UNITED STATES DEPARTMENT OF LABOR
FRANCES PERKINS, Secretary
BUREAU OF LABOR STATISTICS
ISADOR LUBIN, Commissioner

BULLETIN OF THE UNITED STATES BUREAU OF LABOR STATISTICS . . . . . No. 592

LABOR LAWS OF THE UNITED STATES SERIES

DECISIONS OF COURTS AND OPINIONS AFFECTING LABOR 1931 AND 1932

Prepared by the Labor Law Information Service
CHARLES F. SHARKEY, Chief; GEORGE D. PATTERSON, Asst.

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1933

For sale by the Superintendent of Documents, Washington, D.C. - - - Price 25 cents

Contents

BULLETIN OF THE

U.S. BUREAU OF LABOR STATISTICS

No. 592 WASHINGTON OCTOBER 1933

DECISIONS OF COURTS AND OPINIONS AFFECTING LABOR 1931 AND 1932

Introduction

Decisions of courts and opinions affecting labor have been published in bulletin form by the United States Bureau of Labor Statistics since the year 1912.[1] Prior to that time the decisions of courts and the opinions of the Attorney General construing labor laws were published in the bimonthly publications of the Bureau. Annual volumes have been published since 1912 in most years, but, for reasons of economy, during recent years the bulletin has been issued biennially.

In selecting the decisions to be included in the publication the effort has been to choose those which show the current trend of court decisions construing labor laws. Little emphasis has been placed on decisions involving some well-established principle of labor law or those restating some generally accepted theory in construing such laws, but rather the attempt has been made to select cases which show the manner in which the courts have decided the many new questions presented for their determination, or where the courts have made a departure from the customary rule or theory in an effort to render an equitable decision in the light of present-day conditions.

During recent years the courts have faced, and continue to face, many new and varied questions in construing labor laws. It is interesting to note the interpretation and construction placed by the courts, both State and Federal, upon the emergency and relief legislation enacted by the States to help solve their labor problems.

One of the most interesting cases in the publication is the one in which the United States Supreme Court declared unconstitutional

[1] Bulletins published on the subject of Decisions of Courts and Opinions Affecting Labor are: U.S. Bureau of Labor Statistics Buls. Nos. 112, 152, 169, 189, 224, 246, 258, 290, 309, 344, 391, 417, 444, 517, and 548.

a law passed by the State of Oklahoma to regulate the retail ice business so as to limit competition and production and thereby prevent as far as possible irregularity in employment. The dissenting opinion by Mr. Justice Brandeis, based upon the theory that the law was an economic necessity, raises many interesting questions, both in law and economics. The Supreme Court of Utah declared void, as an unlawful diversion of funds and as against the public policy of the State, hand-labor provisions in public contracts entered into by Salt Lake City in an attempt to relieve the unemployment situation. Mr. Justice Folland justified the hand-labor provision in the light of conditions now existing, but concluded by saying that: "Society must solve the problems which arise from the use of modern machinery and efficient methods of production, not by discarding such instrumentalities but by making use of them for the benefit of all."

Another interesting question is presented by the attitude of the courts upon the so-called "prevailing rate of wage" laws enacted by some of the States to govern the wages paid employees engaged upon public works. This volume contains, among the cases on that subject, decisions by the Supreme Courts of Arizona and Illinois declaring such laws void, as being a violation of the due process clause, and also a decision of the Supreme Courts of California and New York upholding in strong terms the constitutionality of the prevailing wage law as applied to public works.

The cases under the Federal Employers' Liability Act indicate that the question of whether the employee was engaged in interstate commerce at the time of the injury is still giving the courts considerable trouble and providing the basis for many appeals. Another basis for much litigation is the breach of the contract of employment, and a number of cases are included in this publication which show the rights of the employer as well as of the employee when such a breach occurs. There is in the present bulletin a marked absence of cases arising out of industrial disputes; only a few of the decisions involve strikes, lockouts, or injunctive relief. It is impossible to determine, however, whether this is the result of efficient means of arbitration and mediation or whether it is due to present industrial conditions.

The cases in the section devoted to workmen's compensation show interesting decisions applying the extraterritorial provisions of the workmen's compensation laws and their effect in regard to the laws of other States. The decisions under the compensation section also reflect the many questions which have arisen due to present economic conditions. Several courts have held that economic conditions, such as the large number of unemployed making it almost impossible for a worker to secure employment elsewhere after recovering from

an injury, cannot be held to change the employee's compensation status. If the employee has recovered to such an extent that he is able to work, his compensation payments stop, even though he is unable to return to work due to economic conditions. Another interesting question raised in the decisions is whether so-called "charity workers" or "relief workers", given employment by a city or public organization as a means of relieving the large number of unemployed, come within the coverage of the workmen's compensation laws.

These questions and many others have been answered in varied ways by the courts throughout the land, and it is the purpose of the authors in compiling this publication to afford a means of ready comparison of these decisions, and by the use of prior bulletins published on this subject to make available to students of labor law the present and the past decisions of the courts construing and applying labor legislation.

The chief source of the material used is the National Reporter System, published by the West Publishing Co., St. Paul, Minn. The Washington Law Reporter and the Opinions of the Attorney General were also reviewed to secure decisions affecting labor. In presenting the cases the authors have given a brief statement of the facts of each case and then presented the conclusions of the courts, expressed either in the language of the courts or in condensed form without quotation.

The decisions used in the present bulletin appear in the following reporters for the years 1931 and 1932:

Supreme Court Reporter, volume 51, page 92, to volume 53, page 189.
Federal Reporter, volume 44 (2d), page 281, to volume 61 (2d), page 624.
Atlantic Reporter, volume 152, page 305, to volume 163, page 208.
New York Supplement, volume 245, page 713, to volume 260, page 560.
Northeastern Reporter, volume 173, page 553, to volume 183, page 272.
Northwestern Reporter, volume 233, page 465, to volume 245, page 480.
Pacific Reporter, volume 293, page 433, to volume 16 (2d), page 464.
Southeastern Reporter, volume 155, page 873, to volume 166, page 688.
Southern Reporter, volume 131, page 1, to volume 144, page 568.
Southwestern Reporter, volume 32 (2d), page 713, to volume 54 (2d), page 360.
Washington Law Reporter, volumes 59 and 60.

[Quoted matter in the opinions of the Attorney General and 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.]

Opinions of the Attorney General

EMPLOYEES' COMPENSATION COMMISSION—AUTHORITY OF COMMISSION—LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT—*Opinions of Attorney General, volume 36, page 465 (Oct. 3, 1931)*.—In an opinion delivered by the Hon. Thomas D. Thacher, Acting Attorney General, it was held that the United States Employees' Compensation Commission had broad powers and authority to administer the provisions of the Longshoremen's and Harbor Workers' Compensation Act and specifically to make rules and regulations which shall be binding upon all deputy commissioners as well as upon the Commission.

Parts of the compensation act were quoted in the opinion and it was held that these provisions made it plain that "Congress intended that the general responsibility for the proper administration of its provisions should rest on the Commission", and that it was authorized to make such rules and regulations as may be necessary, and as the deputy commissioners perform their duties subject to the general supervision of the Commission they would be bound by any rules made by the Commission, unless reversed by a court of competent jurisdiction.

This authority of the Commission "extends not only to matters of practice and procedure but to questions of the proper interpretation of the law which it is the Commission's duty to administer", and these regulations are controlling in the absence of a contrary court decision. The opinion points out, however, that the Commission does not have such specific powers as to enable it to supervise the deputy commissioners in such matters as the weight to be given certain testimony in a particular case, for such powers rest within the discretion of the deputy commissioner.

HOURS OF LABOR—SATURDAY HALF HOLIDAY—GOVERNMENT EMPLOYEES—*Opinions of Attorney General, volume 36, page 407 (Mar. 17, 1931)*.[2]—An opinion of the Attorney General was requested by the

[2] An opinion rendered June 25, 1931 (vol. 36, p. 444) extended the rule outlined in this opinion to cover also employees in the field service of the Navy Department.

President concerning the construction to be placed on the act of March 3, 1931, providing for Saturday half holidays for certain Government employees (46 Stat. 1482).

The act provides that, after a certain date, 4 hours shall constitute a day's work on Saturday "with pay or earnings for the day the same as on other days when the full time is worked, for all civil employees of the Federal Government and the District of Columbia", exclusive of certain employees such as those in the Postal Service or employed in the Panama Canal Zone.

The act of March 3, 1893 (27 Stat. 715), as amended, prescribes the hours of labor in executive departments and also provides for annual leave and sick leave for such employees. The question was therefore raised as whether or not Saturdays shall be considered as full days for the purpose of computing annual leave and sick leave.

In rendering the opinion, Attorney General Mitchell cited an opinion rendered by Attorney General Olney on February 10, 1894, construing the act of March 3, 1893, to the effect that when computing both annual and sick leave Sundays and holidays occurring during the absence should be charged against the employee. Following this decision the Congress passed an act amending the above law and directing that the annual leave allowed under the law should be computed exclusive of Sundays and legal holidays. The amendment made no change in the matter of computing sick leave, however.

Based upon these former decisions and upon the actual practice existing in the executive departments, the Attorney General ruled that Saturday was to be counted as 4 hours rather than as a full day in computing annual leave, but in computing sick leave Saturday was to be counted as a full day.

WORKMEN'S COMPENSATION—PAYMENT OF AWARD—RECEIVING VETERANS' DISABILITY ALLOWANCE—*Opinions of Attorney General, volume 36, page 420 (June 1, 1931)*.—The Administrator of Veterans' Affairs requested an opinion from the Attorney General as to whether a World War veteran who is receiving compensation under the United States Employees' Compensation Act (39 Stat. 742) may be paid the disability allowance provided in the amendment of July 3, 1930, to the World War Veterans' Act (46 Stat. 995) for a disability resulting from the same injury for which he is receiving compensation.

This question arose over an application filed by one Simon Miller, a World War veteran covered under section 11 of the act of July 3, 1930, amending the World War Veterans' Act, and entitled to receive disability allowance under such act. However, at the time he

filed his application he was receiving compensation under the Federal Employees' Compensation Act, based upon the same injury.

The opinion of the Attorney General authorized both payments to Miller. It was pointed out that nothing in the act of 1930 inhibits the payment of a disability allowance because of the fact that Miller was now receiving compensation under the Federal Employees' Compensation Act. The opinion continues as follows:

Nor is there anything in the Federal Employees' Compensation Act which prevents the receipt of a disability allowance by Miller while he is receiving compensation under that act. On the contrary, that statute expressly sanctions this result. Section 7 of that act (U.S.C., tit. 5, sec. 757) provides:

"That as long as the employee is in receipt of compensation under this act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed and except pensions for service in the Army or Navy of the United States."

Section 7 of the Federal Employees' Compensation Act thus provides expressly that the recipient of compensation under that act may receive concurrently a pension for military service. The so-called disability allowance provided by section 11 of the amendatory act of July 3, 1930, is a gratuity to World War veterans who are able to show a certain per centum of permanent disability but who are unable to establish that their disabilities are service connected so as to entitle them to compensation under the World War Veterans' Act. Such a gratuity is a pension in the true sense of the word.

Decisions of the Courts

ADMIRALTY—EMPLOYERS' LIABILITY—ASSUMPTION OF RISK BY SEAMAN—SAFE PLACE TO WORK—*Anderson* v. *Matson Navigation Co., District Court of Appeal (First District), California (Aug. 23, 1932), 13 Pacific Reporter (2d), page 1041.*—Rasmus P. Anderson, a seaman employed by the Matson Navigation Co., brought this action to recover damages for injuries received in the course of his employment. On December 28, 1929, Anderson was struck on the side of his head and face by an iron crowbar which was being lowered down the hatch by a fellow employee, named Cauling. The testimony showed that the crowbar was held only by two loose half-hitches and that the bar slipped through the rope and fell. The second officer called out "Look out below" after the crowbar had slipped, or as it slipped, but only a few moments passed between this and the injury of Anderson.

The superior court, city and county of San Francisco, Calif., awarded Anderson $9,000 for his injury and the Navigation Co. appealed the case to the District Court of Appeal (First District) of California.

The court's reply to the contention of the Navigation Co. that the damage was excessive quoted a recent case (*Davis* v. *Renton*, 113 Calif. App. 651), citing the conditions under which the reviewing court may interfere with the findings of the jury and the trial court on the issue of damages, as follows:

* * * A "reviewing court may interfere only in cases where the excess appears as a matter of law, or where the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice or at first blush raise a presumption that it is the result of passion, prejudice, or corruption rather than honest and sober judgment."

Then the court briefly reviewed the injuries suffered by the seaman Anderson; the hospital treatment from December 28, 1929, to July 19, 1930; the crushed bones of the head and face that necessitated four operations, one of which involved plastic surgery; the destruction or laceration of four sets of nerves, resulting in permanent partial paralysis of the side of the face and the eyelid; the permanent disfigurement; the inability to do certain kinds of work in the future; and the undoubted pain and suffering endured by the injured man—

all of which convinced the court that the award of $9,000 was not excessive.

The Navigation Co. next contended that the trial court erred in failing to give more specific instructions on the subject of contributory negligence, but the court held that the requested instructions added nothing to the instructions given, and further said:

It [the requested instruction] is subject to criticism in that it ignores the element of opportunity to heed such warning. If a warning comes so late in point of time as to offer no opportunity to act to avoid the danger we know of no rule under which an injured man would be chargeable with negligence as a matter of law merely because of his failure to heed such warning.

The Matson Navigation Co. further contended there was error in the trial court's instruction that the doctrine of assumption of risk was not applicable in this case. In reply to this the court said:

Conceding that the doctrine of assumption of risk may apply in cases where an inherently dangerous method is ordinarily employed in doing certain work, still it would do violence to the terms of the statute to hold that an employee assumes the risk of particular acts of negligence of his fellow employees in pursuing the method employed. In the present case, even assuming that respondent may be said to have assumed the ordinary risks attendant on lowering heavy objects into the hold on a line, it cannot be said that he assumed the increased risks resulting from the negligence of his fellow employees in pursuing that method. Turning to the evidence, we find that the seaman, Cauling, who was in the act of lowering the crowbar when it slipped, was not called as a witness, although present in court. The only evidence relating to the cause of the slipping was given by the second officer. He testified that Cauling put two loose half-hitches around the bar, and that it slipped just as Cauling started to lower it. The only rational conclusion to be drawn from the evidence is that the bar slipped by reason of the negligent manner in which Cauling tied the half-hitches, and that the accident happened as the result of this particular act of negligence on the part of Cauling in pursuing the method rather than as the result of one of the ordinary risks inherent in the method employed. Under these circumstances, the doctrine of assumption of risk was not applicable, and there was no error in the giving and refusing of the instructions to which reference has been made.

The company also charged error in that the trial court refused to instruct that all sums paid the injured seaman for maintenance be deducted from the sum awarded, but the appeal court held that under the maritime law the ship owner is under obligation to furnish maintenance to a sick or disabled seaman, regardless of whether he is liable for damages for negligence.

The judgment of the trial court awarding the injured seaman $9,000 was affirmed.

ADMIRALTY—JURISDICTION—FOREIGN VESSEL—*Uravic* v. *F. Jarka Co. et al., United States Supreme Court (Jan. 5, 1931), 51 Supreme Court Reporter, page 111.*—The Supreme Court of the United States held that an American stevedore injured while engaged in unloading a private foreign ship in American waters was covered by the Merchant Marine Act. This decision by the highest court in the land reversed a judgment rendered by the courts in New York State.

The original action was brought in the State courts of New York by the administratrix of the estate of the deceased employee, Anton Uravic. Uravic was an American citizen employed as a stevedore by the F. Jarka Co., a Delaware corporation. On July 13, 1926, Uravic was helping to unload a German vessel in New York Harbor, when he was injured through the negligence of a fellow worker. Section 33 (as amended by an act of June 5, 1920, 41 Stat. 988–1007) of the Merchant Marine Act 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; 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 the principal office is located.

The Supreme Court of the United States in a previous case, *International Stevedoring Co.* v. *Haverty* (272 U.S. 50), had decided that stevedores came within the benefits conferred by section 33 of the Merchant Marine Act. The main question raised in the case under consideration was whether the statute applied to a stevedore working on a foreign vessel, or, in particular, a vessel flying the German flag. The Stevedoring Co. argued that the act did not apply; that whenever any provision was to apply to foreign vessels it was expressly stated, and that Congress, if it had intended the act to apply, would not have left such a regulation to be implied. The petitioners on behalf of the administration, on the other hand, contended that section 33 of the act was designed to affect the relationship of employer and employee and that it did not affect vessels as such.

Mr. Justice Holmes delivered the opinion of the court and stated that the language of the statute was general, and that the right is given "any seaman", which right would also cover stevedores. "There is strong reason", the court said, "for giving the same pro-

tection to the person of those who work in our harbors when they are working upon a German ship that they would receive when working upon an American ship in the next dock, as is especially obvious in the case of stevedores who may be employed in unloading vessels of half a dozen different flags in turn."

The court, in answering the contention that stevedores have their rights only by an artificial extension of the word " seamen " and that a seaman upon a German vessel would not be given the rights claimed, said:

Perhaps it would be a sufficient answer to the objections that, while the section 33 is construed to give the rights of seamen to stevedores, it does not say or mean that stevedores are to be regarded as seamen on the particular vessel upon which for the moment they happen to be at work. They simply are given the rights of seamen and, as they are American workmen, they have the rights of American seamen as well on German as on American ships.

ADMIRALTY—JURISDICTION—WORKMEN'S COMPENSATION—*Dawson et ux.* v. *Jahncke Dry Docks, Inc., Court of Appeal of Louisiana (Jan. 5, 1931), 131 Southern Reporter, page 743.*—While in the employ of Jahncke Dry Docks, Inc., Robert William Dawson was killed on board a steamship which at the time was docked for repairs in a floating drydock of the above corporation. The parents of the deceased sought recovery under the State workmen's compensation act, and the employer filed a petition in which it was contended that the workmen's compensation act had no application, since decedent at the time of his death was on board a vessel lying in navigable waters and was performing work which was maritime by nature.

The suit was dismissed by the civil district court, parish of Orleans, on the ground stated in the petition, and the parents of the deceased Dawson appealed to the Louisiana Court of Appeal. The appeal court began its opinion, after stating the facts, by saying:

There can no longer be any doubt that a State workmen's compensation law has no application where an employee is injured under circumstances which would have given to the injured employee or to his survivors, in case of death, a cause of action in admiralty.

In support of this view, the court cited the famous case of *Southern Pacific Co.* v. *Jensen* (244 U.S. 205), and numerous similar cases.

Turning its attention to the case at bar, the court said the question for decision was whether the claimant had a case which gave a cause of action cognizable in admiralty, " because, if such allegations are found, then no suit in compensation will lie."

In determining the essential requisites to a proceeding in admiralty for wrongful death, the court discussed at length the "locality test" as applied by the United States Supreme Court, and concluded that it was not the sole test to be applied. The true test in determining admiralty jurisdiction was found in the case of *Rosengrant* v. *Harvard*, decided by the Supreme Court of Alabama (104 So. 409), and later affirmed by the United States Supreme Court (273 U.S. 664), in which case the court held "that a tort resulting in injury to an employee is not cognizable in admiralty unless the employer at the time of the injury is on navigable waters, and is engaged in work of a maritime nature."

Applying this test the court found that Dawson at the time of his death was on a completed vessel, which was on a drydock floating in navigable waters. In regard to his employment the court said:

> But the allegations of the petition as to what deceased was engaged in at the time of his death are carefully shrouded in mystery, and we are told no more than that he was taking measurements of a tank, which was a component part of the vessel. If he was repairing the tank, he was engaged in a maritime occupation. * * * It is possible, however, that he may have been measuring the tank in order to build a duplicate of that tank, after he returned to the machine shop, the said duplicate to be used in some other vessel not completed, or for some other purpose on shore. He may have been measuring the tank so that he could return to the shore and then determine how much molasses it would hold. We can conceive of several purposes for which the tank may have been measured which would not be maritime by nature.

The court felt that the question of jurisdiction could not be settled until the facts were clear and unambiguous. The case was therefore remanded to the district court for the purpose of permitting the corporation to amend the petition with regard to the character of the work Dawson was engaged in at the time of his death, so that the court may then be able to pass upon the question presented.

ADMIRALTY—WORKMEN'S COMPENSATION—LIMITATION OF LIABILITY—ESTOPPEL—*Spencer Kellogg & Sons, Inc.*, v. *Hicks et al.*, *United States Supreme Court (Apr. 11, 1932), 52 Supreme Court Reporter, page 451.*—Spencer Kellogg & Sons, Inc., owned and operated a manufacturing plant at Edgewater, N.J. Many of the employees in this plant came over from New York City. The company owned and operated a launch, the *Linseed King*, which was used in transporting these employees from a pier on the New York side across the Hudson River to the plant on the New Jersey side. On December 20, 1926, the *Linseed King* sank in the Hudson River while

making a trip across and carrying not only employees but also men making the trip in search of employment. The general public was not invited to ride upon this launch and no fares were charged for the trip. Many of those surviving suffered from exposure, and almost immediately claims and suits were filed to recover damages caused by the disaster.

In March 1927 Spencer Kellogg & Sons filed a petition in admiralty setting forth the calamity, alleging that it was not due to negligence in operation, and seeking the limitation of liability, allowed by statute, to the value of the vessel at the end of the voyage, alleged to be $1,500. The petition stated that the company would pay claims under the New Jersey workmen's compensation act up to the total sum of $1,500, and prayed for an injunction staying all other prosecution.

This was granted, subject to a hearing in January 1928. When the matter came on for trial at that time, the judge found that the accident was caused by the negligent operation of the launch, and therefore the petition for a limitation on the liability was denied and the case heard to determine the liability. The company contended that all the claims came under the New Jersey workmen's compensation law, while the claimants contended the sole issue was whether the company could limit its liability. The judge sent the case to a commissioner, who received evidence and rendered awards ranging from $300 to $15,000 in most of the cases. The commissioner held that the New Jersey workmen's compensation law was inapplicable, because the tort was maritime and "because the nature of the proceeding conferred upon the admiralty court jurisdiction to hear and determine every claim of any nature growing out of the disaster." From this ruling the case was carried to the United States District Court for the Southern District of New York.

The first question for determination was whether the New Jersey workmen's compensation act covered the employees injured in the disaster and precluded their recovery in the admiralty court. After reviewing the facts and the law in question the judge pointed out that the New Jersey compensation act covers employees transported to work in a conveyance owned and operated by the employer, and that "the death or injury of an employee while being so transported is held to arise out of and in the course of the employment." The judge also held that the argument that the act was inapplicable because the injury occurred outside the State of New Jersey was without ground as the act had previously been held to cover injuries occurring outside the State. The court considered the tort nonmaritime, because "the employment (except as to men engaged in

navigating the launch, and as to men whose work was to unload the ship) was nonmaritime."

In concluding the opinion on the first question, the court said:

My conclusion, therefore, is that the elective system of compensation embodied in the New Jersey workmen's compensation act governed the injuries and deaths of all employees hired for nonmaritime work. The remedy provided by that system (awards by the compensation bureau) was the exclusive remedy for all such employees and their dependents. It seems clear that the suits at common law, the suits in admiralty, and the suits under death statutes which had been commenced could not have been maintained over the objection of the employer that the right to obtain compensation or damages by such suits had been surrendered prior to the accident.

The next question considered by the court and urged by the claimant was that even though the New Jersey workmen's compensation act was applicable the company had lost its right to confine the employees to their workmen's compensation remedy because of the company's proceedings to limit its liability to the value of the vessel. The argument by the claimants, in support of this contention, was based upon waiver, estoppel, and rescission of the contract. The court, however, held that there was no waiver by the company, as it took the stand all through the proceedings that the rights of the employees should be determined under the workmen's compensation act, and the mere fact that it erroneously sought to restrict its liability did not constitute waiver. The court also found the elements of estoppel lacking in the case. As to whether the compensation contract was rescinded the court said:

The general rule is that, where a claim has been released for a promised consideration, which is not given, the claimant may treat the release as rescinded and recover upon the original claim. (Williston on Contracts, sec. 1457.) This rule might be applicable here if the employees had at one time had claims in tort against the employer, which claims they had surrendered upon making contracts for the payment of compensation, and if the employer had later declined to pay the promised compensation. But, under the New Jersey statute and the contract resulting from it, they never had claims in tort against the employer, and they never had claims in contract for injury or death except their claims under the compensation plan. They certainly had no claims for injury, or death prior to December 20, 1926, and before that time came they had made an agreement surrendering all other rights than the right to get workmen's compensation awards. So they are not asking the court to revive claims which they once had at common law, in admiralty, or under a death statute; they are in effect asking the court now to create for them claims which they never owned, claims which they could have had but for the compensation act and the resulting contract. I conclude that there is no room here for the rule of rescission. The remedy for the petitioner's breach of contract is to hold it

for interest upon the delayed payments of compensation, and I have no doubt that the compensation bureau will attend to this matter in making awards.

The court therefore concluded that the claimants who were employees of the company could receive no relief from the court, but should look to their remedy under the workmen's compensation act. The group, who were traveling on the launch looking for employment and those who were responding to the notice sent them by the company to report for duty, were not considered employees by the court, and their claims were therefore within the jurisdiction of the court. Each individual case was reviewed and the award was affirmed or altered in accordance with this opinion. (48 Fed. (2d) 311.)

The case was then appealed to the Supreme Court of the United States for review. On April 11, 1932, Mr. Justice Roberts delivered the opinion of the court, in which the decree of the lower court was reversed. He agreed with the holding of the lower court regarding the negligence of the company, for the scope of the authority of the manager of the Edgewater plant rendered his privity or knowledge that of the company and therefore made the company chargeable with negligence in not taking measures to protect the passengers. However, Mr. Justice Roberts held that as the interstate carriage of passengers by water was a maritime affair, the injury to the passengers was a maritime tort and therefore "the rights and obligations of the parties depended on and arose out of the maritime law"; and the court was of the opinion that once the admiralty court had taken jurisdiction, it should give complete relief to all the claimants. This could not be done under the New Jersey workmen's compensation statute, according to Mr. Justice Roberts. He said:

> The workmen's compensation law of New Jersey (Comp. Stat. Supp., sec. * * 236–1 et seq.), the purpose of which was to supersede the common-law redress in tort cases and statutory rights consequent upon death by wrongful act, and to substitute a commuted compensation for injury or death of an employee, irrespective of fault, is not applicable to the injuries and deaths under consideration.
>
> The decisions hold that the remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction to the courts of the United States of all civil cases of admiralty and maritime jurisdiction. [Cases cited.] * * *

Kellogg & Sons sustained toward employees injured or killed the dual relationship of a carrier by water and a general employer at its Edgewater plant. Under the Federal statutes the company, acting in the first capacity, was entitled to a limitation of liability unless the claimants could prove negligence with the owner's privity or knowledge. They assumed the burden of proving such negli-

gence. They sustained it and are entitled to recover according to the rules of the maritime law, including, of course, any applicable death statute.

The court below was right in refusing a limitation of liability and in holding that the applicants for employment who had been told to return on the morning in question were entitled to awards in this proceeding; but it erred in denying awards according to the rules recognized in admiralty to the surviving employees and personal representatives of deceased employees of Kellogg & Sons, and remitting them to their remedy under the New Jersey compensation act. The decree is therefore reversed and the cause remanded to the district court for further proceedings in conformity with this opinion.

Mr. Justice Brandeis and Mr. Justice Stone concurred in only part of the opinion of Mr. Justice Roberts. Mr. Justice Sutherland was of the opinion that the appeal was not well founded and therefore the opinion of the lower court should be affirmed; and Mr. Justice Cardozo took no part in the decision of the case.

ALIENS—STATUTE PROHIBITING EMPLOYMENT—CONSTITUTIONALITY—*Arrowsmith* v. *Voorhies et al., United States District Court, Eastern District of Michigan (Dec. 9, 1932), 55 Federal Reporter (2d), page 310.*—The Legislature of Michigan approved a bill (Pub. Acts 1931, No. 241) during the 1931 session which defined legal residents of the State, as distinguished from citizens, as being persons either born in the United States or foreign persons entering in conformity with Federal immigration laws, and not classed as "undesirable aliens." The act went further and prohibited all persons classified as undesirable aliens from establishing or maintaining a legal residence in the State, and also provided, among other things, that "any person of foreign birth, who as in this act provided is disqualified from establishing and maintaining legal residence in this State, is prohibited from having employment or engaging in business within the State, except as hereinafter in the penal section of this act provided."

The constitutionality of this law as enacted by the legislature was challenged by George Arrowsmith who was a subject of Great Britain and a resident of the State of Michigan. He was engaged in the contracting business and employed aliens and "at times has hired himself out as an employee of others in the State." He alleged that he was lawfully admitted to the United States, but that he cannot furnish the proof required under the act to show that he is not an "undesirable alien", and under the act may become subject to deportation, fine, and imprisonment. He filed suit in equity to secure

an injunction restraining the attorney general of Michigan from enforcing the law.

The first question for decision by the court was Arrowsmith's right to maintain this action as a private individual against State officials. Among the cases cited by the court in upholding his right to bring the action was *Truax* v. *Raich* (239 U.S. 33) in which the United States Supreme Court had held that such a suit was not a suit against the State and therefore could be maintained by a private individual.

In determining the constitutionality of the statute the court followed a line of Supreme Court decisions which held that "the power to regulate the terms and conditions under which aliens may live in any of the several States having been given by the Constitution to the Federal Government, and that Government having exercised it, the right of the Federal Government is paramount and exclusive * * *." Therefore such legislation by a State is an unlawful invasion of the powers granted the Federal Government.

Continuing, the court said:

> This court, therefore, is of the opinion that the act passed by the Legislature of the State of Michigan is unconstitutional and invalid, because it seeks to usurp the power of government, exclusively vested by the Constitution in Congress, over the control of aliens and immigration.
>
> There are many other reasons urged by the plaintiff as to the unconstitutionality and invalidity of the act under consideration, and, while this court has considered them, we are satisfied to dispose of the case upon the sole ground that the admission and exclusion of aliens are a subject within the exclusive control of Congress, and that this statute cannot be carried out according to its complete intent without trespassing on that control. Whether and to what extent other features of the statute might be thought sustainable, there is no reason to discuss. They are not separable.

CONSTITUTIONALITY OF LAW—ABSENT VOTERS LAW—*State ex rel. Hutchins* v. *Tucker et al., Supreme Court of Florida (Oct. 4, 1932), 143 Southern Reporter, page 755.*—One Victor Hutchins filed a petition in the Supreme Court of Florida to secure a writ of mandamus to compel R. T. Tucker, supervisor of registration, and another, constituting the county canvassing board, to include in their tabulations certain ballots alleged to be absentee ballots cast under the provisions of the Florida absentee voters law. (Comp. Gen.L., sec. 429 et seq.). The election in question was the primary election for the nomination of a county judge in Orange County, Fla.

The first objection raised was that the absent voters law was unconstitutional in that it was in conflict with the constitutional

provisions providing for secret ballots, and therefore subjects the voter to undue influence in elections by bribery, etc., and thereby fails to preserve the purity of the ballot. The court admitted that the absent voters law did in fact destroy the secrecy of the absent vote, but it also said that "there is no provision of the statute which compels the voter to pursue that method of voting, and if the voter does pursue that method it is in the exercise of the free and voluntary choice of the voter." Continuing, the court pointed out that all citizens, unless confined in jail, have the right to go when and where they please, and at the same time they have the right "to be at their respective voting precincts on the day of election to cast their secret ballot for the candidates of their choice, and they cannot be compelled to divulge the identity of such candidates." The absent voters law, however, provides a way in which the voter, away from his precinct, may also vote by waiving his right to a secret ballot. The court said it could "conceive of no method by which an absentee voter could cast his ballot without his identity with the ballot being provided for and being maintained from the time it is prepared by him until it reaches the canvassing board."

As the voter had the election of either remaining in the precinct on election day and casting a secret ballot or waiving his right to the secret ballot and voting if he is away, the court found no violation of the statutory provision requiring a secret ballot. The situation was held to be analogous to requiring testimony in court concerning a vote; the court cannot require testimony as to how an individual voted, but the individual may voluntary waive the secrecy and testify.

The court therefore held the absent voters law to be constitutional, and ruled that the ballots should not be thrown out because of the fact that they were not secret ballots. However, several of them were thrown out on other grounds, such as failure to designate the office for which the candidate was selected or improperly filling in the ballot.

CONSTITUTIONALITY OF LAW—EMPLOYMENT OFFICES—REGULATION OF FEES CHARGED—"PUBLIC BUSINESS"—*Karr* v. *State*, *Court of Criminal Appeals of Texas* (*Oct. 26, 1932*), *54 Southwestern Reporter* (*2d*), *page 92.*—Article 1589 of the Penal Code of Texas provides that no person operating a private employment agency in the State of Texas who secures employment for skilled, professional, or clerical persons shall charge a fee exceeding 20 percent of the first month's salary.

Mrs. E. M. Karr was convicted under this law and fined $101 in the county criminal court of Dallas County, Tex. After the prosecu-

tion in the county court Mrs. Karr obtained an injunction in the United States district court restraining the district attorney of Dallas County and other officials from instituting future prosecutions under article 1589. The statute was assailed as being unconstitutional in that it violated section 19, article 1, of the Texas Constitution and the due-process clause of the Federal Constitution. In the equity court Mrs. Karr alleged that "these prosecutions will force her out of business, and that her damages are incapable of measurement at law, and that she has no other method for the preservation of her business from destruction than the protection of a court of equity."

All of the provisions of the employment-agency act were declared by the district court to be constitutional except the section of the statute fixing the amount of fees that may be charged. In concluding article 1589, Penal Code, was invalid, the court said:

> No valid law can be passed which denies the employment agency and the citizen the right to make a contract for such fee as they may see fit. The provisions, therefore, in article 1589 and article 5215 are invalid. The right of the citizen to contract for services performed or to be performed when there is no disability is highly valuable and may not be invaded by the lawmaking power.

Following the granting of this injunction the decision of the county criminal court was appealed to the Court of Criminal Appeals of Texas.

In rendering the decision on the constitutionality of the fee-fixing provision the appeals court followed the decision of the United States Supreme Court in the case of *Ribnik* v. *McBride* (277 U.S. 350). In concluding that the part of the New Jersey statute which related to the schedule of fees was unconstitutional under the due process clause the Supreme Court said in the Ribnik case:

> That the State has power to require a license and regulate the business of an employment agent does not admit of doubt. But the question here presented is whether the due process of law clause is contravened by the legislation attempting to confer upon the commissioner of labor power to fix the prices which the employment agent shall charge for his services. * * * That is to say, has the business in question been devoted to the public use and an interest in effect granted to the public in that use? Or, in other words, is the business one "affected with a public interest" within the meaning of that phrase as heretofore defined by this court?

The Court then entered into a discussion of what was a "business affected with a public interest", and what regulations could be imposed by the State upon such a business. Regarding an employment agency the Court said:

An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner, and the broker who acts as intermediary between such owner and his tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that "public interest" which the law contemplates as the basis for legislative price control.

The court of criminal appeals of Texas considered the decision of the United States Supreme Court as controlling and therefore the judgment of the county criminal court was reversed and the prosecution order dismissed.

CONTRACT OF EMPLOYMENT—BREACH—CONDITIONAL OFFER ACCEPTED BY EMPLOYEE—*Durkee-Thomas Corporation* v. *Doherty, Supreme Court of Arizona (Jan. 26, 1931), 295 Pacific Reporter, page 302.*—The Durkee-Thomas Corporation was engaged in selling automobile batteries. Its main office was in San Francisco, Calif., with branch offices in southern California and in Arizona. George A. Davis was manager of the southern California branch and J. C. Edwards was in charge of the recently established branch in Arizona, with Doherty working under him as a salesman.

Each branch manager had the right to employ and discharge help in his own district and to fix their salaries, subject to the approval of the home office, but neither had any authority over the actions of the other. Edwards and Doherty received commissions on their sales, but had a drawing account for expenses (amounting to $200 per month), to be charged against the commissions earned. Their commissions did not equal the drawing account, and Doherty told Edwards he could not continue to work for the amount he was then receiving. Edwards wrote Davis explaining the situation and suggesting that he and Doherty each be allowed a drawing account of $250 per month, and that it be figured as a guaranty regardless of what the commissions were. Davis replied advising Edwards to draw the $250 each for himself and Doherty every month, and said that he (Davis) would write to the home office explaining the matter, and telling them that they would draw the increased amount each month for the rest of the year. Doherty saw these letters, indicated his approval, and beginning with January 1, 1929, each drew the increased amount up to and including April 1929, when

Doherty was discharged, because the business was too small to stand the expense of a full-time salesman.

After his discharge Doherty brought suit in the srperior court of Maricopa County, Ariz., contending that the two letters mentioned above constituted a contract of employment for 1 year at the rate of $250 per month. The Durkee-Thomas Corporation, however, insisted "that the letters in question were merely a conditional offer subject to the approval of the San Francisco home office, and that, in order to bind defendants thereby, it must appear that the San Francisco office had actually approved the proposed contract or was estopped by reason of circumstances from denying such approval."

The trial court rendered a decision in favor of Doherty and the company appealed the case to the Supreme Court of Arizona. As part of its decision, this court said:

> It is not the ratification of a contract actually made by an unauthorized agent that is in question, but a conditional offer accepted by the plaintiff, subject to the fulfillment of the condition. Such being the case, it was necessary, in order to bind defendant for any term beyond that during which plaintiff actually performed services, that it appear that defendant, with a knowledge of the offer, approved it specifically, or by acquiescence therein. Obviously the burden is upon the party relying on the contract to show that the condition was fulfilled, or that defendant is estopped from denying such fulfillment.

The decision of the lower court was reversed and the case returned to the lower court for a new trial in accordance with the opinion of the Supreme Court of Arizona.

In a case where a Government employee having certain pension and retirement rights was induced to resign and forfeit these rights because of a promise of employment the rest of his life at a large increase in salary, the court found sufficient facts alleged to constitute a cause of action. (*Heaman* v. *E. N. Rowell Co., Inc.* (1932), 258 N.Y.Supp. 138.)

CONTRACT OF EMPLOYMENT—BREACH—DAMAGES—*Goudal* v. *Cecil B. DeMille Pictures Corporation, District Court of Appeal, Second District, Division 2, of California (Nov. 19, 1931), 5 Pacific Reporter (2d), page 432.*—In an action by a motion-picture actress for breach of employment contract due to her objections and suggestions concerning the production of scenes, the District Court of Appeal for the Second District of California held that such objections and suggestions were in the interest of her employer and contemplated by the contract.

The contract of employment covered a period of 1 year, beginning May 19, 1925, with the option to the corporation of four yearly

extensions of the contract, each yearly extension to be at a specified substantial increase in compensation. The actress entered upon her duties and the corporation twice exercised its option, extending the period of employment to May 18, 1928. However, on September 10, 1927, she was discharged, and thereupon filed suit against her employer to recover damages for the alleged wrongful discharge.

The basic question before the court was whether such termination of the employment was wrongful or whether it was justified by the acts of the respondent violative of the terms of the contract. The superior court of Los Angeles County found that there had been no violation of the contract and that her discharge was not justified, and the corporation appealed to the district court of appeal for the second district.

The claim that the actress failed or refused to perform her parts as requested, thereby violating the contract, was based upon many instances. The company cited occasions when the actress, instead of "unquestioningly performing as directed by the director in charge, called attention to inconsistencies, inaccuracies, possible improvements, or lack of artistic quality in the performance called for as they appeared to her." If the director did not made the suggested change, the actress took the question up with the president of the corporation, and in a substantial number of instances he agreed with her and the changes were made.

In deciding whether such action on the part of the actress was a breach of the contract, the court said:

> Suggestions and even objections as to the manner of enacting the various scenes, when made in good faith, were in the interest of the employer; in fact, it appears from the testimony that they were welcomed and encouraged in many instances, and, prior to commencing work, the president of the appellant informed respondent that he did not want mannikins to work for him, that he wanted thinking people, and that, if she would explain to him why she wanted to do a thing in a particular way, he would appreciate it. By the very wording of the contract "it is agreed that the services of the artist herein provided for are of a special, unique, unusual, extraordinary, and intellectual character." Even without the evidence contradicting that of appellant, the trial court was more than justified in finding that it was not true that respondent had refused or failed to perform her part of the contract.

Another ground urged as justifying her discharge was that she was late, on certain occasions, in arriving on the sets at the time designated by her employer. The court felt that this was explained, however, by her testimony to the effect that, with the approval of her employer, she had voluntarily assumed additional duties, relating to the costumes, and therefore the delay was caused in performing her

employer's business. The court also pointed out that the alleged breaches of contract consist largely of incidents prior to May 1927, when the corporation, for the second time, had exercised its option to continue and extend the contract for another year. The court said that the " exercise of the option may be considered as a declaration by act that the past conduct of the artist was not such conduct as was intended by the contracting parties as a justification for the termination of the contractual relations."

The charge of failure by her to seek other employment was not sustained by the court, because it was not shown by the corporation that by exercise of diligence the actress could have secured employment. The court, however, did approve the deduction of the sum of $3,000 received by the actress for other employment during the period.

The judgment awarding $34,531.23 as damages for the breach of the contract was therefore affirmed.

CONTRACT OF EMPLOYMENT—BREACH—DAMAGES—*Hume* v. *Miller Hatcheries, Inc., Kansas City Court of Appeals, Missouri (June 13, 1932), 51 Southwestern Reporter (2d), page 179.*—Action was brought by C. R. Hume against his former employer, Miller Hatcheries, Inc., to recover damages alleged to have been caused by his wrongful discharge. At the trial in the circuit court, Adair County, Mo., the evidence presented showed that Hume had entered into a contract of employment with Miller Hatcheries, Inc., for employment from January 1 to July 1, 1930, for the sum of $100 per month, payable $50 on the 1st and on the 15th of the month. Hume alleged that on May 15, the corporation, " wholly without previous notice and without cause or explanation, terminated said contract * * * and refused to pay the amount due for the period of time from May 15, 1930, to July 1, 1930, inclusive, to wit, the sum of $150."

The corporation, through its attorney, first denied the damage to Hume and then set up as a counterclaim the fact that he had " wholly failed to devote his reasonable time to the business as to manage, direct, and build up the business, whereby through such neglect on the plaintiff's [Hume's] part at least 25,000 less chickens were hatched ", thereby causing a loss to the company in the sum of $2,125, and judgment was asked on this claim. The court entered judgment in the sum of $150 in Hume's favor and denied the counterclaim made by the former employer.

The case was taken on appeal to the Kansas City court of appeals, where the decision of the lower court was reversed. The court said

Hume was attempting to recover "unpaid wages as per contract", when he should be suing for damages due to the breach of the contract. There was some evidence before the court that Hume had secured other employment, but there was no information as to the amount he had earned. The court said that he might have obtained a better position than he had with the Miller Hatcheries, Inc., and if such was the case he suffered little damage in the breach of the contract; at any rate the amount he earned during the period between May 15 and July 1, 1930, should have been considered, and the judgment should be the amount of his actual damage rather than his wages due under the contract of employment.

CONTRACT OF EMPLOYMENT—BREACH—DAMAGES—*Shapiro* v. *Fyrac Manufacturing Co., Supreme Court of Michigan (June 6, 1932), 242 Northwestern Reporter, page 902.*—Suit was filed against the Fyrac Manufacturing Co. by Louis J. Shapiro to recover damages caused by the breach of an alleged contract of employment. The circuit court of Wayne County, Mich., decided the case in favor of the manufacturing company on the ground that the contract "was void under the statute of frauds because it did not specify the period of its duration." The employee, Louis Shapiro, appealed the case to the Supreme Court of Michigan. The evidence presented showed that the contract was made through a series of wires and letters.

It seems that the Fyrac Manufacturing Co., located in Rockford, Ill., advertised for a sales manager. Shapiro, living and working in Detroit, saw the advertisement and communicated with the company in February 1924, and after extended correspondence Shapiro was offered a place in the New York district. Before accepting the offer he wrote to the company asking the amount of his drawing account and other information. He explained that he wanted to be sure of a permanent connection before leaving his present employment. The company, in response, wrote him full details and offered a drawing account of $150 per week and assured him of permanent employment.

On May 2 Shapiro again wrote the company asking for a drawing account of $200 per week and stating: "I would therefore suggest a 3-year contract, with a renewal of same at the end of such time should I prove myself a real producer." The company wired its reply: "At the end of 30 days' service with us we will be glad to increase your drawing account to $200 weekly."

In response to this Shapiro responded by wire: "Wire received and offer accepted."

The company then wrote Shapiro that it would notify him when and where to report for work, and later wired him to report at Rock-

ford, Ill. Thereupon Shapiro resigned his position, listed his house for sale, and reported at Rockford, Ill.

An entirely new and different proposition was presented to him when he arrived in Rockford, and he declined to accept this new proposition, but was paid his expenses and 4 days' pay. He thereupon filed suit against the company, and having lost the case in the lower court, appealed to the higher court, contending that the contract was for a definite term of 3 years, as the company failed to object to the 3-year term suggested in his letter and it therefore became a part of the contract.

Mr. Justice Fead, speaking for the court, upheld this view. He said that "the term was as much a part of the tentative contract as any of the other conditions"; and that both parties accepted the whole contract as set up in the letters and wires.

The decision of the lower court was reversed and a new trial granted.

CONTRACT OF EMPLOYMENT—BREACH—DAMAGES—DISCHARGE—UNSATISFACTORY SERVICE—*Bernstein* v. *Lipper Mfg. Co., Supreme Court of Pennsylvania (Jan. 11, 1932), 160 Atlantic Reporter, page 770.*—Eugene Bernstein was employed as a salesman under an oral contract for 1 year by the Lipper Manufacturing Co. His territory was New York, and "to some extent the South and Middle West." Before the term of the contract expired Bernstein was dismissed, the manufacturing company charging that he "failed to devote himself exclusively to his employer's business during the hours of employment", and also that during business hours he tried and succeeded in selling stock in a rayon company in which his father was interested.

Bernstein brought action for damages in the court of common pleas, no. 4, of Philadelphia County. A judgment was rendered in his favor, and the manufacturing company appealed the case to the Supreme Court of Pennsylvania.

In rendering its decision affirming the decision of the lower court, the supreme court referred to the "implied obligation in contracts of employment that as a part of the consideration the employee will be loyal, diligent, faithful, and obedient", saying that where his conduct interferes with his employer's business the employer is justified in discharging the employee.

It was also stated that where an employee engages to give exclusive service to his employer he cannot, during the hours of such employment, exploit another business. Whether or not his conduct could be considered as "exploiting another business" was said to depend on the nature and character of his acts and on the character of the employer's business.

In affirming the decision of the lower court, the court said in part as follows:

In the present case the man was engaged as a salesman. To successfully pursue this occupation he must possess many qualities, none the least of which is ability to engage in what is commonly known as a line of "sales talk." Such an employee cannot rigidly adhere to "shop" or the subject matter of his master's business, but, to ingratiate himself with the buyer and to put himself on friendly terms he must do many things of an incidental nature. The latitude to be permitted one acting in this capacity is uncertain, but his acts certainly should not detract from the furtherance of his master's business, nor should they, beyond the scope of such business, consume time otherwise than in the master's business.

The court below finds that rayon was an incident of defendant's business and its customers would naturally be interested in the matter. Since the plaintiff's father was interested, this incident may have furnished the excuse to indulge in talk to aid his father; but the evidence does not disclose sufficient for us to say that he thereby violated the duties of his employment. It is a close case on this point, but we are not convinced the court below committed error in submitting the question to the jury. In all the cases wherein we have held that there was sufficient justification, it was reasonably clear from undisputed evidence that the employee was guilty of misconduct.

The Court of Appeal of Louisiana held in a case that a drug clerk who refused to wait on customers was justifiably discharged. (*Mitchell* v. *Addington* (1931), 134 So. 338.)

CONTRACT OF EMPLOYMENT — BREACH — DAMAGES — EVIDENCE — CHANGED CONDITIONS AS AFFECTING—*San Antonio Machine & Supply Co.* v. *Kinard, Court of Civil Appeals of Texas (Mar. 17, 1932), 47 Southwestern Reporter (2d), page 877.*—L. M. Kinard filed suit in the district court of McLennan county, Tex., against the San Antonio Machine & Supply Co. to recover damages "arising from a breach of a contract of employment." He alleged that he was employed to work for a period of 1 year from April 1, 1930, to April 1, 1931, at a salary of $150 per month; that he was discharged without cause on October 15, 1930, and thereby damaged in the sum of $825. The jury rendered a verdict in his favor and judgment was rendered for $825.

The machine company appealed the case to the court of civil appeals of Texas, where it was contended that—

There was no evidence that appellee was employed for a period of 1 year, nor that Olan Durie, the agent of appellant, who was alleged to have made the contract, had authority to make same, and that the evidence was insufficient to support the verdict.

