injury. The court affirmed the decision of the commissioner who found that—

The Des Moines Council of Boy Scouts of America qualified, as an employer, within the meaning of the Iowa workmen's compensation statute, that the appellee was duly employed by such employer,

and that the disability sustained arose out of and in the course of such employment. * * *

The case was then appealed to the Supreme Court of Iowa and after a review of the evidence the court held that Stiles was not an "employee" within the Iowa workmen's compensation act (Code 1927, sec. 1363) so as to be entitled to compensation. In the course of the opinion reversing the decision of the district court, the Iowa Supreme Court said in part as follows:

The workmen's compensation act provides that any decision of the industrial commissioner may be modified, reversed, or set aside on one or more of four grounds only (sec. 1453) among which are the following: (3) If the facts found by the commissioner do not support the order or decree. (4) If there is not sufficient competent evidence in the record to warrant the making of the decision. Before an award can be made under the terms of the workmen's compensation act, it must conclusively appear that the employer has come within the scope of the act and also that the claimant is a workman or employee of the employer, or, in other words, that the relationship of master and servant existed between the parties at the time of the injury and that such injury occurred in the course of such relationship and arose out of the employment.

The appellee was a boy scout of high rank. He had received the benefits of the organization since his enrollment therein. Those who had advanced in scouting before him assisted him in his advancement, and it was obviously his duty to lend what assistance he could to those scouts who were following him up the ladder of scouting. He had passed the required tests to show his qualifications to render what assistance he could to his younger brother boy scouts, and he voluntarily undertook to do whatever his duty as an Eagle Scout required him to do. The fact that he was to be relieved from expense while attending the camp did not, of itself, constitute remuneration for his services nor make him a workman or employee within the terms of the workmen's compensation act.

The fact that a policy was issued did not, in any manner whatsoever, change the status of the Des Moines Council of Boy Scouts of America as an employer, nor did it operate to bring that institution within the scope of the workmen's compensation law.

The record does not contain sufficient competent evidence to warrant the making of the decision as was made by the Iowa industrial commissioner, and therefore the district court erred in affirming the decision and entering judgment against the Des Moines Council of Boy Scouts of America and the Federal Surety Co.

WORKMEN'S COMPENSATION—COVERAGE—FARM LABOR—*Adams* v. *Ross et al., Supreme Court of New York, Appellate Division, Third Department (June 27, 1930), 243 New York Supplement, page 464.*—Chester Adams received injuries April 2, 1928, resulting in the loss of the sight of his left eye. These injuries were accidental and incurred in the course of his employment, while engaged in spraying

a chicken house with a hand spray pump, on the premises of the employer, Charles Ross. Adams filed claim for compensation and the New York State Industrial Board sustained the employer's contention that Adams was employed as a farm laborer, and the claim was disallowed. Adams appealed to the Supreme Court of New York, which court said:

The evidence does not sustain such a finding. The employer is evidently a retired business man, who owns a costly and pretentious estate situate in the city of Auburn on an old residence street near the center of the city. The residences on this street have been and now are the homes of men of wealth and position. * * * There are about 19 acres of land, of which about 7 are occupied by the house and surrounding lawns. The remaining lands appear to be devoted to pasture and grass land, vegetable garden, and to chicken houses and yards. A very few cows are kept and grass is cut to feed them. This work is not performed by the regular employees, but is let out to others. There is one horse, but the purpose for which it is used is not stated. There are a few farming implements, but nothing is stated as to their use. It appears that there are 400 to 500 chickens regularly kept on the premises and that eggs and broilers are sold, and also a few vegetables from the garden. It appears that the work of the regular employees, including claimant, is the care of the buildings, grounds, and shrubbery, with some incidental work in the chicken houses and garden.

Neither in the common acceptance of the term nor in the definition found in dictionaries is the occupation of the employer, as above described, a "farmer" nor is he engaged in the business of farming. There is no tilling of the soil or engaging in an allied industry as an occupation either for profit or as a means of subsistence. There is no devotion of the property to agriculture. What little is done in the nature of agricultural work is either a pastime or is incidental to the maintenance of the estate.

The court cited section 3, subdivision 1, group 18, of the New York workmen's compensation law which provides that all employments (with certain exceptions) in which there are employed four or more workmen or operatives regularly, come within the compensable provisions of the act, unless such operatives are farm laborers, domestic servants, and persons engaged in voluntary service not under contract of hire. The court held that the employment was not farm labor, but the record was too indefinite to permit the court to say whether the employer had four or more employees engaged in the work with a reasonable degree of regularity during the year.

The decision was therefore reversed and the matter remitted to the State industrial board.

WORKMEN'S COMPENSATION—COVERAGE—LIMITATIONS—EVIDENCE—*Kemper* v. *Gluck*, *St. Louis Court of Appeals* (*December 3, 1929*), *21 Southwestern Reporter* (*2d*), *page 922*.—On November 27, 1926,

Lillian Kemper sustained personal injuries while in the employ of Otto F. Gluck, who conducted a restaurant in St. Louis, Mo. While in the course of her employment, the waitress slipped upon the floor. She brought an action in the St. Louis circuit court alleging that the employer was negligent in allowing water and soap to accumulate on the floor and so failed to exercise ordinary care to furnish a safe place in which to work. The employer denied the allegations and pleaded contributory negligence and assumption of risk. The St. Louis circuit court rendered a verdict in the sum of $6,000 in the employee's favor. The employer thereupon appealed the case to the St. Louis court of appeals where the motion for a new trial was overruled on May 7, 1928. During this time, however, the Missouri Supreme Court handed down a decision stating that the Missouri workmen's compensation act became effective on November 2, 1926, rather than on January 9, 1927, as had been generally understood. The counsel for the employer argued on appeal that the case came within the terms of the workmen's compensation act as the accident occurred on November 27, 1926, and would be covered by the law adopted on November 2, of the same year. He therefore contended that it was necessary that Kemper prove not only that the employer was negligent but also that the case was not covered by the workmen's compensation law. The court reviewed a number of the State compensation laws and concluded that the case was based on a master and servant relationship, and that the accident occurred at a time when the compensation law was in full force and effect. Having decided the compensation law applied, the court raised several questions for consideration, such as whether the employer and employee would be presumed to have accepted the act and whether Kemper was barred by the limitation of time. The court concluded that the facts were not sufficient to decide these questions and in reversing the decision, the court said:

> While it is true that the petition for the reason stated is insufficient to support the judgment rendered, substantial justice, and the peculiar and unusual circumstances of the case, would clearly seem to warrant the giving to plaintiff of an opportunity to plead the true facts, as she knows them or believes them to be, in a manner not inconsistent with the views herein expressed.

The judgment of the circuit court was therefore reversed.

WORKMEN'S COMPENSATION — COVERAGE — PUBLIC EMPLOYMENT — VOLUNTEER "WITHOUT PAY"—*Department of Natural Resources, Division of Fish and Game* v. *Industrial Accident Commission et al., Supreme Court of California (August 22, 1929), 279 Pacific Reporter,*

page 987.—Frank Machado applied to the California Fish and Game Commission for appointment to the position of volunteer deputy fish and game warden in the region of Watsonville, and on October 15, 1927, received his certificate of appointment as such volunteer deputy. While serving in that capacity on June 10, 1928, Machado was accidentally drowned through the capsizing of his motor boat in Pinto Lake in Santa Cruz County, Calif., while actively engaged in performing the duties incident to his employment.

The California Industrial Accident Commission, upon receiving the claims filed by his widow, awarded $1,150 compensation. The department of natural resources carried the case to the Supreme Court of California for review, contending that the commission erred in its interpretation of the compensation act. In defining the term "employee," section 8, subdivision (a), of the compensation act (Stats. 1917, p. 835), provides in part as follows:

The term "employee" as used in sections 6 to 31, inclusive, of this act shall be construed to mean: * * * All elected and appointed paid public officers, and all officers and members of boards of directors of quasi-public or private corporations, while rendering actual service for such corporations for pay, but excluding any person * * * holding an appointment as deputy clerk, deputy sheriff, or deputy constable appointed for the convenience of such appointee, who receives no compensation from the county or municipal corporation or from the citizens thereof for services as such deputy: *Provided*, That such last exclusion shall not deprive any person so deputized from recourse against any private person employing him for injury occurring in the course of and arising out of such employment.

Under a rule of the department relating to volunteer deputies it is provided that "each volunteer deputy will be paid a salary of $5 for the first month's services to compensate him for the bond premium. Thereafter his services will be volunteer and without compensation." The facts showed Machado had received only the $5 provided for in this rule, since his appointment, and the question before the court was whether this placed him among those excluded from compensation as being a "volunteer without pay."

The court reviewed the history of the amendments to the compensation act and cited the case of County of Monterey *v.* Industrial Accident Commission (199 Calif. 221, 248 Pac. 912) in which—

This court differentiated between those deputies of public officers who were engaged in the public service and were serving chiefly for their own convenience and without pay and those who were serving for pay in their particular official capacity; and held that as to the former class it was the clear intent of the legislature in its amendment to the workmen's compensation act adopted in 1917 to exclude those who were thus serving without pay from the beneficial provisions of the act.

The court concluded the opinion by saying:

Following that decision by this court, the legislature, while otherwise making various amendments in the workmen's compensation act at the several sessions thereof, has undertaken to make no change in the provisions thereof relating to those public officers who are to be held to come within the term "employees" for the purpose of being brought within the beneficial provisions of said statute. We therefore see no escape from the conclusion that public officers of the class of the decedent herein who are serving without pay are not to be held included within the beneficial provisions of said act so as to entitle themselves, or, in the event of their death, their heirs or dependents, to receive an award at the hands of the industrial accident commission.

The award of the industrial accident commission was therefore annulled.

In regard to the definition of the terms employee, workman, operator, as applied to public officials in a case before the Court of Appeals of Ohio, it was held that deputy county officers were not "officials" within the meaning of the Ohio statute, defining the terms employee, workman, and operator as every person in public service except any official of the State or of any county, city, or township. This decision was based upon a prior decision of the Ohio court in the Jennings Case (49 N. E. 404, 405) wherein it is stated:

The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer.

(State ex rel. Alcorn *v.* Beaman, County Auditor et al., Court of Appeals of Ohio, June 24, 1929, 170 N. E. 877.)

WORKMEN'S COMPENSATION—DEATH FROM INTERVENING CAUSE—PNEUMONIA—PROXIMATE CAUSE—*Henderson* v. *Louisiana Power Co., Court of Appeal of Louisiana (June 28, 1928), 121 Southern Reporter, page 217.*—Samuel Henderson, while employed by the Louisiana Power Co., sustained an injury in an accident arising in the course of and out of his employment. An axe was thrown into the air by a falling tree, the blade striking Henderson on the forehead. After receiving treatment he was taken home and in a few hours thereafter he became seriously ill and developed a fever which continued until his death five days later. The medical authorities pronounced the cause of his death as pneumonia.

Suit was instituted by the parents of Henderson to recover compensation for the death of their son. The power company used as a defense the fact that Henderson had died with a disease, pneumonia, and alleged that the injury had not caused or contributed to his death.

Following a judgment for the company in the fourth judicial district court, Parish of Ouachita, La., the parents appealed to the Louisiana Court of Appeal. The appeal court reversed the judgment of the lower court and awarded compensation, saying, in part:

All of the physicians agreed the fever which developed in the afternoon following the injury was the result of the blow, and the evidence establishes that the illness continued until death, and, considering this fact with the facts first above stated, the presumption is that the injury caused the illness or aroused the disease resulting in death, and defendant is liable. [Cases cited.]

Had deceased recovered, it would hardly have been contended that defendant was not liable for the disability, although it may have been prolonged by the disease, pneumonia, as in compensation cases, where the injury results in disability which is continuous, the law does not attempt to distinguish between that caused by the injury and that which may be more particularly attributed to disease (Caldwell *v.* City of Shreveport, 150 La. 465, 90 So. 763), and, while there may be some distinction drawn between cases where the claim is for disability and where the claim is for death as the result of the injury, we are of the opinion that the distinction should not be drawn unless the evidence establishes that the disease which was developed during the period of disability and illness therefrom could not have been aroused or contributed to by the injury or illness naturally resulting therefrom, and that the evidence in the present case does not establish such facts.

WORKMEN'S COMPENSATION—DEATH FROM INTERVENING CAUSE—REVIEW—*Valier Coal Co.* v. *Industrial Commission et al, Supreme Court of Illinois (April 17, 1930), 171 Northeastern Reporter, page 627.*—On May 26, 1926, Nick Barrack, an employee of the Valier Coal Co., received an injury in the course of his employment, when coal weighing from 800 to 1,000 pounds fell from the face of the mine and covered him. The coal was removed and he was found in a semiconscious condition. There were three cuts on his head, his chest and the pelvis had been squeezed, and there were other bruises and contusions on his body. He was sent to the hospital and received treatment for about a month. He returned home where the physician, as the company's representative, continued to treat him, except for a short time in 1927 when he was sent by the company's representative to a physician in Chicago. After returning from Chicago the physician noticed a marked improvement. However, after a few months he again was confined to his bed and on August 23, 1927, he died.

His widow, Veronica Barrack, filed petition for compensation and the cause was heard by an arbitrator, who made an award. On review by the Illinois Industrial Commission the award by the arbitrator was affirmed. The case was appealed and after a hearing the

circuit court of Franklin County, Ill., remanded the case to the industrial commission with the specific direction that the commission call as a court witness the physician who had attended Barrack.

After a rehearing, the commission made an award, the same as was made by the arbitrator. This was later affirmed by the circuit court and the case was appealed to the Illinois Supreme Court. The employer contended that the evidence failed to show that Barrack's death was the result of the injuries received by him May 26, 1926. The testimony of several physicians was to the effect that his death was probably caused by a syphilitic condition existing prior to the injury. However, other experts and his attending physician testified that the death was caused by an infection of the lung resulting from the injury. The evidence also showed that prior to the accident Barrack was a strong healthy man who never lost any time from work and that after the accident he was not able to work.

The Supreme Court of Illinois therefore held that even though the death may have been caused by a condition existing prior to the accident, "after considering all the evidence in the case we are of the opinion that the industrial commission was justified in finding that Barrack received an injury in the course and scope of his employment, which proximately contributed to cause his death."

The judgment of the circuit court sustaining the award of the industrial commission was therefore affirmed.

WORKMEN'S COMPENSATION—DEPENDENCY—CLAIMS—MARRIAGE OF INJURED EMPLOYEE—*Gleason's Case, Supreme Judicial Court of Massachusetts (January 3, 1930), 169 Northeastern Reporter, page 409.*—On July 3, 1928, George W. Gleason received an injury arising out of and in the course of his employment with the Hersey Manufacturing Co. He was married to Ida V. Gleason on August 4, 1928, while he was a patient at the Boston City Hospital. He was then 80 years of age and she 76. On August 18 he left the hospital, but returned again August 28 and remained there until his death on September 22, 1928.

Mrs. Ida V. Gleason filed claim for compensation alleging she was dependent upon the deceased. The single member of the industrial accident board found that Mrs. Gleason was a member of the employee's family at the time of the injury and that she, having been the employee's wife at the time of his death, was entitled to the compensation due as his widow. The reviewing board, however, found that the claimant was not a member of the employee's family at the time of the injury and that she, not being then married to him, was

not a dependent within the meaning of the statute, although she was his wife at the time of his death.

Upon appeal to the superior court, Suffolk County, this court sustained the decree of the industrial board denying compensation; and the case was appealed to the Supreme Judicial Court of Massachusetts, where the judgment was affirmed, the supreme court saying in part as follows:

The board had power to reverse the findings of fact of the single member upon the evidence reported by him. * * * G. L. ch. 152, sec. 1 (3), defines dependents as "members of the employee's family or next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury." It is not necessary to decide whether the evidence of the claimant would support a finding that she was a member of the employee's family at the time of the accident, for the board were not obliged to believe this testimony, and we can not say that they erred in finding that she was not a member of his family at that time.

Since the claimant was neither next of kin nor a member of the employee's family at the time of the injury she can not recover.

WORKMEN'S COMPENSATION—DEPENDENCY—CLAIMS—WIFE LIVING IN FOREIGN COUNTRY—*Gonsiorek et al.* v. *Inland Steel Co., Appellate Court of Indiana (December 12, 1929), 169 Northeastern Reporter, page 55.*—On June 13, 1926, one Jan Gonsiorek was in the employ of the Inland Steel Co. and on that date suffered an injury which resulted in his death. Claim for compensation was filed with the Industrial Board of Indiana by Franciszka Gonsiorek, claiming to be the widow of the deceased, and for Julianna and Joseph Gonsiorek, their children. The claim for compensation was denied as the board found the evidence failed to show that the deceased was the same and identical person whom the widow claimed to have been her husband and the father of the children.

The industrial board found that about 1905 the deceased was married in Poland and about four years thereafter came to the United States, leaving his wife and children in Poland. Gonsiorek never returned to them; the wife and children continued to reside in Poland and never thereafter saw the deceased. The testimony of the witnesses upon whom the board was compelled to depend for identification, contained contradictions in their evidence and because of this the board refused to grant compensation. The case was carried to the Appellate Court of Indiana where the judgment of the industrial board was affirmed, the court saying:

The only question for our consideration, as stated above, is as to the sufficiency of the evidence to sustain the finding of the industrial board that the deceased was not identified as the same person whom

appellant Franciszka claimed to have been her husband and the father of appellants Julianna and Joseph, and as to whether they were dependent upon him for support at the time of his death.

While appellant Franciszka, by her deposition, testified that there were two children, the witness upon whom the industrial board was compelled to depend for identification testified that there were four children, naming three of them and stating that he did not remember the name of the fourth. There were other marked discrepancies in his testimony. It is apparent that the industrial board chose not to believe the unsupported testimony of witnesses with such a glaring contradiction in their evidence as here appears. Under circumstances such as here, where a husband has left his wife in a foreign country and they have not lived together for so long a period of time as here appears, before compensation is awarded, the proof that such an award is justified should be clear and convincing. We fully agree with the industrial board that an award based upon such unsupported and contradictory evidence was not justified. There was no evidence to support the dependency of appellants except the bare statement of these two witnesses. If money were sent by the deceased to appellants, it must have been by checks, drafts, or money orders in some form. Better evidence of such remittances should have been produced. The industrial board was justified in denying compensation.

WORKMEN'S COMPENSATION—DEPENDENCY—CONSTRUCTION OF STATUTE—*Rasor* v. *Marshall Hall Grain Corporation et al., St. Louis Court of Appeals (March 11, 1930), 25 Southwestern Reporter (2d), page 506.*—Willis Rasor was killed on August 22, 1927, while in the employ of the Marshall Hall Grain Corporation. The mother of Rasor filed her claim before the Missouri Workmen's Compensation Commission on November 11, 1927. The employer admitted all the statements in the claim for compensation, but denied that she was dependent upon her son for support.

Laura Rasor, a widow 60 years of age, lived on a farm 10 miles from Mountain Grove, Mo. The farm land was of such a poor quality that cultivation was not profitable; she lived on it without paying any rent and for a while her son lived with her. While at home he secured employment and gave his earnings to his mother, and after he secured employment elsewhere he continued to contribute to her support. From May, 1926, until the time of his death he had given her about $317.50 and had purchased some cows and chickens from which an income of about $12 per month was received. This income from her son's property together with the amount he sent her, was her total income and sole source of livelihood with the exception of some vegetables which she grew in the garden.

The commission found upon this evidence that the claimant was only a partial dependent and awarded her a compensation of $6 per

week for a total of 200 weeks. This was later affirmed by the St. Louis circuit court and thereupon the widow appealed to the St. Louis court of appeals.

It was urged by the employer that it was apparent from the language of the workmen's compensation act of Missouri (Laws 1927, p. 490) that the legislature intended for the commission to determine the question of dependency solely upon the basis of contributions made from the wages of a deceased employee. The appeals court, however, held that the legislature intended for the commission to determine the amount due a dependent solely upon the basis of the wages received by a deceased employee, and the determination of dependency rested upon other facts. The court reversed the decision of the lower court and held that the claimant was totally dependent within the meaning of the law, saying in part as follows:

> The house in which she lived and the little farm were evidently of so little value that its owner did not care to charge rent therefor. The cows were purchased by the deceased, and this was also true with respect to the chickens. We can not conceive of a case where the question of total dependency was more clearly shown than in this one. The claimant had no income of any substantial value aside from that which she received directly or indirectly from the deceased. She did not own any property, and did not have any relatives from which she received a single cent, gratuitous or otherwise, except that which she received from her son, the substantial portion of which consisted of that part of his wages which he contributed to her support. She was therefore a total dependent within the meaning of the law.

WORKMEN'S COMPENSATION — DEPENDENCY — CONSTRUCTION OF STATUTE—DISOBEDIENCE OF RULE—*Triola et al.* v. *Western Union Telegraph Co., St. Louis Court of Appeals (March 11, 1930), 25 Southwestern Reporter (2d), page 518.*—Angelo Triola, 17 years of age, died as a result of injuries received November 5, 1927, in an accident arising out of and in course of his employment with the Western Union Telegraph Co. He was riding his bicycle on the sidewalks in St. Louis, in violation of a city ordinance, and a rule of the employer requiring the employees not to ride bicycles upon city sidewalks. Triola was struck by a truck and received injuries resulting in his death.

Upon a hearing before the Missouri Industrial Commission, the parents were allowed the full amount asked for, subject to a credit of $150 for burial expenses. An appeal was taken to the circuit court of St. Louis by the employer where the award of the commission was affirmed. The employer thereupon appealed the case to the St. Louis court of appeals, contending that the parents were only partial dependents and that the award should be decreased accordingly.

The facts show that at the time of the death, Angelo was earning an average weekly wage of $15.24; his brother was earning an average weekly wage of $21.00; and his father an average weekly wage of $22.80. The family consisted of 10 members and the total family income amounted to $59.04 per week. After hearing the contention of both parties, the court said:

We have three theories advocated in this case: First, that this court was right in its original opinion as to the amount a partial dependent should receive (25.8 per cent of total death benefit.) Second, that the part a partial dependent is to receive is determined by the proportion of his contributions, and that if he contributes three-fourths of his income to partial dependents, such partial dependents would receive three-fourths of the total death benefit, or if he contributed all his earnings, the partial dependents would receive the total death benefit, or the same amount the total dependents would receive. The third theory is that the death benefit is the same in all cases, whether there be total or partial dependents, but the method of distributing to partial dependents is determined by the percentage which each partial dependent would receive as compared to the employee's total contributions.

We have given this case much thought and careful consideration, and have come to the conclusion that the second theory above referred to is the correct one, and the one which was really intended by the legislature.

The court cited sections of the Missouri workmen's compensation act (Laws 1927, p. 503) applicable to the facts of this case. Section *c* answered the question involved in the case, as to the amount that a partial dependent should receive, as follows:

If there be partial dependents, and no total dependents, a part of the death benefit herein provided in the case of total dependents, determined by the proportion of his contributions to all partial dependents by the employee at the time of the injury, shall be paid by the employer to each of such dependents proportionately.

The court concluded that section *c*, when properly construed, meant that the part of the death benefit which partial dependents received, was determined by the proportion of the employee's wage which he contributed to such partial dependents and not such amount as the total contributions bear to the total family income. As the circuit court awarded compensation on this basis, the award was affirmed. The court also held that the violation of the city ordinance and the employer's regulation did not come within section 3 of the act, providing that the award be reduced 15 per cent for violation of regulations, as section 3 did not apply to accidents occurring on the streets of St. Louis and not immediately connected with the employer's business. The court held that such rules, adopted by an employer and referred to in section 3, were rules where the employees are engaged in work on the premises of the employer and where safety devices can be used.

WORKMEN'S COMPENSATION—DEPENDENCY—CONSTRUCTION OF STATUTE—MARRIAGE AFTER INJURY OCCURS—*Austin Co.* v. *Brown, Supreme Court of Ohio (June 5, 1929), 167 Northeastern Reporter, page 874.*—Edward Brown was injured October 3, 1919, in the course of his employment with the Austin Co., a self-insurer under section 1465–69, Ohio General Code, section 22 of the workmen's compensation act. Brown was awarded compensation at the rate of $15 per week, which was paid to him continuously to the date of his death, April 9, 1925, a total sum of $4,290. Thereafter his widow, Stella Brown, to whom he was married 14 months after the injury, made claim for death benefits under section 1465–82, Ohio General Code, which claim was allowed by the commission in the sum of $6,500 less $4,290 already paid. After a reconsideration, the order was vacated and the claim denied. The widow then carried the case to the Crawford County common pleas court, Ohio, where the claim was held to be valid and an award granted. The Austin Co. appealed the case to the Supreme Court of Ohio after the court of appeals affirmed the decision of the lower court. The employer claimed the widow was not entitled to compensation under paragraph A of subsection 5.

The supreme court affirmed the decision of the lower court, saying in part as follows:

If this case be considered as only presenting a question of the interpretation of section 1465–82, no great difficulty is found. It is quite clear that the language found in the latter part of subsection 5 applies to "all clear cases," meaning thereby all cases other than a wife living with her husband at the time of his death and children living with the parent at the time of his death. A wife not being one of the other cases referred to is not governed by the provisions relating to other cases.

It is claimed, however, that there is a latent spirit running through the constitutional provision and the workmen's compensation act forbids any one being adjudged a dependent unless the claimant has received support from a deceased employee as such, that is to say, received support out of the actual earnings of his employment.

It is claimed that by reason of this claimant never having received support out of the wages of the deceased employee, she is not a dependent within the intent and meaning of that term as employed in the constitution and the workmen's compensation act.

We think the answer to the question propounded in this case is found in the essential nature of workmen's compensation. It is neither charity, nor pension, nor indemnity, nor insurance, nor wages, though, if a definition of each and all of these terms were placed in parallel columns with a definition of compensation, certain elements would be found common to all.

The entire subject of workmen's compensation is statutory. Rights may be created and destroyed at will by the legislature. It has power to place limitations upon the rights of widows, and could limit or

deny altogether any compensation to a widow of a marriage contracted after an injury resulting in death. It has not done so. The judgment must be affirmed.

WORKMEN'S COMPENSATION—DEPENDENCY—DIVORCED DAUGHTER RESIDING WITH FATHER—EMPLOYMENT STATUS—*Milwaukee Casket Co. et al.* v. *Kimball et al., Supreme Court of Wisconsin (April 29, 1930), 230 Northwestern Reporter, page 627.*—William W. Dolbear died as a result of an accidental injury received while employed by the Milwaukee Casket Co. Both were subject to the workmen's compensation act at the time of the accident. Laura Dolbear Kimball, a daughter of the deceased, was at the time of her father's death a divorced woman, about 50 years of age, having a daughter about 20 years of age, both of whom resided with the deceased and were supported by him. She filed claim for compensation and the Wisconsin Industrial Board made an award in her favor. The circuit court, Dane County, Wis., sustained the award, and the employer and insurer appealed to the Supreme Court of Wisconsin to set aside the award.

It appears that in 1920, Laura D. Kimball left her husband and, together with her child, came to live with her parents. From November, 1922 to November, 1924, she was employed by a doctor at $100 per month. Her mother was in failing health at that time and the daughter quit her employment, assumed the management of the household, and cared for her mother. Shortly thereafter the deceased began giving her $15 per week, and he did this regularly until his death, besides furnishing the daughter and her child with their living.

The employer, on appeal, contended that as the daughter was receiving $15 per week, she was therefore a wage earner and not dependent upon her father. However, the court held that the evidence was "quite satisfactory that the relation was the family relation of father and daughter rather than employer and employee." The court said "at least it presented a question of fact for the commission and its finding is therefore conclusive." The judgment of the circuit court sustaining the award of the commission was therefore affirmed.

WORKMEN'S COMPENSATION — DEPENDENCY — EVIDENCE—*Betor* v. *National Biscuit Co., Supreme Court of Montana (July 16, 1929), 280 Pacific Reporter, page 641.*—The Supreme Court of Montana ruled in this case that "actual dependency" was necessary to secure compensation, as a major dependent, for an employee's death.

The facts in the case show that Arthur Betor, while employed as a salesman for the National Biscuit Co., was accidentally killed on August 6, 1926, while performing his duties. The Industrial Accident Board of Montana awarded the mother of Betor $9.23 per week for 400 weeks as a major dependent, and this award was affirmed by the district court of Lewis and Clark County, Mont. The employer appealed the case to the Supreme Court of Montana, contending that Anna Betor was not a dependent as defined by the statute and cited cases to uphold this view. The facts showed Arthur Betor contributed $40 in May and $40 in June toward the support of his mother, but the court held this was not evidence of her dependency upon him. Blibal Betor, the father, was living and although at the time of the trial he was in debt, the court found he had been successful financially and "was a good provider for his family." The Supreme Court of Montana reversed the decision of the lower court and the industrial board, saying that—

> The industrial accident board and the trial court gave undue weight to certain statements of the claimant but overlooked the controlling and undisputed facts. The positive assertions of a witness can not be taken alone without regard to what he says elsewhere in his testimony. "The legal value of a body of evidence is to be determined by its entire content, and not by any single feature, the effect of which may be destroyed by admissions or contradictions emanating from the same source." (Hood *v.* Murray, 50 Mont. 240, 146 Pac. 541; Bachman *v.* Gerer, 64 Mont. 28, 208 Pac. 891.)

Two of the justices dissented and delivered an opinion in which they held "the test applied by authorities generally is not whether the claimant would have been without the necessities of life in the absence of the contributions, but rather, were the contributions actually made and relied upon?" They were of the opinion that there was competent evidence of partial dependency and as there was such evidence to support the finding and decision of the board its action should not be reversed by the courts.

WORKMEN'S COMPENSATION—DEPENDENCY—EVIDENCE—*Novak* v. *Industrial Commission et al., Supreme Court of Illinois (April 17, 1930), 171 Northeastern Reporter, page 158.*—George Stranz received a fatal injury arising out of and in the course of his employment in the mines of the Skinner Coal Co. in Illinois. Upon the application of his mother, Mary Novak, for compensation under the Illinois workmen's compensation act, an arbitrator made an award of $1,650 in her favor, which the State industrial commission upon review set aside.

On appeal the circuit court of Cook County set aside the award of the industrial commission and entered the same award as the arbi-

trator, whereupon the employer appealed the case to the Supreme Court of Illinois. The only question for review was the dependency of the mother and the only evidence heard was her testimony which was taken before the arbitrator. From her testimony it appears that her son George Stranz was 21 years of age and unmarried at the time of the accident, that his father was dead, and that she had married Thomas Novak with whom she was then living. There were five children of the first marriage—two girls, who were working in Chicago; two boys, Harry and George, who had started to work at the mine; and the youngest, a girl of 15, who lived at home and was unemployed. Thomas Novak, age 6, a son of the second marriage, was living at home. Her husband worked for the Sunlight Coal Co. as a driver for $7.50 a day. She also stated that—

George was not a boarder and paid no board but lived as one of the family, turning all his wages over to his mother for her use in the support of the family. * * * In October, 1927, the month of George's death, the three were employed in the mines, and their wages that month amounted to $322.55, which she received. With that she bought clothes and groceries and paid expenses for lights and other things.

The counsel for the employer compared Mrs. Novak's statement of expenses with the yearly income of her husband and offered this comparison as proof that she was in no way dependent upon her son for support. The court did not sustain this view however, and said that—

Counsel for the plaintiff in error have compared the expense account of the family with the income of the defendant in error's husband, based upon his earnings in October, 1927, and find the income to be from $2,080 to $2,184 a year and the expenses from $1,844 to $1,960, and conclude from their calculation that the defendant in error was supported by her husband and was not dependent in any degree upon the assistance of her son for her support. This calculation makes no allowance for the clothing of the family, for the occasional visits of the doctor, for the payment of taxes, and the various miscellaneous and incidental expenses incurred by a family of five persons and included in Mrs. Novak's statement, "I can't think of everything else." Neither does it take into account the fact that, although the husband in October, 1927, was earning $7.50 a day, during the preceding months he had had employment only part of the time and at only $3.20 a day, and that during this time George had contributed to his mother the whole of his earnings of $3.20 a day. She was at least partially dependent on this contribution for her support and relied on the aid of George's earnings for her means of living.

The court also commented on the fact that the calculation of the employer's counsel also ignored the fact that the employment of Novak was in a coal mine—a seasonal occupation in which working-

days were not constant throughout the year but were subject to considerable interruption. The court concluded the opinion by saying:

The fact that her husband and her two boys received in October, and gave to her, $300 received for their work in the coal mines, did not justify the conclusion that Mrs. Novak's income from their joint receipts was $3,600 a year, or that the wages of her husband furnished an adequate support for the family or made her independent of the assistance of her two sons.

The finding of the industrial commission that George Stranz left surviving him no person entitled to compensation is manifestly against the weight of the evidence, and the judgment of the circuit court setting aside the order of the commission and entering an award of compensation to the defendant in error is affirmed.

WORKMEN'S COMPENSATION — DEPENDENCY — "MEMBER OF FAMILY"—*Memphis Fertilizer Co. et al.* v. *Small et al.*, *Supreme Court of Tennessee* (*January 18, 1930*), *22 Southwestern Reporter* (*2d*), *page 1037*.—Roosevelt Small, while in the employ of the Memphis Fertilizer Co., received injuries resulting in his death. Beatrice Small, his alleged common-law wife, filed suit to recover compensation for herself and for her 6-year-old daughter. The circuit court of Shelby County, Tenn., granted an award to Jewell Stevenson, the daughter, but denied an award to the wife. Thereupon the case was appealed to the Supreme Court of Tennessee. The court quoted from chapter 123, Acts of 1919, as follows:

SEC. 30. Be it further enacted, that for the purposes of this act the following described persons shall be conclusively presumed to be wholly dependent:

(1) A wife, unless it be shown that she was voluntarily living apart from her husband at the time of his injury, and minor children under the age of 16 years. * * *

(3) Wife, child, husband, mother, father, grandmother, grandfather, sister, brother, mother-in-law, and father-in-law who were wholly supported by the deceased workman at the time of his death and for a reasonable period of time immediately prior thereto shall be considered his actual dependents, and payment of compensation shall be made to them in the order named.

Construing the provisions of the act quoted above, the supreme court held that subsection 1 of section 30 applied to legitimate children, while subsection 3 embraced other and different classes of children who were wholly supported by the deceased workman at the time of his death and for a reasonable time immediately prior thereto. Dependency and not relationship was the test.

The court concluded that the trial court correctly held that Beatrice Small was entitled to no compensation. The facts of the case did not

even show that she was a common-law wife, and the court held that it was not the intention of the legislature to provide compensation for such a person.

Construing section 30, the court said, subsection 1 applies to a lawful wife who is not voluntarily living apart from her husband, while subsection 3 refers to a lawful wife not included in subsection 1.

The decision of the circuit court was therefore affirmed.

WORKMEN'S COMPENSATION—DEPENDENCY—MINOR—"EMPLOYEE"—*Clark et al.* v. *White et al., Supreme Court of Wisconsin (January 8, 1929), 222 Northwestern Reporter, page 823.*—Owen Merrick, a minor about 16 years of age, was struck by an automobile while working on a highway, and sustained injuries that caused his death. He was the eldest member of a family of seven children. His father was insane and his mother was dead. Merrick and his sisters were living at the home of an uncle, who received $70 a month from the county for their support.

With the help of Merrick the uncle carried on his 93-acre farm without hiring other help. Merrick attended school and worked about the farm nights, mornings, and Saturdays, and during the entire summer. The value of the service rendered exceeded the cost of supporting the boy. This was one of the considerations which led the uncle to agree to care for and maintain the younger children. The uncle was employed by plaintiff Clark in the work of improving a highway, and Merrick had taken his uncle's place on the day he was killed.

The Industrial Commission of Wisconsin found that the six sisters were partially dependent on Merrick and awarded compensation, which award was affirmed by the circuit court of Dane County, Wis. The employer thereupon appealed to the Wisconsin Supreme Court. Mr. Justice Stevens rendered the opinion of the court affirming the decision of the lower court in granting compensation to the sisters. He said in part as follows:

The proof clearly establishes the fact that the work performed by the deceased during the last year of his life constituted a material contribution to the support of his sisters. They were in fact partially dependent upon his contribution for their support. The service rendered by the deceased was as clearly a contribution to the support of the sisters as would have been the payment of cash of equal value.

The deceased was an employee, within the meaning of the term as used in the workmen's compensation act, which so defines an employee as to include "all helpers and assistants of employees, whether paid by the employers or employee, if employed with the knowledge, actual or constructive, of the employer." (Stats. 1925, sec. 102.07,

subd. (4).) Deceased was the helper or assistant of his uncle, who was the employee of the plaintiff. Deceased was at work with the actual knowledge and express consent of the foreman in charge of the work.

The commission properly fixed the compensation at double the amount of the support which the commission found that the sisters might reasonably have anticipated that they would have received from the deceased but for his untimely death. Deceased was a minor of permit age, who was at work without such permit. Under subdivision (7) (a) of section 102.09 of the Statutes of 1925, it was the duty of the commission to fix compensation at double the amount that would otherwise have been recoverable.

WORKMEN'S COMPENSATION — DEPENDENCY — MINOR — LIVING APART FROM PARENT AS WARD OF THE STATE—*Advance Rumley Co. v. Freestone et al., Appellate Court of Indiana (July 2, 1929), 167 Northeastern Reporter, page 377.*—Alonzo Freestone died October 3, 1927, as the result of an accident which arose out of and in the course of his employment by the Advance Rumley Co. Freestone's two surviving sons, by their guardian, filed an application for compensation. In December, 1916, Mary Freestone, the mother of these boys, was divorced from Alonzo Freestone and was awarded the custody, education, and maintenance of Ernest, an infant 6 months old. The father was ordered to pay $5 per month for his support. Mrs. Freestone married again and at the time of Alonzo Freestone's death, she and Ernest lived with her second husband on a farm in Michigan. The father was given the care and custody of Amos, aged 2 years, until further order of the court. Amos lived with the father until June 23, 1927, when the court committed him to White's Manual Labor Institute at Wabash as a delinquent. Amos was thereafter under the care and custody of that institution until after the father's death, when the probation officer of La Porte County gave a letter to an uncle of Amos for his release in order that he might attend the funeral.

As a result of proceedings under the Indiana workmen's compensation act, compensation was awarded to Amos for 300 weeks at the rate of $12.07 per week and to Ernest at the rate of 61 cents per week.

The employer appealed to the Appellate Court of Indiana contending that neither of the boys was entitled to compensation. The basis of this contention was that—

Section 38 of the workmen's compensation act, as amended in 1919 (Acts 1919, p. 165, ch. 57; sec. 9483, Burns' Ann. Stat. 1926), provides that: "The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: * * * (*c*) A child under the age of 18 years upon the parent with whom he

or she is living at the time of the death of such parent. (*d*) A child under 18 years upon a parent with whom he or she may not be living at the time of the death of such parent, but upon whom, at such time, the laws of the State impose the obligation to support such child. * * * In all other cases, the question of total dependency shall be determined in accordance with the fact as the fact may be at the time of the death, and the question of partial dependency shall be determined in like manner as of the date of the injury. If there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partially dependent shall receive [no] part thereof. If there is no one wholly dependent and more than one person partially dependent, the death benefit shall be divided among the partial dependents according to the relative extent of their dependency."

The court answered this contention, in part, as follows:

Under the workmen's compensation act as originally enacted (Acts 1915, p. 392, ch. 106, sec. 38), the fact that Amos was not living with his father at the time of the latter's death would in itself have excluded him from the class of children conclusively presumed to be wholly dependent for support upon his father. The amendment under which he claims compensation (Acts 1919, p. 165, ch. 57), extends the presumption to certain children not living with the parent at the time of his death, but only to those "upon whom, at such time, the laws of the State impose the obligation to support." It is not to be assumed that the legislature, in using the quoted words, was creating a new and enlarged obligation on the part of the father to support his children, but was merely referring to and embodying therein the existing law of this State, under which the obligation is largely dependent upon the right to custody. We can not enlarge the scope of this amendment by reading into it language which would materially change the existing law, and extend the legal obligation of a father to support to a case like the present, where the custody of the child had been taken from the father and transferred to a custodial institution, without a decree of the court requiring him to pay anything toward its support.

It was not necessary for the court to state, in the decree depriving the father of the custody of his child and committing him to an institution, that the father was relieved of his prior legal obligation to support such child. The legal effect of the decree depriving him of the custody of his child was to relieve him of his legal duty to support such child so long as the decree of the court remained in force. If the court had, by a decree, ordered the father to pay the whole of the cost of supporting the child while in the institution, the law would have imposed upon him the obligation to support such child. The award as to Amos must be, and the same is, reversed. The award in favor of Ernest is affirmed.