Upon reviewing the facts the court found that Kinard had been employed in the plant prior to the contract alleged to have been made in April 1930. The plant had formerly been owned and oper-

ated by the D. June Machinery Co., and Durie was foreman and had authority to employ help for that company. He employed Kinard to work for 1 year from April 1929 to April 1930 at $150 per month. On January of that year the San Antonio Machine & Supply Co. purchased the plant and continued to operate the plant with Durie continuing as foreman. Kinard testified that when his former contract with the company expired on April 1, 1930—

He asked Durie about continuing on the job on the same terms as before; that Durie at first told him that he did not know about it, but thought it would be all right. Appellee [Kinard] stated that he could not work that way and would have to know more definitely, and that Durie then told him "to go ahead just like you have been."

The local manager testified that Durie had the authority to employ people, "but that Durie did not have the authority to employ a man for as long a period as 1 month or 1 year." He admitted, however, that he knew Kinard had remained in the service and was drawing $150 per month, but explained it by saying he thought Kinard was working on a monthly basis.

Having reviewed the above evidence, the court concluded:

We think the evidence was sufficient to support the verdict of the jury in finding that the contract as alleged was actually entered into, and that Durie had authority to make the contract. In passing on the sufficiency of the evidence to support the verdict of the jury we must give the evidence the most favorable construction in favor of the verdict, and if the evidence is such that reasonable minds might differ as to the effect thereof or the inferences to be reasonably drawn therefrom, we must allow the verdict to stand.

CONTRACT OF EMPLOYMENT—BREACH—DAMAGES—SUBSEQUENT EMPLOYMENT IN DIFFERENT CAPACITY—*O'Connor* v. *Hayes Body Corporation, Supreme Court of Michigan (Apr. 4, 1932), 242 Northwestern Reporter, page 233.*—Cornelius J. O'Connor filed suit against the Hayes Body Corporation to recover damages alleged to have been caused by the breaching of a contract of employment. The suit was to recover for services under a special contract as an efficiency expert, at the rate of $300 per month from May 2, 1927, to February 1, 1930.

He recovered a judgment of $2,767.03 in the circuit court of Ionia County, Mich., and the corporation appealed to the Supreme Court of Michigan. The defense set out the fact that there was:

No fixed period of employment as an efficiency expert, and such employment ended when the factory was closed on December 5, 1927; that on December 2, 1927, plaintiff was hired as a day watchman at 45 cents per hour and received pay at that rate to March 1, 1928; that

on March 15, 1928, the factory reopened and plaintiff was hired as a timekeeper at $40 per week, and such employment continued until June 1928, when plaintiff was given charge of the employment department and acted as timekeeper at $225 per month and so continued until January 30, 1929, when the factory again shut down.

In answer to this O'Connor alleges that the contract was for an indefinite period at a salary of $300 per month, and "that the contract was never changed although the character of his work was changed", and while there was a change in his salary every time the work changed, the officers of the company assured him that he would be paid the rest of his $300 salary each month.

The company also urged that as a matter of law the contract terminated when O'Connor was dismissed and rehired as a day watchman. However, the court did not agree with this view. It said that as the contract was a contract at will it could have been terminated at any time, but that "it was not terminated as a mater of law by the closing of the factory and the subsequent employment * * * as a day watchman, if the parties agreed to the continuation of compensation as claimed by plaintiff."

The court concluded by saying that this question was a question of fact for determination by the jury and no reason was shown for disturbing their verdict.

The judgment of the lower court was therefore affirmed.

CONTRACT OF EMPLOYMENT—BREACH—DISCHARGE—DISLOYAL EMPLOYEE—*Elco Shoe Manufacturers, Inc.*, v. *Sisk et al.*, *Court of Appeals of New York (Nov. 22, 1932)*, *183 Northeastern Reporter, page 191.*—In 1921 John P. Murphy entered into a contract of employment with the Elco Shoe Manufacturers, Inc., as a shoe salesman. The contract also provided that Murphy was at liberty to sell other commodities and shoes which did not compete with the shoes manufactured by the Elco Co. He entered into a renewal agreement on May 1, 1926, providing for the continuance of the contract for a period of 3 years, beginning July 1, 1926. In 1928 Murphy began dealing in another line of shoes, called "Chandler shoes", and built up their sales $104,000 in a single year, and during the same period the sale of Elco shoes fell off $150,000. The Elco Co. discharged Murphy on January 18, 1929, and suit was filed against him by the company to secure an accounting and damages caused by an alleged conspiracy between Murphy and the other company. Murphy denied any conspiracy and filed a counterclaim to cover unpaid commissions and damages for wrongful discharge. The New York Supreme Court, appellate division, returned a judgment of $32,212.70 in favor of

Murphy on the counterclaims, following a finding by the jury that the Chandler shoe sold by Murphy did not compete with the lines manufactured by the Elco Co.

The Elco Shoe Manufacturers, Inc., appealed the case to the Court of Appeals of New York, and as Murphy had died during the proceedings the names of his executors were substituted on the record.

On appeal the contention was made that the question of whether the Chandler shoe competed with the Elco shoe was a question of law, as what a contract means is a question of law, and therefore should not have been referred to the jury. The appeals court upheld this view, and said that it was unable to find any grounds to support the findings of the trial court. In interpreting the terms of the contract the trial court defined competing shoes as "those so similar in price, design, style, material, workmanship, and other characteristics as may fairly leave ordinary and reasonable retail dealers in such doubt in making a choice between them as to permit the skill of a salesman to become a determining factor." Regarding this definition the appeals court said:

We do not adopt it for the purposes of this case. We have here an illustration of the fact that no man can serve two masters with equal fidelity when rival interests come into existence. Agents are bound at all times to exercise the utmost good faith toward their principals. They must act in accordance with the highest and truest principles of morality. The question here is not so much a technical definition of the word "competition" as used by shoe dealers as it is a question of loyalty and fair dealing.

The facts showed that the Chandler shoe sold by Murphy resembled the Elco shoe but was a much cheaper shoe, and the court was of the opinion that "an agent is not loyal when he offers for sale a choice between a ladies' high-class fine-turned shoe and a cheaper shoe resembling the former and offered to the trade as such." He not only sold these shoes, but the evidence showed that on one occasion he had even helped the Chandler Co. "disguise an Elco design so as to produce an imitation thereof and sold the product." The court considered this not only disloyalty on the part of the employee but real and active competition, and as a matter of law the court held that the Elco Co. was not required to continue in its employ the services of such an employee. The company was therefore justified in discharging Murphy, as he had already breached the contract by his conduct.

The judgment of the lower court was therefore reversed and a judgment in favor of the Elco Co. was granted authorizing an accounting as requested.

CONTRACT OF EMPLOYMENT—BREACH—DISOBEDIENCE AS GROUND—RETIREMENT—*School, City of Evansville* v. *Culver, Appellate Court of Indiana (July 27, 1932), 182 Northeastern Reporter, page 270.*—In an Indiana case a teacher's refusal to comply with a rule of the Evansville, Ind., school board requiring a teacher to retire at the age of 70 was held not such "other good and just cause" as would justify canceling a teacher's indefinite contract.

It appears that on May 5, 1930, John M. Culver signed a contract with the board of school trustees of Evansville, as a public-school teacher, for the year beginning September 2, 1930. Mr. Culver had been employed as a teacher in this city for over 30 years, and section 6967.1, Burns' Annotated Statutes, 1929 Supplement, says:

> Any person who * * * shall serve under contract as a teacher in any school corporation * * * for 5 or more successive years, and who shall * * * enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation. * * * Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such * * * contract shall remain in force unless succeeded by a new contract signed by both parties or unless it shall be canceled as provided in section 2 of this act.

Mr. Culver was 70 years old on April 14, 1930, and on July 13, 1931, he was invited to be present at a meeting of the school board, held for the purpose of determining whether his indefinite contract should be canceled, because the rules of the board required retirement when a teacher reached 70. After due consideration the board found Mr. Culver guilty of insubordination, in that he refused to retire in obedience to the rules of the board, and resolved that the contract be canceled because of this insubordination.

On September 5, 1931, Mr. Culver wrote the board that he was ready and willing to perform any services assigned to him for the school year, but his offer was refused, and he later demanded 1 month's salary which became due under the alleged contract.

Mr. Culver next brought action in the supreme court of Vanderburgh County, Ind., to have vacated the resolution which canceled his indefinite contract as a permanent teacher and to recover the sum of $270 as 1 month's salary. Judgment was rendered in his favor. The school board appealed the case to the appellate court of Indiana. This court held that the question it was called upon to decide was whether the rule requiring the retirement of all teachers who attained the age of 70 was a just and reasonable rule and whether it violates the statute in question. The teachers' tenure law (Burns' Annot. Stat. 1929 Supp., sec. 6967.1 et seq.) gives the causes for

which a teacher may be removed as: Incompetency, insubordination, neglect of duty, immorality, justifiable decrease in the number of teaching positions, or other good and just cause. It also provides that "the decision of the school board shall be final", and because of this last provision the board also contended that the lower court had no jurisdiction in the matter.

Citing somewhat similar cases in the courts of Indiana and other States, the court quoted: "Where the statute specifically enumerates the causes for which a teacher may be removed or dismissed the teacher cannot be removed or dismissed for any other cause." It was also said that "if a teacher * * * becomes inefficient, impaired in her usefulness, neglectful or otherwise incapable of performing her duties as a teacher in a proper manner, then good reason—'other good and just cause'—would exist for her dismissal."

In reply to the contentions that the contract was canceled for insubordination, consisting of a refusal to obey reasonable rules, and that a general rule providing for retirement at the age of 70 is a reasonable rule, and a valid one under the statute, the court said:

> It is our opinion, and we believe that any fair reasoning would lead to the inevitable conclusion, that the 70-year retirement rule was created with the view that the efficiency or competency of teachers should not be impaired by the infirmities which quite often accompany old age, and it appears here that appellant has resorted to the charge of insubordination as a substitute for a charge of incompetency, in order to cancel the indefinite contract of appellee. At this point we might say that the complaint avers that appellee had a success grade of 96 percent and no attempt was made to charge appellee with incompetency. Were appellee guilty of the latter, the statute affords appellant a remedy for the cancelation of the contract, as this is specifically provided for in the act. We therefore hold that a refusal to comply with the rule requiring retirement at the age of 70 years is not such "other good and just cause" as would justify a cancelation of a teacher's indefinite contract, and further hold that such a rule is unreasonable, in that it indirectly attempts to establish a limit to the tenure of every teacher and would not permit a permanent teacher's indefinite contract to continue in effect for an indefinite period, as provided by section 6967.1, supra.

The court further said in reply to the provision that the decision of the board should be final, that school authorities do not have a right to determine conclusively whether rules passed by them are reasonable or unreasonable. That question is subject to the review of the courts.

CONTRACT OF EMPLOYMENT—BREACH—PLACE OF MAKING—REPAYMENT OF ADVANCES—*Deniham* v. *Finn-Iffland & Co., Inc., Municipal Court of New York (Apr. 26, 1932), 256 New York Supplement, page*

801.—Deniham was employed by Finn-Iffland & Co., Inc., which was organized under the laws of Pennsylvania.

The contract provided that—

Either party may terminate it by giving the other 60 days' written notice, or upon mutual agreement it may be terminated at any time.

It further provided that—

The second party shall be allowed to draw $130 per week against future commissions. This amount, together with traveling expenses, which may be advanced by the first party, shall be charged against the account of the second party from accrued and future commissions.

Deniham was discharged without the notice mentioned above, and he brought this action for damages for breach of the contract. The defendant interposed a counterclaim, claiming that under the laws of Pennsylvania, which it claimed governed the agreement, it could recover the amount which was advanced in excess of the earned commissions.

The court held, however, that the contract was made in Pennsylvania, in that it was sent there for signature, but that the law of the place of performance governs the execution of a contract, and consequently the New York law applied (citing cases). In regard to this law it said:

* * * Under the law of this State one employed as a salesman is under no personal obligation to repay advances made to him to be charged against future commissions, in the absence of an agreement, express or implied, to repay; and, further, that an agreement to pay such an employee a specified sum per week, which sum is to be charged against future commissions, entitles him to recover this drawing account during the entire term of the contract, regardless of commissions earned. * * *

Therefore, if performance of the contract was to be here, which I find to be the fact, the counterclaim interposed is unavailing, as under the law of this State defendant cannot recover, as I find that there was no agreement, express or implied, on the part of the plaintiff to repay the advances made.

After deciding that the laws of the State of New York applied, there remained only the question of damages to be decided. Deniham sought payment of $130 per week from April 22, 1931, to June 17, 1931, a total of $1,040, but he reduced his claim to $1,000, the jurisdictional amount of the municipal court. The court held that since he had tendered his services during all the time between April 22, 1931, and June 17, 1931, and was not allowed to work, his damage was the amount of the drawing account for the unexpired term. Deniham was therefore awarded a judgment for $1,000 and the counterclaim was dismissed.

CONTRACT OF EMPLOYMENT—DISCHARGE—MISCONDUCT AS A GROUND FOR—TRADE SECRETS—*Kellems Products, Inc.*, v. *Coley et al.*, *Court of Chancery of New Jersey* (*May 31, 1932*), *160 Atlantic Reporter, page 639.*—One Coley was the shop foreman of the Kellems Co., which manufactured grips used by electrical companies. He was engaged for a term of years and contracted that he would not, for 5 years after his term of service, engage in a similar business within 100 miles of New York City.

During the early part of 1929 friction developed between Coley and his employer. Coley refused to report correctly the daily output of grips; reported that his money was running the business; caused a protest when the pay was delayed one day; claimed to be the inventor of a "collapsible mandrel" which was really invented by Miss Kellems' brother; and appropriated a check for $20, claiming that he had made in his own home the "swivel grips" for which it was received.

These and other acts of unfaithfulness resulted in Coley's discharge, and he immediately joined Martin & Son Products, Inc., receiving one half the capital stock for the "mandrel" which he claimed to have invented.

Meanwhile "a Kellems' grip, while in use by the Brooklyn Edison Co., pulling a cable through a conduit, separated; the wires of the grip pulled out of the lug, a most unusual occurrence." This "pulling out" indicated that the tips of the wires had not been properly treated with acid in order to "give the proper adhesion to the zinc solder with which they are soldered into the lug." Upon calling in all grips shipped since January 1, a number of imperfect grips were found mixed in with good ones, and it became evident that there had been a conspiracy to injure Kellems' business. A bill was filed requesting an injunction to restrain Coley from engaging in a similar line of business, and also to restrain Coley and his company from using the "collapsible mandrel", a shop secret of the Kellems Co.

The court held that Coley's discharge was justified and that he had made a binding covenant that he would not for 5 years engage in a similar business within 100 miles of New York City, which covenant would be enforced.

In regard to the "mandrel" which Coley had sold to Martin, both Coley and Kellems applied for patents, but the Patent Office held that it was Kellems' invention. The court granted an injunction to restrain Coley from using the "mandrel", which was held to be a shop secret of the Kellems Products, Inc.

CONTRACT OF EMPLOYMENT—LIABILITY FOR CAUSING BREACH—ENTICING AWAY EMPLOYEE—*Jordan* v. *Lewis*, *Supreme Court of Tennessee* (*June 11, 1931*), *39 Southwestern Reporter* (*2d*), *page 743*.—B. F. Lewis filed an action against W. H. Jordan to recover damages for the hiring and enticing away of one of his employees. The suit was based on the alleged violation of the following sections of Thompson's Shannon's Code of Tennessee, 1918:

4337. It shall not be lawful for any person in this State, knowingly, to hire, contract with, decoy, or entice away, directly or indirectly, anyone, male or female, who is at the time under contract or under the employ of another; and any person so under contract or employ of another leaving their employ without good and sufficient cause, before the expiration of the time for which they were employed, shall forfeit to the employer all sums due for service already rendered and be liable for such other damages the employer may reasonably sustain by such violation of contract.

4338. Any person violating the provisions of the first clause of the last section shall be liable to the party who originally had and was entitled to the services of said employee, by virtue of a previous contract, for such damages as he may reasonably sustain by the loss of the labor of said employee; and he shall also be liable for such damages, whether he had knowledge of any existing contract or not, if he fails or refuses to discharge the person so hired, or to pay such damages as the original employer may claim, after he has been notified that the person is under contract, or has violated the contract with another person, which amount shall be ascertained and the collection enforced by action for damages before any justice of the peace of said county where said violation occurs, or the party violating said section may reside.

A judgment was awarded Lewis, and later Jordan appealed to the court of appeals from a judgment against him in the circuit court, which judgment was affirmed. Thereupon the case was carried to the Supreme Court of Tennessee. Jordan complained that the lower court had excluded testimony that the employee hired by him after he had contracted to work for Lewis in 1927 had abandoned his contract for cause, and that the court was in error in charging the measure of damages to be the reasonable rental value of the lands which the employee had contracted to work. The jury should have been instructed, Jordan averred, that it was the duty of the original employer to have minimized his damages, as he might reasonably have done, either by working the land himself or by procuring a substitute renter.

The view of the trial court, concurred in by the court of appeals, appeared to be that "evidence tending to show that the employee had abandoned his contract with good and sufficient cause, was available only to the defendant employee in a suit between the original

employer and the employee, and was incompetent in an action brought by the original employer against the subsequent employer."

The Tennessee Supreme Court did not concur in this view, however, and in interpreting the two sections cited above, said:

While it is true that this defense is expressly provided for only in section 4337, which deals with the remedy in an action brought by the original employer against the employee, leaving his employ "without good and sufficient cause", and while the following section 4338 defines the liability and sets forth the remedy against the subsequent employer, the two sections are parts of one act closely related, referring one to the other, and we are of opinion, both upon a fair construction of the act as a whole and upon reason and principle, that it was not the intention of the legislature to make a subsequent employer absolutely liable, despite a reasonably established showing that the employee had left his former employer for "good and sufficient cause." We think it obvious that it was not the legislative intent to excuse the employee from liability to his former employer on these reasonable grounds, and yet deny to the subsequent employer the right to prove and rely on the same grounds. A contrary view would be subversive of fundamental principles of contractual rights.

The court also said there was error in the instructions with respect to the measure of damages and that it should be modified upon another trial.

The judgment of the court of appeals was therefore reversed.

CONTRACT OF EMPLOYMENT—STATUTE FORBIDDING DISCHARGE—HONORABLY DISCHARGED VETERANS—*Giorando et al.* v. *Brady, director, et al., Supreme Court of New Jersey (June 2, 1932), 160 Atlantic Reporter, page 761.*—This decision of the Supreme Court of New Jersey was rendered after reviewing the action of the directors of several departments of the city of Bayonne, N.J., in dismissing certain honorably discharged soldiers. These municipal employees claimed that under section 191-63, Cumulative Supplement to Compiled Statutes, 1924, they were exempt from discharge except for cause.

The supreme court, however, held that the section relied on grants exemption from discharge, without good cause, of soldiers, sailors, or marines honorably discharged from the United States service only where the term of employment is not fixed by law. In these cases the term of office was fixed by law.

The veterans contended that, because they continued in office after the time fixed for the termination of the employment, they were holding without the term of employment being fixed by law. In holding to the contrary and dismissing the case, the court said:

Where one is employed for a fixed term and continues thereafter to occupy the place without other appointment, he does not acquire any other status than that of a hold-over; and, as a hold-over, he does not obtain the benefits of the veterans' act in question.

CONTRACT OF EMPLOYMENT—TERMINATED BY DEATH—INVENTIONS OF EMPLOYEE—*Cutler* v. *United Shoe Machinery Corporation, Supreme Judicial Court of Massachusetts (Jan. 29, 1931), 174 Northeastern Reporter, page 507.*—The United Shoe Machinery Corporation, "engaged in the business of manufacturing and dealing in shoe machinery and various materials and supplies for the manufacture of shoes", entered into a written contract with Frederick M. Furber.

The contract provided for employment at annual salary with right of either party to terminate contract after specified period by giving of 30 days' notice, and employee agreed to sell and assign to employer any and all inventions and improvements relating to or designed or adapted for use in machinery or mechanisms used in manufacture of footwear, and agreed that he would promptly disclose all inventions and improvements, and that, as often as requested, he and his heirs, executors, and administrators would perform or cause to be performed all necessary acts as employer or counsel should deem proper to obtain grant of letters patent.

Under the contract, Furber made several inventions in shoe machinery, etc., and upon some of these inventions the grant of letters patent had not been obtained at the time of his death. Consequently Samuel R. Cutler, administrator of the estate of Mr. Furber, executed the necessary papers. Not having received any fees for this, Mr. Cutler brought suit for the recovery of compensation for his work and labor, and for the breach of the contract of employment with Mr. Furber.

The superior court, Suffolk County, Mass., decided the case in favor of the United Shoe Machinery Corporation, and Mr. Cutler carried the case to the Supreme Judicial Court of Massachusetts. In holding that the administrator was not entitled to compensation for executing the necessary papers in order that the employer might obtain the grant of letters patent, the court said that, by the terms of the contract Furber agreed—

That at any and all times upon request he would, and his heirs, executors, and administrators should perform or cause to be performed any and all such acts and execute or cause to be executed any and all such applications, specifications, powers of attorney, assignments, and other instruments * * *.

This obligation, by the express terms of the contract, rested upon Furber during his lifetime, and continued after his death in his personal representative. In the present case, even in the absence of such express stipulation, the law would imply such an obligation

which could be enforced in a court of equity. [Cases cited.] As the services rendered by the plaintiff were required by the terms of the contract, and as compensation therefor was included in the salary paid, it follows that the plaintiff is not entitled to recover under either count of the declaration.

In regard to the so-called "breach of contract", the court said:

The terms of the contract are clearly expressed and free from ambiguity. It is apparent that the services which the intestate was called upon to render were of a highly technical character; they involved his personal skill and inventive genius, and required powers of invention and origination which his administrator did not possess. The employment of the plantiff's intestate was terminated by his death. [Cases cited.]

The decision of the superior court, Suffolk County, was affirmed by the Supreme Judicial Court of Massachusetts.

CONVICT LABOR—LIABILITY FOR INJURY WHILE HIRED OUT—SAFE PLACE TO WORK—*Smith* v. *Raleigh Granite Co. et al., Supreme Court of North Carolina (Mar. 2, 1932), 162 Southeastern Reporter, page 731.*—Frank Smith, a Negro convict imprisoned in the State prison in North Carolina, was injured while working in the granite quarries of the Raleigh Granite Co. under contract of hire.

He filed suit against the Raleigh Granite Co. in the superior court, Pitt County, N.C., to recover damages caused by the injury. The evidence was to the effect that Smith, along with other convicts, was hired to work in the granite quarries. He was put to work on top of a pile of rocks by the company's "boss", being given a shovel and directed to push rocks down from the pile so that a scoop could remove them. The scoop was attached by wires to an engine and the engineer moved it forward and backward by means of a pulley. Evidence was presented to show that at the time of the injury this wire or cable "was ragged and old and had a whole lot of frazzles on the rope and looked like it would break any time."

The granite company denied any negligence and set up the plea of contributory negligence. The questions were submitted to the jury. It found that the company was guilty of negligence to which Smith did not contribute, and judgment was rendered on the verdict of $1,125.

Thereupon the case was appealed to the Supreme Court of North Carolina, where the judgment was affirmed. After reviewing the charges to the jury and the admission of certain evidence by the court below and finding no reversible error, the court quoted the general rule of law applicable to the case as found in 21 Ruling Case Law, section 26, pages 1089, 1090, as follows:

While, in a sense, the relation of master and servant may be said to exist between a prisoner and the lessee of his labor, and some authorities so hold, the relation cannot be said to exist in the strict sense, because the service is not voluntary, or for hire or reward, and also because the control exercised by the contractor over the convict is usually limited. Consequently it has been held that where the State, by officers of its own selection, retains the immediate and direct supervision and control of leased convicts, the hirer thereof is not liable to the prisoner for injuries due to negligent acts which he has no power to prevent. He is, however, held to a master's liability to the convict in respect to those incidents of the employment over which he has the same measure of control that a master ordinarily has. Therefore, it is held that he is not relieved of the ordinary care toward convicts which he is required to exercise toward his employees, and he will be liable to them for failure to provide a safe place in which to work and for knowingly bringing vicious persons into contact with them. The contractor is also bound to see that the appliances with which the prisoner is working are reasonably safe.

The court also rejected the "fellow-servant" doctrine as a defense, on the ground that the hoisting engineer was not a fellow servant of Smith at the time of the accident.

CRIMINAL CONSPIRACY—INTIMIDATION OF EMPLOYEES—EVIDENCE—*Newton et al.* v. *Commonwealth, Court of Appeals of Kentucky (May 17, 1932), 50 Southwestern Reporter (2d), page 13.*—Henry Newton and Pete Harper were convicted in the circuit court of Muhlenberg County, Ky., of the crime of conspiring together for the purpose of intimidating and disturbing others. They appealed the case to the Court of Appeals of Kentucky.

It appears from the evidence that there had been a strike by the employees of the Brownsville Mine, owned by the Gibralter Coal Co.; that Newton was a former employee of the mining company and a member of the United Mine Workers of America, but Harper was neither a miner nor a member of the union. There was testimony to the effect that as employees attempted to go to work they were stopped, while on the highway, by a crowd of miners and others and persuaded not to take the place of the strikers. Newton and Harper were among these men and testimony was offered which showed that both were active in keeping men from going to work. One man testified that Harper had a gun.

Another employee in the mine who attempted to go to work testified that he was stopped by the crowd of strikers, but that "he never saw Henry Newton do anything"; that Harper flagged him to stop but afterwards said nothing to him; someone else told him "they did not aim for them to go to work."

The court summarized the defense presented by the two men as follows:

Newton's evidence was that he went to where the crowd was assembled solely for the purpose of asking the men who were going to work not to take the jobs of the strikers, and not in pursuance of any conspiracy to alarm or intimidate them. Harper's defense was that he went to the place purely as a spectator, and not pursuant to a conspiracy to alarm or intimidate the men, and that he took no part in the proceedings, except to point his gun at Hancock, who was advancing on him with a jack.

The indictment had been challenged as being insufficient because it did not charge that the men went forth armed. The court sustained the indictment, as it was of the opinion that it was not necessary under the statutory provision to allege that the men were armed. The court also held that the evidence showing speeches and acts by both men "reasonably calculated to alarm and intimidate the men who were going to work" was sufficient evidence to sustain the verdict. However, serious errors occurred during the trial. The jury was allowed to be shown certain cards posted upon the company's property indicating acts of violence and containing threats, and it was not shown that either Harper or Newton were in any way connected with the cards. The court also was of the opinion that some of the testimony was merely hearsay and should have been excluded; and that instructions "presenting the defense of the accused" should have been given by the court below to the jury.

For these errors during the trial the judgment was reversed and the cause remanded for a new trial.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—EYE INJURY—RAILROAD EMPLOYEE—*Chesapeake & Ohio Railway Co.* v. *Kuhn, United States Supreme Court (Nov. 23, 1931), 52 Supreme Court Reporter, page 45.*—On February 9, 1926, William Kuhn, an experienced section hand, was engaged with others in repairing a sidetrack leading from the main line of the Chesapeake & Ohio Railway. It became necessary to shorten two steel rails some 6 or 8 inches. The process used was first to cut the rail with a cold chisel and then strike it with a heavy hammer. The men took turns in striking the rail, and none of them wore goggles, asked for them, or objected to the method of operation. While Kuhn was standing by, awaiting his turn to strike, a steel chip from the chisel or rail struck and destroyed his eye.

Kuhn filed suit against the company for damages in the court of common pleas, Pike County, Ohio. He alleged that the accident resulted from the company's negligence in "ordering him to use a

defective sledge hammer and chisel; failing to promulgate and enforce proper rules concerning the upkeep of tools ordinarily used, to furnish guards or goggles for workmen's eyes, to provide a reasonably safe place for him to work."

The jury rendered a verdict in favor of the employee and it was affirmed by the court of appeals. The Ohio Supreme Court denied a review, and the case was carried to the United States Supreme Court. In reversing the decision of the lower court, Mr. Justice McReynolds, speaking for the Court, said:

We think the evidence clearly discloses that Kuhn's injury resulted from the ordinary hazards of his employment, which he fully understood and voluntarily assumed. There was no complaint, no promise by his superior to mitigate the obvious dangers. The trial judge should have directed a verdict for the railway company.

In cases like this, where damages are claimed under the Federal Employers' Liability Act (45 U.S.C.A., secs. 51–59), defense of the assumption of the risk is permissible and where the undisputed evidence clearly shows such assumption the trial judge should direct a verdict for the defendant. Moreover, in proceedings under that act, wherever brought, the rights and obligations of the parties depend upon it and applicable principles of common law as interpreted and applied in the Federal courts. [Cases cited.]

The court of appeals acted upon the erroneous theory that it should follow the views of the supreme court of the State rather than those of this Court in respect of questions arising under the liability act. That statute, as interpreted by this Court, is the supreme law to be applied by all courts, Federal and State.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—NEGLIGENCE—RAILROAD—*Blevins* v. *Union Pacific Railroad Co., Supreme Court of Kansas (June 6, 1931), 299 Pacific Reporter, page 593.*—A fireman putting his head out of the cab window, with full knowledge of the negligence and the consequent danger arising when the engineer opened wide the throttle, causing a large quantity of cinders to come out of the smokestack, and thereafter suffering an injury when a cinder lodged in his eye, was held by the Supreme Court of Kansas to have assumed the risk under the Federal Employers' Liability Act.

The facts of the case show that Blevins was engaged in interstate commerce as a fireman in the Union Pacific Railroad Co.'s yards in Kansas City. The engineer, after effecting a coupling to several cattle cars, opened the throttle to its full capacity, causing a severe exhaust, which threw out of the smokestack a large volume of hot cinders. Immediately prior to this Blevins had coaled the engine with fine coal and had taken his position in the cab, when he saw the engineer open the throttle to its full capacity. It was Blevins' duty

to look ahead to see if there were any other engines coming. To accomplish this he put his head outside the cab window and the injury to his eye resulted. Suit was filed by the employee under the Federal Employers' Liability Act and the railroad company claimed as a defense that Blevins had assumed the risk. Evidence was presented to show that Blevins knew that an engine threw sparks or cinders out of the smokestack, that these were increased when fine coal was used, that an exhaust would force a large volume into the air, and that they were likely to fall in his eyes while his head was outside the cab window.

The district court of Wyandotte County, Kans., rendered a judgment in favor of the employee, and the company appealed to the Supreme Court of Kansas. In applying the doctrine of assumption of risk under the Federal Employers' Liability Act the court said:

> The courts appear to have made a general division of negligent acts creating a danger not assumed by the employee, and negligent acts assumed by an employee in the course of his employment.
>
> The negligent acts of employer or coemployee that are sudden and of which the employee has no notice or knowledge, creating a danger which can not be foreseen, are not assumed.
>
> Where the employee has full knowledge of the negligence and appreciates the danger arising therefrom, he assumes the risk if he continues in the employment.

The court cited several cases supporting this view, and continued the opinion reversing the judgment of the district court by saying in part as follows:

> The sole question in the case, as now presented, is whether the negligence established by the evidence is of such character that knowledge thereof charges the employee with an appreciation of the danger arising therefrom. Knowledge of the negligence is admitted. In fact, the plaintiff is the only person who observed it. He also admitted that he knew the consequences that would follow from the pulling of the throttle to its full capacity.
>
> The plaintiff was an experienced fireman, and had been working on this particular job for about 4 months. We must assume that he was a man of ordinary intelligence and would therefore be expected to know and appreciate the things that are obvious to the ordinary apprehension. His own statements clearly indicate that he comprehended the nature and degree of the danger arising from the opening of the throttle, and that he voluntarily put his head out of the cab window knowing that he was likely to get a cinder in his eye. He assumed the risk and must abide the consequence.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—SAFE PLACE AND APPLIANCES—*Gulf, Mobile & Northern Railroad Co.* v. *Walters, Supreme Court of Mississippi (June 1, 1931), 134 Southern Reporter,*

page 831.—Leonard Walters was killed while employed as a brakeman in the yards of the Gulf, Mobile & Northern Railroad Co. at Union, Miss. At the time of the accident Walters was on the top of a car engaged in interstate commerce. It was alleged that the engineer knew the dangerous position of the deceased on the car, and without signaling him, suddenly applied the steam and caused the car to come into contact with a chain of cars. These cars were not equipped with automatic couplers and a violent impact followed, causing Walters to be thrown from the top of the car under the wheels and killed.

Cora E. Walters, administratrix, filed suit against the railroad to recover damages for Walters' death. The circuit court of Green County, Miss., rendered a judgment for $2,500 in favor of the administratrix, and the railroad company appealed the case to the Supreme Court of Mississippi.

The first question involved on appeal was whether Walters at the time of his death was engaged in interstate commerce. The court applied the test as laid down by the United States Supreme Court in the case of *Shanks* v. *Railroad Co.* (239 U.S. 556), as follows:

> The true test of employment in interstate commerce in the sense intended is stated to be, " Was the employee, at the time of the injury, engaged in interstate transportation or in work so closely related to it as to be practically a part of it? "

The court found that as a car of the train being made up was loaded with interstate merchandise, the work was so closely related to interstate commerce as to be a part of it. As the court found Walters engaged in interstate commerce at the time of the accident, its attention was turned to the question of whether he had assumed the risk, as assumption of risk was a valid defense under the Federal Employers' Liability Act. After reviewing the evidence the court found:

> * * * That the deceased had the right, and it was his duty as head brakeman, to communicate signals to the engineer for the purpose of controlling the movement of the car; that he was standing within 3 feet of the end of the car and the brake stand, which extended about 3 feet above the top of the car; and from all the evidence in the record the jury might have found that the engine and car were being operated at a speed of from 12 to 20, or, as testified by one witness, 18 to 20 miles an hour; that this speed, under the circumstances, was highly dangerous and excessive; and that the speed and consequent danger were so obvious that the deceased, who was a brakeman of long experience in the operation or movement of cars and trains, must have been aware of the excessive speed and must have appreciated the danger thereof; and if so, then he must be held to have assumed the risk, unless the jury should further find that he was confronted with a sudden and unexpected danger from which he did not have the time, opportunity, and means of extricating himself.

The judgment of the lower court was reversed and the case was returned to the court to allow the jury to determine whether Walters assumed the risk of his employment.

EMPLOYERS' LIABILITY—BARRED BY FACTORY ACT—OCCUPATIONAL POISONING—STATUTE OF LIMITATIONS—*Calhoun* v. *Washington Veneer Co., Supreme Court of Washington (Nov. 15, 1932), 15 Pacific Reporter (2d), page 943.*—Claude Calhoun entered the employ of the Washington Veneer Co. during April 1926, and was directed to work with veneer paint in close proximity to the room where glue was manufactured. In September 1931 he filed suit against the company alleging that he had contracted "a severe and permanent case of carbon bisulphide poisoning", due to the fact that the company had failed to provide proper ventilation and had failed to warn him of the dangerous character of the gases.

Calhoun died on November 17, 1931, and his administratrix was substituted as plaintiff in the case, and counts were added to cover the additional funeral cost. The company's attorney demurred to the complaint on the grounds (1) that it did not state facts sufficient for a cause of action and (2) that the statute of limitations had run against the suit. The trial court sustained the demurrer and the case was dismissed. The administratrix appealed from this judgment to the Supreme Court of Washington. The court summed up the widow's cause of action as follows:

> Appellant declares that her cause of action is purely one under the common law, based upon a breach of the master's duty to exercise ordinary care in furnishing the servant with a reasonably safe place in which to work. It is asserted that there are two grounds of negligence charged: Failure to ventilate the place of work so as to render the poisonous gases generated therein harmless; and failure to warn and instruct the servant against the hidden and unknown dangers of these poisonous gases.

After reviewing the cases cited in which such actions under the common law were sustained in other jurisdictions, the court concluded that a suit to recover damages for an injury of this nature could be successfully maintained under the common law only when no statutory provision was made for such a recovery. In Washington a remedy was provided by statute in the workmen's compensation act and also in the factory act. As the injury was an occupational disease, it would not come within the terms of the Washington workmen's compensation act and therefore the remedy would be under the factory act. (Rem. Comp. Stat., sec. 7659.) The statute provides that all actions under the factory act must

be brought within 3 years from the date of the injury. The facts alleged in this case clearly showed that the injuries received from the violation of the factory act by the company culminated and accrued about the middle of May 1928, while the suit was not commenced until September 1931, which date was not within the 3-year period allowed. The court held that the action was therefore barred by the statutory limitation in section 159, Remington's Compiled Statutes.

The contention was then made that even if the recovery for the original injury was barred by the 3-year limitation, the widow should be allowed to recover for wrongful death and the funeral expenses, as these were added by the amendment in 1931 and the statutory period had not run as to them. The court, however, said that the widow "did not have a cause of action against the respondent [employer] because of the death of her husband, but because of the negligence of the respondent [employer]. The negligence was the cause; the death was the result. Under the statute the claim accrued, if at all, at the time of the injury to Claude Calhoun." Therefore the court refused to allow the causes of action set up in the amended part as they were also barred by the 3-year period.

The judgment of the lower court, denying recovery, was therefore affirmed.

EMPLOYERS' LIABILITY—CAUSAL CONNECTION—SAFETY APPLIANCE ACT—*Peters* v. *Wabash Railway Co., Supreme Court of Missouri (July 3, 1931), 42 Southwestern Reporter (2d), page 588.*—James Cornelius Peters was killed on the night of December 1, 1925, while employed as a switchman in the Wabash Railway yards in St. Louis, Mo. On that night Peters was a member of a switching crew "engaged in making up a 'drag' of freight cars to be taken to another part of the city and put into a train." While performing his duties he was caught and crushed between one of the cars and an adjacent loading platform.

The widow of Peters brought suit under the Federal Employers' Liability Act to recover damages for his death. The St. Louis circuit court rendered a judgment for $30,000 and the railway company appealed the case to the Supreme Court of Missouri. The sole ground of negligence alleged was the violation by the railway company of the Federal Safety Appliance Act, in that the cars were not equipped with automatic couplers as required by the act, and it was contended Peters was killed as a direct result of this violation while attempting to effect a coupling. The question for decision upon appeal was whether this violation was the proximate cause of the injury.

According to the record, one of the members of the switching crew testified that Peters was "field man" and had the duty of seeing that

the coupling was effected between the Wabash car and the Kansas City car. He stood at the north end of the Wabash car and gave a "back-up" signal, which was relayed to and obeyed by the engineer. About 10 minutes after the coupling was effected Peters was found dead.

After considering many cases cited in the record, the court quoted the rule as stated in *Davis* v. *Wolfe* (263 U.S. 239), as follows:

> The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.

Following this rule, the court held the violation of the Safety Appliance Act was not the proximate cause of the injury. The court said: "The defective coupler merely furnished the occasion for Peters being between the cars and the platform when the third and successful attempt to couple was made. It did not cause or contribute to cause the movement of the cars that killed him. He was not killed while engaged in the coupling movement." The court also pointed out that it was his own act in failing to go to a place of safety while giving the signals that brought about the injury. Also his signal brought about the further movement of the train after the coupling and this action on his part was considered by the court as constituting an efficient independent intervening cause but for which the accident would not have happened and it was therefore the proximate cause of his death.

The judgment of the circuit court was therefore reversed.

EMPLOYERS' LIABILITY—CONTRIBUTORY NEGLIGENCE—FAILURE TO INSTRUCT—*Trimble* v. *Steele, Supreme Court of Appeals of West Virginia (Feb. 24, 1931), 157 Southeastern Reporter, page 166.*—Darwin Trimble was employed as fireman at a sawmill operated by Samuel T. Steele. On February 28, 1928, while attempting to start a fire in the boiler, he dashed about one half pint of oil on the live coals, thinking it was ordinary lamp oil. As a matter of fact, the oil was crude oil, and an explosion occurred from which Trimble received severe burns resulting in permanent injuries.

The employer was not a subscriber to the West Virginia workmen's compensation fund. Trimble filed suit against him to recover dam-

ages for personal injuries. The circuit court, Harrison County, rendered a verdict of $2,000 in his favor. The employer appealed the case to the Supreme Court of Appeals of West Virginia, contending that Trimble was guilty of contributory negligence in dashing the oil on the fire. Trimble testified that he was familiar with lamp oil and had previously used it in this manner; that he had been instructed to use this oil in starting the fire and that he did not know it was crude oil, with which he was not familiar and as to which his employer gave him no information or caution. The employer denied that the oil was kept for ignition or that he had instructed Trimble to use it for that purpose, and claimed that he had warned him against its use.

After considering the evidence the court held that the contributory negligence of Trimble, if any, would have no effect on the liability of his employer when the latter was primarily negligent and this negligence contributed directly to the injury.

The decision of the lower court was therefore affirmed.

EMPLOYERS' LIABILITY—CONTRIBUTORY NEGLIGENCE—SAFE PLACE TO WORK—*McLean* v. *Andrews Hardwood Co. et al., Supreme Court of North Carolina (Jan. 27, 1931), 156 Southeastern Reporter, page 528.*—B. A. McLean, who acted as brakeman and conductor on a logging train, filed suit in the superior court, Cherokee County, N.C., to recover damages for injuries he received due to the alleged negligence of his employer, the Andrews Hardwood Co. Upon trial the evidence showed that McLean was injured by a log which rolled off one of the cars and hurt his hand; the evidence also showed that it was the brakeman's duty to see that the car was properly loaded and chained.

The issues of negligence on the part of the employer and of contributory negligence on the part of McLean were submitted to the jury and the answer to both issues was in the affirmative. In answer to the question whether McLean was entitled to any damages the jury awarded the sum of $500.

The employer appealed to the Supreme Court of North Carolina, where the judgment was reversed. The higher court took the view that since a logging road was considered a "railroad" within the statute, "contributory negligence is no bar to recovery but mitigates or diminishes damages." However, the court said: "The duty was placed upon him to see to the proper loading and inspection and the injury he complains of was caused by his nonperformance of duty for which he is barred from recovery."

EMPLOYERS' LIABILITY—EMPLOYEE—RAILROAD—*Docheney* v. *Pennsylvania Railroad Co., Circuit Court of Appeals, Third Circuit (Aug. 4, 1932), 60 Federal Reporter (2d), page 808.*—Alonzo J. Docheney was employed as a brakeman by the Crucible Steel Co., whose plant was situated on both sides of the Pennsylvania Railroad tracks in Pittsburgh. The steel company had trackage of its own and Docheney was employed as a brakeman to operate its own locomotive to switch cars within its own plant. At times he also moved cars from the tracks of the Pennsylvania Railroad to those of his employer, when he was under the supervision of the railroad's trainmaster and subject to the rules and regulations of the railroad.

While engaged in moving the engine into his employer's plant it became necessary for Docheney to move some of the Pennsylvania cars which were on a siding. In attempting to do this Docheney stepped into a hole in the right of way and was injured. He brought suit against the Pennsylvania Railroad under the Federal Employers' Liability Act (45 U.S.C.A., secs. 51–59) and also under the Safety Appliance Act (45 U.S.C.A., sec. 1 et seq.), claiming that he was injured because a defective "lever lift" on one of the cars failed to operate.

After a hearing in the District Court of the United States for the Western District of Pennsylvania judgment was rendered in favor of the railroad company, and Docheney appealed the case to the Circuit Court of Appeals, Third Circuit. In affirming the decision of the lower court, this Court said:

Under these facts we are unable to find that the plaintiff was an employee of the railroad company within the purview of these acts. He was injured purely in the business of his employer, the Crucible Steel Co., in moving one of its engines over the tracks of the railroad company, as a means of passage from one plant of the steel company to another. In this movement no work was being done for the railroad company. The same engine crew had, earlier in the day, delivered the cars in question to the point where they were standing, but, in moving them at the time of the accident, they were moving the cars, not for the business and convenience of the railroad company but for the purposes and business of the steel company in getting the engine from one point to another.

In regard to the contention that the injured brakeman was an employee because he was subject to the rules of the railroad the court said:

While the plaintiff was subject to regulations, orders, and discipline imposed by the railroad company, that was for the purpose of coordinating the movements of cars being shifted over the railroad company's tracks from one part of the steel company's plant to another, but the actual control of the steel company's employees in

doing the work was retained by their employer, the steel company. The regulations, orders, and discipline imposed by the railroad company were necessary for insuring safety to both corporations and their employees in carrying out the purposes of the agreement concerning the use of the railroad company's tracks. The court below rightly held that the plaintiff did not, by reason of compliance with such regulations, become an employee of the railroad company.

The Supreme Court of Missouri held in the case of a foreman of a railroad switching crew that he was engaged in intrastate commerce, and therefore the State workmen's compensation act applied. (*Phillips* v. *Union Terminal Ry. Co.* (1931), 40 S.W. (2d) 1046.)

EMPLOYERS' LIABILITY—EMPLOYMENT STATUS—INDEPENDENT CONTRACTOR—*West* v. *Smith & Kelly Co., Court of Appeals of Georgia (Feb. 14, 1931), 157 Southeastern Reporter, page 261.*—A. P. West was an itinerant mender of chairs. He solicited and obtained a chair for mending from the Smith & Kelly Co., of Savannah, Ga. He was permitted by the company to take the chair into the basement of the place of business and there engage in the mending. While working in the basement he had occasion to use the lavatory, situated on the basement floor but on a somewhat higher level, making the use of steps necessary. In returning to his work his foot caught in a "split place" in one of these steps, causing him to fall, and as a result of the fall he received injuries.

He filed suit against the Smith & Kelly Co. to recover damages for the company's failure to provide a safe place in which to work. The city court of Savannah dismissed the suit and appeal was taken to the Georgia Court of Appeals. In affirming the judgment of the lower court the appeals court said:

Whether or not the plaintiff [West], while in the basement for the purpose of carrying on the work undertaken for the defendants [Smith & Kelly Co.] as an independent contractor, occupied the status of an invitee upon the premises, the invitation did not extend to any other portion of the premises, and in entering upon another portion of the premises he was at most a mere licensee.

The court further held that there was no breach of any duty owing by the company to West, and therefore it was not liable for his injury.

EMPLOYERS' LIABILITY—EMPLOYMENT STATUS—NEGLIGENCE—*Denton* v. *Yazoo & Mississippi Valley Railroad Co. et al., United States Supreme Court (Jan. 4, 1932), 52 Supreme Court Reporter, page 141.*—The work of handling mails, done by men furnished by rail-

roads under postal regulations, is Government work and the railroads are relieved from liability for injury caused by employees while engaged in such work, according to a decision by the United States Supreme Court.

Jesse H. Denton, a United States railway postal clerk, sustained an injury due to the alleged negligence of one Hunter, a porter in the general service of the Yazoo & Mississippi Valley Railroad Co. and the Illinois Central Railroad Co. At the time of the injury Hunter was loading United States mail into a mail car, under the direction of a United States postal transfer clerk, and was not, while engaged in such work, under the direction or control of either of the railroad companies. The work was done as required by statute (39 U.S.Stat.L. 412) and the railroad companies furnished the men necessary to handle the mail.

Denton brought action in a Mississippi court to recover damages against Hunter and the two railroad companies, and a judgment was entered against all three defendants. The Mississippi Supreme Court, however, reversed the judgment as to the railroad companies on the ground that "what Hunter was doing at the time of his alleged negligent act was not for them but for the United States." Thereupon the case was carried to the United States Supreme Court for review.

Mr. Justice Sutherland, in rendering the opinion for the court, laid down the following for determining whether the railroad companies were liable:

> Whether the railroad companies may be held liable for Hunter's act depends not upon the fact that he was their servant generally but upon whether the work which he was doing at the time was their work or that of another; a question determined, usually at least, by ascertaining under whose authority and command the work was being done. When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former. This rule is elementary and finds support in a large number of decisions.

The prior decision of the court in *Standard Oil Co.* v. *Anderson* (29 Sup. Ct. 252; 212 U.S. 215) was discussed and quoted in part, and the case of *Driscoll* v. *Towle* (63 N.E. 922), relied on to sustain the judgment of the lower court, was also discussed. The court, however, found "the facts of the present case require a different conclusion", and in affirming the judgment of the Mississippi Supreme Court relieving the railroad companies from liability, said, in part, as follows:

> The statutory obligation imposed upon the railroad carriers is simply to transport mail offered for transportation by the United

States. They are not required to handle, load, or receive mail matter, but only to furnish the men necessary for those purposes. The men so furnished handle the mails and load them into, and receive them from, the railway post-office cars, as the regulation prescribes, "under the direction of the transfer clerk, or clerk in charge of the car." The work they do is that of the Government.

EMPLOYERS' LIABILITY—FELLOW SERVICE—NEGLIGENCE—*Pollock* v. *Reitz, Court of Appeals of Ohio (June 14, 1929), 176 Northeastern Reporter, page 478.*—Marguerite Reitz, a registered nurse, was employed by one Miss Pollock, performing the usual duties of a nurse. Elizabeth Kennedy was also an employee of Miss Pollock, engaged as a general housekeeper. On February 18, 1927, after Miss Pollock finished her noon meal, Miss Reitz took her tray down a back stairway which led to the kitchen.