A strong dissenting opinion was delivered by Judge Lockyear, who said in part as follows:

No order of any court relieving the father of Amos Freestone from his legal duty to support his children ever having been made, and if he was not relieved by law from his duty to support his child, he

was still under a legal obligation to support his child at the time of his death. When a child is to be sent to an institution, other than a State institution, unless the father is called before the court and excused from the obligation imposed upon the father by law, the obligation remains upon him to support his child while in the institution. In this case, the father was not relieved by law, but was compelled by the law to support his child.

While the parent's duty to support his child and his right to custody and services of the child are usually reciprocal, the parent remains liable for the support of the child where he is deprived of its custody on account of his own misconduct or wrongdoing, and the fact that, as between the parents, the custody of the children has been awarded to the mother, does not relieve the father of the duty to support.

WORKMEN'S COMPENSATION—DEPENDENCY—MINOR—LIVING WITH ELDER BROTHER—*Clark* v. *Appalachian Power Co., Supreme Court of Appeals of Virginia (September 19, 1929), 149 Southeastern Reporter, page 613.*—C. E. Clark, an employee of the Appalachian Power Co., was accidentally killed while engaged in the performance of his duties. On July 23, 1924, without contest from the employer, an award was entered by the Industrial Commission of Virginia directing the payment of $12 per week, plus cost of medical attention and burial expenses, to Louise F. Clark, the alleged widow. Under this award there was paid to Louise F. Clark a payment of $44 and two additional payments of $48 each. Shortly after the last of these payments the father of the deceased notified the employer that the alleged Louise F. Clark had never been married to his son. Thereupon, no further payments were made by the employer and in July, 1928, the industrial commission canceled the previous award.

Following that action a claim was filed by Fred Clark, a brother of C. E. Clark, in which he alleged total dependency and asked for an award upon that basis. The facts show that at the time of C. E. Clark's death, this minor brother, about 16 years of age, had lived with him for a period of about 11 months. However, he had returned to Pulaski and was living with his father and mother when the accident occurred. His father was an engineer for the Norfolk and Western Railroad, and was making at least $2,700 per year. The industrial commission refused to grant compensation and the case was appealed to the Supreme Court of Appeals of Virginia. The counsel for the employer advanced three reasons for refusing the claim:

1. Claimant was barred by the statute of limitations.
2. Claimant was not a dependent.
3. Admitting for the sake of argument that claimant was a dependent, there was a change in condition to total nondependence at the time and immediately following the accident.

After reading the evidence the court reached the conclusion that Fred Clark was not a dependent of the deceased, therefore it was unnecessary for them to consider the first and third contentions. In affirming the decision of the commission, the court said in part as follows:

It is very true, as heretofore said, that the commission found as a fact that the claimant was a total dependent, and the claimant and various members of his family have testified that he was a total dependent; but the facts upon which they based their conclusion do not justify it.

The deceased never made any cash contribution to the claimant, and at the time of the accident claimant was not staying with the deceased and the latter was not contributing anything to his support. The bare fact that the claimant spent about 11 months with his brother does not, under the circumstances of this case (and we wish to confine our remarks to the facts of this case), show the existence of dependency. Claimant did not go to his brother's because of necessity or because of dependency upon him, but at the request of his brother and as a convenience and accommodation to the latter. Claimant's father was amply able to support him and, so far as the record shows, never refused to do so. * * * The legal obligation to support his son rested upon his father, who, as heretofore stated, was amply able to take care of not only his son but of his family. The bare fact that the claimant baldly states that he is a dependent is not conclusive upon the court, where the undisputed facts show that there was no actual dependence.

WORKMEN'S COMPENSATION—DEPENDENCY—MINOR—MARRIAGE OF WIDOW—*Reliance Coal & Coke Co. et al.* v. *Fugate et al.*, *Court of Appeals of Kentucky* (*February 7, 1930*), *24 Southwestern Reporter* (*2d*), *page 605*.—On February 4, 1923, Mitchell Fugate was killed while in the course of his employment with the Reliance Coal and Coke Co. He left surviving him his mother, Nannie Fugate, and his sisters, Mary and Sallie. As the employment was within the Kentucky workmen's compensation law an agreement was entered into by the employer and Fugate's dependents whereby the employer agreed to pay Nannie Fugate for the benefit of herself and two daughters, $12 a week for 333⅓ weeks.

After the compensation had been paid for 183 weeks Nannie Fugate remarried on May 26, 1926. At that time Mary Fugate was also married, having married on October 29, 1925, and Sallie Fugate was over 16 years of age. The employer declined to make further payment of compensation, whereupon Sallie Fugate instituted proceedings before the Kentucky Compensation Board to compel the employer to complete the payments in accordance with the award. The board held that because Sallie Fugate had become 16 years of age she was not thereby deprived of the right to future compensation

even though she was not incapacitated from wage earning. The Perry County circuit court affirmed the decision of the compensation board and the case was then carried to the Kentucky Court of Appeals.

In considering the first contention made by the employer, that when an infant dependent reaches the age of 16 and is not incapacitated from wage earning, the compensation which has been awarded then ceases. The court cited the Kentucky statute (subsec. 4 of sec. 4893–4894) and said:

It follows that, as the statute made the question of the appellee's dependency turn on what the facts were at the time of the accident, and there is no provision terminating her right to compensation solely because she had become 16 years of age and is not incapacitated from wage earning, the first question raised by this record must be answered in the negative.

It was next contended by the employer that when compensation was awarded to three dependents, and thereafter two of them married, compensation ceased and the third was not entitled to the entire compensation which previously had been paid to the three. In affirming the judgment of the lower court the court answered this contention and said:

We find in the award of the compensation board in this case that it is stated as a finding of fact that the appellee was by the original award found to be totally dependent upon her brother at the time of his death. Section 4894 of the statutes above quoted provides that, when a group of dependents are entitled to compensation and for some reason or other the right of any person of that group to further compensation ceases, the remaining persons in the group are entitled for the unexpired period to such part of the compensation which has been theretofore awarded as they would have received had they been the only persons entitled to such compensation at the time of the accident. The original award found these three parties totally dependent. Sallie Fugate therefore would have been entitled to all of the compensation then awarded had she been the only dependent at that time, and therefore, when the right of her mother and sister to share in that compensation ceased, she was under the statute entitled to all of the compensation.

WORKMEN'S COMPENSATION — DEPENDENCY — MINOR — WIDOW GUILTY OF BIGAMOUS MARRIAGE—*M. Martin Polokow Corporation* v. *Industrial Commission et al., Supreme Court of Illinois (October 19, 1929), 168 Northeastern Reporter, page 271.*—Frank Ciesielski died on July 14, 1927, from injuries suffered while employed by the M. Martin Polokow Corporation. On November 13, 1894, Ciesielski married Marianna Ostrowski and about June 30, 1919, he deserted his wife and children. About five months thereafter, Marianna Ciesielski, the wife, without having obtained a divorce from her

husband, married John Sartori. Sartori was supporting Mrs. Ciesielski and her two minor children at the time of Ciesielski's death.

On November 13, 1926, Ciesielski, not having received a divorce from his wife Marianna, married Agnes Skrzp, and was supporting her at the time of his death. Marianna Ciesielski and Agnes Skrzp, each claiming to be the widow of decedent, filed applications for compensation with the Illinois Industrial Commission.

The arbitrator awarded Agnes Ciesielski $10.50 per week for 280 weeks and to Marianna Ciesielski, the mother of the two minor children, for their support $4.50 per week for 280 weeks. This award was set aside by the industrial commission, which awarded Marianna Ciesielski for the support of herself and one minor child $15 per week for 280 weeks. They found the other minor child over 16 years of age and not entitled to compensation. Agnes Skrzp then carried the case to the Superior Court of Illinois, which court confirmed the decision of the industrial commission to the extent that it denied compensation to Agnes Skrzp, but set aside the remaining portion of the decision which directed payment of compensation to Marianna Ciesielski. Upon her petition the case was then carried to the Supreme Court of Illinois for review.

In reference to Marianna Ciesielski's right to compensation the court said:

The widow's statutory right to compensation is predicated upon the legal obligation of her husband to support her, existing at the time he suffered the accidental injury from which death ensued. Owing to Marianna Ciesielski's misconduct, no such obligation existed when her husband was injured, and for that reason she is not entitled to compensation for his death.

The situation with respect to George and Gertrude Ciesielski, the two minor children, differs from that of their mother. A father's obligation to provide for his child is not affected by his wife's misconduct. * * * These children did not leave their father; on the contrary, he deserted them. His obligation to support them continued and existed at the time of his death.

Continuing the court said:

Agnes Skrzp's bigamous, and hence void, marriage to Ciesielski imposed upon him no duty or obligation to support her.

The judgment of the superior court is reversed, and the award of the industrial commission is set aside, and the cause is remanded to the industrial commission, with directions to permit, first, an amendment of the application filed by Marianna Ciesielski so that it will seek the adjustment and payment of the compensation owing to the two minor children; and, second, the introduction of evidence relevant to the question of the amount of such compensation and the time and manner of its payment.

WORKMEN'S COMPENSATION—DEPENDENCY—WIFE NOT LAWFULLY MARRIED—*Atlantic Bitulithic Co.* v. *Maxwell, Court of Appeals of Georgia (October 18, 1929), 150 Southeastern Reporter, page 110.*—Will Maxwell was accidentally killed in Wayne County, Ga., while working as an employee of the Atlantic Bitulithic Co. His death arose out of and in the course of employment, which was subject to the provisions of the Georgia workmen's compensation act. (Laws 1920, p. 167 as amended.)

Alice Jackson Maxwell and Johnnie Mae Maxwell each claimed compensation as the wife of Will Maxwell. The industrial commission found that neither of them was the lawful wife of Maxwell and denied both claims. Separate appeals were taken to the superior court of Wayne County, where the appeal of Alice Jackson Maxwell was sustained and that of Johnnie Mae Maxwell denied. The employer appealed from the decree awarding compensation to Alice Jackson Maxwell, and Johnnie Mae Maxwell appealed from the decree denying compensation to her. Both appeals were taken to the Court of Appeals of Georgia, which court found the facts to be as follows:

Alice Jackson Maxwell was married to the decedent on May 30, 1924. This marriage was under license and according to due ceremony. The parties thereto lived together as husband and wife for some months, perhaps a year or so, the exact period not appearing. Alice Jackson, however, had theretofore, to wit, in 1918, undertaken to marry one Henry Jackson, when Henry Jackson had a living wife from whom he was not divorced. She knew that he had a living wife at the time she married him. She and Jackson lived together for eight or nine months, after which she went her way and Jackson returned to his lawful wife. Apparently Maxwell did not know of her past relations with Jackson when he married her in 1924, and it might have been inferred that he left her soon after discovering the facts. * * * He was formally married to Johnnie Mae Sutton on January 25, 1927, and was living with her as his wife at the time of his death on March 14, 1928.

The court said in the course of the opinion that "this is not a controversy between two women, each claiming to be the widow of the deceased, and does not put in direct competition, as to validity, two marriages; on the other hand each is a separate suit against the employer." The court held that the attempted marriage between Alice and Henry Jackson in 1918 was bigamous and was therefore void. Quoting from Irving *v.* Irving (152 Ga. 174, 176, 108 S. E. 540, 541), in which the Georgia Supreme Court said:

The marriage of a man and woman, where one of them has a husband or wife by a prior marriage, who is then living and undivorced, is void, and not merely voidable. Being a nullity, no decree is necessary to void the same.

Continuing the opinion the court said:

It follows from the above decision that the so-called marriage between Alice Jackson Maxwell and Henry Jackson in 1918, and her unlawful cohabitation with him for a time, however wrong and immoral, constituted no legal obstacle against the later marriage between her and Will Maxwell, which occurred in 1924. There was no incapacity in either of the parties preventing such marriage, and she became his lawful wife. * * * Then, so long as this marriage was undissolved, he could not marry Johnnie Mae. Alice was the widow, and Johnnie Mae was not. The superior court was correct in sustaining the appeal of the former and denying the appeal of the latter.

WORKMEN'S COMPENSATION—DEPENDENT—PARENT'S RIGHT TO ACTION—*Bradley* v. *Swift & Co.*, *Balthazar* v. *Swift & Co.*, *Supreme Court of Louisiana* (*October 29, 1928*), *119 Southern Reporter, page 37, and 120 Southern Reporter, page 896.*—William Balthazar, while working for Swift & Co., was accidentally killed on April 1, 1925. A few months after the deceased was killed his widow, Elizabeth Bradley Balthazar, and his father, Paul Balthazar (the deceased left no child or mother), brought suits to recover compensation under the employer's liability act. (Act No. 20 of Louisiana, 1914, as amended.)

The trial court found the widow dependent upon the deceased and allowed her compensation, but upon appeal by the company the court of appeal found that she was not then dependent upon him and, moreover, had not lived with him for some 20 years preceding the accident. The counsel for Swift & Co. cited as a defense to this suit section 8, subsection 1, paragraph (L) of Act No. 216 of Louisiana, 1924, which reads as follows:

No compensation shall be payable under this section to a widow unless she be living with her deceased husband at the time of the injury and death, or be then actually dependent upon him for support.

In view of this section and the findings by the court the decision of the trial court awarding compensation to the widow was reversed by the court of appeal. The Supreme Court of Louisiana affirmed the decision of the appeal court and dismissed the suit of the widow.

The trial court and the court of appeal found that as the deceased left a widow, the father was excluded whether he was dependent on the deceased or not, even though the widow was not entitled to recover.

The supreme court, after discussing the provisions of the employers' liability act, reversed the decision of the court of appeal regarding the rights of the father and held that the fact that the deceased left a widow who was not entitled to compensation did not

exclude the father. The case was remanded to the court of appeal for disposition.

The case was again tried by the Court of Appeal of Louisiana and a decision rendered March 4, 1929. (Balthazar *v.* Swift & Co., 120 So. 896.) The question involved was whether the father was actually dependent upon the deceased as the evidence showed the son did not contribute to the support of the father, even though the father was in destitute circumstances. The court cited the case of Bourg *v.* Brownell-Drews Lumber Co. (Ltd.) (120 La. 1009, 45 So. 972), in which case a parent sued in damages for the death of his minor son, claiming that he was deprived of the potential right to claim from his son maintenance to which he was entitled under the Civil Code of Louisiana, article 229. Regarding this case the court said:

It was argued that the father was deprived of this right, and that this deprivation constituted a loss to him, and therefore an item of damage to be taken into consideration. The court refused to consider this item of damage, and in so doing said:

"But there has been no attempt to prove that plaintiff is in need, or ever expects to be."

It seems, then, that our supreme court, had the parent shown that he was in need, or that there was a probability that he would be in need, might have awarded damages on this item.

If, then, this is an item of damage which, when the parent is in need or in destitute circumstances, may be taken into consideration in a tort case, and if the compensation act was intended in a small measure to recompense persons who, as a result of industrial accidents, sustain losses, then should not the destitution of the parent alone be sufficient to entitle him to recover from the employer of his deceased son?

In concluding the opinion the court said:

Our conclusion is that, in the light of the cases to which we have referred, actual dependency at the time of the injury or death exists where the parent is, at that time, in need, although prior to the injury or death the deceased child may never have contributed anything to the support of the parent.

It is therefore ordered, adjudged, and decreed that the former opinion and decree be and it is hereby vacated and recalled, and it is now ordered, adjudged, and decreed that there be judgment in favor of claimant, Paul Balthazar, and against the defendant, in the sum of $4.39 per week, for 300 weeks, commencing April 1, 1925, with legal interest from November 5, 1925, on all installments due at that time, and with legal interest on each subsequent installment from its due date.

WORKMEN'S COMPENSATION—DISABILITY—DISFIGUREMENT—INJURY TO TEETH—*Amalgamated Sugar Co.* v. *Industrial Commission et al., Supreme Court of Utah (April 8, 1930), 286 Pacific Reporter, page 959.*—Wendell E. Smith, in the course of his employment by the

Amalgamated Sugar Co., sustained accidental injuries whereby he lost one front tooth and fractured another. In proceedings before the Industrial Commission of Utah he was awarded compensation at the rate of $16 per week for ten weeks for disfigurement and loss of bodily function notwithstanding he was not disabled for work. The employer appealed the decision to the Supreme Court of Utah, contending that under the Utah workmen's compensation act the award was invalid because the injury sustained did not cause disability or incapacity for work.

The Compiled Laws of Utah, 1917, section 3138 (as amended by Laws of Utah, 1919, ch. 63), after prescribing fixed and definite periods of compensation for the loss of certain physical members and functions, provides:

Any other disfigurement or the loss of bodily function not otherwise provided for herein, such period of compensation as the commission shall deem equitable and in proportion to compensation in other cases not exceeding 200 weeks.

After citing this section of the compensation act, the court affirmed the decision of the industrial commission, saying in part:

The general purpose of the workmen's compensation act is to provide compensation for loss of earning capacity resulting from industrial accidents. But the scheme of compensation is not necessarily limited to cases where there is immediate impairment of earning ability. It is within the general purpose of the law, and without doubt within the power of the legislature, to provide for compensation for injuries which impair physicial efficiency, even though present earning capacity is not directly affected. In most cases any disfigurement or loss of bodily function ultimately impairs earning capacity. We think it was the intention of the legislature by that part of the statute quoted to provide for the payment of compensation, within the limits prescribed, for the kind of injuries described, whether disability for work is presently caused or not.

WORKMEN'S COMPENSATION—DISABILITY—FRIGHT—NEGLIGENCE—*Chiuchiolo* v. *New England Wholesale Tailors, Supreme Court of New Hampshire (May 6, 1930), 150 Atlantic Reporter, page 540.*—Betty Chiuchiolo was employed by the New England Wholesale Tailors. She worked in a room about 10 feet from a gas-heated boiler, which carried a pressure of from 70 to 80 pounds. While in the course of the employment an explosion took place. The glass of the pressure gauge broke with an accompanying escape of steam. Betty Chiuchiolo was frightened and her health consequently impaired. At the time of the explosion four or five other women were also at work in the room and it frightened all of them.

Betty Chiuchiolo had been in good health prior to the time of the fright, and she filed an action against her employer to recover dam-

ages for injury to her health. The Merrimack County superior court, of New Hampshire, rendered a judgment in her favor, and the employer appealed the case to the New Hampshire Supreme Court. In discussing the result of fright the court said in part:

It is fair to take the position to-day that one should not carelessly frighten another if the fright is likely to, and does, result in harm to body or health. Medical science informs us that fear and fright are at the bottom of many ailments and distresses. A rule that it is lawful carelessly to frighten another, regardless of the consequences, and provided impact is avoided, does not seem responsive to a fair sense of justice. If a sudden explosion by its noise makes one deaf or by its light makes one blind, there may be recovery. If, instead, the shock is so frightening as to produce impairment of health in other ways, the denial of liability therefor must be supported by stronger evidence of the requirement of expediency therefor than has been presented.

After discussing the exceptions raised by the employer, the court answered the employee's contention that the employer had a duty to anticipate fright regardless of its consequences, by saying:

It assumes a legal duty, the breach of which imposes no liability. If there is no liability for fright, there can be no wrong in causing it, and there can be no duty to anticipate and avoid it. It may be an exercise of ordinary care to avoid it, but the exercise of care is not always a legal duty. One is not required to anticipate against dangers which it is not his duty to avoid.

One has no absolute right not to be frightened by another. It is only under certain conditions that the right exists, and carelessness as the cause is not a violation of the right, in the absence of other damage and physical impact. There is no breach of duty, unless a corresponding right is violated. The defendant therefore had no duty to avoid frightening the plaintiff unless reasonable anticipation would have shown that the fright was likely to have such consequences as to call for its avoidance.

There may be anticipation of fright when serious results of the fright are not probable enough to give them foreseeable attention. The probability of fright and the probability of harm from it are not the same.

In conclusion the court said:

If the rule is founded on policy, the argument for expediency, regarded as unsustained in cases of fright resulting in serious consequences, is maintained when there are no such consequences. A rule of liability would impose undue burdens and go beyond the practical needs of recovery for another's negligence When there are no consequences of fright, the fright can be regarded only as a momentary and transient disturbance, and as either too lacking in seriousness or as giving too great an extension of legally wrongful conduct to warrant the imposition of liability. In the contacts of life and experience, suddenness of action in conduct, noise, light, and otherwise is an incident of numberless frequency, and to sub-

ject each instance to the test of care when fright alone is shown would carry liability to an impractical, unwise, and unjust range. Social order neither requires nor expects it.

The judgment of the superior court was therefore reversed.

WORKMEN'S COMPENSATION—ELECTION—CONSTRUCTION OF STATUTE—THIRD-PARTY LIABILITY—*Tocci's Case, Supreme Judicial Court of Massachusetts (November 27, 1929), 168 Northeastern Reporter, page 744.*—Constantino Tocci sustained injuries while working for Rosse & Son. The employers insured their employees under the Massachusetts workmen's compensation act. Tocci was injured by an automobile owned by a third person. He commenced two court actions against the owners of the automobile whereby he sought to recover damages. Those actions were tried before a jury and resulted in judgments in favor of the automobile owners. Tocci then proceeded under the workmen's compensation law of Massachusetts to secure compensation from his employers.

In the superior court, Suffolk County, Mass., compensation was denied on the ground that by bringing an action at law the employee made a binding election of remedy under the terms of the workmen's compensation act, and he could not thereafter seek relief under the act. The employee appealed the case to the Supreme Judicial Court of Massachusetts where the lower court was affirmed.

In rendering the decision, Mr. Chief Justice Rugg said in part:

The pertinent statutory provision at the time of the injury of the employee was in these words: "Where the injury for which compensation is payable was caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages or against the insurer for compensation under this chapter, but not against both. * * *" (G. L. ch. 152, sec. 15.) The argument in behalf of the employee proceeds upon what seems to us a strained construction of the words "legal liability" in the statute. It is urged that "legal liability" means an actual and established obligation to make compensation, and that, therefore, if an employee after pursuing an action against the third person ascertains at the end of that litigation that he is unable to establish a claim enforceable by the courts, there has been no "legal liability" within the meaning of the statute. This is not the natural construction. Many actions at law are prosecuted where the issue is unfavorable to the plaintiff and yet where it can not rightly be said that he was not attempting to enforce a legal liability. * * * Moreover, the word "proceed" in the statute must be given its natural meaning. The signification of that word is not open to reasonable doubt.

That the general court intended to use this word in its natural meaning is apparent from an amendment to said section 15 by Statute 1929, chapter 326, section 1, approved on May 17, 1929, long after the

injury was sustained by this employee. By that amendment there was added to section 15 this provision: "An employee shall not be held to have exercised his option under this section to proceed at law if, at any time prior to trial of an action at law brought by him against such other person, he shall, after notice to the insurer, discontinue such action, provided that upon payment of compensation following such discontinuance the insurer shall not have lost its right to enforce the liability of such other person as hereinbefore provided."

WORKMEN'S COMPENSATION—ELECTION—IGNORANCE OF STATUTE—THIRD-PARTY LIABILITY—*Ott* v. *St. Paul Union Stockyards, Supreme Court of Minnesota (October 18, 1929), 227 Northwestern Reporter, page 47.*—In February, 1925, Gust B. Ott was an employee of the Standard Cattle Co., a "market agency" operating in the St. Paul Union Stockyards. Ott was injured by a large icicle falling from a water tank owned by the St. Paul Union Stockyards. Ott first sought to recover from his employer under the workmen's compensation act of Minnesota. He was denied such recovery by the Industrial Commission of Minnesota upon the ground that he had not suffered any compensable disability. Later he began an action in the district court, Dakota County, against the St. Paul Union Stockyards, alleging that at all times during the proceedings "he was of the opinion and belief that he had two remedies, and that he could pursue either or both of them." A judgment was rendered in favor of the St. Paul Union Stockyards and Ott appealed to the Supreme Court of Minnesota.

This court held that "the statute is explicit in its declaration that in such a case as this the employee may at his option proceed either at law against the party responsible for the injury because of his negligence or against the employer for compensation, 'but not against both'." Continuing the court said:

It is therefore not quite a case of an ordinary election of remedies, but one where the election was made under the mandate of a statute to the effect that, having proceeded against one of the parties, the employee may not proceed against the other. * * * The statute is not that the injured employee may not recover against both his employer for compensation and against the third party for damages, but rather that he may not proceed against both.

The judgment of the district court was therefore affirmed.

WORKMEN'S COMPENSATION — "EMPLOYEE" — EVIDENCE — CAUSAL CONNECTION—FREEZING AS ACCIDENTAL INJURY—*Ferrara's Case, Supreme Judicial Court of Massachusetts (December 2, 1929), 169 Northeastern Reporter, page 137.*—Francisco Ferrara was in the gen-

eral employment of Ralph Guerro, a teamster who rented carts, horses, and drivers to the Montrose Construction Co., engaged in the business of collecting ashes. The agent of the Montrose Construction Co. directed Ferrara to the place where he was to work and the way in which the work was to be done. While so employed and engaged in dumping ashes along the seashore on an extremely cold day, Ferrara suffered injuries from frostbites which resulted in the loss of the index finger. He filed claim for compensation with the Industrial Accident Board of Massachusetts and received an award, which was affirmed by the superior court, Suffolk County, Mass.

The insurance carrier appealed to the Supreme Judicial Court of Massachusetts contending Ferrara was not an employee of the Montrose Construction Co., and also that he was subject to no greater danger than the ordinary outdoor worker. In this view the supreme judicial court did not agree and, in affirming the decision of the lower court awarding compensation, said in part as follows:

There was additional evidence bearing on the question of the supervision of the work in which Ferrara was engaged, indicating that it was under the control and direction of the Montrose Construction Co., that, while Ferrara had the care and control of the team, the place where he was to work and the way in which the work was to be done were to be controlled by that company, and the transaction between it and the general employer amounted merely to a loan of the general employer's servant. As the right to control Ferrara was, at the time, in the Montrose company, it having the right to direct him in all the details of the employment, he was the servant of this company.

A witness stated he had to keep working all the time. It was found that the employee "was especially exposed by reason of the performance of his work as a teamster out in the open without any covering. * * * [He] was not at liberty to stop his work to prevent his hands from being frozen. * * *."

Taking into account the fact that the employee was constantly at work in the open on the day he was injured with no opportunity to protect himself, the condition of the place of his employment, and its nature, the wind and the cold, he was in fact exposed to a greater danger of being frozen than the ordinary outdoor worker.

WORKMEN'S COMPENSATION—EMPLOYERS' LIABILITY—INSURANCE COMPANY INSOLVENT—*Owners' Realty Co.* v. *Bailey et al., Court of Appeals of Maryland (March 21, 1929), 145 Atlantic Reporter, page 354.*—An action was filed by Lula Bailey, the widow of a former employee of the Owners' Realty Co., to enforce payment by the employer of compensation duly awarded and heretofore paid by an insurer but now discontinued because the insurer had become insolvent and unable to continue payments.

The circuit court No. 2, of Baltimore, Md., rendered a verdict in favor of the widow and the case was appealed to the Maryland Court of Appeals. The counsel for the employer contended that "the act in many places contemplates payment only by the insurance carrier when there is insurance" and furthermore pointed out that it was the purpose of the act to secure, by utilizing the aid of insurance, the payment of rates of compensation which would be beyond the abilities of some employers of small means if they should be required to pay directly; and from this, too, it was argued that freedom of insured employers from liability to pay direct must be intended.

However, the court of appeals was unable to agree in that view and held that the carrying of insurance for a payment of money would ordinarily imply an original primary liability on the employer.

Furthermore, the court said "the general understanding in Maryland has always been since the enactment that there was a continuing liability on employers who carry insurance." The court quoted from its opinion in Brenner *v.* Brenner (127 Md. 189, 96 Atl. 287), that—

> The persons concerned, and with whom the act had primarily to do, were the employer and employee; the insurance carrier occupies the position of a surety for the employer, to secure the fulfillment of any liability which may be determined to have arisen.

The opinion of the circuit court was therefore affirmed.

WORKMEN'S COMPENSATION—EMPLOYERS' LIABILITY—MEDICAL AND SURGICAL TREATMENT—*Whiterock Mineral Springs Co. et al.* v. *Horwatich et al., Supreme Court of Wisconsin (November 5, 1929), 227 Northwestern Reporter, page 291.*—Pauline Horwatich, an employee in the bottling department of the Whiterock Mineral Springs Co., was injured on June 26, 1924, when a bottle exploded, part of it striking her nose. The company immediately took the employee to a nose specialist for treatment. He continued to treat her until the laceration was fully healed. After three days she returned to work and worked up to Christmas without loss of time or wages. She then discontinued her employment with the mineral springs company. Some further trouble developed with her nose, and she consulted and was treated by various doctors of her own selection, without requesting the company for such medical attention.

She then filed claim for $460 for medical treatment, together with $58 for six weeks' compensation, and the Industrial Commission of Wisconsin upheld this claim. Later, upon appeal, the circuit court affirmed the award of the commission on the ground that the company failed and refused to furnish medical attendance by reason of having failed to furnish its employee with a panel of

physicians from which she could make a selection, as provided by subdivision (1), section 102.09, Wisconsin Statutes.

The mineral springs company thereupon appealed the case to the Wisconsin Supreme Court, contending that the award was not sustained by the evidence.

The supreme court reviewed the facts and pointed out that the employee had not claimed that the company's physician was not competent; also that the employee quit work for the company of her own choice and not by reason of illness.

The supreme court reversed the decision of the lower court regarding the medical expense, saying in part as follows:

It conclusively appears that the employer did not have any knowledge that the employee was in need of any further treatment than she had been tendered and had received. There was no evidence before the commission that a sufficient panel of physicians had not been furnished by the employer. The fact that the employer promptly took the employee to a nose specialist for treatment is no evidence of its failure to maintain a panel. That fact was evidence only of the employer's desire to fully comply with the purpose of the act in giving its employee prompt and suitable medical attention. If the employee was dissatisfied with the doctor furnished by her employer, she should have requested a panel of doctors from which to make a selection of another doctor. This she did not do, and there is no evidence that the employer did not provide such a panel or that it refused to furnish such a panel.

The judgment of the circuit court is reversed, and the cause remanded to the circuit court, with directions to enter judgment affirming the award of the industrial commission for compensation in the amount of $58.50, and setting aside and vacating the award of the industrial commission allowing surgical and medical expense in the sum of $460.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—CASUAL EMPLOYMENT—INTERPRETATION OF STATUTE—*Corbett's Case, Supreme Judicial Court of Massachusetts (January 31, 1930), 170 Northeastern Reporter, page 56.*—One McNamee was the president and general manager of the Bay State Insulated Wire & Cable Co. He employed one Mitchell, a carpenter, to do general repair work on buildings owned by the company and used by it in the manufacture of rubber covered wire for electrical purposes and "to house its employees, office machinery, and stock and as a plant wherein to carry on its work." The carpenter work consisted of ordinary repairs, such as repairing floors, sills, and windows. McNamee told him that he would have to use more men, and accordingly Mitchell ordered William H. Corbett and another carpenter named Brown to report to the company to do the work. In performing this work William H. Corbett fell from a ladder while nailing up some windows on the

premises of the company and received injuries which resulted in his death.

The widow filed claim for compensation and a single member of the Industrial Accident Board of Massachusetts found that the deceased, at the time of his injury, was not an employee of the company and that the work he was doing was not a part of the "trade, business, or profession of the subscriber" within the meaning of section 18 of the workmen's compensation act. The decision and findings of the single member were later affirmed by the reviewing board, and the superior court, Suffolk County, Mass., entered a decree dismissing the claim for compensation. The widow appealed to the Supreme Judicial Court of Massachusetts.

This court held that it was settled that the findings of fact by the industrial accident board rest upon the same footing as the finding of a judge or a verdict of a jury and must stand if there is any evidence to support them. In regard to the question whether the deceased was an employee of an independent contractor, and if so, whether his widow was entitled to compensation under Gen. L. Mass., ch. 152, the court said:

Under this section the claimant is entitled to compensation from the insurer even though the deceased was not in the employ of the company, provided Mitchell was an independent contractor and the work in which he was engaged was a "part of or process in the trade or business carried on by the insured" and not merely ancillary and incidental thereto.

It is plain that, upon the facts found, Mitchell was an independent contractor and not an employee of the company. It is equally plain that Corbett was an employee of Mitchell and that he did not at any time become an employee of the company. It is the contention of the claimant that, if Corbett was not an employee of the company, he was an employer [employee] of Mitchell, an independent contractor working for the company, and was entitled to compensation under Gen. L. ch. 152, sec. 18, which in part reads as follows: "This section shall not apply to any contract of an independent or subcontractor which is merely ancillary and incidental to, and is no part of or process in, the trade or business carried on by the insured. * * * ." The agreement between the company and Mitchell related to general repairs upon the buildings of the company. The work to be done by Mitchell consisted of an accumulation of ordinary day-to-day repairs which were usually done at different times by employees of the company. The single member found the work that Mitchell and his employees did was not a part of the business carried on by the insured. There was ample evidence to support that finding. The findings of the board show that Mitchell was an independent contractor and that the work which he was engaged to perform was no part of or process in the trade or business carried on by the insured. These findings must stand.

The decision of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—CHARITABLE CORPORATION—PROFESSIONAL SERVICES—*Renouf* v. *New York Central R. Co., et al., Supreme Court of New York, Appellate Division (March 27, 1930), 240 New York Supplement, page 720.*—Prior to April 5, 1927, a contract had been made between the New York Central Railroad Co. and Doctor Gillespie whereby the railroad agreed to pay him a certain sum annually for professional services. It was also agreed that the railroad would furnish sufficient supplies and equipment to maintain an emergency hospital. Doctor Gillespie was given complete charge of the hospital. On April 5, 1927, one of the employees of the New York Central Railroad was accidently injured while in the employ of the company and Doctor Gillespie was assigned to treat him. Soon after the injury the employee was taken by Doctor Gillespie to the Hospital for Ruptured and Crippled in New York. He instructed the hospital to assign a private nurse to the patient as the railroad would pay the expense.

Florence Renouf was secured as the private nurse. She performed exclusively for the patient and her directions and orders came from the doctor who employed her on behalf of the railroad company. While in the course of her employment she pricked her finger with a pair of scissors used in cutting bandages. Infection followed which resulted in 66⅔ per cent permanent loss of the use of her hand.

She proceeded under the workmen's compensation act of New York to secure compensation and the State industrial board made an award in her favor. The railroad appealed to the New York Supreme Court contending that the relation of employer and employee did not exist as a nurse, like a physician, is engaged in an independent calling and neither can, under any circumstances, become the servant of another. The court held this argument to be fallacious, saying in part as follows:

The hospital was relieved from liability as has been stated, because claimant was not actually in its employ, and as a charitable corporation it could not be held liable as her employer under the circumstances. Ordinarily the relation of master and servant does not exist between one engaged in the practice of a profession and another who engages such service for a limited purpose or transaction. But there is no reason why such relation can not be created; and it is common knowledge that it frequently happens that lawyers, doctors, and other men of skill are employed at a regular salary for a definite period. Such a contract of employment creates the relation of master and servant.

Here it is conceded that the railroad company employed a physician and gave him authority to select other employees whose salaries or wages were paid by the company. This claimant was so employed and paid and was subject to the orders of the physician and could

be discharged by him. The employer had intrusted the physician with superintendence and authority. The claimant ad hoc was the employee of the railroad company just the same as she would have been in acting as a nurse in its emergency hospital. We see no difference between this case and that where a superintendent is authorized to employ an expert mechanic for a limited time to render some special service in repairing a locomotive. Undoubtedly the latter would be an employee of the company.

The award was therefore affirmed.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—CONSTRUCTION OF STATUTE—REVIEW—*El Reno Broom Co. et al.* v. *Roberts et al., Supreme Court of Oklahoma (September 24, 1929), 281 Pacific Reporter, page 273.*—I. N. Roberts was employed by the El Reno Broom Co. in August, 1918, as a broom maker. The record shows that he had worked irregularly, being laid off frequently for indefinite periods and called back to work when needed. On May 27, 1927, he was laid off indefinitely and paid up in full. On June 6, 1927, he called to see about work and went into the plant to get two brooms he had sold, and while going into the factory he slipped and fell, sustaining injuries. The Oklahoma State Industrial Commission awarded him compensation and the broom company carried the case to the Oklahoma Supreme Court for review, contending that the relation of employer and employee did not exist.

Roberts maintained that this was a question of fact and called attention to the well-known rule that the court will not review questions of fact where there is competent evidence to support the findings of the commission. However, the court said the question of whether the relation of employer and employee existed was a question of law for the court within the meaning of the compensation act.

The court cited several cases in which the commission had made an award, and upon review by this court it was held there was no evidence in the record upon which to base the conclusion that the relation of master and servant existed. Quoting from the case of Hillestad et al. *v.* Industrial Insurance Commission (80 Wash. 426, 141 Pac. 913), the court said:

The law in its tenor and terms contemplates that the relation between employer and employee shall possess some element of certainty. It implies, if indeed it does not literally provide, that there shall be an actual contractual relation between the parties. That is, an agreement to labor for an agreed wage or compensation. The tax put upon an industry is determined by the pay roll.

In concluding the opinion setting aside the award of the commission, the court said, in part:

In the case at bar the record very clearly discloses, as shown by the testimony of plaintiff himself, that his relation as employee of respondent was terminated on May 27, at which time he was, to use his own language, "laid off indefinitely." He was no longer on the pay roll, and there was no agreement to perform labor for an agreed wage or compensation, but he was free to seek other employment, and according to his testimony he did so.

It is very vigorously contended by claimant that, having been requested by his employer to take orders at such times as he could do so, same formed a part of his employment, and that the more orders he took the more brooms he would be able to manufacture, and that he was therefore doing an act for the benefit of his employer. This, in our judgment, is wholly insufficient, under all the facts as disclosed in this record, to establish the relation of employer and employee within the meaning of the compensation act. His regular employment having been terminated some 10 days previous, he was at most only a salesman. No agreement as to any compensation is shown, and it is not disclosed by the record as to whether he ever accounted for the two brooms he claims to have sold and had gone after at the time he was injured.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—CONTRACT OF EMPLOYMENT—*Hinds* v. *Department of Labor and Industries of State of Washington, Supreme Court of Washington (December 13, 1928), 272 Pacific Reporter, page 734.*—O. H. Johnson was killed July 5, 1927, while operating an airplane.

Leo Huber was the owner of the airplane and was engaged in business under the name of the Puget Sound Airways in taking up passengers for a flight around Lake Washington and also in instructing student fliers. Johnson was a pilot but owned no plane. He and Huber entered into an arrangement whereby he would become associated with Huber and make use of Huber's plane for the purpose of taking up passengers and also student flyers. Johnson was to receive 40 per cent and Huber 60 per cent of the gross compensation from flights which Johnson made. Huber was to bear all the expense of keeping up the plane, and Johnson was in charge only when Huber was absent.

Johnson's widow filed claim for compensation but the department of labor and industries rejected the claim on the ground that the deceased was not a workman within the meaning of the compensation act. Mrs. Hinds (the widow having remarried) carried the case to the superior court, King County, Wash., where the decision was reversed. Thereupon the department of labor and industries appealed the case to the Supreme Court of Washington for final hearing.

The question involved was whether the relation of employer and employee existed at the time of the injury or whether the relation was that of bailor and bailee as contended by the department.

The Washington Supreme Court agreed with the case of Glover *v.* Richardson & Elmer Co. (64 Wash. 403, 116 Pac. 861), in which it was held that the final test of the relation of employee and employer is whether there is a right of control. They found from a review of the facts that Huber was in control and that Johnson only had custody of the plane during a flight and not possession, as required in the case of bailment, and was therefore an employee within the meaning of the workmen's compensation act.

The court continued by saying that Johnson was an employee, notwithstanding the fact that he was paid every evening or that he was free to come and go as he pleased with no regular hours of employment, since section 7676 of the Washington Code (Rem. Comp. Stat.) distinctly recognizes that there may be relation of employer and employee though payment may be for piecework or allowance in the way of profit sharing.

The Washington Supreme Court therefore affirmed the judgment of the superior court granting compensation.