As she went down the stairs she tripped on a carpet sweeper, was thrown to the landing, and received injuries for which she brought suit against Miss Pollock in the court of common pleas of Mahoning County, Ohio. A judgment was rendered in favor of Miss Reitz, and the case was appealed to the Court of Appeals of Ohio.

On appeal there were two main questions to be settled. It had been attempted to prove that the accident was the result of Miss Kennedy's negligence in leaving the sweeper on the stairway and that the two employees were not fellow servants because they were serving in different departments, the one as nurse and the other as housemaid, and consequently the employer was liable for any injury caused the one by the negligence of the other.

The court said that the leading factor in the question of fellow service is whether the two employees actually serve a common employer, neither exercising any control over the other, and that in the absence of the relation of superior and subordinate (it was shown no such relation existed in this case) their common employer was not liable to either for the injuries received as the result of negligence on the part of the other. (Cases cited.) Since it was shown that the injured employee and the negligent one were fellow servants, as defined by a number of cases cited, the court held that they had assumed the risk of injury within the employment and that the employer could not be held liable for any injury. The judgment of the lower court was reversed.

The court also mentioned that Miss Reitz had been instructed to use the front stairs, and her disobedience was the proximate cause of the injury and sufficient contributory negligence to bar a recovery of damages, even if it had been conceded that the two employees were not fellow servants.

EMPLOYERS' LIABILITY—FRAUD—MISREPRESENTATION OF AGE—CAUSAL CONNECTION—*Borum* v. *Minneapolis, St. Paul & Sault Ste. Marie Railroad Co., United States Supreme Court (May 23, 1932), 52 Supreme Court Reporter, page 612.*—James M. Borum was employed by the Minneapolis, St. Paul & Sault Ste. Marie Railroad Co. in 1911 and continued in its employ until 1917. In October 1921 he returned to the employment office of the railroad and applied for employment. Among the rules relating to employment prescribed by the railroad were the following:

No person inexperienced in railroad work over 35 years, and no experienced person over 45 years, shall hereafter be taken into the service.

Applications for employment in yard service not rejected in 30 days will be considered accepted.

In 1911 when Borum was employed he gave his age as 28; and in the application filed in 1921 he stated that he was 38, when as a matter of fact he was 49 years old. The application was never rejected, and upon standing the necessary physical examination he entered upon his duties as switchman in the yards at Minneapolis. On December 11, 1928, he was injured while engaged in performing his duties, and sustained the loss of both legs. He brought suit under the Federal Employers' Liability Act (35 U.S.Stat.L. 65) to recover damages, and the district court, Hennepin County, Minn., rendered a verdict in his favor. The case was appealed to the Supreme Court of Minnesota.

Among the questions involved on appeal was whether the misrepresentation regarding his age should prevent his recovery. It developed from the testimony of the vice president that the purpose of the rule regarding the age limit for employment was not because of public policy for the protection and safety of the traveling public, but was for the purpose of promoting efficiency in the operation of the railroad.

The evidence also developed the fact that it was a common practice to understate the age and that the railroad had made an investigation of Borum and could easily have ascertained his correct age.

The railroad relied chiefly on the case of *Minneapolis, St. Paul & Sault Ste. Marie R. Co.* v. *Rock* (279 U.S. 410)[8] as controlling authority that an employee securing his employment by fraud cannot recover under the Federal Employers' Liability Act. In that case Rock, having failed to pass the physical examination required of all prospective employees, applied for employment under a different name and secured a substitute to stand the examination for him. He was

[8] U.S. Bureau of Labor Statistics Bul. No. 548: Decisions of courts and opinions affecting labor, 1929–1930, p. 88. Washington, 1931.

given employment and later received injuries for which he sought recovery. In deciding that case the court held:

That one who obtained employment as a switchman for an interstate carrier by railroad by fraudulently evading the company's rule requiring applicants to submit to a physical examination and who suffered injury in the course of employment in interstate transportation, while the company remained unaware of the deception, was not as of right an employee within the meaning, or entitled to the protection, of the Federal Employers' Liability Act and could not maintain an action for injury under that statute.

The court concluded that the Rock case differed in several material points from the case at bar. The court said Rock was not the man for whose services the railroad contracted. Here the plaintiff was. The defendant knew him. Here also Borum was physically fit to perform the work, while in the other case Rock was in a very bad condition, making it dangerous for him to be employed. The court also said that the public policy effective here did not require the defendant to have or enforce such a rule. The Minnesota Supreme Court therefore rendered a decision in favor of the injured employee. The railroad then appealed the case to the United States Supreme Court where the decision of the lower court was affirmed, the supreme court being of the opinion that the Rock case, supra, was not controlling. In comparing the two cases, Mr. Justice Butler said:

Here, defendant could not have regarded the difference between plaintiff's actual age and that stated in his application as having any material bearing upon the physical condition it required. The arbitrators did not find, and the evidence does not show, that plaintiff's false statement of his age substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition, or that, if he had given his real age, the surgeon would have found otherwise. Indeed the surgeon's testimony shows that, save in exceptional cases, defendant, in accordance with its established rules, permits its switchmen to continue in the service until they are 65 years old without any physical examination after they are employed. Plaintiff's physical condition was not shown to be such as to make his employment inconsistent with the defendant's proper policy or its reasonable rules to insure discharge of its duty to select fit employees. The evidence indicates that, under its own interpretation of rule 22 together with the schedule constituting the agreement between defendant and its switchmen, defendant, after the final acceptance of plaintiff's application, was not free to discharge him on account of the false statement as to his age.

It is clear that the facts found, when taken in connection with those shown by uncontradicted evidence, are not sufficient to bring this case within the rule applied in *Minneapolis, etc., R. Co.* v. *Rock*, supra, or the reasons upon which that decision rests.

EMPLOYERS' LIABILITY—INTERSTATE COMMERCE—*Chicago & Northwestern Railway Co.* v. *Bolle* (*Nov. 23, 1931*), *United States Supreme Court, 52 Supreme Court Reporter, page 59.*—Eugene Bolle was employed by the Chicago & Northwestern Railway Co. to fire a stationary engine which was utilized to generate steam for the purpose of heating the passenger depot and other structures used for general railroad purposes at Waukegan, Ill. The steam was also used to heat passenger coaches while standing in the yard, and sometimes the steam was used to prevent the freezing of turntables used in both interstate and intrastate commerce.

On the occasion in question the stationary engine was temporarily out of order and Bolle had been using a locomotive engine as a substitute. In the course of his work he had to accompany the engine, along with three engines used in interstate commerce, to a place about 4 miles distant to obtain a supply of coal. He was seriously injured while coal was being placed upon one of the engines, and he filed suit against his employer to recover damages for the injury under the Federal Employers' Liability Act.

After several trials in the State courts the final decision of the appellate court was appealed to the United States Supreme Court for review.

The Supreme Court followed its decision in the case of *Shanks* v. *Delaware, Lackawanna & Western Railroad Co.* (239 U.S. 556), in which the test applied was whether an employee, when injured, was engaged in interstate "transportation" or in work so closely related thereto as to be practically a part thereof.

Continuing the opinion reversing the judgment of the lower court in favor of Bolle, Mr. Justice Sutherland said, in part:

> It will be observed that the word used in defining the test is "transportation", not the word "commerce." The two words were not regarded as interchangeable but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term. The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; and hence the test of whether an employee at the time of his injury is engaged in interstate commerce, within the meaning of the act, naturally must be whether he was engaged in interstate transportation, or in work so closely related to such transportation as to be practically a part of it.
>
> Plainly, the respondent in the present case does not bring himself within the rule. At the time of receiving his injury, he was engaged in work not incidental to transportation in interstate commerce, but purely incidental to the furnishing of means for heating the station and other structures of the company. His duty ended when he had

produced a supply of steam for that purpose. He had nothing to do with its distribution or specific use. Indeed, what he produced was not used or intended to be used, directly or indirectly, in the transportation of anything. It is plain that his work was not in interstate transportation, and was not so closely related to such transportation as to cause it to be practically a part of it.

EMPLOYERS' LIABILITY—INTERSTATE COMMERCE—COVERAGE—*New York, New Haven & Hartford Railroad Co.* v. *Bezue, United States Supreme Court (Jan. 25, 1932), 52 Supreme Court Reporter, page 205.*—Clarence Bezue filed suit under the Federal Employers' Liability Act against his employer, the New York, New Haven & Hartford Railroad Co., to recover damages for injuries sustained in the course of his employment.

The appellate division of the New York Supreme Court rendered a judgment in his favor and it was affirmed by the New York Court of Appeals, whereupon the railroad appealed to the Supreme Court of the United States.

As the question involved was whether Bezue was engaged in interstate commerce at the time of his injury, the court reviewed the facts of the case. Bezue had been employed for about a year at the roundhouse of the railroad at Maybrook, N.Y. He was engaged as an engine wiper and later was placed in the general unskilled labor gang. He also operated the electric truck in transporting materials in the plant.

On the morning of the accident, September 2, 1929, he had been engaged in work on an engine which had arrived at the roundhouse on August 23, to be washed. While being cleaned a general inspection was made of the engine and parts were removed for repair, making it incapable of locomotion. On the ninth day the gang was instructed to replace the main driving wheels on the engine and while they were pushing these wheels on another track, "preparatory to moving them to a pit in the roundhouse where they could be placed under the locomotive", Bezue was injured due to the alleged negligence of a foreman in removing a block from under the wheels.

The injured employee contended that the terminal facilities, including the roundhouse, were a part of the railroad's system necessary for the conduct of interstate commerce and as the work was being performed on a locomotive used in interstate commerce, therefore Bezue was engaged in interstate commerce at the time of the injury. The State courts upheld this contention, but the United States Supreme Court held that such a decision was broader than its former decisions justified.

In reversing the decision of the lower court, Mr. Justice Roberts, speaking for the court, said in part as follows:

All work performed in railroad employment may, in a sense, be said to be necessary to the operation of the road. The business could not be conducted without repair-shop employees, clerks, janitors, mechanics, and those who operate all manner of appliances not directly or intimately concerned with interstate transportation as such, or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the act. [Cases cited.]

The criterion of applicability of the statute is the employee's occupation at the time of his injury in interstate transportation or work so closely related thereto as to be practically a part of it. [Cases cited.] Under the circumstances of this case, whether respondent is within the act must be decided, not by reference to the kind of plant in which he worked, or the character of labor he usually performed, but by determining whether the locomotive in question was, at the time of the accident, in use in interstate transportation or had been taken out of it. The length of the period during which the locomotive was withdrawn from service and the extent of the repairs * * * stamp the engine as no longer an instrumentality of or intimately connected with interstate activity.

EMPLOYERS' LIABILITY—INTERSTATE COMMERCE—DELAY IN UNLOADING CAR—*Jonas* v. *Missouri Pacific Railroad Co.*, *Kansas City Court of Appeals, Missouri* (*Jan. 11, 1932*), *48 Southwestern Reporter* (*2d*), *page 123*.—Bartholomus Jonas filed suit against the Missouri Pacific Railroad Co. to recover damages under the Federal Employers' Liability Act for injuries sustained while unloading certain ties from a box car. The question involved was whether "he was engaged in interstate transportation, or work so closely related to it as to be a part of it", at the time of the injury. From the facts it seems an interstate shipment of ties was received in the railroad yard in Leavenworth, Kans. "The ties were to be used in new work" in "putting in power switches" and were allowed to remain in the car for 1 or 2 days before they were removed. The question was whether this delay in unloading terminated the interstate character of the shipment. The circuit court, Pettis County, Mo., held that the delay did not destroy the interstate character of the goods. Thereupon the railroad company appealed to the Kansas City court of appeals, contending that "the cars containing the ties had been placed upon a storage track several days before the unloading operations" and that this handling was a new and distinct movement of the ties having no relation to interstate commerce.

The appeals court reviewed the testimony and found no evidence "that the track upon which the cars had been placed for unloading

was a storage track." As the court was of the opinion that the goods had not been "stored", the conclusion reached was that the goods retained their interstate character. The decision of the lower court allowing recovery under the Federal Employers' Liability Act was affirmed.

EMPLOYERS' LIABILITY—INTERSTATE COMMERCE—RECHARGING SIGNAL BATTERIES—*Steward et al.* v. *Industrial Commission of Utah et al., Supreme Court of Utah (Oct. 26, 1932), 15 Pacific Reporter (2d), page 334.*—Charles E. Steward, an employee of the Oregon Short Line Railroad Co., died as the result of alleged injuries sustained in the course of his employment. His widow and children petitioned the Industrial Commission of Utah for an award of compensation under the workmen's compensation act of that State. The employer, the railroad company, denied liability upon the ground that the employee at the time of his alleged injury was engaged in interstate commerce, and hence the industrial commission was without jurisdiction to make an award. The commission found the employee was engaged in interstate commerce and therefore denied compensation. The case was carried to the Supreme Court of Utah for review.

It appeared that the Oregon Short Line Railroad Co. is engaged in both interstate and intrastate commerce in Utah and Idaho. Along its railroad it uses certain signals known as block signals, which are operated by means of an electric current supplied by storage batteries.

It was Steward's duty to gather up these batteries, recharge them, and replace them in their position along the track between Salt Lake City, Utah, and Oxford, Idaho. He performed this work in the following manner:

On each Monday the employee went out on the railroad line with the battery car and took a certain number of charged batteries. He placed these in position in the various block signals and took up a similar number of used batteries for the purpose of recharging them. These used batteries he took to the shop in Salt Lake City, where, during the balance of the week, he would recharge the batteries. On each Saturday he would load the charged batteries in the battery car and on the Monday following would go out on the road with the charged batteries and exchange them for used batteries in the various block signals and return with the used batteries and recharge them as before.

The cause of Steward's death was pneumonia, and it was alleged that his illness was "caused or contributed to by the irritating fumes given off by the batteries in process of charging." This question, however, was not before the court, as the sole question in-

volved was the question of jurisdiction of the commission, which was based upon the employment of the deceased.

In determining whether the employee was engaged in interstate commerce, the court applied the test adopted by the Supreme Court of the United States in cases under the Federal Employers' Liability Act. The test is stated to be "that if at the time of injury he was engaged in interstate commerce or the work was directly related to such commerce or so closely connected with it as to be a part of interstate commerce" he is therefore engaged in interstate commerce and subject to the Federal act. Cases were cited in which the Supreme Court held that "an employee is employed in interstate commerce when making repairs, working upon, or keeping in usable condition instrumentalities used in interstate commerce."

However, it was contended that the batteries were withdrawn from interstate commerce when taken to the shop, and that the employee while working in the shop recharging the batteries was not engaged in interstate commerce. The plaintiff contended that "the recharging of the batteries bears analogy to the repairs on an engine withdrawn from service and placed in a repair shop", in which cases courts have held that the engine loses its interstate character.

Mr. Justice Folland, speaking for the court, reviewed many cases on this subject and concluded by saying:

> Applying the rule stated in the Davis case and in the Oglesby, Kuchenmeister, and Peters cases, it would seem the facts before us bring the case within the margin of cases so closely related to interstate commerce as to be a part of it. The batteries were withdrawn for a definite period, for a definite purpose, and with a definite intent to be replaced in actual interstate service as soon as charged. They were not withdrawn generally or for an indefinite period, nor was the purpose of their repair and future use left in doubt. They were taken from actual use as part of an interstate system of signaling to be recharged, returned as soon as charged and connected with and made a part of an interstate block-signaling system. They were not withdrawn at all from interstate commerce. The whole movement by which they were taken out of the block-signaling system, recharged, and returned, was one continuing transaction. It is illogical to draw a line and say the employee was engaged in interstate commerce on Monday, but not engaged in such commerce the remainder of the week. His entire service had to do with instrumentalities of interstate commerce, the task of conditioning the batteries being so closely related to such commerce as to be a part of it.

The order of the Industrial Commission of Utah denying compensation was therefore affirmed.

EMPLOYERS' LIABILITY—MINOR—SAFE PLACE TO WORK—INSTRUCTIONS—*Roy* v. *Mutual Rice Co. of Louisiana, Inc., Court of Appeal*

of Louisiana (Oct. 5, 1932), 143 Southern Reporter, page 668.—Demosthenes Roy, a minor, 16 years of age, received severe injuries while employed by the Mutual Rice Co., of Louisiana. In the course of his employment he climbed a small ladder leading to a platform "to disentangle a belt that operated on a glucose machine", when his foot and leg were caught in the revolving shaft and crushed.

He filed suit against the company to collect damages under the general tort law of Louisiana (art. 2315, Civ. Code), and he also alleged in the alternative that should the court hold that he was covered by the employers' liability act of Louisiana, that he be granted an award under the act. However, he had not elected to come under the employers' liability act and therefore claimed his remedy was a suit at law rather than an award under the act.

Prior to the accident he had married and thereupon became an emancipated minor. The Louisiana code provides that "The emancipated minor who is engaged in trade, is considered as having arrived at the age of majority for all acts which have any relation to such trade." The employer, basing his defense upon this provision, contended that as the plaintiff had been liberated from all the disabilities of a minor his contract of employment becomes subject to the provisions of the workmen's compensation law and that as he has not complied with the provisions of the act he should not be allowed to recover either under the act or in a suit at law.

The district court, Parish of Acadia, rendered judgment in Roy's favor, awarding him damages in a suit at law, and the case was appealed to the Louisiana Court of Appeal.

That court held that the provisions in the code regarding an emancipated minor had no effect unless it was shown that Roy was "engaged in a trade and that his acts had 'relation to such trade.'" The court was of the opinion that the performance of such duties as oiling and sweeping, mixing the glucose, and taking care of the chicken feed required no special training and fell within the duties of a common laborer, and Roy was therefore not engaged in a trade, as he was not performing acts having relation to his trade at the time he was injured; the disabilities of minority were not removed, and he was therefore not compelled to bring his action under the employers' liability act.

The sole question left for decision by the court was whether the company was guilty of negligence in failing to warn Roy about the dangerous places and caution him to be on his guard against any perils incidental to his work. Regarding this phase of the case, the court said that:

The danger of attempting to disentangle the flying belt from the revolving shaft might have been apparent or obvious to an experi-

enced workman or to a man that had passed the immature period of life; but, as we have hereinabove explained, considering the age of plaintiff at the time, the character of the work assigned to him, and his manifest inexperience, the removing of the belt did not so appear to him. He had been instructed that if anything "broke" he should tell Mr. Lafleur. Evidently, the order to inform his superior of any "breaks," which was also the instruction given Arabee [who preceded Roy], could have no reference to the flapping of the belt, and plaintiff could not be held to have violated his instructions in not notifying Lafleur of that incident. The other part of his instructions was, if anything went wrong, to fix it, and if he could not, to make his report. He evidently thought he could remedy the situation by disentangling the belt, and in trying to fix it, his leg was caught which caused the unfortunate accident. Under his instructions it cannot be said he was at fault in so acting.

Plaintiff did not receive the warning which should have been given him, and we therefore find that defendant company was properly held liable in damages.

The judgment of the lower court was therefore affirmed.

EMPLOYERS' LIABILITY—MINOR ILLEGALLY EMPLOYED—CONSTITUTIONALITY OF STATUTE—*Landry* v. *E. G. Shinner & Co., Inc., Supreme Court of Illinois (June 18, 1931), 176 Northeastern Reporter, page 895.*—Fred Landry was injured on July 21, 1928, while cleaning a meat chopper, in the employ of the E. G. Shinner & Co., Inc. Being a minor 15 years old, Landry brought suit by his next friend, Henry Landry, in the superior court of Cook County, Ill., against the E. G. Shinner & Co. to recover damages for his personal injury. A judgment in bar of the common-law action for damages was entered, and Landry appealed the case to the Supreme Court of Illinois.

Before the superior court, the E. G. Shinner & Co. conceded that Landry, a minor, was injured in an employment prohibited by the child labor law, and contended that the cause of action was under paragraph (k) of section 8 of the workmen's compensation act, which reads as follows:

In case the injured employee is under 16 years of age at the time of the injury and is illegally employed, the amount of compensation payable under paragraphs (*b*), (*c*), (*d*), (*e*), and (*f*) of this section shall be increased 50 per centum: *Provided, however,* That nothing herein contained shall be construed to repeal or amend the provisions of an act concerning child labor, approved June 26, 1917, as subsequently amended relating to the employment of minors under the age of 16 years.

Landry contended, on the other hand, that paragraph (k), of section 8, quoted above, was unconstitutional, because (1) it was contrary to public policy, it having always been the policy of the State

to preserve the health of children by forbidding their employment in certain industries, etc.; (2) that it repealed the child labor law without making any reference to such repeal in the title of the act; and (3) that in the case of a minor under 16 years of age, illegally employed, there could be no contract of hire.

In reply to the contention that paragraph (k) is contrary to public policy, the court said:

The public policy of a State, when not fixed by the Constitution, is not unalterable, but varies upon any given question with changing legislation thereon, and any action which by legislation, or in the absence of legislation thereon, by the decisions of the court, has been held contrary to the public policy of the State, is no longer contrary to such public policy when such action is expressly authorized by subsequent legislative enactment. [Cases cited.] If paragraph (k) is a valid enactment, then it is not contrary to the public policy of this State.

In reply to the contention that paragraph (k) repealed the child labor law, the court said:

Paragraph (k) does not purport to repeal, or in fact repeal, the child labor law or any portion thereof, but, on the contrary, expressly states an intention not to do so. The child labor law is wholly a penal law, and is in no wise affected by the enactment of paragraph (k). The only effect that paragraph has with reference thereto is to transfer a remedy of a minor not given by the child labor law, but accruing to a minor by reason of a violation thereof, from a suit in trespass for personal injuries to a claim for such injuries under the workmen's compensation act. There is no vested right of one injured to any particular remedy, and a transfer of remedies is clearly within the scope of legislative enactment. [Cases cited.]

In regard to the last contention, that a minor illegally employed was under no contract of hire, the court said:

A contract of hiring a minor in violation of the child labor law is an illegal contract, and, while it is commonly called void, it is not absolutely void in all its aspects. If it were, then no claim for damages could be based on injuries received by a minor while performing services under such contract. * * * The contract of hiring alleged in the declaration was an illegal contract and unenforceable by either party, and the services rendered under it were rendered under a contract, i.e., an illegal contract, which was not absolutely void but had sufficient virility to fix the relation between appellee and Fred Landry as that of master and servant. The intention of the legislature is clearly expressed in the language which it has used, and it is clear from such language that it was its intention that paragraph (k) of section 8 should apply to all minors and not be limited to minors who were legally permitted to work under the laws of this State.

In conclusion, the court held that, since the remedy was under the workmen's compensation law and not by an action at law, the lower court had properly entered a judgment in bar of the action, and the judgment was affirmed.

EMPLOYERS' LIABILITY—MINOR ILLEGALLY EMPLOYED—EMPLOYMENT "IN CONNECTION WITH MILL"—*J. Ray Arnold Lumber Corporation of Olustee* v. *Richardson, Supreme Court of Florida (Apr. 19, 1932), 141 Southern Reporter, page 133.*—Section 5943 of the Compiled General Laws of Florida, 1927, provides:

No child under 14 years of age shall be employed, permitted or suffered to work in, about or in connection with any (1) mill, (2) factory, (3) workshop, (4) mechanical establishment, (5) laundry, (6) or on the stage of any theater.

Upon the basis of this statute, suit was brought in the circuit court of Baker County, Fla., against the J. Ray Arnold Lumber Corporation, of Olustee, Fla., by V. A. Richardson as next friend of William Richardson, a minor under the age of 14 and alleged to have been injured while employed in connection with the mill operated by the company. A judgment in the sum of $10,000 was recovered and the lumber company appealed the case to the Florida Supreme Court.

The facts show that Richardson was a minor, 12 years of age, and employed by the J. Ray Arnold Corporation. The corporation operated a sawmill and lumber plant at Olustee, Fla., and also owned certain skidder equipment that was used in hauling logs from the place where they were cut in the woods to a location suitable for loading on railroad cars. Richardson was employed with this skidder crew in cutting down and hauling logs and while so engaged his leg was crushed.

As a defense the company contended no cause of action had been shown. The question at issue was whether Richardson was employed "in connection with" the mill at the time he was injured, for the court said that a violation of the statute "has been universally held to give rise to a cause of action because statutes for the protection of the lives and limbs of children are held to create a liability for damages due to their infraction whether provided for in so many words in the statute or not." [Cases cited.] Continuing, the court said regarding the construction to be placed upon the statute that—

Such statutes, being to effectuate a humane purpose and intended for the progress of humanity, should be liberally construed. * * *

The statute was enacted in pursuance of a wise, humane, public policy to prohibit the parents of children under 14 years of age from hiring them out to work not only in, about, but " in connection with," any mill, factory, workshop, mechanical establishment, laundry, or on the stage of any theater, and to make the observance of it effective by prohibiting the owners or operators of such places from employing children under age to work in, about, or in connection with, the named establishments.

The court held that as the work in which the minor was engaged was that of securing raw materials for the mill the question of whether this work was " in connection with " the sawmill was properly submitted to the jury by the lower court, and its finding of fact would not be disturbed by the higher court.

The court, however, felt that the judgment of $10,000 was excessive under the evidence presented. There was evidence showing that the greater part of the injury was attributable to the lack of care of the injured member by the minor and his parents over whose conduct the corporation had no control.

The judgment was therefore reduced to $4,000 and affirmed.

EMPLOYERS' LIABILITY—MINOR ILLEGALLY EMPLOYED—PROXIMATE CAUSE—*Hogan* v. *Bateman Contracting Co., Supreme Court of Arkansas (Nov. 30, 1931), 43 Southwestern Reporter (2d), page 721.*— On May 27, 1930, Clyde Hogan, Jr., was employed by the Bateman Contracting Co., which was engaged in building a bridge at Cotter, Ark. He carried cement, helped to operate the mixer, and did anything else he was told to do.

On June 30, Hogan, while lifting sacks of cement weighing about 95 pounds, suffered an injury to his side and after a few days' treatment was operated on for hernia.

Hogan brought action against the contracting company to recover damages for 4 months' disability, basing his right to recover on section 7091 of Crawford and Moses Digest, which reads as follows:

No boy or girl under the age of 18 years shall be employed, permitted or suffered to work in any occupation for more than 6 days in any week, or more than 54 hours in any week, nor more than 10 hours in any 1 day, or before the hour of 6 in the morning or after the hour of 10 in the evening.

The lower court directed a verdict in favor of the contracting company, and Hogan appealed the case to the Supreme Court of Arkansas. In the appeal it was contended that the company had violated the statute since Hogan was only 16 years of age at the time he was employed and had been required to work 11 hours per day on certain days prior to his injury. The higher court, however, affirmed the decision of the lower court, and held that the evidence

conclusively showed that the injury did not occur while the statute was being violated and that the violation of the statute 3 weeks before the injury could not be the proximate cause of the injury. The court said:

> The evidence, however, in the case at bar, conclusively shows that appellant was not injured while the statute was being violated, and shows that the violation of the statute was in no way connected with the injury. It is true that the evidence shows that the first week appellant was employed, beginning May 27, 1930, the statute was violated, but there is no evidence tending to show that it was violated at any time thereafter. The evidence shows that the appellant was injured on the 30th of June. * * *
>
> There is therefore no evidence tending to show that the injury resulted from a violation of the statute or that it was in any way connected with the violation of the statute.

The court therefore held that there was no causal connection between the violation of the statute and the injury received, and hence there could be no recovery. The court also held that certain statements made by Hogan, while he was in the hospital, to his physician and a notary public were not admissible, as such communications were considered by the law to be confidential and therefore could not be introduced into evidence by anyone other than Hogan.

Under a West Virginia statute the supreme court of that State upheld an action alleging that injuries received by a child 15 years of age while employed in a gainful occupation without a work permit as required by Code (1923), section 73, chapter 154, and the failure to secure a permit was the proximate cause of the injury. The court held this a good cause of action even though the child had misrepresented his age to the employer. (*Dale* v. *Wheeling Steel Corporation* (1932), 164 S.E. 245.)

EMPLOYERS' LIABILITY—MINOR ILLEGALLY EMPLOYED—STATUTE REPEALED BY IMPLICATION—*Devine et al.* v. *John Lang Paper Co., Inc., Supreme Court of Pennsylvania (June 30, 1932), 162 Atlantic Reporter, page 206.*—John Devine, a minor, and his parents, Joseph and Katherine Piatkowsky, filed suit against the John Lang Paper Co., Inc., to recover damages for injuries received by the minor while adjusting a belt on unguarded moving machinery. At the time of the injury Devine was 17 years old, and it was alleged that he was illegally employed in violation of the provisions of the act of April 29, 1909 (P.L. 283), "prohibiting the employment of male minors between 14 and 18 years of age in any factory using power machinery not properly guarded."

The employer defended by alleging that the act of 1909 had been repealed by an act passed in 1915 (P.L. 286) which prohibited the

employment of minors under 16 years of age in readjusting belts on moving machinery which is not guarded. The act also provides:

Nor shall any minor under 16 years of age be employed or permitted to work, in any capacity, in adjusting or assisting in adjusting any belt to any machinery, or in proximity to any hazardous or unguarded belts, machinery, or gearing, while the same is in motion. * * * No minor under 18 years of age shall be employed or permitted to work in the operation or management of hoisting machines, in oiling or cleaning machinery, in motion.

The common pleas court, Philadelphia County, Pa., rendered judgment for the employer notwithstanding the jury had rendered a verdict for the minor. Appeal was then taken to the Supreme Court of Pennsylvania for a decision upon the sole question of whether the 1909 act was repealed by the 1915 act in the absence of a specific section repealing the prior act. The court in comparing the two statutes found that the titles were the same; that the same subject matter was covered in each; the sections in each act dealt with the same subjects, and the only marked difference was that the later act was more comprehensive and that there was a change in the age limits in the prohibited occupations. The court considered the second act irreconcilable with the first and concluded that the act of 1915 did repeal the one passed in 1909. The court quoted, in concluding, the opinion from the case of *Hammond* v. *Aluminum Co. of America* (261 Pa. 370) as follows:

The rule here applicable is thus stated in Endlich on Interpretation of Statutes, sec. 201: "In such cases, the later act, although it contains no words to that effect, must, in the principles of law, as well as in reason and common sense, operate to repeal the former—the negative being implied from the 'reasonable inference that the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject-matter in force at the same time.' If this could be the case, it is obvious that the later statute could become the law only so far as parties might choose to follow it; whereas, the mere fact that a statute is made shows, that, so far as it goes, and so far as it introduces a new rule of general application, it was intended as a substitute for, and to displace, an earlier one of equally general application." Among the authorities cited in support of this rule are *Bartlet* v. *King* (12 Mass. 537, 7 Am. Dec. 99); *Johnston's Estate* (33 Pa. 511). To these may be added *Rhoads* v. *Hoernerstown Building & Savings Association* (82 Pa. 180). As will be observed these authorities are to the effect that when the later statutes establishing a general system for government are silent as to the repeal of former statutes relating to the same subject, an intention to repeal the earlier statutes arises by implication.

The judgment of the lower court was therefore affirmed.

EMPLOYERS' LIABILITY—NEGLIGENCE—SAFE PLACE TO WORK—*Waddell* v. *A. Guthrie & Co., Circuit Court of Appeals, Tenth Circuit (Dec. 23, 1930), 45 Federal Reporter (2d), page 977.*—Gilbert Waddell was employed by the Bureau of Reclamation of the United States as a rodman, in the construction of an outlet tunnel of the Echo Dam, a reclamation project in Utah. The construction of the tunnel was begun by A. Guthrie & Co., in March 1928, and by June it was about completed. The work was done in the customary and ordinary method.

On June 26, 1928, while Waddell was working in the tunnel, he was severely injured when "a large chunk of the side wall sloughed off from a point about 5 feet above the floor of the tunnel." This was caused by a clay seam back of a large rock on that side of the tunnel, which was not discernible when the rock was in place and the method of "sounding" the wall would not disclose the presence of the seam of clay.

Waddell filed suit against the A. Guthrie & Co. to recover damages for his injury, alleging the accident was due to the negligence of the construction company. The District Court of the United States for the District of Utah rendered judgment in favor of the company and Waddell appealed the case to the Circuit Court of Appeals, Tenth Circuit.

The only question for consideration on appeal was whether the company was negligent in the construction of the tunnel. The court quoted the rule of law, as stated in the case of *Canadian Northern Railroad Co.* v. *Senske* (201 Fed. 637), that the care required "is that degree of care (1) which ordinary prudent persons (2) engaged in the same kind of business (3) usually exercise under similar circumstances."

Following this rule the court affirmed the judgment of the trial court, saying in part as follows:

> The undisputed evidence in this case is that the defendant followed the customary and usual method of inspection; that it timbered wherever such inspection indicated a need therefor. The care which it used is attested by the fact that, even in the presence of the pressure from the air-driven cement, no other slough ever occurred.
>
> The plaintiff was without fault, and he has suffered serious injury; the accident was deplorable, but we can see no evidence of negligence on the part of the defendant, and, without that, the pecuniary loss which the plaintiff has suffered cannot be shifted to the defendant.

EMPLOYERS' LIABILITY—NEGLIGENCE OF PHYSICIAN—SICK BENEFIT FUND MAINTAINED—*Thomas et ux.* v. *Postal Telegraph-Cable Co. et al., Court of Civil Appeals of Texas (Feb. 20, 1932), 48 South-*

western Reporter (2d), page 422.—The Postal Telegraph-Cable Co. and the Wichita Falls & Southern Railroad provided a "sick benefit fund" to afford medical and hospital services for their employees. The fund was raised by deductions from the pay of the employees and was not to be used in cases where the injury or sickness arose out of or in connection with the employment, for by statute the employer was liable for the expense incurred in such cases, but was to be used only in covering the cost of the "care of employees who were hurt or sick and for which the railroad company was not responsible."

While employed by the company Elmer Thomas, age 16, became infected with tonsilitis, and in accordance with the agreement under the sick-benefit plan Dr. R. C. Smith, the physician selected by the company, was sent to treat the case. He treated the boy from December 11, 1928, until March 1929, at which time he stated that the boy would not recover. On July 17, 1929, Thomas died, and his parents filed suit against the employer, alleging that "Dr. Smith was guilty of negligence in failing to remove the affected tonsils and in failing to furnish hospital facilities and in other particulars not necessary to mention, as a result of which the boy died * * *."

The employer denied the negligence of the doctor, and stated further that the company had provided sick and hospital funds for the benefit of its employees as a mere charity and therefore would not be liable. At the trial in the district court, Wichita County, Tex., the vice president of the company stated that the creation of the fund was of no advantage to the company and the company merely handled it for the benefit of the employees.

The district court rendered judgment in favor of the company and an appeal was taken to the Court of Civil Appeals of Texas. The higher court agreed with the lower court in holding that the company could not be charged with liability for the negligence of Dr. Smith, if any, and in discussing the defense of a "charity organization" said:

> In 5, R.C.L. section 117, page 373, it is said: "A railroad hospital maintained by contributions for sick and injured employees, and not run for a profit, has been considered to be a charitable institution, and the same has been held true although the hospital is entirely maintained by the railroad company, but without profit. But such an institution is not a charity if the benefits it extends to employees are on condition of relieving the employer from liability for negligence causing an injury."
>
> In a note to 2 L.R.A. (N.S.) 557, it is said: "So, a hospital maintained by a railroad company for the free treatment of railroad employees and supported partly by contributions, which the company deducts monthly from the wages of its employees, the balance being paid by the company itself, is a charitable institution, and the com-

pany is not liable for the malpractice of a physician, or the carelessness of the attendants. (*Union P. R. Co.* v. *Artist*, 60 F. 365, 23 L.R.A. 581, 9 C.C.A. 14.)"

The court discussed the two cases (*T. & P. Coal Co.* v. *Connaughten*, 50 S.W. 173, and *Zumwalt* v. *Texas Central Ry. Co.*, 121 S.W. 1133) cited as controlling authority; and distinguished them from the present case. In concluding the opinion the court said:

Appellants urge, among other things, in substance, that the fund under consideration cannot be said to be a pure charity, for the reason that the employee, however great the accumulation of the fund, is given no interest therein, and for the further reason, as suggested in the Zumwalt case as written by this court, it is a benefit and profit to the company to maintain the health of its employees. We think, however, upon a consideration of the authorities already cited, it will be seen that these contentions are distinctly without legal force.

EMPLOYERS' LIABILITY—RAILROAD—ASSUMPTION OF RISK—EMPLOYEE KILLED BY ROBBERS—*Missouri Pacific Railroad Co.* v. *David, United States Supreme Court (Feb. 15, 1932), 52 Supreme Court Reporter, page 242.*—James Lee David was murdered on the night of May 17, 1923, while employed by the Missouri Pacific Railroad Co. as a "train rider", or guard. The railroad company had suffered losses through robberies, by organized bands of robbers, on freight trains in and about Kansas City, Mo. The company employed David to protect the cars. He had had experience in work of this nature, but was carefully advised concerning the probable danger. The railroad company also employed one McCarthy, known to be associated with one of the criminal bands, who agreed to advise the railroad in advance of intended depredations and to give aid in locating the stolen property.

David was killed by robbers during an attempt to rob the train, and following his death his administratrix filed suit against the railroad company under the Federal Employers' Liability Act. The Supreme Court of Missouri allowed recovery upon the theory that while acting for the railroad McCarthy knew of the plan to rob the railroad and he negligently failed to notify the company; "that because of such negligence David received no notice of the plan, although he had the right to rely upon being supplied with such information in order to prepare to cope with the brigands on equal terms. As a consequence, he failed to take the necessary precautions and exposed himself to being shot."

The railroad company thereupon carried the case to the United States Supreme Court for review. Mr. Justice McReynolds, in delivering the opinion, cited numerous cases holding that assumption of

risk is an adequate defense under the Federal Employers' Liability Act. In concluding the opinion reversing the judgment of the court below, he said:

Under the circumstances disclosed by the record, clearly we think David assumed the risk of the default which, it is said, resulted in his death. He understood the nature of his employment and the incident dangers. He well knew that he was subjecting himself to murderous attacks by desperadoes. There was no promise to give him special warning or protection. Even if he had knowledge of McCarthy's employment (and this is far from certain), he must have appreciated the utter unreliability of the man and the probable inability of the master to obtain timely information through such a medium. He could not properly expect to be protected against criminals whom he was employed to fight through treachery by one of their associates. The common employer, notwithstanding efforts to obtain warning, actually knew nothing of the criminal plan. If we accept respondent's view of the facts, David assumed the risk of the negligent action of which complaint is now made.

EMPLOYERS' LIABILITY—RAILROAD—FEDERAL ACT—NEGLIGENCE—*Baltimore & Ohio Railroad Co.* v. *Berry, United States Supreme Court (May 16, 1932), 52 Supreme Court Reporter, page 510.*—Ray Berry filed suit under the Federal Employers' Liability Act against the Baltimore & Ohio Railroad Co. to recover for injuries suffered while he was in the employ of the company. He received a favorable judgment in the circuit court of the city of St. Louis, Mo., and the judgment was later affirmed by the Missouri Supreme Court. An appeal was then taken to the United States Supreme Court by the railroad.

From the facts in the case it appears that Berry was an experienced railway brakeman and was employed by the Baltimore & Ohio Railroad Co. as a rear brakeman on a freight train running over the company's track between Illinois and Indiana. On the night of the injury the train was proceeding towards Xenia, Ill., when a "blazing hot box" was discovered on one of the cars. The train was stopped and the conductor and Berry extinguished the fire. The conductor instructed Berry to tell the engineer to stop the train at Xenia, Ill., where repairs would be made. When the train arrived at Xenia, the conductor instructed Berry to "get out and go ahead and fix the hot box." Berry thereupon "took his lantern, walked down the caboose steps, from which he stepped into space" and fell into a ravine as the train had stopped temporarily over a trestle. The State court had allowed Berry to recover upon the ground that the conductor had negligently directed Berry to alight at a place of danger without properly warning him.

This view was not upheld by the United States Supreme Court. Mr. Justice Stone, delivering the opinion of the Court, pointed out that there " was no evidence that either the conductor or respondent knew that the caboose had stopped on the trestle and as they were together in the cupola of the caboose when the train stopped, their opportunity for knowledge, as each knew, was the same. Hence there was no room for inference that the conductor was under a duty to warn of a danger known to him and not to the respondent, or that respondent relied or had reason to rely on the conductor to give such warning."

The court was also of the view that Berry could have discovered the danger by using his lantern or by other reasonable precautions, and therefore there was no breach of duty on the part of the conductor in asking Berry to alight to perform his duties. As there was no such proof of negligence as is required under the Federal Employers' Liability Act the judgment of the lower court was reversed.

EMPLOYERS' LIABILITY—RAILROAD—NEGLIGENCE—ACT OF GOD—*Chicago, St. Paul, Minneapolis & Omaha Railway Co.* v. *Henkel, Circuit Court of Appeals, Eighth Circuit (Aug. 24, 1931), 52 Federal Reporter (2d), page 313.*—Carl E. P. Henkel was killed while employed by the Chicago, St. Paul, Minneapolis & Omaha Railway Co., as head brakeman. The accident happened shortly after midnight July 13, 1929, while the train was en route from Omaha to Sioux City. The wreck was caused by a washout in the main line about 4 miles north of Tekamah, Nebr. As the engine ran into the washout it turned over and Henkel was killed.

The widow filed suit against the railway company to recover damages under the Federal Employers' Liability Act. She alleged that the negligence of the railway company caused the wreck. This alleged negligence was—

(1) Failure on the part of the defendant to use due care in the maintenance of its roadbed and track at the place of the accident, resulting in a washout and a wreck of the train upon which Henkel was employed; (2) failure on the part of the defendant to use due care in inspecting said roadbed and track just prior to the accident.

The railway company denied all negligence and claimed as a defense that " the rain which caused the washout was an act of God ", and therefore the company was not liable. The United States District Court for the District of Minnesota rendered judgment for the widow, and the railway company appealed to the Circuit Court of Appeals, Eighth Circuit. The first objection raised was that the

evidence was insufficient to establish negligence as to the maintenance and inspection of the roadbed. The evidence showed that the drainage system was poor along this section of the track and that the company's roadmaster, without consulting the engineering department, had ordered the section crew to dig a ditch along the side of the track to aid in carrying away the water. This ditch caused a change in the flow of the water and caused it to accumulate.

There was also evidence that prior washouts had occurred in this same section within the preceding 10 or 12 years. The court therefore concluded that there was sufficient evidence to go to the jury on the question of neglect in maintaining the roadbed and also as to the proper inspection, for there was testimony that—

It was customary, in rainy weather, for the section men to patrol and inspect the track in section 13, which included the place of the accident. The section foreman and his men did patrol and inspect the track from Tekamah to Matthews crossing shortly after the train in question had passed through and, of course, discovered the wreck. It was admitted that no patrol and inspection of the track took place on the night of July 13 prior to the accident.

The court held that the lower court had fairly instructed the jury as to the meaning of the expression "act of God", and, as the jury had rendered a verdict for the widow after considering all the evidence, the appeals court would not sustain the contention that the company was relieved of all liability because the rain was an act of God.

The court considered other assignments of error and concluded that "there was substantial evidence to support the verdict" and as they found no reversible error the judgment of the district court was affirmed.

EMPLOYERS' LIABILITY—RAILROAD—NEGLIGENCE—SUFFICIENCY OF THE EVIDENCE—*Atchison, Topeka & Santa Fe Railway Co.* v. *Saxon, United States Supreme Court (Feb. 15, 1932), 52 Supreme Court Reporter, page 229.*—One J. W. Moore, while employed as head brakeman by the Atchison, Topeka & Santa Fe Railway Co. and engaged in interstate comerce, sustained fatal injuries at a railroad station in New Mexico. While running along the side of a train, he fell into a depression and sustained injuries resulting in his death.

The personal representative of Moore filed suit under the Federal Employers' Liability Act and obtained a judgment. Upon appeal by the railroad the court of civil appeals at El Paso reversed the judgment holding that the evidence failed to show that the accident

resulted from negligence of the railroad. The Texas Supreme Court reversed this decision holding that there was enough evidence to show negligence and a causal connection. The case was thereupon appealed to the United States Supreme Court. In delivering the opinion of the court, Mr. Justice McReynolds stated that the case under consideration was of a class in which the court was frequently obliged "to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the liability act as here interpreted."

Continuing he said that—

Examination of the record convinces us that the court of civil appeals reached the proper conclusion. We can find no evidence from which it may be properly concluded that Moore's tragic death was the result of negligence by the railway company. As often pointed out, one who claims under the Federal act must in some adequate way establish negligence and causal connection between this and the injury.

The Court reviewed the language of the State supreme court and also the facts relative to the accident and said that—

What occasioned this distressing accident can only be surmised. It was necessary to show causal negligence in order to establish the respondent's right to recover. The evidence fails to meet this requirement.

The judgment of the State court was therefore reversed.

EMPLOYERS' LIABILITY—RAILROAD—SAFE PLACE AND APPLIANCES—ASSUMPTION OF RISK—*Atlantic Coast Line Railroad Co.* v. *Powe*, *United States Supreme Court* (*May 18, 1931*), *51 Supreme Court Reporter*, *page 498*.—George A. Marshall, a switchman, was killed when he was struck by a semaphore while on the outside of a moving railroad car. The evidence disclosed that the South Carolina Railroad Commission had previously made an order prohibiting structures nearer than four feet from the outer edge of the main or side track. It was alleged by the administrator of the deceased employee that the railroad company was negligent in maintaining the semaphore too near the track, and thus causing the death of the switchman. The Supreme Court of South Carolina rendered a judgment in favor of the administrator, and the case was carried to the United States Supreme Court by the railroad company, which contended that there was no evidence of its negligence and that Marshall should be considered to have assumed the risk of the alleged cause of his death.

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

The general principles laid down with regard to mail cranes in *Southern Pacific Co.* v. *Berkshire* (41 Sup. Ct. 162) and *Chesapeake & Ohio Railway Co.* v. *Leitch* (48 Sup. Ct. 336) apply equally to semaphores. It is impracticable always to set such structures so far away as to leave no danger to one leaning out, and in dealing with a well-known incident of the employment, adopted in the interest of the public and of the employees, it is unreasonable to throw the risks of it upon those who were compelled to adopt it.

The semaphore in this instance was 4 feet and 10 inches at its base from the outer edge of the track and probably a little more at 4 feet above the top of the rail. An order of the South Carolina Railroad Commission, made, as it states, in consideration of the safety of the public and employees of the road and of the necessity for employees to give and receive signals, provides that no structure be allowed nearer than 4 feet from the outer edge of the main or side track, measurement being made 4 feet above the top of the rail. It will be seen that the railroad company in this case more than complied with the order. It is true that 4 feet was a minimum distance, but it satisfied the requirement of the commission, and it would be going far to say that the railroad company was not warranted in supposing that it had done its duty, so far as the commission was concerned, when it put the semaphore 4 feet 10 inches away. Marshall from his previous experience probably knew of the semaphore as he was required to do by the rules of the road. It was shown that some other semaphores were farther from the track, but the circumstances do not appear, and there is nothing to show that in this case the petitioner could have made the position safer than it was, except by changing the place of the track.

The judgment of the lower court was therefore reversed.

The United States Supreme Court also held, in construing the Federal Employers' Liability Act, that no recovery would be allowed when a conductor disobeying train orders was killed in a collision with the freight train, as his disobedience was held to be the sole cause of his death. (*Southern Railway Co. et al.* v. *Youngblood* (1932), 52 Sup. Ct. 518; also *Southern Railway Co. et al* v. *Dantzler* (1932), 52 Sup. Ct. 520.)

The same rule was followed in a case where the conductor was killed in a collision where he had misread the train orders, and discovered his error too late to prevent the collision. The court rejected the contention that the facts brought into being the doctrine of the last clear chance and denied recovery upon the theory that his negligence was the sole cause of his death. (*St. Louis Southwestern Railway Co.* v. *Simpson* (1932), 52 Sup. Ct. 521.)

EMPLOYERS' LIABILITY—SAFE PLACE AND APPLIANCES—DEFENSES—*Rooney* v. *Overseas Railway, Inc., et al., Supreme Court of Louisiana (July 17, 1931), 136 Southern Reporter, page 486.*—In March

1929 Joseph E. Rooney was in the employ of the Todd Engineering Dry Dock & Repair Co., Inc., as a mechanic. In compliance with a request of the Overseas Railway, Inc., the Todd Co. sent Rooney to the steamship *Seatrain* to make repairs. The *Seatrain* was docked alongside a lifting crane, constructed on the wharf and used to lift and carry loaded freight cars from the docks to the boat. Both crane and steamship were owned and operated by the Overseas Railway, Inc.

While Rooney was working upon the *Seatrain*, the superintendent in charge of both the steamship and the crane instructed Rooney to leave the ship and go upon the crane and examine the engines. While Rooney was examining the gears the operator of the engine started the platform in motion and Rooney received injuries resulting later in his death.

Compensation was paid the widow by the employer, the Todd Co. in the sum of $7,095.20. Subsequently she filed suit against the Overseas Railway, Inc., to recover damages for the wrongful death of her husband.

The court of appeal for the parish of Orleans affirmed a judgment of the civil district court dismissing the suit as having no cause of action, as the court found that Rooney at the time of the accident was the employee of the Overseas Railway, Inc., thereby precluding an action for his wrongful death.

The widow appealed the case to the Louisiana Supreme Court, contending that the action should lie as her husband was not in the employ of the Overseas Railway, Inc., at the time of the accident. The Supreme Court of Louisiana sustained this view. It pointed out that there was no contract of hiring between Rooney and the Overseas Railway, Inc.; that the presumption is that when Rooney left the *Seatrain* to go upon the crane he went as the employee of the Todd Co. and continued so until the accident. Continuing, the court said:

> The facts do not logically admit of any other presumption or inference. It is not unusual for an employee, who is sent by his master to do a particular thing for another, in the course of his master's business, after arriving there, to be called upon to do, in addition, some other thing in the same line, but it is not considered that the employee, in undertaking to do such other thing, is acting for himself, and not for the one who sent him.

EMPLOYERS' LIABILITY—SAFE PLACE AND APPLIANCES—PROPER NOTICE—*Tatum* v. *Torson et al.*, *Supreme Court of Missouri* (*Mar. 25, 1931*), *36 Southwestern Reporter* (*2d*), *page 939*.—Charles H. and Thomas M. Torson were engaged, as a copartnership, in constructing

a sewer system in Kansas City. Edgar J. Tatum was employed by them in connection with this work. On the morning of December 12, 1925, he was ordered to operate a concrete mixing machine. He examined the machine and started the mixing drum, but was told by his foreman, Carson, to shut the machine down as it was all right. Relying upon this statement of the foreman, Tatum shut down the machine, and for the next 30 or 40 minutes did other work. Later he watched the foreman operate the machine, and then took over the operation himself. While running the first mixture through the machine, the brake refused to work, " whereupon the hopper fell with great violence to the ground and caused cables on the machine to whip about, thereby destroying one of plaintiff's [Tatum's] eyes and otherwise greatly injuring him about the head."

He filed suit against his employer, and upon trial by the circuit court, Jackson County, Mo., received a verdict in the sum of $15,000. The case was appealed to the Supreme Court of Missouri, on the ground that the case failed to show negligence on the part of the employer, as the machine was in good condition when last inspected by him.

Regarding the liability of an employer in a situation of this nature, the court said:

> The evidence sufficiently shows that the brake was temporarily defective and out of repair, thus permitting the hopper to fall and cause injury to plaintiff. This was shown not only by the falling of the hopper, but by the testimony of defendant's former employee, that the brake would not hold the hopper, as was intended and customary, until he tightened, immediately subsequent to plaintiff's injury, the adjustment nuts affecting the brake. Defendants, however, cannot be held responsible for the failure of the brake to hold the hopper, under this theory of recovery, unless they had knowledge or notice of the brake's defective condition. That is to say, parties cannot be held responsible for an injury unless there is a showing of facts or circumstances from which negligence, or an inference thereof, may be deduced.

The court held that Carson's knowledge of the defective condition of the brake was imputed to the employer and that he was therefore charged with the duty of attending and adjusting the brake, which he failed to do.

The judgment of the lower court was therefore affirmed.

The Supreme Court of Oregon held that an employer rejecting the workmen's compensation act was required to comply with the employers' liability law of the State (Code of 1930, sec. 49–1701), and that " all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits." (*Rorvik* v. *Astoria Box & Paper Co.* (1931), 299 Pac. 333.)

EMPLOYERS' LIABILITY—SAFE PLACE AND APPLIANCES—SILICOSIS—*Pennsylvania Pulverizing Co.* v. *Butler, Circuit Court of Appeals, Third Circuit (Sept. 29, 1932), 61 Federal Reporter (2d), page 311.*—Eldred C. Butler was employed for nearly 2 years by the Pennsylvania Pulverizing Co. in grading and pulverizing sand for commercial purposes. The process used in preparing the sand for market included the washing and sifting of the silica sand which was dug from a pit. After being thoroughly washed the sand was hoisted in buckets to the top of an 80-foot tower and sifted through screens of progressively finer mesh. The coarser sand caught in the first screens was then placed in airtight revolving pebble mills and ground to powder, which was sold as a commercial product. The operations created a considerable amount of dust even though most of the movement of the sand was in airtight passages.

After working in the plant for about 16 months Butler suffered from pains in his chest, and he requested that he be furnished an air-line mask in place of the sponge mask which he had been using. This new mask was obtained for him but his condition grew worse, and he was forced to discontinue his work. His condition was diagnosed as silicosis and pronounced incurable. Butler thereupon filed suit against the Pennsylvania Pulverizing Co., alleging that he contracted the disease by inhaling silica dust while employed in the plant. He maintained that the company breached its duty to him in failing to use reasonable care to provide him with a safe place to work. The United States District Court for the District of New Jersey rendered judgment in the employee's favor and the company appealed the case to the Circuit Court of Appeals. The question involved upon appeal was whether the company had used reasonable care in providing a proper ventilating system in its plant.

Testimony was offered which showed that the Pulverizing Co. had engaged in such business since 1906, and that before building the plant in 1929 the president and several engineers visited many dusty plants "in order to benefit by all of their experience in securing the very best dust collecting and ventilating systems it was possible to secure." The system used in the New Jersey plant had been installed by one of the very best concerns installing ventilating equipment and was pronounced to be the very latest method in dust collection. The commissioner of labor of the State of New Jersey testified that he "found it to be in very good condition," and that it was satisfactory.

Butler contended that the ventilating system was defective in that it did not collect the dust caused by the open buckets of sand as they ascended to the top of the tower. He further complained about the type of bags used. The company used burlap or cloth bags and these sometimes burst and allowed the sand and dust to escape, which he

contended would not have happened had the company used paper bags as recommended by the New Jersey Department of Labor, in place of fabric bags.

After reviewing the evidence and the issue before the court, Judge Wooley, speaking for the court said:

The plaintiff's evidence of the defendant's ventilating system might show negligence were it permissible to infer negligence from the fact of the plaintiff's injury, or it might show a spark of evidence of negligence from the fact that the windows in the tower were kept closed. But without more to prove that keeping the windows closed need not, in an orderly manufacturing process, have been done or should not, for the plaintiff's protection, have been done, that evidence, standing alone, is not enough to submit to the jury, or, if submitted, is not enough to sustain an affirmative finding of negligence. It left uncertain and unproved, and therefore left the jury to conjecture, whether the defendant did something it should not have done or failed to do something it should have done. Keeping in mind that the plaintiff charged the defendant with negligence, not in making too much dust or in making more dust than a properly organized plant properly operated would make, but in failing to use reasonable care to provide a proper ventilating system to control the dust it did make, proof of much dust at a particular place without proof that the defendant could and therefore should have provided efficient means to overcome it is not substantial enough to be controlling on the averment that it was negligent in failing " to use reasonable care to provide a proper ventilating system."

The court applied the test followed in many prior cases and stated in the following manner in the case of *Haines* v. *Spencer* (167 Fed. 266): "The employer is not an insurer, and the duty imposed upon him is not to furnish the safest or newest and best machines and appliances, but only to exercise due care to provide those which are reasonably free from danger."

The court concluded from a review of the evidence that the company met this requirement. It was careful to provide the best ventilation system available, and provided all the workers with standard masks. The employees were warned of the danger of the dust and requested to wear the masks at all times. Therefore the court held that the company did not fail in its duty to give the employee adequate warning nor in its duty to provide a reasonably safe place for him to work. The decision of the lower court in favor of the employee was therefore reversed.

EMELOYERS' LIABILITY—WORKMEN'S' COMPENSATION ACT—INVITEE—NEGLIGENCE—*Ferro* v. *Leopold Sinsheimer Estate, Inc., Court of Appeals of New York (June 2, 1931), 176 Northeastern Reporter, page 817.*—At the time of his injury Joseph Ferro was

14 years of age. His brother was a drayman, and he would go to a building, collect packages and place them in the hallway until his brother called for them. He also ran errands for Aaron Levy, the superintendent of the building, for which he had no contract and received no wage, merely getting an occasional tip or gratuity.

On November 11, 1925, Ferro went on an errand for Levy, and was given a tip. Then Levy asked the boy to go with him to the top of the 10-story building to clean the elevator cable. After directing the elevator man to stop the elevator, Levy instructed Ferro how to hold a cloth so that the moving cable would pass through it. Levy then left the room and ordered the elevator started, and later the cable caught Ferro's hand, causing the injury.

At the close of the evidence the trial judge "directed a verdict for the defendant on the ground that the plaintiff has an exclusive remedy under the provisions of the workmen's compensation act." This judgment was affirmed by the appellate division (245 N.Y. Supp. 873), and Ferro appealed the case to the Court of Appeals of New York.

The court of appeals held that gifts and gratuities can never be considered as wages unless so understood by the parties making the contract of employment, saying:

> The circumstances disclose that the relationship of employer and employee was not contemplated or established. The payment of small sums as gratuities or a promise to pay the same did not constitute the payment of wages as defined by the act. Section 2, subdivision 9 of the act defines "wages" as follows: "Wages means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident." There was no "money rate" established or contemplated or "contract of hiring" in force.

Therefore Ferro was not an employee, within the meaning of the workmen's compensation act. The act uses the words "employer" and "employee" with the common-law meaning, denoting a relation between the parties more substantial and formal than existed in this case, a contractual relation not a mere voluntary rendering of a slight service rewarded by a gratuity.

However, in reversing the judgment of the two lower courts and granting a new trial, the court said that the owner of land is liable to a business visitor or a gratuitous licensee for bodily harm caused them through his negligence, but in this case it was not necessary to go as far as that rule. Ferro was there at the request of the superintendent to perform an act for his benefit, and—

> The superintendent was the defendant corporation for the purposes of this action. He had general authority and full control of the building. He was authorized to clean the cables or to cause

another to do it for him. What he did to induce the plaintiff to undertake to hold the cloth while the cable passed through it, the defendant did through its agent. The plaintiff was invited or induced by the superintendent to go into a place of danger and undertake to do a dangerous act, at least a jury might so find. Under the circumstances, if the act of the superintendent was the negligent cause of plaintiff's injury, the defendant is liable therefor as the superintendent was acting within the scope of his authority.

The judgment of the lower court was reversed.

EXAMINATION, LICENSING, ETC.—BARBERS—CONSTITUTIONALITY OF STATUTE—RELATION OF STATUTE TO PUBLIC HEALTH—*Gerard et al.* v. *Smith et al., Court of Civil Appeals of Texas (June 23, 1932), 52 Southwestern Reporter (2d), page 347.*—The forty-first legislature of the State of Texas enacted a law (Vernon's Ann. P. C., art. 734a) providing for the creation of a board of examiners, which issues licenses after an examination and prescribes sanitary rules for the practice of barbering. Suit was brought by H. L. Gerard, manager and owner of a barber college, W. B. Noles, who had applied for a license, and J. B. Harwell, who had practiced barbering in the past but was denied the right to continue without the payment of a license fee of $10. Each attacked the constitutionality of the act and objected to the administration by the board.

The district court of Dallas County upheld the act and declined to grant the injunctive relief sought. Appeal was then taken to the Court of Civil Appeals of Texas, which considered in turn each objection raised by the plaintiffs. The first objection was that the $10 license fee prescribed by the statute was a tax on a mechanical pursuit, and therefore a violation of the State constitution which prohibited such a tax. The court, after reviewing several court decisions interpreting that provision of the constitution, was of the opinion that the license fee provision did not violate it, since "the act itself provides that all money collected by the board shall be placed in a special fund and used only for carrying out the purposes of the act"; therefore the court did not consider it an occupation tax.

The act was next assailed as being contrary to the due process clause of the Constitution. It was also alleged that the act was discriminatory because beauty shops were exempt from its operation although they performed the same type of work, and because the classifications within the act were unreasonable.

In answering these objections the court considered the general "power of the legislature to enact any legislation governing the practice of barbering." It was agreed that such a right, if existing, would come under the police power of the State. In discussing this,

the court held that the State had complete power to exercise this police power where questions of public health, public safety, and public comfort were shown, and in such cases private rights must yield. Continuing, the court said:

Laws regulating trades, callings, and occupations in the interest of public health are universally upheld by the courts of this country, and, where the validity of such laws is challenged, it is no longer a question of authority to enact them, but rather a question of whether the trade, calling, or occupation is one involving the public health. [Cases cited.] Therefore we are confronted with the question of whether the regulation of the occupation of barbers is necessary to the public health.

We are of the opinion that there can be no serious question but that there is danger of infection to the public from the carelessness and unskillfulness of barbers and from unsanitary methods of performing the functions of that occupation. The infection may be communicated from the barber himself to the customer or from one customer to another. Therefore the regulation of the occupation is proper for the protection of the health of the public and, consequently, a proper subject for the exercise of the police power. This being true, then the act, if not invalid because of improper classification of the persons subject to its provisions, is not violative of the "contract" clause nor the "due process" clause of the constitution.

After examining the classification made by the act the court found that the statute was valid in that respect. The court held that "if the classification could have seemed reasonable to the legislature," then it was the duty of the court to sustain it, and said:

We must conclude that the legislature could have reasonably decided that shaving and trimming the beard and cutting the hair involved more danger to the public than the doing of the other things enumerated, and, therefore the limiting of the provisions of the act to those doing these things was within their power, even though the doing of some of the things specified by one engaged in shaving and cutting the hair would be barbering, while the doing thereof by one not so engaged would not be.

The other objections raised, to the qualifications of those entering the practice of barbering and the question of the administration of the act by the examining board, were not sustained by the court, it being of the opinion that it should not substitute its opinion for that of the legislature. The decision of the lower court was therefore affirmed.

EXAMINATION, LICENSING, ETC.—PEDDLERS—TRAVELING SALESMEN INCLUDED—CONSTITUTIONALITY OF STATUTE—*Rose* v. *City of Pine Bluff, Supreme Court of Arkansas (Sept. 26, 1932), 52 Southwestern Reporter (2d), page 979.*—The city of Pine Bluff, Ark., adopted an ordinance requiring all persons engaged in certain occupations to

secure a license. Part of the ordinance (Lyle's Digest of Ordinances of Pine Bluff sec. 1300), reads as follows:

It shall be unlawful for any person to engage in, exercise, or pursue any of the following vocations without having first obtained and paid for a license therefor from the proper city authorities, the amounts of which license are fixed as follows, to wit: * * *

No. 30. For peddling any other article not otherwise provided for, $3 per month. * * *

No. 32. For peddling apparel, dry goods, notions, household goods, and any other article not otherwise specifically provided for, $5 per month, or $50 per annum.

D. J. Rose was representative of a wholesale cigar house in Little Rock and solicited business from firms located in Pine Bluff. It was his practice to forward the orders received to his firm in Little Rock, whence the goods were shipped to the customer. However, he carried a limited supply of cigars with him in his car, and when the customer was out of a particular brand Rose would leave him a box of these cigars for making sales until the goods arrived from Little Rock. He followed the same practice with new customers. In such cases the cost of the cigars left with the customer was included in the bill for the merchandise ordered, and was paid in the regular course of business, no money being paid to the salesman.

Having failed to secure a peddler's license as cited above, Rose was convicted in the circuit court of Jefferson County, Ark. He appealed to the Supreme Court of Arkansas, insisting that "he was only a traveling salesman or drummer and not a peddler within the terms of the ordinance." He also challenged the validity of the ordinance as being "an attempt to levy an occupational tax" upon the business of a wholesale house.

In discussing the questions involved in the case, the court reviewed the powers granted by the constitution to the general assembly among which was "the power to tax hawkers and peddlers." The legislature defined the term as follows:

Whoever shall engage in the business of selling goods, wares, or merchandise of any description, other than articles grown, produced, or manufactured by the seller himself, or by those in his employ, by going from house to house, or place to place, either by land or water, to sell, the same is declared to be a peddler or hawker. (Sec. 9793, Crawford & Moses' Digest.)

As this definition made no exception of drummers or traveling salesmen, the majority of the court was of the opinion that "the method employed by the salesman in disposing of the cigars, delivering part of the merchandise sold at the time of the sale from stock carried with him for immediate use by the purchaser * * * is such an engaging in the business of selling goods, wares, and mer-

chandise within the meaning of the statute as comes within its prohibition." The court was also of the opinion that the license fee was neither an occupation tax within the meaning of the law nor a violation of the statute providing that no firm shall pay a license tax in more than one city of the State unless it maintains a place of business in more than one city.

The judgment of the lower court was therefore affirmed.

EXAMINATION, LICENSING, ETC.—PEDDLERS AND HAWKERS—CONSTITUTIONALITY OF STATUTE—*Ratta* v. *Healy, Chief of Police, District Court, District of New Hampshire* (*Nov. 3, 1932*), *1 Federal Supplement, page 669.*—Louis A. Ratta, a resident of Springfield, Mass., filed a bill in the District Court, New Hampshire district, to secure an injunction prohibiting the chief of police of Manchester, N.H., from enforcing the "hawkers and peddlers license law" of New Hampshire. Ratta was engaged in the sale of certain household vacuum cleaners in the States of New Hampshire, Vermont, and Massachusetts. He employed canvassers on a commission basis and these men would deliver the vacuum cleaner upon sale. The chief of police of Manchester, N.H., attempted to force these canvassers to secure a license as required under the New Hampshire act relating to peddlers and hawkers.

The evidence disclosed the fact that Ratta would either be forced to abandon his business in Manchester, N.H., as he had conducted it or be forced to pay the license fee for most all of his canvassers, as many of these men were without adequate means to undertake the employment if forced to pay this fee. These fees would entail an annual expenditure by Ratta of about $300, if he assumed the burden of paying for the license. He therefore filed suit to enjoin the enforcement of the act, alleging that the act was unconstitutional because it violated article 4, section 2, of the United States Constitution and also the fourteenth amendment thereto.

The objection first raised to the suit was that Ratta could not sue in a Federal equity court because the amount involved was not sufficient to vest jurisdiction on the ground of diversity of citizenship, and it was also alleged that there was an adequate remedy at law, and therefore the court in equity should not assume jurisdiction. The court, however, overruled both of these objections and held that a Federal equity court has jurisdiction where a threatened interference of a property right is involved by the prosecution of a criminal suit if the act under which such prosecution be threatened is unconstitutional.

The statute was first challenged under the "privileges and immunities" clause (sec. 2, art. 4) of the United States Constitution,

in that the statute discriminated in favor of citizens of New Hampshire, as no license fee is required of a citizen of New Hampshire who is 70 years of age, whereas a citizen of any other State, regardless of his age, would be required to secure a license and pay the fee. The court upheld this objection to the law and said that even though this section of the law was of no great practical importance, "the Constitution, in respect to safeguarding the equality of privileges and immunities between citizens of the several States, does not permit of any encroachment predicated upon such a basis or excuse."

The second objection to the statute was that it violated the fourteenth amendment to the Constitution in that it deprived the salesman of property without due process of law. In reviewing the scope of the fourteenth amendment, the court quoted from the opinion of the United States Supreme Court in the case of *Barbier* v. *Connolly* (113 U.S. 27), as follows:

> The fourteenth amendment, in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws", undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; * * * that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.

The court then reviewed the provisions of the peddlers and hawkers license law and found it "replete with the most arbitrary of attempted classifications and exemptions." Section 3 of the act allows any canvasser to make sales from house to house without paying a license fee provided he does not make a delivery at the time of making the sale. In other words, the peddler is exempt from the payment of the fee if he sells from a catalog or if he uses only a sample, whereas he must pay the fee if he delivers at the time he has demonstrated an article to the customer. The court also found no reasonable classification in the list of articles requiring a license for their sale and the articles for which a sale could be made without a license. The court pointed out that:

> Without a license one may peddle provisions which would presumably include foodstuffs and groceries, but may not without a license sell and deliver at the time bathroom fixtures, toothbrushes, or combs. He may without a license, as provided in section 3, peddle fruit trees, vines, and shrubs, but to peddle fir trees, onion sets, or annual plants for the garden, if not the product of his own farm, he must have a license. One may by his own labor, or that of his family, make wheelbarrows and hand sleds and vend them without

a license, but to peddle a porch chair or ladder a license must first be obtained.

The court therefore held that the classifications in section 3 regarding the articles sold and in section 11 as to the age of the peddler were "wholly unreasonable and arbitrary" and that "they bear no relation whatever to the proper object or subject matter of such legislation, namely, the protection of the public" and therefore "result in an arbitrary and unequal application of restrictions to persons in legal status similarly circumstanced." The law was therefore declared unconstitutional and its enforcement prohibited.

EXAMINATION, LICENSING, ETC.—PEDDLERS AND HAWKERS—LIABILITY OF CORPORATION—*Sterchi Bros.* v. *State, Court of Appeals of Alabama (Mar. 29, 1932), 140 Southern Reporter, page 772.*—The State of Alabama in 1919 passed a law requiring all peddlers and hawkers to secure a license (Gen. Acts of 1919, p. 282). Sterchi Bros., a corporation, was peddling mattresses by motor vehicles in May 1931 in Franklin County, Ala., and had not secured the peddler's license prescribed in the statute. The attorney general therefore filed suit against the company to recover $128.72 claimed for State and county licenses for peddling during the year 1931. The corporation entered as a defense the fact that it was a corporation, and because a corporation cannot peddle, it cannot be required to secure a peddler's license. The law and equity court, Franklin County, rendered a decision in favor of the State and the corporation appealed to the Court of Appeals of Alabama.

In affirming the decision of the lower court the appeals court said in part as follows:

We are of the opinion that the evidence adduced upon the trial of this case was ample to sustain the insistence of the State as to the charge of peddling, and it was without dispute appellant had secured no license so to do.

The principal inquiry upon this trial was raised by the demurrer to the complaint, as above stated, to the effect that a corporation cannot be a peddler, and that the license tax provided by the revenue laws for peddlers applies only to individuals. This insistence is wholly untenable. Section 1 of said act is conclusive of the question. The act to provide for the general revenue of the State of Alabama is found on page 282 et seq. of the General Acts, 1919. Section 1, supra, contains a definition of terms, and, among other things provides: "G. The term 'person' or 'party' or other word or words importing the singular number shall be held to include firms, companies, associations, and corporations", etc., and, if a corporation by and through its agents or employees engage in the practice of peddling, as contemplated and provided by the revenue act, supra, it must, in order to comply with the law, first obtain the license prescribed so to do.

EXAMINATION AND LICENSING, ETC.—PLUMBERS—CONSTITUTIONALITY—*Gregory et al.* v. *Quarles et al., Supreme Court of Georgia (Feb. 10, 1931), 157 Southeastern Reporter, page 306.*—On March 28, 1929, the city of Atlanta adopted an ordinance relating to plumbing. It provided for the creation of an examining board and prescribed their powers and duties. Among the duties was the issuance of certificates of proficiency and licenses to persons who had successfully passed an examination. The ordinance required all persons engaged in the business of plumbing to have such a license, but excluded persons engaged in repairing fixtures already installed and provided further that "persons engaged in installation or repair of steam, gas, or water pipes shall not be required to stand examination." The sole test applied in the ordinance seemed to be whether sewer connections had been made.

D. H. Gregory, a plumber in the city of Atlanta brought suit to enjoin the enforcement of the ordinance on the ground that it was unconstitutional. The superior court, Fulton County, Ga., dismissed the suit on the ground that Gregory had no cause as yet for complaint as the ordinance had not been enforced against him.

On appeal to the Supreme Court of Georgia the decision of the lower court was reversed and the constitutional objections were considered. The principal contention made by Gregory was that the ordinance "makes a palpable discrimination against members of that class engaged in original construction where connections 'are being made' with the sewer system and in favor of members of the same class where they are engaged in repair or maintenance work where connections 'have already been made' with the sewer system."

In considering the right of a city or State to regulate a trade or profession the court cited the case of *Felton* v. *Atlanta* (61 S.E. 27), wherein the court said:

> The common inherent right which every citizen has of enjoying the inestimable blessing of laboring at any honest employment he may choose, save only so far as restrictions are necessary to the protection of the public peace, health, safety and morality, is so well established that limitations thereon are to be strictly construed.

The decision of the lower court was therefore reversed.

EXAMINATION, LICENSING, ETC.—PLUMBERS—VIOLATION OF STATUTE—*Power* v. *Board of Examiners of Plumbers, Supreme Judicial Court of Massachusetts (Nov. 2, 1932), 182 Northeastern Reporter, page 924.*—In 1906 William Power was licensed as a master plumber, and in 1931 he passed certain civil service examinations, and was appointed superintendent of plumbing and heating for the city of Worcester, Mass.

The office of the superintendent was in the city hall and Power had two journeyman plumbers working under him.

The permits, etc., for work to be done on city buildings were taken in the name of the superintendent, and the actual work was done by the journeyman plumbers, under the supervision of the superintendent. The materials were purchased by the city, and the payment of the salary was made by the city direct to each employee.

A complaint was filed by the Worcester master plumbers' council against Power. The board of examiners of plumbers voted to suspend Power's license as a master plumber for a period of 3 months. The charge against Power was that he had engaged in the practice of loaning his license to the city of Worcester, which was in violation of the general system of licensing plumbers provided in chapter 142 of the General Laws. This chapter divides plumbers into two classes—master plumbers and journeyman plumbers. A master plumber is defined as "a plumber having a regular place of business and who, by himself or journeyman plumbers in his employ, performs plumbing work; while a journeyman plumber is "a person who himself does any work in plumbing subject to inspection under any law, ordinance, by-law, rule, or regulation." The law also provides that a journeyman plumber has "the right to work for himself and to take contracts for or to do by his own labor, plumbing upon buildings. But * * * he * * * has no right to employ other journeyman plumbers to assist in the doing of such work. That would make him a master plumber."

The contention was made by the master plumbers' council that the method of doing a plumbing business in Worcester violated the provisions of chapter 142, in that the city secured the permits and inaugurated the system, which work should be done by a master plumber.

It was further contended that the journeyman plumbers were engaged in plumbing work outside their power, as they were employed by the city rather than by a master plumber; and even though they worked under the supervision of Power, a master plumber, being city employees they were subject to the orders and direction of many other city officials. The objection was also raised that the master plumber did not meet the requirement of having a "regular place of business" as that requirement contemplated a regular place of business open to the public.

William Power filed a petition to prohibit the action of the board of examiners of plumbers, and the Supreme Judicial Court of Massachusetts issued a writ. Exceptions were noted by the attorneys for the council and after a hearing before the Massachusetts Supreme Judicial Court the exceptions were overruled and the proceedings to suspend Power's license were ordered to be quashed. The court said in part as follows:

We think, however, that the requirement that a master plumber shall have a "regular place of business" is satisfied if the applicant for a master plumber's license has a place to do the business which he may be called upon to do as a master plumber, and that it must not necessarily be available to the public but must at all times be certain and not itinerant; that the words "in his employ," Gen.L. (Ter. ed.), c. 142, sec. 1, are broad enough to cover journeyman plumbers who are not employed by him, but under their contracts with others are, nevertheless, to be subject to his orders and supervision [cases cited], and that the participation of the petitioner in the operation of the system of the city of Worcester in the manner complained of by the respondents is not a violation of the master plumber's license or of Gen.L. (Ter. ed.), c. 142.

HOURS OF LABOR—CLOSING TIME OF BARBER SHOPS—CONSTITUTIONALITY OF STATUTE—*City of Alexandria* v. *Hall, Supreme Court of Louisiana (Dec. 1, 1930), 131 Southern Reporter, page 722.*—The city of Alexandria, La., passed an ordinance requiring, among other things, all barber shops to close at 6:30 p.m. except on Saturdays and days prescribed as legal holidays.

Bazil Hall, a barber in Alexandria, was tried and convicted in the city court of Alexandria for the violation of this statute, and was fined $15. He appealed the case to the Supreme Court of Louisiana, contending that the ordinance was class legislation, depriving him of his property and liberty without due process of law, and was an unwarranted and arbitrary interference with his constitutional right to carry on a lawful business.

The city of Alexandria, however, attempted to maintain the constitutionality of the statute on the ground that it was a proper exercise of its police power in protecting the health of the public. Medical experts were introduced who testified that "the longer the hours of work are, the more run down becomes the system of the barber, and the more susceptible is he to communicable diseases, and thereby the public health may become endangered." The court rejected this view, however, and said in part as follows:

In our opinion, the public health is protected by the provisions of the ordinance itself requiring inspection of barber shops, sterilization of instruments, and examination of all barbers suspected of having communicable diseases.

Besides, the requirement in the ordinance that barber shops shall be closed at 6:30 p.m. throughout the year, with certain exceptions, is not really an appropriate measure for the protection of the public health, as the alleged necessity for the restriction in the ordinance bears no reasonable relation to public health, is not supported by anything of substance, but rests, in our opinion, upon mere conjecture.

Continuing the opinion the court quoted from the case of *State* v. *City of Laramie* (275 Pac. 106), in which the court said:

To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.

In concluding the opinion, declaring section 4 of the ordinance unconstitutional the court said:

It is our conclusion, therefore, that section 4 of ordinance 276 of the city of Alexandria is not a reasonable exercise of the power of the city, under Act No. 136 of 1898, and amendments thereto, to regulate and control barber shops, and that this section is unconstitutional, null, and void as a whole. Its main purpose was to secure the uniform closing of all barber shops in the city of Alexandria, and we are satisfied that, without such provision in it, neither the barbers nor the city council would have written a section into the ordinance for the sole purpose of regulating the closing of barber shops on legal holidays and Sundays.

A city ordinance regulating the hours during which barber shops shall remain open in Clarksdale, Miss., was declared void by the Mississippi Supreme Court. (*Knight* v. *Johns* (1931), 137 So. 509.)

LABOR ORGANIZATIONS — CONTRACT — BREACH — INJUNCTION — *Harper et al.* v. *Local Union No. 520, International Brotherhood of Electrical Workers et al., Court of Civil Appeals of Texas (Mar. 30, 1932), 48 Southwestern Reporter (2d), page 1003.*—The local union of the International Brotherhood of Electrical Workers, located in Austin, Tex., entered into a contract with certain contractors, which prescribed the number of hours to be worked and the rate of pay the employees were to receive, and also contained the usual provisions in such contracts regarding the contractors' agreement to employ only members of the International Brotherhood of Electrical Workers, the union in turn agreeing to furnish the men desired. The contract was to run from April 1, 1930, to the last day of March 1933, and the rate of pay prescribed for journeyman electricians was $9 per day during the first year of the contract; $9.50 per day during the second year; and $10 per day during the last year of the contract.

All the parties to the contract abided by its terms until August 31, 1931, at which time it is alleged that Harper and Linscomb, two contractors signing the contract, breached the terms of the contract by discharging the electricians in their employ who were members of

the International Brotherhood of Electrical Workers and employing nonunion men at a much lower wage scale. The union thereupon instituted proceedings against the contractors to secure an injunction enforcing the agreement. The district court, Travis County, granted a temporary injunction and the two contractors appealed to the Court of Civil Appeals of Texas. The contentions of the contractors were summarized by the court as follows:

(1) The agreement is unilateral and wanting in consideration, in that it does not impose any obligation upon the union to supply labor to the contractors.

(2) The agreement in effect is for personal service, which cannot be enforced by specific performance, and therefore under the doctrine of mutuality of remedy, injunction, which in effect is specific performance, is not available to the union.

(3) The effect of the agreement is to require employers of electrical construction workmen at Austin to employ only members of the labor union for electrical construction work in Austin and surrounding territory, and to render membership in the local union an indispensable condition to any workmen obtaining employment; it is therefore against public policy.

In their petition the members of the union alleged all the facts which form the basis of the suit and further alleged that "they will suffer irreparable injury unless they are given relief" sought and that they have no adequate, plain, and certain remedy at law. As a justification for their action the contractors set up the change in prices and conditions.

In rendering the decision the court said the questions involved were in a large measure new questions in that jurisdiction and that "the principles of law that have been applied to collective bargains between employers and employees are of comparatively recent development, and have been largely influenced by new conditions that have arisen under methods employed in modern industry."

As to the legality of the electrical union, the court followed the view expressed in Mr. Justice Holmes' dissent in the case of *Vegelahn* v. *Guntner* (44 N.E. 1077), decided by the Massachusetts Supreme Court, as follows:

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. * * *

If it be true that workingmen may combine with a view, among other things to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty

that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control.

Having decided that the union itself was legal, the court next turned its attention to the agreement or contract which the union made with the electrical contractors. The court reviewed several cases decided by courts in other jurisdictions and reached the conclusion that the recognized principles of contract law should be applied to collective bargaining agreements. A number of leading cases were cited holding that the "right of labor to contract collectively for employment and other advantages * * * is now generally recognized." Going further the court said that contracts providing for the employment of only a certain group, as the members of a local union, are not on that ground alone invalid and unenforceable.

The court then considered the specific objections urged by the contractors against enforcing the agreement by injunctive process. In interpreting the provisions of the contract, the court followed the rule, laid down in former decisions, of "giving a practical interpretation with a view to effect the intention of the parties as gleaned from the language of the instrument, the subject matter dealt with, the surrounding circumstances, and the objects sought to be accomplished."

In refuting the three objections raised the court said:

> We do not believe the agreement is unilateral, in that it imposes no obligation upon the union. While it is true that there is no express agreement on the part of the union to furnish labor at the prices and under the terms and conditions prescribed in the contract, its very purpose and object was to prescribe terms under which the members of the union would work and the contractors would employ. It was therefore, we think, a necessarily implied term of the agreement that the union, its officers and members, would collectively abide by the terms of the agreement, and would not collectively or as an organization exercise any right or do any act it or they might otherwise lawfully exercise or do, which was in conflict with any of the terms of the agreement; and that the union would enforce the contract to the extent of its powers over its members under its constitution and bylaws. * * *
>
> Appellants' second proposition that injunction will not lie at the suit of the union because the contract is one for personal service, which could not be compelled by injunction, and therefore as to that remedy it is lacking in mutuality, is supported by decision in several jurisdictions. We have reached the conclusion, however, that the contract in its collective aspect is not one for personal service. Insofar as it may inure to the benefit of the individual members of the union, it does not purport to bind the employers to employ any particular workman, or to continue in the business; nor does it purport

to bind any particular workman to work for appellant, or in fact to continue a member of the union, or in the particular line of employment. It does bind the employers, however, to its several terms if they continue in the business; and it becomes a part of the contract of each member of the union on entering the employment of appellant. The right of discharge for any valid reason is not affected by the contract on the one hand; and the right to leave the employment for any valid reason is likewise not affected on the other. * * *

We think it clear that appellees have no adequate remedy at law. As we have seen, there were no specific contracts of employment, and no criterion of practical application for ascertaining the damages that would flow from breach of the collective agreement is suggested. * * *

Appellants' third proposition is predicated upon the principle announced in the following quotation from *Polk* v. *Cleveland Railway Co.* (20 Ohio App. 317, 151 N.E. 808, 810): "Contracts by which an employer agrees to employ only union labor are contrary to public policy when they take in an entire industry of any considerable proportions in a community so that they operate generally in that community to prevent or seriously deter craftsmen from working at their craft or workmen from obtaining employment under favorable conditions without joining a union." * * *

The general principle announced in this quotation may be conceded; but we do not believe the record brings the case at bar fairly within its purview.

The judgment of the lower court granting an injunction to enforce the contract was therefore affirmed.

LABOR ORGANIZATIONS—DUTY OF OFFICIALS—MEMBERSHIP RIGHTS, ETC.—RULES, ENFORCEMENT, VALIDITY, ETC.—*Webster et al.* v. *Rankins et al.*, *St. Louis Court of Appeals, Missouri (June 7, 1932), 50 Southwestern Reporter (2d), page 746.*—The International Hod Carriers, Building and Common Laborers' Union of America is a voluntary unincorporated union, and is the parent body of numerous local unions. Among these local unions is the Brick Masons Tenders Local Union, No. 319, of the city of St. Louis. There are six other locals in the city of St. Louis and these, together with local no. 319, send one representative to the district council. The bylaws of the international union provide, among other things, that—

It should have supreme ruling power over all local unions; that it should be ultimate tribunal to which all members [matters] of importance to welfare of local unions should be referred for adjustment; that general president should have power to visit and inspect proceedings of local unions, deputize others to investigate grievances in local unions, suspend and prosecute officers guilty of defalcations, and preside at any meeting of local union in case of questions arising between officers and members of union; and that duty of several

vice presidents in their order was to perform all duties of president in his absence or whenever requested by him to do so.

When local union no. 319 was organized in March 1928 a resolution was passed that the officers elected at that time should hold office until June 1930. William B. Rankins was elected president of the local at the first election and he continued to hold office until time for the election in June 1930.

However, on June 4, 1930, Herbert Rivers, sixth vice president of the International Union, wrote to Rankin requesting that "the election be postponed for another year" in view of the conditions existing in the local union at that time. At the regular meeting on June 5, 1930, it was moved to proceed with the election in accordance with the bylaw passed in 1928; but Rankins, who was presiding, ruled the motion out of order and when an appeal was taken to the floor he undertook to adjourn the meeting and all the officers withdrew from the meeting. The other members, however, remained and attempted to reorganize the meeting, adopting a resolution to hold the election of officers at the second regular meeting in June. At this meeting on June 19, Rankins was presiding and when the motion was made to proceed with the election of officers he ruled it out of order and again attempted to adjourn the meeting, all the officers withdrawing from the room. The members remained and nominations were made for officers to be voted upon at the next regular meeting. This meeting convened on July 3, 1930, and again Rankins attempted to adjourn the meeting and all the officers withdrew from the room. The members remained and proceeded with the election of officers.

Sam H. Davis was elected president and among the other officers elected were Sam R. Webster, Jr., and Ernest Yokley, as trustees and J. J. Boyd, business agent.

The former officers refused to turn over the books and records of the local union to these newly elected officers and at the meeting on July 17, 1930, Rankins again presided and Rivers, the sixth vice president of the parent organization, was present. He stated that he would not recognize the former election, refused to permit the installation of officers, and then declared the meeting adjourned and withdrew.

Some time later it was discovered that certain members of the district council attempted to make certain contractors discharge all members of local no. 319 from their employment by representing that the members of that local were not in good standing with the international union.

Suit was thereupon filed by Webster and the other newly elected officers to secure injunctive relief against Rankins and others. The

circuit court of St. Louis granted an injunction enjoining the former officers " from in any manner interfering with the officers of the local union, elected at the meeting held July 3, 1930, in the exercise of the duties of their offices ", and also restraining the members of the district council " from in any way interfering with the members of the local union in following their occupation and from threatening, or in any way preventing contractors with whom said members have contracts from employing such members." From this judgment the former president and the others enjoined appealed to the St. Louis court of appeals.

In affirming the judgment of the lower court granting the injunction, Chancellor Sutton, speaking for the appeals court, said in part as follows:

The chief contention made by the defendants, for the reversal of the judgment below, is that the vice president of the international union had the power, under the laws of the union, to prevent and forbid local union 319 from holding its election of officers in accordance with the bylaws of the local union, and that the vice president, having issued his edict forbidding an election of officers by the local union, the election thereafter held by the local union is void, and that the incumbents are entitled to continue in the offices and exercise the duties thereof. We are not persuaded, however, that the laws of the international union confer upon the vice president any such arbitrary power. We can see nothing in the laws of the international union empowering the vice president, or the union, through the vice president, to arbitrarily set at naught the bylaws of the local union, to prevent it from electing its officers in accordance with its bylaws, so as to retain the incumbents in the offices, as the record shows the vice president undertook to do in this case.

It is further contended that the plaintiffs cannot maintain this action because it is not shown that they have exhausted all remedies provided within their own organization. There is no doubt as to the general rule that it is the duty of the member of an organization to exhaust his remedy by appeal or otherwise, within the order, before resorting to the courts for redress. But this rule has application only when the organization has acted strictly within the scope of its powers. It therefore has no application here. [Cases cited.]

LABOR ORGANIZATIONS — INJUNCTION — ANTIUNION CONTRACT — RIGHT TO UNIONIZE—*Kraemer Hosiery Co. et al.* v. *American Federation of Full Fashioned Hosiery Workers, Reading Branch, Local No. 10, et al., Supreme Court of Pennsylvania (Oct. 9, 1931), 157 Atlantic Reporter, page 588.*—The Kraemer Hosiery Co. owned and operated a hosiery mill at Nazareth, Pa. It employed over 200 employees in its mill, and operated on a strictly nonunion basis. On June 20, 1929, the company requested each of its employees to sign an anti union contract, to the effect that the signer would not become a mem-

ber of a labor union while employed by the company, and that if he should desire to join such an organization he would withdraw from the company's employ.

Subsequently the American Federation of Full Fashioned Hosiery Workers, a national organization, attempted to organize a local in Nazareth and to induce the company's employees to join. Budenz, an attorney from Rahway, N.J., and one White, secretary of the Reading local union, visited Nazareth and "by addresses, both spoken and written, at meetings attended by plaintiff's employees, induced a number of the company's employees to violate their agreement * * * and enroll in the defendant union."

The company secured a preliminary injunction in the court of common pleas, Northampton County, restraining the union and Budenz and White from inducing the employees of the hosiery company to become members of the union. This injunction was made permanent and Budenz, being neither a member of the union nor an employee of the company, appealed to the Supreme Court of Pennsylvania to have the injunction set aside.

After briefly reviewing the facts, Mr. Chief Justice Frazer rendered the opinion for the court. He found "that the hosiery company practiced no fraud or duress in inducing its members to sign the agreement, and that each signer was afforded full opportunity to read and understand the contract before adopting its terms." The court also found that the relation between the employer and the employees was entirely satisfactory and peaceable, and that "the combination between the defendants to accomplish the unionization of plaintiff and to induce plaintiff's employees to violate the individual contract which each signed * * * was an illegal and malicious conspiracy."

Basing the decision upon the cases of *Flaccus* v. *Smith* (199 Pa. 128, 48 Atl. 894) and *American Steel Foundries* v. *Tri-City Central Trades Council et al.* (257 U.S. 185), the court further held that the company had a property right in the conduct of its business, and "no one had a right to interfere with it" to its prejudice or injury. The contract made with its employees was a legal contract, the court said, and the employer's rights under it should be protected by the court. The court did admit, however, that Budenz had the right peacefully to persuade the employees to withdraw from the employment of the company, and after they had thus withdrawn they were free to join the union. Therefore the court modified the injunction to read as follows:

That appellant, Lewis Francis Budenz, his agents, servants, employees, and every [one] of them, be, and they hereby are, perpetually enjoined and restrained from using threats or intimidation, from

sending libelous and scandalous letters, pamphlets, or newspapers, and from picketing plaintiff's plant in combination with others, for the purpose of inducing or attempting to induce employees of the Kraemer Hosiery Co., plaintiff, while still in its employ, to become connected with the American Federation of Full Fashioned Hosiery Workers' Union, or any of its local branches, or with any other organized labor body, or for the purpose of inducing or attempting to induce them to make efforts to bring about the unionization of plaintiff's factory.

Mr. Justice Maxey delivered a forceful dissenting opinion in which he reviewed all the evidence before the court. He found the sole issue of the case to be "Budenz's right of free speech—his right to advocate by both written and spoken word the principles of labor unionism and to attack antiunion individual contracts." After reviewing the publications of Budenz, offered in evidence, he concluded:

I find in them no phrases as offensive as those commonly used in political contests by zealous partisans against candidates for the highest offices in State and Nation. Equity is entering a forbidding and hitherto untrodden field if it is to be used to enjoin the making of speeches and the publication of articles that offend the feelings of persons who are in the front line in the age-long and never-ending battle of ideas. * * *

The dissent also contended that the company had no right to come into a court of equity to secure an injunction to protect these individual contracts with its employees, because the contracts were signed under conditions that were unconscionable and offensive. Mr. Justice Maxey considered the threat of the loss of a job as constituting duress and fraud in securing the signatures of the employees. Continuing, he said:

Oppressive bargainers are outcasts in a court of equity. These plaintiffs were oppressive bargainers because they forced their employees to surrender their right to associate with their fellow-employees for economic self-protection. The conduct of these plaintiffs is comparable to that of an avaricious money lender who forces a hungry man to agree to pay usury for food money. There was no "freedom of contract" in this case between employer and employee, but only a colorable pretense of such freedom, and "the law is not to be hoodwinked by colorable pretenses. It looks at truth and reality, through whatever disguise it may assume." (Shaw, C. J., in *Commonwealth* v. *Hunt et al.*, 4 Metc. (45 Mass.) 111, 38 Am. Dec. 346.) * * *

When most labor was unskilled, the loss of a job was not a serious matter, for a new one was usually at hand. In these days of specialization, the loss of a job is to a wage earner a calamity. A husband and father who is threatened with idleness unless he signs an agreement not to join a union has about as much "freedom of contract" as has a shipwrecked sailor who is bartering for a seat in the only lifeboat in sight.

The next objection raised in the dissenting opinion was that the contract lacks mutuality—there was no consideration—and it therefore was a nullity in law. It was pointed out that the contract "deprives the employee of a most valuable right, to wit, the right to cooperate with his fellow men in a labor union," while "it confers no rights upon him whatsoever; his job he had before the contract; his wages he had to earn."

The third proposition considered in the dissent was that "an antiunion contract is so at war with public welfare as to disentitle it to legal recognition." Many eminent authorities were quoted in support of this view. Mr. Justice Maxey considered such contracts as "a vestige of economic bourbonism * * * headed for complete rejection in this country." Such contracts were also considered to be objectionable as being provocative of violence. Continuing he said:

These antiunion contracts are not regarded by employers as contracts whose breach gives rise to actions at law. There is no record of any employer ever suing an employee for violating them. This antiunion contract has never served any purpose except as an emplacement for equity's longest range injunction gun. It is a verbal contrivance to inveigle a court of equity into an alliance with the opponents of labor unions in the battle of ideas between unionism and nonunionism. In a battle of ideas, the agencies of government should always be neutral. Ideas should be fought out in a fair field. Truth is the best antidote for error. * * *

Turning his attention to the specific question involved in the appeal Mr. Justice Maxey held the view that contracts between third parties were not a sufficient basis for the suppression of Budenz's right of free discussion. "Employers of labor have no peculiarly sacred rights in their contracts with employees and courts of equity cannot, in order to protect such contracts, infringe on the constitutional rights of others." In concluding the dissenting opinion, he said:

If this court means to hold—as I understand its decision in this case to hold—that because there might have resulted from Budenz's speeches and writings a violation of the individual antiunion contract, these speeches and writings should be enjoined, I cannot follow this court to that extreme position. I could not do so even if I considered the individual contract legal, instead of utterly illegal and void, as I do hold it. To enjoin the dissemination of ideas because they may result in a breach of some contract is to my mind a doctrine both novel and utterly impracticable in application. * * *

The decree appealed from is in effect an injunction against Budenz's ideas, not against his acts, for not a single unlawful act did or could the court below find against him. That decree should therefore be entirely reversed and set aside, for ideas are not subject to injunction. Ideas have far-reaching effects. Some of these effects

may be good and some may be evil, but it is opposed to progress and contrary to the spirit of our institutions to intrust any official with the abritrary power to say what ideas shall be liberated and what ideas shall be suppressed.

The Court of Chancery of New Jersey held in a case that while third parties who may aid others to violate an injunction cannot be held in contempt as violators of the terms of the injunction, yet they are amenable for obstructing the administration of justice. (*In re Staire et al.* (1932), 162 Atl. 195.)

LABOR ORGANIZATIONS—INJUNCTION—PICKETING—*Stillwell Theater, Inc.*, v. *Kaplan, Court of Appeals of New York (July 19, 1932), 182 Northeastern Reporter, page 63.*—Suit was instituted by the Stillwell Theater, Inc., the Rosekay Amusement Corporation, and the Windsor Circuit Corporation, against Sam Kaplan as president of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators' Union to secure injunctions prohibiting the members of the union from doing any act or acts to induce or cause a breach of the contract between the Empire State Motion Picture Operators' Union and the respective employers.

From the facts in the case it appears that the employers made a contract with the Empire State Motion Picture Operators' Union in which they agreed to employ only members of that union as motion-picture operators. The contract ran from September 1, 1930, to August 31, 1931, and during part of that time the members of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators' Union—a union affiliated with the American Federation of Labor and the Central Trades and Labor Council of Greater New York—picketed the place of employment. The picket was entirely peaceful and unaccompanied by acts of violence. Signs were displayed which read: "Owners of this theater refuse to employ members of Motion Picture Operators' Union, Local 306, affiliated with the American Federation of Labor."

The appellate division rendered judgment for the employers, affirming a judgment of the special term. The court of appeals, however, held that unquestionably the defendant, in picketing these three theaters, was actuated by a desire to improve labor conditions as to wages, hours, number of employees, and conditions of work, although incidental disadvantages to the employer might result."