WORKMEN'S COMPENSATION — EMPLOYMENT STATUS — FRAUD — *Ganga* v. *Ford Motor Co., Supreme Court of Michigan (April 7, 1930), 230 Northwestern Reporter, page 159.*—The Ford Motor Co. operated a plant at Iron Mountain, Mich. In August, 1928, it announced it would rehire former employees. William Ganga, although only 18 years of age, in order to secure employment represented himself to be Carman Ganga, a 24-year-old brother, who was a former employee of the company. He thus secured employment and at a higher rate of wages than he would have received had his true age been known. After he was hired he told the foreman that he had never previously worked at the plant. He was, however, put to work on odd jobs and about a month later he was directed to operate a shaper machine. He sustained injuries two nights later and filed claim for compensation under the Michigan workmen's compensation act.

The Department of Labor and Industry of Michigan awarded him compensation and the employer appealed to the Supreme Court of Michigan to review the award, contending that the employment had been secured through fraud and that the company had not entered into a contractual relation with Ganga so that he would be entitled to compensation under the workmen's compensation act. The company relied on the case of Minneapolis, St. Paul & Sault Ste. Marie

R. Co. *v.* Rock (279 U. S. 410, 49 Sup. Ct. 363), in which case compensation was denied an employee who had secured a friend to impersonate him and pass a physical examination. In distinguishing this case from the case at bar, the court said:

This case is distinguishable from the one at issue in many ways, particularly in that plaintiff was a minor, only 18 years of age, when he was employed, that he did not secure employment through a fraudulent medical examination, and that his physical condition did not even remotely contribute to the accident.

The court also found that the Michigan workmen's compensation act (Comp. Law, 1915, sec. 5429, as amended by Act No. 113, Pub. Acts, 1929, p. 262) distinctly provides that minors shall have the right to come under the act the same as adult employees, and further provides that minors under 18 shall be entitled to double the amount of compensation provided for, unless they have secured the employment fraudulently, in which event they shall only receive single compensation.

The award was therefore affirmed by the Michigan Supreme Court; however, a dissenting opinion was delivered by Mr. Justice Clark in which Mr. Chief Justice Wiest, Mr. Justice Potter, and Mr. Justice Sharpe concurred.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—GENERAL AND SPECIAL EMPLOYERS—LOSS OF EYE—*Ideal Steam Laundry et al.* v. *Williams, Supreme Court of Appeals of Virginia (September 19, 1929), 149 Southeastern Reporter, page 479.*—Andy Williams was carried on the books of the Ideal Steam Laundry as an employee. He was required to work four days a week as janitor at the laundry. He was also required to work one day a week at the home of Eanes, the proprietor, and also one day a week at the home of Malone, the superintendent. While at the homes of Eanes and Malone, Williams did gardening, domestic work, and odd jobs about the premises. Although subject to recall if his services were required at the laundry, Williams, while working at the home of Malone, was under the control of Malone and his wife, both as to the work performed and the method of doing it.

On March 15, 1928, while engaged in building a grape arbor at the home of Malone, Williams attempted to drive a nail in a post. The nail glanced from the post and struck him in the eye, totally destroying the vision. He thereupon filed a claim for compensation before the Virginia Industrial Commission.

Upon the hearing by the commission, it was held that Williams was, at the time of the accident, an employee of the Ideal Steam

Laundry and was awarded compensation for a period of 100 weeks. The laundry appealed the case to the Supreme Court of Appeals of Virginia, contending that Williams was not their employee at the time of the accident. The court sustained this contention and held that Malone, as special employer, would be liable for injuries received while the work was in progress. In the course of the opinion the court said:

The Virginia compensation act (Acts 1918, ch. 400, as amended) is silent with reference to the status of a loaned employee, and it becomes necessary to ascertain the rights of the employee against his general and special employers.

The court then cited the case of Atlantic Coast Line R. Co. *v.* Treadway's Adm'x (120 Va. 735, 93 S. E. 560, 562), which held the relationship of employer and employee was the same as master and servant. In that case it was held that—

A servant may be transferred from his service for one master, who may have made the express contract of employment of the servant and may pay the latter his wages and be his general master, to the service of another person other than his general master, in which case (1) the special master is alone liable to third persons for injuries caused by such acts as the special servant may commit in the course of his employment; (2) the special servant must look to the special master for his indemnity, if he is injured, while the stipulated work is in progress, by dangerous conditions resulting from the special master's failure to fulfill one of those duties which the law imposes upon the masters for the benefit and protection of their servants.

Upon the authority of the above case the court concluded the opinion, reversing the order of the industrial commission, as follows:

Our conclusion is that, both under the common-law rule as to a loaned employee and the statutory definition of an employee, claimant was, at the time of the accident, an employee of Malone, and his claim for compensation does not fall within the provisions of the Virginia compensation act.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—INDEPENDENT CONTRACTOR—COURSE OF EMPLOYMENT—GOING AND COMING RULE—*Globe Indemnity Co. et al.* v. *Industrial Accident Commission of State of California et al., Supreme Court of California (January 27, 1930), 284 Pacific Reporter, page 661.*—Jack Clemmer, a 12-year-old newsboy, was injured by falling from his bicycle while on the property of the railroad station at San Rafael, Calif., procuring a bundle of newspapers for distribution. He made application for compensation before the California Industrial Commission against Fred Johansen, the Independent Publishing Co., and the Tribune Publishing

Co. The commission rendered an award against the Tribune Publishing Co., having found that—

Jack, at the time of the accident which caused the injury, was in the employ of the Tribune Publishing Co., and that the injury arose out of and occurred in the course of that employment; that, though he was at the same time employed by the San Rafael Independent, he was not acting in the course of that employment, but was engaged in a material detour therefrom at the time the injuries were sustained.

The publishing company appealed to the Supreme Court of California to review the award. It claimed that the evidence did not sustain the finding that Clemmer was an employee of the company but in fact was an employee of Fred Johansen, who was an independent contractor.

It appeared from the evidence that Fred Johansen, assisted by his mother, carried on an agency to distribute the Oakland Tribune to the subscribers in San Rafael. He paid to the publishing company $1.50 per 100 for the papers and collected 85 cents per month from each subscriber which he retained but reported on a printed form to the company. Regarding his duties the court found that—

He was furnished a list of the subscribers by the company, which was, of course, changed as new subscribers were added or old subcriptions were canceled. Notification of such changes was sent by the company. Complaints of poor service received by the company were also forwarded by it to Fred. A representative of the Tribune Publishing Co. occasionally called to see if everything was all right, if more receipt forms were required, etc., but who gave no instructions on such visits.

At no time did the publishing company instruct Fred as to the means he should use in distributing the papers, the route that should be taken, or whom, if any one, he should employ to assist him. The publishing company knew that Fred was employing assistance in his work and made no objection thereto. His only instructions were that deliveries of papers should be made as early as practicable after their arrival at the San Rafael railroad station.

Upon these facts the court concluded that Fred Johansen was not an independent contractor, but was an employee within the meaning of the workmen's compensation act, and that the findings of the commission on the question of the employment of Jack Clemmer was correct. The court said:

It is unquestionably well settled that "one of the best tests to determine whether the relation is that of an independent contractor or that of employer and employee is the right of 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. * * * It is not a question of interference, or noninterference, not a question of whether there have been suggestions, or even orders, as to the conduct of the work, but a question of the right to act, as distinguished from the act itself or the failure to

act. * * *." (Hillen *v.* Industrial Acc. Commission, 199 Calif. 577, 581, 582, 250 Pac. 570, 571.)

The contention was made by the insurer that the accident occurred while Clemmer was going to his place of employment and cases were cited showing the employer was not liable for such injuries. The court said, however, that the record sustains the conclusion that the boys collided and Jack was hurt within 2 or 3 feet of the station platform upon which the papers were lying and just as the boys were about to alight from their bicycles, and that the occurrence took place within the precincts of the station. The court concluded the opinion affirming the award by quoting from the case of Makins *v.* Ind. Acc. Commission (198 Calif. 698, 247 Pac. 202), as follows:

> The rule is well settled that an employee, in going to work, comes under the protection of the act when he enters the employer's premises or upon the means provided for access thereto, though the premises and such means of access are not wholly under the employer's control or management. * * *

The Supreme Court of the State of Washington held that a newspaper delivery boy who covered a rural route and furnished his own car was not an independent contractor, and the publisher was liable for the death of one struck by the car. (Wilson *v.* Times Printing Co. et al. (1930), 290 Pac. 691.)

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—MEMBER OF FIRM AS EMPLOYEE—EMPLOYER'S REPORT—*Swalley* v. *Department of Labor and Industries, Supreme Court of Washington (December 5, 1929), 282 Pacific Reporter, page 905.*—Charles E Swalley and James L. Vale jointly purchased a tract of timberland, each paying one-half of the initial payment, under an agreement that Swalley should conduct logging operations and that Vale should cut logs into ties in his mill. It was further agreed that the proceeds of the ties should be equally divided between the parties, and that Swalley was to pay all expenses in connection with logging operations out of his share and Vale was to pay all mill-operating expenses out of his share, and that neither was to be repaid his original investment. In the course of the operations it so happened that the mill was short one man and Vale requested Swalley to lend him one of his logging crew. In compliance with this request Swalley himself went to work in the mill and while so employed sustained certain injuries for which he sought compensation under the Washington industrial insurance act. His claim being disallowed by the State department of labor and industries, Swalley appealed to the superior court, where the order of the department was reversed and judgment rendered for Swalley. The department appealed the case to the Supreme Court of Washington, contending that Vale and Swalley were

partners, and as no notice was given to the department prior to the injury Swalley could not claim benefit under the act. That portion of the act (sec. 7675) upon which the department relied reads as follows:

Any individual employer or any member or officer of any corporate employer who shall be carried upon the pay roll at a salary or wage not less than the average salary or wage named in such pay roll and who shall be injured shall be entitled to the benefit of this act as and under the same circumstances as and subject to the same obligations as a workman: *Provided*, That no such employer or the beneficiaries or dependents of such employer shall be entitled to benefits under this act unless the director of labor and industries prior to the date of the injury has received notice in writing of the fact that such employer is being carried upon the pay roll prior to the date of the injury as the result of which claims for compensation are made.

The Washington Supreme Court, in considering the contention made by the department that Vale and Swalley were partners, said that even though the parties were partners so far as the ultimate division of profits were concerned they were not partners in all the operations. Vale paid out of his share all the expenses of operating the mill. Swalley's wages while he was working in the mill therefore were paid directly and solely by Vale. This being true, in the work upon which he was then engaged, the court concluded that Swalley was not an "employer" but an "employee" within Remington's Compiled Statutes of Washington, section 7675, as above quoted, and it was therefore not necessary that notice of such employment should be given the department of labor and industries to entitle Swalley to compensation for his injuries.

The judgment entered by the superior court directing the department to place Swalley under the workmen's compensation act and to allow him compensation thereunder was correct and was therefore affirmed.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—MINOR—INJURY "GROWING OUT OF AND INCIDENTAL TO" EMPLOYMENT—*City of Sheboygan et al.* v. *Traute et al.*, *Supreme Court of Wisconsin (November 11, 1930), 232 Northwestern Reporter, page 871.*—The city of Sheboygan, Wis., maintained a poor farm, which was under the general control of the city poor master and which was operated under the immediate supervision of a superintendent who had been permitted to employ extra farm help when necessary. Since 1914, Albert Koehler was superintendent and lived on the farm with his family, including his daughter and her son, Gordon Traute. The daughter was employed on the farm, receiving a monthly salary, and the son attended school. At the direction of Albert Koehler, his

grandfather, and to the knowledge of the city poor master, he helped on the farm during his spare time. He was injured on October 19, 1928, while operating a feed cutter.

It had been the agreement between Koehler and the poor master that Gordon should help with the work on the farm to pay for his board. He was also authorized to render tonsorial services for inmates. The Wisconsin Industrial Commission awarded compensation and the circuit court of Dane County affirmed the award. The city thereupon appealed the case to the Supreme Court of Wisconsin. In affirming the decision of the lower court and the industrial commission, the court said:

In view of the facts thus established, Gordon's activity on the farm at the time of his injury was not merely as a member of his grandfather's family, or as an object of charity. He was helping at the feed cutter, at the direction of the farm superintendent, and by reason of the arrangement made with the city poor master he was obliged to perform services of that kind for his board and lodging. To the extent of the farm work which he was to perform in consideration of his keep at the farm he was in the employment of the city, and his work at the feed cutter when he was injured was service growing out of and incidental to that employment. Consequently, under section 102.03(1), (2), Stats., liability for compensation existed on the part of the city for his injury.

The court also held that if the evidence had not established the existence of the relation of employer and employee under an expressed arrangement, nevertheless Gordon Traute would have been entitled to compensation as an employee by reason of provisions in section 102.07(4), Wisconsin Statutes, which extend the benefits of the compensation act so as to include "all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer."

In conclusion the court said:

The actual knowledge of the poor master that Gordon Traute frequently helped other employees perform necessary work on the farm was chargeable to the city. Consequently, the latter had constructive knowledge, as the employer. Under the circumstances liability would exist under the compensation act, although at the time of injury Gordon Traute may have been merely helping at the feed cutter as a substitute for Albert Koehler, because of the latter's illness.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—NECESSITY—CAUSAL CONNECTION—*Maryland Casualty Co.*, v. *Garrett*, *Court of Civil Appeals of Texas* (*June 20, 1929*), *18 Southwestern Reporter* (*2d*), *page 1102*.—The Tidal Oil Co., operating oil wells in the State of Texas, carried a policy of compensation insurance with the Mary-

land Casualty Co. J. I. Garrett was employed by the oil company as a roustabout. On April 22, 1928, while in the course of his employment he sustained injuries by reason of a sudden and unexpected flow of hydrogen sulphide gas, a poisonous substance, from the oil well. He filed claim for compensation with the Texas Industrial Accident Board, alleging that the poisonous gas which was forced into his nose, mouth, and bronchial tubes caused a dormant tubercular bacilli to become active and developed a disease known as tuberculosis, and that by reason of which he has since that date been totally and permanently physically disabled.

The Texas Industrial Accident Board made an award in the sum of $5,776.88 in favor of Garrett and the insurance carrier brought suit in the district court of Crane County, Tex. In the district court the jury found that Garrett was totally disabled as a proximate result of the injuries complained of; that the injuries he sustained would be permanent; and that a failure to recover compensation in a lump sum would work a manifest hardship and injustice on him. The court affirmed the award of the board and the insurer appealed to the Texas Court of Civil Appeals, contending that Garrett was not an "employee" of the company as he was employed in violation of the criminal statute prohibiting any employer requiring a laborer to work on Sunday. The facts showed Garrett was working on Sunday when the accident occurred. As to whether the company had violated the statute the court said:

Article 283 of the Penal Code provides against any person obliging an employee or workman to labor on Sunday; article 284 of the Penal Code provides that such inhibition shall not apply to works of necessity, and the cross-action on its face does not show that Garrett's work was not a work of necessity. A review of the evidence does not, in our opinion, necessarily show that the work he was obligated to do was not a work of necessity. The work he was obligated to do was that of a helper, a roustabout, in the oil field in which he was engaged to work, a work incident to some other work, and apparently a work of an economic and moral necessity.

Another contention made by the insurance carrier, on appeal, questioned the insufficiency of the evidence to support the jury's finding that the inhalation of oil and gas by Garrett on April 22, 1928, excited a latent and dormant tubercular condition. The appeals court sustained this contention and upon this assignment of error reversed the decision of the lower court, saying in conclusion:

After a careful examination of the record we have concluded that this assignment must be sustained, and that, appellee's cause of action being based upon that theory, the case must be reversed.

Appellee in his cross-action alleged, "as a direct and proximate result of said substance entering the lungs, an irritation was set up which weakened the resisting powers of the said J. I. Garrett and

excited a latent and dormant tubercular bacilli to become active, and by reason thereof the said Garrett has developed a definite form of disease known as tuberculosis, and by reason thereof has been totally and permanently disabled since that date," and the case was tried in the lower court upon that theory.

The testimony of the physicians that a large per cent of people have tuberculosis would not be sufficient to show that appellee was so afflicted.

We think the evidence not only fails to show that he had a latent or dormant tubercular condition, but that his own evidence, that "prior to June 28 I believe my physical condition was as good as any living man's," refutes the existence of such a condition.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—POWERS, ETC., OF COMMISSION—THIRD-PARTY LIABILITY—*Thompson* v. *Kiester et al., Supreme Court of Oklahoma (January 7, 1930), 283 Pacific Reporter, page 1018.*—R. L. Thompson was employed by R. H. Hickey, a rig contractor, building and repairing rigs for the Prairie Oil & Gas Co. According to instructions of the Praire Oil & Gas Co., Hickey sent Thompson and two other men to repair a rig at the well where J. T. Kiester was drilling. While so engaged the boiler used by Kiester exploded and caused an injury to Thompson. Both Kiester and Hickey carried compensation insurance. Thompson filed an action before the Oklahoma Industrial Commission but asked that it be held in abeyance until the final decision of the courts, which was granted. He then filed suit in the district court of Tulsa County for damages for personal injuries where a verdict was rendered in favor of Kiester. Thereupon Thompson appealed the case to the Oklahoma Supreme Court, contending that under the facts in the case Kiester was a third person, not in the same employment as himself, and that under the workmen's compensation act he had a right to elect whether he would take compensation under the act or pursue his remedy against Kiester in a lawsuit. On the other hand Kiester contended that both he and Thompson were in the same employ under the meaning of the compensation act and that the Oklahoma Industrial Commission had exclusive jurisdiction. After quoting the sections of the statute applicable to the case the court said:

At the outset we believe it may be conceded that, if this action falls within the jurisdiction of the industrial commission, such jurisdiction is exclusive, and the present action can not be maintained; and if the plaintiff and defendants were "in the same employ," or were the employees of the same employer, under the meaning and intention of the compensation act, then the jurisdiction of the industrial commission would be exclusive. [Cases cited.]

At the time of the injury, the defendants had completed their contract to drill the well for the Prairie Co., but were drilling the well

deeper under an agreement with the Prairie, who were paying them $100 per day, the defendants furnishing the tools and the workmen necessary to do the drilling. Under the compensation act, we believe the defendants were employees of the Prairie Oil & Gas Co. at the time this injury occurred. That company not only designated the work to be done but directed the manner in which it should be done. The case of Fox *v.* Dunning (124 Okla. 229, 255 Pac. 582), we think, supports this conclusion.

In considering the contention made by Thompson that as he was hired by Hickey, paid by Hickey, and under the control of Hickey, he was in no manner an employee of the Prairie Oil & Gas Co., the court, after citing a number of cases, said in part as follows:

The object of the employment of both plaintiff and defendants was to produce oil upon the lease owned by the Prairie Oil & Gas Co. "The purpose of the workmen's compensation law is to make the industry prosecuted, if hazardous, bear the burden of human wreckage incident to its operation." (Fox *v.* Dunning, supra.) We do not think that the term "in the same employ," as used in the compensation act, was so limited that both parties must be hired and working directly under the same person. If they are engaged in the same general business, as shown by the facts here, and for the same general employers, they are in the same employ as intended by the act. Whether Hickey, plaintiff's employee [employer], or the defendants are independent contractors, we do not need here determine. However, we do believe that the same rule as applied in determining who is an independent contractor is applicable in determining whether two parties are in the same employ. Under the compensation act this, we think, is largely a question of fact, to be determined by the facts and circumstances surrounding each individual case, and where there is any testimony reasonably supporting the finding of the trial court the same will not be disturbed on appeal.

In conclusion the Oklahoma Supreme Court upheld Kiester's contention that the industrial commission had exclusive jurisdiction. The decision of the lower court was therefore affirmed and Thompson directed to seek his remedy before the Oklahoma Industrial Commission.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—VOLUNTEER—*Nobles* v. *Texas Indemnity Ins. Co., Commission of Appeals of Texas (February 12, 1930), 24 Southwestern Reporter (2d), page 367.*—Clyde Buttery was an employee of the Magnolia Petroleum Co., at Llano, Tex., and had charge of all local business. Leonard Janner was employed by Buttery as a truck driver. Lee Nobles, a friend of Janner, was employed by a hardware company at Llano, Tex. About noon on November 14, 1925, Nobles approached Janner about going on a hunting trip the next day. Janner said he would be unable to go as he had to make some deliveries of oil and gas for his employer. Nobles suggested that he would help Janner, and ar-

rangements were made whereby Nobles secured someone to work for him at the hardware store. Nobles while driving the truck, received injuries resulting in his death.

Claims for compensation were originally filed by the parents of Nobles for the death of their son and an award was made by the Industrial Accident Board of Texas. The Texas Indemnity Insurance Co., insurance carrier for the Magnolia Petroleum Co. thereupon instituted suit in the district court of Mason County, Tex., to set aside the award. The parents contended that their son was killed while in the employ of the oil company. In the district court a judgment was rendered in favor of the parents. The indemnity company thereupon appealed to the court of civil appeals at San Antonio, Tex., and the judgment of the lower court was reversed. The case was then carried to the Texas Supreme Court where the judgment of the appeals court was reformed and the case referred to the lower court.

The court quoted the definition of "employee" and "volunteer" as follows:

Article 8309, Rev. Civ. Stat. of Texas, 1925, defines an employee as follows: "Employee shall mean every person in the service of another under any contract of hire, express or implied, oral or written," etc.

40 Cyc. 222 defines a volunteer as: "One who enters into service on his own free will; one who gives his service without any express or implied promise of remuneration; one who does or undertakes to do something which he is not legally or morally bound to do, and which is not in pursuance or protection of any interest."

On the second hearing the court held that Nobles was a volunteer at the time of the injury and not an employee, as he assumed the driving of the truck of his own free will without any express or implied promise of remuneration. The award of compensation was therefore denied to the parents of the deceased as he was a mere volunteer and therefore not covered by the compensation law.

Where the Union Paving Co. hired a steam shovel and an operator from the operator's employer and directed the operator to get the shovel ready to be transported and to leave with it, the Supreme Court of Pennsylvania held that the death of the operator, while riding on the truck used in transporting the shovel, was in the "course of his employment" with the paving company and compensation was allowed. (Lobos *v.* Union Paving Co. (1930), 148 Atl. 500.)

WORKMEN'S COMPENSATION—EVIDENCE—DEATH FROM INTERVENING CAUSE—*Jarnagin* v. *Wm. R. Warner & Co. (Inc.) et al., St. Louis Court of Appeals (June 21, 1929), 18 Southwestern Reporter (2d), page 129.*—On May 19, 1927, John Jarnagin, while in the course of employment for William R. Warner & Co., slipped and

fell to the floor while emptying a large kettle containing boiling water. He sustained burns on his right shoulder, arm, and leg. There was also a bruising and contusion of the right hip and evidence that he received an injury to the back of his head. About two weeks after he received these injuries he died. The evidence showed he had been confined to his home from the day of the accident until his death, with the exception of one visit to the doctor's office.

Mrs. Ellen Jarnagin, the widow, filed claim for compensation, and the Compensation Commission of Missouri made an award in her favor which the St. Louis circuit court upheld. Thereupon the employer appealed the case to the St. Louis court of appeals, contending that there was no substantial evidence to support the finding of the commission that death resulted from the injuries received May 19, 1927.

The employer secured the testimony of several doctors. The evidence showed death was caused by a chronic condition of the kidneys and that the burns and bruises had nothing to do with Jarnagin's death.

The court of appeals, however, did not concur in this view. It found sufficient evidence showing that the deceased worked regularly up until the time he received the injury on May 19, 1927, and that he was taken to his home and died two weeks later without recovering. The court ruled that the commission was not conclusively bound by the evidence of the physicians who testified, and upon the evidence, as stated above, the commission was authorized in making an award in favor of the widow. The court therefore affirmed the judgment of the circuit court and the award of the commission as being sound and supported by the authorities.

WORKMEN'S COMPENSATION—EVIDENCE—MEDICAL TREATMENT REFUSED—POWERS OF COURTS TO REVIEW—*Creech Coal Co.* v. *Smith et al., Court of Appeals of Kentucky (May 2, 1930), 27 Southwestern Reporter (2d), page 686.*—Robert Smith received a small abrasion on his wrist while handling a lump of coal in the course of his employment by the Creech Coal Co. Blood poisoning set in, resulting in his death. His widow and children applied for compensation under the workmen's compensation act of Kentucky and the board sustained their claim. The employer appealed the case to the Harlan County circuit court, which affirmed the action of the board. Thereupon the employer carried the case to the Court of Appeals of Kentucky.

On appeal the employer contended that the judgment should be reversed, on the ground that, because of Smith's religious belief, he

refused to accept medical treatment for his injuries until it was too late to save his life. Section 6 of the Kentucky workmen's compensation act was cited, which provided that—

No compensation shall be payable for the death or disability of an employee if his death is caused, or if and in so far as his disability may be aggravated, caused, or continued by an unreasonable refusal, failure, or neglect to submit to or follow any competent surgical treatment or medical aid or advice. (Ky. Stat., sec. 4886.)

The appeals court held that whether or not the action of an employee in failing to follow competent medical advice is reasonable is almost universally held to be a question of fact to be determined by a careful inquiry into the circumstances of each case by the compensation board, and the rule is that if there is any evidence the finding of the board will not be disturbed by the court. In considering the present case the court said "clearly there was some evidence here that there was no unreasonable refusal, failure, or neglect to submit to competent surgical treatment, medical aid or advice. It does not appear that the doctor ever suggested serum treatment or that the medicine that the doctor left was not used." The decision of the lower court sustaining the award of the compensation board was therefore affirmed.

WORKMEN'S COMPENSATION—EVIDENCE—PRIOR EMPLOYER'S LIABILITY—SECOND INJURIES—*Martin* v. *Northern Cooperage Co. et al.*, *Same* v. *St. Paul Wreckage Co.* (*Inc.*) *et al.*, *Supreme Court of Minnesota* (*October 4, 1929*), *226 Northwestern Reporter*, *page 767*.—While in the employ of the St. Paul Wreckage Co., Charles Martin was injured in an accident on July 25, 1927. He fell from a building and suffered injuries to his head and hip which resulted in headaches, dizziness, and disability. His condition improved and about December 3, 1927, he entered the employ of Swift & Co., and worked for them until March, 1928. The dizziness and headaches increased again during that time and he had to quit his employment. He was then disabled until September 1, 1928. The insurer of the St. Paul Wreckage Co. paid him compensation and medical expenses up to September 9, 1928.

About September 10, 1928, he entered the employ of the Northern Cooperage Co. and on September 27, 1928, while in the employ of that company, a limb of a tree fell on his head and inflicted a scalp wound. The wound healed promptly and after a few days' absence he returned to work for the Northern Cooperage Co. until about October 20, 1928. By that time his headaches and dizziness had increased to such an extent as to disable him for work.

He filed claims for compensation against the St. Paul Wreckage Co. for additional compensation and also against the Northern Cooperage Co. on account of the injury suffered September 27, 1928. The referee made findings and awarded compensation against both employers, but upon appeal to the Minnesota Industrial Commission the award against the Northern Cooperage Co. was set aside, as the commission found the disability resulted entirely from the accident on July 25, 1927, while Martin was employed by the St. Paul Wreckage Co. The case was taken to the Supreme Court of Minnesota for a review. The only question to be decided was whether there was evidence reasonably sufficient to sustain the findings of the commission.

After reviewing the testimony given by the doctor as to the character and complete healing of the scalp wound and the absence of any resulting disability therefrom; the testimony of Mrs. Martin as to the continuance and recurrence of the headaches, suffering, and disability from the first accident; and the fact of the recurrence of the same disability while he was in the employ of Swift & Co., in March, 1928, the court held that the facts tended to sustain the findings of the commission. The fact that the second accident in some degree had aggravated the prior disability was not sufficient to justify disturbing the findings actually made.

The opinion of the court was that the conclusions of law awarding compensation were fully sustained by the findings, and the order of the industrial commission was therefore affirmed.

WORKMEN'S COMPENSATION—EXTRATERRITORIALITY—ELECTIVE STATUTE—*Industrial Commission of Ohio* v. *Gardinio*, *Supreme Court of Ohio* (*January 16, 1929*), *164 Northeastern Reporter*, *page 758*.—Frederick Gardinio, a resident of the city of Cleveland, was employed by the Rice-Jones Co., an Ohio corporation. On February 3, 1924, he entered into a contract with the company to do certain work at Donora, Pa., where the company was engaged in the construction of a bridge. Under this contract Gardinio had no duties to perform in Ohio and was not paid for any time up to the actual commencement of his work in Pennsylvania.

The Rice-Jones Co. had complied with the workmen's compensation law of Pennsylvania, and—

Under the law of that State insured its workmen there engaged in its service. Said company is a contributor to the Ohio workmen's compensation fund and had returned no pay-roll report for premium purposes on any of its employees engaged upon said work in Pennsylvania, but had reported same to the industrial commission of the latter State.

Gardinio was injured in the course of his employment in Pennsylvania and received compensation in accordance with the law of that State. Thereafter Gardinio filed an application for compensation from the workmen's compensation fund in Ohio. This application was denied, and an appeal was taken to the court of common pleas of Cuyahoga County. This court awarded compensation for a period of 60 weeks at $18.75 per week. The case was then taken to the Supreme Court of Ohio for review.

The Supreme Court of Ohio reversed the decision of the lower court, and held that the Ohio workmen's compensation fund was not available to an employee injured while engaged in the performance of a contract to do specific work in another State, no part of which was to be performed in Ohio. The decision was rendered by Judge Matthias, who said in part as follows:

The legislative intent is quite manifest that the provisions of the act shall apply to all those employed within the State and also where, as incident to their employment, and in the discharge of the duties thereof, they are sent beyond the borders of the State. Undoubtedly an injury received by an employee of an Ohio employer is compensable under the workmen's compensation law, though the injury was actually received in another State, if the service rendered by him in such other State was connected with, or part of, the duties and service contemplated to be performed in Ohio. Here, however, we have an entirely different question relative to the liability of the Ohio compensation fund. The situation here presented is not one wherein the employee was called upon to perform a portion of his duties in Ohio and a portion elsewhere. The contract here presented was one which provided for the performance of no service whatsoever in Ohio, but, on the contrary, clearly specified that the service to be rendered thereunder was wholly in another State.

WORKMEN'S COMPENSATION—EXTRATERRITORIALITY—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—INTERPRETATION OF STATUTE—*Val Blatz Brewing Co. et al.* v. *Gerard et al., Supreme Court of Wisconsin (April 29, 1930), 230 Northwestern Reporter, page 622.*—The Val Blatz Brewing Co., doing business in Milwaukee, Wis., entered into a contract in Wisconsin with one Gerard to sell its products in Missouri and Arkansas. Gerard was struck by an automobile while crossing a street in Fort Smith, Ark., during the evening of October 23, 1926. He had gone to Fort Smith to call on the trade for his employer.

The widow filed claim for compensation, and the Wisconsin Industrial Commission found that Gerard was performing services growing out of and incidental to his employment at the time he was struck by the automobile. The commission thereupon made an award to Alma Gerard, the widow.

The employer and the insurance carrier filed suit in the circuit court for Dane County, and a judgment was entered setting aside the award on the ground that the Wisconsin compensation law did not cover injuries received in another State. The widow appealed the case to the Supreme Court of Wisconsin, contending that the Wisconsin compensation act applied to an employee who enters into a contract of employment in Wisconsin to perform services entirely outside the State.

The Wisconsin Supreme Court, in answering this contention reviewed the purpose of the compensation act and said that "the fundamental idea upon which liability is imposed is that an injury to an employee, like damage to a machine, is a burden that should be borne by the product of the industry and ultimately paid by those who consume this product." The court also said that the State was concerned in the prevention of pauperism, with its concomitants of vice and crime. Continuing, the court said:

> The interest of the State in the protection of the health and lives of its citizens and "in the prevention of pauperism, with its concomitants of vice and crime," is the same whether its citizens be injured in their employment in this State or outside its borders. Business has scant respect for State boundaries. Employees can not hope to retain their employment if they refuse to go outside the State to perform service when directed so to do by their employers. * * *
>
> If an employee resident in Wisconsin loses his right to compensation the moment he crosses the State line, so far as he is concerned the whole beneficent purpose of the workmen's compensation act would be frustrated. Both the employer and employee would be relegated to the uncertain rights and liabilities of the common-law tort action or to the equally uncertain remedy of the workmen's compensation act of some sister State of whose provisions they had no knowledge and with which they had made no attempt to comply.

Interpreting the Wisconsin compensation act, the court said in part as follows:

> The Wisconsin act "contains no language from which it may be inferred that its application was intended to be limited to injuries which occur within the State." (Anderson *v.* Miller Scrap Iron Co., 169 Wis. 106, 112, 170 N. W. 275, 277, 171 N. W. 935.) The Wisconsin act applies to all cases "where, at the time of the accident, the employee is performing service growing out of and incidental to his employment." (Subd. (2) of sec. 102.03 of the statutes.) This statute does not distinguish between injuries sustained in Wisconsin and those happening outside of its borders. The one essential requisite to liability under the Wisconsin compensation act is employment under such circumstances as to create the status of employer and employee under the Wisconsin act. That status arises out of the contract of employment, which may be either "express or implied, oral or written." (Subd. (4) of sec. 102.07 of the statutes.) It may be

made by express agreement. It may be implied from the performance of service.

That status is created when service is performed within the State under a contract of hire, without regard to the question of where the contract was made. Such status may also exist where no service is performed in the State in those cases where both the employer and the employee are residents of the State when the contract is made.

In view of this interpretation of the compensation act the court held that contracts of employment made by citizens of Wisconsin within the State were within the act whether the work was performed within or without the State. This power of the State arises because in case of an injury to an employee resident in Wisconsin, whether the injury was sustained within or without its boundaries, the State must care for the employee and his dependents if they are not able to care for themselves, or are not cared for by the employer.

As the questions of citizenship and employment status were not properly handled by the lower court the Wisconsin Supreme Court reversed the case, saying in part as follows:

To properly determine the rights of the parties, the judgment must be reversed with directions to remand the record to the industrial commission for the purpose of determining whether at the time the contract of employment was made it created a status which subjected both the employer and the employee to the provisions of the Wisconsin act, and, if so, whether such status continued down to the time that the injury was sustained.

The judgment was therefore reversed.

WORKMEN'S COMPENSATION — EXTRATERRITORIALITY — INTERPRETATION OF STATUTE—INJURY OUTSIDE THE STATE—*Pederzoli's Case, Supreme Judicial Court of Massachusetts (January 3, 1930), 169 Northeastern Reporter, page 427.*—A corporation engaged in building roads in the New England States maintained an office in Massachusetts and a field office in Vermont. In the summer of 1928 this corporation was building a road in Vermont, and at the same time had a contract for building a road in Marlboro, Mass., and one in the State of Maine. In February, 1928, Alphonse Pederzoli asked the employer's agent for work and was told he would be given a job as soon as the employer "had something opening up." On July 26, 1928, the employer's agent telephoned from Framingham, Mass., to Pederzoli in Milford, Mass., that he had a job for him and that he was going to try to get him work in Marlboro, Mass. However, the next day the employer's agent told him he would "send him to Vermont for the time being." The employee accepted the proposal and within a few days was taken to Vermont at the employer's expense.

He worked in Vermont as a timekeeper for the employer until August 22, 1928, when he received personal injuries which arose out of and in the course of his employment. The employer insured its employees in Massachusetts, New Hampshire, and Vermont under a standard workmen's compensation policy.

The Massachusetts Industrial Accident Board awarded compensation to the employee, and this award was affirmed by the Suffolk County superior court. The insurance carrier appealed the case to the Supreme Judicial Court of Massachusetts, contending the employee was not entitled to compensation under the provisions of the Massachusetts workmen's compensation act. The Massachusetts workmen's compensation act was amended by a statute of 1927 (ch. 309, sec. 3), to read as follows:

If an employee who has not given notice of his claim of common-law rights of action, under section 24, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer, and whether within or without the Commonwealth, he shall be paid compensation by the insurer, as hereinafter provided, if his employer is an insured person at the time of the injury: *Provided*, That as to an injury occurring without the Commonwealth he has not given notice of his claim of rights of action under the laws of the jurisdiction wherein such injury occurs or has given such notice and has waived it.

The insurer did not contend that this extraterritorial amendment was unconstitutional in its application to employees who are injured while engaged in work that is incidental to and in furtherance of an undertaking carried on or begun by the employer in Massachusetts, but did contend that—

The workmen's compensation act, as amended, is not available to an employee injured while at work outside the Commonwealth, under a contract of hire to perform work outside the Commonwealth, which is separate and distinct from any work carried on by the employer within the Commonwealth, although it may be of the same kind; and that the right of the employee, if any, is to be sought in the State where the work is to be performed.

The court did not concur in this view and in affirming the judgment of the superior court said:

The argument is ingenious, but not convincing, that the legislature intended that upon facts like the present the amendment in its effect should be strictly construed, and that so interpreted it should be limited in its application to cover cases only where the employee when injured while working outside the Commonwealth was engaged in work which was incidental to and in furtherance of an undertaking carried on in Massachusetts. We think General Laws, chapter 152, section 26, as amended by Statutes, 1927, chapter 309, section 3,

should be broadly construed; and that so interpreted the intent of the legislature is unequivocal, plain, and unmistakable that in circumstances like the present an employee injured in the performance of work which arose out of and in the course of his employment should have compensation under the workmen's compensation act.

WORKMEN'S COMPENSATION—EXTRATERRITORIALITY—LOSS OF EYE—PERMANENT TOTAL DISABILITY—*Hargis* v. *McWilliams Co.* (*Inc.*), *Court of Appeal of Louisiana* (*August 13, 1928*), *119 Southern Reporter, page 88.*—On August 1, 1925, Claude P. Hargis, a citizen of Louisiana, was employed by the McWilliams Co., a Louisiana corporation, to go to Long Beach, Fla., to work as engineer in a floating steam dredge. The McWilliams Co. carried insurance as prescribed by the compensation act of Louisiana.

On May 23, 1926, while Hargis was engaged in making repairs to the boiler on the dredge he was struck in the left eye by a metal chip which came off the head of the hammer he was using. This caused him to become totally blind and permanently disabled, as he had lost the sight of his right eye about eight years prior thereto. The company furnished hospital services but failed to pay for medical services and Hargis filed suit to recover the cost of the medical services, and to recover compensation under the workmen's compensation law of Louisiana.

The Civil District Court, Division D, of Louisiana, rendered a judgment in favor of Hargis, and the McWilliams Co. appealed to the Court of Appeal of Louisiana, insisting that "the Louisiana workmen's compensation law had no extraterritorial effect, and hence did not cover an accident occurring in a Florida jurisdiction." The court did not agree with this exception, saying:

> The principal argument in some of these cases is that "there is no provision of the act (compensation) which can be construed to authorize compensation for an injury occurring outside of the State." The answer to that is that there is no provision in the law restricting the liability to accidents within the State nor any general law to that effect. It is true that article 10 of our Code provides that the effect of acts passed in one country to have effect in another country is regulated by the laws of the country where such acts are to have effect.
>
> But this article does not pretend to affect the rights acquired by parties under a contract made in another country. If the employers' liability act of Louisiana protects an employee against an injury suffered in another State, then this article 10 has no application.
>
> The object of the compensation act is to protect a contract made in Louisiana.
>
> It is immaterial under the act where the work has to be done; the law looks to the workman, not to the place where the work is done.

The workman is not deprived of the protection of the law because the work is done outside of Louisiana.

The employers' liability act of Louisiana forms part of every contract made in Louisiana for the employment of labor and carries with it the liability of the employer under said act for every injury suffered by the employee in the course of his employment in executing the work within or without the State. [Cases cited.]

The counsel for the company also argued that the amount of the judgment should not exceed 65 per cent of his wages during 100 weeks for the reason that Hargis suffered the loss of only one eye, and under section 8, 1(a), page 399, he was entitled only "for the loss of an eye 65 per cent of wages during 100 weeks," and that for a permanent partial loss of the use of the member compensation could not be granted for a greater period than that provided for the loss of the member.

The court did not agree with this contention, saying, in part:

It is evident that the plaintiff's claim is not based upon section 8, 1(d), " for the loss of an eye," for that would produce only a partial disability in case the plaintiff had both eyes and that is the partial disability that that section has in contemplation.

But the plaintiff claims under section 8, 1(b), quoted above, for an injury producing permanent total disability to do work of any reasonable character.

Such was the interpretation of the court in Brooks *v.* Peerless Oil Co. (146 La. 383, 83 So. 663), and Guderian *v.* Sterling Sugar Co. (151 La. 59, 91 So. 546).