The court then quoted from the case of *Exchange Bakery & Restaurant, Inc.*, v. *Rifkin* (245 N.Y. 260), in which case the court held that "resulting injury from lawful picketing was incidental and must be endured." The court of appeals did not believe the evidence sufficient to support findings of the lower court and stated the view of the appeals court to be as follows:

The court of appeals has for many years been disposed to leave the parties to peaceful labor disputes unmolested when economic rather than legal questions were involved. The employer, if threatened in his business life by the violence of the unions or by other wrongful acts, might have the aid of the court to preserve himself from damage threatened by recourse to unlawful means, but the right of the workmen to organize to better their condition has been fully recognized. The fact that such action may result in incidental injury to the employer does not in itself constitute a justification for issuing an injunction against such acts. The interests of capital and labor are at times inimical and the courts may not decide controversies between the parties so long as neither resorts to violence, deceit, or misrepresentation to bring about desired results. [Cases cited.] Acts must be legal but they may be legal or illegal according to circumstances.

The court then proceeded to distinguish this case from the cases cited by counsel for the employer and held that none of the cases cited were controlling authority, as either the facts or the statutory law differed in each case.

The decision of the lower court granting the injunction was therefore reversed and the complaint was dismissed.

LABOR ORGANIZATIONS—INJUNCTION—STRIKE—SECONDARY BOYCOTT—*Armstrong Cork & Insulation Co.* v. *Walsh et al., Supreme Judicial Court of Massachusetts (July 1, 1931), 177 Northeastern Reporter, page 2.*—The Armstrong Cork & Insulation Co. is a corporation engaged in selling and installing certain cork material used for insulation. This material is placed upon the roofs of buildings and is also used in interior of cold-storage and refrigerating plants. The material is usually installed by carpenters or plasterers, as the company maintains a construction crew to do this work, and these men belong to their respective labor unions. Within a radius of 25 miles about the city of New York the company employed regular roofers to do the work.

The United Slate, Tile & Composition Roofers, Damp and Waterproof Workers' Association, a voluntary unincorporated labor union, sought to obtain as part of its jurisdiction all the work done in connection with installing the company's material. The action instituted by the company sought injunctive relief to prohibit the members of the above union from refusing to work for contractors using the company's material if the company did not exclusively employ "roofers" in the installation of the material. Some of the facts found in the master's report are as follows:

The work is performed by carpenters where asphalt or a similar substance is used, and by plasterers if the board is laid in cement. Except within a radius of 25 miles of the city hall of New York

City where certain men among the roofers have had special training, no roofers have been employed. In a few instances the plaintiff has employed roofers elsewhere, but with unsatisfactory results. Roofers do not customarily carry the tools nor possess the skill adequately to perform the work essential to satisfactory installation; but they could acquire tools and skill for the part of the work which they claim within a short period.

As early as 1928 the roofers claimed the work of laying cork board in hot asphalt wherever used. The work on a few jobs was given them, but was not satisfactory to the plaintiff. * * * Pursuant to instructions from the International Roofers' Union to Local Union No. 33 to endeavor to obtain all the work of installing and applying the cork board material demanded of the plaintiff, that local voted on February 10, 1930, to refuse "to handle any product of the Armstrong Cork Co. until they come to a signed agreement with our local"; and it forthwith notified the Building Trades Employers' Association of its refusal.

The master also found that this action on the part of the union was a part of a plan "to obtain a monopoly of all the work of installing and applying cork-board material manufactured by the plaintiff and others engaged in a similar line of business to the exclusion of all other crafts, * * *."

In an effort to carry out this plan certain members of the union employed by the Columbia Cornice Co. refused to handle material purchased from the Armstrong Co., and which was being installed by the Columbia Co. on a job of the Thompson-Starrett Co., Inc., in Boston. Similar instances occurred at Cambridge, Waltham, and other places where the Armstrong cork was used in construction. The labor troubles resulted in substituting other materials in place of the Armstrong cork.

After reviewing the evidence and facts found by the master the court was of the opinion that the Armstrong Co. was entitled to injunctive relief. The court said, in part, as follows:

Although the law has recognized a determination by laborers united in a voluntary unincorporated labor union to obtain for themselves all the work of a particular kind, as a legal justification for a strike or the exercise of pressure to compel their employment to the exclusion of others [cases cited], it refuses to regard as legal certain methods of exerting pressure. These methods equity will restrain. The defendants here have resorted to them. They have no direct relation as employees of the plaintiff, except, perhaps, in the vicinity of the city of New York, where it gives roofers the work which they are demanding to have elsewhere. Except in that vicinity, they cannot resort to the direct strike which would be regarded as legal. Accordingly at Boston and in its vicinity they have seized upon what, in their nature, are sympathetic strikes, boycotts, and blacklisting which are illegal.

LABOR ORGANIZATIONS—MEMBERSHIP, RIGHTS, ETC.—DUTY OF OFFICIALS—*Walsh* v. *Reardon et al.*, *Supreme Judicial Court of Massachusetts* (*Feb. 25, 1931*), *174 Northeastern Reporter, page 912.*—The Amalgamated Association of Street and Electric Railway Employees of America is a voluntary association of employees on street and electric railways. It is the parent organization, and is composed of various locals, among which is the Boston Carmen's Union, Local No. 589. William Walsh joined this local shortly after its organization and held the office of business agent for three terms, 1920 to 1922. He was defeated for reelection in 1923 and according to the record:

He did not in good faith return to the ranks and do his best for the local and for the officers who were guiding the local. He was largely responsible for intemperate and bitter language at meetings of the local. He attended its meetings in a belligerent spirit and criticized the officers repeatedly and continuously. There was turmoil and altercation at meetings which were brought about largely by his attitude and disposition. Business progress at meetings had been seriously interfered with.

However, no action was taken by the local union and no charges against him were ever made officially. On June 12, 1924, John H. Reardon, a member of the executive board of the parent organization, attended the meeting of the local and at this meeting Walsh acted in a "belligerent manner" and "seriously reflected upon the integrity" of Reardon. Thereupon Reardon withdrew from further assistance to the local and the international president wrote the local that unless apologies were made to Reardon all further assistance would be withdrawn. The local union went on record repudiating the accusation and insults made against Reardon.

The international president attended the meeting of the local on July 10, 1924, and at this meeting Walsh, addressing the members, declared "that the international president was surrounded by Judases and also criticized the committee and the defendant Reardon." The international president later called a meeting of the general executive board of the Amalgamated and after discussing the statements made by Walsh, it was declared that:

The board was so convinced, that the said William Walsh is guilty of violation of his obligation to Division No. 589, and the Amalgamated Association, which obligation is taken by applicants to membership in the association, * * * and that said member, William Walsh, shall stand suspended from membership of the Amalgamated Association of Street and Electric Railway Employees of America and/or Division No. 589 of said association, until such time as he may retract his alleged wrongdoings in writing to this general executive board, * * *.

The local union therefore, " in accordance with instructions ", notified Walsh that he was suspended, and refused to receive further dues or assistance from him. He did not appeal to the convention in Montreal in 1925 as was provided in the general laws of the association, but filed suit in the superior court, Suffolk County, Mass., to compel his reinstatement. He contended that as no charges had been preferred against him by the local and no vote was taken to suspend him, the procedure was not as prescribed in the constitution of the union. The superior court sustained Walsh in his contention and issued a decree in his favor. The union appealed the case to the Supreme Judicial Court of Massachusetts where the decree was affirmed. The court said in part as follows:

It is plain the general executive board of the Amalgamated had no authority under its constitution and general bylaws to consider complaints against the plaintiff. * * * Nor if it had such jurisdiction could it lawfully exercise it without notice to the plaintiff and an opportunity given him to be fully heard upon the charges preferred against him at a proper place and at a reasonably convenient time. It is manifest that under said constitution and general laws the general executive board of the Amalgamated has no general jurisdiction as a trial board, and that it is given under section 72 of its constitution appellate jurisdiction to hear appeals only from a member or members of a local division " feeling that they have been unfairly dealt with by the " local division. * * * It follows that the act of the general executive board in suspending the plaintiff from membership was unauthorized, void, and of no effect. * * *

LABOR ORGANIZATIONS—PAINT-SPRAYING MACHINES—INJUNCTIONS AGAINST BLACKLIST—*Bayer* v. *Brotherhood of Painters, Decorators, and Paperhangers of America, Local 301, et al., Court of Errors and Appeals of New Jersey* (*May 18, 1931*), *154 Atlantic Reporter, page 759.*—The Court of Errors and Appeals of New Jersey held that an injunction is not warranted in an employer's action against a labor union if the facts disclose no unlawful acts of the union and show that the combination of employees was for their mutual protection and economic welfare.

The suit in question was instigated by Andrew Bayer, a painting contractor operating in the vicinity of Trenton, N.J., against the Brotherhood of Painters, Decorators, and Paperhangers of America. The difficulty arose over the alleged activity of the contractor in encouraging the use of machines instead of manual labor to apply paint. The union regarded this practice as inimical to its members' economic welfare. The contractor denied that he used such machines in his own business, but admitted that he advanced money for the purchase of such a machine for a corporation in which he

was a stockholder and the corporation used such machines. He applied for an injunction restraining the union from placing him on the unfair list, and from attempting to collect fines from his employees. Bayer also asked relief from those who were injuring his business in any way, such as encouraging sympathetic strikes and persuading others to refrain from working for him.

The vice chancellor found the union had, among other things, by threats of fine or discipline, kept others who were willing and desirous of working for Bayer from doing so. He further found that it was not against the bylaws or rules of the union for an employer to own part interest in a paint-spraying machine, and that the union was not justified in taking such action against the contractor. The order granting an injunction was issued, and the union thereupon appealed to the Court of Errors and Appeals of New Jersey, contending that the employees had a right to combine and by peaceable means refuse to work for an employer who does not conform to the rules of the union and to persuade others to leave or refuse to enter such employment.

The court cited the act of 1883 (3 Comp. Stat. 1910, p. 3051, sec. 128), and the act of 1926 (Comp. Stat. Supp., sec. 107–131a), which grants to the employee the right to form a union and to persuade others, by peaceable means, from entering the employment of any person or corporation. After reviewing the evidence, the court reversed the order of the court of chancery, saying in part as follows:

> The court below appears to have concluded that efforts to persuade their members not to work or to discipline them for breaking the union rules was [sic] unlawful because the conduct of the complainant was not unlawful.
>
> Nothing has been proved in this case to warrant a finding that the defendants have done or threatened anything that is not legalized by the acts of the legislature.
>
> It seems clear from the statutes and the decisions of the courts of our own State, as well as of other jurisdictions, that employees may combine for their mutual protection; that they may for themselves conclude what acts and things are for their economic welfare; that they may enforce their demands by strikes, if they thereby violate no contracts of employment; that they may peaceably and without threats or intimidation induce others to do so, if no contractual rights are violated thereby. None of these acts is unlawful, and the fact that complainant may be affected unfavorably by the regulations of the union established to further their own interests does not render them unlawful.

LABOR ORGANIZATIONS — PEACEFUL PICKETING — PERSUASION — *Brandt-Rosen, Inc.*, v. *Golden et al., New York Supreme Court, Special Term, New York County (Jan. 11, 1932), 256 New York*

Supplement, page 824.—In this case the New York Supreme Court, New York County, held that a trade union, in furtherance of a strike, may solicit and entreat employees to leave their employment, but that disregard of the rights of others will not be tolerated. A part of the opinion which affirmed a judgment for the plaintiff (employer) is given below:

On the facts as elicited at this trial there can be no doubt that the defendants, particularly as represented by the union, indulged in conduct far in excess of the privilege accorded by law. Since *Exchange Bakery & Restaurant* v. *Rifkin* (245 N.Y. 260, 157 N.E. 130), the extent to which a trade union can go in its quarrel with an employer of labor is no longer debatable, and abuse of that privilege in consequence as a general rule is no longer excusable or condoned. It is as essential to protect the right of the individual to conduct his business as he wishes, free from interference by force or threat, as it is to defend the right of the other contestant in a labor dispute to engage in any peaceful means to gain individual and popular favor for its members. Without prejudice or bias for either capital or labor, the necessities of present political economy have impelled the law to declare in no unmistakable language the road to be traveled by the principals in a strike. * * * Much as the law seeks to succor the privilege of labor to defend its interests and solidify its ranks, it is equally concerned with the need of safeguarding the prerogatives of ownership. Whether a shop is or is not unionized, unless by contract the employer limits his right to control his establishment, his right to employ only those who please him, whether members of the union or not, cannot be denied; and the courts must recognize his inalienable right to dominate the use of his property regardless of the sentiments of others. It is certain that some of the members of the union, as well as the individual defendants, after the declaration of the strike, did overstep the bounds of propriety; but I am inclined to believe that this was due rather to hysteria common to the female when under undue excitation than to willfulness.

In decreeing judgment for the plaintiff, it is adjudged that the defendants be enjoined and restrained from any other activity than picketing and that in the exercise of that right only two members of the union be used at one and the same time. If there be a violation of this provision, or if any interference by physical means or moral suasion interrupting the course of the plaintiff's business be used, then on proof of such facts the judgment may be amended forbidding the right to picket.

LABOR ORGANIZATIONS—POWER OF COURTS TO REVIEW ACTS—RIGHTS OF MEMBERS—JURISDICTION OF COURT—*Maloney* v. *District No. 1, United Mine Workers of America, et al., Supreme Court of Pennsylvania (May 9, 1932), 162 Atlantic Reporter, page 225.*—A controversy arose over the nomination for president of district no. 1 of the United Mine Workers of America. The district has 135 locals comprising the counties of Luzerne, Lackawanna, Sullivan, and Susquehanna in the State of Pennsylvania. The method for the

election of officers is prescribed in the constitution and bylaws of the district organization. Section 5 provides that no member shall be elected president unless he has received 15 or more nominations.

Thomas Maloney and John J. Boylan were both aspirants to the office of district president. Boylan received 107 nominations and Maloney had received only 10 according to the secretary-treasurer's records. Maloney contended that he had received 20 and that the secretary-treasurer had refused to record the 10 additional nominations. The reason given for not recording the additional nominations was that they were not properly filled in or that they were received too late.

Maloney filed suit against the union in the Luzerne County court of common pleas, and the court after an investigation directed that Maloney's name be placed upon the ballot. Thereupon the union appealed the case to the Supreme Court of Pennsylvania. The court reviewed the facts and discussed the duties and obligations of the officers. The court held Maloney correctly appealed to the executive board and found that he had a full and complete hearing, since the board sustained the ruling of the secretary-treasurer in refusing to record the nominations, the court said: "The jurisdiction of the court below ended when it found the secretary-treasurer and board acted in accordance with the provisions of the constitution and bylaws of their organization." The Supreme Court held that the lower court should not have gone into the merits of the case. In concluding the opinion the court said:

> When the officers of an association such as this in good faith, and in a reasonable, proper, and legal manner under their bylaws and constitution exercise their duties as a tribunal to settle disputes on matters pertaining to the association or the rights of any of its members, such exercise cannot be questioned collaterally; the courts may judge whether the exercise is arbitrary, and review the form of proceedings to see whether the tribunal has acted within its jurisdiction and in the line of order, but cannot review the case on its merits. Courts entertain jurisdiction to keep these tribunals within their own laws, and to correct abuses, so as to preserve, on the one hand, the right of the association and, on the other, that of the members; but they do not inquire into the merits in a regular course of proceeding. [Cases cited.]
>
> Furthermore, appellee did not exhaust his remedy within the organization. From the action of the executive committee he could have appealed to the convention. Courts will not entertain jurisdiction unless all the remedies provided by the laws of the association are exhausted. * * * The court below should have assumed jurisdiction only to ascertain if the acts done were in accordance with the constitution and bylaws of the order. It should not have gone beyond this and inquired into the merits of the case. We dismiss the appeal as the question is moot.

LABOR ORGANIZATIONS—RULES AND REGULATIONS—REVIEW—*Blek* v. *Wilson et al., New York Supreme Court, Special Term, New York County (June 14, 1932), 259 New York Supplement, page 443.*—In 1924 one Blek became a member of Local Union No. 83, International Brotherhood of Electrical Workers of Los Angeles, Calif. In 1926 he obtained a traveling card from the above local and deposited it with Local Union No. 3, which had jurisdiction over all the electrical workers of Greater New York and Long Island.

About April 4, 1930, Blek was informed that complaint had been made against him, as he had performed work outside the authorized scope of his duties as a union member, and that he had been found guilty, fined $200, and indefinitely suspended.

Blek appealed to the supreme court, New York County, requesting that the court:

* * * Decree that the assessment of the plaintiff in the sum of $200 and his indefinite suspension were unlawful, void, and of no effect, and that it be decreed that the plaintiff is a member in good standing, of said Local Union No. 3 of the International Brotherhood of Electrical Workers, and entitled to all the rights and privileges as such, and that he recover of the defendant damages for the length of time that he has been unable to procure any work due to his suspension.

The question was raised as to whether the court had the authority to review the decisions of a labor union tribunal before the member had exhausted the remedies within the union, and in regard to this the court said:

While ordinarily the court will not pass upon the weight of evidence and substitute its judgment for that of his fellow members, nevertheless "if their determination of his guilt of the charge was totally unsustained by any substantial evidence, such determination should here be considered 'as contrary to natural justice', and so subject here to review and correction."

It was said that one joining an organization of this kind agreed to obey its rules and regulations except that he could not be held to have agreed to be bound by rules which were unfair, unreasonable, and arbitrary and which would deprive him of his constitutional rights. In this case no copies of the charges had been served on Blek, and the trial was held in his absence. When he appeared before the duly constituted board he was told that the trial would be adjourned because the complaining witness had not appeared. He was not told the nature of the charges at that time, and although he notified the local that circumstances over which he had no control prevented his being present, it later proceeded with the trial without him.

These actions on the part of the union, in the conduct of what its constitution termed a "summary and immediate" trial, were held to be a violation of the man's constitutional rights, and the court further said that, from the record, it could not find that Blek violated "any law or trade or working rule" of the defendant union.

The court concluded its opinion awarding a judgment in favor of Blek, with the following:

A suspension from a union such as the one to which the plaintiff belongs carries with it very serious consequences. It deprives him of his opportunity to make a livelihood in his selected occupation and of various financial benefits that accrue to a member of the union. In view of the seriousness of the penalty, section 8 should not be so interpreted as to deprive the plaintiff of notice and a copy of the charges. Not only was he deprived of his rights in that respect, but the evidence did not support the charges. I therefore hold the finding of the board to be void and that the plaintiff is entitled to reinstatement in Local Union No. 3 as of the date of his suspension and the restoration of all rights accruing to a member of a local, including the remittance of the fine imposed. * * * A labor union is a quasi-public institution. Injustice to an individual member is apt to undermine confidence on the part of the other members as well as society at large, and tend to the destruction of the organization and the establishment of rival unions by leading to the belief that it is run for the benefit of the few at the expense of the rank and file. As to the demand for damages, the evidence on the probability of plaintiff obtaining employment during the period of his suspension is too speculative to warrant any award.

LABOR ORGANIZATIONS—STRIKE—COERCION—INJUNCTION AGAINST PICKETING—*Levy & Devaney, Inc.*, v. *International Pocketbook Workers' Union et al., Supreme Court of Errors of Connecticut (Feb. 16, 1932), 158 Atlantic Reporter, page 795.*—Levy & Devaney, manufacturers of pocketbooks, operated a factory in Bridgeport, Conn., in which they employed both union and nonunion labor. The International Pocketbook Workers' Union called a strike in the factory.

The factory was picketed; groups of strikers gave the employees "black and threatening" looks as they came and went, and employees were occasionally followed to or from their homes, some even requiring the police to escort them to or from their work.

The superior court, Fairfield County, Conn., granted a temporary injunction to restrain the picketing, and it was later made permanent. The union appealed to the Supreme Court of Errors of Connecticut.

The union contended that "intimidation or coercion cannot be found to exist, in the absence of actual physical violence or express

threats of physical injury to person or property." The supreme court of errors, however, held that "to intimidate is to inspire with fear, to overawe, or make afraid," and said that "moral intimidation may be accomplished by a menacing attitude and a display of force which may coerce the will as effectually as actual physical violence."

The supreme court of errors, in affirming the holding of the lower court, said:

The court rightly held that such picketing was not peaceful and was unlawful. In the furtherance of a lawful strike, the strikers may use peaceful persuasion to induce other workmen to join them in the strike. The boundary between lawful and unlawful conduct is that between peaceful persuasion and intimidation. Some courts have held picketing to be lawful if strictly and in good faith confined to the purpose of gaining information as to what persons remain in the employment or are seeking employment, and of peacefully persuading such persons, if not under contract, to leave the employment or not to enter it. Others have said that the term "picket" indicates a militant purpose inconsistent with peaceful persuasion, that picketing has for its purpose the backing up of persuasion with a show of physical force, and almost inevitably tends to intimidation and violence, so that the phrase "peaceful picketing" is a contradiction in terms. Here, as we have seen, the acts and conduct of the defendants were actually intimidating and coercive, and such as would be held unlawful in any jurisdiction.

The supreme court of errors therefore held that as the members of the union by their unlawful conduct had abused their right peacefully and lawfully to picket the factory, and the lower court had not erred in enjoining the strikers from maintaining the system of picketing.

OLD-AGE PENSION—CONSTITUTIONALITY—DELEGATION OF AUTHORITY—*In re Opinion of the Justices, Supreme Court of New Hampshire (March 3, 1931), 154 Atlantic Reporter, page 217.*—During the 1931 session of the New Hampshire Legislature the president of the senate was directed to obtain from the justices of the Supreme Court of New Hampshire, their opinion regarding the constitutionality of the proposed old-age pension bill. The bill was entitled "An act providing for assistance to the aged."

The justices were of the opinion that the bill did not observe the necessary constitutional principles.

The first objection raised was that a grant of assistance to one merely because he reached a certain age would be a pension within the definition and prohibition of the New Hampshire constitution (part I, art. 36) and therefore its constitutional validity would be doubted. A former opinion (100 Atl. 49) was cited to uphold this view.

The second objection raised against the proposed pension bill was that it would be void under the prohibition of the constitution against taxation for private purposes. The court said:

The provisions that "every member of the community * * * is therefore bound to contribute his share in the expense" of the public protection of the right to enjoy life, liberty, and property (Const., pt. 1, art. 12), and that the "public charges of government" may be raised by taxation (Const., pt. 2, art. 6), have always been understood to deny power to the legislature to authorize the assignment of public funds to other than public purposes.

The objection was also raised that the bill discriminated in favor of one citizen to the detriment of another, as the classification did not reasonably promote some proper object of public welfare or interest. The court found, however, that the title was misleading. The proposed law was merely a law in relief of paupers and should therefore be considered in the light of the different acts of the legislature providing support for paupers, the validity of which had never been assailed. The court said that "the legislature may pass laws 'for the benefit and welfare of this State' and may impose taxes for 'the protection and preservation of the subjects thereof' * * * and in the relief of pauperism the State acts for its own benefit and welfare."

Regarding the change in authority from county to local authorities, the court said the exercise of this authority by the legislature appeared to be a reasonable incident of the classification, adopted to secure one of its objects. The court said, from the consideration given the above objections, the bill meets the constitutional test.

The provision of the bill proving fatal to its constitutionality, however, was in regard to the administration of the proposed law. This proposal the court said, was a direct violation of the provisions of the State constitution requiring the three departments of the government to be kept separate and distinct. This bill attempts to delegate executive authority to the judicial branch of the government. The court said:

The executive department is the active agency to carry laws into effect and enforce them. The commission set up by the bill unquestionably belongs to it. Administration of a law is placed under its charge and committed to it. The bill proposes that a court of justice shall be a branch of the executive department of the State government, in respect to its subject matter.

* * * The judicial department can require no power to administer laws relating to pauperism to make its purposes effective, and such laws cannot require administration by the courts to give pauperism efficient treatment. The subject must be classed as one for executive dealing, and is not within any uncertainties of borderland boundaries.

For the reason stated above the court was of the opinion that the bill proposes a law which would be invalid.[4]

PENSIONS FOR EMPLOYEES—WORKMEN'S COMPENSATION A CONDITION PRECEDENT TO—SUNSTROKE NOT COMPENSABLE—*Doyle* v. *City of Saginaw, Supreme Court of Michigan (June 6, 1932), 243 Northwestern Reporter, page 27.*—Doyle, a police officer of the city of Saginaw, suffered a sunstroke on July 22, 1923, while performing his official duties, and died on May 15, 1925.

Neither Doyle nor any dependent made application for workmen's compensation for this injury, but on October 20, 1925, his widow, Margaret Doyle, applied to the council of the city of Saginaw for a pension provided for dependents of firemen and policemen who died as the result of injuries received when performing their official duties. The pension being denied, suit was filed in the circuit court of Saginaw County, Mich., for the recovery of the money claimed to be due as accrued pension. The circuit court certified questions to the supreme court as follows:

1. Was sunstroke an injury within the meaning of the pension provisions of the charter of the city of Saginaw?
2. Was an application for and an award and payment of workmen's compensation a condition precedent to the payment of the pension provided for in the charter of the city of Saginaw?
3. Under the terms of the charter of the city, is a pension payable for an injury which is not within the provisions of the workmen's compensation act, and of a character for which workmen's compensation could not be recovered?
4. Has the plaintiff, widow of the deceased police officer, an election to take the pension provided in the charter or workmen's compensation?
5. Are the provisions of the charter for pension and provisions for workmen's compensation alternative or cumulative rights?

The Supreme Court of Michigan discussed the subject fully, and in reply to question 1, held that sunstroke was not compensable under the workmen's compensation law of the State. The court said that the provisions of the city charter are supplemental to the workmen's compensation act, applying only to injuries compensable under the act, and hence sunstroke is not compensable under the pension provisions of the city charter.

In reply to the second, third, and fourth questions, the court quoted the city charter which specified that the pension should not be paid until "after said person, or his widow, children, or dependent parents, shall have ceased to receive compensation under the act." The

[4] An old-age pension law, however, was enacted in 1931 (ch. 165). For analysis of act, see Monthly Labor Review, September 1931, pp. 59–60.

provisions in regard to pensions are supplemental to the compensation act, the court held and defined a supplemental act as one enacted to improve an existing statute, by adding thereto without changing the original text. It was, therefore, held that the receipt of workmen's compensation was a condition precedent to receiving a pension.

In answer to the fifth question, the provisions of the city charter for pensioning of firemen and policemen or their dependents and provisions of the State law for workmen's compensation were held to be cumulative rights.

PUBLIC WORKS—AWARDING PUBLIC CONTRACTS—DISCRIMINATION BECAUSE OF UNION LABOR—*State ex rel. United District Heating, Inc.*, v. *State Office Building Commission et al., Supreme Court of Ohio (Mar. 23, 1932), 181 Northeastern Reporter, page 129.*—The United District Heating, Inc., instituted this action by the State ex rel. against the State Office Building Commission, to compel the commission to enter into a contract with the corporation for the construction of a transmission line between two State buildings.

The question involved in the case was "whether a public contract may be denied to the lowest bidder upon the sole ground that he employs only union labor or upon the sole ground that he does not employ exclusively union labor." The court said that if the contract could be denied upon one of these grounds it could for the same reasons be denied upon the other, and that courts have, "without exception, announced the rule that no such discrimination can be made" by the commission.

In discussing the discretionary powers vested in the commissioners the court said that "The principles usually applying to discretion and its control cannot possibly apply where the discretion is arbitrarily exercised, and based solely upon the ground that one class, and only one class, of labor should be employed, and especially is this so when the exercise of this discretion results in abridging constitutional guaranties to a citizen or in denying him the equal protection of the laws." The claim that costly delays and added expense may occur because of possible labor trouble was dismissed by the court on the ground that the State was powerful enough to enforce its laws regarding public contracts and therefore the court refused to assume that such labor trouble might occur. The court then considered the case from the other viewpoint, assuming that the State should refuse to award the contract because the contractor employed only union labor, and said:

In such event organized labor would protest, and rightly so; and this court would scrupulously protect it from such unconstitutional discrimination. In the case of *La France Electrical Construction & Supply Co.* v. *International Brotherhood of Electrical Workers* (108

Ohio St. 61, 140 N.E. 899), this court was called upon to protect, and it did protect, the lawful rights of union labor. In the course of that opinion it was said (at p. 95 of 108 Ohio St., 140 N.E. 899, 908): "Equality of justice demands that in any controversy the rights of all parties be scrupulously maintained. The right of workmen to be employed, irrespective of union membership, must be maintained; the right of the employer to conduct his business without illegal interference must be upheld; and legal means employed by strikers must not be curtailed."

The court therefore directed the commission to award the contract, as directed by law, to the lowest bidder regardless of whether the contractor employed exclusively union labor.

A strong dissenting opinion was written by Mr. Chief Justice Marshall based upon the view that this question was a matter of discretion for the commissioners to decide and therefore the court should not command its performance.

PUBLIC WORKS—HAND LABOR REQUIRED—CONSTITUTIONALITY OF STATUTE—*Bohn* v. *Salt Lake City et al.*, *Supreme Court of Utah* (*Jan. 23, 1932*), *8 Pacific Reporter* (*2d*), *page 591.*—Salt Lake City, in an attempt to relieve the unemployment situation, undertook to construct a system of storm sewers. It was estimated that the improvement would cost about $600,000; and at a special bond election held in October 1931 the electorate authorized the city to create a bonded indebtedness of $600,000 for making this improvement.

Public bids were received by the city board of commissioners, and four separate contracts were awarded for a part of the work. The commissioners inserted in these contracts certain provisions regarding labor and wages and they intended to insert the same provisions in the other contracts for the work. Certain citizens and taxpayers began legal action to prevent the insertion of these provisions, which were alleged to be illegal and wasteful. The provisions in question are, in brief, as follows:

The contractors agree * * * (2) that all excavating, loading, and back filling shall be done with hand labor, except that teams and tractors may be used for plowing and loosening the materials to be moved; (3) that contractors shall rotate all common labor, and, so far as practicable, all other labor once each week and shall not employ any workmen more than 2 weeks in any month, nor shall they employ any workman in any month who has had 2 weeks' work from any source during any given month if there are other men who are unemployed and available. * * *; (4) preference in employment shall be given to citizens of the United States or those having declared their intention to become such, and particularly residents and heads of families of Salt Lake City; (5) 8 hours shall constitute a day's labor; (6) that $3.50 per day shall be paid as a minimum wage.

It was alleged that the cost of the proposed improvement would be increased to the extent of $55,000 by reason of insertion of the provisions for hand labor, and for rotation of labor, and that labor could be secured for $3 per day.

After reviewing the facts the court considered the object and purpose of the improvement. Mr. Justice Ephraim Hanson, speaking for the court, said:

The direct and primary commitment resting with the city, and its commissioners by law, is the construction of the storm sewers in order to provide a much-needed public improvement. It should be needless to say that the unemployment situation is something collateral to the object and purpose sought to be accomplished by the construction of the storm sewers.

Continuing, he said:

It is not only obvious, but it is specifically admitted, as well, that the very unusual specifications in respect to the employment and rotation of hand labor were inserted in the proposed contracts on the city's instance for the purpose of creating employment. * * * It is not urged that this extra expenditure adds anything to the value or to the merit of the work to be accomplished. It is frankly admitted that it does not. The decision to make this extra expenditure was not the result of any consideration tending to advance or promote the interest of the storm sewers, but was motivated entirely by considerations affecting the unemployment situation.

In considering the city's authority to undertake construction in this manner, the court cited the general law providing for the organization and classification of cities, in which Salt Lake City is given express authority to construct and keep in repair drains and sewers and to regulate their use and construction. These powers, the court agreed, carried with them all implied powers necessary to carry into effect the powers expressly granted. But, the court said, the insertion of these provisions into contracts for public improvement for the sole purpose of alleviating the unemployment situation "carries it far beyond the orbit of the power it is ostensibly asserting," and—

* * * We should be compelled by the admitted facts to say that it was but a thinly veiled effort to do by indirection what cannot be done directly. We have no difficulty in coming to the conclusion that there is a plain diversion to the extent of $55,000 from a fund specifically created by the sale of bonds for the purpose of constructing a system of storm sewers for the purpose of affording employment for the unemployed. This cannot meet the sanction of the law.

The minimum-wage provision was likewise challenged. The court cited cases holding that "the power to fix a minimum wage and to prescribe the hours that shall constitute a day's labor are quite gen-

erally regarded as an exercise of the police power," but "this power is inherent in the State." Continuing along this line, the court said:

It is, however, contended by way of argument that the city might have done the work without letting it out on competitive bids and could then fix a wage of $3.50 a day. Assuming, of course, that $3.50 is a fair wage that might be true, but that is not the case before us. But even so, we do not think it a true analogy to assume that it has the like right to dictate to its contractors the wages they must pay their workmen. In this jurisdiction, inasmuch as municipalities have none of the elements of sovereignty in exerting their given powers, we think the provision in the proposed contracts with respect to the minimum wage must be ruled out.

The provision giving preference in employment to residents and heads of families of Salt Lake City was also declared void as being in conflict with the State statute (Comp.L. 1917, sec. 4865) giving preference on public works to United States citizens or those having declared their intention to become citizens. The order preventing the insertion of these provisions into the contracts was therefore allowed.

Justices Straup and Elias Hansen delivered concurring opinions, and Mr. Justice Folland delivered a dissenting opinion in which Mr. Chief Justice Cherry concurred. The dissent maintained that, as the State had placed no limitations upon this power of the city, the city could therefore exercise all powers which the State might exercise. He pointed out that—

In its capacity as owner and proprietor the city is not hampered where there are no statutory or constitutional restrictions, as to the manner or means to be employed in the construction of its public works. The conditions which an employer municipality may impose as to the manner of doing its work involves questions of policy which are within the discretion of the board of commissioners to decide. With respect to questions of policy the courts have nothing to do.

In determining its policy, the dissent contends, the city has the right to consider the welfare of the public even though the conditions imposed do not exclusively promote the efficiency of the work.

After citing cases and arguments in support of this theory, Mr. Justice Folland concludes the dissenting opinion by saying:

I do not pretend to say that the requirement of hand labor instead of machinery in the excavation and back filling for the sewers is ordinarily an economical or sound policy. That is for the board of commissioners to say in the light of the conditions now existing. * * * In view of the present emergency, the requirements for rotation of labor and that certain work be done by manual labor were prescribed in the exercise of a sound discretion. In view of this situation, we cannot say that the board abused its discretion, or

that its action was arbitrary or capricious in any respect whatsoever. * * * The people do not want charity but do desire to support themselves and their families by honest labor. It would be an indictment of our civilization if public officers under such circumstances have no means of meeting the situation and particularly where, as here, the city authorities have proceeded only within the powers granted them by the legislature and are not violating any law enacted to place a limit upon their powers.

RAILROAD REGULATIONS—FULL-CREW LAW—*New York, Chicago & St. Louis Railroad Co.* v. *Public Utilities Commission of Ohio, Supreme Court of Ohio (Apr. 15, 1931), 176 Northeastern Reporter, page 71.*—This was a proceeding brought by the New York, Chicago & St. Louis Railroad Co. in the Supreme Court of Ohio, seeking to set aside an order made by the State public utilities commission. A complaint had been filed alleging that the Railroad Co. was operating a regular passenger train with a crew less than that required in section 12553 of the General Code of Ohio, which reads:

Whoever, being superintendent * * * of a railroad company, sends or causes to be sent outside of yard limits, a passenger train of not more than five cars, any one of which carries passengers, with a crew consisting of less than 1 engineer, 1 fireman, 1 conductor, and 1 brakeman * * * or, if when more than two cars, either of which carries passengers, requires a brakeman to perform the duties of baggage-master or express agent, shall be fined not less than $25 for each offense.

The commission investigated the complaint, and it was reported that—

The train in question consists of an engine, a combination mail-baggage car, and 1 day coach, with a crew consisting of 1 engineer, 1 fireman, and 1 conductor; that in the combination mail and baggage car there is 1 man in charge of the mail and 1 man known as an expressman, who delivers the baggage and express and is paid by the express company, and that neither of them has anything to do with the operation of the train; that the conductor looks after the tickets, gets the orders, does the flagging, and assists passengers in entering or alighting from the cars.

The case required an interpretation of the statute and application to the facts as given. The railroad company contended it was complying with the statute, because the man employed as a baggageman was discharging a sufficient number of the detailed duties of a brakeman.

The court said that portion of the statute forbidding a brakeman to perform the duties of a baggageman or express agent did not apply because the train did not carry more than two cars. Therefore, the brakeman could perform some of the duties of a baggage-

man or express agent. In affirming the order of the Public Utilities Commission of Ohio, the court continued:

The statute does not provide that a train consisting of only two cars may be served without a brakeman, neither does it provide that a baggageman or express agent may take the place of a brakeman and perform only a part of the duties of a brakeman. The statute very clearly requires a brakeman as a part of the crew of every train carrying passengers. * * * Its apparent purpose and intent is that the duties of the conductor and the brakeman be entirely separate and distinct, and that each shall discharge the duties of his separate position. * * * It is conceded by the attorney general that a regularly constituted brakeman on a 2-car train, who discharges all the duties pertaining to the position of brakeman, and who has time, in addition to the performance of that service, to also perform the duties of baggageman or expressman, is not forbidden to do so. With this interpretation we concur. This view, however, does not in the least obviate the plain requirement of having one person, whether he carry title of brakeman, or other designation, perform all the duties which customarily devolve upon a brakeman, and having another person perform all the duties which customarily devolve upon a conductor.

RAILROAD REGULATIONS—FULL-CREW LAW—CONSTITUTIONALITY—*Missouri Pacific Railroad Co.* v. *Norwood, United States Supreme Court (Apr. 13, 1931), 51 Supreme Court Reporter, page 458.*—The Missouri Pacific Railroad Co. filed a suit against the attorney general of Arkansas to enjoin the enforcement of statutes regulating train crews and switching crews. The company applied for an injunction, but the court held the complaint insufficient to show any ground for relief and dismissed the case. Thereupon the suit was appealed to the United States Supreme Court.

The acts in question were Act No. 116, Laws of 1907, and Act No. 67, Laws of 1913. The 1907 act requires railroad carriers whose lines are not less than 50 miles in length to have not less than three brakemen in every full-crew train of 25 cars or more. The 1913 act requires not less than three helpers in switch crews in yards located in cities of the first and second classes operated by companies having lines of 100 miles or more.

Mr. Justice Butler, in delivering the opinion of the Supreme Court, cited prior cases in which the constitutionality of these acts had been upheld. Regarding these decisions, he said:

The first of these cases was decided in 1911. The court held that the act of 1907 is not a regulation of interstate commerce and that upon its face it must be taken as having been enacted in aid of, and for the protection of those engaged in such commerce. It said that Congress might have taken entire charge of the subject, but that it had not done so and had not enacted regulations in respect of the number of employees to whom might be committed the management

of interstate trains and that until it does the statutes of the State, not in their nature arbitrary, must control. * * *

The railroad company, however, contended that conditions had changed since these decisions and since the laws were enacted. In substance the petition alleged that—

Roads and equipment have been so improved that longer and heavier trains may be operated more safely now than much smaller trains could then be operated. It is standard practice of railroads wherever the density of traffic is sufficient, except in the State of Arkansas, to operate freight and passenger trains and switch engines with crews consisting of less than the extra switchmen (meaning one less than required by the 1913 act) and extra brakemen (meaning one less than required by the 1907 act) provided by the Arkansas laws.

In regard to this contention the United States Supreme Court said:

There is no showing that the dangers against which these laws were intended to safeguard employees and the public no longer exist or have been lessened by the improvements in road and equipment or by the changes in operating conditions there described. * * * It is not made to appear that the expense of complying with the State laws is now relatively more burdensome than formerly. Greater train loading tends to lessen operating expenses for brakemen. There is no statement as to present efficiency of switching crews compared with that when the 1913 act was passed, but it reasonably may be inferred that larger cars and heavier loading of today make for a lower switching expense per car or ton. * * * And the claim that "standard" crews are generally employed by the railroads of the United States is substantially impaired by the qualified form of the allegations and also by the fact, which we judicially notice, that other States have laws somewhat similar to the Arkansas act in question. It is clear that, so far as constitutionality is concerned, the facts alleged are not sufficient to distinguish this case from those in which this court has sustained these laws.

It was also contended that the acts were repugnant to the Interstate Commerce Act as amended in 1920. (49 U.S.C.A. 1 et seq.) The company alleged that by this act Congress authorized the Interstate Commerce Commission to regulate the number of brakemen and helpers required. However, the Supreme Court said that "in the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews." After a careful consideration of the provisions of the act in question the court concluded that it was "very clear that Congress has not prescribed or empowered the Commission to fix the number of men to be employed in train or switching crews."

The decree of the lower court dismissing the case was therefore affirmed.

RAILROAD REGULATIONS—FULL-CREW LAW—INAPPLICABLE TO ELECTRIC CARS—*Brotherhood of Locomotive Firemen and Enginemen et al.* v. *Public Utilities Commission, Supreme Court of Ohio (Mar. 11, 1931), 175 Northeastern Reporter, page 454.*—The Ohio Supreme Court on March 11, 1931, affirmed an opinion of the public utilities commission of the State which held that a motor car and an attached passenger car were "propelled by electricity", and excepted from the Ohio full-crew law.

The Brotherhood of Locomotive Firemen and Enginemen applied to the Ohio Public Utilities Commission for an order requiring the Wheeling & Lake Erie Railway Co. to comply with the provision of section 12553, Ohio General Code, known as "the passenger full-crew law." This section provides that no train shall be sent outside of the yard limits, to carry passengers, with a crew consisting of less than 1 engineer, 1 fireman, 1 conductor, and 1 brakeman, and under certain prescribed conditions additional employees. It was contended that the railroad company was violating the statute, in that it was running a train consisting of a motor car and one car that carried pssengers between Toledo and Zanesville, Ohio, without having on the train a full crew of four men. The commission decided that the railroad company was not violating the law for the reason that the train was not governed by the provisions of section 12553. The case was thereupon appealed to the Ohio Supreme Court.

Because a gasoline motor was used in generating the electricity which propelled the car the Brotherhood of Locomotive Firemen and Enginemen contended that the car was run by a gasoline motor rather than by electricity, and for this reason did not fall within the exceptions of the section. The court, however, found no merit in this contention and said, in part, as follows:

> We are not able to appreciate any merit in the contention that the cars in this train were not propelled by electricity. We think it is entirely self-evident that they were so propelled.
>
> And coming now to the other question as to whether they were included in the provisions of section 12554, that question is squarely answered by the plain wording of the statute, which reads as follows:
>
> "The next preceding section shall not apply to trains picking up a car between terminals in this State, or to cars propelled by electricity."
>
> To hold that that exception is not broad enough to cover the cars in the train in question would surely do violence to every known rule of construction. The fact that the legislature has used the term "cars" and at another time used the term "trains" is not important. Evidently the legislature intended to exclude from the operation of section 12553 all cars that were propelled by electricity.

The order of the public utilities commission was therefore affirmed.

RAILROADS—RIGHTS OF SENIORITY—EFFECT OF DISCHARGE—*George v. Chicago, Rock Island & Pacific Railway Co., Supreme Court of Minnesota (Mar. 27, 1931), 235 Northwestern Reporter, page 673.*—In November 1922 George S. George entered the employ of the Chicago, Rock Island & Pacific Railway Co. as a locomotive fireman. Under the contract with the company he acquired seniority rights and could be discharged only for cause. In April of 1924 he was an extra fireman and because of force reduction he was "cut off the board." This left him free to take other employment, but did not cause him to lose his seniority rights as a fireman. In case the force was increased he was entitled to employment in accordance with his seniority rights. Thereafter he was employed by the railway company as a hostler's helper.

His work in the roundhouse was not always regular, and he did not always respond promptly to calls. He told the superintendent that he had promising prospects outside of railroad work, and if everything went well he would quit and if he did not return within 4 days they might disregard him. He went away and did not return, and hence was no longer treated as an employee.

In May 1925 George ceased to be a member of the Brotherhood of Locomotive Firemen and Enginemen because of nonpayment of dues. However, at his request the union negotiated with the railway company relative to his reinstatement, and as a result he was reinstated in the employ of the company in October 1925. Thereupon he presented a claim in the district court of Hennepin County, Minn., for back pay during the time he was wrongfully deprived of employment, based upon his seniority rights as fireman. He contended that his resignation as hostler's helper did not interfere with his seniority rights as an engineman. The company, however, claimed that this amounted to a resignation both as hostler's helper and as an engineman. The court referred this question to the jury for determination, and the jury found that the resignation as hostler's helper did not affect his seniority rights as an engineman, as the two positions were entirely separate and independent.

Another claim of the company was that George was discharged for cause, and thereby lost his seniority rights. However, the jury found that he acted reasonably and did not forfeit his seniority rights and that a discharge was not justified.

The final contention of the railway company was that George was reinstated upon the condition that he waive any claims against the company for wages which he had lost, since this was an agreement between the union and the company. In regard to this claim George contended that his representative in the union had no authority to waive his claim for lost time, and that before the negotiations were closed he had so informed the officers of the railroad, for at that time

he had been expelled for nonpayment of dues and to some extent was representing himself. Upon this question the jury found there was neither a valid surrender of seniority rights by George, nor a valid discharge by the railroad company. The court therefore held that the seniority rights continued and rendered a judgment in favor of the employee. On appeal the Supreme Court of Minnesota affirmed the judgment of the district court, and held that the questions were properly submitted to the jury and that the facts, as found, justified a judgment for the employee.

RAILROADS—RIGHTS OF SENIORITY—LOSS BY TRANSFER—RAILWAY TELEGRAPH OPERATOR—*McGregor* v. *Louisville & Nashville Railroad Co. et al., Court of Appeals of Kentucky (June 24, 1932), 51 Southwestern Reporter (2d), page 953.*—Ernest McGregor, a former employee of the Louisville & Nashville Railroad Co., filed suit against the company to protect his alleged seniority rights as a telegraph operator. From the facts it appeared that McGregor entered the employ of the railroad in 1910 as a telegraph operator and served in that capacity until 1920, when he was transferred to Atkinson, Ky., as yardmaster. On June 1, 1930, he was relieved of duty, and he thereupon demanded reinstatement as a telegraph operator on the basis of his alleged seniority rights prior to 1920, when he was transferred. The railroad company gave him a position as telegraph operator, and he served in this capacity for one month, when he was again dismissed because of the complaint filed by employees in the telegraphic department and objections raised by the Order of Railroad Telegraphers. The objections were based upon the fact that McGregor had lost his seniority rights as telegraph operator when he transferred to the position of yardmaster.

Suit was brought by McGregor in the circuit court of Hopkins County, Ky., and the decision of the court was adverse. He thereupon appealed the case to the Court of Appeals of Kentucky.

In reviewing the case the appeals court said "The soundness of the decision depends upon an interpretation of several contracts made by the railroad with its telegraphic employees as a result of collective bargaining." The contract which was in effect when McGregor was transferred in 1920 provided among other things that—

(*a*) Employees accepting transfer to other class of service than covered by this agreement, except to official positions or supervisory agencies, shall forfeit their seniority after having filled such positions more than 6 months.

In 1923 yardmasters were classified as "subordinate officials" and in 1924 a new contract was made with the telegraphers which provided that such employees also were permitted to accumulate senior-

ity. McGregor contended that the provisions in these later contracts inured to his benefit, although he was then serving as a yardmaster. The court held, however, that "McGregor's rights must be determined by the terms of the contract in force at the time he transferred from the telegraphic department." Continuing the court said:

The question, then, is whether the contract in force in 1920, at the time McGregor transferred from the telegraphic department, preserved his seniority rights. The answer depends upon a definition of the term "official position" as used in the contract. If the position of night yardmaster was an "official position" as used therein, the rights of McGregor were expressly preserved, and he was entitled to be restored to his position in the telegraphic service. McGregor testified that he was told by a superior that his position was an official one. But evidence was adduced to the effect that an "official position", as used in the contract, did not embrace such a status as that occupied by a night yardmaster.

The court held that the finding of the circuit court that a yardmaster was an "official position" was supported by the evidence "and the conclusion of law derived therefrom was sound." The judgment of the circuit court was therefore affirmed.

RAILROADS—RIGHTS OF SENIORITY—PROPERTY RIGHT—LABOR ORGANIZATIONS—SERVICE OF PROCESS—*Gore* v. *Pennsylvania Railroad Co. et al., New York Supreme Court, Erie County (Aug. 31, 1932), 259 New York Supplement, page 410.*—Roland F. Gore filed suit against the Pennsylvania Railroad Co., the local lodges of the Brotherhood of Railroad Trainmen, and the Order of Railway Conductors to enforce a seniority right which he claimed to have under a contract between the railroad company and the unions.

The contract between the railroad company and the labor unions outlined the employment relation between the company and the employees. The section of the contract covering the question of seniority rights provided among other things that "When two or more divisions are merged or separated, the seniority of the trainmen then in service shall be confined to the original territory on which they have earned it. They shall also have seniority on the combined division over trainmen entering the service after the date of the merger and have seniority on the combined division."

Two divisions of the Pennsylvania Railroad were combined in 1916 and Gore alleged that "by action of the labor organization he has been denied and deprived of certain seniority rights that he is entitled to as a member of the Brotherhood of Railroad Trainmen." He filed suit in the New York Supreme Court, Erie County, to have the court protect his seniority right, as he claimed he had exhausted his remedy within the union.

The Brotherhood of Railway Trainmen has its headquarters in Cleveland, Ohio, while the head office of the Order of Railway Conductors is located in Cedar Rapids, Iowa. Both are unincorporated associations. As it was impossible to secure personal service within the State of New York, the court issued an order granting service of process by publication. Upon receiving such service the union sent special counsel to object to the jurisdiction of the court upon the ground that the service by publication was improper.

Gore contended that the service by publication was proper and that it was specifically allowed by section 232 of the Civil Practice Act, which allows service by publication in an action to enforce a right as to personal property located within the State. Gore contended that the seniority right was personal property within the State.

The question, therefore, before the court was " whether or not the rights constitute such a species of property that an action in rem can be maintained." In discussing the reasons for allowing the service by publication in certain actions, the court said:

The test of the power of a State to permit service of process outside of the State that will be effective as to a nonresident is as to whether or not the decree or judgment that the court may make will be effective. The judgment sought must be one that operates upon the thing itself. The only basis for the jurisdiction is the fact that the judgment of the court in the action can be executed because the subject of the action is within the State. The action must relate to property in which the nonresident defendant has some title or interest. If the judgment in the action is one that does not relate to the propery itself but requires personal action upon the part of the nonresident, then the court has no power to issue process that will have any binding effect upon the nonresident.

In order for the publication to be sufficient service the court held that the property must be of such a nature as to make a judgment, if rendered, capable of being enforced. " In other words, it must be shown that at the time when the order of publication is made there is property of the defendant within the State over which the court could exercise jurisdiction, since it can exercise none in personam." [Cases cited.]

The court then pointed to the fact that Gore was not claiming that the unions have any property in the State; he claimed, in fact, that he was entitled to protection and the recognition by the court of his property, which was claimed by the union. If relief were granted, the judgment would not act upon the property itself but would make the defendants personally do some affirmative act. This would make the action in personam and not in rem, and service by publication would not be sufficient. The court would have no way of enforcing the judgment once it was rendered. The seniority right could not

be sold and therefore the court could not make a decree effective as to nonresident parties.

The court therefore held service by publication was not sufficient and the service of the summons was set aside.

RELIEF ASSOCIATIONS, DEPARTMENTS, ETC.—EMPLOYERS' LIABILITY—RECOVERY OF BENEFITS—*Grandillo* v. *Pennsylvania Railroad Co., Superior Court of Delaware (Oct. 13, 1932), 162 Atlantic Reporter, page 349.*—On July 24, 1922, Pietro A. Grandillo, an employee of the Pennsylvania Railroad, voluntarily became a member of the "Pennsylvania Railroad Voluntary Relief Fund", a voluntary beneficial association of the employees of the railroad corporations associated with the Pennsylvania Railroad. The railroad company administered the funds, created solely by contributions from the members in paying sick, accident, and death benefits.

The rules and regulations adopted to govern the administration of the funds of the association provided that the funds shall be invested in securities in the name of the Pennsylvania Railroad, which company shall hold them in trust for the relief association or department.

The regulations adopted also provided that "all questions or controversies in connection with the relief department or the operation thereof * * * shall be submitted to the determination of the superintendent whose decision shall be final and conclusive thereof, subject to the right of appeal, to the advisory committee, within 30 days after notice to the parties interested, of the decision."

Grandillo became disabled in October 1929 and, as he had paid the necessary premiums, etc., the relief department paid him $2.50 per day disability benefits from the 12th of October 1929 until the 8th of February 1930, at which time the medical examiner pronounced him fit for duty and ordered his return to work. He failed to return to work as ordered by the medical examiner and was thereupon discharged. All further payments of disability benefits ceased and Grandillo filed suit in the superior court, New Castle County Pa., against the Pennsylvania Railroad, to recover payments which he alleged were due him from the relief association.

The Railroad Co. contended that the suit was against the wrong party, as the contract was made by Grandillo with the Mutual Benefit Association, and not with the Pennsylvania Railroad, and therefore Grandillo should look to the association rather than the railroad for payment. It further alleged that he could not recover because he had not exhausted his remedies under the rules and regulations governing the association. In deciding these issues the court said:

Under a general demurrer no question as to whether any of these pleas are defective in form because they amount to the general issue can be considered (1 Chitty's Pl. 500); but whether the record shows that the plaintiff's contract was made with the defendant company, or whether its relief funds were administered by a separate and distinct unincorporated mutual benefit association, of which he was a member and with which his contract was made, is squarely raised, and is the important question for us to determine.

Under the regulations creating and governing the relief department of the Pennsylvania Railroad Co., any employee, whose application is approved by the superintendent of the department may, by making certain prescribed monthly payments, become a member of its "relief fund" so that in case of sickness, injury, etc., he may participate in the benefits offered by "the voluntary relief department" of the railroad company.

Continuing, the court pointed to the fact that the general supervision of the operations of the relief association was vested in an "advisory committee" composed of the vice president of the Pennsylvania Railroad, the superintendent of the department, and certain other elected members. This committee was given the power to make bylaws for governing the association, not inconsistent with the regulations of the department. The court said in part as follows:

The railroad company supplies the necessary facilities for conducting the department and pays all of its operating expenses. As a matter of fact, the office of the superintendent is also located in such place as may be designated by the vice president of the railroad company. That company holds, manages, and invests the moneys belonging to the "relief fund" but in trust for the "relief department" and such funds are so invested by it in such securities as may be approved by the board of directors of the company. Applications to participate in the benefits derived from the relief fund must be on forms specifically prescribed by the regulations of the department. * * *

Without attempting to point out the essential characteristics of a mutual benefit association, considering the regulations as a whole, and the contract attached thereto, it is apparent that the relief funds of the Pennsylvania Railroad Co. are administered by a department of that company and that the contract of the plaintiff was, therefore, with the railroad company and not with a separate and distinct unincorporated mutual benefit association of which the plaintiff was a member.

Numerous cases were cited in support of the above view, and the court discussed a number of the cases cited by the counsel for the railroad company and pointed out that they were not controlling in the present issue. Therefore the court held that Grandillo should be allowed to bring his suit against the Pennsylvania Railroad.

RIGHT OF STATE TO LIMIT COMPETITION—CONSTITUTIONALITY OF STATUTE—"BUSINESS AFFECTED WITH PUBLIC INTEREST"—REGULATION OF ICE BUSINESS—*New State Ice Co.* v. *Liebmann, United States Supreme Court (Mar. 21, 1932), 52 Supreme Court Reporter, page 371.*—The Legislature of the State of Oklahoma in 1925 (ch. 147, Laws of 1925) declared the manufacture of ice for sale and distribution a public business, and that no one shall be permitted to engage in such a business without first having secured a license from the corporation commission.

In violation of the statute, Ernest A. Liebmann began the construction of an ice plant for the purpose of entering a competitive ice business. The New State Ice Co. of Oklahoma City, engaged in the business of manufacturing, etc., ice under a license issued by the corporation commission, brought an action against Liebmann to enjoin him from engaging in the same business without first having obtained a license from the commission. Liebmann objected to that section of the law which gave to the corporation commission the power to refuse a license to anyone whenever it was disclosed at a hearing "that the facilities for the manufacture, sale, and distribution of ice by some person, firm, or corporation already licensed by said commission at said point, community, or place are sufficient to meet the public needs therein."

Liebmann contended that the manufacture, sale, and distribution of ice was not a public business, but a private one. He also argued that the right to engage in a common calling was one of the fundamental liberties guaranteed by the due process clause of the fourteenth amendment, and that for the State to make his right to engage in such a business dependent upon a finding of public necessity deprived him of his rights under the Federal Constitution.

The district court dismissed the complaint "on the ground that the manufacture and sale of ice is a private business which may not be subjected to the foregoing regulation." The court of appeals later affirmed the lower court. Upon appeal to the United States Supreme Court, the majority opinion, delivered by Mr. Justice Sutherland, held that the statute was an unwarranted interference with private business and affirmed the decision of the lower courts. The court conceded "that all businesses are subject to some measure of public regulation," especially those in which the public health is concerned. The main question, however, in this case was whether the ice business was so charged with a public interest as to justify the restriction placed by the statute.

The case of *Frost* v. *Corporation Commission* (278 U.S. 515) was relied upon in upholding the law. This case concerned the business of operating a cotton gin, and it was conceded "that this was a business clothed with a public interest, and that the statute requiring a

showing of public necessity as a condition precedent to the issue of a permit was valid." In the case under consideration the Supreme Court, said "the conditions which warranted the concession there are wholly wanting here." Here the court said, "we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity of the entire State in large measure depends."

The majority opinion applied the fourteenth amendment of the United States Constitution, which in part provides that no State shall "deprive any person of life, liberty, or property without due process of law." "The practical tendency of the restriction," the court said, was "to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments against rather than in aid of the interest of the consuming public." The court therefore held that the manufacture of ice is a private business and that anyone has a right to engage in such a business.

Mr. Justice Brandeis delivered a dissenting opinion in which he was joined by Mr. Justice Stone. The minority opinion declared that the State had a right to lessen unlimited competition which was destructive, and urged State control, deeming it economically sound to limit production and thus prevent as far as possible irregularity in employment. Mr. Justice Brandeis based his opinion for reversal of the judgment of the lower court upon several points involving principles of law and political economy. He stated that the certificate of public convenience and necessity required by the Oklahoma law was unknown to the common law. "It is a creature", he said, "of the machine age, in which plants have displaced tools and businesses are substituted for trades." The purpose of such a statute in modern business, it was pointed out, is "to promote the public interest by preventing waste." Even prior to the enactment of the Oklahoma law, similar requirements were common in other lines of business such as railroads, street railways, and public utilities. It was shown in many of such cases that the constitutionality of the legislation "has never been successfully questioned." The Legislature of Oklahoma had declared the business of manufacturing ice as a public one.

Local conditions, Mr. Justice Brandeis observed, may prompt a State legislature to declare the manufacture of ice a public utility, but unless the law is clearly arbitrary or unreasonable, "it affords no ground for judicial interference." The minority opinion entered into the history of the ice business in Oklahoma, the practices of certain companies in the matter of cutting prices, inadequate services, etc., and the stand which the Oklahoma Corporation Commission was obliged to take to prevent discriminations, etc., in the sale and delivery of ice, finally culminating in the commission's recommendation that all public utilities be required to secure a "certificate

of public convenience and necessity." "In the light of these facts", the opinion asked, "can it be said * * * that it was not an appropriate exercise of legislative discretion to authorize the commission to deny a license to enter the business in localities where necessity for another plant did not exist?" The need of some remedy for the evil of destructive competition had been widely felt in the State for a long time and to hold the act void as being unreasonable would, the dissenting opinion stated, "involve the exercise not of the function of judicial review but the function of a superlegislature." The minority opinion also denied that the manufacturing of ice for sale was a business inherently private, or that it was a "common calling."

So far as concerns the power to regulate, the minority opinion contended there is no difference "between a business called private and one called a public utility or said to be affected with a public interest." The source in every case was the police power, it was shown, and it is argued that the Constitution does not require that every calling which has been common shall remain so forever. The familiar *Slaughter-House case* (16 Wall. 36), the abolishment of liquor selling, and other incidents were enumerated to show that it is consistent with the due-process clause for a State to abolish such common callings. And from several cases decided by the United States Supreme Court, it was settled that "the police power commonly invoked in aid of health, safety, and morals, extends equally to the promotion of the public welfare."

The last point upon which Mr. Justice Brandeis based his opinion for a reversal of the judgment was that of economic necessity. "The people of the United States", he said, "are now confronted with an emergency more serious than war." He cited published fears of leaders that "the long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices, and a volume of economic losses which threaten our financial institutions." Remedies are being sought by economists and business leaders, it was shown, but in spite of it all—

> Increasingly, doubt is expressed whether it is economically wise, or morally right, that men should be permitted to add to the producing facilities of an industry which is already suffering from overcapacity. In justification of that doubt men point to the excess capacity of our productive facilities resulting from their vast expansion without corresponding increase in the consumptive capacity of the people. They assert that through improved methods of manufacture, made possible by advances in science and invention and vast accumulation of capital, our industries had become capable of producing from 30 to 100 percent more than was consumed even in days of vaunted prosperity; and that the present capacity will, for a long time, exceed the needs of business.

In the opinion of many economists, unless production and consumption are more nearly balanced, the evils of irregularity in employment cannot be overcome. While plans for proration and stabilization have been attempted, such as the La Follette proposal, the Swope plan, and the Davis-Kelly bill to regulate the soft-coal industry, it is the opinion of thoughtful men, Mr. Justice Brandeis said, "that all projects for stabilization and proration must prove futile unless, in some way, the equivalent of the certificate of public convenience and necessity is made a prerequisite to embarking new capital in an industry in which the capacity already exceeds the production schedules."

Mr. Justice Brandeis could not believe that "the framers of the fourteenth amendment or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts." There must be power, he said, "in the States and the Nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs."

SAFETY LAW—FEDERAL PROJECT—JURISDICTION—*Six Companies, Inc.*, v. *Stinson, State Inspector of Mines, et al., District Court, Nevada District (Apr. 28, 1932), 58 Federal Reporter (2d), page 649.*—The Six Companies, Inc., secured a contract with the United States for the construction of Hoover Dam. In order to divert the flow of the stream from its normal bed it was necessary to dig four tunnels about 4,000 feet long and 56 feet in diameter, two on the Arizona side of the river and two on the Nevada side. Stinson, inspector of mines of Nevada, ordered the construction company to cease using gasoline-propelled trucks in removing the rock and dirt from the tunnels on the Nevada side, contending that the use of such trucks violated section 4229 of the Nevada Compiled Laws, 1929. The question was carried to the district court by the company and upon the filing of the complaint, on November 13, 1931, a preliminary restraining order was issued restraining the State mine inspector from interfering. The order was continued in force and a motion for a temporary injunction was submitted to the court in April 1932.

In support of this motion the construction company contended that the State of Nevada is without jurisdiction to enforce laws in this area, as it had been ceded by the State to the Federal Government. Other reasons advanced were that the law the State mine inspector attempted to enforce is void because it amends another statute without reenacting and publishing the statute as

required by article 4 of the State constitution, and because it violates the fourteenth amendment to the Federal Constitution. Lastly, it was contended that the construction company "in performing its contract is an instrumentality of the United States, and hence not subject to State police regulations."

Stinson challenged these allegations and further contended that the action was in effect one against the State and therefore the district court was without jurisdiction.

The court, before considering the statute itself, settled the jurisdictional question by quoting from the case of *Truax* v. *Raich* (239 U.S. 33) as follows:

> As the bill is framed upon the theory that the act is unconstitutional, and that the defendants, who are public officers concerned with the enforcement of the laws of the State, are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the State.

Judge Norcross, speaking for the court, said that the questions involving the validity of the reservations, the constitutionality of the act, and the relinquishment of jurisdiction by the State should not be determined upon a preliminary hearing. The court, therefore, in determining whether the temporary injunction should be granted, weighed the interests involved. It appeared that the injury to the construction company would be certain and irreparable if the injunctions were denied, as the company invested heavily in the gasoline-propelled trucks, and a great increase in expenses and a loss in time would result if their use should be discontinued. The company also contended that the use of such trucks did not endanger the lives or imperil the health of its employees, and that a statute requiring it to adopt some other means would "be in effect depriving it of its property without due process of law."

At the time of this hearing the court found the tunnels were about completed and "the possibility of serious danger from an accidental interruption of the ventilation system as extremely remote." The only work remaining to be done was the excavation in the floor of the tunnel known as the "invert." There also remained some rock on the walls of the tunnel to be removed and it was the desire of the company to remove the excavated material by the use of gasoline-propelled trucks. In concluding the opinion granting the temporary injunction the court said:

> The question, as the court is now called upon to deal with it, is the danger, if any, which exists in using gasoline-propelled trucks in further enlarging a completed tunnel the height and width of which now average approximately 40 feet. We do not understand that there is any contention that such danger longer exists.

SCRIP, TOKENS, ETC.—PAYMENT TO EMPLOYEES—REDEMPTION BY THIRD PARTY—*Elkhorn Piney Coal Co.* v. *Elvove, Court of Appeals of Kentucky (Jan. 20, 1931), 36 Southwestern Reporter (2d), page 3.*—The Elkhorn Piney Coal Co. is engaged in business at Weeksbury, Ky. Near the Coal Co. one Elvove was engaged in a general mercantile business. The Coal Co. had, for some time, made a practice of issuing to its employees metal scrip in advance of pay days. The scrip was "intended for use by the employees and had back of it as a redemption fund, the amount which the Coal Co. was indebted to the particular employee receiving the scrip."

Elvove in the course of his business received from the employees of the company scrip amounting to $2,000 and upon demand payment was refused. He filed suit to collect and the circuit court, Floyd County, rendered a verdict in his favor in the sum of $1,823.85. The Coal Co. appealed to the Court of Appeals of Kentucky, contending that Elvove had not complied with the provisions of the scrip law.

One of the objections raised was that the scrip statements kept by Elvove were insufficiently dated. The date was recorded in figures in the following manner: "12/16 1927." The court said: "It is well known that in the business world these signs and figures are used to indicate dates", and no one would be deceived by them. It was urged that some of the statements did not contain the name of the employee, as required by the law. However, the court found such statements had been subtracted from the $2,000 claim by the lower court and no additional items were pointed out. The court also held that it was not necessary to show the amount paid, and that "the amount could be paid in cash, goods, or other thing of value."

Another ground urged against the statement was that it did not disclose the name of the employee from whom the scrip was first purchased. The court cited prior cases answering adversely this contention.

Among the other contentions made on appeal by the Coal Co. was that the scrip was payable in merchandise and that the company could not be compelled to pay in cash. In answering this the court said:

> This contention overlooks the provisions of the scrip law. It is a complete answer to that contention. The very purpose of the enactment of the law was to enable the holder of the scrip to obtain in cash, in the manner therein provided, the amount which he had paid for the scrip. If the question had been raised and sustained by the evidence that appellee did not pay full value for the scrip, another question might be presented.

After answering several other minor contentions made by the Coal Co., the appeals court affirmed the judgment of the lower court allowing recovery.

SCRIP, TOKENS, ETC.—WAGES—ASSIGNMENT TO THIRD PARTY—*Radford* v. *Louisiana Central Lumber Co., Court of Appeal of Louisiana (Dec. 23, 1930), 131 Southern Reporter, page 765.*—The State of Louisiana enacted in 1908 a law (Act No. 228, as amended 1924, No. 210) "making any person, firm or corporation, liable on demand in current money of the United States on their regular pay day to any legal holder thereof, for the full face value, of any checks, punchouts, tickets, tokens, or other device issued by them and redeemable either wholly or partially in merchandise at their or any other place of business * * *."

Under this act E. W. Radford brought suit against the Louisiana Central Lumber Co., of Webb, La., alleging that the company had issued trade checks to employees in payment of wages and that the employees transferred these checks to him for merchandise and cash at his place of business.

The Central Lumber Co. denied that these credit slips were trade checks as defined in the act, and said that the slips were merely written requests by its various employees to charge merchandise to their accounts up to a certain value.

The seventh judicial district court, parish of Catahoula, rendered a judgment in favor of Radford for the amount of the checks, and the company appealed to the Court of Appeal of Louisiana.

The trade checks in question contained the name of the lumber company and the date and stated: "Please charge my account for merchandise amounting to $------, not exceeding $3. Signature." The bookkeeper testified that these slips were issued to facilitate their credit system and prevent dissatisfaction among the employees by thinking "their accounts may be charged with something that they didn't get." These slips were not deducted from their wages until filled in by the employees and returned to the commissary. The testimony also showed that the slips acquired by Radford were issued to employees, some of whom were due no wages and others were paid in full on the following pay day.

As to the purpose of the statute in question the court said:

> What was the mischief that this statute was intended to remedy? It was not the giving of credit to the laborer between pay days. It was the giving him, in lieu of his wages, trade checks, tokens, etc., only redeemable in merchandise at the place of business of his employer. Prior to the passage of this act, there were concerns that paid off entirely with punchouts, coupon books, metal money, etc., only redeemable in merchandise at the commissary of the employer, and the laborer, in order to receive any cash, was forced to discount these different representatives of money to someone who desired to purchase goods from the said commissary. That was the mischief that this act intended to remedy. It was not the intention to force the employer to pay his employees wages between pay days.

In reversing the judgment of the lower court and relieving the lumber company of liability, the court said, in part, as follows:

The instruments sued on not expressing or carrying an obligation of the defendant to pay, there is of necessity no obligation for it to redeem.

It cannot be said that the instruments sued on are trade checks, etc., within the meaning of the act when there is no proof that the defendant owed anything to the employees who obtained them, and when it is shown, in fact admitted, that these slips were not charged to such employees. There was no motive, cause, or consideration for an obligation evidenced by a trade check, etc.

SEAMEN—RIGHT OF ACTION FOR NEGLIGENT CARE—WRONGFUL DEATH STATUTE—*Cortes* v. *Baltimore Insular Line, Inc., United States Supreme Court (Dec. 5, 1932), 53 Supreme Court Reporter, page 173.*—Rafael Cortes, administrator of the estate of Manuel Santiago, filed suit against the Baltimore Insular Line, Inc., to recover damages for the death of Santiago, caused by pneumonia contracted while he was employed as a seaman on a voyage from Boca Grande, Fla., to New York City on board one of the company's vessels.

The suit was based upon the ground that Santiago's death was due to the failure of the master of the ship in providing him proper care.

The District Court rendered a judgment in favor of the administrator, but the judgment was reversed on appeal by the Circuit Court of Appeals, Second Circuit, on the ground "that the seaman's right of action for negligent care or cure was ended by his death, and did not accrue to the administrator for the use of the next of kin." The case was then taken to the United States Supreme Court for review.

In rendering the opinion, Mr. Justice Cardozo cited cases which show that under the general maritime law a seaman had no remedy for injuries suffered unless they "had been suffered as a consequence of the unseaworthiness of the ship or a defect in her equipment", and that the remedy for such an injury, in the absence of a statute continuing it, ends with the death of the seaman. He said:

The question, then, is to what extent the ancient rule has been changed by modern statute. Section 33 of the Merchant Marine Act of 1920, commonly known as the Jones Act (41 Stat. 1007, sec. 33, 46 U.S.C., sec. 688) * * * gives a cause of action to the seaman who has suffered personal injury through the negligence of his employer. For death resulting from such injury, it gives a cause of action to his personal representative. We are to determine whether death resulting from the negligent omission to furnish care or cure is death from personal injury within the meaning of the statute.

The argument was made that the care which a master owed to a seaman disabled while in service was an implied term of the contract of employment and for this reason the Jones Act should not be interpreted to include such an injury, since the statute was not intended to cover injuries for which he already had a sufficient remedy under the existing law. The court did not accept this view and said the origin of the duty in this case was consistent with a remedy in tort since the wrong of a violation of a contract is also something more. The fact that there is a remedy based upon the contract does not exclude an alternative remedy built upon a tort. Continuing, the court said:

The employee of an interstate carrier, injured through the omission to furnish him with safe and suitable appliances, may have a remedy under the Federal Employers' Liability Act (45 U.S.C.A., sec. 51) * * * or at times under the Safety Appliance Act (45 U.S.C.A., secs. 1 to 6) * * * though the omission would not be actionable in the absence of a contract creating the employment. So, in the case at hand, the proper subject of inquiry is not the quality of the relation that gives birth to the duty but the quality of the duty that is born of the relation. If the wrong is of such a nature as to bring it by fair intendment within the category of a "personal injury" that has been caused by the "negligence" of the master, it is not put beyond the statute because it may appropriately be placed in another category also.

The question to be decided by the court was therefore whether the acts of the employer could be held to be "negligence" and whether the deceased because of such acts suffered a "personal injury" as contemplated by the Merchant Marine Act. The contention was made that a narrow interpretation should be placed upon the act regarding its application to seamen and that it would not cover such injuries as starvation or malpractice because the seamen had a remedy for these injuries prior to the passage of this act. The court, however, was of the opinion that the overlapping of the remedies was "no reason for denying to the words of the statute the breadth of meaning and operation that would normally belong to them, at all events when a consequence of the denial is to withhold any remedy whatever from dependent next of kin."

The argument for the respondent imputes to the lawmakers a subtlety of discrimination which they would probably disclaim. There was to be a remedy for the personal representative if the seaman was killed by the negligent omission to place a cover over a hatchway or to keep the rigging safe and sound. There was to be none, we are told, if he was killed for lack of food or medicine, though the one duty equally with the other was attached by law to the relation. This court has held that the act is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings. * * * Approaching the

decision of this case in a like spirit of liberality, we put aside many of the refinements of construction that a different spirit might approve. The failure to furnish cure is a personal injury actionable at the suit of the seaman during life, and at the suit of his personal representative now that he is dead.

In rendering the opinion the Court pointed out that the same interpretation would not necessarily follow in the case of an injury to a railroad employee because the duties of a railroad company differ in many respects from the liability imposed upon carriers by water.

The decision of the court of appeals was reversed.

SUNDAY LABOR—CONSTITUTIONALITY OF LAW—*Kislingbury et al.* v. *Treasurer of City of Plainfield, Court of Common Pleas of New Jersey, Union County (Apr. 8, 1932), 160 Atlantic Reporter, page 654.*—Frederick Kislingbury, the manager of a motion-picture theater was arrested on January 24, 1932, for violation of an ordinance of the city of Plainfield, N.J., which reads as follows:

> No person shall * * * keep open any shop or store or place * * * in which the occupation of barber * * * or other trade requiring the exercise of manual labor is carried on, on the first day of the week, commonly called Sunday, except in cases of necessity, and the sale of milk and medicine. Any person violating this section shall upon conviction thereof be fined in a sum not exceeding $25, or be imprisoned in the city or county jail not exceeding 10 days, or both, in the discretion of the court.

After being convicted and fined by the city judge, Kislingbury appealed the case to the Court of Common Pleas of New Jersey. Other persons who worked in or about the theater were also convicted, and appealed, and it was stipulated that the decision of the court in Kislingbury's case would dispose of all the appeals.

The court said that it was not deciding the question of the legality of motion pictures on Sunday, but whether Kislingbury was lawfully convicted under the charge in the complaint and the statute upon which it was based.

It was argued that the words "other trade or business requiring the exercise of manual labor" brought the supervising of a motion-picture theater within the statute; but the court held this could not be done by any stretch of the imagination, and said that where general words follow particular words, as in this case, "the rule is to construe the former as applicable to the things or persons particularly mentioned."

In regard to other provisions of the ordinance the court said:

> The ordinance under consideration divides the people of Plainfield into classes and exempts from its operation all persons who habitually observe the seventh day, commonly called Saturday, as the Sab-

bath, and permits such persons to carry on business in such a manner as not to disturb the religious observance of Sunday. On the other hand, it prohibits other persons from carrying on business within their premises, even though such persons carry on their business in such a manner as not to disturb the religious observance of Sunday, and permits the sale of milk and medicine by still another class, and finally exempts from its operation such persons who do business on Sunday "in cases of necessity", and is therefore highly discriminatory in its provisions.

The ordinance was therefore held to be unconstitutional in that it violated both the State and Federal Constitutions—"equal protection of the laws" meaning "equal security of burden under the laws to everyone similarly situated."

SUNDAY LABOR—HOURS OF LABOR—INJUNCTION—ENFORCEMENT OF STATUTE—*Boynton* v. *Fox West Coast Theatres Corporation et al., Circuit Court of Appeals, Tenth Circuit (Aug. 1, 1932), 60 Federal Reporter (2d), page 851.*—The Fox West Coast Theatres Corporation brought this suit against the attorney general of Kansas and certain county officers to enjoin them from enforcing the Sunday labor law (Kansas Rev. Stat. 1925, sec. 21–952) and thus close the motion-picture theaters on Sunday. The District Court of the United States for the District of Kansas, First Division, overruled a motion to dismiss the amended bill, and granted an injunction. The attorney general, with the named attorneys and sheriffs, appealed the case to the Circuit Court of Appeals, Tenth Circuit.

In support of its request for an injunction the theater corporation contended that it had been discriminated against, since motion-picture theaters were operating on Sunday in 40 other cities in the State, and county attorneys in other counties were not enforcing the law. In reply to this the court reviewed the duties of county attorneys and said:

The county attorney of Sedgwick County is charged with the enforcement of the penal laws of the State only in that county. He is not officially concerned with violations of such laws in other counties. The fact that county attorneys in other counties in Kansas were not attempting to enforce section 21–952, *supra*, against the operators of motion-picture shows in their counties would certainly constitute no defense to a prosecution for such a violation in Sedgwick County by the county attorney of that county, especially in the absence of a showing that the several county attorneys were acting in concert and arbitrarily and willfully discriminating against motion-picture theater operators in Sedgwick County.

A second contention on the part of the theater corporation was that the statute in question imposed a direct burden on interstate commerce. The court replied that—

It is well settled that a producer or manufacturer, who ships motion-picture films from one State to lessees in another State to be exhibited by the lessees, is engaged in interstate commerce. [Cases cited.] But when an article that has been transported in interstate commerce has arrived at a destination and is there held for use or disposal, it then passes under the protection of State law and becomes subject to the taxing and police power of the State. [Cases cited.] It is our opinion that section 21–952 supra, by prohibiting the exhibition of such films on Sunday at theaters in Kansas, when they have come to rest in such State for the purpose of being exhibited by lessees thereof at such theaters, does not regulate or impose a direct burden on interstate commerce. [Cases cited.]

The third question discussed by the court was whether the theater corporation was entitled to equitable relief. The court said that an exception to the general rule (that equity will not prevent enforcement of an unconstitutional criminal statute) is made when there is danger of a great and irreparable loss, "but the attack on the constitutionality of the statute must be real and substantial and must at least present a fairly debatable question." In this case, however, the attack on the constitutionality of the statute was not based on substantial ground in that the Supreme Court of Kansas had sustained the statute as valid and held that it applied to motion-picture theaters, and the United States Supreme Court had upheld the constitutionality of a similar statute.

We conclude that the bill is without equity and that plaintiffs are not entitled to the relief sought. It follows, notwithstanding this is an appeal from an interlocutory order, that this court has the power to consider this case on the merits and to direct a dismissal of the bill. [Cases cited.] The decree is reversed and the cause remanded with instructions to dismiss the bill at plaintiffs' cost.

SUNDAY LABOR—WORK OF NECESSITY—*State* v. *Coffee*, *Springfield* (*Missouri*) *Court of Appeals* (*Feb. 23, 1931*), *35 Southwestern* (*2d*), *page 969.*—The State of Missouri passed a law (Rev. Stat. 1919, sec. 3596) which provides that "every person who shall either labor himself, or compel or permit his apprentice or servant * * * 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 $50."

C. L. Coffee was charged and convicted in the circuit court of Ripley County for violating this statute, and fined $10. The evidence showed that Coffee was in charge of a force of men engaged in erecting a power line connecting the city of Doniphan, Mo., and other small towns, with the main line of the Arkansas-Missouri Power Co. While working in this capacity he was present and per-

mitted the men under his control to engage in the work of erecting the line on Sunday, September 22, 1929. Coffee pleaded that the work upon which he was engaged was a work of necessity. He presented testimony tending to prove that—

The electric power plant at Doniphan, from which was obtained the electric current for lighting these towns and homes, was in bad condition and a complete breakdown was probable and expected at any time, so that it was necessary to make the connection with the main high line as soon as possible.

Following the verdict in the circuit court the case was appealed to the Springfield court of appeals. This court, in determining whether the work was a work of necessity, applied the test laid down by the St. Louis court of appeals, in the case of *State* v. *Schatt* (107 S.W. 10), in which case the court said:

First, if the proposition be clear that the particular act of labor performed is one of necessity—that is to say, if the labor is so clearly a work of necessity that no two reasonable minds would differ thereabout—the court may treat it as a matter of law identically as in other cases, and under such circumstances, no doubt, would be justified in so declaring; second, on the other hand, if the question is one about which reasonable minds might well differ, it is then essentially one of fact, and as such within the province of the jury; and, third, if the proof is so clear that no two reasonable minds could differ on the proposition that no possible element of necessity whatever entered into the particular act of labor performed, then the court may, as a matter of law, treat the case as falling within the penalties, and not within the exception to the statute as one of necessity or charity.

Applying the rule to the present case the court was of the opinion that it was a question of fact for the jury to determine. The court said:

* * * Whether or not the labor of erecting the high line on Sunday was one of "moral fitness and propriety" was not so clearly proven that men of reasonable minds might not differ on the question.

The court of appeals saw no error in the case, and therefore affirmed the judgment.

SUNDAY LABOR—WORK OF NECESSITY—*State* v. *Needham, Supreme Court of Kansas (Nov. 7, 1931), 4 Pacific Reporter (2d), page 464.*—It was alleged that on a certain Sunday, one Berle Needham exposed for sale and sold the Sunday Kansas City Star, and on the same day he compelled certain persons under his charge and control to work in distributing the papers. This conduct on the part of Needham was alleged to have violated section 21–952 of the Kansas Revised Statutes of 1923, which reads as follows:

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 district court, Dickinson County, Kans., sustained a motion to dismiss the case on the theory that metropolitan newspapers are a necessity. Thereupon the case was appealed to the Supreme Court of Kansas. In affirming the decision of the lower court, the supreme court said:

At this stage of the world's progress, with the means of gathering news that are available, we have grown to expect far more expeditious service on the part of the newspapers of the State than was received during the days when the statute in question was passed. * * * This court will take judicial notice of the fact that these demands are met by the Sunday papers of our larger cities. From the small boy whose first thought on arising Sunday morning is the comic section, to the son grown older who turns eagerly to the sport page, the young daughter who peruses the society columns, and father and mother who turn their attention to the more serious pages, the Sunday paper is looked upon and has grown to be a necessity, and this court so holds.

WAGES—ASSIGNMENTS—EFFECT OF CONTRACT AND NOTICE—*State Street Furniture Co.* v. *Armour & Co., Supreme Court of Illinois (June 18, 1931), 177 Northeastern Reporter, page 702.*—An employee of Armour & Co. assigned part of his wages to the State Street Furniture Co. as security for a debt. As a defense to an action brought by the furniture company, under its wage assignment, Armour & Co. stated that the employee whose wages were involved had, prior to the date of the assignment, entered into a written contract whereby he agreed not to "sell, transfer, set over, or assign * * * any right to or claim for wages or salary, * * * due or to become due from Armour & Co. * * * without the consent in writing of Armour & Co. * * * and that any attempted sale, transfer, or assignment without such written consent shall be null and void."

Prior to the date of the assignment, Armour & Co. had given written notice to numerous firms, including the State Street Furniture Co., that it had entered into such a contract with all of its employees and would no longer honor wage assignments. It was therefore the contention of the employer that because of such contract and notice, the subsequent assignment of wages without its consent was null and void.

The muncipal court of Chicago rendered judgment in favor of the assignee. On appeal the judgment was affirmed by the appellate court and because of the importance of the questions involved an appeal was allowed to the Illinois Supreme Court.

In regard to the right of an employee to make an assignment of his wages the supreme court said:

The right of an employee to make an assignment of his wages has long been recognized in this State, and the privilege of using and contracting for the disposal of wages is both a liberty and a property right. [Cases cited.] The relationship between employer and employee with respect to unpaid wages is that of debtor and creditor, and the right of the employee to those wages is a chose in action and as such may be assigned. (*Monarch Discount Co.* v. *Chesapeake & Ohio Railway Co.*, 120 N.E. 743.) This court has not only held that assignments of wages may be enforced as to past services, but has also sanctioned such assignments as to wages to be earned in the future under an existing employment if such assignment is made for a valuable consideration and untainted with fraud.

As to the effect of the written contract entered into by the employee the court said in part:

The contract relied upon to defeat the judgment in this case contained no absolute denial of the employee's right to make an assignment of his wages. It only specified that such wages should not be assigned without the written consent of Armour & Co., and that unless such consent was obtained the assignment should be null and void. It is not necessary to have the consent of an employer to make a valid assignment of wages where the assignment is of the entire claim. * * * The right of the assignee to institute suit to recover the salary or wages of an employee is the same as that of the employee himself.

The defense was also made that a partial assignment of a debt due or to become due cannot be made without the consent of the debtor. In this case, however, the court found the assignment was of the entire claim, and in conclusion affirmed the judgment of the appellate court, saying in part that—

Where the employer owes the employee for wages earned, the contract of employment has, as to the wages earned, ceased to be a bilateral contract with mutual rights and duties. It has then become a unilateral contract or debt, with an absolute obligation on the part of the employer to pay and an absolute right on the part of the employee to receive his pay (*Ginsburg* v. *Bull Dog Auto Fire Ins. Assn.*, 160 N.E. 145). When one has incurred a debt, which is property in the hands of the creditor, the debtor cannot restrain its alienation as between the creditor and a third person any more than he can forbid the sale or pledge of other chattels. A debt is property, which may be sold or assigned, subject to the ordinary rules of the common law in determining the rights of the assignee, and, when untainted with fraud, its sale offers no ground for complaint by the debtor.

WAGES—CONCURRENT EMPLOYMENTS—CONTRACT OF EMPLOYMENT—*Rudebeck* v. *Pacific Copper Co., Supreme Court of Washington (Jan. 5, 1931), 294 Pacific Reporter, page 986.*—Harry Rudebeck was employed, under an oral contract, by the Pacific Copper Co., which was operating a mine in Snohomish County, Wash. He was to receive $100 per month and expenses, from September 1, 1927, to June 30, 1928, and was to be caretaker of the property, to purchase supplies, and to look after the men and the camp.

Shortly after Rudebeck was employed, the president and the secretary of the Pacific Copper Co. went to New York, and as their return to the mine was delayed, Rudebeck bought supplies in order to keep the mine operating. Previous to the secretary's departure in September, however, he gave Rudebeck $100, part of which was to be applied on bills already incurred and the balance on subsequent expenses.

When winter closed the mining operations on November 10, Rudebeck collected and stored the tools and supplies and returned to Index, Wash., to await instructions from the representatives of the company. He was directed to lay out the summer's work and to keep his expenses within a certain amount. He was also informed that the company would take care of certain labor bills and send him a substantial check to apply on the amount due him. Rudebeck's agreement did not require him to go to the camp unless conditions demanded, and so he returned to the camp in May 1928. After the company failed to pay him for his services and the supplies purchased, Rudebeck left the company on May 31, 1928, and filed suit for 9 months' wages at $100 per month, and $310.45 for supplies, less the credit of $100, or a total amount of $1,110.45 for services and supplies.

The superior court of Snohomish County, Wash., gave a judgment in favor of Rudebeck for the full amount claimed, and the Pacific Copper Co. appealed the case to the Supreme Court of Washington. The company contended that Rudebeck had no authority to incur expenses, and that he was not entitled to wages for the period between November 10, 1927, and May 31, 1928, because he was employed by a third party for the greater part of that time. In regard to this contention, the court said:

The duties respondent performed for the Puget Sound Power & Light Co. were in no wise inconsistent with the duties respondent was to perform for the appellant. All of the duties assigned to him by the appellant the respondent performed in a satisfactory manner. He was employed by the third party during the time he was waiting under his contract for instructions or the assignment to other duties. His employment by another during the period stated was not in any way a violation of his agreement with the appellant. He was at all times ready and willing to perform every duty under his con-

tract with the appellant and did perform every service demanded by the appellant and every service in which appellant was entitled under its agreement with the respondent. The appellant suffered no injury by reason of the fact that respondent worked at something else when he could not work under his agreement with appellant.

The supreme court therefore affirmed the judgment of the superior court and granted a recovery of $1,110.45 for services and supplies.

WAGES—GARNISHMENT—PUBLIC EMPLOYEES—WAIVER OF EXEMPTION—*Bull* v. *Ziegler, Supreme Court of Arkansas (Nov. 14, 1932), 54 Southwestern Reporter (2d), page 283.*—The Ziegler Construction Co. was engaged in constructing highways for the Arkansas Highway Commission. G. A. Bull, an employee of the construction company, was injured and filed suit against his employer to collect damages. He also filed "a writ of garnishment to impound money due the contractor by the State highway commission in order that the money may be applied to the satisfaction of any judgment which the employee may finally recover." The question involved was whether the writ of garnishment should be allowed against the highway commissioner.

The circuit court, Pulaski County, Ark., held that Bull had no right to garnishee the State highway commission, because the commission was an agency of the State and was therefore not subject to suits of this nature. The employee appealed the case to the Supreme Court of Arkansas. He contended that as the highway commission admitted the indebtedness to Ziegler, and that in its answer no question was raised as to the right of Bull to garnishee the commission, therefore Ziegler could not raise the question of whether or not the commission was subject to garnishment. The court, however, was of the opinion that an exemption to garnishment might not be waived in this manner, and that Ziegler had a right to move that the writ be quashed although the highway commission had not done so.

In support of its decision the court cited the case of *Porter & Blair Hardware Co.* v. *Perdue* (16 So. 713), a similar case decided by the Supreme Court of Alabama. In that case the court said it was of no practical consequence whether the nonliability of such a corporation to a writ of garnishment be put upon the idea of exemption from the operation of a statute broad enough to embrace them or upon the idea that they are not embraced at all in the terms of the statute. For "if they are not within the statute at all, no court has, nor by consent can acquire, jurisdiction to proceed against them in this way; and if it is a mere matter of exemption, the same public policy which gives life to it is potent also to prevent the officers

and agents for the time being of such corporations from waiving the exemption by appearing, without objection and admitting indebtedness for the corporation."

The judgment of the lower court was therefore affirmed.

WAGES—LIABILITY FOR DISCHARGE—PENALTY—*Missouri Pacific Railroad Co.* v. *Diffie, Supreme Court of Arkansas (July 13, 1931), 41 Southwestern Reporter (2d), page 752.*—On June 14, 1930, C. L. Diffie brought an action in the justice of the peace court to recover the sum of $13.55 for wages due him by the Missouri Pacific Railroad Co. and also to recover a penalty for the nonpayment. The railroad company paid the wages—$13.55—on the day of the trial, and judgment was entered against it for $128.40 as a penalty. The judgment was later affirmed by the circuit court, Hot Springs County, and the railroad company appealed to the Supreme Court of Arkansas.

The suit was based upon section 7125 of Crawford and Moses' Digest, which reads in part as follows:

> Whenever any railroad company or corporation * * * engaged in the business of operating or constructing any railroad * * * shall discharge with or without cause or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; any such servant or employee may request of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept, and if the money aforesaid, or a valid check therefor, does not reach such station within 7 days from the day it is so requested, then as a penalty for such nonpayment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ at the same rate until paid. Provided, such wages shall not continue more than 60 days, unless an action therefor shall be commenced within that time.

From the evidence it appeared that Diffie worked about a month and a half for the railroad under a foreman in charge of an extra gang. He worked until May 16, 1930, when he was discharged, and he requested the foreman to send his money or check to Malvern, Ark. The foreman, however, testified at the trial that he did not discharge Diffie; that the extra gang went to another place to work and he offered to give Diffie the same kind of work there as he had been performing. This was denied by Diffie.

After reviewing the record the Arkansas Supreme Court affirmed the judgment of the lower court, saying that the jury in the lower court passed upon all the questions, and "their verdict as to the facts is conclusive here, if based on substantial evidence." The court found

no evidence that there was an emergency as in the case of *Chicago, Rock Island & Pacific Railway Co.* v. *Russell* (292 S.W. 375), relied on by the railroad company. It also found no evidence that the work of the extra gang was at an end, or that the work was not permanent. Therefore the court felt that the evidence was sufficient to support the verdict, and the judgment was affirmed.

WAGES—PREVAILING RATE—CONSTITUTIONALITY OF STATUTE—PUBLIC WORKS—*Mayhew* v. *Nelson; Pigott et al.* v. *Department of Public Works and Buildings et al.* (*two cases*), *Supreme Court of Illinois* (*Dec. 17, 1931*), *178 Northeastern Reporter, page 921.*—The Legislature of Illinois enacted, during the 1931 session, a law regulating the wages and hours of work of mechanics and laborers employed under contracts for public works. This law was approved by the Governor of the State on June 20, 1931, and became effective on July 1.

On September 2, 1931, one Harry A. Mayhew filed a bill as a citizen and taxpayer against the Governor of the State and several other public officers to enjoin them from entering into a contract for the improvement of a section of a State highway. Approximately 2 weeks later another citizen and taxpayer, Pigott, filed another bill in the same court requesting the director of public works to be enjoined from entering into a contract with a road contractor for the construction of a section of a State highway in Cook County. Injunctions in both cases were asked upon the ground that the law was unconstitutional.

The circuit court of Sangamon County held that the act was unconstitutional and granted the relief that was sought by the taxpayers. The case was immediately appealed to the Supreme Court of Illinois, and this court, in an opinion written by Judge De Young, affirmed the decision of the lower court. The attorney general, who represented the State officers, contended that the act was a valid exercise of the legislative power, that the law was complete and certain in its provisions and therefore was capable of enforcement. The taxpayers, on the other hand, contended that the law was vague, uncertain in its terms, incomplete, and defective in its provisions, and that it was difficult of enforcement, and therefore invalid. They also contended that the act was a violation of the constitution in that it delegated absolute or unlimited and arbitrary powers to an administrative officer, and deprived the taxpayers of the State of property without due process of law, and that it also abridged the right of contractors to enter into contracts.

The supreme court, in rendering its opinion, declared that it would be necessary only to consider the contention that the act was void

because of incompleteness and uncertainty, and that it delegated arbitrary power in violation of the constitution. The court said that when a law left the legislature it "must be complete in all its terms and conditions so that every person may know by reading the law what his rights are, and how it will operate when put into execution." The court, quoting from a former Illinois case (*People* v. *Rogier*, 326 Ill. 310, 157 N.E. 177), declared that a law "which is so vague, indefinite, and uncertain that the courts are unable, by accepted rules of construction to determine with any reasonable degree of certainty what the legislature intended, or which is so incomplete or conflicting and inconsistent in its provisions that it cannot be executed, will be declared to be inoperative and void." After declaring the primary purpose of the act the court declared:

> The act not only prescribes no test or standard by which the prevailing rates of wages in a particular jurisdiction may be ascertained but when an improvement extending from one subdivision of the State or municipality into or through another or dividing them is contemplated, no guide is offered by which the applicable rate or rates of wages may be determined.

The court took up the question of adjustments in cases of disputes arising under the prevailing rates of wages, and reviewed the various methods of appeal in such cases. The procedure before the various boards, the court said, was considered wholly conjectural, for the act omits "to provide when and where such boards shall meet, whether they shall conduct hearings at which parties interested in the subject matter may appear, whether the attendance of witnesses may be compelled, and whether a record of the proceedings shall be kept."

The law in addition to the provision relative to the payment of the prevailing-wage rate also limits the hours of work during any 1 calendar day to 8. Numerous exceptions, as in the case of extraordinary emergency caused by fire, flood, danger to life or property, etc., are set forth in the law. The court said that these exceptions would give rise to differences of opinion whether a contractor may avail himself of one or of many. Without considering other objections to the act, the Supreme Court of Illinois concluded it was sufficiently shown that the act was "not only uncertain and indefinite in its provisions, but that it is also incomplete and delegates legislative powers by allowing administrative officers to supply many of its substantial features. Accepted rules of construction applied to certain sections will not avail to disclose the legislative intent, and courts are powerless to supply the omissions of the act. No person, by reading the act, will know with a reasonable degree of certainty what rights it confers and what duties or obligations it imposes."

The act was therefore declared void.

WAGES—PREVAILING RATE—DEFECTIVE INDICTMENT—FAILURE TO NAME UNDERPAID LABORERS—*State* v. *Lassotovitch et al* (*and three other cases, Nos. 16–19*), *Court of Appeals of Maryland* (*Mar. 4. 1932*), *159 Atlantic Reporter, page 362.*—These cases (Nos. 16–19) were identical so the Court of Appeals of Maryland considered only no. 16, *State* v. *Lassotovitch*, and announced that the others would be controlled by it. In that case action was brought against a contractor, Lassotovitch, for violating the prevailing rate of wage clause appearing in the local laws of Baltimore city (Flack's Public Local Laws of Maryland, 1930 (Baltimore city, sec. 516)).

The indictment read as follows:

On the ninth day of May, in the year of our Lord nineteen hundred and thirty one, at the city aforesaid being then and there subcontractors engaged in the execution of a contract in public work within the city of Baltimore, unlawfully did pay less than the current rate of per diem wages in the locality where the work was performed, to laborers, workmen, and mechanics employed in the execution of a contract in public work, within the city of Baltimore, contrary to the form of the act of assembly in such case made and provided, and against the peace, government, and dignity of the State.

The criminal court of Baltimore city held that the indictment was defective, because—

The particular act which constituted the alleged offense is not described with sufficient accuracy and definiteness to inform the accused of what he is called upon to defend, and protect him against future prosecution.