The judgment of the lower court awarding compensation for 400 weeks was therefore affirmed.

WORKMEN'S COMPENSATION—FAILURE TO COMPLY—JURISDICTION—LIMITATIONS—THIRD-PARTY LIABILITY—*State ex rel. Woods* v. *Hughes Oil Co., Supreme Court of North Dakota (August 19, 1929), 226 Northwestern Reporter, page 586.*—The Hughes Oil Co. was engaged in the business of selling gasoline and other petroleum products in North Dakota and maintained a place of business at the city of Beach. William J. Woods was employed for the purpose of conducting its business in the city of Beach, and on May 3, 1923, while so employed, was instantly killed when the truck which he was driving was struck by a Northern Pacific train at the railroad crossing near Beach. The Hughes Oil Co. had not complied with the provisions of the workmen's compensation act of the State of North Dakota, having failed to contribute to the compensation fund. The widow filed a claim for compensation with the North Dakota Workmen's Compensation Bureau, on June 30, 1923. The claim was denied because the company was not insured under the act. She later

filed another claim, and on November 4, 1927, the bureau made an award whereby the company was ordered to pay the widow and her dependent child the sum of $4,766.91. Previously she had received an award of $1,000 from the railroad.

The award of the bureau remained unpaid and the widow brought action in the district court of Burleigh County, where she received an adverse judgment. The case was taken on appeal to the Supreme Court of North Dakota. The first contention made by the oil company was that—

The workmen's compensation act requires any person who elects to present a claim against a noninsured employer for determination and allowance by the workmen's compensation bureau to present such claim within one year after the injury or death, and that inasmuch as the claim in this case was not presented within such time the workmen's compensation bureau was without authority to conduct any hearing or make any award.

In answering this contention the court reviewed the records which showed that the widow filed a claim with the workmen's compensation bureau asking that she be allowed compensation out of the compensation fund; that this claim was dismissed because the Hughes Oil Co. was not insured under the workmen's compensation fund, and on May 5, 1927, she filed a "petition for hearing."

The court quoted part of the North Dakota workmen's compensation act (Laws 1919, ch. 162) applicable to the case and then dismissed the first contention made by the company, as follows:

This contention is predicated upon the erroneous premise that sections 15 and 18 apply to claims against a noninsured employer. These sections have no application whatever to such claims; they apply only to claims for compensation out of the workmen's compension fund. (Nyland *v.* Northern Packing Co. (N. Dak.), 218 N. W. 869.) By the express provisions of section 11, supra, an injured employee, or a dependent of an injured employee whose death has ensued, is afforded one of two remedies: (1) He may maintain a civil action against the employer for the damages suffered (Olson *v.* Hemsley, 48 N. Dak. 779, 187 N. W. 147); or (2) he may apply to the workmen's compensation bureau for an award against the employer (State ex rel. Dushek *v.* Watland, 51 N. Dak. 710, 201 N. W. 680). According to the plain import of the statute, these two remedies are coexistent and continue for an equal length of time; that is, they both continue until the right of action at law is barred by the statute of limitations.

The second contention was that the widow was barred (under sec. 7377 Comp. L., N. Dak., 1913) from any action, as she had not presented the claim within the 2-year period, and the workmen's compensation bureau was without authority to conduct any hearing or make any award. However, the court held that section 7377, Com-

piled Laws, 1913, had no application to the widow's cause of action against the oil company as this existed solely by virtue of the workmen's compensation act. The right of action of the widow was predicated upon an obligation or liability created by the statute, and the limitations of time for commencement of the suit was controlled by section 7375, Compiled Laws, 1913, which fixed a 6-year period of limitation. That "the bureau not only had the power but it was its unquestioned duty to hear the claim and make such determination thereof as the facts warranted," was the conclusion of the court.

The third contention of the Hughes Oil Co. was—

That at the time of his death the relator's husband, William J. Woods, was not an employee of the defendant, Hughes Oil Co., within the meaning of the workmen's compensation act.

Regarding this the court said:

A careful consideration of all the evidence leads us to the conclusion that at the time of his death William J. Woods was an employee of the defendant company, and that the injury which caused his death was sustained in the course of such employment.

The evidence brought out the fact that the oil company had the right of exercising control over the performance of his work, and that the company had the right to terminate the employment of Woods at any time without liability on its part. The fact that Woods worked on a commission basis was not of controlling importance.

The fourth and last contention was that the widow, by entering into an agreement with the Northern Pacific Railway Co. for a settlement of her claim, became and was estopped from seeking any compensation from the Hughes Oil Co. under the provisions of the workmen's compensation act.

In answering this contention the court said in part that—

The act provides for the establishment of a workmen's compensation fund, and requires every employer who comes within the purview thereof to pay into such fund the prescribed premiums, and failure on the part of an employer to comply with the provisions of the act and pay the required premiums is deemed a breach of legal duty. Not only does the act make it incumbent upon the employer to provide the insurance therein prescribed for the benefit of his employee, but it inhibits the employee from waiving his right to compensation. (Laws 1919, ch. 162, sec. 21.)

Liability on the part of the railway company was dependent upon the existence of actionable negligence on its part and the absence of contributory negligence on the part of the relator's husband. Liability on the part of the defendant is not dependent upon any question of negligence or contributory negligence; that liability is one created by statute and is bottomed upon the defendant's failure to comply with the provisions of the workmen's compensation

act. In a word, the liability of the railway company was governed and measured by the rules applicable in an action for death by wrongful act (secs. 8321, 8322, C. L. 1913) while the liability of the defendant is controlled and measured by the provisions of the workmen's compensation act.

The defendant in this case was in no manner concerned with the relator's cause of action against the railway company. Its rights and obligations could in no manner be affected by any act of the relator in regard thereto. If she decided not to bring suit against the railway company, obviously the defendant could not require such suit to be brought. Nor could the defendant, even if it had compensated the relator in accordance with the provisions of the workmen's compensation act, have maintained an action against the railway company on the theory that it was entitled to reimbursement for the moneys which it had been compelled to expend by reason of the death resulting from the negligence of the railway company.

The court concluded the opinion as follows:

It follows from what has been said that the trial court was in error in dismissing the action. It should have ordered judgment in favor of the plaintiff for the amount demanded in the complaint. Accordingly the judgment appealed from must be, and it is, reversed, and the cause is remanded, with directions to enter such judgment.

WORKMEN'S COMPENSATION—FELLOW-SERVANT RULE—SAFE PLACE TO WORK—*Jutras* v. *Amoskeag Manufacturing Co., Supreme Court of New Hampshire (November 5, 1929), 147 Atlantic Reporter, page 753.*—Laura Jutras was a spinner in the mill of the Amoskeag Manufacturing Co., at Manchester, N. H., and was injured by slipping on the floor in front of one of the spinning frames. It was customary to scrub the main alley each week, but it was not the practice to wash the spaces between the spinning frames, and for that reason the employee claimed the company failed to furnish her a safe place to work when water was carelessly spilled on the floor.

Jutras recovered a judgment in the superior court, Hillsboro County, N. H., and the company carried the case to the Supreme Court of New Hampshire. This court found that proof of the company's negligence was entirely lacking and said that the company—

Having presumably prescribed suitable regulations and having no reason to suspect that the scrubber was negligent or incompetent (Hodges *v.* Company, 81 N. H. 101, 122 Atl. 794, and cases cited) can not be charged with knowledge that this was likely to occur. For this reason the evidence that the combination of soap and soda used in scrubbing made the floor slippery for a short time is not

material, and the question of the cooperating negligence of master and fellow servant, which the plaintiff raises, is not involved.

In the present case the defendant has complied with the requirements of the workmen's compensation act and is consequently entitled to invoke the fellow-servant rule in its defense.

The judgment was therefore reversed.

WORKMEN'S COMPENSATION—FOREIGN GUARDIAN—FAILURE TO COMPLY WITH STATUTORY PROCEDURE—AGREEMENT—*In re Bones, McBroom et al.* v. *Callahan Zinc-Lead Mining Co. et al., Supreme Court of Idaho (July 25, 1929), 280 Pacific Reporter, page 223.*—On April 2, 1921, James Bones, while employed as a miner by the Callahan Zinc-Lead Mining Co., was killed in its mines in Shoshone County, Idaho, in the course of his employment. He left surviving him a widow and four minor children. Mary Bones, the widow, moved to Butte, Mont., with her children, and died there in 1922. Prior to her death she filed application for compensation with the Industrial Accident Board of Idaho and received $472 from the insurance carrier. Thomas Bones, a brother-in-law, was appointed guardian of the minor children in the second judicial district in Montana.

In February, 1922, Thomas Bones entered into a written agreement with the insurance company regarding the amount of compensation due the minor children. According to this agreement compensation was paid Bones, as guardian, until July, 1923, when the industrial accident board ordered payments to stop and another guardian was appointed. John H. Golden was appointed guardian, and in December, 1923, the board made an order directing payments to Golden. The facts show that neither guardian applied for letters of guardianship in any probate court of Idaho.

Margaret Bones McBroom reached the age of 18 in November, 1926, and letters of guardianship were issued to her by the probate court of Shoshone County, Idaho. She brought this action in her own behalf and as guardian of her brothers, asking an award on the application filed by Mary Bones in 1921, and that the surety repay the amounts paid Thomas Bones and John Golden as guardian appointed by Montana courts.

The district court of Shoshone County affirmed certain portions of the award of the industrial accident board and Margaret McBroom appealed to the Supreme Court of Idaho, alleging that the guardians appointed by the Montana courts can not lawfully enter into a contract fixing compensation under the workmen's compensation law of Idaho, and payments made to them should be treated as voluntary payments.

The court upheld the contention made by Margaret McBroom and, in the course of the opinion, said in part as follows:

The right to compensation and payment involved in this case arises solely by virtue of the workmen's compensation law of this State. Bones and Golden attempted to represent the wards, solely as guardians by virtue of their appointment as such by a court of a sister State. Not having power to act concerning the wards' property outside the State of Montana, their agreements concerning compensation to be awarded their wards in Idaho were invalid, each having failed to take out letters in this State, or to comply with the statutes governing foreign guardians of nonresident wards having property in this State. The approval by the board of their agreements with the surety could not make them valid. (See London Guarantee & Accident Co. *v.* Sterling, supra; In re Levangie, 228 Mass. 213, 117 N. E. 200.)

It follows that, having failed to comply with the law governing foreign guardians above referred to, the said Bones and Golden were not authorized to receive and transfer to Montana the payments made by the surety.

Any payment, or part payment, made by the surety or employer to either of said foreign guardians, Thomas Bones and John H. Golden, if shown by competent evidence to have been actually applied to the use and benefit of their said wards, should be deemed voluntary payments for which respondents are entitled to credit under the provisions of C. S., section 6238, provided the industrial accident board shall approve them as such.

The portion of the judgment appealed from was therefore reversed. Upon a petition for rehearing, the court denied the petition and said the industrial accident board is an administrative "body exercising special judicial functions," and the rules governing the procedure before the board should be flexible and informal, so that the objects of the act may be accomplished in a summary manner while preserving the rights of the parties and doing justice between them.

WORKMEN'S COMPENSATION—GOING TO AND FROM WORK—CAUSAL CONNECTION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Van Gee* v. *Korts et al., Court of Appeals of New York (November 19, 1929), 169 Northeastern Reporter, page 370.*—Andrew W. Korts was the owner of the Korts's Dairy in the city of Rochester and engaged in distributing milk throughout the city. James E. Van Gee was in his employ as a truck driver. His duties required him to be at the plant between 12 and 1 o'clock each morning, in order that he might load his truck and start on his route at 2 o'clock. On the morning of November 21, 1926, Van Gee failed to report at the plant in time to load his truck. Korts's son was in the employment of his father at the plant, it being his duty to see that the plant

was operated properly. At 2 o'clock he took Korts's automobile. which was at the plant, and drove to the home of Van Gee, knocked on the door, and awoke Van Gee who had overslept. Van Gee dressed and got into the automobile with young Korts and they started toward the plant. An accident happened as a result of the negligence of Korts, and both were killed. Action was brought by John Van Gee, as administrator of James Van Gee, against Korts, and the trial term entered a judgment in favor of Van Gee. This judgment was later affirmed by the appellate division of the supreme court, fourth department. Korts appealed to the New York Court of Appeals, contending that Van Gee was not entitled to recover in this action because the injury was covered by the workmen's compensation act, as the accident arose out of and in the course of the servant's employment, within the meaning of section 10 of the workmen's compensation law (Consol. Laws, N. Y., ch. 67, as amended).

Regarding the question of whether the deceased employee was at the time of the accident in the employ of the company, and whether the accident arose in the course of the employment, the court said:

There can be no serious question that the deceased was in the employment of the said defendant at the time of the accident. He worked by the week. His day's work commenced between 12 and 1 o'clock in the morning. It was past that time, and at the time of the accident he was on his way to his place of work under the direction of and in a conveyance provided by the master and driven by the master's son, his superior, who was acting within the scope of his employment.

We believe, also, that the deceased employee, at the time of the accident, was within the course of his employment, or within the zone of his employment, and that the trip in the automobile from his home was a benefit to the master incident to the contract for his services.

The court also held that Van Gee was entitled to compensation as there was a causal connection between the accident and the employment. In reversing the judgment of the appellate division of the New York Supreme Court, referring the case to the workmen's compensation board, the court said in part:

We believe it is equally clear that, if the servant is required to be in the particular conveyance at the time as an incident of the employment in furtherance of his master's business, and is injured, he comes within the act and is entitled to compensation.

Compensation is awarded for injuries to an employee which occur in a conveyance furnished by the employer while carrying him to his work, provided the employer is bound by contract, express or implied, to furnish transportation. The work commences when the employee enters the conveyance, and the journey is an incident to the employment.

He was performing a duty owed to the master and furthering the master's business. The deceased would not have been in the automobile driven by the master's representative except for his contract

of service which imposed upon him the duty of obeying his master's orders. He was under no obligation to dress and ride with the master's representative to the plant, unless it was under his contract for service and to further his master's interests.

There was a causal connection between the employment and the accident. The accident was a rational consequence of a hazard connected with the employment. The hour of employment had arrived; the truck to be driven by the deceased had not been loaded; the master desired that it should be loaded and started on the route; and, in furtherance of that purpose, he undertook to hasten the arrival of the servant at the plant. The servant obeyed instructions when he entered the automobile, and thereby placed himself under the master's control for the purpose of furthering the master's interests. Since he was acting within the course of his employment and came within the workmen's compensation act this action can not be maintained.

The judgment was reversed and the complaint dismissed.

The Louisiana Court of Appeal held in a case that an employee injured in going to or from work while still on the employer's premises or in a conveyance furnished by employer has a compensable claim. However, an employee injured when stepping on a nail while on his way home from work and a considerable distance from the employer's premises was not entitled to compensation. (Thibodaux *v.* Yount Lee Oil Co. (1930), 128 So. 709.)

WORKMEN'S COMPENSATION—GOING TO AND FROM WORK—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*De Rosa et al.* v. *Levering & Garrigues Co., Supreme Court of Errors of Connecticut (July 9, 1930), 151 Atlantic Reporter, page 246.*—One De Rosa was a structural-iron worker in the employ of Levering & Garrigues Co., which was engaged in erecting structural steel buildings throughout New England. On December 28, 1928, a job upon which he had been working at New Haven was completed, and he and a fellow workman were told to report for work the next morning at Wilsons Station, a short distance north of Hartford, Conn. The next morning De Rosa left his house in Fairfield on a motor cycle, picked up his fellow workman at Milford, and proceeded toward Wilsons Station. As they were passing through Berlin shortly before 8 o'clock a tire on the motor cycle blew out, and De Rosa and his companion were thrown and sustained fatal injuries. When going from one job to another the employer paid the cost of railroad fare to the new work, and the employee was supposed to begin work each morning at 8 a. m.

The dependents filed claim for compensation and the Compensation Commission of Connecticut found that the injury and death arose out of and in the course of his employment, and awarded compensation. The superior court of Hartford County dismissed an

appeal and affirmed the award. Following this action the case was appealed to the Supreme Court of Errors of Connecticut. In reversing the decision of the superior court, the court said:

An employee is not, as a general rule, entitled to compensation for injuries received upon a public highway while going to and from work. Such injuries do not ordinarily occur in the course of the employment, and the risks incidental to such travel do not ordinarily arise out of the employment. This is so, because the ordinary contract of employment of a workman to render service at a designated place does not cover his movements outside of that place. He uses the highways as the public uses them, because he must, and not because his employer, by the terms or implications of his contract of employment, has the right to require him to use them at the employee's will. (Lake *v.* Bridgeport, 128 Atl. 782, 784; Whitney *v.* Hazard Lead Works, 136 Atl. 105, 106; Orsinie *v.* Torrance, 113 Atl. 924.) The rule is subject to exceptions based upon the terms, express or implied, of the particular contract of employment involved. We noted four such exceptions in the Whitney case, supra, and it is the contention of the plaintiffs that this case comes within the fourth there stated, to wit: "Where the employee is using the highway in doing something incidental to his employment, with the knowledge and approval of the employer."

The injury took place before the period of the decedent's employment had begun, and while he was on his way to work (under the finding as corrected) by a means of conveyance not known to or acquiesced in by his employer. It can not be said he was using the highway in doing something incidental to his employment with the knowledge and approval of his employer. Nor does the case come within the exception to the general rule arising where the employer contracts to and does furnish transportation to and from work.

The Supreme Court of New Jersey held in a case that an injury to an employee struck by an automobile while changing street cars, on his way to install screens was one "arising out of and in course of employment." The evidence disclosed that the employee's work was to go to the place where he was to install the screens and there receive instructions. He very seldom went to the office and his expenses in traveling from one job to another were paid by the employer. (Orange Screen Co. *v.* Drake (1930), 151 Atl. 486).

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—COMMON HAZARDS—EXEMPTIONS AND EXCLUSIONS—*Pegg* v. *Postal Telegraph & Cable Co., Supreme Court of Kansas (December 27, 1929), 283 Pacific Reporter, page 58.*—On November 28, 1927, John A. Pegg, while in the course of his employment with the Postal Telegraph & Cable Co., received a personal injury while delivering messages. At the time of the accident Pegg was on his bicycle delivering his last message for the day and, as he was crossing a street intersection, was struck by an automobile, thrown some distance, and run over by a truck, resulting in a broken wrist, a broken nose, a sprained

back, and other injuries. He was totally disabled for about two weeks, after which he returned to work, and continued for two weeks when he stopped work because of his condition.

He filed claim under the Kansas workmen's compensation act and received an award which was affirmed by the district court of Sedgwick County. The employer appealed to the Kansas Supreme Court, contending that the compensation act did not include employees of a telegraph company. The Kansas compensation act provided:

That this act shall apply only to employment in the course of the employer's trade or business in the following hazardous employments: * * * electric, building, or engineering work. (Sec. 5, ch. 232, Laws of 1927.)

Section 8 of the act defines the various employments to which it applies. It specifies that—

Electrical work means any kind of work in or directly connected with the construction, installation, operation, alteration, removal, or repair of wires, cables, switchboards, or apparatus used for the transmission of electrical current, or operation of telegraph or telephone lines.

The court interpreted this to mean that electrical work was not confined to work directly connected with the construction of the lines, but when properly analyzed included any kind of work in or directly connected with the operation of telegraph or telephone lines; and the delivery of messages was a necessary and essential factor in the carrying on of the telegraph business. The court held that "the messenger boys of the telegraph company are within the purview of the compensation act" and the $6 per week minimum compensation was properly applied in this case under section 232, which provides that—

Where temporary total disability results from the injury no compensation shall be paid during the first week of disability, except that provided in paragraph 1 of this section, but after the expiration of said first week payment shall be made in accordance with the provisions of this act, during such temporary total disability, of a sum equal to 60 per cent of the average weekly earnings of the injured workman, computed as provided in section 11 of this act, but in no case less than $6 per week nor more than $18 per week. (Ch. 232, Laws 1927, sec. 10, par. 3(b).)

The judgment of the district court sustaining the award of compensation made by the commission was therefore affirmed.

The Supreme Court of Oklahoma in a case held that an employee engaged in collecting accounts for a lumber company was not entitled to compensation under the Oklahoma workmen's compensation act for injuries received when his employer's automobile, in which he was riding, was wrecked. The court held that such an occupation was not hazardous as prescribed by the law. (Vanoy *v.* State Industrial Commission et al. (1930), 283 Pac. 555.)

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—CONSTRUCTION OF STATUTE—COVERAGE—*Bryant* v. *Meyer Coal, Ice, Storage & Transfer Co., Supreme Court of Kansas (April 5, 1930), 286 Pacific Reporter, page 222.*—On December 31, 1926, George Bryant was injured while unloading coal from a coal car which had been sidetracked on a switch in Leavenworth, Kans. Bryant was employed as a truck driver by the Meyer Coal, Ice, Storage & Transfer Co., engaged in operating a coal yard, ice, and cold-storage business. While assisting in unloading a car of coal Bryant suffered an injury and was totally incapacitated from December 31, 1926, until March, 1927.

Bryant filed suit under the former Kansas workmen's compensation law, in the district court of Leavenworth County, Kans., to recover compensation from his employer, and the court rendered a judgment in his favor. The employer appealed to the Supreme Court of Kansas contending that Bryant was not covered by the workmen's compensation law. The pertinent part of the statute reads: "That this act shall apply only to employment in the course of the employer's trade or business on, in, or about a railway * * *." The employer contended that the injury to Bryant did not occur "on, in, or about the premises of the employer." On the other hand, Bryant urged that the act meant any railway, as it did not specify "the employer's railway."

The court cited a number of cases interpretative of the Kansas workmen's compensation law and concluded by rejecting Bryant's interpretation of the act.

In reversing the judgment of the lower court and rendering judgment in favor of the employer, the supreme court said:

It required a fanciful flight of the imagination to place a construction on the act such as the appellee [Bryant] contends should be done. It is manifest that, when the act specifies that it "shall apply only to employment in the course of the employer's trade or business on, in, or about a railway," it necessarily means that the employer's principal business must be that of operating the railway, or that the employer must operate the railway in connection with its principal business. In the present case the defendant was not engaged in the railroad business. It was in the coal, ice, and cold-storage business—something entirely foreign to the business of operating a line of railway. Nor does the fact that the employer in this case sent the plaintiff to the switch track to unload the car of coal extend the danger zone of its factory or place of business to the railroad track. To permit such a construction as contended for by the appellee would be to say that the employer would be liable under similar circumstances, even if the railway were situated several miles away from the plant. It would mean also that, if a workman employed by a mining company in its mine were sent to a powder factory for some blasting powder, and while at the factory suffered

an injury, the employer would be liable under the act for such injury, notwithstanding the "on, in, or about" provision of the law. Such a construction of the statute is illogical and unsound.

WORKMEN'S COMPENSATION — HAZARDOUS EMPLOYMENT — COVERAGE—TOWN MARSHAL—*Mashburn* v. *City of Grandfield et al., Supreme Court of Oklahoma (April 8, 1930), 286 Pacific Reporter, page 789.*—O. D. Mashburn had been for many years the town marshal of the village of Grandfield, Okla. As marshal he had authority to arrest persons for infractions of the law, and in addition he had to patrol the streets and guard the town. One night while so patrolling the streets some small substance hit him in the eye breaking the skin on his eyeball, and finally resulting in the total loss of vision of the eye.

He filed application for compensation and the claim was denied by the Industrial Commission of Oklahoma upon the ground that "the claimant was not engaged in an occupation at the time of the accident that comes within the intent and meaning of the workmen's compensation law." Mashburn, in due time, filed a petition in the Supreme Court of Oklahoma to review the order.

In discussing the scope of the Oklahoma workmen's compensation act (sec. 7284, Comp. Stat. 1921, as amended by Laws 1923, ch. 61, sec. 2) the court said:

Subdivision 3 of section 7284 of the statute brings the employees of the "State, county, city, or any municipality" under the act when such employees are "engaged in any hazardous work within the meaning of this act in which workmen are employed for wages." Subdivision 1 of the same section defines hazardous employment and restricts it to "manual or mechanical work or labor connected with or incident to one of the industries, plants, factories, lines, occupations, or trades mentioned in section 7283." Section 7283 of the statute describes the various hazardous employments falling within and protected by the workmen's compensation law. The statute is lengthy, and it is unnecesary for us to quote in full, but it includes factories, mills, and workshops, shops where machinery is used, mines, wells, gas works, laundries, construction and engineering work, construction of public roads, etc.

The court held that Mashburn was not entitled to recover compensation under the Oklahoma compensation act and in conclusion said:

There is nothing in the statute to which the patrol duty of a night watchman of a town might be incident. To make it more concrete, the petitioner in this case, in patrolling the streets, making his "beat," keeping the public peace just as any other night marshal or night policeman would do, was largely performing a governmental function; and the legislature has not seen fit to include this

class of employment within the operation of the workmen's compensation law.

Having reached the conclusion that under our law neither a town marshal nor a town watchman, performing duties similar to the duties which the petitioner in this case performed, is protected by statute, the petition for review of the action of the State industrial commission in finding against the petitioner is hereby denied.

The Supreme Court of Wyoming, in a case under the Wyoming workmen's compensation law, held that a city employee injured in the course of his employment while impounding animals, which occupation was not within the compensation law, could not recover compensation although he was also employed as a truck driver which was within the law. (Leslie *v.* City of Casper (1930), 288 Pac. 15.)

WORKMEN'S COMPENSATION—HERNIA—CAUSAL CONNECTION—*Industrial Commission* v. *Polcen, Supreme Court of Ohio (December 4, 1929), 169 Northeastern Reporter, page 305.*—John Polcen had been employed in the sulphuric department of the General Chemical Co. of Cleveland, Ohio, for a period of 10 years. He filed claim with the Ohio Industrial Commission alleging that he was ruptured on April 23, 1926, by a violent coughing spell occasioned by the emission of sulphuric fumes into the atmosphere of the factory. Compensation was denied by the industrial commission, and upon appeal a judgment was rendered for Polcen in the common pleas court, which judgment was later affirmed by the court of appeals, Cuyahoga County, Ohio. In reference to the so-called injury Polcen testified that—

We worked all day on the job until between 3 and 3.30. It was gassy all day on the job, and I done a lot of coughing that day, but about 3.30 or so I was overcome with gas and I went outside and I almost strangled from coughing; I got a little pain, but I didn't think it was as bad as it was. I was outside about half an hour, I judge, and then went back in; I had the pain, but I didn't pay much attention to it, as we often get to coughing down there.

The case was appealed to the Supreme Court of Ohio by the industrial commission contending that the situation disclosed nothing of the nature of an accident. The Ohio Supreme Court held, however, that an injury of this nature constituted an injury compensable under the workmen's compensation act (Gen. Code, secs. 1465–67 et seq.) and in affirming the judgment of the lower courts, said, in part:

The evidence does show that the coughing upon that day was extraordinary * * *. The evidence tends to show that this particular coughing spell upon this particular day caused the specific injury. The jury so found. It was not a continuous condition, but a particular condition, which induced the hernia. This court has held that an accident is a happening which occurs by chance, unexpectedly, not in the usual course of events. * * * Certainly

the sustaining of an inguinal hernia, due to a coughing fit, is not a usual and customary incident to the occupation in which Polcen was engaged. If Polcen had fallen, and from the fall a hernia had resulted, this would have constituted an injury incurred in the course of employment. We see no essential difference in the case at bar.

After distinguishing several cases, the court said:

The facts in this record fall within the principles laid down in Industrial Commission *v.* Roth (98 Ohio St. 34, 120 N. E. 172), where there was an accidental and unforeseen inhaling of a special volatile poison or gas by an employee in the course of his employment.

WORKMEN'S COMPENSATION—HERNIA—PREEXISTING CONDITION—TEMPORARY TOTAL DISABILITY—*Von Cloedt* v. *Yellow Taxicab Co. et al., St. Louis Court of Appeals (June 4, 1929), 18 Southwestern Reporter (2d), page 84.*—Charles L. Von Cloedt, an employee of the Yellow Taxicab Co., was injured while in the course of his employment. The facts show that prior to the date of the accident in question Von Cloedt was suffering with an incomplete hernia of such a nature, however, that it did not necessitate an operation. The injury aggravated his hernia to such a degree that an operation became necessary.

The Workmen's Compensation Commission of Missouri made an award which was affirmed by the St. Louis circuit court, and the taxicab company appealed to the St. Louis court of appeals.

The company contended they were not liable for an injury of this nature and based their contention upon section 17 of the Missouri compensation statute regarding permanent partial disability, subsection (b) of which reads as follows:

(b) In all claims for compensation for hernia resulting from injury arising out of and in the course of the employment, it must be definitely proved to the satisfaction of the commission: First, that there was an accident resulting in hernia; second, that the hernia appeared suddenly, accompanied by intense pain; third, that the hernia immediately followed the accident; fourth, that the hernia did not exist in any degree prior to the accident resulting in the injury for which compensation is claimed.

The court, however, did not uphold this contention and held that the above section referred only to permanent partial disabilities. In affirming the decision of the lower court and the compensation commission, the court said in part as follows:

Our legislature, under the Missouri act, makes hernia resulting from injury arising out of and in the course of the employment compensable upon the same conditions as other compensable injuries excepting as to compensation for permanent partial disability, where it has seen fit to provide that as a prerequisite to recovery there shall be proof made as provided for in subsection (b) of section 17.

Holding as we do, therefore, that hernia, other than for compensation for permanent partial disability, stands upon the same footing as other injuries that are compensable under the act, and finding substantial testimony here to support the finding that respondent, who had an incomplete hernia prior to the accident, of such character, however, that it did not require an operation, was injured as a result of the accident, and that such injury resulted in said prior incomplete hernia becoming a complete inguinal hernia, which necessitated an operation to correct, then under section 13 of the act the award herein complained of, namely, $175 for an operation for hernia and eight weeks, at $20 per week, for total disability following such operation, is warranted.

WORKMEN'S COMPENSATION—ILLEGAL EMPLOYMENT—MINOR—VIOLATION OF CITY ORDINANCE—*Walsh* v. *Myer Hotel Co., Supreme Court of Tennessee (July 19, 1930), 30 Southwestern Reporter (2d), page 225.*—The Myer Hotel Co., of Nashville, Tenn., employed a boy 17 years of age as an operator of a passenger elevator, and he was killed while engaged in the performance of his duties. The administrator brought a common-law action for damages against the Myer Hotel Co. As a defense the hotel company claimed that its liability was controlled and limited by the provisions of the workmen's compensation law of Tennessee (Acts of 1919, ch. 123). The county circuit court dismissed the suit and an appeal was taken to the State supreme court.

At the time of the accident there was in force in the city of Nashville an ordinance of the city government providing that "no person under the age of 18 years shall operate, control, manage, or be in charge of any elevator. No person, firm, or corporation shall employ a person under the age of 18 years to operate, control, manage, or have charge of any passenger elevator in the city of Nashville." It was contended by the administrator that the effect of this ordinance was to render unlawful the contract of employment, and that the workmen's compensation law for that reason had no effect upon the respective rights and liabilities of the parties, and also that the relationship of employee and employer did not exist under the workmen's compensation law, and therefore an action for damages on account of the employer's negligence was proper.

The supreme court, after reviewing a number of cases interpretative of the Tennessee workmen's compensation act, said that—

Inasmuch as the compensation act contains no language expressly excluding from its operation contracts which are unlawful because of the incapacity of one of the parties thereto, the exclusion of such

contracts by judicial construction must result from a determination that such exclusion is in accord with the legislative intent.

The language of this court in Manning *v.* American Clothing Co. and in Western Union Telegraph Co. *v.* Ausbrooks, cited above, that "The employment contemplated by the provisions of the workmen's compensation acts is a lawful employment," etc., was used with reference to contracts in violation of a State law regulating the employment of minors; and we think the sound reason for the holding in those cases is, as stated by the New Jersey court in the case above cited, that "it would be entirely unreasonable to attribute to the legislature the intention of adding terms to a contract of hiring which it had already prohibited the parties thereto from making."

The reason of exclusion, the court continued—

Must fail when the illegality of the contract of employment arises solely from a violation of a municipal ordinance regulating the employment of minors within the restricted area of a municipality. It can not be presumed that the legislature intended to exclude from the operation of the compensation statute a contract rendered unlawful because of some local municipal ordinance, which may not have been in existence at the date the compensation law was enacted, and of the terms and provisions of which the legislature could not have been advised.

The compensation law was enacted as a general statute of uniform application throughout the State. The exclusion from its application of contracts prohibited locally by municipal ordinance would destroy this uniformity; and, in the absence of an express provision to that effect, we can not assume that the legislature intended to place the local application of the statute within the regulatory discretion of municipal governments.

The compensation statute does not expressly exclude from its application contracts of employment otherwise included, because contrary to the ordinances of a municipality in which the contract is made or performed, and we hold that such exclusion is not clearly nor necessarily implied.

The judgment of the circuit court was therefore affirmed.

WORKMEN'S COMPENSATION — INDEPENDENT CONTRACTOR — "EMPLOYEE"—*Phillips* v. *Tennessee Eastman Corp., Supreme Court of Tennessee (April 5, 1930), 26 Southwestern Reporter (2d), page 1051.*—Caney Phillips was accidentally killed by the falling of a tree on which he was working while engaged in the performance of a written contract with the Tennessee Eastman Corp. By the terms of the contract he undertook to cut and pile a given number of cords of chemical wood. Specifications covering sizes, lengths, nature, and quality of the wood and manner of piling were set forth in the written contract in detail.

Mrs. Dona Phillips filed suit in the lower court of Sullivan County, Tenn., to recover compensation under the State workmen's

compensation act, and the petition was dismissed on the ground that Phillips was an independent contractor rather than an employee of the Eastman Corp. The widow appealed the case to the Supreme Court of Tennessee, insisting that there was no evidence to support the trial judge; that the contract did not create the relationship of independent contractor but of employer and employee; and that this construction was sustained by the custom prevailing under this class of contracts to direct and supervise the work. The Tennessee Supreme Court held that the employer's responsibility under the compensation law was limited to conditions under which he exercised in some reasonable degree control of manner and mode of performance. The decisive question in this case therefore was whether the company had the right to control. The court answered this in the negative and in affirming the decision of the lower court said in part as follows:

It seems quite clear that the Eastman Corp. neither reserved nor exercised the right to control in these given particulars which bear directly on the accident the operations of the deceased. He worked when he chose, employed whom he selected, and did the work in the manner his judgment or desires prompted.

We have considered the oral proof of the custom and practices under other like contracts but find nothing therein materially affecting the construction adopted. Moreover, where the contract is in writing and its terms unambiguous, the question is one of law.

WORKMEN'S COMPENSATION—INDEPENDENT CONTRACTOR—EMPLOYMENT STATUS—USUAL COURSE OF BUSINESS.—*Royal Indemnity Co.* v. *Industrial Accident Commission et al., District Court of Appeal, Fourth District, California (March 3, 1930), 285 Pacific Reporter, page 912.*—M. Brauer was engaged in operating a real estate office in the city of San Diego, Calif., and advertised for a salesman. D. R. Murray answered the advertisement and entered Brauer's office under an agreement, the exact nature of which was not clear.

A short time later Murray inserted an advertisement in a newspaper to the effect that he had a client who desired to purchase a small piece of land. In response to this advertisement a man named Bean called the office and asked for Murray. Brauer took his name and address and later Murray called him and arranged to go with him to inspect the parcel of land. Before they arrived at the land Murray observed some avocado trees on adjoining property. He left the road and entered the property for the purpose of seeing whether or not there was fruit on these trees. While on this mission he slipped, fell down an incline, and received injuries. He filed claim for compensation.

The Industrial Accident Commission of California awarded compensation, having found that his injury arose out of and in the course of his employment and that he was at the time an employee of Brauer. The Royal Indemnity Co., the insurance carrier, appealed the case to the California Court of Appeal, Fourth District, contending that Murray was an independent broker and not an employee. This contention was based upon the fact that Murray did not secure a salesman's license but continued to use his broker's license; that Brauer was only interested in the results of his work and exercised very little control over his mode or method of performing the work; and that both made suggestions and raised points in connection with their work.

The court concluded that the evidence did not indicate an employment and in reversing the decision of the commission said, in part:

We find no evidence in the record showing any control over the means, manner, or mode of the work, to have been exercised by Brauer, or reserved to him. We think the relationship between Murray and Brauer, as conclusively shown by the record, was the not unusual one of associated real estate brokers, rather than that of employer and employee.

A second point raised is that the injury suffered by Murray did not arise in the course of his employment, but arose when he was on a purely personal errand, having no relation to the sale of real estate. Were Murray an employee of Brauer, this contention would be without merit, as the evidence sufficiently shows his motive in examining the avocado trees was to gain information that would assist him in selling the land, the sale of which was the object of the trip.

For the reason that the record discloses that the relationship of employer and employee did not exist in this case, the award is annulled.

WORKMEN'S COMPENSATION — INDEPENDENT CONTRACTOR — EVIDENCE—*Bradley's Case, Supreme Judicial Court of Massachusetts (December 17, 1929), 169 Northeastern Reporter, page 156.*—Leighton & Barrie (Inc.) employed Gladys E. Bradley as bookkeeper. The company sold gasoline, oil, and accessories, maintaining several gasoline stations, and paid her additional money for anything she did in addition to her regular bookkeeping work. In order to earn extra money she bought an automobile to use in going on errands for the company. The car was registered in her name, and she paid all expenses of maintaining it. She also used the car for pleasure as well as business.

On April 18, 1928, while driving alone in her car an accident occurred which resulted in serious injuries. Compensation was

awarded by the Industrial Accident Board of Massachusetts, and upon appeal to the superior court, Suffolk County, Mass., the award was sustained. The insurer appealed to the Supreme Judicial Court of Massachusetts claiming the evidence was not sufficient to sustain the award, and also that the claimant, Gladys Bradley, was an independent contractor rather than an employee when the accident occurred.

The supreme court upheld the contention of the insurance carrier and reversed the decision of the lower court granting compensation, saying that—

The burden of proof was upon the claimant to prove that at the time of the accident she was operating her automobile as the servant of Leighton & Barrie (Inc.) and not in her own right. (Comerford's Case, 224 Mass. 571, 113 N. E. 460; Marsh *v.* Beraldi, 260 Mass., 225, 157 N. E. 347.) There is no evidence reported to warrant a finding that the claimant was subject in any degree to the control of the subscriber in the management of her automobile while driving on the day of the accident or at the time of the accident. Upon her own testimony she was an independent contractor and not an employee for whose defaults the subscriber might be held liable to answer in damages.

WORKMEN'S COMPENSATION — INDEPENDENT CONTRACTOR — EVIDENCE—*Mallinger* v. *Webster City Oil Co. et al., Supreme Court of Iowa (December 13, 1929), 228 Northwestern Reporter, page 41.*— W. B. Mallinger was killed on December 8, 1926, while engaged in collecting accounts for the Webster City Oil Co. Mrs. Lillian Mallinger filed a claim for compensation, alleging that Mallinger was employed by the Webster City Oil Co. under a written contract to sell and deliver its products within a prescribed territory and to collect money for sales thus made. The oil company admitted the execution of the contract but contended that this contract, together with the oral testimony interpretive of such contract, created the relation of an independent contractor, and that under the provisions of the Iowa workmen's compensation act an independent contractor was not within the purview of the act, but specifically excepted.

The contract and agreement between the oil company and Mallinger provided many details as to the conduct of the business and also provided that Mallinger was to be paid on a commission basis twice a month, that he was required to give a surety bond, and also that either party might cancel the contract by giving 10 days' written notice.

The deputy industrial commissioner of Iowa ruled that Mallinger was an independent contractor and compensation was therefore denied. This was affirmed by the industrial commissioner and sustained upon appeal by the district court, Webster County, Iowa.

The case was then appealed to the Supreme Court of Iowa on the ground that the evidence did not support the verdict. In considering the terms of the contract, the Iowa Supreme Court said in part as follows:

The contract between the appellee company and Mallinger did not, in its essential features or otherwise, provide that the company would retain no control over the details of the work to be performed by Mallinger. The contract is silent on that subject, and because of this silence it must be held that the company did not as a matter of law or fact relinquish its right to control the details of the work.