The State appealed the case to the Court of Appeals of Maryland, contending that it was sufficient to describe the act in the words of the statute. This court said though the general rule is that the language of the statute is sufficient in describing a crime, yet it is necessary "to allege such facts in connection with the commission of the offense as will certainly put the accused on full notice of what he is called upon to defend, and establish such a record as will effectually bar a subsequent prosecution for that identical offense." Continuing, the court said:

We are of the opinion that * * * the indictment should contain an allegation setting forth the names of the "laborers, workmen, or mechanics" who were paid on the date alleged less than the current rate of per diem wages in the locality where the work was performed. * * *

The law presumes every accused to be innocent; and if so, to prepare a proper defense against the charge alleged, they would be compelled to consider every employee to whom payment had been made on the date specified in the indictment and each count thereof, determine the classification to which each belonged, and be pre-

pared to prove that the amount paid each individual was not less than the current rate of wages in the locality where the work was done. This, it seems to us, is a burden which the law should not, and does not, place upon the accused, and would be in contravention of the ancient rule of the common law now embodied in the Maryland Declaration of Rights, that the accusation or charge must be such as to enable the accused to prepare his defense, and serve as a bar to future prosecution for the same act.

The decision of the trial court, discharging the contractor, was therefore affirmed.

WAGES—PREVAILING RATE—HOURS OF LABOR—GRADE CROSSINGS—CONSTITUTIONALITY—*Long Island Railroad Co.* v. *Department of Labor of State of New York et al., New York Supreme Court, Albany County (Jan. 4, 1931), 247 New York Supplement, page 278.*—The State of New York, after a thorough investigation, passed a series of laws providing for the elimination of grade crossings. In 1929 a law was passed which distributed the cost of this elimination work. The following year a law (ch. 804, Laws of 1930) was passed, providing that all grade-crossing elimination work, where the State pays for a proportion of the cost, shall be considered public work; and that the provisions of the law requiring an 8-hour day and the payment of a prevailing rate of wage on all public works shall be applicable to this work.

A group of railroads having lines in New York State sought an injunction to prohibit the enforcement of this latter act requiring an 8-hour day and the payment of the prevailing rate of wage on the elimination work. The constitutionality of the statute was challenged upon the following grounds:

1. That it abridges the privileges and immunities of plaintiffs, deprives plaintiffs of their property without due process of law, and denies to plaintiffs the equal protection of the laws, in violation of the fourteenth amendment of the Constitution of the United States and sections 1 and 6 of article 1 of the Constitution of the State of New York.
2. That it deprives plaintiffs of liberty of contract.
3. That it sets up a standard for the payment of wages which is vague, uncertain, and indefinite.
4. That, assuming the standard is capable of ascertainment, it compels plaintiffs to pay, and to enter into contracts to pay, wages according to the standard before the same is ascertained.
5. That it conflicts with the Federal Hours of Service Act and the Railway Labor Act, whereby the Congress of the United States has entered the field of legislation as to hours of service and wages of employees of railroads engaged in interstate commerce.

In answering these contentions the court began by citing cases which held that "the State, by virtue of its police power, may com-

pel the elimination of grade crossings and impose the cost thereof wholly upon the railroads" and that the State may use its funds in the aid of such work. The court said that the elimination work was undoubtedly a public work so far as it promoted a public object, but the validity of the statute did not necessarily rest upon the police power of the State, for "provisions in contracts made by the State in this respect are not an exercise of the police power, but are mere terms deemed beneficial to it, which those willing to contract with the State or its instrumentalities must accept, if they contract at all."

The statute could not be upheld as a valid exercise of the police power because the regulation regarding hours or wages was not reasonably incident to the main object of the grade-crossing elimination statute, nor was there anything peculiar in the work as affecting "the health, safety, or welfare of those employed in such work different from workers generally."

Next, the court concluded that the State could compel compliance with the provisions of the statute, under its power to regulate public works. The court considered the work as a public undertaking "in behalf of the welfare of the people of this State", and held that "the State may legally prescribe the conditions under which it directs and permits it to be performed."

The New York Department of Labor also contended that the State may compel compliance by virtue of its reserve power to alter, amend, and repeal corporate charters. The court held this was a question of the reasonableness of the statute, and in sustaining the contention said:

> In the interests of safety, the State has united with the railroads to eliminate grade crossings because of the dangers and interference with public use of streets and highways. * * * What might be unreasonable were the railroads to pay the whole cost is hardly a test in a situation where the State pays a substantial part.
>
> The policy of the State in the expenditure of public moneys for labor has been to pay the prevailing rate in the locality for a day's labor of 8 hours. To apply that policy to grade-crossing elimination where the State pays a substantial part of the cost does not appear to be unreasonable.

The fact that some of the railroads were foreign corporations made no difference, since foreign corporations could not complain because they were subject to the same law as a domestic corporation.

The last argument was that the statute was a violation of the commerce clause of the Federal Constitution. The court held that whether the work was directly a part of interstate commerce need not be determined. However, the court said:

It is connected with interstate commerce, although primarily a local highway improvement. For that reason Congress would have the right to deal with railway employees engaged by an interstate carrier to do the work. [Cases cited.]

Grade-crossing elimination work may be performed by contractors and employees of the State. As to them the above acts would not apply, and article 8–A may be given effect.

* * * Orders may be entered enjoining and restraining the defendants and each of them during the pendency of the actions from enforcing compliance by the plaintiffs with any of the provisions of article 8–A of the labor law in connection with work for elimination of grade crossings so far as such provisions may be applicable to employees of the plaintiffs who are subject to and under the operation of the provisions and agreements thereunder of the Hours of Service Act and the Railway Labor Act enacted by the Congress of the United States.

The case was appealed to the Court of Appeals of New York, which court affirmed the decision of the lower court. (*Long Island Railroad Co.* v. *Department of Labor of New York et al.*, 177 N.E. 17.)

The appeals court based its decision upon the ground that these regulations were regulations tending to promote efficient and uninterrupted performance of the work and therefore not beyond the power of the State. The court said:

It follows that, at least in times where there is no extraordinary unemployment, the workmen who will work for more than 8 hours a day at a rate of wages less than the rate prevailing in the same trade or occupation in that locality are men who lag behind others in skill and efficiency and cannot command the same wages as they receive. A regulation that all workmen shall be paid for a day's work of 8 hours not less than the rate of wages prevailing in the locality where the work is performed is at least some assurance that the workers employed will not be drawn from the least skillful group. Then, too, such a regulation is some assurance that the work will not be interrupted and delayed by labor unrest. The laborer who is paid at the prevailing rate of wages for a day's work of 8 hours has more to lose if discharged and less to gain if he seeks work elsewhere, than one who receives a wage less than the majority of workers receive.

Continuing its opinion, the court said that even if the above considerations were not sufficient to justify the State in imposing the regulations, "such regulations would still be a valid exercise of the power of the State to determine the conditions upon which the moneys or credit of the State shall be used in meeting 50 percent of the cost of the work." The court also held that as the corporations had "consciously subjected this work to State supervision" they cannot reject its burdens.

James Sim was employed by the State of New York as an inspector of engineering work, at a salary of $1,820 per year. He filed a suit under Laws of 1929, chapter 479 (as amended 1930, ch. 736) which statute authorized the court of claims to hear and determine claims of canal laborers, workmen, and mechanics, against the State "by reason of the failure of the State to pay claimants the prevailing rate of wages." His contention was that his work was similar to that of foreman of masons, and that he was entitled to the rate of wages paid to those in such occupation.

The court of claims held, that although Sim occasionally did manual work, the nature of his work was primarily that of inspection, which has been defined as "securing by supervision, the proper performance of work, or ascertaining by examination the quality or condition of work." The court of claims therefore held that the services performed by Sim did not constitute him a laborer, workman, mechanic, or foreman of masons, and the claim was dismissed. (*Sim* v. *State* (1931), 254 N.Y.Supp. 150.)

WAGES—PREVAILING RATE—INJUNCTION—DETERMINATION OF PREVAILING RATE OF WAGES—REVIEW—*In re Rate of Wages on Sewage Disposal Plant at Princeton, Supreme Court of New Jersey (Apr. 26, 1932), 160 Atlantic Reporter, page 408.*—The Borough of Princeton, N.J., had a contract with Engstrom & Wynn, Inc., for the construction of a sewage-disposal plant. The corporation was notified to appear before the commission of labor to answer the charge that, contrary to law, it was not paying the employees the prevailing rate of wages.

The corporation moved to dismiss the proceedings upon the grounds that no dispute had arisen that could not be adjusted by the contracting parties, and that the statute in question (Laws of 1931, ch. 242, p. 597) was not applicable in the instant case since it concerned only the "rate of wages for laborers and mechanics employed on public buildings" within the State. The commissioner denied this motion and proceeded to take jurisdiction. The contractors then requested that the case be reviewed by the Supreme Court of New Jersey.

In its decision, this court held that the contract in question complied with the requirements of the act, and that—

> Before the commissioner of labor could take cognizance of complaint of violation of the statute it was essential not only that a dispute had arisen between the parties immediately concerned, but that that dispute was one that could not be adjusted by the contracting parties.

Since there was no evidence of a dispute between the contractors and the laborers and mechanics as to the prevailing rates of wages, the court held that the proceedings before the commissioner were "unwarranted and illegal", and they were set aside.

WAGES—PREVAILING RATE—INJUNCTION—ENFORCEMENT OF MINIMUM WAGE SCALE—*Harlan et al.* v. *Employers' Association of Maryland et al., Court of Appeals of Maryland (Mar. 3, 1932), 159 Atlantic Reporter, page 267.*—In May 1929 the mayor of Baltimore, Md., appointed a committee to advise him as to the meaning of the phrase "current rate of per diem wages in the locality where the work is performed", as contained in the Baltimore city charter (Acts of 1910, sec. 516), which reads as follows:

That 8 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 8 hours per calendar day for the protection of property or human life: *Provided*, That in all such cases the laborer, workman, or mechanic * * * shall be paid on the basis of 8 hours constituting a day's work: *Provided further*, That the rate of per diem wages paid * * * 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 * * *.

After investigation the committee filed a report setting out a scale of wages for foremen, mechanics, and helpers, and recommended that "the city should regard [these rates] as the 'current rate of per diem wages in the locality' less than which it shall not pay for work done by it, or in its behalf." It was recommended that these rates be in effect until June 30, 1930, and that they should be renewed or modified every year thereafter. The report was adopted, and contractors doing work for the city of Baltimore were warned to pay the rates of wages recommended by it.

Upon the adoption of the report and the notice to the contractors, a number of citizens, residents, and taxpayers of the city of Baltimore, filed a bill to enjoin the mayor and others from enforcing the resolution adopting the schedule of wages. The mayor and council objected to the complaint, for they considered it valid to adopt a prevailing-wage scale on public work in Baltimore. The objection was overruled by the circuit court of Baltimore city, and the case was then appealed to the Court of Appeals of Maryland. It was contended that "the action of the board of estimates is fairly to be implied from the provisions of the statute" and even though there were no direct authority for such action it was incident to the declared object and purpose of the act. The appeals court, however, did not sustain this contention. It said:

The fact is that there is no power conferred on the city or any of its agents by the act of 1910, chapter 94. It is a penal statute, applicable to city officials as to the 8-hour provision and to contractors

and subcontractors doing public work in Baltimore as to hours and wages, and as appears from the preamble to the act, was designed to improve the condition of employees. It is true that contracts are made with regard to the law existing at the time and place of contracting * * * but that does not authorize a municipal corporation to insert in its contracts provisions not authorized by the legislature from which it derives its authority, or which are not fairly to be implied from the authority conferred.

The court also held that the action by the city authorities was based upon the fallacious theory that "if every contractor paid the scale so adopted he would be free from the danger and risk of prosecution for his failure to observe the terms of the statute." The court said that compliance with the adopted wage scale would not even be evidence in the event a contractor was prosecuted for noncompliance with the terms of the statute.

WAGES—PREVAILING RATE—PUBLIC WORKS—*Austin* v. *City of New York, Court of Appeals of New York (Jan. 5, 1932), 179 Northeastern Reporter, page 313.*—During the years 1926 to 1929, Frank E. Austin was employed by the city of New York as a foreman of bridgemen and riveters. The prevailing rate of wages for bridgemen and riveters was $12 a day during the first half of 1926 and $14 a day after that time, and the prevailing rate for a foreman was $3 a day additional. Austin was not paid the additional amount and he brought action to recover it. The judgment of the lower court gave him only a part of the additional $3, and the appellate division affirmed the decision.

The case was carried to the Court of Appeals of New York where the court said, "The question is whether the plaintiff is a 'laborer, workman, or mechanic' within the meaning of the statute." If he is, he has been underpaid, the court said.

The appeals court held that a foreman of a group of bridgemen and riveters is a workman if we "take the words in their plain popular meaning", saying:

The plaintiff was a bridgeman and riveter, and a member of the Iron Workers' Union. He did not cease to be a bridgeman or riveter, or to be employed in that trade, when assigned to act as foreman. He was one of a gang of workmen, though he was charged with special duties. He held the men to their job, and, "when necessary, jumped in and helped them." He was exposed to nearly all the risks that cause the occupation of a bridgeman or a riveter to be attended with exceeding hazard. He did not take himself out of his calling by becoming an overseer too.

The judgment of the appellate division was therefore reversed and that of the lower court modified, allowing the workman the

prevailing rate of wages for work in the same trade in the locality where the work was done.

In another "prevailing rate of wage case" in New York State the claimant, a night watchman at a barge terminal whose duties were "to sweep and mop the floor, take care of fires, go through building once an hour, act as custodian of real property, answer telephone, and prevent loiterers from lounging around warehouse and terminal", was held to be a "laborer, workman, or mechanic" within the terms of the statute (Laws, 1929, ch. 479, as amended by Laws of 1930, chs. 701 and 736).

The court further said that when the claimant produced witnesses who testified to 10 different rates of wages paid night watchmen, he had met the burden of establishing a prevailing rate, and that the average of these rates, including that of the claimant, should be taken as the prevailing rate. (*Smith* v. *State* (1931), 255 N.Y.Supp. 756.)

WAGES—PREVAILING RATE—PUBLIC WORKS—*State* v. *Jay J. Garfield Building Co., Supreme Court of Arizona (Oct. 15, 1321), 3 Pacific Reporter (2d), page 983.*—The Jay J. Garfield Building Co. was charged with violating section 1350 of the Arizona Revised Code, 1928, in failing to pay one of its employees the current rate of wage for work on the construction of a school building in Pima County, Ariz. It was contended that if the statute were enforced the employer would be deprived of liberty and property without due process of law, and in violation of the Fourteenth Amendment to the United States Constitution, and section 4 of the Arizona Constitution. It was also averred that the statute was too indefinite and uncertain, because whether an act was lawful or unlawful under the statute was left to conjecture, guess, and reasonably different constructions.

In determining the question involved in the case the court said:

It is the validity of the current wage feature of the statute that is in question. The right of the State to limit the hours of labor upon public works for itself or its political subdivisions has long been settled law (*Atkin* v. *Kansas*, 191 U.S. 207), and it seems the prevailing rule so declared for a like reason is that the State and its political subdivisions may establish a minimum rate of wages for laborers upon public works (16 R.C.L., 497, sec. 68).

It is not, then, a question of the power of the legislature to prescribe a current rate of wages for manual and mechanical labor on public works, but whether that phrase in its context is sufficiently clear and definite to inform the employer of the per diem he should pay to satisfy the law.

The court, after reviewing cases involving criminal statutes of vague and uncertain meaning, adopted and approved a statement of the rule as found in the case of *United States* v. *Capital Traction Co.* (34 App. D.C. 592), as follows:

The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.

Applying this rule to the statute in question, the court held that the terms, "current rate of wages" and "locality" were indefinite and uncertain and fatal to the validity of the statute. In conclusion the court cited the case of *Connally* v. *General Construction Co.* (269 U.S. 385), and said that "as it was the last and only direct affirmative expression" of the United States Supreme Court, the statutes requiring the employer to pay the current wage were invalid, and therefore the court was bound to follow it.

WAGES—PREVAILING RATE—PUBLIC WORKS—CONSTITUTIONALITY OF STATUTE—*Metropolitan Water District of Southern California* v. *Whitsett, Supreme Court of California (Apr. 18, 1932), 10 Pacific Reporter (2d), page 751.*—The California prevailing wage rate law was declared constitutional and valid by the Supreme Court of California. This court said "the great weight of authority and distinct trend of recent judicial decision is in favor of the constitutionality of prevailing wage laws as applied to public work."

The case came before the court in an action to compel the chairman of the board of directors of the Metropolitan Water District to sign a contract for the construction of a road to be used in connection with the Colorado River Aqueduct. The facts in the case showed that bids for the construction of the road were invited and the contract was duly awarded to Martin Bros. Trucking Co. Later the chairman of the board refused to sign the contract because the board did not "ascertain and specify in its notice inviting proposals, and insert in the contract, the general prevailing rate of per diem wages in the locality in which the work is to be performed" as required by the California prevailing wage law (Acts of 1931, ch. 397). The law provides in part as follows:

> Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed * * * shall be paid to all laborers, workmen, and mechanics employed by or on behalf of the State of California * * *.
>
> The public body awarding any contract for public work * * * shall ascertain the general prevailing rate of per diem wages in the

locality in which the work is to be performed, for each craft or type of workman or mechanic needed to execute the contract, and shall specify in the call for bids for said contract, and in the contract itself, what the general prevailing rate of per diem wages in the said locality is for each craft or type of workman needed to execute the contract.

The law also provides a penalty of $10 for each laborer employed in violation of this law, and directs the public officials awarding the contract to withhold the amounts forfeited by such contractor. Section 3 of the law requires that accurate records be kept by the contractor, showing the actual wages paid each worker. Section 4 defines the terms used in the statute, and after defining what shall be considered "public works" provides:

The term "locality in which the work is performed" shall be held to mean the city and county, county or counties in which the building, highway, road, excavation, or other structure, project, development, or improvement is situated in all cases in which the contract is awarded by the State, or any public body thereof, and shall be held to mean the limits of the county, city and county, city, town, township, district, or other political subdivisions on whose behalf the contract is awarded in all other cases. The term "general prevailing rate of per diem wages" shall be the rate determined upon as such rate by the public body awarding the contract, or authorizing the work, whose decision * * * shall be final.

A public official or a contractor or subcontractor, violating his duty as prescribed in the act "shall be guilty of a misdemeanor" and punished.

The statute was challenged upon three grounds: "(1) That said act is void for uncertainty; (2) that the burden thus attempted to be imposed * * * is in violation of section 12 of article 11 of the State constitution; and (3) that the act makes an invalid delegation of legislative power." The allegation of uncertainty was on the following grounds:

(*a*) In that the phrase "general prevailing rate of per diem wages" is not and cannot be stated as a definite amount, (*b*) in that the phrase "work of a similar character" is too vague to permit definition, and (*c*) in that the phrase "in the locality in which the work is performed" is in itself uncertain and is rendered less certain by the attempt made in the act to define it.

In answering these contentions the court pointed out, as being of prime importance, that the penal offense consists in the nonperformance of those things required by the act. The officers of the district are required, according to the terms of the act, to ascertain the "general prevailing rate of per diem wages in the locality in which the work is to be performed"; and the rate is defined to be

the rate determined by the officers of the district awarding the contract, and the decision of such body is made final and conclusive. Continuing, the court said:

When this final decision is made, no uncertainty would arise in the requirement that the schedule of rates of wages be inserted in the call for bids and in the contract itself. Nor would any uncertainty be encountered in entertaining complaints as to violations by the contractor of the terms of the contract, nor in determining upon investigation what, if any, deductions should be made from the final payment to the contractor by reason of such violation. When these duties are performed the statute has been complied with by the public officers, and when performed in good faith no criminal or other liability may be invoked against them.

The court then turned its attention to the duty imposed upon the contractors, subcontractors, or their representatives. The court found no uncertainty. The duty imposed was the keeping of accurate records so that the amount paid each worker could be ascertained. The terms of the act outlining the duty, the court said, were not " so vague that men of common intelligence must necessarily guess at their meaning, and differ as to their application."

The following three cases were relied upon by the petitioner in attempting to have the law declared void: *Connally* v. *General Construction Co.* (269 U.S. 385), involving an Oklahoma statute; *State* v. *Garfield Building Co.* (*Arizona*) (3 Pac. (2d) 983); and *Mayhew* v. *Nelson* (*Illinois*) (178 N.E. 921). The court, distinguishing between these cases and the present case, said:

In the Connally case and in the case of *State* v. *Garfield Building Co.*, it is observed that the statutes therein involved imposed the duty on the contractor to determine at his peril the current rate of wages, and the locality in which the work was to be performed was not defined. In the California statute the prevailing rate of wages, which must be deemed the same as the current rate of wages, is determined by the public body awarding the contract, and the locality to be considered in fixing the rate of wages is also defined. The statute in the Mayhew case provided, as here, that the public body awarding the contract should determine the rate and the " locality " was designated. The Illinois court based its decision on its own reasoning and cited as authority for its conclusion two cases in its own jurisdiction and the case of *People ex rel. Rodgers* v. *Coler* (166 N.Y. 1, 59 N.E. 716), without regard to the fact that the Coler case was distinguished, and not followed in the later case of *Ryan* v. *City of New York* (177 N.Y. 271, 69 N.E. 599), where the New York statute, providing for the payment of " not less than the prevailing rate " of wages in the locality, was sustained.

In upholding the statute, great reliance was placed upon the case of *Atkin* v. *Kansas* (191 U.S. 207), in which the court held the State had the right to place certain requirements and restrictions upon the construction of public works. Most of the opinion in

that case deals with the 8-hour provision of the Kansas statute, but the provision relative to the prevailing rate of wage was also discussed, and it was not held invalid. Cases in other States were cited and relied upon by the court in upholding the California statute. In New York the prevailing-wage statute was approved (*Long Island Railroad Co.* v. *Department of Labor* (1931), 177 N.E. 17); and the doctrine of the New York case was followed in Washington (*Malette* v. *City of Spokane*, 137 Pac. 496), Wisconsin (*Wagner* v. *City of Milwaukee*, 192 N.W. 994), and Maryland (*Ruark* v. *International Union*, 146 Atl. 797). In basing its decision upon the Atkin case, the court said it had never been overruled and was not referred to in the Connally case, which "is not applicable to the case at bar for the reason that here we are not confronted with any uncertainty as to the nature or character of the particular offense that is declared a crime."

In response to the question of what is a prevailing wage, the court said no court could fix any definite amount as a prevailing-wage rate, for its determination depends upon the relation of the work "to time and place, both of which are within the purview and cognizance of the administrative board in each case."

The court found the phrases "work of a similar character" and "locality in which the work is performed" were not too vague, as the work and the locality could be determined with a reasonable certainty.

The second objection to the statute was that it violated the California Constitution. This argument was based upon the theory that the payment of a prevailing-wage rate was in the nature of a tax, and therefore such legislation must conform to the taxing powers of the State. The court held such payment was not a tax as contemplated by the State constitution. The court also denied the third objection, that it was an unlawful delegation of legislative power, and held that such action by the legislature was warranted, and amounted only to a delegation to the board of power to exercise a discretion.

WAGES—PROFIT SHARING—OVERTIME—SERVICES RENDERED ON REQUEST—*Sheets* v. *Eales*, *Supreme Court of Kansas* (*June 4, 1932*), *11 Pacific Reporter* (*2d*), *page 1020*.—Suit was brought by Daniel G. Sheets against H. L. Eales, his employer, to recover an amount alleged to be due him as unpaid wages. He claimed wages for services rendered under a written contract of employment, and also for extra services. The suit was dismissed by the district court, Reno County, and Sheets appealed to the Supreme Court of Kansas. At the trial he showed a contract between himself and Eales, whereby he agreed

to work for Eales for a period of 1 year from January 1, 1926, until January 1, 1927, as salesman in the business of selling automobile supplies, etc., and to receive as compensation one fourth the net profits. The contract also provided that he was to have a drawing account of $25 per week which would be deducted from his share in the net profits. There was a further provision that Sheets was to acquire no interest in the business and that he should devote his entire time and attention to the business for the compensation stated in the contract. A provision for 10 days' notice before termination was also included. Sheets worked under the contract until the business was sold in July 1929. He contended that he had worked 148 extra Sundays and 18 extra evenings since he entered the employment under the contract. He further testified that:

* * * Near the end of 1927, he told defendant he would have to have more money for 1928, and that defendant responded by saying, "Don't worry, I will take care of you." In December of 1927, he said he told defendant that he would have to have $45 to $50 per week if he worked for him in 1928, but no change was made in the contract, and he said defendant replied, "Let it slide, and I will pay you a bonus at the end of the year that will make as much money."

Eales, the employer, contended that Sheets was bound by the written contract and that "payment for extra services cannot be required in the absence of proof of an express agreement to that end." He also contended that there was a mutual interest in the success of the business, as Sheets' salary depended upon the profits of the business and therefore it was as much to his interest to increase the profits by extra services as it was to Eales.

In deciding the question involved the Kansas Supreme Court quoted a general rule from 25 A.L.R. 218, as follows:

It is generally held that there is a presumption of law that all services rendered by an employee during the period for which he is employed, of a nature similar to those required of him in the course of his regular duties, are paid for by his salary, and to overcome this presumption he must show an express agreement for extra compensation.

The court then proceeded to point out the specific provisions in the contract providing that he should receive one fourth of the profits as his compensation. The court upheld the idea urged by the defendant that Sheets was interested in the profits made in the business, and therefore his extra service would inure to his interest as well as to that of Eales. There was no provision in the contract regarding extra compensation for extra work and "no agreement was ever entered into that any particular sum should be paid for any extra services that might have been rendered", even though

Eales may have made vague promises that for such services he would receive extra pay.

The court therefore concluded that Sheets failed to establish a right of recovery and the judgment of the lower court dismissing the suit was correct.

WORKMEN'S COMPENSATION—ACCEPTANCE—EMPLOYMENT STATUS—*Kouns* v. *Josselson Bros. et al., Court of Appeals of Kentucky (Nov. 14, 1930), 33 Southwestern Reporter (2d), page 347.*—On November 7, 1927, Walter Kouns entered the employment of Josselson Bros., who were operating under the Kentucky workmen's compensation law. Notices to that effect were posted on the premises and a register was kept for the workmen to sign, indicating their acceptance of the act. Kouns was first assigned to driving a truck; but about noon on November 19, 1927, he was directed to wear a Santa Claus uniform in an advertising scheme the company was promoting. While thus attired his uniform was ignited from an open gas fire, and Kouns received severe injuries. The shipping clerk of Josselson Bros. visited him during the resulting illness and while there learned that Kouns had never signed the workmen's compensation register. It was a part of the shipping clerk's duty to see that all new employees signed the register and it was purely an oversight that Kouns had not signed it. Kouns authorized Ferguson (the clerk) to sign the register for him. This Ferguson did and the employer did not know until later that Kouns had not signed the book personally.

Kouns filed an application for compensation and the workmen's compensation board dismissed the claim because the employee at the time and date of the injury had not elected to accept the provisions of the Kentucky workmen's compensation act.

The decision was affirmed by the circuit court of Boyd County, Ky., and an appeal was taken to the Court of Appeals of Kentucky.

According to the testimony offered at the trial the shipping clerk, Ferguson, was not acting for the company in placing Kouns' name on the register, but was acting solely for Kouns. The appeals court reviewed the evidence and decision of the board and concluded by saying:

> At the time he received his injuries, Kouns had not elected to accept the provisions of the act. After he was hurt, he did, and at his direction his name was signed to the register and dated November 7, 1927. That acceptance, if valid, cannot have a retroactive effect. We have never so held. Our decisions in *Junior Oil Co.* v. *Byrd*, 264 S.W. 846, and *Sunlight Coal Co.* v. *Floyd*, 26 S.W. (2d) 530, are not to the contrary. In those cases we held that the employers by their acts and conduct had estopped themselves to deny that the employee was under the provisions of the act. Such facts do not appear here. In

those cases the employers had agreed with the injured workmen and had been making them payments for their injuries. They thereby led those workmen to believe they were under the act, and we held they could not thereafter change their positions. That is not the case here. * * * The judgment of the circuit court in approving the action of the workmen's compensation board is correct, and it is affirmed.

WORKMEN'S COMPENSATION—ACCIDENT—BURNS—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Stacey Bros. Gas Construction Co.* v. *Massey, Appellate Court of Indiana (Mar. 30, 1931), 175 Northeastern Reporter, page 368.*—On June 3, 1930, Oral Massey, a boilermaker employed by the Stacey Bros. Gas Construction Co., was driving hot rivets into metal sheets while exposed to the sun. At about 4:20 p.m. he noticed his feet stinging and, upon examination, discovered he had received "second-degree burns", blisters. He was totally disabled for a while, and the workmen's compensation board awarded him compensation.

The employer, Stacey Bros. Gas Construction Co., appealed the case to the Appellate Court of Indiana, contending that Massey's injury was not a personal injury by accident within the meaning of the workmen's compensation law (Burns' Annot. Stat. Supp. 1929, sec. 9447).

In its decision the court referred to former cases which held that the workmen's compensation act should be liberally construed, and in harmony with the humane purposes of the act, and that the word "accident" should be used in its usual sense of an untoward or unexpected event. In view of the fact that this employee had worked at the trade of boilermaker for 26 years without a similar injury, it was held that the blisters were caused by an accident arising out of and in course of the employment, and the award of the industrial board was affirmed.

WORKMEN'S COMPENSATION—ACCIDENT—BURNS—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EPILEPTIC FIT—PREEXISTING CONDITION—*Georgetown College* v. *Hoage et al., Court of Appeals of the District of Columbia (June 6, 1932), 60 Washington Law Reporter, page 555.*—The Court of Appeals of the District of Columbia, in an opinion written by Mr. Chief Justice Martin, held that an injury arose out of and in the course of an employment in a case in which an employee, while using a hot-water hose, fell in an epileptic fit and, because of the contraction of his muscles, continued his grasp on the hose so that the hot water ran over his body inflicting serious burns which subsequently caused his death.

This case was an appeal from a decree of the Supreme Court of the District of Columbia which set aside an order of the deputy commissioner of workmen's compensation in the District of Columbia rejecting a claim for compensation for death of an employee. From the facts in the case it appeared that the deceased employee was engaged as a laborer on construction work at a hospital being erected by the university. While using a hot-water hose for defrosting cans in an ice plant of the employer, the employee was seized with an epileptic fit, with fatal results as noted above.

The deputy commissioner held that the proximate cause of the injury was the epileptic seizure, which had no relation whatever to the employment. He also found that the employment did not aggravate the preexisting epileptic condition. Upon appeal to the Supreme Court of the District of Columbia by the widow, the court held that the order of the deputy commissioner, based upon facts, was not in accordance with the law. The contention of the employer was that the decree of the lower court had the effect of setting aside the order of the compensation commissioner upon a pure question of fact, which was beyond the court's authority since the statute authorized the court to set aside the compensation order only when not in accordance with the law.

The only question, therefore, raised and to be decided by the court of appeals was whether the facts as found by the deputy commissioner showed as a conclusion of law that the death of the employee "arose out of and in the course of the employment." The court of appeals held that the employee's death was caused by the burns and not by the epileptic condition, and that such burns were inflicted by means of an instrumentality in the hand of the employee. The court called attention to the fact that a liberal interpretation in favor of an injured employee should be given, since workmen's compensation statutes in general are remedial. In concluding the opinion the court cited several cases, basing its opinion principally upon a Massachusetts case (*Cusick's case*, 260 Mass. 421). In that case an employee subject to epileptic fits had an attack while going down some cellar stairs. The Massachusetts court held that compensation could be recovered under the State workmen's compensation act, and in the course of its opinion referred to the fact that an employee not subject to epilepsy who fell upon the stairs while in the course of his employment would be entitled to compensation. The fact of suffering the epileptic attack did not, therefore, bar a recovery. It was shown that the protection of the statute was not limited merely to employees who are in good health but included all employees enumerated in the statute who are in the service of an employer under a contract of hire. The Court of Appeals of the

District of Columbia also referred to the case of *Rockford Hotel Co.* v. *Industrial Commission* (300 Ill. 87), in which it was held that the employer was not liable in a case in which an employee was seized with a fit and fell to his death. In that case the injury was not considered one arising out of the employment. However, the District of Columbia court said that the majority of the courts, both American and English, have held that if the injury was due to a fall the employer is liable "even though the fall was caused by a pre-existing idiopathic condition."

The court therefore affirmed the decree of the lower court and awarded compensation to the widow of the deceased employee.

WORKMEN'S COMPENSATION — ACCIDENT — DRINKING IMPURE WATER—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*State et al.* v. *Smith, Appellate Court of Indiana (Mar. 4, 1931), 175 North-eastern Reporter, page 146.*—From the facts of the case it appears that the deceased employee, Smith, was engaged in resurfacing a part of the State highway between Lebanon and Frankfort, Ind. The son of the foreman on the job was working as water boy, and had furnished Smith and the other workmen drinking water taken from the mouth of a tile ditch which carried the "surface run-off water." The ditch was also connected directly to a septic tank which received the sewage from a farm house. The evidence disclosed that Smith became sick on July 20 and that four fellow workmen also became sick on the same day. They all manifested practically the same symptoms and the attending physician diagnosed their infection as gastroenteritis, caused by eating impure food or drinking impure water.

The Indiana Industrial Board awarded compensation to the widow, and the State highway commission appealed to the Appellate Court of Indiana, contending that the evidence was not sufficient to sustain the inference that Smith's death was the result of drinking polluted water furnished by the highway commission and that the death was not "death by accident arising out of and in the course of his employment." Regarding the second contention the court cited the case of *Wasmuth-Endicott Co.* v. *Karst* (133 N.E. 609), in which it was said:

> It is clear that the entering of typhoid germs into appellee's intestines by reason of drinking the polluted water furnished him by appellant for that purpose while in its employ may rightfully be termed an "accident."

The court therefore held that the death was an accident arising out of and in the course of the employment.

The court reviewed the report of the chemist and the attending physician and concluded the opinion by holding that—

The industrial board are the triers of the facts in cases of this kind, and where, as in this case, 14 or 15 men are working together, and it is shown by expert evidence that a workman can be affected by either impure food or impure water and 5 or 6 of them are stricken with a malady from a common source, to wit, water, the board had the right to find as an ultimate fact that it was the polluted water that caused the death in question.

In the light of the authorities cited above, we hold that the evidence is sufficient to sustain the award.

The award of the industrial board was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT—DROWNING—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Daigle* v. *Moody et al., Court of Appeal of Louisiana (Apr. 5, 1932), 140 Southern Reporter, page 842.*—On August 9, 1928, Alex Daigle was drowned while attempting to swim across Red River near Benton, La. At the time of his death Daigle was employed by H. N. Moody in constructing dikes in the Red River.

A pile driver was used in connection with the work and it was mounted on a barge which was kept in position by an anchor attached to a cable and placed on a sand bar or in shallow water across the river from the barge. As the work progressed it became necessary each day to change the position of the barge and therefore to change the position of the anchor. It was part of the duties of the deceased to change the position of this anchor each day. Accompanied by several fellow employees he would cross the river in a boat and change the position of the anchor and then return in the same boat to the barge.

On the afternoon in question Daigle and the other employees were conveyed across the river. They landed on the banks of the river then waded back into the water where the anchor was located. After moving the anchor to a new position in water about 3 or 4 feet deep, one of the men returned to the shore to get the boat and pick up the others. Before the employee arrived with the boat the three remaining employees decided to swim across the river to the barge. The deceased became exhausted about midway across and drowned before he could be rescued.

The mother and sister of the deceased employee filed suit against the employer to recover compensation, and upon receiving a judgment denying compensation in the twenty-sixth judicial district court, Parish of Bossier, they appealed the case to the Court of Appeal of Louisiana.

In affirming the judgment of the lower court the appeal court said in part:

The custom which had been invariably followed by him and the other employees was to return in the boat, and, instead of following the rule of his employer, which had at least become a rule by custom, he violated that rule and his duty to his employer, when he left a place of safety and went into a place of danger. * * * The courts of this State have held in similar cases that the employee was not performing services arising out of and incidental to his employment, and that an accident occurring under such conditions did not happen in the course of his employer's employment.

The court was also of the opinion that there was no causal connection between the employment and the acts by which the deceased lost his life. The decision of the lower court denying compensation was therefore affirmed.

Upon an appeal to the Louisiana Supreme Court the decision of the appeal court was affirmed and compensation denied upon the ground that the employee caused the accident by his deliberate failure to use an adequate protection, provided for him by his employer, against such an accident. The court, however, considered the accident as having arisen out of and in the course of his employment as the employee was required to cross the river in performing the business for which he was employed. His purpose in crossing the river was to resume his work and it did not matter what method he chose to get across. The court said the injury was received in the course of his employment, and there was a causal connection between the conditions of employment and the resulting injury, but as he deliberately failed to use the boat provided for his safety and protection it was held compensation was properly denied. (*Daigle* v. *Moody* (1932), 144 So. 596.)

WORKMEN'S COMPENSATION—ACCIDENT—DROWNING—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Southern et al.* v. *Morehead Cotton Mills Co. et al., Supreme Court of North Carolina (Jan. 27, 1931), 156 Southeastern Reporter, page 861.*—J. P. Southern met his death by accidental drowning while regularly employed by the Morehead Cotton Mills Co. in the capacity of night watchman. His duties consisted of making the rounds, helping raise and lower the gates to the dam, and in general looking after the mill preperty. On the night of the accident an automoble ran into the mill pond and Southern, who jumped into the pond to assist, was accidentally drowned.

His widow claimed compensation and the North Carolina Industrial Commission, having found that " Southern met with an accident arising out of and in the course of his employment upon the

premises of his employer which resulted in his death", made an award in her favor. This award upon appeal was set aside by the superior court of Forsyth County on the ground that the evidence did not support the finding that the accident arose out of and in the course of the employment. The widow appealed to the North Carolina Supreme Court for review. There was testimony that Southern had jumped into the pond to save the lives of the people in the automobile rather than to assist in removing the car. There was also evidence that it was necessary to the safe running of the machinery in the mill that the gates be down and that the gates could not be dropped until the automobile was removed. After reviewing the record to see whether it contained competent evidence to sustain the award, the court concluded that it did. In reversing the judgment of the lower court the supreme court said in part:

The conduct of Southern undoubtedly leads to the conclusion that he went in the race to get the automobile out and miscalculated the swiftness of the current. He often cleaned out debris in the race before, and his wife said that he stated on one occasion before, "This is my job getting planks and things out of the race." This faithful employee, in performing a harzardous duty, to protect his employer's property and keep the mill running, lost his life by accidental drowning. It was "an injury by accident and arising out of and in the course of the employment." The commission so found, and there was competent and sufficient evidence to support the finding. The deceased belonged to that noble army of workmen, who serve their employers faithfully and not by "eye service", and in attempting to save the property of his employers, accidentally lost his life and left dependent a wife and children. The beneficent purpose of the act was that industry would care for the widow and orphan in such cases as the present.

WORKMEN'S COMPENSATION—ACCIDENT—GOING TO AND FROM WORK—*Union Starch & Refining Co.* v. *Industrial Commission et al., Supreme Court of Illinois (Apr. 23, 1931), 176 Northeastern Reporter, page 303.*—Roe Whittaker was employed by the Union Starch & Refining Co., working from 11 p.m. to 7 a.m. On the morning of the injury he quit work about 10 minutes before 7 o'clock and went to the time office to check out. The time office was a small building, located at the intersection of a public street and the railroad tracks, about 200 feet from the part of the plant in which Whittaker was employed. All the employees were required to enter this building, ring the time clock, and make their exit through a door which opened onto the street.

As Whittaker stood near the door leading to the sidewalk a driver of an automobile lost control of his car, and it ran across the sidewalk, injuring Whittaker and three other persons.

The industrial commission granted Whittaker compensation of $15.26 per week for 28⅞ weeks for temporary incapacity, and additional compensation at the same rate for the further period of 95 weeks, for 50 percent loss of use of the right leg. The circuit court of Madison County, Ill., upon appeal confirmed the decision of the industrial commission, and the case was then carried to the Supreme Court of Illinois for review. The court affirmed the judgment of the lower court and in reply to the employer's contention that Whittaker's accident did not arise out of or in the course of his employment said:

That the employee at the time of the accident must be doing that which he is reasonably required to do within the time of his employment and at a place where he reasonably may be expected to be while discharging the duties of his employment. [Cases cited.] At the time of the accident here Whittaker was at his employer's time office for the purpose of checking or "ringing" out. This his employer required him and all other employees to do. He was thus doing that which he reasonably was required to do and at the place provided for that purpose by his employer.

Under these circumstances we believe the record clearly shows that the injury occurred in the course of, and arose out of the employment. A risk is said to be incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service.

WORKMEN'S COMPENSATION—ACCIDENT—GYPSUM DUST—OCCUPATIONAL DISEASE—INTERPRETATION OF STATUTE—*United States Gypsum Co.* v. *McMichael et al., Supreme Court of Oklahoma (Nov. 25, 1930), 293 Pacific Reporter, page 773.*—On February 8, 1930, the Oklahoma Industrial Commission awarded one Dewey McMichael the sum of $539.50 and directed that additional payments at a rate of $17.31 per week be made by his employer, the United States Gypsum Co. The award was based upon a finding of an accidental personal injury sustained on June 27, 1929, when McMichael was employed in loading box cars with gypsum rock. He claimed that he inhaled an excessive amount of gypsum dust, which resulted in acute bronchitis and prevented him from returning to work. The physician's report diagnosed his case as pneumoconiosis.

The United States Gypsum Co. denied liability on the ground that the injury was due to an occupational condition and not to an accidental injury, and appealed from the award of the industrial commission to the Oklahoma Supreme Court. The family physician testified that McMichael had complained of his lungs prior to June 1929, and that after an examination he had diagnosed the condition as pneumoconiosis, an occupational disease. The employer con-

tended there was no evidence that the employee received an accidental personal injury within the meaning of the Oklahoma compensation law. The court upheld the contention made by the company, saying in part:

The evidence before us does not show an accident at all. The legal result is the question as to whether a disease incident to the occupation of a workman is compensable under our law. The compensation laws of the several States differ in this regard, but Oklahoma's law, as amended by chapter 61, S.L. 1923, makes an accidental personal injury a condition precedent for compensation of a workman engaged in hazardous employment. Such a condition excludes injuries arising exclusively from occupational diseases.

As to whether the breathing of dust necessarily caused by the very work in which the employee was engaged constituted an accident, the court quoted from the case of *Meade-Fiber Co.* v. *Starnes* (147 Tenn. 362, 247 S.W. 989):

We cannot conceive that the breathing of dust, caused to arise necessarily from the very work being performed, has in it any element of accident. The material being moved was in the form of dust. It was contained in sacks. The very nature of the material and its container, and the movement thereof, necessarily, and not accidentally, caused the dust to float in the air, and to be breathed by the workmen. * * * It seems to us that the same reasons which exclude occupational diseases must apply here, and exclude an injury which is produced by the necessities of the occasion, in the absence of any accident entering into the cause of or as producing the particular occasion.

The court concluded that under the law there was nothing in the case to justify a finding of an accidental personal injury. The award was therefore reversed and the claim dismissed. A dissenting opinion was rendered by Mr. Justice Clark.

WORKMEN'S COMPENSATION—ACCIDENT—PNEUMONIA—*Gibson* v. *Frank Kuhn Co. et al., Superior Court of Pennsylvania (July 14, 1932), 161 Atlantic Reporter, page 456.*—In February 1930 James Gibson was employed as a stationary engineer by the Frank Kuhn Co., which operated a meat-packing business. The conditions within the plant were more or less damp at all times. On February 5, 1930, Gibson was working outside repairing the roof of one of the buildings, and while he was thus engaged he got wet. He contracted a cold from this exposure, which developed into pneumonia resulting in his death. The widow petitioned for an award of compensation and the Pennsylvania board rendered an award in her favor. This award was affirmed by the Allegheny County court of common pleas, and the employer and insurance carrier appealed the case to the Superior Court of Pennsylvania.

The question involved upon appeal was whether the death of James Gibson was caused by an accident arising out of and in the course of his employment. In determining what constitutes an accident the court quoted the rule applied in *Jones* v. *P. & R. C. & I. Co.* (285 Pa. 132): "To constitute an accident there must be some untoward occurrence aside from the usual course of events."

The court said there was no element of accident in the employee getting wet by the rain. His employment was that of an engineer and repairman and in the exercise of this employment he was called to expose himself to the elements when performing outside work. Such an injury, the court said, as contracting pneumonia would be likely to follow in the usual course of events and there was nothing untoward or unusual in its occurrence. The court distinguished this situation from that of *Boyle* v. *P. & R. C. & I. Co.* (99 Pa. Super. Ct. 178) in which compensation was awarded, by saying that in the Boyle case "the wetting was the result of the flooding of the mine so that the water covered the gangway to a depth above the rails. Certainly an unusual situation, obviously out of the ordinary."

In conclusion the court said that it was "unable to come to the conclusion that there was any evidence to support the finding that this was an unusual exposure; on the contrary it is such an ordinary situation as any repairman is likely to meet when he does outside work."

The judgment of the lower court was therefore reversed.

WORKMEN'S COMPENSATION—ACCIDENT—RABBIT FEVER—TRAUMATIC INJURY—*Great Atlantic & Pacific Tea Co.* v. *Sexton, Court of Appeals of Kentucky (Feb. 2, 1932), 46 Southwestern Reporter (2d), page 87.*—Dennis Sexton was employed by the Great Atlantic & Pacific Tea Co. in a store of the company located at Hazard, Ky. On December 17, 1929, while engaged in preparing a shipment of rabbits, he contracted a disease technically known as "tularaemia", but commonly called "rabbit fever."

He brought action against the company in the Perry County Circuit Court claiming that the company was negligent, since it did not warn him that the rabbits were infected. The company denied the allegation. It stated that an agreement had been reached between the employee and the company whereby the sum of $65 was agreed upon and accepted in full satisfaction of all claims growing out of the injuries; that it was operating under the workmen's compensation law of Kentucky at the time when Sexton sustained his alleged injuries; and that he, being an employee of the company, had accepted the provisions of that act.

The employee claimed that the sum of $65 was paid to him not as recompense for his injuries but as wages, and that his signature to any papers purporting to be a settlement of his claim for injuries was procured through fraud and misrepresentation. On a final hearing in the circuit court of Perry County a judgment of $5,000 was returned by a jury. The company thereupon appealed the case to the Court of Appeals of Kentucky.

From the facts in the case it appeared that at the time the employee was dressing and preparing the rabbits for shipment he had a small abrasion or scratch on one of his fingers. In the course of the testimony it was brought out that he had mentioned the cut on his finger to the manager of the meat market conducted by the company, stating that he was afraid of the rabbit fever. He was, however, directed by the manager to proceed and dress the rabbits for shipment. He was subsequently stricken, and the symptoms all pointed to the disease technically known as tularaemia. The main question for determination by the court of appeals was whether the alleged injury was compensable under the workmen's compensation act of Kentucky. Section 4880 of the Kentucky statutes provides in part as follows:

> This act * * * shall affect the liability of the employers subject thereto to their employees for personal injuries sustained by the employee by accident arising out of and in the course of his employment, or for death resulting from such accidental injury: *Provided, however*, That personal injury by accident as herein defined shall not include diseases except where the disease is the natural and direct result of a traumatic injury by accident.

The court pointed out that if the injury came within the exception, and the disease was the natural and direct result of a traumatic injury by accident, the lower court was without jurisdiction to hear the matter insofar as the company was concerned, but in the event the injury was not so included the employee was pursuing a proper remedy. In deciding the case, the court cited several cases and also a definition determining the exact meaning of the word "accident." According to Webster, an accident is defined as "an event that takes place without one's foresight or expectation. An undesigned, sudden, and unexpected event * * * happening by chance or unexpectedly taking place not according to the usual course of things." The court thought that, according to this definition, the injury of the employee was due to an accident and was within the meaning of the section of the compensation law under consideration.

The question of whether the infection and disease which the employee contracted was the natural and direct result of a traumatic injury under the terms of the workmen's compensation act was

then taken up. It was the intention of the legislature, the court pointed out, in enacting the workmen's compensation law to exclude from its provisions what is known as industrial or occupational diseases and all other diseases where the cause may not be traceable to a traumatic injury. Several cases were cited by the court in which the word "trauma" was defined, and it was shown that such a condition was an internal injury resulting from an external force, or, as defined by Webster, "a wound or injury directly produced by causes external to the body." The court of appeals, in endeavoring to seek precedents for the case, was obliged to resort to cases decided in other jurisdictions, particularly in Pennsylvania and New York. None of the cases, however, involved the disease of tularaemia. In the case under consideration the court said that the injuries of the employee—

May be traced directly to his coming in contract with meats laden with tularaemia germs. The time, the place, and the cause of the injury are determinable with reasonable certainty. As an immediate result of the contact, symptoms peculiar to the disease manifested themselves. It was not a gradual development arising out of natural dangers incident to the employment, but was sudden, unexpected, and unusual, without any of the distinctive features of an occupational disease.