It is also significant that the contract contained the provision that no gasoline should be placed by Mallinger in any container of any description that was not painted red. This was a requirement of the law of this State, and it is strange that such a provision should be written in the contract by the appellee company. One of the tests in determining who is "master" is whether such person would be liable to third parties for the misconduct or torts of an alleged "servant." (Holbrook *v.* Hotel Co., 200 Mich. 597, 166 N. W. 876, 878.) The fact that appellee company saw fit to write the specific order regarding the placing of gasoline in red-painted receptacles makes it appear that the oil company had in mind its liability for the acts of Mallinger. Had he been an independent contractor, the company would not have been solicitous in this matter. Furthermore, the fact that the tank truck was to be kept in good appearance is also an indication that the service was being rendered directly for the appellee company.

In conclusion the court said:

The evidence fails to disclose that Mallinger was engaged in any independent business, nor had he a distinct calling or occupation. Mallinger had no organized sales force, nor pretended that he was in a position where he could undertake the sale or distribution of the oil company's goods as an independent contractor, separate and apart from the oil company. The evidence shows conclusively that he had made a contract with the oil company to give his personal service to the company's business. He did not have a license from the State of Iowa as a dealer in these products. His work was dependent and not independent of the appellee company's business. In the absence of any and all waivers of the company's right to control the methods and means whereby the company's goods were to be sold, delivered, and collected for by him he was in the position of a servant or employee of the appellee company and not an independent contractor.

In the light of all of these facts it may be said that there is not sufficient competent evidence in the record to warrant the making of the order as was made by the industrial commissioner (sec. 1453, par. 4, Code 1924) or to support the judgment entered by the trial court on the appeal.

The judgment of the lower court sustaining the industrial commissioner was therefore reversed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ACT OF GOD—CYCLONE—*Baker* v. *State Industrial Commission et al., Supreme Court of Oklahoma (September 17, 1929), 280 Pacific Reporter, page 603.*—French Baker was employed by E. G. Fuqua, district agent for the sale of refrigerators. The place of business was at Altus, Okla. Baker's duties were to install the refrigerators in the district about Altus. On June 16, 1928 , at the direction of Fuqua, Baker went to Snyder, Okla., and installed a refrigerator. While returning to Altus a cyclone occurred and Baker sought refuge in a church building. The building was destroyed by the cyclone and Baker was injured. The State Industrial Commission of Oklahoma denied his claim for compensation, and Baker brought an action in the Supreme Court of Oklahoma. He based his claim upon the principles laid down by the Supreme Court of Illinois in the case of Central Illinois Public Service Co. *v.* Industrial Commission et al. (291 Ill. 256, 126 N. E. 144), wherein a tornado was shown to have blown down the building in which the employee was working and the court granted him compensation.

The supreme court found the cases cited by Baker contained a necessary element in fact, which was absent in the present case, and cited the opinion of the Supreme Court of Nebraska in the case of Gale *v.* Krug Park Amusement Co. (114 Nebr. 432, 208 N. W. 739), wherein the injury to the employee also occurred in the destruction of a building in which he sought refuge in a storm and the court held that no recovery could be had under facts similar to those in the present case. In this case the Nebraska court concluded its opinion by saying:

> Injuries resulting from exposure to the elements, such as abnormal heat, cold, snow, lightning, or storms, are generally classed as risks to which the general public is exposed, and as not coming within the purview of workmen's compensation acts, unless the record discloses a hazard imposed upon the employee by reason of the employment greater than that to which the public generally is subject.

After reviewing the facts in the case the Supreme Court of Oklahoma upheld the ruling of the industrial commission that at the time of the injury Baker was not in greater peril from the storm than all other persons within that territory and that there was nothing in the character of his employment which caused or contributed to his injury, and therefore his injury did not arise out of his employment and was not covered by the workmen's compensation law of Oklahoma.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSAULT—CAUSAL RELATION—*January-*

Wood Co. v. *Schumacher et al., Court of Appeals of Kentucky (November 26, 1929), 22 Southwestern Reporter (2d), page 117.*—Ben Schumacher was employed as night watchman at the January-Wood Co.'s cotton mill in Maysville, Ky. About 1 o'clock in the morning of December 9, 1919, Schumacher, while making his rounds in a remote part of the building in the course of his duties, was shot and killed by Henry L. Eddings. It appeared that the cause of the shooting was personal, resulting from domestic difficulties and having nothing to do with the employment.

The Workmen's Compensation Board of Kentucky denied compensation to Belva Schumacher on the ground that the injury did not arise out of and in the course of the employment. The case was appealed to the Mason County circuit court, of Kentucky, where the decision of the board was reversed.

The employer appealed the case to the Court of Appeals of Kentucky, contending there was not such causal relation as to bring the case within the term "arising out of his employment" in the workmen's compensation act (Ky. Stat., sec. 4880). The appeals court held that the workmen's compensation act declaring the employer liable for death resulting from injuries to employees by accident "arising out of and in course of his employment" imposed a double condition. "In the course of employment" referred to time, place, and circumstances, while "arising out of employment" related to cause or origin of the accident.

Continuing the court said the personal animosity of Eddings was the direct cause of the employee's death and was not because he was the company's watchman. The court concluded that the fact that his duty put him in such a place as to give his murderer an opportunity to carry out his nefarious design with less probability of apprehension than if he did so elsewhere did not constitute such causal relation as to bring the result within the term "arising out of his employment." The court said:

> The compensation act does not afford compensation for injuries or misfortunes which are merely contemporaneous or coincident with the employment or collateral to it. There must be a direct causal connection between the employment and the injury. That is an essential connecting link to the operation of the act. It is absent in this case. Schumacher's death can not be traced to any cause set in motion by his employment. We can not reason from the sequel to the cause. The fact that he was on the company's premises at work when killed by Eddings for reasons wholly unconnected with his employment and entirely unassociated with the relation existing between his employer and himself does not seem to this court sufficient to justify an award of compensation, which is in effect but holding the company responsible in a degree for his murder.

While this tragedy did occur while the employee was in the discharge of his duty, his death can not be said to have been an incident

of his work, flowing therefrom as a natural or reasonably anticipated consequence or having a causal connection therewith. The court is unwilling to give to the statute the extremely liberal interpretation placed upon it by the learned trial judge.

It is therefore of the opinion that error was committed in adjudging the deceased employee's dependents entitled to compensation from the appellant.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—AWARD—PUBLIC EMPLOYMENT—POLICEMAN—*Town of Presque Isle et al.* v. *Rutherford, Supreme Court of Wisconsin (January 7, 1930), 228 Northwestern Reporter, page 589.*—George Rutherford was the duly elected constable of the town of Presque Isle, Wis., and had also been appointed policeman by the town board for service in the unincorporated village of Winegar, where he lived.

On the evening of August 11, 1926, the sheriff of the county went to Winegar with a warrant for the arrest of one Charles Boring. He gave the warrant to his deputy sheriff in Rutherford's presence, and it was generally understood that Rutherford would also arrest Boring if he saw him in the village.

On the next afternoon George Rutherford and his wife went into the woods for the purpose of picking berries. While in the woods they saw Boring. Rutherford advanced to where Boring was standing. Immediately there was an exchange of shots. Rutherford was killed and Boring was wounded.

Mrs. Rutherford made an application to the Wisconsin Industrial Commission under the workmen's compensation act and an award was made. This award was later affirmed by the circuit court for Dane County, Wis., and the town of Presque Isle and the indemnity company appealed to the Wisconsin Supreme Court. It was contended that the award should be set aside because it was unsupported by any evidence that at the time of his death Rutherford was acting in the course of his employment as constable, also that there was no evidence to indicate whether Rutherford was shot while engaged in a private quarrel with Boring or in an attempt to accomplish his arrest. In regard to this, the court said:

There is evidence to indicate that at the time of the shooting he was standing within a few feet of a still, and within a few feet from where he was standing there was a container partially full of mash. Section 165.01 made the possession of such still and mash prima facie evidence of the unlawful manufacture of liquor. If these things were observed by Rutherford, it was his duty to arrest Boring. There is no evidence in the record of any feud or enmity existing between Rutherford and Boring, and it seems clear that the circumstances justified an inference on the part of the commission that

Rutherford was attempting the arrest of Boring for violation of the liquor law. If so, he came to his death while discharging his duties as constable in the town of Presque Isle, which entitles him to compensation by the express terms of the compensation act. This conclusion renders it unnecessary to consider the authority of Rutherford to attempt or accomplish the arrest of Boring on the charge of desertion.

The award of the industrial commission was $1,200 per year for four years. It was also contended on the part of the insurer that the amount of the award was not justified by the evidence, as Rutherford was receiving only $20 per month from the city at the time of the accident. However, in affirming the decision of the lower court, the court said in part as follows:

It appears that, up until a short time prior to his death, Rutherford was working at a sawmill at $120 per month. Upon the termination of his employment the question of employing him as full-time policeman was under consideration by the town board, but while there was some understanding that he would be employed full time, at a salary of $120 per month, it does not appear that the formal appointment was made. However, $120 per month represents the earning capacity of the deceased while working at common labor. The judgment of the town board that a full-time constable was entitled to $120 per month also appears. It was not unreasonable for the commission to assume that the full-time services of a constable were worth at least an amount which could be earned by a common laborer. In addition to this the commission had before it evidence of the amount paid policemen in the city of Ashland, a city in an adjoining county. We see no reason for disturbing the award.

In another case, a sequel to the case cited above, where the deputy sheriff authorized two citizens to search for fugitives and take them into custody, getting others to assist them if necessary, the Wisconsin court held that a third individual, wounded while assisting in the search and arrest, was entitled to compensation from the county under Statutes 1925, section 102.01 et seq., although he was not sworn in nor any statement made that he was being deputized or directed to go. (Vilas County et al. *v.* Monk et al. (1930), 228 N. W. 591.)

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—BURNS—*Dattilo's Case; Supreme Judicial Court of Massachusetts (November 28, 1930), 173 Northeastern Reporter, page 552.*—Joseph Dattilo was in the employ of one Quigley, a contractor. In connection with his business he used a compressor, mounted on a motor truck, for drilling holes in rock. Dattilo's duties were to run the compressor or drill, drive a truck, and help sharpen the drills. On December 21, 1928, the compressor had been at the blacksmith shop of one Kilcup, and Quigley told Dattilo to go down and bring the compressor home. Upon arriving at the shop

about 5 o'clock Dattilo found that there were 71 drills to be sharpened and he assisted in this work. While working on the drills it became necessary to secure more gasoline for the engine. As he was pouring it into the tank of the machine some of it spilled over his clothing. He immediately wanted to go home and Kilcup called up Quigley and told him of Dattilo's desires. Quigley then told Dattilo that he "had better wait" until the work was finished. He therefore agreed to do this and went to a near-by store to get a cup of coffee before resuming work. While there he attempted to light a cigarette by scratching a match on his trousers and his clothing ignited. He was severely burned and died at the hospital on April 28, 1929.

An award of compensation was made to the widow by the Industrial Accident Board of Massachusetts. Upon appeal the award was reversed by the superior court of Suffolk County. The widow appealed to the Supreme Judicial Court of Massachusetts. As to whether the employee's injury arose out of and in the course of his employment, the Massachusetts Supreme Court said: "We think the case at bar on its basic facts can not be distinguished from the decisions of this court wherein it has been held that the injury was not compensable because not sustained during the course of the claimant's employment." (Cases cited.) Holding this view the court found it unnecessary to decide the question of the causal connection between the presence of the gasoline and the injury.

The decree of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—CAUSAL CONNECTION—*Stakonis* v. *United Advertising Co. et al., Supreme Court of Errors of Connecticut (January 6, 1930), 148 Atlantic Reporter, page 334.*—It was a custom of the United Advertising Co. to give an outing each year to its employees for the purpose of promoting good feeling. The company made all arrangements for a picnic and furnished transportation for all employees. The employees were not obliged to attend and were not required to remain at the outing. Those who attended were paid their usual wage for the day and those who did not attend were not paid.

The foreman of the company on the day before the outing told John Stakonis, one of the employees, that "he was not to work the next day, but was to go to the outing." The next day Stakonis was given transportation to the picnic in the automobile of a fellow employee. On the way to Milford Shore, where the outing was to be held, this car was involved in an accident and Stakonis sustained serious physical injuries.

Stakonis filed claim for compensation and an award of the Compensation Commission of Connecticut was made in his favor. Upon appeal the award was affirmed by the New Haven County superior court. The employer thereupon appealed to the Supreme Court of Errors of Connecticut, contending the injury did not arise out of and in the course of the employment. He argued that the outing was not a part of the employment or of the conditions incident to the employment so as to make the company liable. Regarding this contention, the court said:

It appears, however, that the injury occurred while the plaintiff was under his regular pay for the day and that he had been ordered by the defendant's foreman, who, we must assume, was authorized to give his orders, to make this trip. It is difficult to see why the injury did not occur in the course of the employment. The plaintiff may or may not have been willing to make this use of the day, but he went because he was told to go. * * * While it is true the finding says the employees were not "obliged" to go, it must be admitted that that term is ambiguous. Doubtless there was no physical compulsion, but he was obliged to go if he was to receive his pay.

Moreover, this was not a novel or unusual event which took place that day. It was a regular feature of the defendant's business which took place each year, and everyone entered the defendant's employment with the understanding that this was one of the incidents which the defendant had annexed to the employment.

Whatever may have been the motive of the defendant, it seems to be true that the defendant employer had annexed the dangers involved in the transportation as a risk incident to the employment.

The court said an injury arises in the course of the employment when it takes places (*a*) within the period of employment, (*b*) at a place where the employee may reasonably be, and (*c*) while he is reasonably fulfilling the duties of the employment or doing something incidental to it. The court concluded that the injury to Stakonis met this test and was therefore in the course of the employment. To be compensable, however, the injury must also be the result of a risk involved in the employment or incident to it. As to this question the court said:

The employer has made this outing one of the features of its business. For reasons of its own it desired all its employees to attend and all others except its officers were excluded. It had become a fixed incident of the business. The situation required the employee to assume, from the fact that he was ordered to attend, and that it was a fixed custom and for employees only, under the direction and at the expense of the employer, that it was in some way in furtherance of the interests of the employer, or at least that it had some relation to it, as indeed it did. Moreover, the causative danger to the employee in this case was peculiar to the particular employment, since it included only employees and subjected them to a risk to which they, as members of the general public, would not otherwise have been subjected.

Under the circumstances of this case, it can not fairly be denied that the plaintiff's injury had its origin in a risk connected with his employment, and that it flowed from that risk as a natural sequence. This is not the ordinary case of a gratuitous outing or picnic given to employees by an employer, but the facts of this case are unusual and agree with the conclusion of the trial court that this injury arose in the course of the employment and resulted from a risk incident to the employment.

The decision of the lower court sustaining the award of compensation was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—CAUSAL CONNECTION—CONSTRUCTION OF STATUTE—*Industrial Commission of Ohio* v. *Dunham, Court of Appeals of Ohio (December 10, 1928), 169 Northeastern Reporter, page 36.*—One Dunham was employed by the Keltner Manufacturing Co., of Delaware, Ohio, for upholstering work in their factory. While so engaged, and in the course of his employment, he made several trips carrying some heavy chairs from the second floor to the first floor of the factory. After making the last trip he told one of his fellow employees that he sneezed while carrying one of the chairs, and added that he "tore something loose inside." He rested for a while and then left the factory. Some hours later he died. The doctor diagnosed the cause of death as the rupture of a blood vessel near the heart, and said that this could be caused by such exertion as Dunham was subjected to.

The widow, Mary Dunham, made application to the Industrial Commission of Ohio for compensation on account of the death of her husband. Compensation was denied on the ground that the death was not the result of an injury sustained in the course of his employment. The case was carried to the court of common pleas and the widow's case was sustained. The employer thereupon carried the case to the Court of Appeals of Ohio, Delaware County. As to the test for an award under the workmen's compensation law, the court cited the case of Industrial Commission of Ohio *v.* Weigandt (102 Ohio St. 1, 130 N. E. 38), in which the court held:

The test of right to award from the insurance fund under the workmen's compensation law for injury in the course of employment is not whether there was any fault or neglect on the part of the employer or his employee, but whether the employment had some causal connection with the injury, either through its activities, its conditions, or its environments.

Continuing the opinion, the court said:

The evidence all points to and clearly shows that the violent exercise and overwork of the decedent brought about the condition which caused his death, and that such death resulted from his employment and

had some causal connection with the injury, either through its activities, its conditions, or its environments.

If we keep in mind the facts in the case now before us for review, and the humanitarian purposes of the workmen's compensation law, and the fact that it is the poor man's insurance, and that, in truth and in fact, he pays for such compensation through his employer in the way and manner of contributing to overhead expenses, and the further fact that the law should be liberally construed in order that it may carry out the purposes for which it was enacted, we are bound to hold, in the light of the authorities herein cited and the reasons herein stated, that there is no prejudicial error in the record before us, and that the judgment of the common pleas court should be affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—COMMON HAZARDS—FALL DUE TO EPILEPTIC SEIZURE—*Andrews* v. *L. & S. Amusement Corporation et al., Court of Appeals of New York (February 11, 1930), 170 Northeastern Reporter, page 506.*—On the 20th of August, 1928, Leslie Andrews was employed as a painter by the L. & S. Amusement Corporation, which was engaged in operating a theater. When about to begin work Andrews went with another employee to get a pail of water and while thus proceeding was taken with a fit and fell, striking his head on the concrete sidewalk. He sustained a fractured skull, from which he died on the same day.

Katharine Andrews, mother of the deceased, filed claim for compensation and the New York State Industrial Board made an award upon a finding that death resulted from accidental injuries arising out of and in the course of his employment. This was later affirmed by the appellate division of the New York Supreme Court, and the employer and insurance carrier appealed to the New York Court of Appeals.

The appeals court reversed the decision of the lower court and the industrial board and rendered a verdict in favor of the employer, as the court found the injury resulted from no added risk because of his employment. Regarding this, the court said, in part:

The epileptic seizure caused him to fall to the sidewalk, striking his head and fracturing his skull. Where was there any added risk due to the employment? The same result might have followed if he had been coming to or going from his employment, or even in his own house, if he had fallen and struck his head on a chair, table, or other hard substance. If the epileptic fit itself had killed him, like an attack of heart disease, all concede that there would be no recovery. The risk of falling to the pavement in such a fit was not due to the employment. Had Andrews fallen from a ladder, from a scaffold, from a stairway, or down a hole, the chances of injury would have been increased. If there had been an accident causing his fall,

we would have another element in the case. There was no accident; he fell because of internal disorders, and the injury resulted from no added risk because of his employment.

This decision was based upon a number of English cases, and also the case of Lodger *v.* School Board of Paisley ((1911, 1912) 49 Scot. Law Rep. 413), in which case the facts were very similar to the facts of the case at bar and the Lord President of the Scotland Court of Session said:

I do not think that his employment in any way subjected him to the particular class of accident in consequence of which he died. * * * He might have had this fainting fit in his own room and fallen against the fender, and he might on the other hand have fallen upon a soft rug in a room and upon some comparatively soft surface in the street.

Mr. Justice O'Brien, however, rendered a dissenting opinion affirming the order of the appellate division, in which he held that the test is the relation of the service to the injury, of his employment to the risk. In discussing the injury causing Andrews's death, he said in part:

Falling upon a concrete walk where his duties as painter had taken him, he sustained a fracture of the skull which caused his death. His injury was due to the fact that his employment required him to be in a place where the fall approximately caused the injury. * * * If the work involves exposure to this peril, if the workman is in the place of danger by reason of his employment, the injury arises out of the employment. * * * A man carries with him all his disabilities, either those of age or of some other nature, and the fact that he has them does not destroy his right to recovery. (Wicks *v.* Dowell & Co. (Ltd.), (1905), 2 K. B. 225, 231.)

I vote to affirm the order of the appellate division.

Mr. Chief Justice Cardozo also concurred in this view.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—"EMPLOYEE"—DEATH—*Columbia County Highway Commission et al.* v. *Peterson et al., Supreme Court of Wisconsin (April 1, 1930), 230 Northwestern Reporter, page 40.*—H. P. Peterson was foreman of a road crew employed by the County Highway Commission of Wisconsin. He owned an automobile which he used in connection with his work and which was kept in repair by members of the road crew. His son, who was also a member of the crew, after making repairs on the automobile under the foreman's directions and while upon the premises of the highway commission, took the automobile out for a test run, and while making the test was killed by a railway train.

The Industrial Commission of Wisconsin made an award to Peterson for the death of the son, and this award was later affirmed by the Dane County circuit court. The case was appealed to the Supreme Court of Wisconsin. In affirming the decision of the circuit court, the Wisconsin Supreme Court said as follows:

The only question presented is whether the deceased was performing services growing out of and incidental to his employment at the time that he was killed.

Had the car belonged to the highway commission, there would doubtless have been no question that the deceased was performing services within the scope of his employment while he was repairing and testing the car. He made the repairs on the premises of his employer, during the usual working hours. The car was as much a part of the equipment used by the highway commission in the transaction of its business as if the highway commission had owned the car or had secured its use by a formal contract of hiring.

The testing and repairing of machinery used in promoting the business of an employer is a service that is within the scope of the employment, regardless of the question whether the machine belongs to the employer or is merely used by it to transact its business.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO AND FROM WORK—*Howes* v. *Stark Bros. Nurseries & Orchards Co. et al., St. Louis Court of Appeals (January 7, 1930), 22 Southwestern Reporter (2d), page 839.*—Steve Howes was employed as a teamster by the Stark Bros. Nurseries & Orchards Co., located about 2 miles from the city of Louisiana, Mo. On November 12, 1927, shortly after 5.30 o'clock, he was injured while on the State highway which runs through the property of the company. Howes had taken his team from the field and, with several fellow employees, rode in a wagon belonging to the superintendent to the highway, where a bus, used to transport the employees to and from the city, was parked. Howes got out of the wagon and started across the highway to board the bus, and as he was thus crossing was struck by an automobile coming from the opposite direction and severely injured.

The Compensation Commission of Missouri awarded compensation and said that—

Where an employer furnishes a bus to transport its employees to and from their work between a city and its plant, two miles distant, such transportation is incident to the employment, and an accident to an employee in connection with such transportation arises out of and in the course of the employment.

An accident to an employee while crossing a public highway to ride home from work in such bus is so connected with such transportation that it arises out of and in the course of the employment.

From this award the employer appealed to the Pike County circuit court, and a judgment was given for Howes. The case was thereupon appealed to the St. Louis court of appeals by the employer, contending that the injury did not arise out of and in course of his employment within the meaning of the workmen's compensation statute.

The court cited many cases where compensation had been paid for injuries resulting from the transportation of employees to and from work. The doctrine was in accord with Smith *v.* Levis-Zukoski Mercantile Co. (14 S. W. (2d) 470), cited by the employer, wherein the court, speaking through Commissioner Bennick, said in part:

The consensus of authority is to the effect that an injury to an employee arises "in the course of" his employment when it occurs within the period of his employment, at a place where he might reasonably be, and while he is reasonably fulfilling the duties of his employment, or engaged in the performance of some task incidental thereto. Necessarily the converse of the rule must also apply, so that where, at the time his injury is received, the employee is engaged in a voluntary act not known to or accepted by his employer, and outside of the duties for which he is employed, the injury can not be said to have been received in the course of his employment.

The appeals court applied this doctrine to the present case, and in affirming the judgment of the circuit court said in part as follows:

Manifestly the plaintiff in the present case, while on the highway going from the barn to take the bus home after his day's work was done, had not removed himself from the course of his employment. While it is true the evidence shows he could have reached the bus without traveling on or across the highway, from which we understand it was not absolutely necessary for him to go to the bus in this way, yet he pursued the course which his employer had for a long time acquiesced in and thus impliedly directed him to pursue. We think, too, that the hazard of thus regularly and continuously using the highway in going from his work to the bus was a hazard to which he was exposed in a peculiar way by reason of his employment—something beyond the normal hazard common to the general public—so that, in any view of the case, there was a causal relation existing between the injury and the employment. We conclude, therefore, that the plaintiff's injury arose out of and in the course of his employment.

However, the third department of the appellate division of the New York Supreme Court held in a case that an injury to an employee attempting to board the employer's truck after quitting time, in violation of employer's orders, did not arise in course of employment. The court also said the accident did not occur on employer's premises, although the truck was only a short distance from the street where the work was being carried on. (Parisi *v.* Whitmore, Rauber & Vicinus, et al. (1930), 243 N. Y. Supp. 622).

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO AND FROM WORK—ASSAULT—*Enterprise Foundry Co. et al.* v. *Industrial Accident Commission of California et al., Supreme Court of California (February 26, 1929), 275 Pacific Reporter, page 432.*—John Goytan was a foreman in the employ of the Enterprise Foundry Co. The foundry had considerable trouble with the labor union, and for four or five years had been waging industrial warfare. In 1922 the company adopted the open-shop plan but changed to the union plan. This continued until 1925, when the open-shop policy was again adopted. The molders' union immediately called a strike, and warfare continued during 1925 and 1926.

John Goytan continued his regular work as foreman, and even though he was urged to join the union he refused to do so. On the morning of July 8, 1926, he left home about 7.30 a. m., evidently headed for his place of work. When about two and one-half blocks from it he was shot in the leg by some unknown party who drove away in an automobile. The injury resulted in his death two days later. The California Industrial Accident Commission found that the injury was sustained in the course of and arose out of his employment and made an award in favor of the widow. The foundry company carried the decision before the Supreme Court of California for review, contending that the injury did not arise in the course of his employment. The California Supreme Court annulled the award of the industrial commission. This decision was based upon the case of Lampert *v.* Siemons (203 App. Div. 264, 197 N. Y. Supp. 25), which corresponded very closely to the instant case. The court quoted from that case, in part, as follows:

> Had there been no strike Lampert's employment would have ended when he left the factory at 134 West Thirty-ninth Street. His work was indoor work as foreman of the operating room. There was no work for Lampert to do for his employer after he left the factory at night and before he reached there in the morning. Therefore, all the authorities agree that while going to and from his work Lampert, if injured, would not come under the workmen's compensation law as such injury would not have arisen in the course of his employment. [Citing cases.]
>
> The strike could not extend the field of his employment or the limits of his occupation unless he were employed to do something in connection with the strike which, of course, is not this case. That he was in danger on the streets because of the strike is beyond question, but the danger existed at all times and not necessarily while Lampert was going to and from his work. He could have been assaulted by a striker on the streets while he was going from his home to do an errand or while going to the theater or to a dance or other place of amusement. * * * The fact that the em-

ployer may have offered or ordered protection from strikers to the employee while he was upon the street and after the hours of his work would not or could not change the nature of his work or the time of its commencement and completion. The statute says that an employee must be injured while in the course of his employment. In this case Lampert's employment ceased when he left the factory.

Mr. Justice Shenk delivered a dissenting opinion in which Mr. Justice Richards concurred. He said that "there was ample evidence that the injury was inflicted by the strikers. Under these circumstances I can not escape the conclusion that the assault and the attendant death were incidental to the employment, without which the injury would not have happened. Except for the employment there would have been no incentive on the part of the strikers to punish him * * *." He also pointed out the fact that Goytan assumed a risk for the benefit of his employer, of special and temporary character, and not shared by the commonalty in the use of the street.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO AND FROM WORK—STREET ACCIDENT—*Hasslen* v. *Carlson & Hasslen et al., Supreme Court of Minnesota (May 29, 1930), 231 Northwestern Reporter, page 188.*—Carlson & Hasslen were contractors engaged in erecting buildings throughout Minnesota and the Dakotas. In 1928 they were erecting a schoolhouse at Battle Lake, Minn., about 135 miles distant from Ortonville. C. B. Hasslen, a son of one of the partners, was employed as a carpenter. He and Brown, another carpenter, resided at Ortonville, and made frequent week-end trips home while the work was in progress at Battle Lake. On the afternoon of December 15, 1928, they drove to Ortonville in Brown's car. On Sunday they started back in Hasslen's car, and while traveling along a graveled highway an automobile passed and snapped a stone, breaking the windshield and causing a piece of glass to penetrate Hasslen's eye. He was taken to the hospital, but the doctors were unable to save the eye. Compensation was denied by the Industrial Commission of Minnesota, and the case was appealed to the Supreme Court of Minnesota. It was brought out at the trial that Hasslen—

Had not intended to go home this week-end, but to wait until the next and then go home for the Christmas holidays. He states as the reason for making this trip that he was fitting and hanging doors, and, in order to do the work properly, needed a rabbet plane which he had at home; that he told his father he had some tools at home which he needed to hang doors, and that his father said if he needed them to go home and get them, but to be back Monday morning. He further states that he got the plane and also a brace and some bits, and was returning with them at the time of the accident.

In considering the evidence the supreme court found that—

The carpenters furnished their own tools. The employers did not furnish carpenter tools. There were eight or more other carpenters working on the job. The relator states that he made no inquiry to ascertain whether any of them had a rabbet plane. At least one of them had such a plane, for relator's witness Brown had seen him using it. The distance of the round trip to Ortonville was 270 miles. The relator states that he was allowed 80 cents an hour for the time required to make the trip and is corroborated by his father. This would amount to more than the cost of a new rabbet plane. There were three hardware stores at Battle Lake, but no attempt was made to obtain a plane from them.

In concluding the opinion the court said:

In view of all the facts and circumstances disclosed by the record and of the improbability that the employer would send a carpenter who was to furnish his own tools on a trip of 270 miles at an expense of 80 cents an hour to get an inexpensive tool needed only occasionally without even inquiring whether any of the other carpenters had one, we are unable to say that the commission was required to find that the relator sustained his injury while on the business of his employer. The evidence made that question a question of fact, and the finding of the commission thereon is final.

The order of the industrial commission was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—HORSEPLAY—*Brown* v. *Vacuum Oil Co., Court of Appeal of Louisiana (June 9, 1930), 128 Southern Reporter, page 691.*—On August 5, 1929, Jessie J. Brown was injured while in the performance of his duties as a helper on one of the Vacuum Oil Co.'s oil rigs in the Lockport oil field in Calcasieu Parish, La. He filed suit for compensation in the fourteenth judicial district court, and a judgment was rendered in favor of the employer. Thereupon he appealed the case to the Louisiana Court of Appeal.

He described the accident which caused the injury as follows:

While engaged in his duty of cleaning the floor of the oil derrick with a water hose, another employee by the name of Hasha leaped on him in an attempt to take the hose away from him, and in the tussle between them he slipped and fell to the floor, Hasha falling at the same time on his left leg and injuring it. He avers that he had done nothing to provoke this sudden attack on him. He claims that his left leg and knee are permanently injured as a result of the accident, that he is unable to continue to do work of the character he was engaged in, and therefore is entitled to the compensation which the law provides in cases such as this.

The employer denied that the injury arose in this manner but contended that the scuffle in which Brown was hurt and provoked by him after he had used the water hose to throw water on Hasha, a co-

worker, a habit he had been indulging in against the rules and orders of the company and over the protest of his fellow employee. After reviewing the evidence the appeal court found that—

On the night he was injured he had twice before sprayed the one he had provoked into this scuffle which resulted in the accident. The night was rather cold, according to the testimony, and it must have been irritating to Hasha to have to remain in wet clothes, especially as he had to work on top of the derrick. After the second wetting he remonstrated with plaintiff and told him if it occurred again he would drown him. To this remark the plaintiff jocularly answered that he had often been in deep water, but had not been drowned yet. His conduct in general and his attitude on this occasion would indicate a deliberate intention on his part to have some fun in this way at the other man's expense, and that he was ready to meet the consequences. His splashing of Hasha for the third time that night was an implied challenge to the latter to carry out the threat he had made, and prompted the scuffle which resulted in the injury he claims to have received.

Under this state of facts can it be said that the accident, which was the cause of his injury, arose out of, or was incidental to, his employment. We think not.

The court concluded:

The nature of plaintiff's employment required that he use the water hose for the purpose of washing off the water and mud from the floor of the oil derrick and the machinery on and around the derrick, and any other use of it, especially for indulging in a bit of horseplay by wetting his fellow workers, was an act which not only did not arise out of his employment, but was entirely foreign to it. Besides, the source of his injury was the tussle between himself and his fellow worker, which can hardly be said to bear any relation to the character of his employment.

The decision of the lower court denying compensation was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—HORSEPLAY—*Maddox et al.* v. *Travelers' Insurance Co. et al., Court of Appeals of Georgia (May 15, 1929), 148 Southeastern Reporter, page 307.*—S. M. Maddox was employed by the Franklin Motor Car Co. of Atlanta, Ga., as an automobile mechanic. It was often necessary for Maddox to go to the supply room to obtain parts for his repair work. The supply room was in charge of an employee named Muller, and a 16-year-old boy named Bradberry was assistant.

Bradberry was engaged in cutting twine with a small pocket knife, when Maddox and Benson, another employee, came for supplies. After giving them the necessary supplies Bradberry asked them to "get out" as their conversation had annoyed Muller, who was wait-

ing on another employee. Maddox did not leave and a friendly scuffle followed, during which the man and boy slipped and fell and the open knife, still in the boy's hand, in some way penetrated the heart of Maddox and caused his death.

An award by the Georgia Industrial Commission denying compensation to the widow was affirmed by the superior court, Fulton County, and the case was appealed to the Court of Appeals of Georgia. The appeals court held that the injury did not arise out of the employment and, in affirming the judgment of the lower court, said:

In the instant case, while possibly the evidence might have supported a finding that the fatal accident occurred in the course of the decedent's employment, it would not have authorized a finding that it arose out of his employment. On the contrary, it clearly appears from the evidence that the unfortunate death of Maddox was brought about by his own acts in teasing Bradberry and in chasing him around the table and in playfully trying to eject him (Bradberry) from the room. Muller, being in charge of the stockroom, had the authority to direct Maddox and Benson to leave the room after they had gotten the articles they needed; and he so directed through his assistant, Bradberry. Benson promptly obeyed the order. Maddox, however, in a spirit of levity or horseplay, defied the order and entered into a good-natured and playful scuffle with Bradberry, which resulted in his death. The horseplay engaged in by Maddox and Bradberry was not such an act as could have been reasonably contemplated by their employer as a risk naturally incident to the nature of their employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—HORSEPLAY—EVIDENCE—*Baker* v. *Roberts & Beier et al., Supreme Court of Iowa (December 13, 1929), 228 Northwestern Reporter, page 9.*—L. D. Baker, while in the employ of Roberts & Beier, operators of a dray line at Waucoma, Iowa, fell from a wagon in which he was riding and was seriously injured. He filed claim for compensation, and the industrial commissioner of Iowa denied the claim. Baker stated that one horse of the team he was driving lagged behind and that he raised the lines with his right hand for the purpose of striking the horse, and that as he did so a man named Sullivan, who was walking by the side of the wagon, caught the line; that when he released it Baker lost his balance and fell out of the wagon onto the ground. At the hearing witnesses attempted in their testimony fully to corroborate Baker. However, prior to the hearing and shortly after the accident they had signed an affidavit stating that Baker raised his lines and in a playful manner attempted to strike Sullivan. The industrial commissioner, believing these affidavits, found that the injuries were the result of horseplay and therefore were not compensable.

The case was taken to the district court, Fayette County, Iowa, and the finding and order of the commissioner was reversed and compensation allowed. Thereupon the employer appealed to the Supreme Court of Iowa. In considering the conflicting testimony the court cited section 1441 of the Iowa Code of 1927, which provides that—

Neither the board of arbitration nor the commissioner shall be bound by common law or statutory rules of evidence or by technical or formal rules of procedure; but they shall hold such arbitrations or conduct such hearings and make such investigations and inquiries in such manner as is best suited to ascertain and conserve the substantial rights of all parties thereto. Process and procedure under this chapter shall be as summary as reasonably may be.

In conclusion the court held that the competent evidence introduced at the hearing before the arbitration committee, without conflict, supported Baker and that the injury received by him arose out of and in the course of his employment, and was, therefore, under the law compensable. The judgment of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—INTERPRETATION OF STATUTE—LIMITATION—*Speas* v. *Boone County, Supreme Court of Nebraska (October 25, 1929), 227 Northwestern Reporter, page 87.*—Wylie C. Speas was employed on road work for the County of Boone, Nebr. On October 4, 1926, Speas was using a 4-horse team furnished by him on the road passing his farm. At about 11.30 he ceased dragging for the forenoon and turned his horses into the barn to be fed. As he entered to tie them one of the horses kicked him, causing serious injury. The injury was reported to the county commissioner, who promised to pay Speas compensation. He was told that it would not be necessary to file compensation claims. He received no compensation during that year; however, the insurance carrier pretended to be about to close up his claim and pay compensation whenever he inquired about the claim.

On November 17, 1927, Speas filed a claim against the county under the workmen's compensation act, and the county contended it was not liable because (1) the injury did not arise out of and in the course of the employment and (2) no petition was filed within a year after the accident occurred, by reason of which the statute of limitations had run.

The case was decided in favor of Speas by the district court and carried by the county to the supreme court, where the judgment was affirmed. However, upon a rehearing, the judgment of affirmance was set aside. Wylie C. Speas died, and the case was revived in the

name of John S. Speas, the administrator and was again brought before the supreme court for a hearing.

In deciding whether the injury arose out of the employment the court referred to the case of Tragas *v.* Cudahy Packing Co. (110 Nebr. 329, 193 N. W. 742):

In that case the court affirmed a judgment allowing compensation to Tragas, who, at the time of his injury, was engaged in sharpening a chisel for the purpose of cleaning some pans. It happened during the noon hour and was done on claimant's own time, for which he was not paid. It was held that the work on which Tragas was engaged was incidental to his employment.

The supreme court continued the opinion in part as follows:

The work extended past his home on the day in question and he stopped right there for the noon hour, drove into the yard, and unhitched. A moment afterwards he was injured. To say that his employment ceased before all of the horses reached their stalls, or that it ceased during the usual hour for feeding, is to draw a very strict line against the employee. The compensation law is to be liberally interpreted in favor of the workman. * * * It seems to us that the logic of the situation requires that we either conclude that Speas was entitled to compensation or that we overrule the Tragas case. We are satisfied with the latter case and therefore conclude that, on the merits, Speas was entitled to recover, that his feeding the team at the place of his injury was incidental to his employment and that his injury was received in the course thereof.

Regarding the statute of limitations as a bar, the court said the district court was correct in their finding that the county "had agreed to the payment of compensation to the plaintiff prior to the expiration of one year from the date of the injury and that this action is not barred."

The court concluded the opinion by quoting from the case of Baade *v.* Omaha Flour Mills Co. (117 Nebr. —, 225 N. W. 117, 119), as follows:

This jurisdiction has repeatedly held that the workmen's compensation act "is one of general interest, not only to the workman and his employer, but as well to the State, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it."

The judgment of the district court was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—INTERSTATE COMMERCE—ACT OF PERSONAL CONVENIENCE—*Hanna* v. *Erie R. Co., Supreme Court of New Jersey (November 14, 1930), 152 Atlantic Reporter, page 179.*—On the night of April 5, 1927, William Hanna was fatally injured while in the employ of the Erie Railroad Co. He had been working on the

night shift for eight or nine days, setting valves and piston packing in engines. It was customary for the employees to eat lunch between 3 and 3.20 a. m. Some of them went across the street to eat, while others went into the machine shop, where no adequate facilities were provided for them. The custom of eating lunch in the shop and the occasional use of the planer as a seat was well established, and no signs were displayed forbidding the men from sitting where they chose. On the night in question Hanna sat upon the planer to eat his lunch. The power was still on and the machine apparently commenced operations without anyone moving the lever. Hanna was severely injured and died almost immediately.

Alice Hanna filed claims for compensation under the New Jersey workmen's compensation act for the death of her son. The court of common pleas, Passaic County, later rendered an award in her favor.

The railroad company appealed to the Supreme Court of New Jersey on the ground that the evidence did not justify the finding that the accident arose out of and in the course of the employment, and that Hanna was not engaged in interstate commerce. The New Jersey Supreme Court held that the nature of Hanna's work justified the conclusion that he was not engaged in interstate commerce and cited several New Jersey cases holding that a shop employee repairing a car withdrawn from interstate commerce was not engaged in such commerce.

As to whether the injury arose out of and in the course of the employment the court said:

> The mere circumstances that the employee was eating his lunch does not seem to alter the case. [Cases cited.]
>
> There is nothing in the case to justify a conclusion that the injury occurred by reason of horseplay or skylarking.
>
> The proofs, however, do show quite conclusively that it was the custom for the workers to eat their lunch in the machine shop. No other provision was made for them, except that they could go to the Y. M. C. A. across the street. No benches were arranged for them in the machine shop, but they sat wherever they chose, upon machinery or anything that was convenient, and the planer had been used on several occasions as a convenient place to sit and eat. There is the further circumstance that the planer was known to be out of order and would start up while the power was on without the application of any levers. The men were not warned of any danger or forbidden to use the machine shop as they saw fit.

The decision of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—LEAD POISONING—TIME OF CONTRACTING DISABILITY UNDETERMINABLE—*Breault's Case, Supreme Judicial*

Court of Massachusetts (January 31, 1930), 170 Northeastern Reporter, page 54.—The Industrial Accident Board of Massachusetts awarded compensation to George Breault for an injury due to lead poisoning resulting from his work as a painter for Harold J. Beaudette. The board found that the date of the injury was July 18, 1928, the date upon which Breault last was able to work, due to the effect of lead poisoning. The award of compensation was later confirmed by the superior court, Suffolk County, Mass., and the employer and insurer appealed to the Massachusetts Supreme Judicial Court, contending that the evidence did not warrant the finding of the industrial board.

The supreme judicial court found no causal connection between the injury and the nature of his employment with Beaudette. The decision of the lower court and of the industrial accident board was reversed and a decree entered in favor of the employer and the insurer. In concluding the opinion the court said:

> There is no evidence in the record that any paint or any painting compound used by the employee contained lead or other harmful substance while he was in the employment of the subscriber. The testimony of the physician (Fossner) that the description of the employee's symptoms during the three years last past indicated lead poisoning justified, if believed, the finding of the board of review that the injury of the employee was due to lead poisoning, but afforded on the evidence no basis for its further finding that "the date of the employee's injury is July 18, 1928." There is no evidence in the case that the alleged lead poisoning of the employee was due directly or indirectly to his employment with the subscriber. It is elementary that the evidence must prove that the accident arose out of, as well as in the course of, the employment. We find no causal relation between the injury of the employee and the nature of his employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—LIGHTNING STROKE—POWERS OF THE COMMISSION—*Lickfett* v. *Jorgenson et al., Supreme Court of Minnesota (February 7, 1930), 229 Northwestern Reporter, page 138.*—Alvin Lickfett, while driving a 4-horse team along a highway and engaged in road-construction work, was killed by a stroke of lightning.

Herman Lickfett, as the dependent father of the deceased, proceeded under the workmen's compensation act of Minnesota to secure an award. He insisted that the accident arose out of the employment, as the chance of being struck by lightning was enhanced by the employee being with large horses on a high roadway in the absence of other objects above the ground. On October 16, 1928, the Industrial Commission of Minnesota filed its order approving and adopting the referee's finding denying compensation. This was upon

the theory that death was not proximately caused by any accident arising out of and during the course of the employment; but, on the contrary, was the result of an act of God.

On May 15, 1929, Lickfett filed a petition for a rehearing, claiming that he had found additional valuable information. The information submitted by him for a rehearing consisted of a statement made by Mr. F. W. Peek, jr., who, it was said, "is an expert of great ability on the phenomena of electricity and lightning." The statement was as follows:

Chances of being struck. The above data offers a means of estimating the chance of objects of different heights being struck during a thunder storm when the cloud is overhead and of sufficient voltage to discharge to earth.

Assume a cloud 1,000 feet high. A 6-foot man on a plane directly under the storm center would be hit 15 times out of every 100 strokes, while a 25-foot building would be hit every time. A man flat on the ground would be struck about once for every 100 strokes. An 18.5-foot building directly under the storm center would be struck 84 times out of 100 hits.

The application for a rehearing was denied, and the case was taken to the Supreme Court of Minnesota for review. The court affirmed the order denying a rehearing and in the course of the opinion said in part:

It is a settled law in this State that death of an employee caused by lightning is compensable only when he is exposed to injury from lightning by reason of the employment which necessarily accentuates the natural hazard from lightning and the accident is natural to the employment. It is necessary that the employment expose the employee to the hazard in some way peculiar to the employment so that he does not stand in relation thereto the same as the public generally. [Cases cited.]

We do not take judicial notice of things which are not of common and general understanding. We may take judicial notice of scientific facts which universal experience has rendered axiomatic—that is, generally recognized scientific facts; but relator asks more than that. The doctrine should be extended, where it may be reasonably accepted rather than restricted; yet we can not take judicial notice of such facts as are known, if at all, only by a specially informed class of persons. In the instant case we may take notice of the use of lightning rods and that they are to some extent effectual within their immediate area, but to go to the extent now sought would take us into the field known only, if at all, to the scientist and the technician. The rule does not permit that. The commission correctly rejected the application of the doctrine of judicial notice.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PERSONAL ERRAND—*Natol* v. *Booth & Flinn Co. et al., Supreme Court of Oklahoma (October 15, 1929)*,

281 Pacific Reporter, page 264.—Ramon Natol was employed by the Booth & Flinn Co., engaged in the construction of a gas-pipe line. The employees were furnished food and lodging in a camp which the company maintained near the place where the work was being done. On the 24th of October Natol finished his work and returned to the camp about 5.30 in the afternoon, and about 9 o'clock that night he went some several hundred yards to a nearby ravine. Returning from the ravine in the dark, he tried to avoid being run over by an automobile while crossing a public highway, and fell 20 or 30 feet over a precipice. He received a fracture of one arm and one leg and the subsequent amputation of the leg above the knee.

The State Industrial Commission of Oklahoma denied his application for compensation and Natol petitioned the Supreme Court of Oklahoma to review and vacate the award. Natol contended that he was engaged in acts incidental to his employment since it was necessary for him to live in the camp furnished by the company, and therefore the injury arose out of and in the course of his employment. He relied principally upon the case of Kaiser Lumber Co. et al. *v.* Industrial Commission of Wisconsin (181 Wis. 513, 195 N. W. 329), and other cases decided by the Supreme Court of Wisconsin.

The Supreme Court of Oklahoma held that the Wisconsin cases were not applicable, as Natol's testimony disclosed that he was not on the company's premises but was standing on the highway listening to a group of men engaged in conversation when the accident occurred. This therefore brought the case under the rule announced in Southern Surety Co. et al. *v.* Galloway et al. (89 Okla. 45, 213 Pac. 850), wherein this court held—

An injury does not arise out of the employment within the meaning of Comp. Stats. 1921, sec. 7285, unless it results from a risk reasonably incident to the employment, and unless there is apparent to the rational mind upon consideration of all the circumstances a causal connection between conditions under which the work is required to be performed and the resulting injury.

The court, in concluding the opinion, denied the petition and said as follows:

Conceding, without deciding, that the petitioner's original mission was such as to bring his accidental injury within the rule announced in the Wisconsin cases, supra, yet when he stopped on the public highway to engage in, or listen to, a conversation of a group of other employees, he was engaged in a private mission, and, under the rule announced in Southern Surety Co. *v.* Galloway, supra, said accident did not arise out of and in the course of his employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PERSONAL ERRAND—*Taylor* v. *Hogan Milling Co. et al., Supreme Court of Kansas (December 7, 1929), 282 Pacific Reporter, page 729.*—James H. Taylor was employed by the Hogan Milling Co. On August 1, 1928, while at work in the mill, Taylor was given permission by the foreman to go from the first to the fourth floor of the mill to pay a bill which he owed. It was a rule of the employer that employees should pay their bills to collectors whenever they called, and on the company's time. In going from one floor to another the company consented to the use of the elevator by the employees. While Taylor was going to the fourth floor on the elevator it collided with some object, and he was severely injured.

As the employment was covered by the Kansas compensation law, Taylor filed suit for compensation, and the Geary County district court rendered a verdict in his favor. The employer and insurer then appealed the case to the Supreme Court of Kansas.

The only question involved on appeal was whether the injury arose out of and in the course of his employment. The employer contended that the employee was going on a personal errand and was outside the scope of his employment while using the elevator. The Kansas Supreme Court, however, upheld the decision of the district court. In concluding the opinion the court said:

> We conclude that, as the accident occurred in the plant where plaintiff had a right to be, and was doing what he had a right to do, when he was injured, had in fact express permission to do, and was doing it under a rule of his employer, the errand was an incident of his employment, and that within the authorities cited his injury arose out of and in the course of his employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—POLICEMAN—WATCHMAN—*Wilson Berger Coal Co.* v. *Metcalf, Court of Appeals of Kentucky (October 15, 1929), 21 Southwestern Reporter (2d), page 112.*—The Wilson Berger Coal Co. employed Moss Metcalf as watchman and peace officer to maintain order in and around their coal mine. On May 22, 1927, a quarrel arose across the river some 20 yards from the company's property between some outsiders and two of the company's employees. Metcalf left the premises of the coal company, endeavoring to quiet the disturbance, and after some conversation one of the men shot and killed him.

Samantha Metcalf filed claim for compensation and the claim was denied by the Kentucky Workmen's Compensation Board. The claim, however, was allowed on appeal by the Harlan County circuit

court. From the judgment allowing the claim the coal company appealed to the Kentucky Court of Appeals. The coal company contended that the board's finding that "an accident occurring to a deputy sheriff when off the property of an employer for whom he is working to preserve the peace on said property does not arise out of and is not in the course of the employment" was a finding of fact and, there being some evidence to support such finding, it could not be disturbed upon appeal. The court, however, ruled that this was a question of law, as the facts were not in dispute and the case was reviewable by the court. After reviewing the testimony of Mr. Scott, the secretary and treasurer of the coal company, and other evidence, the court affirmed the judgment of the circuit court, saying in part as follows:

Though it be true that Mr. Scott testified that he gave Metcalf no orders to go across the river to Pennington's store and make arrests, or attempt to preserve the peace, and that he had no specific contract or agreement with Metcalf that Metcalf was to patrol the public road as part of his police duty, his evidence defining Metcalf's duties must not be overlooked. He repeatedly stated that Metcalf was directed to maintain order and act as peace officer, not only in the camps but around the camps, and that was exactly what he was employed for. He was also employed to keep down dissension in and around the camps. It is apparent from this evidence that the conclusion of the board that Metcalf while off the property of appellant was not acting in the course of employment can not be sustained. On the contrary, it clearly appears that it was his duty to keep order in and around the camp and to quell disturbances before they reached the camp. Being engaged in this duty when he was shot, it necessarily follows that the accident was one which arose out of and in the course of his employment, and that the circuit court did not err in so holding.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PROXIMATE CAUSE—EVIDENCE—*McLain* v. *New Orleans Public Service (Inc.)*, *Court of Appeal of Louisiana (March 10, 1930)*, *126 Southern Reporter, page 701.*—Ernest McLain filed suit under the Louisiana workmen's compensation law (Act No. 20, of 1914, as amended) against his employer, the New Orleans Public Service (Inc.), claiming to have received in the course of his employment an injury to his eyes as a consequence of being exposed to an intense glare of an electric welding machine. He alleged that a cataract developed in his left eye, destroying his sight and impairing the vision of his right eye. McLain stated that while working on a rail within 6 feet of the electric welder, contrary to orders, the electric current was turned on, causing an arc or flash when the welder came in contact with the rail. On the other hand, the New Orleans Public Service (Inc.), testified that the welding was

done on the neutral ground between the tracks before the arrival of McLain.

The trial judge rendered a judgment in favor of the employer and dismissed the case. McLain appealed to the Louisiana Court of Appeal, which court held that the trial judge was correct in his finding of fact upon which his judgment was predicated and concluded the opinion, affirming the judgment of the lower court by saying:

We might add that, if we and our brother below are in error as to the first point, plaintiff could fare no better on the second phase of the case, for the record has convinced us that exposure to the glare of the welding machine at the distance which plaintiff claims he was from machine, and under the circumstances obtaining, could not have produced the cataract in his eyes.

WORKMEN'S COMPENSATION — INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PROXIMATE CAUSE—PREEXISTING CONDITION—*Townsend Grace Co. (Inc.) et al.* v. *Ackerman, Court of Appeals of Maryland (January 6, 1930), 148 Atlantic Reporter, page 122.*—Joseph Ackerman was employed in the straw hat factory of Townsend Grace Co. (Inc.). He claimed compensation for disabilities resulting from a stroke of apoplexy and subsequent paralysis, which he contended was brought about by an accidental fall while at work. There was controversy upon the question whether the stroke of apoplexy or a precedent accidental fall and injury inducing the stroke of apoplexy, caused the disability.

From an order of the Compensation Commission of Maryland denying an award, the employee appealed to the superior court of Baltimore, which court awarded compensation. Ackerman testified that—

He had no dizziness before his fall, that he slipped on wet and sticky glue on the floor, turning his foot, and struck his head, and that upon striking his head he became unconscious.

The employer appealed the case to the Court of Appeals of Maryland and, in affirming the decision of the lower court, the court said that the evidence as stated was legally sufficient—

To enable it to find that the man, while working at his employment, slipped on glue on the floor rather than by reason of the weakness which comes with a stroke of apoplexy, and that he was struck on his head as a result of that slipping on glue; that while the stroke of apoplexy and paralysis which the man did suffer might have come to such a man irrespective of the accident, still, given the accident preceding the stroke, they might and probably did come from the accident. And having found so much, the jury was legally entitled

to find that in point of fact the disability resulted from an accidental injury arising out of and in the course of the employment, as they did find.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—REVIEW—*Metropolitan Casualty Insurance Co. of New York et al.* v. *Dallas, Court of Appeals of Georgia (December 13, 1928), 146 Southeastern Reporter, page 37.*—Otis Dallas was employed as janitor by the Exposition Cotton Mills of Atlanta, Ga. While so employed he was killed when he came in contact with an electric wire which had fallen across the mill yard. Dallas noticed the fallen wire and started towards it. A fellow workman told him not to touch the wire as it would kill him. The end of the wire was sputtering and smoking at the time, but regardless of this fact and the warning given him, Dallas caught hold of the wire and was electrocuted.

His widow filed a claim for compensation, but the Georgia Industrial Commission denied it on the ground that it was not a part of Dallas's duties to interfere with the wire and, furthermore, he should have been cautious and after the warning should have reported the danger to his superior.

The widow appealed to the superior court, Fulton County, Ga., and the judge of the superior court set aside the award of the commission and entered judgment in favor of the widow, granting compensation. The employer and insurance carrier thereupon appealed to the Court of Appeals of Georgia. The appeals court held that the findings of fact by the commission were conclusive and binding upon the court. The decision of the superior court was, therefore, reversed and the award of the commission denying compensation affirmed. The court concluded the opinion as follows:

While compensation is ordinarily not recoverable unless the injury arises out of and in the course of employment, it is the general rule in this country, established by the great weight of authority, that an employee does not, in contemplation of law, go outside his employment if, when confronted with a sudden emergency, he steps beyond his regularly designated duties in an attempt to save himself from injury, to rescue another employee from danger, or to save his employer's property. (6 A. L. R. 1247, and cases there cited; Baum *v.* Industrial Commission, 288 Ill. 516, 123 N. E. 625, 6 A. L. R. 1242.) In the instant case, however, the commission has found as a matter of fact that the deceased, in catching hold of a live, smoking, and disconnected wire, lying out in the yard, in spite of the repeated warnings of a fellow employee, did not act in any such emergency, so as to bring himself within the scope and operation of such rule, but in effect found that his act amounted to willful and intentional misconduct.

The findings of the commission being in effect and intent that the injury did not arise out of and in the course of the decedent's employment, nor by virtue of the bona fide act of the decedent in stepping out of the bounds of his usual course of employment in order to serve the interests of his master when confronted by a sudden emergency, its findings upon these questions became conclusive, and the judge of the superior court erred in setting aside the findings as entered by the commission and awarding compensation.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—RISK OF THE STREET—WILLFUL AND INTENTIONAL MISCONDUCT—*Morse's Case, Supreme Judicial Court of Massachusetts (January 30, 1930), 170 Northeastern Reporter, page 60.*—Norman K. Morse was killed on the evening of October 8, 1928, at Lenox, Mass., while driving his automobile south on the main highway between Lenox and Stockbridge. At the time of his death he was employed by Fred K. Chaffee, as treasurer, salesman, and manager of a truck company. When the accident occurred Morse was en route to Great Barrington, Mass., to try to sell a truck.

The cause of the death of Morse was a collision between the car which he was driving and a truck loaded with planks. Many of these planks protruded beyond the end of the truck and one, about 5 feet above the ground, protruded some 41 inches beyond. There were lights on the rear of the truck but neither light nor a warning sign on the long plank. At the time of the accident the truck was parked parallel with the road under an arc light. The truck was therefore clearly visible for a distance of more than 500 feet.

The evidence indicated that Morse misjudged either his speed or the distance when endeavoring to pass the truck and ran in such a way that the protruding piece of timber crashed through the windshield and pierced his skull. The superior court, Suffolk County, Mass., affirmed an award of the industrial accident board awarding compensation and from this decree the insurer appealed to the Supreme Judicial Court of Massachusetts. Two questions were raised by the insurer:

(1) Was Morse an independent contractor and not an employee as to the operation of his own automobile at the time of the accident; and (2) if Morse was an employee did the injury arise out of and in the course of the employment?

The court held that the accident did not arise out of his employment, as it did not arise out of an ordinary risk of the street. In reversing the decision of the lower court and the industrial accident board the court said:

The evidence of the State officer who was an eye witness to the accident, that Morse was driving at a very fast rate of speed, and of

a witness whose car Morse passed just before the accident occurred, that Morse was driving between 60 and 70 miles an hour, justified the report of the trial judge at the inquest that the real cause of the accident was an unusual and excessive rate of speed of the Morse car.

Putting to one side, without decision, the question whether in the circumstances of this case Morse in the operation of his own car was an employee of the subscriber at the time of the accident, * * * we pass to the question whether the injury arose out of and in the course of Morse's employment. The injury received by Morse clearly arose out of a "risk of the street"; and the hazard of that risk was not contemplated by his contract of employment unless the personal injury received by him was one "arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer." It is plain the legislature did not intend by Statutes 1927, chapter 309, section 3, to cover every street risk, and that it did intend that the phrase "ordinary risk" should mean common, customary, or usual risk. So interpreted, the words "ordinary risk of the street" are not applicable to the injury received by Morse as a consequence of driving his car, at a speed of 60 miles an hour along a level, straight road, into a truck parked by the side of the road which was clearly visible for a distance of more than 500 feet.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—STREET ACCIDENT—*Frigidaire Corporation et al.* v. *Industrial Accident Commission et al., District Court of Appeal, First District of California (January 30, 1930), 283 Pacific Reporter, page 974.*—Elmer Melke was employed by the Frigidaire Corporation as zone manager for Northern California and Nevada. His duties consisted in planning, supervising, and inspecting the installation of refrigerator plants within his district. While standing on the open platform of the railroad station at Reno, Nev., awaiting the arrival of a train which he was to board for San Francisco, Melke was struck and mortally wounded by a stray bullet fired by a police officer at a suspected criminal whom the officer was pursuing along the public street adjacent to the railroad station.

On account of Melke's death his widow and son were awarded compensation by the Industrial Accident Commission of California. Thereafter the Frigidaire Corporation and its insurance carrier instituted proceedings to have the award annulled upon the ground that the injury which resulted in Melke's death did not arise out of his employment.

The case was tried in the District Court of Appeal, First District, Division 1, California, and the commission's determination that the injury happened in the course of Melke's employment was not questioned. It was contended by the employer that the danger of being

shot by a police officer in the pursuit of a fleeing criminal can not be classified as a street risk or a travel hazard and that, since Melke's injury was received from such source it is not compensable under the terms of the California workmen's compensation act (Stat. 1917, p. 831).

The appeal court, however, said the case before them was analogous to the case of Katz *v.* Kadans & Co. (232 N. Y. 420, 134 N. E. 330), in which case a dairyman's chauffeur, while driving his employer's car along the street after having delivered certain dairy products, was stabbed without cause by an insane person who was running amuck upon the street; and it was claimed there, as in this case, that the accident did not arise out of a street risk. In holding to the contrary, the court said:

If the work itself involves exposure to perils of the street, strange, unanticipated, and infrequent though they may be, the employee passes along the streets when on his master's occasions under the protection of the statute. This is the rule unequivocally laid down by the House of Lords in England: "When a workman is sent into the street on his master's business * * * his employment necessarily involves exposure to the risks of the streets and injury from such a cause [necessarily] arises out of his employment."

Applying the same principals used in the Katz *v.* Kadams & Co. case the court held that the injury to Melke was under the terms of the California compensation act. The court said in part:

The theory upon which compensation is awarded in the class of accidents above mentioned is that the causal connection between the employment and the injury, which is essential to make it compensable, consists in the fact that the employment requires the presence of the employee upon the street and the fact that the injury was caused by some human or mechanical instrumentality incidental to the use of the street. In other words, as said in Globe Indemnity Co. *v.* Industrial Acc. Comm. (36 Calif. App. 280, 171 Pac. 1088, 1089), with respect to the facts of that case, "The causative danger was peculiar to the work in that had he [the employee] not been upon the street in the course of his duty he would not have been injured." And, as held in Larson *v.* Industrial Acc. Comm. (193 Calif. 406, 224 Pac. 744), the fact that the injuries to the employee are not of a kind to be anticipated nor peculiar to the employment in which he is engaged does not defeat the claim to compensation.

The decision of the industrial accident commission was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—STREET ACCIDENT—*Klettke* v. *C. & J. Commercial Driveaway (Inc.) et al., Supreme Court of Michigan (June 2, 1930), 231 Northwestern Reporter, page 132.*—The C. & J. Commer-

cial Driveaway (Inc.) was engaged in driving automobiles from factories to points of delivery. Henry Klettke was employed as a supervisor of drivers. On or about May 30, 1929, he superintended a driveaway of automobiles from Lansing, Mich., to Indianapolis, Ind. Some of his men started back to Lansing in an automobile provided by Klettke, but as there was not room in the car for all, Klettke and two other employees remained in Indianapolis over night. The next morning they accepted an invitation from a Mr. Bryan to ride with him as far as South Bend, Ind. Before reaching South Bend, Bryan's car was wrecked in a collision. Klettke was severely injured, resulting in his death.

The widow, Mae Klettke, filed claim for compensation and the Michigan Department of Labor and Industry awarded compensation. The employer and insurer appealed the case to the Michigan Supreme Court. In affirming the decision of the department of labor and industry, the supreme court said that, as Klettke had complete charge of the men conducting the driveaway—

It was his business to see that they performed their duties properly. He took care of the expenses of the men and himself out of money advanced by the employer, collected the license plates, and was responsible for their return to the employer's office at Lansing. It was his duty to report at Lansing upon the cars delivered and the money expended. He had authority to hire and discharge men on the road, and that authority continued while on his way back to Lansing. No specific directions had been given him or the men to return by train, bus, or in any other particular way, but the manner of return was left to the discretion of decedent. It was a condition of his employment that he should return to Lansing. He was exposed to all the dangers of traveling on the highway, a danger which was incident to his employment.

The Michigan workmen's compensation law is applicable, although the injury occurred out of the State. * * * The fact that decedent was riding in a private automobile instead of in a public carrier neither took him out of the course of his employment nor changed the fact that the accident arose out of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—STREET ACCIDENT—*Schofield's Case, Supreme Judicial Court of Massachusetts (July 2, 1930), 172 Northeastern Reporter, page 346.*—On September 28, 1929, William Schofield was employed as a salesman in the business of selling machinery to oil filling stations. According to his contract of employment he was required to use an automobile in the course of his business, for which he received a salary and commission. On the above date he was proceeding from New Haven, Conn., to Boston, Mass., preparatory to attending a meeting of company salesmen, to which

he had been ordered. While en route his automobile was in a collision and he was severely injured.

The Massachusetts Industrial Accident Board allowed him compensation and, upon appeal, the award was upheld by the superior court, Suffolk County. In the supreme judicial court, to which court the case was appealed by the insurer, Judge Pierce was of the opinion that the employee, as a matter of law, was an independent contractor relative to the operation and management of his own automobile and therefore was not entitled to compensation under the act. In reaching this conclusion he said:

Other than that the claimant was required to "use his own car" while engaged in his employment within the territory allotted to him, there is nothing in the record to prove or to warrant an inference that the claimant, while actively engaged in his employment, was not master over the operation of his car, or that any right, by the terms of his employment, was granted to the employer to restrict the claimant in the control of his own car whenever it should elect to direct him as to the manner and mode by which at any time or at any place it should be operated.

The decree of the superior court was therefore reversed and a decree entered in favor of the employer and the insurance carrier.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—STREET ACCIDENT—ERRAND FOR EMPLOYER—*Kahn Bros Co. et al.* v. *Industrial Commission et al., Supreme Court of Utah (December 19, 1929), 283 Pacific Reporter, page 1054.*—Charles A. Doe, an employee of Kahn Bros. Co., was severely injured January 21, 1929, while crossing a public street in Salt Lake City en route from his home to the post office. An award of compensation was made by the Industrial Commission of Utah, and the employer carried the case to the Supreme Court of Utah for review, contending that the accident did not arise out of and in the course of the employment. Doe was employed as a bookkeeper by Kahn Bros. Co., and he customarily did general uptown business for his employer, such as making collections, credit investigating, and calling for the employer's mail at the post office. The uptown business was cared for by him on his way home to lunch or on his way back. On the day of the accident Doe visited the bank, ate his lunch at home, and had started toward the post office when he was struck by an automobile.

The supreme court sustained the award of the commission and held that Doe resumed the purpose of his employment when he left home bound for the post office.

In the course of the opinion the court said in part:

It is a general rule that injuries sustained while an employee is traveling to and from his place of employment are not compensable.

An exception to this rule, however, is where an employee, either on his employer's or his own time, is upon some substantial mission for the employer growing out of his employment. In such cases the employee is within the provision of the act.

Applicant here [Doe] in proceeding to the post office, to the Mutual Coal Co.'s office, and to the Lincoln G. Kelly office, was carrying out a distinct and definite duty on behalf of the employer, and this he was doing in the same manner as he had customarily discharged his duties for several years. Having completed his lunch he immediately resumed the employment of his employer by going directly to the post office. While in the discharge of this errand, on his way to the post office, the accident happened which caused his injury. The industrial commission had before it ample evidence upon which to find that the accident was one arising out of and in the course of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—WATCHMAN—EVIDENCE—*McLaughlin* v. *Davis Lumber Co., Supreme Court of Alabama (December 19, 1929), 125 Southern Reporter, page 608.*—John S. McLaughlin was employed by the Davis Lumber Co. as night watchman at their sawmill near Mobile, Ala. His main duty was to guard the plant at night, and in the performance of this duty he was required to make periodical rounds of the plant under a clock-punching system. On the night of January 8, 1928, McLaughlin was shot while making his rounds. There was no robbery committed and nothing to indicate the object of the trespasser in shooting McLaughlin. The deceased died on February 14, 1928, without making any explanation or any statement concerning the assault upon him.

Ida McLaughlin, the widow, proceeded under the workmen's compensation act of Alabama to secure compensation. The circuit court of Mobile County, Ala., in denying compensation said, in part:

The rule is to construe the facts favorably to the employee where the evidence affords reasonable room for such construction, but that such conclusion can not be allowed to rest on a mere surmise, and that there must be legal evidence to authorize the court in finding that the injury which caused the death arose out of and in the course of the employment; and in this case, after considering all of the facts and circumstances in evidence, I find the evidence is insufficient to reasonably satisfy the court that the injury which caused the death of the said John S. McLaughlin arose out of his employment by the defendants.

The widow then appealed the case to the Supreme Court of Alabama which court reversed the decision of the lower court, saying, in part, as follows:

The deceased employee, a night watchman, was slain while upon the premises he was hired to watch and while engaged in the dis-

charge of his duty as watchman. That he came to his death in the course of his employment is not denied.

The employee's death was accidental within the meaning of the statute. Dean *v.* Stockham Co. (123 So. 225). But, to entitle appellant to compensation, the death of her husband, the employee, must also have arisen out of his employment. Section 7596. Whatever of difficulty there is in the case arises out of the last-mentioned requirement of the statute.

The burden of proof was on the claimant, but according to the decisions in similar cases the court should have construed the relevant law liberally in favor of the employee. From the facts stated the conclusion was entirely reasonable, if not inevitable, that the employee was killed by a trespasser on the property he was employed to care for, a lumber yard. If the facts in evidence indicated that the employee was killed solely on account of some personal feeling against him, or if the circumstances pointed to suicide, there could be no award of compensation. Of the first hypothesis there is not a trace of evidence. The second is excluded by the location and manner of the wound. We have only the facts stated, to repeat, that he was a night watchman, engaged at the time in the discharge of his duty to his employer, and that he was killed by some intruder upon the premises for whose action no interpretation appears save only the inference to be drawn from the fact that while trespassing, he came into contact with the employee watchman and killed him. The opinion here is that the stated interpretation involves also the conclusion that the death of the employee arose out of his employment.

WORKMEN'S COMPENSATION—INTENTIONAL AND WILLFUL ACTS—VIOLATION OF REGULATION—OUTSIDE SCOPE OF EMPLOYMENT—*Seaman Body Corporation* v. *Industrial Commission of Wisconsin et al., Supreme Court of Wisconsin (June 11, 1930), 231 Northwestern Reporter, page 251.*—Henry Haas was employed by the Seaman Body Corporation as a coal passer. In the balcony of the engine room was a cage inclosed by a wire netting, in which were located the main electrical switches, lightning arresters, and transformers. It was a part of Haas's duties to sweep the engine room and the balcony. He was instructed not to go inside the area inclosed by the wire netting, because of the high-voltage electricity.

Subsequently Haas was sent to sweep the balcony. He was later found electrocuted, lying inside the area inclosed by the wire netting. The Industrial Commission of Wisconsin awarded compensation, and suit was filed in the Dane County circuit court, where the award was set aside. The court ruled that Haas had gone outside the sphere of his employment by going in the inclosure.

The case was appealed to the Supreme Court of Wisconsin, where the decision of the lower court was affirmed. The court said the

instructions were of such a nature as to actually limit the sphere of the employment, as—

The employer had set apart a portion of the balcony and protected it in such a way that an employee could not enter unless he unscrewed the fastening of a door or squeezed his body through an 18-inch opening between the wall and the frame of the inclosure.

Employers effectually limit the scope of an employment when they erect physical barriers which make access to the prohibited area as difficult as it was in the case at bar. When employees go outside the limits of employment which are as clearly defined by physical barriers as they were in the case at bar, they take themselves outside the protection given them by the workmen's compensation act (Stat. 1929, sec. 102.01 et seq.), because injuries sustained by them under such circumstances are not incidental to and do not arise out of their employment.

WORKMEN'S COMPENSATION—INTENTIONAL AND WILLFUL ACTS—VIOLATION OF TRAFFIC LAW—*Standard Accident Insurance Co. et al. v. Pardue, Court of Appeals of Georgia (December 14, 1928), 146 Southeastern Reporter, page 638.*—William Pardue was an automobile salesman employed by the Tompkins Motor Co., of Augusta, Ga. He was sent by his employer into South Carolina for the purpose of demonstrating an automobile to a prospective purchaser. While carrying out this order his car was wrecked on a public highway with the result that he was injured and died within a few hours. Travelers upon the highway testified that Pardue was driving the automobile down a steep hill at a speed of 45 or 50 miles per hour when suddenly the car began to swerve, and after reaching the bottom of the hill it ran off the road and was wrecked.

Mrs. William Pardue, the widow, filed a claim for compensation and received an award by the Industrial Board of Georgia. This award was affirmed by the superior court of Richmond County, and the insurance carrier and the employer appealed to the Georgia Court of Appeals, claiming that his death was due to his own willful misconduct, or to a failure to perform a duty imposed by statute. The court did not uphold this contention. In affirming the decision of the lower court and the industrial board, the court said in part:

Commissioner Land, who heard the case and who rendered the decision for the industrial commission, said: "The fact that the car which he was driving was swerving from one side of the road to the other when coming down a hill and finally turning over, killing him, strongly establishes my conviction that the deceased was not speeding, but was standing by a wild car, rendered uncontrollable by a defect in the steering gear or other part of the machinery"; and the commissioner accordingly found that the death of the employee was not due to any willful misconduct on his part. We think this finding of the commissioner was fully warranted by the

evidence. * * * Findings of fact made by the industrial commission are final, and can not be reviewed either in the superior court or in this court if supported by any evidence.

Furthermore, even if the automobile was not defective, and if the employee lost control of it because he was running it at a speed prohibited by law, this fact alone would not bar compensation; and there was no evidence in this case to show any willful act or omission on the part of the employee. The mere violation by an employee of a criminal traffic law is not ground for denying compensation in case of his injury or death resulting therefrom.

WORKMEN'S COMPENSATION—JURISDICTION—EXTRATERRITORIALITY—*State ex rel. Loney* v. *State Industrial Accident Board et al., Supreme Court of Montana (March 26, 1930), 286 Pacific Reporter, page 408.*—In May, 1928, Guy D. Loney was employed by one J. L. McLaughlin in road making. In August, 1928, the employer was building a section of road for the National Forest Service, 8 miles long, extending from near Babb in Glacier County, Mont., westerly into Glacier National Park. Approximately 5 miles of the road was outside and 3 miles inside the park. On August 29, 1928, Loney was accidentally injured by falling under a truck. The accident occurred upon the road within the boundaries of the park; however, the contract of employment was made in Montana, and both employer and employee were residents of that State.

The employee filed his claim for compensation with the Montana Industrial Accident Board, and on January 18, 1930, the board dismissed the claim upon the sole ground that some years prior the attorney general rendered an opinion that the workmen's compensation act (Rev. Code, 1921, sec. 2816, et seq.) of Montana had no application to employers and employees within the Glacier National Park. Following the refusal of the board to grant a rehearing, Loney appealed to the Supreme Court of Montana to compel the board to hear his claim.

The attorney general held in the prior decision that the workmen's compensation act of Montana had no extraterritorial operation, that it related only to accidents occurring within the State and that, while Glacier National Park is within the State, except as to the limited powers reserved in the act of cession, the State had no jurisdiction over it. However, upon the facts presented in the case at bar, the present attorney general's office was convinced that Loney's application should be granted. The Montana Supreme Court was also of this opinion and said in part as follows:

The employer and employee, citizens of Montana, are governed by a contract made in Montana. They elected to be bound by plan 3, a statutory enactment for the benefit of employer and employee alike. The statute entered into and became a part of their contract.

The weight of authority in this country sustains the assertion that a workmen's compensation act will apply to injuries to workmen employed in the State and injured while temporarily out of its limits, unless there is something in the act making it inapplicable or clearly denying the right of the employee to recover in such case.

The Montana act does not carry a necessary inference against extraterritorial operation in a proper case. Had the lawmakers intended thus to confine its operation, it would have been easy to have said so, but they did not.

The court called attention to the fact that the purpose of the compensation law was that the burden of caring for injured workmen and their dependents should not fall upon the public in general, but upon the industry. In conclusion the court said:

While section 2847 declares: "This act is intended to apply to all inherently hazardous works and occupations within this State," we do not see that this necessarily excludes its operation beyond the limits of the State where the employee, in the furtherance of his employer's business which is localized in Montana, and which he is following in passing over the State line, meets with an accidental injury. The contract between employer and employee here contemplated that the road would extend into the park. The employee might or might not work on that portion of the road. The employer's business was localized in this State. The employee was acting in the course of and within the scope of his employment, furthering his employer's business, when he performed work within the park and received his injury. He should be compensated precisely as if he were injured within the State but not within the limits of the park.

The Montana Industrial Accident Board was therefore instructed to hear and determine Loney's claim for compensation.

WORKMEN'S COMPENSATION — JURISDICTION — INDEPENDENT CONTRACTOR—IN COURSE OF EMPLOYMENT—*Hill's Case, Supreme Judicial Court of Massachusetts (September 24, 1929), 167 Northeastern Reporter, page 914.*—The Park School Corporation operated a private day school. It employed Hill, a deaf-mute, to wash the windows of two buildings used for school purposes and agreed to pay a fixed sum per window. The employment was made by Miss Lee, a teacher, authorized to employ persons to do work incidental to the ordinary care of the school property. Hill was to supply necessary materials and appliances for doing the work. He furnished a ladder, which broke when he was on it engaged in the work, and he was injured.

Hill proceeded under the workmen's compensation act, and the Industrial Accident Board of Massachusetts granted him an award. Upon an appeal to the superior court of Suffolk County, the award was affirmed. The insurer, Massachusetts Bonding & Insurance Co., appealed then to the Supreme Judicial Court of Massachusetts,

Suffolk County. The contention of the employer and the insurer was that Hill was an independent contractor, as there was evidence that Hill carried on a business of washing windows for hire.

The supreme judicial court affirmed the decision and held that in proceedings under the workmen's compensation act findings of fact made by the industrial accident board are final and can not be reversed by the reviewing court if there is evidence which, as a matter of law, can support them. In regard to Hill's employment status the court said:

> This court can not determine the credit to be given the witnesses and can not properly say that the single member and the board on appeal were wrong in finding that Hill was here an employee rather than an independent contractor or an employee of an independent contractor.
>
> The question of fact is a close one. A contrary finding could not properly have been disturbed. We discover nothing which, as matter of law, compels a finding either way.
>
> The employment was, in our opinion, "in the usual course of the trade, business, profession or occupation of his employer." (Gen. L. ch. 152, sec. 1, cl. 4.) Teaching is not the only business of a day school. Care of its property is part of its occupation.

The decree of the lower court was affirmed.

WORKMEN'S COMPENSATION—JURISDICTION—POWERS OF COMMISSION—REVIEW—*United States Smelting, Refining & Mining Co.* v. *Evans, Circuit Court of Appeals, Eighth Circuit (October 7, 1929), 35 Federal Reporter (2d), page 459.*—P. M. Evans received an eye injury while employed by the United States Smelting, Refining & Mining Co. The parties filed an agreed statement of facts, and the Industrial Commission of Utah made a finding of those facts and rendered a decision allowing Evans compensation for permanent total disability. The facts show he had lost the sight of his left eye and that without the aid of glasses he had less than 10 per cent of vision in his right eye, but with glasses his distant vision in that eye was limited and his near vision was normal. The commission concluded that as a result of the injury he was "permanently industrially blind" in both eyes, and hence permanently and totally disabled.

The mining company, to enjoin the enforcement of this award, filed a bill in the District Court of the United States in the District of Utah. This court dismissed the bill; the company appealed to the Circuit Court of Appeals, Eighth Circuit, claiming that the award and finding of the commission was in excess of its jurisdiction, and would, if enforced, deprive the company of its property without due process of law and that the commission had denied

the petition for rehearing and the company was without adequate remedy except by injunction, as requested in the bill.

The circuit court of appeals pointed out the remedy provided in the act for review of awards made by the commission, saying in part:

The act also provides the award of the commission is subject to certiorari or review in the State supreme court applied for within 30 days after an adverse decision or denial of petition for rehearing solely upon the certified proceedings and evidence before the commission, the scope of the review being to determine whether (1) the commission acted without or in excess of its powers; (2) the findings support the award. It is further provided by the act that the findings and conclusions of the commission on questions of fact shall be conclusive and final, and the court shall enter judgment, either affirming or setting aside the award, that the State Code of Civil Procedure is applicable, but only the supreme court shall have jurisdiction to review, reverse, or annul any award or to sustain or delay the operation or execution thereof.

In ascertaining the powers of the commission the court said:

We are bound by the decisions of the State courts which interpret them. (Supreme Lodge *v.* Meyer, 265 U. S. 30, 44 Sup. Ct. 432.) The commission is an administrative body, and the supreme court of the State will review the record of the cases at least to determine whether its findings are supported by the evidence.

The court concluded the opinion by saying:

The appellant had to abide this award or choose to obtain a review in the State supreme court. Having waived that remedy it is not entitled to collaterally invoke the equity powers of a Federal court for relief. The bill was properly dismissed by the district court for want of equity, and its decree is accordingly affirmed.

WORKMEN'S COMPENSATION—LIMITATIONS—EMPLOYER WITHDRAWING FROM COMPENSATION ACT—CONSTRUCTION OF STATUTE—*Montello Granite Co.* v. *Schultz et al., Supreme Court of Wisconsin (December 4, 1928), 222 Northwestern Reporter, page 315.*—Ernest E. Schultz had been employed by the Montello Granite Co. as an operator of a polishing machine and as a foreman of the polishing department. On August 24, 1926, being disabled on account of tuberculosis, he quit his employment and filed application for compensation under the Wisconsin workmen's compensation law. The Montello Granite Co. withdrew from the workmen's compensation act on July 1, 1926, and notice of this injury was not served until about November 1, 1926. Shultz contended that he should receive compensation even though his employer had withdrawn from the act, as the disease was contracted long prior to the manifestation of the disability, and while both employer and employee were subject to the act. The

Wisconsin Industrial Commission awarded compensation to the employee and the company appealed to the circuit court for Dane County, Wis., where the award of the commission was set aside. The case was then carried to the Supreme Court of Wisconsin and the judgment of the circuit court was affirmed. The court held that the statutory provisions of the compensation act were framed "with the thought that there would always be a definite date—that of the accident—which would be the basis for determining liability." In concluding the opinion, the court said:

> The conclusions of the lower court in the instant case preclude the applicant from the recovery of compensation. But the industrial commission is an administrative body, and is required to administer the law as it finds it, and the courts must construe the statutes in the form in which they are enacted, when the provisions thereof are plain and unambiguous. To do otherwise would be equivalent to an invasion of the legislative field. In the enactment of legislation designed to cover the vast field of the compensation act, it is nigh impossible to anticipate and provide for all of the various complicated situations which might arise during the period of its administration. The defects in the present legislation, pertinent to the facts herein involved, may be readily remedied, and unquestionably will receive the prompt attention of the legislature; but until that time it is our duty to construe the law as we find it.

WORKMEN'S COMPENSATION — LIMITATIONS — NOTICE — *Long* v. *Watts*, *Supreme Court of Kansas* (*January 11, 1930*), *283 Pacific Reporter, page 654*.—James G. Long was injured in the course of his employment with the J. B. Watts Construction Co., while engaged in paving the streets of Hiawatha, Kans. On December 16, 1925, Long was thrown upon a heavy piece of timber while moving part of the paving equipment. After the accident he endeavored to carry on his work, and the next day he consulted the company physician, who after an examination stated that the pain suffered was due to rheumatism and not to the accident. Long again returned to work, but on February 4, 1926, he was compelled to quit work and went to his home in Wymore, Nebr. In April, 1926, an examination was again made, which showed that Long was suffering from an injury to his hip bone, received through his fall on December 16, 1925. Immediately after this disclosure he made oral demand for compensation for his injury. On May 7, 1926, Watts met Long and stated to him that he would see that some payment of compensation for his injury was made. Watts therefore requested Long to fill out some papers relating to the claim for compensation.

When no compensation was paid, Long brought an action against Watts in the district court of Cloud County, Kans. Watts pleaded

that Long had failed to demand compensation within three months after the injury and thereby relieved the company of liability. The district court rendered judgment in favor of Watts, and Long appealed the case to the Kansas Supreme Court alleging that by reason of Watts's statement "that he would see that Long got some compensation," he waived the making of a claim for compensation within the statutory time. The court did not uphold the contention made by Long and, in affirming the decision of the lower court denying compensation, said in part:

No demand for compensation was made within the 3-month period prescribed by the statute. The only exception to this limitation is incapacity to make a demand, and it is provided that the failure to make it within the period is a bar to a recovery of compensation. (R. S. 44–520.) It may be noted that plaintiff does not plead that he did not have capacity to make the demand. He does allege that he had been informed by a physician that the pain he suffered was due to rheumatism, and that he was led to believe that his ailment was not due to the injury sustained while he was at work for his employer. But the statute does not provide that ignorance of that fact excuses the failure to make the demand, and the court can not add to the provisions of the statute.

Long alleged that on May 7, 1920 (1926), Watts met him and said to plaintiff that he had been advised of plaintiff's condition, and that he would see that he received some compensation on account of his injury, and plaintiff at the request of defendant filled out some papers in regard to his injury. This conversation occurred, it appears, almost five months after the accident, and long after the bar of the statute had fallen. There was then no obligation on the defendant and no liability for compensation, and hence no basis for a waiver. If the statement of defendant were treated as a new promise, there was no consideration for it. The legislature has made no provision for a waiver of demand, but, on the contrary, has declared that, if it is not made within the limited time, a recovery of compensation is barred.

The decision of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION—LUMP SUM—BASIS OF AWARD—*Bacon v. United Electric R. Co., Supreme Court of Rhode Island (January 24, 1930), 150 Atlantic Reporter, page 818.*—In November, 1928, the United Electric Railways Co. of Rhode Island entered into an agreement with the wife of a deceased employee for the payment of weekly compensation of $10, for a period of 300 weeks, as provided in the State workmen's compensation act. The company continued the payments until the widow filed a petition for a lump sum on January 13, 1930. The trial court, upon hearing the parties, entered a decree commuting the weekly payments to a lump sum of $2,055.86. The railroad company thereupon appealed to the Supreme Court of Rhode Island, contending that the trial court did not have authority

to do this without making some provision for the reimbursement of the company in the event that the widow died or remarried during the statutory period. It also contended that there was no evidence that the commutation of the payment would be for the best interest of the widow. Reliance on the payment of the lump sum was based on section 25, article 2, chapter 92 of the General Laws of Rhode Island for 1923, in which it was provided—

In case payments have continued for not less than six months either party may, upon due notice to the other party, petition the superior court for an order commuting the future payments to a lump sum. Such petition shall be considered by the superior court and may be summarily granted where it is shown to the satisfaction of the court that the payment of a lump sum in lieu of future weekly payments will be for the best interest of the person or persons receiving or dependent upon such compensation, or that the continuance of weekly payments will, as compared with lump-sum payments, entail undue expense or undue hardship upon the employer liable therefor, or that the person entitled to compensation has removed or is about to remove from the United States.

From the facts in the case it was shown that the widow desired to move to Nova Scotia and care for an aunt who resided there. For her services she was to receive some compensation in addition to board and room, and she averred that she could live on the weekly payments of $10. She owed four or five hundred dollars, which she was desirous of paying, but for the money remaining after the payment of her debts she had no definite use and intended to put it away.

The Rhode Island Supreme Court, after citing two cases (Di Donato *v.* Rosenberg, 225 N. Y. Supp. 46; Dikovich *v.* American Steel & Wire Co., 36 N. J. L. J. 304), decided in other jurisdictions, held that the commutation should not be made merely because the person receiving compensation had a desire to pay debts.

The widow (as it was admitted during the trial of the case), the court said, could without inconvenience "receive the payments periodically when living in Nova Scotia as she does now while residing in Massachusetts."

Continuing, the court pointed out that it was against the policy of the statute "to pay to a dependent a considerable amount of money in a lump sum when the dependent has no definite use for the same. The authorities agree that only exceptional circumstances can justify a departure from the general rule of periodical payments of compensation. (Sangamon Mining Co. *v.* Industrial Com., 315 Ill. 532, 146 N. E. 492; Becker *v.* Taylor & Co., 217 App. Div. 414, 216 N. Y. Supp. 625.) There was no evidence upon which a decree for commutation could be validly based."

The supreme court therefore affirmed the appeal of the railroad company and reversed the decision of the lower court.

WORKMEN'S COMPENSATION—LUMP SUM—SETTLEMENT—REVIEW—POWERS, ETC., OF COMMISSION—*Wakenva Coal Co.* v. *Deaton et al., Court of Appeals of Kentucky (March 1, 1930), 25 Southwestern Reporter (2d), page 1024.*—While working in the mine of the Wakenva Coal Co., at Hazard, Ky., Joe E. Deaton was killed by falling slate on June 29, 1927. On July 3, 1927, his widow, Martha Deaton, and the company entered into a written agreement by which the company agreed to pay her the sum of $4,000, payable at the rate of $12 a week for 333⅓ weeks. This was the maximum compensation payable under the Kentucky workmen's compensation act, and the agreement was approved by the Workmen's Compensation Board of Kentucky.

After several payments had been made Martha Deaton filed her written application with the board asking that future payments of compensation be commuted to a lump sum. The basis for the application was that she was poor, had several children, could not live on the monthly payments, had to work in the cornfields, and that for $700 she could secure a home which together with the necessary repairs would cost $1,200. She also complained that the company was behind in its payments and that the present plan was unsatisfactory. The application was considered on three different occasions, and each time the lump-sum settlement was denied.

The widow thereupon appealed the case to the circuit court for Perry County, Ky., contending that the decision of the board was contrary to the evidence, the law, and the facts, and that the board acted without, and in excess of, its authority. She also contended that the decision of the board was rendered through fraud. The circuit court at first ruled that it did not have jurisdiction over the matter, but thereafter reconsidered the question, took jurisdiction, and rendered a decree in favor of the widow, referring the case to the board for further proceedings. From that judgment the coal company appealed to the Kentucky Court of Appeals.

In rendering the opinion Judge Clay quoted section 4907 of the Kentucky statute, which provides that—

Whenever compensation has been paid for not less than six months thereafter, on the application of either party and upon notice to the other party, in any case where the board may determine that it will be for the best interests of either party and will not subject the employer or his insurer to an undue risk of overpayment, future payments of compensation or any part thereof may be commuted to a lump sum of an amount which will equal the total sum of the probable future payments so commuted, discounted at 5 per cent per

annum on each payment. Upon payment of such lump sum all liability for the payments therein commuted shall cease.

In reversing the decision of the circuit court and remanding the cause to the compensation board, the court of appeals said:

We do not find in the act any provision authorizing an appeal from the action of the board under the foregoing section, and we are convinced that no appeal was intended. The purpose of the compensation act is to allow compensation extending over a period of time, so that the monthly payments will take the place as far as possible of the wages of the deceased employee. In other words, it was intended that the dependents should have something to live on, and not a sum that might be spent, consumed, or lost without accomplishing that purpose. Section 4907, Kentucky Statutes, supra, was intended to meet special cases and to permit the board to commute future payments of compensation or any part thereof to a lump sum, where it determined that it would be for the best interest of either party, and would not subject the employer or his insurer to an undue risk of overpayment. We are therefore of the opinion that the legislature regarded the commutation of future payments of compensation to a lump sum purely as an administrative feature of the act, and lodged the final determination of that question in the board. It follows that the board's action was not reviewable on appeal, and that the lower court erred in not sustaining the special demurrer and dismissing the petition on appeal.

WORKMEN'S COMPENSATION—LUMP SUM—"TOTALLY INCAPACITATED"—*Texas Employers' Insurance Association* v. *Brock, Court of Civil Appeals of Texas (March 17, 1930), 26 Southwestern Reporter (2d), page 322.*—On April 10, 1929, Jasper Brock, while in the course of his employment with J. W. Sessions, was injured by a falling tree. He presented a claim for compensation for the injury suffered, and as he was not satisfied with the action of the Texas Industrial Accident Board, he filed an action against the Texas Employers' Insurance Association, the insurers of the employer.

It appeared that at the time Brock suffered the injury he was a strong, healthy boy, 15 years of age, doing the same kind of work and receiving the same wage as his father. As a result of the tree falling upon him, his collarbone was broken in two places, and he suffered a fracture of the base of the skull and suffered other bodily pains. He alleged that he was permanently incapacitated and that his father was not able to support and maintain him and requested that compensation be paid in a lump sum so that he could invest the money in a farm. The case was tried in the district court of Cherokee County, Tex., and it was found—

(1) That the injury appellee received resulted in "his total incapacity to perform labor;" (2) that such total incapacity was per-

manent; (3) that manifest hardship and injustice would result to him if the compensation he was entitled to was not paid to him in a lump sum.

On this finding judgment was rendered in Brock's favor for $10.38 per week for 401 weeks to be paid in a lump sum amounting to $4,162.38, less a discount. The insurer appealed the case to the Texas Court of Civil Appeals, where the decision of the lower court was affirmed. In the course of the opinion the court said:

If it was true, as alleged, and, as determined by the jury, it is assumed that appellee had no means of support and his father was unable to support him, and true that he could and would invest compensation he was entitled to, if paid to him in a lump sum, so the revenue therefrom would support and maintain him, we think the court and jury had a right to conclude that "manifest hardship and injustice" would result to appellee if the compensation was not paid to him in a lump sum.

In his charge the trial court told the jury that as used in the workmen's compensation law the term "total incapacity" did not "imply an absolute disability to perform any kind of labor," but meant "disqualified from performing the usual tasks of a workman in such a way as to enable him to procure and retain employment." Appellant objected to the definition on the ground that it was incorrect, and complains here because the court overruled its objection. But it has been repeatedly held by courts in this State that, as used in said law, the words meant what the court told the jury they meant.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL TREATMENT—EVIDENCE—JURISDICTION—*Southern California Edison Co.* v. *Industrial Accident Commission et al., Supreme Court of California (September 17, 1929), 280 Pacific Reporter, page 679.*—On November 26, 1927, James W. Williamson sustained an injury arising out of and in the course of his employment with the Southern California Edison Co. The company furnished the employee medical treatment through its regular physician. Upon the advice of the company physician, Williamson returned to work December 19, 1927, but continued to complain of his condition. On January 5, 1928, he quit work and returned to the physician for further treatment, but the physician was of the opinion that Williamson had recovered and refused to treat him further. Thereupon Williamson secured treatment from Dr. W. F. Rey, of Oxnard, Calif., and was treated by him for several days. On January 8, Doctor Rey informed the Edison Co. and its insurer that he was treating Williamson but received no reply from either until about three months later.

Williamson filed an application with the California Industrial Accident Commission to adjust his claim so that the company would pay for the treatments he received from Doctor Rey. He based

his claim upon the provisions of section 9 (a) of the California workmen's compensation act (Stat. 1917, p. 836, as amended by Stat. 1919, p. 913, sec. 4, and Stat. 1925, p. 640), which provides that the employer shall furnish—

(a) Such medical * * * treatment * * * as may reasonably be required to cure and relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal reasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same.

The award was entered by the industrial accident commission in favor of Williamson and the employer carried the case to the Supreme Court of California for review, claiming the commission did not have sufficient facts before it so as to give it jurisdiction to make the award. The court affirmed the award of the industrial commission, however, and held that if the commission believed the testimony of Williamson and of his selected physician, Doctor Rey, regardless of the counter showing by the employer and its insurer, such testimony would be sufficient not only to support its award but would give jurisdiction to the commission to make the same.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL TREATMENT—LIABILITY OF INSURANCE CARRIER—LIMITATIONS—*Pacific Employers' Insurance Co.* v. *French et al., District Court of Appeal, Second District, California (February 26, 1930), 285 Pacific Reporter, page 876.*—Dr. J. Rollin French and the Golden Star Hospital filed a petition with the California Industrial Accident Commission ordering the Pacific Employers' Insurance Co. to pay a reasonable value for medical services rendered two employees. The insurance company was the insurer of the two employees at the time of the accident, but claimed to be relieved of liability because prior to the time of the injuries of the employees a general notice purporting to terminate any employment of the persons and institutions that rendered the medical treatment had been served upon French and the hospital. The notice also requested that all medical treatment be done by Dr. C. E. Early and the Angelus Hospital.

The reason the injured men went to Doctor French and the Golden Star Hospital for treatment was that the employers gave the injured men cards that had theretofore been furnished by the insurance company. These cards contained the names of Doctor French and the Golden Star Hospital, with directions as to how the employees were to get there for treatment. The evidence in the case showed that when the employers sent the injured men to the hospital for treatment the insurance company was at once notified that these men

were receiving treatment. The insurance carrier, however, made no effort to transfer the cases or to designate other doctors to take care of the injured men.

The California Industrial Accident Commission rendered a decision in favor of Doctor French and the Golden Star Hospital, saying that as soon as the treatment was given the injured men the employers who sent these men to obtain this treatment became liable for the reasonable value of the services so rendered, since the men were injured in the course of their regular employment. The insurance carrier had agreed to assume and carry this liability, and therefore should be substituted for the liability of the employers.

The case was then appealed to the district court of appeal, where the decision was affirmed upon the same reasoning followed by the commission.

WORKMEN'S COMPENSATION—MEDICAL, ETC., TREATMENT REFUSED—NEGLIGENCE—INJURY TO MEMBER—*Du Pont Rayon Co.* v. *Bryant, Supreme Court of Tennessee* (*March 1, 1930*), *24 Southwestern Reporter* (*2d*), *page 893.*—On April 8, 1928, Thurman Bryant, while operating a machine for the Du Pont Rayon Co. had his left hand cut just below the thumb by a piece of glass. The company's physician and surgeon treated him for several weeks. Failing to recover the use of his thumb after the wound had completely healed, he consulted a Doctor Sumpter on August 17, 1928, who discovered that the tendon by which the last phalanx of the thumb is controlled, had been severed. It was contended that if a proper diagnosis had been made at the time of the injury, the ends of the tendon could have been united by a simple surgical operation and the use of the thumb restored. Doctor Sumpter did not advise an operation, as he believed it would be unsuccessful.

Bryant filed an action against the company to recover compensation, and the circuit court, Davidson County, Tenn., rendered judgment in his favor. Thereupon the employer appealed to the Supreme Court of Tennessee, contending that Bryant was not entitled to compensation as he had refused to submit to a surgical operation. The Tennessee Supreme Court in affirming the judgment of the lower court said that it was apparent from the record that the surgeon of the company was either negligent or inefficient and as a result of this negligence the likelihood of a successful operation had decreased and the danger therefrom increased.

Therefore, the company was in no position to insist on an operation at this late date. The court concluded that there was ample

evidence to support the finding of the trial court that the thumb of the petitioner was permanently partially disabled, 75 per cent, and the decree of the circuit court was affirmed.

WORKMEN'S COMPENSATION—MEDICAL, ETC., TREATMENT REFUSED—RELEASE—*American Mutual Liability Insurance Co. et al.* v. *Braden, Court of Appeals of Georgia (July 10, 1929), 149 Southeastern Reporter, page 98.*—Buford Braden, while in the course of his employment with the Southern Brighton Mills, suffered a fracture of the bone in his thigh. He was treated for the injury, but the results were not satisfactory and the employer's doctor recommended an operation, which, according to the testimony, was a major operation and "should be performed only by a skilled man and by no one but a bone specialist." The employer or insurance carrier agreed to the operation only on the condition that it be performed by a certain named physician. Braden refused to accept the tendered operation unless a physician recommended as the only physician capable of performing an operation of this character was employed as a consultant. The employer and insurance carrier refused this request and the Georgia Industrial Commission denied Braden compensation on the ground that his refusal to accept medical aid was unreasonable.

Braden thereupon filed an action in the superior court of Floyd County, Ga., and the court set aside the order of the industrial commission. The insurance carrier appealed to the Georgia Court of Appeals. This court affirmed the decision of the lower court and held that—

The undisputed evidence demands a finding that the injured employee was justified in refusing to accept the operation tendered him by the employer and the insurance carrier, and the industrial commission erred in holding that this refusal was unjustified and in denying compensation.

The appeals court quoted from the opinion of the superior court, in part, as follows:

The law seems to be well settled that an injured employee seeking compensation must submit to an operation which will cure him when so advised by his attending physician, when not attended with danger to life or health, or extraordinary suffering. (Enterprise Fence & Foundry Co. *v.* Majors, 68 Ind. App. 575, 121 N. E. 6.) In a case of this sort "the burden of proof is on the party asserting that an operation to which a reasonable man would submit would probably effect a cure, and that the refusal of the prosecutor to submit to an operation is unreasonable." * * * Applying this rule, the burden would be upon the insurance carrier to show that this operation would probably effect a cure and would not be attended with danger to life

or health, or extraordinary suffering. This they failed to do. * * * So far as the court is able to find, the rule seems to be uniform that the refusal to undergo a major operation is not unreasonable.

WORKMEN'S COMPENSATION — MINOR — DEPENDENT — EMPLOYED PARENTS—*Purity Baking Co.* v. *Industrial Commission et al., Supreme Court of Illinois (April 20, 1929), 166 Northeastern Reporter, page 33.*—The Illinois Industrial Commission awarded compensation to a minor 15 years of age, on account of the death of her mother resulting from accidental injuries received while she was employed by the Purity Baking Co. The award was affirmed by the circuit court, Macon County, Ill., and the company carried the case to the Supreme Court of Illinois for review. The company contended that the mother was not under legal obligations to support her minor child because of a woman's legal status and because the child had another source of support arising from the legal obligations of the father.

The evidence showed the child had always lived with the parents, both of whose earnings were substantially equal. For years the mother had supplied the child with food and clothing and all of the other necessaries, except a home and a portion of the school expenses, which were furnished by the father.

The Illinois Supreme Court affirmed the judgment of the circuit court in sustaining the award of the industrial commission, and said in part as follows:

It is true that at common law the legal status of the mother was such that she was not under legal obligations to support her minor children, where the father was alive and able to do so. The common-law rule has been modified by a number of statutory provisions.

Furthermore, the principal reason for the common-law rule no longer exists. Under the common law all of the earnings and property of the wife belong to the husband. Therefore it was only natural and proper that he should be the one primarily responsible for the support of the children, which has always been regarded as a natural obligation of both parents. Under such circumstances, it would have been idle to place upon the wife obligations that could only be satisfied out of the property of the husband. However, since the wife has become emancipated, and now possesses the full enjoyment of her property and earnings, there is no longer any reason why she should not be held legally responsible for the support of her minor children equally with her husband. This is true particularly in view of the statutory provisions above mentioned.

The further argument of petitioner is that the child is not entitled to compensation for the death of its mother for the reason that it had through its father another source of support. The child was entitled to the support of both parents. It has been repeatedly held that the right to recover for the loss of one source is not affected by the existence of another source of support.

WORKMEN'S COMPENSATION—MINOR—VIOLATION OF STATUTE—LOSS OF MEMBER—INCREASED COMPENSATION—*Tesar* v. *National Ventilating Co. et al., Supreme Court of New York, Appellate Division, Third Department (November 20, 1929), 237 New York Supplement, page 488.*—Frank Tesar, a minor 17 years of age, was injured in 1925 while in the course of his employment with the National Ventilating Co. An award of $3,731 was made against the employer and insurance carrier for 90 per cent loss of use of the left hand. This award was paid. Tesar later filed claim for increased compensation, basing his claim upon section 14a of the New York workmen's compensation law. This section provides that the compensation shall be double the amount otherwise payable, if the injured employee is a minor under 18 years of age employed in violation of any provision of the labor law. It further provides that the employer alone shall be liable and that an age certificate properly issued shall be conclusive evidence that the minor has reached the required age.

The Industrial Board of New York awarded increased compensation, having found that "at the time claimant sustained the accidental injuries herein referred to he was a minor under 18 years of age, employed, permitted, and suffered to work in violation of section 256 of the labor law of the State of New York." The employer appealed the case to the Supreme Court, appellate division, third department, of New York.

The supreme court held that section 256 of the labor law, upon which the industrial board based its decision, required the guarding of machinery but fixed no age limit for workers thereon. The court found Tesar was not employed in violation of any labor law and said, "The employment in which he was injured was lawful for one of his age; a statute which is violated by employment of a minor must be one which forbids his employment, and no provision of the labor law forbids the employment of children over 16 years of age."

To uphold the award Tesar invoked rule 922, as follows:

No minor between the ages of 16 and 18 years shall be employed, suffered, or permitted to work at any machine listed in the industrial code rules for the guarding of point of operation of dangerous machinery unless such machinery is equipped at the point of operation with such a guard as is specified therefor in said rules.

This rule was discarded by the court because it was adopted in 1928, while the injury was sustained in 1925. It could have no force or application in this case.

The award of the industrial board was therefore reversed and the claim dismissed.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—CONSTRUCTION OF STATUTE—LUMP SUM—*Associated Indemnity Corporation* v. *Wilson, Court of Civil Appeals of Texas (October 1, 1929), 21 Southwestern Reporter (2d), page 314.*—Ernest Wilson, a minor of 12 years, was an employee of Metzger Bros., who owned and operated a dairy near Dallas, Tex. On August 25, 1925, Wilson was injured when he fell from Metzger Bros.' wagon while delivering milk in the city of Dallas. This injury resulted in his death. His father, Fred Wilson, filed claim for compensation as sole beneficiary and requested payment in a lump sum. The district court of Dallas County awarded him compensation of $11.25 per week for 360 weeks. The insurance carrier appealed the case to the Court of Civil Appeals of Texas for review.

The appeals court reviewed the evidence and found that the court should review the propositions containing the following contentions:

(1) That the deceased minor, Ernest Wilson, was employed by Metzger Bros. in violation of the child labor law, in that (*a*) said minor was working in or about a factory containing dangerous machinery; (*b*) that he was engaged as a messenger in a city of more than 15,000 population; and (*c*) he was working at 1 a. m., in violation of the law prohibiting him being directed or being permitted to work between the hours of 10 p. m. and 5 a. m. (2) The submission of certain issues and instructions given in connection therewith.

The above contentions were based upon article 1573, Tex. Rev. Crim. Stats. 1925, which reads in part as follows:

> Any person, or any agent or employee of any person, firm or corporation who shall hereinafter employ any child under the age of 15 years to labor in or about any factory, * * * or in messenger service in towns and cities of more than 15,000 population, according to the Federal census, except as hereinafter provided, shall be deemed guilty of a misdemeanor; * * * provided that nothing in this act shall be construed as affecting the employment of children on * * * dairies. * * *

The court ruled the statute had not been violated by Metzger Bros. in employing Wilson. Metzger Bros. was, at the time Wilson received his injuries, engaged in the dairy business within the meaning of that term as used in article 1573 of the statute, and said minor was employed to work at a dairy. The next question considered by the court was whether Wilson was employed in messenger service in violation of the statute. In regard to this question, the court said in part as follows:

> The deceased minor was not employed by Metzger Bros. in messenger service, but was employed to work in or about a " dairy "; part of his duties being to assist in the delivery of milk, which involved taking milk to the house of a customer, gathering empty milk bottles, and taking same back to the milk wagon. This was not work performed in messenger service, but part of the work incident to the

dairy business, which did not involve, in any respect, "messenger service," as that term is commonly understood.

It is "messenger service" and not "delivery service" that is interdicted by article 1573, supra, and said article 1575 applies only to a minor in the employ of a person, firm, or corporation doing a messenger or delivery business sending a child under the age of 17 years in their employ to deliver any message, package, merchandise, or other thing, failing before sending any such child on such errand to first ascertain if such child is being sent or is to be sent to any place prohibited by article 1574, * * * Therefore, a minor employed to work in or about a dairy, delivering its products in a city of more than 15,000 population, is not in violation of either the provisions of articles 1573, 1574, or 1575.

The statute provided, however, that no child under the age of 15 should be permitted to work between the hours of 10 p. m. and 5 a. m. The provisions of this act did not apply to children employed on farms, but applied to all other industries. Wilson was injured at 1 a. m., and it was contended that at that time he was working in violation of the above statute. The court found that "dairies" could be included under the occupation of farming and therefore the work of the minor in relation to the dairy was legal. They went further and found that even if the employment at 1 a. m. was illegal the insurance carrier would be liable, as Metzger Bros. was responsible for the violation of the statute and not the minor, and the contract between Metzger Bros. and the insurance carrier covered all injuries sustained in the course of employment except the injuries specifically pointed out as not being included within the contract. Those excluded did not include such a case as the present injury, and therefore the insurance carrier should be liable for compensation.

The court of civil appeals upheld the charge of the lower court that in determining the compensation the jury might consider any increase in wages the deceased minor might have expected, and cited sections from the statute upholding this view. The court also found the evidence was sufficient to support the request for a payment in a lump sum, as manifest hardship and injustice would otherwise result.

In concluding the opinion the court said:

All propositions not discussed have been carefully considered and, in our judgment being necessarily involved in the propositions discussed, and finding no reversible error in the rendition of the judgment appealed from, same is in all things affirmed.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—DOUBLE RECOVERY—*Dixon* v. *Pequot Manufacturing Corporation et al., Supreme Court of New York, Appellate Division (March 27, 1930)*,

240 New York Supplement, page 572.—This action was brought by William Dixon, a minor employed by the Pequot Manufacturing Corporation, to recover an award under the New York workmen's compensation law. The employer appealed to the Supreme Court of New York from the decision of the State industrial board granting a double award under section 14a of the workmen's compensation law.

It was found that Dixon, a minor lacking five days of being 16 years of age at the time of the accident, " was permitted and suffered to work on a paper-cutting machine in violation of section 146 of the labor law." Section 146 provides that, " No child under 16 years of age shall be employed in operating or assisting in operating any of the following: * * * k. Paper-cutting machines * * *."

The State industrial board found that the boy " was employed as a bundler "; that while " engaged in the regular course of his employment * * * and while working on a paper-cutting machine," his thumb was cut off by the machine, and that the injuries received by him " arose out of and in the course of his employment."

The New York Supreme Court held that Dixon was not permitted or suffered to work in violation of any provision of the workmen's compensation law (sec. 14a) unless there was a violation of the labor law. (Sec. 146.) The court said there " was no violation of section 146 of the labor law under the facts found because that section is not violated unless the child is ' employed ' to operate the machine and the board has found that he was employed as a ' bundler ' and was injured in the course of that employment."

The award of the State industrial board was, therefore, modified by striking out that portion which awarded double compensation against the employer, and as modified was affirmed.

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE—ACCIDENT—PREEXISTING CONDITION—*Skelly Oil Co.* v. *Gaugenbaugh, Supreme Court of Nebraska (May 2, 1930), 230 Northwestern Reporter, page 688.*—Don Gaugenbaugh was employed as a salesman by the Skelly Oil Co. in Omaha, Nebr., under a written contract of employment. He selected Iowa as his territory. On May 20, 1929, in the course of his employment in Harlan, Iowa, while assisting in the installation of equipment, he sustained an accidental injury, the result of which immediately appeared in the form of a hemorrhage in his right groin and leg. He received treatment in Harlan without being afforded any relief from the pain which he was suffering. He thereupon returned to Omaha and remained in the hospital.

Proceeding under the Nebraska workmen's compensation act, he filed claim for compensation and received an award. The employer

brought an action in the district court of Douglas County, Nebr., and a judgment was rendered in favor of the employee. The case was then appealed to the Supreme Court of Nebraska. The employer contended that—

The disabilities of appellee were not caused nor contributed to by any accident, but were due wholly to purpura, which was in truth an occupational disease; second, that no notice, either oral or written, of injury was given as prescribed by section 3056, Comp. Stat. 1922.

The employee contended on the other hand that his condition was due to his inhalation of gas during the course of his employment, and that this was induced by the representations of the oil company to its agents and its patrons that the product was wholly harmless and could be safely inhaled; that as a result of the inhalations thus made, the poisonous effects of the gas produced an " unexpected and unforeseen event happening suddenly and violently with or without human fault and producing * * * objective symptoms of an injury " by accelerating the results of a former accident.

It was contended that as purpura was an occupational disease the employee could not recover under the Nebraska compensation act. However, the court said:

The rule is that " death or injury arising solely as the result of an occupational disease is not compensable under the workmen's compensation act; but, where the result is attributable in whole or in part to an accident, the fact that, but for the accident, the disease of which claimant died would be classed as occupational, will not prevent compensation, which in such case is awarded for the accident, not the disease." (Van Vleet *v.* Public Service Co., 111 Nebr. 51, 195 N. W. 467.) In other words, " it is sufficient to show that the injury and preexisting disease combined to produce disability, and not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement that the accident arise out of the employment." (Gilcrest Lumber Co. *v.* Rengler, 109 Nebr. 246, 190 N. W. 578.) This being true, the employee is entitled to compensation at the rate allowed by the district court, unless, because of lack of notice and failure to comply with the statute in this respect, his rights have been lost, * * *.

The court also held that as the employer knew of Gaugenbaugh's return to Omaha on account of the injury and visited him in the hospital and received reports from the physicians regarding his condition, the failure to give notice did not afford the employer any defense in this action. The decision of the lower court sustaining the award was therefore affirmed.

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE—CAUSAL CONNECTION—BRIGHT'S DISEASE—ACCIDENT—*Gunter* v. *Sharp & Dohme (Inc.) et al., Court of Appeals of Maryland (June 24, 1930), 151*

Atlantic Reporter, page 134.—John E. Gunter was an employee of Sharp & Dohme (Inc.), of Baltimore, Md. He was engaged in the mixing of bichloride and cyanide powders, and had been so employed for three years. He filed application with the Maryland Industrial Accident Commission for compensation, as he had contracted nephritis or Bright's disease, which he contended was the result of an accidental injury, the accident alleged being the inhalation of the fumes or dust arising from bichloride of mercury and cyanide of potassium.

The Maryland Accident Commission made an award to the employee, and the employer and insurer appealed to the Baltimore city court where judgment was rendered in favor of the employer. Gunter thereupon appealed the case to the Court of Appeals of Maryland, contending that the disability was "the result of an accidental injury arising out of and in course of his employment."

The court pointed out that the injury must be an "accidental injury" to be compensable under the Maryland workmen's compensation act as the act does not provide compensation for occupational diseases. In distinguishing between these the court said:

An "accidental injury" is an unforeseen event, occurring without design, while "occupational diseases" arise from causes incident to certain occupations and do not occur suddenly.

Also quoting from the case of the United States Mutual Accident Association *v.* Barry (9 Sup. Ct. 755), where the court instructed:

That if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it can not be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs which produces the injury, then the injury has resulted through accidental means.

In concluding the opinion, affirming the decision of the lower court, the court of appeals said in part:

The claimant himself said that, when he was asked by the superintendent to take a job in the bichloride room, "he saw the danger in it, but the idea of it was you can be careful of anything." It is therefore apparent that there was nothing unexpected or unlooked for in some kind of resulting sickness or discomfort from the occupation. If the illness came on gradually, without any reference to time, suddenness, unexpectedness of cause or event, the disease with which the claimant is now afflicted would not be accidental in its cause. Bright's disease or nephritis may not be common to the employees of such an occupation as that in which the claimant was engaged, but the testimony of his physician gives it that effect, and, in the absence of any other evidence in the record, it is controlling.

There being in the opinion of this court no legally sufficient evidence to show that the disability for which compensation is sought

originated in an accidental injury, and the evidence that it was occupational being undisputed, the judgment appealed from will be affirmed.

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE—LEAD POISONING—*Carmossino's Case, Supreme Judicial Court of Massachusetts (June 26, 1929), 167 Northeastern Reporter, page 350.*—One Salvatore Carmossino, who had been employed by the Bethlehem Shipbuilding Corporation at the plant in Massachusetts for 14 years suffered an attack of lead poisoning on October 28, 1927, and was paid compensation to February 22, 1928, inclusive. He returned to work February 23, 1928, and did light work until March 16, 1928, when he was discharged, due to his weak and sick condition. He proceeded under the workmen's compensation act of Massachusetts and secured a decree for compensation at the rate of $8.43 per week from March 16, 1928, as a result of his partial incapacity for work.

The insurer, the United States Mutual Liability Insurance Co., appealed to the Supreme Judicial Court of Massachusetts. The insurer contended—

That there was no evidence that the employee after March 16, 1928, was partially incapacitated as a result of his former lead poisoning, or that his earning capacity was only $18 a week.

The court reviewed the evidence and the opinions submitted by impartial physicians and Judge Field rendered the opinion affirming the decision of the lower court. He said, in part, as follows:

If the testimony of the employee and this statement of opinion, in spite of testimony conflicting therewith, were believed by the board it could find that the employee was partially incapacitated for work after March 16, 1928, and that there was a causal connection between that condition and the attack of lead poisoning of the preceding October. This evidence if true goes farther in proof of the employee's case than did that in Falco's Case (260 Mass. 74, 156 N. E. 691), or that in Green's Case ((Mass.) 165 N. E. 120.) There is more than a "mere conjecture or surmise."

We can not say that the finding that the earning capacity of the employee was only $18 a week after March 16, 1928, was erroneous. Nothing in this case prevents the application of the rule stated in O'Reilly's Case (Mass.) 164 N. E. 440), that "in the absence of testimony as to the earning capacity of the employee, the members of the board are entitled to use their own judgment and knowledge in determining that question."

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE—PRIOR EMPLOYER'S LIABILITY—CAUSAL CONNECTION—WEAKENED CONDITION—*Santini* v. *Levin et al., Supreme Court of Errors of Connecticut (November 7, 1929), 147 Atlantic Reporter, page 680.*—Alfonso San-

tini on September 20, 1926, suffered a compensable injury from a cement dermatitis under the Connecticut workmen's compensation law. Beginning on September 28, 1926, Levin, the employer, and his insurer entered into a voluntary agreement with Santini by which they were to pay him compensation. This compensation continued until July 5, 1927, at which time the pathological dermatitis was completely healed, and Santini then entered the employment of the New York, New Haven & Hartford Railroad Co., at a varying weekly wage of $19, $20, to $24. He did not go back to work for Levin, as medical experts advised him that a return to his former occupation would result in a recurrence of the cement dermatitis. On April 30, 1928, Santini left the railroad and began work with one Aloisi as a hod carrier. At that time he had no disease. Within a short time, however, he was disabled again from a dermatitis resulting from his occupation. He filed claims for compensation and an award was granted. Appeals were taken from the finding and award of the commission to the Connecticut Superior Court by Levin and by Aloisi. The superior court dismissed the appeal of Levin and sustained that of Aloisi and returned the case to the commission for further action as to the claim against Aloisi. Levin appealed his case to the Supreme Court of Errors of Connecticut. The question involved was—

Whether "a susceptibility to a recurrence of the pathological dermatitis in event of exposure to lime" constitutes a compensable injury; there being no "actual pathological dermatitis" and no "disease."

The court cited its decision in Matore *v.* New Departure Manufacturing Co. (104 Conn. 709, 134 Atl. 259), regarding the necessity for a causal connection, in part as follows:

The fact that injuries, whether from accident or disease, happen contemporaneously or coincident with the employment, affords no basis for an award under our act. Injuries of that nature which arise in the course of the employment, unless they also arise out of the employment, do not come within our act. * * * That an injury arose out of the employment can never be held unless there is found a causal connection between the injury and the employment, or the conditions under which the employee is required to carry on his work. * * * An injury is proximately caused by the employment when the chain of causation between it and the employment is so closely related as to be directly caused by it, or by the conditions under which it is required to be performed.

In concluding the court said:

Throughout his employment by the railroad Santini "was subject to a susceptibility to a recurrence of the pathological dermatitis in event of exposure to lime; this susceptibility was attributable in part to the prior exposure and to the actual pathological dermatitis incurred while in the employ of Levin."

There is thus found a causal connection between the lessened wages Santini was forced to take and the susceptibility to a recurrence of the disease he had incurred in his employment with Levin, and therefore this susceptibility arose in part from that employment, and hence arose out of it as a result of the disease incurred in it.

Similar questions were involved in a case where a coal miner fell down a manway and was severely injured. He received compensation and treatment for three months, during which time the doctor made no diagnosis of tuberculosis. Shortly thereafter he returned to work and worked for a period of 13 months, and then developed pulmonary tuberculosis. The Supreme Court of Pennsylvania affirmed a judgment granting an additional award of compensation on the ground that the present disability was due to a latent condition of tuberculosis "lit up as result of the fall," and therefore a proximate result of the first injury. (Maurer *v.* South Penn Collieries Co. et al. (1929), 144 Atl. 822.)

WORKMEN'S COMPENSATION—PAYMENT OF DEBTS FROM AWARD—CONSTRUCTION OF STATUTE—*Dunseath* v. *Nevada Industrial Commission, Supreme Court of Nevada (December 2, 1929), 282 Pacific Reporter, page 879.*—Harry Dunseath, an attorney at law, brought action against the Nevada Industrial Commission to compel the commission to pay him the sum of $600 out of an award to an injured workman. In August, 1917, the commission awarded the workman, T. H. Lynch, compensation for total disability for a period of one year. Thereafter the commission determined he was totally disabled and awarded him the total amount of compensation that the law authorized. Lynch contended that he was entitled to compensation allowed under the law for permanent total disability but the contention was refused by the commission. Later, he employed Dunseath to appeal the case to the District Court of Nevada, agreeing to pay him as full compensation for his services $600 out of the amount recovered in the action. The district court gave Lynch a judgment for the sum of $50 per month during his life, and the commission paid Lynch on account of the judgment the sum of $350. A controversy arose between Lynch and Dunseath regarding the fee agreed to be paid, and Lynch refused to carry out his agreement to pay Dunseath the $600.

Dunseath thereupon filed a declaration of attorney's lien in the district court, Ormsby County, Nev., and he began action to impose this lien upon the judgment Lynch recovered. The district court rendered judgment in favor of the Nevada Industrial Commission and held that a contract for compensation of the attorney out of the moneys of the award was void under the provisions of section 28 of the Nevada industrial insurance act (Stat. 1913, ch. 111) as

amended by Statutes 1915, at page 291 (ch. 190, sec. 10). The section, in part, reads:

Compensation payable under this act, whether determined or due, or not, shall not, prior to the issuance and delivery of the warrant therefor, be assignable; shall be exempt from attachment, garnishment, and execution, and shall not pass to any other person by operation of law.

The case was appealed to the Supreme Court of Nevada on the contention that the provisions of the section referred to above were not applicable in the case at bar, where an enlarged compensation has been awarded by the court but applied only to an original award made by the commission. The court did not accept this view and held that "the terms of the section are clearly against it. The exemptions and prohibitions found in the section apply to all 'compensation payable under the act.'" The court also held there was no impairment of the contract for the law was enacted long prior to the contract in question. The judgment of the district court denying the lien to the attorney was therefore affirmed.

WORKMEN'S COMPENSATION — POWERS OF INDUSTRIAL ACCIDENT BOARD—MEDICAL AND HOSPITAL SERVICES—UNUSUAL CASE—*Meuse's Case, Supreme Judicial Court of Massachusetts (January 7, 1930), 169 Northeastern Reporter, page 517.*—George A. Meuse was severely injured while in the course of his employment. He filed claim for compensation and received an award from the Industrial Accident Board of Massachusetts. It was also decided that his case was an unusual one, entitling him to medical and hospital services for a period longer than two weeks, under General Laws, Massachusetts, chapter 152, section 30.

After Meuse had received the maximum compensation of $4,000 under General Laws, chapter 152, section 30, as well as the specific compensation provided for, and in addition there was paid the sum of $9,033.52 for medical, hospital, and nursing services, the injured employee filed claims for continued payments for hospital and medical services after the statutory period for payment of compensation had passed.

Three members of the industrial accident board ordered the insurer to continue to furnish medical and hospital services for the employee, and upon appeal the superior court, Suffolk County, affirmed this decree. The insurance carrier then appealed to the Supreme Judicial Court of Massachusetts. This court held that the industrial accident board did not have authority under the workmen's compensation act to require the insurer to furnish medical services for an injured employee in an unusual case when the statutory period for the pay-

ment of compensation had ended and the full amount of compensation had been paid. The court therefore reversed the decision of the lower court affirming the decree of the three members of the industrial accident board, and said in part as follows:

Before the amendment (Stat. 1914, ch. 708, sec. 1) medical and hospital services to be furnished by the insurer in all cases arising under the workmen's compensation act were limited to two weeks, and were further limited to the first two weeks after the injury (Stat. 1911, ch. 751, sec. 5). The amendment entitled the injured employee to two weeks' hospital and medical services from the time of his incapacity if he were not immediately incapacitated by his injury. It also made a further change by enacting that medical and hospital services should be furnished by the insurer "in unusual cases, in the discretion of the board, for a longer period."

In our opinion the words "for a longer period" gave no right to the industrial accident board to require the insurer to pay for these services after the statutory compensation period has passed and the insurer has paid in full the compensation to which the employee was entitled. The phrase "for a longer period" means a period longer than two weeks; a period which is to continue for such a part of the compensation period as the industrial accident board or department should in its discretion determine. The board could entirely relieve the insurer of these payments even in an unusual case, if in the exercise of a wise discretion it so determined, or it could order such payments during the whole period. But the jurisdiction of the board was entirely at an end in so far as hospital and medical services were concerned when the compensation period was passed. * * * To impose the burden of paying for hospital and medical services for an uncertain time after all compensation payments were made would be too indefinite to enable it to be ascertained with any degree of accuracy what these expenses were.

We appreciate that this is a hard case; the injury is serious and no amount of money, nor the payments allowed by the statute, will compensate the employee; but that affords no justification for reading into the statute a meaning which it does not contain. The hardship of the employee does not confer jurisdiction on the board, and if the legislature had intended to extend the time of payment in an unusual case beyond the compensation period it could have used language to make this meaning plain. It did not indicate any such intention; it meant what it said, that hospital and medical bills in unusual cases should be borne by the insurer for a longer period than two weeks in the discretion of the board, without any intimation that this longer period was to pass beyond the compensation period.

WORKMEN'S COMPENSATION—PUBLIC EMPLOYEE—CONSTRUCTION OF STATUTE—*Industrial Commission of Ohio* v. *Rogers, Court of Appeals of Ohio (June 24, 1929), 170 Northeastern Reporter, page 600.*—Mary Rogers was injured at the courthouse in Hamilton County, Ohio, while engaged in jury service. She filed her applica-

tion with the Industrial Commission of Ohio for compensation under the State workmen's compensation law. The industrial commission denied compensation and she filed an appeal in the court of common pleas of Hamilton County, Ohio. A verdict was returned in her favor and a judgment was entered. The Ohio Industrial Commission appealed from the judgment to the Ohio Court of Appeals, contending that jury service was not within the protection of the law entitling a State employee to a share in the State insurance fund. The part of the Ohio statute relied upon was section 1465–61, General Code, which reads in part as follows:

> The terms "employee," "workman," and "operative" as used in this act (Gen. Code, sec. 1465–45 et seq.) shall be construed to mean:
> 1. Every person in the service of the State, or of any county, * * * under any appointment or contract of hire, * * * except any official of the State, or of any county. * * *

The appeals court held that a juror was engaged in the service of the State and of the county; that his selection and service was provided for by the legislature and the service was paid for out of county funds; and that the service being by appointment, plaintiff, Mary Rogers, would therefore be protected by the workmen's compensation law unless she was within the exception provided in the statute, to wit: "except any official of the State or of any county."

The court held that she was not in any respect an "official of the State or of any county" and was clearly within the right to compensation under the statute. The decision of the lower court awarding compensation was therefore affirmed.

This case was carried on appeal to the Supreme Court of Ohio, which court on March 26, 1930, affirmed the judgment of the court of appeals holding that a juror was not an officer of the State or county but was in the county service under appointment of hire. The supreme court held further that the provision of section 1465–89, General Code, for a unanimous approval by the industrial commission before such commission is authorized to pay "actually necessary medical, nurse, and hospital services and medicines" in excess of $200, prior to the amendment to section 1465–90 of March 26, 1925 (111 Ohio Laws, p. 227), had no application to the determination of such an issue by the court of common pleas upon appeal to that court from an order of the industrial commission denying such compensation. (Industrial Commission of Ohio *v.* Rogers, Supreme Court of Ohio, March 26, 1930, 171 N. E. 35.)

WORKMEN'S COMPENSATION—PURPOSE OF EMPLOYER'S TRADE OR BUSINESS—ASSAULT—PLACE OF INJURY—*Pendl* v. *Haenel et al., Supreme Court of New York, Appellate Division (March 27, 1930), 241*

New York Supplement, page 59.—Leo Pendl was superintendent of an apartment house in which he and his family lived. He died as the result of a stab wound inflicted by an unidentified person. The owner of the building directed a Negro, who appeared to be seeking employment, to the basement where Pendl and his wife were engaged in their work. The Negro first saw the wife and was directed to the place where her husband was working. He wandered about the basement with no apparent mission and after a time again approached the wife, displaying a long knife in his belt. She screamed for help and the husband pursued the Negro out of the building, and Pendl was stabbed.

The widow filed claim for compensation and the award was denied by the State Industrial Board of New York on the ground that Pendl had abandoned his employment. The board decided that in continuing the pursuit into the street there was an abandonment of the employment for private personal vengeance, and hence the widow was not entitled to compensation for his death.

The widow appealed to the New York Supreme Court, and in reversing the decision of the State industrial board, the court said:

> We are not to determine whether the pursuit was negligent or even sensible, but only whether it was in connection with the master's business. Decedent had to deal with a vicious criminal who came into the building of which he was superintendent. Persons lawfully there might be injured, or the property of his employer destroyed or stolen. The intruder might have had a design to ascertain the plan of the interior of the building in preparation for a later burglarious or felonious entrance. The continuation of the pursuit for 150 feet beyond the basement door was not an abandonment of the employment.

WORKMEN'S COMPENSATION—REVIEW—POWERS OF COMMISSION—PREEXISTING CONDITION—HEART DISEASE—*Martin* v. *State Compensation Commissioner, Supreme Court of Appeals of West Virginia (September 17, 1929), 149 Southeastern Reporter, page 824.*—Walter Martin, apparently in good health, began work in the mine of Kelly Creek Colliery Co. on the morning of June 14, 1928. About noon of that day he requested his son-in-law, who was also working in the mine, to assist him in moving a loaded mine car, weighing about 2½ tons, a distance of 40 feet, so he could repair the track where he was working. They put their shoulders to the car and moved it the desired distance. Martin complained of a pain in his chest. He soon began gasping and in a few minutes expired. As the result of an autopsy the following day the doctors concluded his death was caused by heart disease.

Upon investigation the workmen's compensation commissioner of West Virginia refused to grant an award on the ground that Mar-

tin's death was caused by heart disease and not by injury received in the course of and resulting from his employment. The widow appealed the case to the board of appeals, where the order of the commissioner was sustained; and from that order she appealed the case to the Supreme Court of Appeals of West Virginia.

It was argued that the widow took the wrong course in appealing the case to the appeal board, because the commissioner had denied compensation and had made no award. In this view the court did not concur, saying in part:

The appeal board took jurisdiction, and the commissioner, by Mr. Graham, one of his departmental heads, appeared and assisted in the presentation of the case to the appeal board. No objection seems to have been made to the jurisdiction of that board; and it is upon the evidence there taken that the case is now presented here. There was a consistent effort on the part of the widow to assert her claim; and we decided last week in the case of Conley *v.* State Compensation Commissioner (149 S. E. 666), that under circumstances of this character the claimant should not be deprived of her appeal.

In continuing the opinion the court said:

In reviewing the action of the compensation commissioner, this court takes cognizance of questions of law only. (Poccardi *v.* Public Service Commission, 75 W. Va. 542, 84 S. E. 242.) We do not decide upon questions of controverted fact; and where there is evidence to sustain the ruling of the commissioner it is rarely that such ruling will be disturbed, unless it is plainly against the law. The commissioner is selected for his peculiar fitness for the position and acts impartially for all concerned. And where his opinion and judgment upon controverted facts is buttressed by the appeal board composed of his excellency, the commissioner of labor, and the head of the medical department, we think such finding should have a force somewhat similar to the verdict of a jury on questions of fact. As Judge Litz said in the case of Heaton *v.* Compensation Commissioner (106 W. Va. 563, 146 S. E. 368): "The finding of fact by the compensation commissioner should be treated as the finding of a judge or the verdict of a jury and will not, as a general rule, be set aside if there is substantial evidence to support it."

After citing a number of cases where the industrial accident board denied compensation and the court on appeal refused to disturb the judgment of the board, the court said, in part, as follows:

There is a great mass of decisions involving claims where the applicant was afflicted with heart disease at the time of the alleged injury. * * * Without analyzing and discussing those decisions it may be deducted therefrom that compensation will not be awarded where the employee has chronic heart trouble which has reached such a stage that death is liable to ensue at any time, from any exertion, and death came while he was doing the ordinary work of his employment.

There is substantial evidence in the instant case to support the judgment of the compensation commissioner and that of the appeal

board; and although we might have found a different conclusion from the evidence had we been called to do so, sitting in the first place, under the well-settled principle enunciated in many of our cases, illustrative of which is Judge Litz's opinion in Heaton *v.* Compensation Commissioner (106 W. Va. 563, 146 S. E. 368), we will not disturb the finding of the appeal board.

WORKMEN'S COMPENSATION—RIGHTS OF EMPLOYEE—THIRD-PARTY LIABILITY—CONSTRUCTION OF STATUTE—*Hunt* v. *Bank Line (Ltd.) et al., Circuit Court of Appeals, Fourth Circuit (October 15, 1929), 35 Federal Reporter (2d), page 136.*—John W. Hunt was a stevedore employed by the Atlantic Coast Shipping Co. He was injured while unloading a steamship owned and operated by the Bank Line (Ltd.). His injury was reported to the United States Employees' Compensation Commission by his employer and he was paid compensation in accordance with the provisions of the longshoremen's and harbor workers' compensation act. He requested his employer to bring suit for damages under section 33 of that act (33 U. S. C. A., sec. 933) against the owner of the vessel, but the employer refused to do so.

Hunt alleged that he had a substantial interest in having such suit instituted and that the employer would not institute the suit because its insurance carrier was also the insurance carrier of the vessel.

The section of the act upon which libelant relies provides that, where some person other than the employer is liable in damages for the injury to the employee, acceptance of compensation by the employee shall operate as an assignment to the employer of the employee's right to recover damages against such third person, and that, in case of recovery thereunder, the employer, after retaining an amount sufficient to reimburse him for the compensation and benefits paid to the employee, together with the expenses incurred in the proceeding, shall pay any excess to the employee. See subsections (b) and (e) of section 33, 33 U. S. C. A., section 933 (b) (e).

The court, however, after considering all the subsections of section 33, said:

When all of these sections are considered together, it is clear that the intention of the act is to require the employee who claims to have been injured by the negligence of a third person to elect whether he will accept compensation under the act or proceed against such third person. If he elects to receive the compensation, his cause of action is transferred to his employer and he has no further interest therein, unless the employer recovers more than enough to reimburse him for the compensation paid with costs and expenses, in which event the excess belongs to the employee. If he desires to assert his cause of action against the third person, he may

do this without forfeiting his right to compensation, provided he gives the notice and files proceedings as the statute provides.

The United States District Court for the District of Maryland had rendered a prior judgment against Hunt, and upon appeal to the Circuit Court of Appeals, Fourth Circuit, this judgment was affirmed, upon the grounds stated above. In continuing the opinion the Circuit Court of Appeals said:

As to the provision that the employee who has accepted compensation shall be entitled to any excess over reimbursement which the employer may recover in his suit against a third person, we think it clear, in the light of the other provisions which we have discussed, that this was not intended to give to the employee who has accepted compensation any right or interest in, or control over, the cause of action which is assigned by the act to the employer. It is the employer, to whom the cause of action is assigned upon payment of compensation, who is given the right of deciding whether he will hazard the costs and expenses of suit. It is the employer who is given the power to determine whether a compromise shall be accepted or not. And the employee, having accepted the compensation which the law has fixed, has no further interest in the matter, unless the employer decides to sue and succeeds in recovering more than is necessary for his reimbursement. Then, and not until then, the interest of such employee arises. And this is given by the statute to the employee, not, we think, because he is deemed to have any interest in the cause of action, but to avoid the unseemly spectacle of the employer realizing a profit from his injury.

WORKMEN'S COMPENSATION—SUBCONTRACTOR—COVERAGE—DOUBLE RECOVERY—*Swartz* v. *Conradis, Supreme Court of Pennsylvania (November 25, 1929), 148 Atlantic Reporter, page 529.*—W. L. Swartz was employed by August Conradis, a subcontractor engaged in plastering under a contract with a general contractor. He was severely injured while engaged at his work by a ceiling which fell, and received compensation for this injury from the subcontractor. He then sued the principal contractor in the court of common pleas, Allegheny County, Pa., for failing to provide a safe place to work. This court rendered a verdict for the principal contractor, and held that an employee of a subcontractor could not maintain a common-law action of trespass against the general contractor without showing as a part of his case that the general contractor had rejected the compensation act. The case was appealed by the employee to the Supreme Court of Pennsylvania. In discussing the scope of the workmen's compensation act the court said:

Section 203 of article 2 (Pa. Stat. 1920, sec. 21926) makes the principal contractor liable to a subcontractor's employee as though he had employed him, and section 302 (b) provides that the general contractor "shall be conclusively presumed to have agreed to pay

to such laborer * * * compensation in accordance with the provisions of article 3, unless the employer (principal or general contractor) shall post in a conspicuous place upon the premises * * * a notice of his intention not to pay such compensation." In the same section the employee agrees to be bound by the act unless he takes steps to reject it.

When the statutory employer accepts article 3 (Pa. Stat. 1920, sec. 21983 et seq.), he is relieved of all liability for compensation at common law. Section 303 (Pa. Stat. 1920, sec. 21990) makes the "agreement (referred to in sec. 302) * * * operate as a surrender by the parties thereto of their rights to any form or amount of compensation * * * or to any method of determination thereof other than as provided in article 3 of this act."

Under the act, as quoted above, the contractor when he accepts article 3, may agree with the subcontractor that the latter carry insurance under section 302 (b) of article 3. The court said this was done in the present case and the subcontractor carried compensation insurance according to the agreement; and under it he paid Swartz the compensation provided for by the act. Under the agreement section 303 then became applicable and the general contractor was relieved. The court concluded that "this did not mean that the general contractor rejects the act, for such agreement is possible only if the act is accepted."

The judgment of the lower court was therefore affirmed and the action against the general contractor was dismissed.

The Supreme Court of Pennsylvania also held in another case that a contractor refusing to be bound by the workmen's compensation act and thereby not required to carry compensation insurance for his own employees and for employees of subcontractors, under articles 2 and 3 of the act, must respond in damages under common-law liability for any injury to a subcontractor's employee through the negligence of his servant. The fact that he may be bound by section 302 (a) of the act to pay compensation to his own employees will not alter such liability. (Robinson *v.* Atlantic Elevator Co. (1930), 148 Atl. 847.)

WORKMEN'S COMPENSATION—THIRD-PARTY LIABILITY—CONSTRUCTION OF STATUTE—*Robinson* v. *McHugh et ux., Supreme Court of Washington (August 12, 1930), 291 Pacific Reporter, page 330.*—David T. Robinson was employed by the city of Tacoma, Wash., as a lamp trimmer. On April 19, 1929, while in the performance of his duty, he ascended a 12-foot ladder placed against a light post on South Commerce Street, in Tacoma. When he had reached a position on the ladder about 10 feet above the ground a gasoline shovel, owned and operated by Frank McHugh, struck the light post with such force as to throw Robinson to the pavement, thereby injuring him.

Robinson elected to sue the third party rather than take compensation under the Washington workmen's compensation act, and filed suit against Frank McHugh on July 3, 1929. Twenty days prior, however, the workmen's compensation act had been amended to read in part as follows:

Provided, however, That if the injury to a workman is due to the negligence or wrong of another not in the same employ, the injured workman * * * shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the State for the benefit of the accident fund; * * * *Provided, however*, That no action may be brought against any employer or any workman under this act * * * if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under this act. Any such cause of action assigned to the State may be prosecuted or compromised by the department, in its discretion. (1929 Session Laws, ch. 132, p. 325, sec. 1.)

The superior court, Pierce County, Wash., held that the amended section of the act applied to the case, and as the moving of machinery was listed as an extrahazardous occupation Robinson could not maintain this suit. The case was appealed to the Washington Supreme Court, where the decision of the lower court was affirmed. The court said in part as follows:

Where a tort action can be brought only by virtue of a statute, there can be no vested right therein, and the legislature may take away the right at any time. That it was the intention of the Legislature to take away the right of action can hardly be questioned. The language itself providing that "no action may be brought" would so indicate. The subsequent language in the act that "this act shall not affect any appeal pending or right to appeal existing, at the time this act shall take effect," further accentuates the idea that the legislature intended to cut off all civil actions such as this from the time the amendatory act became effective. We can reach no other conclusion than that this action, not having been brought prior to June 12, 1929, is effectually barred by the statute of 1929, and the demurrer was, therefore, properly sustained.

WORKMEN'S COMPENSATION—THIRD-PARTY LIABILITY—ELECTION—TEMPORARY MEDICAL SERVICES—*City of Nashville* v. *Latham, Supreme Court of Tennessee* (*May 24, 1930*), *28 Southwestern Reporter* (*2d*), *page 46*.—R. A. Latham, while delivering ice for his employer, the Cumberland Ice & Coal Co., in the city of Nashville, Tenn., received an injury due to the defective condition of the street. He sued the city and was awarded a judgment of $150 in the circuit court. Upon appeal to the court of appeals the judgment of the lower court was reversed and the action dismissed upon the ground that Latham

had already accepted benefits under the Tennessee workmen's compensation act (Laws 1919, ch. 123, as amended). Latham thereupon appealed to the Supreme Court of Tennessee for a review of the case.

It appears that when Latham was injured he was carried to the company doctor, who dressed his wounds and thereafter treated him several times. The injury prevented Latham from working for six days, and under the Tennessee workmen's compensation statute no compensation was payable for the first seven days. Latham, therefore, was not entitled to compensation and received none further than medical attention, which the court of appeals held was an election to proceed under the act and a bar to a common-law action against the city.

After reviewing the evidence the Tennessee Supreme Court reversed the decision of the court of appeals, saying in part:

In our opinion the legislature did not intend that the term "compensation payable" should embrace temporary medical service rendered, which is apart from or in addition to the sums payable under the act. Medical services are not "payable" but are "performed" or "rendered." The language of the statute is that the employee may not "collect" from both employer and third person who is at fault. It would be inapt to refer to the temporary medical attention as having been "collected" by the injured employee. The word "collect" in the context implies the act of payment and reception of money. (American Mutual Liability Ins. Co. *v.* Otis Elevator Co., 160 Tenn. 248, 23 S. W. (2d) 245.)

When an accident occurs an employee can not ordinarily know how long his disability will continue, and the acceptance of temporary aid from his employer should not be construed as an election to take under the compensation act, unless such was his manifest intention.

Here the employee has collected nothing from his employer; hence he can proceed to judgment against the city and collect from it if he chooses to do so.

The conclusions announced herein harmonize sections 14 and 25 of the act and work no injustice to any of the parties.

WORKMEN'S COMPENSATION—THIRD-PARTY LIABILITY—RELEASE—SUBROGATION—*Jolley* v. *United Power & Light Corporation, Supreme Court of Kansas (July 5, 1930), 289 Pacific Reporter, page 962.*—Frank Jolley was in the employ of the United Telephone Co. He was employed on the telephone lines of that company and on August 30, 1928, went to an underground manhole for the purpose of doing certain repair work. While working in this manhole a helper handed him a torch and an explosion followed. Jolley was badly burned and was taken to the hospital. Both Jolley and his employer were under the Kansas workmen's compensation law. The telephone company paid him his wages after the injury and until he returned to

work on November 30, 1928. The doctor's bill and hospital bill were also paid. Following Jolley's return to work he entered into a written agreement with the company waiving all rights to workmen's compensation, in consideration of which the telephone company waived its right of subrogation to any claim for damages against any third person.

Jolley later filed suit against the United Power & Light Corporation, alleging that the accident was due to the negligence of the company in allowing gas to escape. The district court, Dickinson County, Kans., rendered judgment in favor of Jolley. The gas company thereupon appealed the case to the Kansas Supreme Court, contending that as the employee had failed to give written notice to his employer electing to sue the third party within 90 days, the cause of action had become vested in the telephone company.

As to the effect of the agreement between the employer and employee, the Kansas Supreme Court said:

No matter what they may do, the liability of the third party can not be increased nor diminished by any action of theirs. The third party is in no way prejudiced by the failure to observe the provisions of the statute. The employer and the employee may, if they see fit, waive the 90-day provision in the statute, and, so long as they are satisfied with their dealings as between themselves, the matter is of no concern to the third party who has wrongfully injured the employee. We hold, therefore, that the contract of February 1, 1929, made between the employer and the employee, is valid, and that the plaintiff had a right to maintain this action.

The court also found the gas company guilty of negligence, in that the gas had been escaping for some time, and the company knew or should have known there was a hole in the gas main.

The judgment of the lower court awarding damages was therefore affirmed.

WORKMEN'S COMPENSATION—THIRD-PARTY LIABILITY—SECOND INJURIES—INDEPENDENT CONTRACTOR—*Culbertson* v. *Kieckhefer Container Co., Supreme Court of Wisconsin (December 4, 1928), 222 Northwestern Reporter, page 249.*—Andrew J. Culbertson was injured through the negligence of an employee of the Kieckhefer Container Co. while he was employed by an independent contractor installing a sprinkler system in the company's plant. The injury was caused by the falling of a roll of paper into the passageway along which he was walking. It was the custom of the workers to give warning whenever the crane was moving rolls of paper over the passageway. The warning was given in this instance but not in time to avoid injuring Culbertson.

The circuit court for Milwaukee County, Wis., awarded a judgment in favor of Culbertson, and the jury assessed $16,150 as damages, $1,000 of which was assessed as compensation for a second injury received while he was attempting to do work for another employer.

The Kieckhefer Container Co. appealed the decision of the circuit court to the Wisconsin Supreme Court for review. The court, in affirming the decision, said in part as follows:

The workmen's compensation act gives the plaintiff no right to compensation from the defendant. * * * The plaintiff was not an employee of the defendant company. There was no contract, either express or implied, which required him to serve the defendant company. He was employed by an independent contractor that had exclusive control over the men whose duty it was to complete the job specified in the contract. The defendant had no control over the plaintiff and no right to demand service of him.

A consideration of all the statutes that bear on the question of the relationship of the parties leads to the conclusion that the plaintiff had no right to claim compensation of the defendant, and that his only means of securing redress of the defendants was by this common-law action for damages.

The appellant relies upon the fact that his earnings have at times been as large after the injury as prior to the accident here in question. This situation is explained by the fact that his former employer has continued him as a foreman in charge of a crew of men, on condition that labor costs on jobs be kept down to the same level as before he sustained the injury, and when he worked regularly with the men under him. It appears that his fellow employees, out of sympathy for their unfortunate coemployee, have thus far so expedited the work that they have kept down the labor costs and enable the plaintiff to retain his position as foreman. But it is manifestly uncertain how long the men will continue to do the work of the plaintiff so as to enable him to hold his job. The defendant can not ask to have the damages assessed against it reduced, because these men are making this contribution to their fellow workman.

In regard to the $1,000 damages for the second injury the court said that the injury was proximately caused by the negligence of the Kieckhefer Container Co., and as his employer failed to prosecute the company under the statute Culbertson was now entitled to enforce this liability.

WORKMEN'S COMPENSATION INSURANCE — ELECTION — DAMAGES — BURNS—*Moen* v. *Melin*, *Supreme Court of North Dakota* (*March 17, 1930*), *231 Northwestern Reporter*, *page 283*.—Ida Melin was a beauty specialist and chiropodist, maintaining an office in Fargo, N. Dak. She employed Ida Moen as a helper and assistant. As part of the routine of her work, the helper frequently prepared lunch

in the office for her employer and herself, and such others as might be invited.

On September 7, 1927, while in the course of her employment she started to prepare lunch. In doing this she used a contrivance intended to employ "canned heat." Instead of canned heat, however, wood alcohol was used as a fuel. In some way this contrivance was tipped over and the burning alcohol was spilled on her, burning her severely.

The employer had not complied with the workmen's compensation act of North Dakota and so she was not protected under it. Ida Moen filed an action in the district court, Traill County, N. Dak., against Ida Melin to recover damages and a judgment was rendered in her favor. The employer thereupon appealed to the Supreme Court of North Dakota, challenging the sufficiency of the evidence to sustain the verdict and specifying numerous errors. In considering these different allegations of the employer the court said:

However, the complaint also alleges that the defendant had failed to comply with the provisions of the workmen's compensation act and pay the premiums required to be paid by her as an employer under it. Though the defendant in her answer denied any negligence on her part and pleaded negligence on the part of the plaintiff as the cause of the accident, she at no time attempted to define the issues and confine the plaintiff in her proofs to the common-law cause of action. * * * The trial court at all times considered the action as one to recover under the compensation act and in his charge to the jury instructed on that theory. The pleadings and proofs justify that theory. The fact that the complaint also alleges negligence on the part of the defendant will not alone warrant a holding to the contrary. We must consider the case then as one brought by an employee to recover against her uninsured employer pursuant to the provisions of section 11 of the act (sec. 396 a 11, Supplement). This section declares that uninsured employers shall be "liable to their employees for damages suffered by reason of injuries sustained in the course of employment." Viewed in this way the plaintiff made her case when she established by her evidence that she was employed by the defendant in a hazardous employment; that she was injured in the course of such employment; that the defendant had failed to comply with the provisions of the act in the way of paying the premiums by it required; and the amount and extent of the damages she suffered on account of her injuries. Though, as the defendant contends, there is no proof of negligence on the part of the defendant, nevertheless the failure of proof in that respect does not defeat the plaintiff's cause of action. She is liable regardless of fault.

In discussing the liability of a noncomplying employer, the court cited Fahler *v.* City of Minot (49 N. Dak. 960, 194 N. W. 695), in which the court said:

Since section 11 makes the sole criterion of the liability of a noncomplying employer the occurrence of injury in the course of em-

ployment, we think the act must be construed as placing the employee of such an employer in the same position he would have occupied had his employer complied with the act, except that such employee's claim is necessarily subject to the hazard of financial responsibility. Also, his damages may be adjusted by the legal machinery for arriving at compensation instead of by the workmen's compensation bureau.

The court considered the errors assigned and held the particular matters alleged did not constitute error, and the decision of the district court was therefore affirmed.

WORKMEN'S COMPENSATION INSURANCE—EXCLUSION OF PART OF EMPLOYEES—CONSTRUCTION OF STATUTE—LIMITED POLICY—*Ocean Accident & Guarantee Corporation (Ltd.)* v. *Industrial Accident Commission et al., Supreme Court of California (September 17, 1929), 280 Pacific Reporter, page 690.*—The American Mercury Corporation secured a standard workmen's compensation policy from the Ocean Accident & Guarantee Corporation covering the corporation's liability at its Oceanic mine near Columbia, Calif. The policy stated that employees other than those employed at the Oceanic mine were not covered by the policy. William Jones, an employee, was injured while employed at the company's mine located at Keene, Calif., and the California Industrial Commission made an award in his favor. This action was brought by the insurance carrier against the commission to annul the award on the ground that the policy did not cover the miners employed at the Keene mines.

The supreme court annulled the award of the commission, as it found the intention of the insurance carrier and the assured was to exclude from the field of coverage of the policy any operations carried on by the assured at any point other than at its Oceanic mine. In regard to the contention made by the commission that the policy became an unlimited policy through failure of the insurer to print on it "Limited compensation policy" and to print the exceptions in bold type, the court said this failure did not make the policy an unlimited policy so as to cover employees not working at the place specified. The court cited previous decisions in which it held that the limited policies as outlined in section 31 (a) of the workmen's compensation act applied only to those policies containing limitations on amounts of compensation payable.

The Supreme Court of California in a case held that a workmen's compensation insurance policy covering injuries sustained by employees legally employed by employer did not cover employees illegally employed and that the policy covering only those legally employed was not a limited policy as outlined in section 31 (a) of the workmen's compensation act. (Stat. 1917, p. 831.) (Maryland Casualty Co. *v.* Industrial Accident Commission et al. (1929), 280 Pac. 690.)

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, 444, 517, and 548—years 1912 to 1930, inclusive.

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LIST OF BULLETINS OF THE BUREAU OF LABOR STATISTICS

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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.

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*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 on 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. 468. Trade agreements, 1927.
No. 481. Joint industrial control in the book and job printing industry. [1928.]

Cooperation.

No. 313. Consumers' cooperative societies in the United States in 1920.
No. 314. Cooperative credit societies (credit unions) in America and in foreign countries. [1922.]
No. 437. Cooperative movement in the United States in 1925 (other than agricultural.)
*No. 531. Consumers', credit, and productive cooperative societies, 1929.

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 Employment Managers' Conference held at Minneapolis, Minn., January 19 and 20, 1916.
*No. 202. Proceedings of the conference of Employment Managers' Association of 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.
No. 520. Social and economic character of unemployment in Philadelphia, April, 1929.

Employment and unemployment—Continued.

No. 542. Report of the Advisory Committee on Employment Statistics. [1930.]
No. 544. Unemployment-benefit plans in the United States and unemployment insurance in foreign countries.

Foreign labor laws.

*No. 142. Administration of labor laws and factory inspection in certain European countries. [1914.]
No. 494. Labor legislation of Uruguay. [1929.]
No. 510. Labor legislation of Argentina. [1930.]
No. 529. Workmen's compensation legislation of Latin American countries. [1930.]

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*No. 158. Government aid to home owning and housing of working people in foreign countries. [1914.]
No. 263. Housing by employers in the United States. [1920.]
No. 295. Building operations in representative cities in 1920.
No. 545. Building permits in the principal cities of the United States in [1921 to] 1930.

Industrial accidents and hygiene.

*No. 104. Lead poisoning in potteries, tile works, and porcelain enameled sanitary ware factories. [1912.]
No. 120. Hygiene of painters' trade. [1913.]
*No. 127. Danger 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 the committee on statistics and compensation insurance costs of the International Association of Industrial Accident Boards and Commissions. [1916.]
*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. The safety movement in the iron and steel industry, 1907 to 1917.
No. 236. Effects of the air hammer on the hands of stonecutters. [1918.]
*No. 249. Industrial health and efficiency. Final report of British Health of Munitions 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, 1910–1919.
No. 306. Occupation hazards and diagnostic signs: A guide to impairments to be looked for in hazardous occupations. [1922.]
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. 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.
No. 460. A new test for industrial lead poisoning. [1928.]
No. 466. Settlement for accidents to American seamen. [1928.]
No. 488. Deaths from lead poisoning, 1925–1927.
No. 490. Statistics of industrial accidents in the United States to the end of 1927.
No. 507. Causes of death, by occupation. [1929.]

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, 1920–1924.
No. 399. Labor relations in the lace and lace-curtain industries in the United States. [1925.]
No. 534. Labor conditions in the Territory of Hawaii, 1929–1930.

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 laws of the United States: Construction and operation [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. 528. Labor legislation, 1929.

Proceedings of annual conventions of the Association of Governmental Officials in Industry of the United States and Canada. (Name changed in 1928 from 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.
*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.
*No. 455. Fourteenth, Paterson, N. J., May 31 to June 3, 1927.
*No. 480. Fifteenth, New Orleans, La., May 21–24, 1928.
No. 508. Sixteenth, Toronto, Canada, June 4–7, 1929.
No. 530. Seventeenth, Louisville, Ky., May 20–23, 1930.

Proceedings of annual meetings of the 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.
*No. 456. Fourteenth, Atlanta, Ga., September 27–29, 1927.
No. 485. Fifteenth, Paterson, N. J., September 11–14, 1928.
No. 511. Sixteenth, Buffalo, N. Y., October 8–11, 1929.
No. 536. Seventeenth, Wilmington, Del., September 22–26, 1930.

Proceedings of annual meetings of the 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.

Proceedings of annual meetings of the International Association of Public Employment Services—Continued.

No. 478. Fifteenth, Detroit, Mich., October 25–28, 1927.
No. 501. Sixteenth, Cleveland, Ohio, September 18–21, 1928.
No. 538. Seventeenth, Philadelphia, September 24–27, 1929, and eighteenth, Toronto, Canada, September 9–12, 1930.

Productivity of labor.

No. 326. Productivity costs in the common-brick industry. [1924.]
No. 360. Time and labor costs in manufacturing 100 pairs of shoes, 1923.
No. 407. Labor cost of production and wages and hours of labor in the paper boxboard industry. [1926.]
*No. 412. Wages, hours, and productivity in the pottery industry, 1925.
No. 441. Productivity of labor in the glass industry. [1927.]
No. 474. Productivity of labor in merchant blast furnaces. [1928.]
No. 475. Productivity of labor in newspaper printing. [1929.]

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. 495. Retail prices, 1890 to 1928.

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. Rules for governing the approval of headlighting devices for motor vehicles.
*No. 351. Safety code for the construction, care, and use of ladders.
No. 375. Safety code for laundry machinery and operations.
*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 codes for the prevention of dust explosions.
No. 447. Safety code for rubber mills and calenders.
No. 451. Safety code for forging and hot-metal stamping.
No. 463. Safety code for mechanical power-transmission apparatus—first revision.
No. 509. Textile safety code.
No. 512. Code for identification of gas-mask canisters.
No. 519. Safety code for woodworking plants, as revised, 1930.
No. 527. 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. [1917.]
No. 271. Adult working-class education in Great Britain and the United States. [1920.]
No. 459. Apprenticeship in building construction. [1928.]

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. 218 Wages and hours of labor in the iron and steel industry, 1907 to 1915, with a glossary of occupations.
No. 225. Wages and hours of labor in the lumber, millwork, and furniture industries, 1915.

Wages and hours of labor—Continued.

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, 1923.
No. 365. Wages and hours of labor in the paper and pulp industry, 1923.
No. 394. Wages and hours of labor in metalliferous mines, 1924.
No. 407. Labor costs of production and wages and hours of labor in the paper boxboard industry. [1926.]
*No. 412. Wages, hours, and productivity in the pottery industry, 1925.
No. 416. Hours and earnings in anthracite and bituminous coal mining, 1922 and 1924.
No. 476. Union scales of wages and hours of labor: Supplement to Bulletin 457.
No. 484. Wages and hours of labor of common street laborers, 1928.
No. 497. Wages and hours of labor in the lumber industry in the United States, 1928.
No. 498. Wages and hours of labor in the boot and shoe industry, 1910 to 1928.
No. 499. History of wages in the United States from colonial times to 1928.
No. 502. Wages and hours of labor in the motor-vehicle industry, 1928.
No. 503. Wages and hours of labor in the men's clothing industry, 1911 to 1928.
No. 504. Wages and hours of labor in the hosiery and underwear industries, 1907 to 1928.
No. 513. Wages and hours of labor in the iron and steel industry, 1929.
No. 514. Pennsylvania Railroad wage data. From report of Joint Fact Finding Committee in wage negotiations in 1927.
No. 516. Hours and earnings in bituminous coal mining, 1929.
No. 522. Wages and hours of labor in foundries and machine shops, 1929.
No. 523. Hours and earnings in the manufacture of airplanes and aircraft engines, 1929.
No. 525. Wages and hours of labor in the Portland cement industry, 1929.
No. 526. Wages and hours of labor in the furniture industry, 1910 to 1929.
No. 532. Wages and hours of labor in the cigarette manufacturing industry, 1930.
No. 533. Wages and hours of labor in woolen and worsted goods manufacturing, 1910 to 1930.
No. 535. Wages and hours of labor in the slaughtering and meat-packing industry, 1929.
No. 537. Wages and hours of labor in the dyeing and finishing of textiles, 1930.
No. 539. Wages and hours of labor in cotton-goods manufacturing, 1910 to 1930.
No. 540. Union scales of wages and hours of labor, May 15, 1930.
No. 546. Wages and hours in rayon and other synthetic manufacturing, 1930.
No. 547. Wages and hours in cane-sugar refining industry, 1930.

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*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.]
No. 458. Health and recreation activities in industrial establishments, 1926.

Wholesale prices.

*No. 284. Index numbers of wholesale prices in the United States and foreign countries. [1921.]
No. 453. Revised index numbers of wholesale prices, 1923 to July, 1927.
No. 543. Wholesale prices, 1930.

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.]

Women and children in industry—Continued.

*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 the lead industries. [1919.]
No. 467. Minimum wage legislation in various countries. [1928.]

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 in Switzerland. [1912.]
No. 107. Law relating to insurance of salaried employees in Germany. [1913.]
*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.
No. 301. Comparison of workmen's compensation insurance and administration. [1922.]
No. 312. National health insurance in Great Britain, 1911 to 1921.
No. 379. Comparison of workmen's compensation laws of the United States as of January 1, 1925.
No. 477. Public-service retirement systems, United States and Europe. [1929.]
No. 496. Workmen's compensation legislation of the United States and Canada as of January, 1929. (With text of legislation enacted in 1927 and 1928.)
No. 529. Workmen's compensation legislation of the Latin American countries. [1930.]

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*No. 174. Subject index of the publications of the United States Bureau of Labor Statistics up to May 1, 1915.
No. 208. Profit sharing in the United States. [1916.]
No. 242. Food situation in central Europe, 1917.
No. 254. International labor legislation and the society of nations. [1919.]
No. 268. Historical survey of international action affecting labor. [1920.]
No. 282. Mutual relief associations among Government employees in Washington, D. C. [1921.]
No. 319. The Bureau of Labor Statistics: Its history, activities, and organization. [1922.]
No. 326. Methods of procuring and computing statistical information of the Bureau of Labor Statistics. [1923.]
No. 342. International Seamen's Union of America: A study of its history and problems. [1923.]
No. 346. Humanity in government. [1923.]
No. 372. Convict labor in 1923.
No. 386. Cost of American almshouses. [1925.]
No. 398. Growth of legal-aid work in the United States. [1926.]
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No. 461. Labor organizations in Chile. [1928.]
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*No. 465. Beneficial activities of American trade-unions. [1928.]
No. 479. Activities and functions of a State department of labor. [1928.]
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*No. 489. Care of aged persons in the United States. [1929.]
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No. 506. Handbook of American trade-unions: 1929 edition.
No. 518. Personnel research agencies: 1930 edition.
No. 541. Handbook of labor statistics: 1931 edition.