The court stated that it was in agreement with the general trend of decisions in other jurisdictions in cases of ambiguity in the language of the compensation law, and believed that any doubtful meaning in the law should be liberally construed in favor of the employee. To do so would be to give effect to the humane and beneficent purposes intended in the enactment of workmen's compensation laws. The court therefore concluded that—

With this fixed rule and policy of the court in mind, and after a careful consideration of the provisions of the act and the authorities bearing on the question, we have reached the conclusion that appellee's infection or disease is the natural and direct result of traumatic injury by accident sustained while in the course of his employment.

The judgment of $5,000 was therefore reversed and the case remanded for decision under the workmen's compensation act.

WORKMEN'S COMPENSATION—ACCIDENT—ROBBERY—GOING TO AND FROM WORK—*Porter* v. *Stoll Oil Refining Co. et al., Court of Appeals of Kentucky (Feb. 12, 1932), 46 Southwestern Reporter (2d), page 510.*—Herbert R. Porter was employed by the Stoll Oil Refining Co. as manager of a filling station in Louisville, Ky. He worked at the filling station on alternate days. The days on which he was away from the filling station he was expected, but not required, to

sell coupon books for his employer, receiving a commission on his sales.

On the night of January 8, 1928, while going home from the filling station, Porter was held up and mortally wounded. He died 2 days later.

Mrs. Herbert R. Porter, widow of the employee, claimed compensation, under the Kentucky workmen's compensation law, but it was denied by the compensation board. The circuit court affirmed the order of the compensation board and the widow appealed the case to the Court of Appeals of Kentucky.

In the appeal the oil company contended that the evidence of Mrs. Porter and that of a police officer who talked with the injured man immediately after the shooting was incompetent under certain rules of evidence, but the court said:

> Conceding the competency of this evidence for present purposes, and without deciding the question, we have concluded that the evidence fails to show that Porter's death resulted from an accident arising out of and in the course of his employment. The shooting occurred after Porter had ceased work at the filling station for the day and at a place at least four squares from his employer's premises and while he was walking home. He was carrying no money belonging to his employer, but the receipts of the day had been locked in a safe. * * * It is true that Porter was carrying on his person two coupon books belonging to his employer, and that he was dressed in a uniform indicating the nature of his employment. * * * It was not his custom to work after his regular hours at the station selling the coupon books, but he spent the following day at this work, beginning about 8:30 a.m.

It was held, therefore, that the facts did not make the accident one "in the course of employment", and that granting a recovery under the facts of this case would be contrary to the language and the spirit of the workmen's compensation law. The order of the compensation board denying compensation was therefore affirmed.

WORKMEN'S COMPENSATION—ACCIDENT—SMOKE AND GASES—OCCUPATIONAL DISEASE—*Brewer* v. *Veedersburg Paver Co., Appellate Court of Indiana (June 25, 1931), 177 Northeastern Reporter, page 74.*—Pearlie L. Brewer had been employed as a laborer in the brick yard and kiln conducted by the Veedersburg Paver Co. for 12 or 14 years. For the past year Brewer had been working in a part of the factory where the smoke and gas was blown from the burning kiln into the factory.

On Monday, April 14, 1930, while in the course of his duties he had difficulty in breathing but continued to work the remainder of the day. He also continued to work the rest of the week until clos-

ing time the following Friday. That night he called a doctor who gave him treatments at that time and several times afterward. He did not sufficiently recover so that he could return to work, and filed a claim with the industrial board. After hearing the evidence the board found that it failed to " sustain the plaintiff's claim that the alleged injury was the result of an accident arising out of and in the course of said employment " and therefore denied compensation. Brewer thereupon appealed the case to the Appellate Court of Indiana, contending that the award of the board was contrary to the law and the evidence.

The doctor who attended Brewer testified that the cause of Brewer's trouble " was that he was not getting normal inhalation ", and that the lung cells had " thickened to a point where they do not admit of the normal amount of air." The question involved on appeal was whether such a disability constituted an injury within the provisions of section 73 of the workmen's compensation act, which provides that " 'injury ' and ' personal injury ' shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form except as it shall result from the injury."

The court proceeded to compare the provision of the Indiana workmen's compensation act with the provisions of the laws in other States and concluded that " in order for a disease to be compensable " under the Indiana law, " it must arise ' by accident '; that is, it must have been caused by some fortuitous, unusual, untoward, not foreseen, not designed, not anticipated event." Following this rule the court held that the injury to Brewer did not come within this definition. It said:

> We do not believe that the appellant's sickness is compensable under our law. He had worked for appellee under conditions similar to the conditions testified to for almost a year, and had worked in appellee's brickyard 12 or 14 years. The smoke and gas were visible to his sight on previous days as well as on the day of his injury. * * * The very nature of the work being done in the brick factory necessarily and not accidentally caused the air to become smoke and gas laden and to enter the appellant's body in the course of natural processes. The evidence fully sustains the finding and order of the industrial board.

WORKMEN'S COMPENSATION — ACCIDENT — SUICIDE — EVIDENCE — *Israel* v. *Brisgol Bros. et al., Superior Court of Pennsylvania (Mar. 5, 1932), 159 Atlantic Reporter, page 51.*—The Superior Court of Pennsylvania sustained the decision of the workmen's compensation board refusing an award of compensation, holding that a deceased employee intentionally drank certain poisons.

This case was a proceeding under the workmen's compensation law of Pennsylvania by the widow of a deceased employee who worked for a drug company in Philadelphia. Israel had been employed as a porter and messenger by Brisgol Bros. since June 1920. He cleaned the store, moved supplies, did general errands, and made deliveries to customers, and hence was entirely familiar with the different drugs.

In the afternoon of June 1, 1929, Israel was found lying on the floor of the basement, apparently asleep. Later the employer procured a physician, who "found that Israel appeared to be in a partially asphyxiated condition suffering from the corrosive effects of some acid." He was carried to a hospital, where, before he died, he became sufficiently conscious to indicate to the attendants that he had taken sulphuric acid and nitric acid.

Upon learning that the deceased employee, who had recently had his tonsils removed, was in the habit of going to the basement to gargle his throat, the referee of the workmen's compensation board held that death was accidental; that Israel made the mistake of taking the acids instead of a simple antiseptic solution. The workmen's compensation board reversed the referee's decision, and held that no compensation should be awarded because it was a case of suicide.

The lower court affirmed the decision of the compensation board, and the case was appealed to the Superior Court of Pennsylvania. The only question before the superior court was whether there was sufficient evidence to sustain the conclusion of the board and the lower court.

The superior court held that the facts in the case were not in dispute. It was shown that the deceased was entirely familiar with the location of the drugs; that his wife was in ill health; that he had been sick and "had an unfounded fear that he might lose his position." These facts and the circumstances attending his death would lead to the conclusion that the man committed suicide. The court also said if the man had taken the acid by mistake, he would have been aware of its character as soon as it touched his lips.

The superior court affirmed the decision of the compensation board and the lower court, holding that there was ample competent evidence to support their conclusions.

WORKMEN'S COMPENSATION—ACCIDENT—TICK BITE—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Reinoehl* v. *Hamacher Pole & Lumber Co. et al., Supreme Court of Idaho (Dec. 8, 1931), 6 Pacific Reporter (2d), page 861.*—In this case, Mrs. R. Reinoehl brought action under the workmen's compensation law of Idaho for the

death of James Edward Pierce, who was employed as a "swamper" in a lumber camp. Pierce's duties kept him in the woods all day, but he returned each night to the camp.

The evidence showed that wood ticks were plentiful in the woods. Upon returning to camp each evening the men got rid of the ticks. Since wood ticks do not stay in a clearing or camp, the men were not again troubled by them until work was begun the next morning.

On April 3, 1930, Pierce complained of being sick, but continued to work until the night of April 5, and on the morning of April 9 he died of Rocky Mountain spotted fever, a disease caused by a tick bite. The doctor testified that Pierce had many insect bites on his body that conformed to those produced by ticks, and that, in his opinion, they were tick bites.

The industrial accident board found the facts substantially as given above, but that Pierce's death was not "the result of a personal injury by accident arising out of and in the course of his employment."

On appeal to the district court, it found, in addition to the findings of the board, "that said spotted fever was the result of a tick bite or bites received by said James Edward Pierce in the course of his employment * * *." The district court further found—

> That there remains but one other question, and that is whether a tick bite can be termed an accident. Taking the ordinary meaning of the word "accident" we are unable to find that a "tick bite" is an accident.

It therefore sustained the board's orders dismissing the proceeding. The case was then appealed to the Supreme Court of Idaho. This court said:

> Two questions are presented by this appeal: (1) Is there sufficient evidence to justify the finding of the district judge that tick bite or bites were "received by said James Edward Pierce in the course of his employment, and while employed as a 'swamper', as set forth in paragraph 3 of the findings"? and, if the evidence is sufficient in that particular, (2) is a tick bite, from which Rocky Mountain spotted fever ensues, an "accident" within the meaning of the workmen's compensation act?

The first question was promptly answered in the affirmative, but the second question was said to be one of first impression in this court, and it was said that the court could not find a record of any case involving tick bite and resulting in Rocky Mountain spotted fever being settled in any appellate court.

After reviewing numerous cases in which the word "accident" was defined, the court said:

> The tick bite, or bites, the injury, or injuries, that caused the Rocky Mountain spotted fever, resulting in the workman's death in the

instant case, was therefore an " accident " since it was in the ordinary and popular sense of the term, an unlooked-for mishap which was neither expected nor designed. The fact that the accidental injury results in a disease does not alter the nature or the consequential results of such injury. * * * We therefore hold that deceased received " a personal injury by accident arising out of and in the course of his employment."

The judgment of the district court and the industrial accident board was reversed and the case was returned to the district court with instructions to order the industrial accident board to award compensation.

WORKMEN'S COMPENSATION—ACCIDENTAL DEATH—HEAT PROSTRATION—EVIDENCE—*Gerst* v. *Smith-Faris Co. et al., Superior Court of Pennsylvania (Oct. 10, 1932), 162 Atlantic Reporter, page 490.*—Albert H. Gerst was employed by the Smith-Faris Co. as an asbestos coverer. On the 26th, 27th, and 28th of December 1929 he was employed over some boiler furnaces, and because of the extreme heat and the carbon-monoxide fumes, he and three other men on the job were " distressed, fatigued, and sick." Every 15 minutes " he would have to quit and come down and get fresh air and water, and after he cooled off he would then return to work for another 10 or 15 minutes."

After working under these conditions for 2½ days Gerst was seen starting home; he seemed " wobbly " and just about able to walk. His landlady talked with him on his arrival at his rooming house at 2 p.m., and she did not notice anything unusual about him. However, her husband found Gerst ill and apparently intoxicated at 6 p.m. and 9 p.m., and at 10 a.m. the next day Gerst and Swan, who had worked on the same job under conditions identical to those under which Gerst worked, were found dead in their adjoining rooms.

There was evidence to show that the two rooms occupied by Gerst and Swan contained five windows, consequently plenty of ventilation; that the landlord had turned out a radiant fire gas stove at 9 p.m. December 28; and that it was burning when the men were found dead but there was no " smell of fumes coming from the stove."

The referee found—

As a fact that Albert H. Gerst, the decedent, while furthering the business and affairs of the defendant on December 26, 27, and 28, 1929, took into his vascular system (blood stream) sufficient carbon-monoxide gas to cause sufficient pathology in the organs of his body and his brain that he died on December 29, 1929, and that the primary cause of death was the inhalation of carbon-monoxide gas while working above the boiler furnaces for a period of 2½ days, which is not an occupational disease, but an injury by accident, which

occurred at a particular time and while the decedent was in the course of his employment with the defendant.

The compensation board affirmed the findings of the referee allowing compensation and also added that the heat exhaustion suffered by Gerst in the performance of his duty "materially contributed as a cause of his death."

The court of common pleas dismissed the appeal of the employer and insurance carrier, and they appealed to the Superior Court of Pennsylvania. This court said that "if the findings are based on any legally competent evidence, or on an inference fairly deducible therefrom, the award must be sustained though we might differ from the conclusions thus reached." After saying that the whole case turned on the proximate cause of the death of Gerst, the exposure to the heat and the carbon-monoxide gas on the premises of the Smith-Faris Co. or the exposure to the fumes of the radiant gas heater, the court reviewed all the evidence in the case. The testimony of the police officers, who were called when the two men were found dead, differed materially from that of the landlady in regard to the temperature and fumes in the rooms and the lack of ventilation.

The court concluded that "in determining that the decedents inhaled carbon monoxide in the course of their employment, the referee did not rely on contradictory expert opinions, but did consider the symptoms exhibited by the men while at work as indicative of the place and time where the gas was inhaled."

There was no dispute as to the terrific heat at the place where the decedents were working, and death from heat exhaustion is an accidental injury within the meaning of the compensation law of Pennsylvania.

The Superior Court of Pennsylvania concluded that the evidence in the case warranted the referee's finding, and the judgment in favor of the claimant was affirmed.

WORKMEN'S COMPENSATION—ACCIDENTAL INJURY—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—FREEZING—*Belanger's Case, Supreme Judicial Court of Massachusetts (Jan. 30, 1931), 174 Northeastern Reporter, page 497.*—One Belanger was employed by the Perryville Woolen Co. as a millwright, machinist, and engineer. He was last seen alive about 2 p.m. February 16, 1930. His body was found lying on a loaded wheelbarrow near a coal pit. He was dead and parts of his body were frozen. The right side of his face was against the handle of the wheelbarrow, and there was a mark on it which might have been made by striking it against the handle. The ground was slippery and the weather exceedingly cold. The

single member of the industrial commission found that the employee slipped, struck his face on the handle of the wheelbarrow, and was sufficiently stunned for his body to become frozen before he regained consciousness. The single member also found that the deceased employee partially supported his married daughter, paying the rent and giving her $30 per week, and awarded her compensation at the rate of $6 per week for a period of 500 weeks. The industrial accident board affirmed and adopted the decision of the single member and also allowed counsel fees of $50 to be paid by the insurer. A decree was entered in the superior court, Suffolk County, Mass., in accordance with above findings, and the insurer appealed the case to the Supreme Judicial Court of Massachusetts.

The insurer contended (1) that the cause of the employee's death was a matter of conjecture or speculation, as it could be inferred that a heart attack was the cause of employee's fall and the striking of his head, and his subsequent death by freezing; and (2) that as a matter of law the claimant was not a dependent of the deceased employee.

Replying to these contentions, the court said it was not necessary the claimant should prove the precise cause of the death, but that he must show that the cause of the death occurred in the course of the employment. Continuing, the court said that—

> Upon the entire evidence and the reasonable inferences to be drawn therefrom we are of opinion that the cause of the employee's death does not rest merely upon surmise and conjecture but that a finding was warranted that the injury and death arose out of and in the course of the employment. * * *

As the court found no error in the finding that the daughter was partially dependent, the decree of the superior court was therefore affirmed.

The Supreme Court of Kansas held in a case that an employee who had frozen his toes did not receive an accident within the meaning of the State workmen's compensation law. (*Wright* v. *Keith* (1932), 15 Pac. (2d) 429.)

WORKMEN'S COMPENSATION—ACT OF PERSONAL CONVENIENCE—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Van Devander* v. *West Side M.E. Church, Supreme Court of New Jersey (June 2, 1932), 160 Atlantic Reporter, page 763.*—A claim for workmen's compensation was made by the minister of the West Side Methodist Episcopal Church in Jersey City, N.J. The Workmen's Compensation Bureau of New Jersey awarded compensation for injuries alleged to have been sustained as the result of an accident arising out of and in the course of his employment.

An appeal from the bureau's decision was made to the Supreme Court of New Jersey. It appeared that the minister was injured on November 11, 1930, while removing a heavy barrel from the cellar of the parsonage. The question presented to the supreme court was whether or not the accident was one arising out of and in the course of the employment. The court reviewed the contract of employment and the method by which the minister was to carry on his work in the parsonage. He was granted a stated salary, and out of this amount the sum of $700 was deducted, presumably for rent, etc. As no janitor service was specified in the contract, he was required to do all work about the house, including the care of the furnace. According to his own statement he was required to keep the house in condition for use of the members of his parish.

The Supreme Court of New Jersey set aside the award of the compensation bureau and held that it was an error to hold that the accident arose out of the employment. The court reasoned that the claimant was performing a household duty for his own benefit, which he would have been required to perform had he lived in a house owned by himself. The court cited the case of *Bryant* v. *Fissell* (86 Atl. 458), in which the workmen's compensation act was said to cover only risks which are within the ordinary scope of the particular employment in which the workman is engaged. The court was of the opinion that the duty which the claimant was performing when injured was not incidental to his office. The court also cited a New York State case (*Lauterbach* v. *Jarett*, 178 N.Y. Supp. 480) in which a janitress was injured by the falling of plaster while in her own apartment, which was furnished to her. In this case the court held that in no sense could it be said that she was janitress of her own apartment merely because the accident happened in the building in which she was employed; that she was acting in a dual capacity, and that her personal relations to her family who were living in one of the apartments were distinct and separate from her relations to her employers.

The New Jersey Supreme Court was of the opinion that the reasoning in the New York case was sound, and that the minister in the case under consideration was at the time of the accident performing an act personal to himself and not connected with his employment. It therefore set aside the judgment of the Workmen's Compensation Bureau of New Jersey.

WORKMEN'S COMPENSATION—ACT OF GOD—POWERS OF COMMISSION—FINDING OF FACT—*Scott County School Board* v. *Carter*, *Supreme Court of Appeals of Virginia (June 18, 1931), 159 Southeastern Reporter, page 115.*—On May 2, 1929, Miss Ava Carter was

fatally injured when a cyclone completely demolished the building in which she was teaching in Rye Cove, Scott County, Va. The mother of the deceased filed claims under the Virginia workmen's compensation act and was found to be partially dependent upon her daughter for support. An award of $6.25 per week for 300 weeks was made by the commission, having found that this injury arose out of and in the course of employment, and that the schoolhouse was located at a point where the wind blew more continually than at other points, and "located as to be exposed to and more susceptible to the hazards of storms."

The school board objected to this finding of fact by the commission and appealed to the Supreme Court of Appeals of Virginia. The court cited numerous authorities holding the employee, or his dependent, entitled to compensation when injured in a cyclone or some other "act of God", if in some way the hazard was increased by reason of the employment. In regard to the above finding of the commission the court said:

> These are declared facts to which we must give credence. These being the conditions which obtained at the time, we are bound to say that the employment subjected the unfortunate young woman to greater exposure than were those persons generally in that locality. In view of this and the fact that the statute should be construed liberally in favor of the complainant, and the further fact that its intention is to secure employees and their dependents against becoming objects of charity, we are constrained to affirm the order and judgment of the commission.

WORKMEN'S COMPENSATION—ADDED PERIL VOLUNTARILY ASSUMED—SCOPE OF EMPLOYMENT—*Eifler's Case, Supreme Judicial Court of Massachusetts (June 5, 1931), 176 Northeastern Reporter, page 529.*—The Supreme Judicial Court of Massachusetts held that an injury does not "arise out of employment" within the compensation act, when the risk is not one fairly contemplated by the agreement of employment.

Catherine J. Eifler filed a petition with the Industrial Accident Board of Massachusetts to recover compensation for the death of Henry Eifler, her husband. The deceased employee, while working as a garbage collector, was riding in a truck operated by the employer's chauffeur. While the truck was proceeding at the rate of 3½ miles an hour, the employee attempted to alight and in so doing fell and was run over by the truck, sustaining an injury which resulted in his death. A hearing was held before a single member of the board, who found that "the employee did not fall from the truck while waiting for it to come to a stop, but was in the act of alighting

from it when it was in motion, and while doing so he fell and was run over." The industrial accident board granted an award, and the Suffolk County Superior Court rendered a decree in favor of the claimant. The insurer thereupon appealed the case to the Supreme Judicial Court of Massachusetts. The question involved on appeal was whether the injury arose out of the employment or was incidental to it. The insurer contended that, as the risk was not contemplated by the contract of employment, it did not arise out of the employment.

At the trial the operator of the truck testified that his "custom was to come to a dead stop and let the men off. * * * He was going to stop on this particular morning; he had the foot brake partially on and the emergency brake partially on."

The evidence and the finding of the single member was reviewed by the court and a decision rendered in favor of the insurance carrier. The court said:

> If an employee voluntarily incurs a risk not contemplated by his contract of employment, or incidental to it, he is not within the protection of the workmen's compensation act (Gen.L., ch. 152 as amended). The purpose of the act is to compensate employees for injuries arising out of and in the course of their employment. But an injury does not arise out of an employment when the risk is one not fairly contemplated by the agreement of employment. If an employee goes outside the scope of his employment and incurs a danger of his own choosing and one altogether outside of any reasonable exercise of his employment, he cannot recover. There are numerous cases which uphold this principle. [Cases cited.] In *Wither's case* (252 Mass. 415, 147 N.E. 831), the employee was injured in attempting to board a moving railroad train. It was held that he could not recover. In that case it was said (252 Mass., p. 418, 147 N.E. 832): "The claimant voluntarily incurred an added peril not within the contemplation of his contract of service." On the findings of the single member, in the case at bar, which were adopted by the industrial accident board, the employee "attempted to alight from the truck"; "he was in the act of alighting." In doing this he voluntarily assumed an added peril which was no part of his employment.

WORKMEN'S COMPENSATION—ALIEN BENEFICIARIES, NONRESIDENT—*Hansen* v. *Corson Construction Corporation et al., New York Supreme Court, Appellate Division (Oct. 9, 1931), 253 New York Supplement, page 96.*—Jens Hansen was injured and died on July 25, 1929, while in the employ of the Corson Construction Corporation. His widow, Louise Hansen, filed claim for compensation and received an award from the State industrial board. The company and its insurance carrier filed application with the board to commute the award and upon a denial of the application, appeal was taken to the Appellate Division of the New York Supreme Court.

The sole question for decision by the court was whether the widow, Louise Hansen, was an alien, as the application to have the award commuted was based upon section 17 of the New York workmen's compensation law, which provides that—

The commission may, at its option, or upon the application of the insurance carrier, shall, commute all future installments of compensation to be paid to such aliens, by paying or causing to be paid to them one half of the commuted amount of such future installments of compensation as determined by the commission.

From the evidence it appeared that Jens Hansen became a citizen of the United States in April 1904. In August 1913 he married Louise Hansen, who was at that time a citizen of Norway. Two children were born of this union, one in New York City in 1916, and one in Onsoy, Norway, in 1918. In 1916 Hansen and his wife returned to Norway and she continued to remain in that country. Hansen returned to America and resided in the United States until his death.

After reviewing the facts in the case, the court cited the United States statutes pertaining to citizenship.

By section 10 of title 8 of the United States Code (8 U.S.C.A., sec. 10), the former statute as continued in force for the purposes of this case, provides that " any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." It also provides that " any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within 1 year after the termination of such marital relation.

The company referred to the terms of a treaty between the United States and Norway and Sweden, which provided that naturalized citizens renewing their residence in Norway or Sweden without the intent to return to America shall be held to have renounced their American citizenship. Section 17, title 8, of the United States Code was also cited.

When any naturalized citizen shall have resided for 2 years in the foreign State from which he came, or for 5 years in any other foreign State it shall be presumed he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years. Such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe.

The court held that the above section of the United States Code and the treaty between the United States and Norway and Sweden applied only to "naturalized citizens", and that the claimant, Louise Hansen, did not come within that class. It was therefore necessary to show whether she had failed to register before a United States consul, according to the provisions of section 10 of title 8 of the United States Code.

Having failed to show that she had appeared before a consul, the court held the company had "failed to meet the burden of establishing that the said widow is an alien." The decision of the industrial board was therefore affirmed and the appeal dismissed.

WORKMEN'S COMPENSATION—ASSIGNMENT OF CLAIM—REDUCED TO JUDGMENT—*Prime* v. *Dunaway et al., Supreme Court of Tennessee (June 4, 1932), 50 Southwestern Reporter (2d), page 223.*—The sole question involved in this suit by Robert Prime against Joe Dunaway and others was "whether or not a claim for compensation is assignable after it has been reduced to judgment." The chancery court, Marion County, Tenn., held that after a claim was reduced to judgment the prohibition against assignment, contained in section 18 of the Tennessee compensation act, no longer applied. Following this decision the case was appealed to the Supreme Court of Tennessee.

Section 18 of the Tennessee workmen's compensation act (Pub. Acts, 1919, ch. 123) provides that "no claim for compensation under this act shall be assignable, and all compensation and claims therefor shall be exempt from claims of creditors." It was contended that the provision applied to a claim even though it had been reduced to judgment. In support of this contention Mr. Justice Cook, speaking for the court in the case of *Gregg* v. *New Careyville Coal Co.* (31 S.W. (2d) 693), was quoted as follows:

> The compensation act is designed to relieve society of an economic burden through its provisions for the injured employee and those dependent upon him, and section 18, above quoted, was intended to prevent diversion of the compensation to objects beyond the purposes of the act, and so the employee cannot defeat the objects of the act by assigning his claim for compensation to third persons so as to give such persons a right of action against the employer, nor could he assign the claim or any portion of it even to his employer in payment of antecedent debts.

Applying this doctrine to the present case the court said:

> The State and society has an interest, and the safeguards against assignment, and the provisions for installment payments, and for the placing of the fund, when fixed by the award at its present value, on deposit with an approved bank in trust, as well as the provisions for exemption from the claims of creditors, all evince an intent to insure

application of the award to the necessities of the injured employee, or his dependents, as a substitute for wages and as a protection against want. Another recognized object is the preventing of a disabled and dependent class from becoming a public charge.

These considerations suggest a liberal construction of the phrase "claim for compensation", as used in the first line of section 18. We think the language, "No claim for compensation under this act", should be taken to mean no claim for compensation arising under or based on the provisions of this act shall be assignable. This would cover the claim for compensation in every stage before actual payment of the award.

Further evidence supporting the view that a judgment is still a "claim" under the compensation act was also found in the fact that judgments in compensation cases differ from ordinary judgments in that they "lack that finality ordinarily a characteristic of judgments, being subject to review and modification, and even of complete suspension of liability on a proper showing."

The court found no reason why the legislature could not protect the claimant from assignment of the claim both before and after the judgment was rendered, and the mere fact that judgments are ordinarily assignable should have no weight in determining the case.

The judgment of the lower court allowing the assignment of the claim was therefore reversed.

WORKMEN'S COMPENSATION—ATTORNEY'S FEES—CONSTITUTIONALITY OF LAW—*Ahmed's Case and Difelici's Case, Supreme Judicial Court of Massachusetts (Jan. 30, 1932), 179 Northeastern Reporter, page 684.*—The Supreme Judicial Court of Massachusetts filed an opinion on January 30, 1932, upholding the constitutionality of an act of the legislature passed in 1930, which provided for the assessment of costs, including reasonable attorney's fees, against the insurer if a claim for review was made and lost.

There was no controversy that either of the employees received injuries "arising out of and in the course of the employment." It was admitted that Ahmed and Difelici received injuries, and an award of compensation was subsequently made by a member of the industrial accident board. The insurer in both cases claimed a review.

The Massachusetts workmen's compensation law provides that a hearing must be first held before a single member, who makes a finding, and if either party is dissatisfied with the decree there may be a review before a reviewing board of from three to five members. The law further provides that the reviewing board has the power to revise the finding of both the facts and the law, and that either party as of right may claim a review. In the case under consideration the re-

viewing board affirmed and adopted the findings of the single member.

By the provisions of an act of 1930, assessment of cost, including reasonable attorney's fees, is made against an insurer if a claim for review is made and subsequently lost. There is no provision, however, if the employee should claim a review and loses.

According to the amended act of 1930, costs were assessed for the expenses of the hearing on review. Upon appeal to the superior court a decree in conformity with the decision of the reviewing board was entered. The insurer thereupon appealed to the State supreme judicial court. The main question under consideration in the high court of the State was the constitutionality of the statute which provided for the payment of costs by the party appealing the decree. Chapter 208 of the Acts of 1930, which is an amendatory act of chapter 152, section 10, of the General Laws of 1921, provides as follows:

> If a claim for a review is so filed by the insurer in any case and the board by its decision orders the insurer to make, or to continue, payments to the injured employee, the cost to the injured employee of such review, including therein reasonable counsel fees, shall be determined by the board and shall be paid by the insurer.

The court reviewed the provisions of the workmen's compensation act and stated that it was an elective system of compensation insurance—the act was compulsory upon nobody. The court said that before the act is operative both the employer and the employee must be bound by its terms. It is entirely optional, the court said, with any insurance company whether it shall insure an employer. However, whenever the employer, employee, and insurer have voluntarily come within the provisions of the act, the court said "a status is established upon which the terms of the workmen's compensation act become operative." The court also reviewed the history of the compensation act and stated that it was "a humanitarian measure enacted because of a belief that previous remedies had failed to give the adequate relief to employees for personal injuries arising out of their employment commensurate with risks demanded by modern conditions." Continuing, the court said that the workmen's compensation act is regarded as falling within the category of regulations enacted under the police power of the States and it has been held in many cases to violate no provision of either the State or the United States Constitution with respect to either employer or employee. The act, Mr. Chief Justice Rugg stated, "creates rights and remedies and procedure all its own, not previously known to the common or statutory law."

"It is against this background of history and design of the workmen's compensation act that the statute here assailed", the

court said, "must be interpreted and its constitutionality determined." The power to award costs in this case, as pointed out by the court, does not relate to frivolous appeals, for such appeals have existed ever since the original enactment of the workmen's compensation law (ch. 152, sec. 14, Gen.L. 1921), a section left unaffected by the amended act of 1930 (ch. 208). The amended act applies to appeals only by the insurer. It has nothing to do with appeals by employees and no similar provision exists as to such appeals; therefore, the court said, it related solely to the costs "to the employee of the review, in which is expressly included reasonable counsel fees."

The court reached the conclusion that the statute "according to its fair construction affords something in the nature of court costs as reimbursement for actual expense incurred by the employee and not as a penalty upon the insurer for seeking review of the decision of the board member."

Against the objection raised as to the validity of the statute as contrary to articles 1, 10, and 11, of the State constitution, and to article 14 of the United States Constitution, the court first considered its relation to the State constitution, and said that—

> It is plain that the statute provides for costs in favor of the employee, if he prevails before the reviewing board, to be paid to him by the insurer, and does not authorize the payment of costs in favor of the insurer, if it prevails. To that extent the statute is unequal in its operation. It prefers the employee to the insurer in respect to costs. In that respect employee and insurer are not on an equal footing.
>
> The statute here assailed makes a valid classification. It applies only to employees injured under the workmen's compensation act, an act which itself constitutes classification not open to successful attack. It affects adversely only the insurers under that act on claims for review taken by them. Laws applicable to insurance corporations alone are valid in general as to classification. (Opinion of the Justices, 251 Mass. 569, 594, 607–615, 147 N.E. 681, and cases there reviewed.) Liability imposed by the statute may be regarded as assumed and acquiesced in by the insurer by undertaking and continuing insurance. (*Sioux County* v. *National Surety Co.*, 276 U.S. 238, 242, 48 S.Ct. 239.) As already pointed out, the underwriting of risks of this nature is wholly voluntary on the part of the insurer. The statute does not operate oppressively or in an arbitrary or unjust manner. It affords costs as defined to injured employees who have prevailed at a hearing before the board member, who by act of the insurer have been obliged to prosecute their claims before the reviewing board and who also prevail to the extent of recovering some compensation. One aim of the workmen's compensation act is that there be speedy ascertainment and payment of the amount due to an injured employee. The employee in the circumstances prescribed by said chapter 208 is at least in misfortune, because he has received personal injuries. He may be presumed commonly to be

somewhat needy. He is pitted against the insurer, who, from the nature of its business, has every facility for presenting its contentions before the reviewing board. Said chapter 208 enlarges to a comparatively small extent the beneficent design of the workmen's compensation act already described. So far as the imposition of these costs may tend to discourage improvident claims for review by insurers, it promotes that design.

The statute does not contravene in any particular the principles as to equality before the law on which rests the decision in *Bogni* v. *Perotti*, 224 Mass. 152, and which have been frequently followed. It is supported to some extent by *Sawyer* v. *Commonwealth*, 182 Mass. 245, and *Fairbanks* v. *Commonwealth*, 183 Mass. 373, where in the assessment of damages not required by eminent domain but granted by statute appeal to a jury was allowed to the Commonwealth and denied to the property owner. The statute does not violate our sense of fair play or equality before the law.

The court reached the conclusion that the statute did not violate the provisions of the State constitution. For the same reasons it was stated that the statute violated no rights secured by the fourteenth amendment to the United States Constitution.

The court reviewed other decisions, one by the United States Supreme Court in the case of *Chicago & North Western Railway* v. *Nye, Schneider Fowler Co.*, 260 U.S. 35, and also the case of *Missouri, Kansas & Texas Railway Co.* v. *Cade*, 233 U.S. 642, and said that "the principles thus declared are to be applied to the statute here in question with respect to the facts disclosed." Numerous other citations, in which statutes at least as questionable as the amended act of 1930 have been upheld, were made by the court.

In concluding the opinion, Mr. Chief Justice Rugg stated:

The statutes under review in all these decisions and especially in those of the Supreme Court of the United States go further than the one here assailed. In those statutes the inequality as to recovery of attorney's fees and other impositions upon one party and not upon the other applied to proceedings in courts where it could be strongly argued there ought to be absolute equality. That argument has prevailed in several States where statutes of similar nature have been denied enforcement. It is not necessary to review or analyze those decisions because we regard it as plain that the decisions of the Supreme Court of the United States already discussed or cited uphold the validity of said chapter 208 against all contentions founded on the fourteenth amendment. The costs recoverable under that statute are moderate in amount, are not in the nature of a penalty and are no more than reasonably adequate to accomplish permissible objects, such as discouragement of unnecessary claims for review by insurers and something toward reimbursement of necessary expenses of an unfortunate employee ultimately prevailing to some extent.

The argument of the insurer has been directed chiefly to the contention that the operation of the statute here asailed is to produce

inequality before the law. Our conclusion is that it does not violate that constitutional guaranty. The argument that it deprives the insurer of its property without due process of law has not been separated from the argument as to inequality before the law and is not definite and direct. We are unable to discern any invalidity on that ground. There is nothing in the statute violative of the articles in our Declaration of Rights to which reference has been made. This decision is confined to the points argued.

The decree of the superior court was therefore affirmed.

The Supreme Judicial Court of Massachusetts held in another case that an employee was entitled to the costs of a review. The court made it clear that the cost of the review was granted the employee under chapter 208, Acts of 1930, but not under sec. 14, ch. 152, General Laws, 1921. (*Riley's Case* (1932), 179 N.E. 690.)

WORKMEN'S COMPENSATION — AVIATION — EMPLOYMENT STATUS — LIABILITY OF INDIVIDUAL PARTNERS—*Hatch* v. *Kilpatrick et al., Court of Appeal of Louisiana (May 20, 1932), 142 Southern Reporter, page 202.*—A suit was instituted under the Louisiana workmen's compensation act by Mrs. Marietta Hatch against Kilpatrick & Haskins, operating as a partnership, and also against L. L. Kilpatrick, individually, to recover compensation for the death of her husband. The business of the partnership was that of operating automobiles and airplanes for hire. The widow alleged that at the time of her husband's death he was engaged in piloting the airplane on a regular commercial flight. Shortly after the plane had begun the flight, it caught fire and fell to the ground, with the result that her husband was instantly killed.

As a defense, it was contended that Hatch had taken two of his friends on a joy ride, and that the ride was not taken in the course of his employment. It appeared from the allegations that in June 1929 Hatch had been employed by the partners for the sole purpose of teaching them how to pilot a recently acquired airplane, which was to be operated in the partnership business. By September 7, 1929, the partners had learned to fly and the contract with Hatch was terminated, and a new contract was entered into between Hatch and L. L. Kilpatrick. According to the terms of the new contract, Hatch was to be an automobile salesman with the same salary, but working only for Kilpatrick. However, as both partners desired to increase their flying hours, it was stated in the contract that Hatch should "take care of the plane and assist them in flying, all without compensation except that he would have the privilege of using the plane for himself and his friends." It was therefore contended that he was using the plane in this private capacity at the time of his death.

The sixth judicial district court, Parish of East Carroll, La., rendered a judgment in favor of the widow but no interest was allowed and no date was fixed when the payments should begin.

The partners appealed to the Louisiana Court of Appeal and the widow answered and asked that the judgment be amended by fixing the rate of interest and the date of payment. The appeal court reviewed the evidence regarding the nature of the trip and whether the passengers were personal friends of Hatch, and concluded:

There is no testimony that the boys were friends or even acquaintances of Hatch. On the contrary, notwithstanding the denial of Haskins, one of the defendants and owners of the plane, it is proved to our entire satisfaction that Haskins was present on the occasion of this fatal ascent and ride; that he assisted in preparing the plane for the flight; that the boys paid him the usual fare of $2.50 each for the trip; that he took their hats for them and buckled them in the plane as is the usual custom. Other flights had been made on that same afternoon, and the usual fares were paid. Under his contract of September 7, Hatch was required to be present on this occasion, and we are sure that if he had refused to make the flight he would have lost his employment as automobile salesman. So that, under these circumstances, the irresistible conclusion is that he (Hatch) was performing service for Kilpatrick & Haskins in the regular scope of his employment, as provided in his contract with Kilpatrick.

The court also found that "Hatch was just as much in the employment and subject to the orders and control of the partnership of Kilpatrick & Haskins after September 7 as he was before that date, the only difference being that as between Kilpatrick & Haskins the latter was not obligated to pay any portion of the salary." Since all the wages were paid by Kilpatrick the court held that judgment should be against Kilpatrick for the entire amount of compensation. The rate of interest and date of the first payment were stated and the judgment of the lower court awarding compensation in the sum of $3,900 was affirmed.

WORKMEN'S COMPENSATION—AVIATOR—PRESUMPTION OF EMPLOYMENT—EVIDENCE—*Gale et al.* v. *State Industrial Accident Commission et al., Supreme Court of California (Dec. 23, 1930), 294 Pacific Reporter, page 391.*—Mark M. Campbell built an airplane which, he thought, would make new aeronautic records. He was in need of money to finance test flights and appealed to the Richfield Oil Co., which entered into a written agreement with him. The company agreed to give the financial assistance Campbell needed if the plane and the pilot met with its approval, and Campbell agreed to use the company's products for fuel and lubrication and to allow the company to use his testimonials for advertising purposes. The contract

did not contain a clause as to the employment or payment of a pilot, but it was understood that the pilot must be approved by the Richfield Oil Co.

After refusing one pilot the oil company, in August 1929, approved Kenneth W. Gale. After an interview, Gale said that he had made a contract with the company, and later made several test flights. On September 5, 1929, in his third attempt to break a record, an accident occurred which resulted in his death.

The widow and minor children of Gale proceeded under the California workmen's compensation statute against Mark M. Campbell, the Richfield Oil Co., and another, as employers, and the Maryland Casualty Co., the insurance carrier. At a hearing before the compensation commission, certain witnesses testified that Gale had told them the Richfield Oil Co. would pay him pilot's wages for every hour he was in the airplane, while two of the oil company's officials testified they had never employed Gale. The compensation commission denied compensation to the widow, stating that the evidence did not establish that Gale had been an employee of Mark M. Campbell or the Richfield Oil Co.

Mrs. Gale made an unsuccessful attempt to have the case reviewed by the District Court of Appeals, and later carried the case to the Supreme Court of California for a decision. This court said that the greater weight of the evidence would seem to be in favor of granting compensation. To this there is to be added, the court said, the presumption of employment created by section 8 (b) of the workmen's compensation act (Stat. 1917, p. 835), which says: "Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this act." However, the supreme court upheld the order of the industrial commission denying compensation, saying:

> We are constrained to hold that the positive denial on the part of the officials of the Richfield Oil Co. to the effect that no understanding or agreement for the employment of Gale had ever been entered into by or on behalf of the Richfield Oil Co. created such a material conflict in the evidence relating to his said employment as would have sufficed to justify the findings and decision of the commission to the effect that no such employment existed, and to have therefore compelled the conclusion that this court has no authority to overthrow the findings and decision of the commission in that regard.

WORKMEN'S COMPENSATION—AWARD—REMARRIAGE OF WIDOW—ANNULMENT—AFFECTING RIGHT TO AWARD—*Dodds* v. *Pittsburgh, Mars & Butler Railway Co., Superior Court of Pennsylvania (Oct. 19, 1932), 162 Atlantic Reporter, page 486.*—On September 5, 1926, an

employee of the Pittsburgh, Mars & Butler Railway Co. was killed. Compensation was paid under the Pennsylvania workmen's compensation act to his widow, Dillie Dodds, for herself and their adopted daughter.

Payments were made regularly until August 2, 1928, when it was discovered that on June 14, 1928, the widow had married Benjamin Oldmixon at Tia Juana, Mexico. The marriage in Mexico complied with all the requirements of a valid marriage under the Mexican law. The couple went to Los Angeles, Calif., and lived together until October 1, 1928. Dillie Dodds then brought suit under a California statute to have the marriage annulled. The ground for annulment was fraud, a statutory ground for annulment in California, but not a ground in Mexico. On March 29, 1929, the California court decreed, after a hearing, that the marriage be annulled and set aside.

On July 2, 1929, the Pittsburgh, Mars & Butler Railway Co. petitioned the Workmen's Compensation Board of Pennsylvania that the agreement to pay compensation be terminated because of Dillie Dodds' remarriage.

The referee dismissed the petition after a hearing, and his decision was sustained by the entire board, and affirmed by the court of common pleas of Allegheny County. Appeal was taken by the railway company to the Pennsylvania Superior Court.

The two questions involved upon appeal were: (1) Was the widow's Mexican marriage a "remarriage" under the Pennsylvania workmen's compensation act; and (2) under the "full faith and credit" clause of the Federal Constitution, was the California decree binding on the Pennsylvania courts, as of March 29, 1929, when the decree was rendered, or as of the 1928 date of the marriage in Mexico?

The attention of the court was turned first to the validity of the Mexican marriage. As the marriage was in full compliance with the Mexican laws the general rule would be that the marriage was a valid marriage there and elsewhere. The court followed the general rule as stated in *Stull's Estate* (183 Pa. 625) that "a marriage which is valid by the law of the place where it is solemnized is valid everywhere."

As the Mexican marriage was valid when the marriage was contracted, the next question presented was the effect of the California decree. The court said that between the parties there could be no question as to their personal status, for the court decree would be binding as between themselves but so far as the decree must be given full faith and credit by other States an entirely different principle controls. The distinction was made between a divorce and an annul-

ment, and the court referred to the case of *Millar* v. *Millar* (167 Pac. 394) in which the California Supreme Court said:

Strictly speaking the word "divorce" means a dissolution of the bonds of matrimony, based upon the theory of a valid marriage, for some cause arising after the marriage, while an annulment proceeding is maintained upon the theory that, for some cause existing at the time of marriage, no valid marriage ever existed.

The main question involved in this case therefore seemed to be whether the courts of California had the power to declare the marriage null and void from the beginning or whether their decree was effective only from the time it was rendered. As the annulment must be based upon some ground existing at the time the marriage contract was entered into by the parties, and as the fraud used as ground for the annulment in California was not such a ground in Mexico, the court was of the opinion that "the California court had no jurisdiction, power, or capacity to annul the Mexican marriage ab initio [from the beginning] by virtue of the California statute." As the California court was erroneously applying the law of the State of California rather than the law of Mexico in decreeing an annulment, the court followed the decision of the United States Supreme Court in *Supreme Council, R. A.*, v. *Green* (237 U.S. 531) and held that such an error resulted in a denial of the operation of the "full faith and credit" clause of the Federal Constitution.

This view is supported by the Restatement of the Law of Conflict of Laws, 1930, by the American Law Institute, in which it is provided, in section 122, that "a State can exercise through its courts jurisdiction to nullify a marriage from its beginning only insofar as the marriage in respect to the requirement for its validity, which it is claimed were not satisfied, was governed by its law."

Therefore the Pennsylvania courts would not be bound to give the decree of the California court full faith and credit, and were free to hold that the marriage was dissolved on March 29, 1929, the date of the California decree. The court therefore held that—

Dillie Dodds did remarry, and therefore her right to weekly compensation from appellant ended on June 14, 1928, under section 307, clause 7, of the workmen's compensation act of Pennsylvania [cases cited], and thereafter she became entitled only to such payment as the workmen's compensation law of Pennsylvania provides for.

Without questioning the validity of the California decree in its application to the parties involved in that case, we are satisfied it did not have the effect to restore to her the rights under the compensation agreement which she had lost by her remarriage.

The decision of the lower court dismissing the petition was therefore reversed.

WORKMEN'S COMPENSATION—BAR TO COMMON-LAW ACTION ELSEWHERE—EXTRATERRITORIALITY—*Bradford Electric Light Co., Inc.*, v. *Clapper, United States Supreme Court (May 16, 1932), 52 Supreme Court Reporter, page 571.*—A contract made in Vermont, subject to the provisions of the Vermont workmen's compensation act, bars an action for negligence in New Hampshire.

The action was brought under Lord Campbell's Act of New Hampshire (Public Laws 1926, ch. 302, secs. 9–14) to recover for injuries resulting in the death of an employee and alleged to have occurred through the negligence of the Bradford Electric Light Co., Inc., the employer.

The employing company is a public utility organized under the laws of Vermont, with its principal place of business in Bradford, Vt. It is engaged in furnishing electric current for public use in both Vermont and New Hampshire. The employee was a resident of Bradford, and the contract of employment was entered into in Vermont, but the employee received his injuries in the course of his employment in the State of New Hampshire. While in the course of his work he came in contact with high-tension wires and received the injuries which caused his death.

The action was originally brought in the New Hampshire Superior Court and was removed to the Federal district court on the ground of diversity of citizenship. The third trial before a jury resulted in a verdict for the employee's administratrix for $4,000. The case was thereupon appealed to the Circuit Court of Appeals for the First Circuit.

The defense set up in the suit was that the Vermont workmen's compensation act provided a remedy, which excluded any action at law to recover damages. The court pointed out that the Vermont workmen's compensation act had an extraterritorial effect, and said that:

> In this case, as neither the defendant corporation nor the plaintiff's intestate gave notice of a refusal to assent to the Vermont act, both were bound by it, and its provisions became a part of the contract of employment and covered all injuries whether received in Vermont or New Hampshire, and for which under the Vermont act no action at common law based on negligence would lie.
>
> There can be no doubt, therefore, if the proceedings had been brought under the Vermont statute, the plaintiff's intestate could have recovered only the sum provided where there are no dependents; and herein lies the reason for this action. The deceased had no dependents, and, as is provided in all such acts, including that of New Hampshire, in such cases only a comparatively small sum to provide for burial expenses is allowed. (51 Fed. (2d) 992.)

The real question before the court was whether the law of the place where the contract was made should govern under the well-

recognized principles of comity or the law of the State where the injury occurred. "There is a clear tendency", the court said, "for the courts to settle down on the policy of enforcing contracts according to the law of the State in which they were made." Many cases were cited in support of this view.

The contention was raised, however, that the Vermont law differed from the New Hampshire law, and therefore could not be applied in this case, as such provisions were against the public policy of New Hampshire. The court, in answering this, said that details of each act have never been regarded as establishing a definite public policy, for such a view would cause much confusion among the courts. Continuing the court said:

> The numerous decisions of the courts giving these acts extraterritorial effect would then be of little value, as an injured employee, whenever his contract of employment was in one State where he had accepted a compensation act, and he was injured in another, might in every such case, if to his advantage, bring a common-law action in the State where injured, provided the act of the State of employment differed in any important provision from the act of the State where the injury occurred; but no court has yet so held.
>
> The State courts have repeatedly held that, because a statute of one State differs in some of its provisions from that of the State of the forum, it does not follow that the courts of the State of the forum would not enforce contracts entered into in the other State and valid under its law, though not in compliance with the lex fori, especially where both statutes were enacted with the same purpose in view. (51 Fed. (2d) 992.)

In conclusion the court set aside the judgment of the district court and returned the case for further proceedings, saying, in part, as follows:

> We are of the opinion that there is nothing in the contract entered into between these parties in Vermont that is contrary to the main purpose of the New Hampshire act, or inimical to the welfare of its citizens, and, according to the trend of recent decisions in other jurisdictions, the contract of hire under the Vermont act, upon the principles of comity, constitutes a good defense to an action under the New Hampshire death statute, there having been no contract of hire in New Hampshire. (51 Fed. (2d) 992.)

Circuit Judges Anderson and Wilson each delivered strong dissenting opinions, holding the view that the New Hampshire law must be strictly complied with, and that "the public policy of New Hampshire is not subject to determination by this court 'in the light of the decisions of other jurisdictions.'"

The case then was carried to the United States Supreme Court. On May 16, 1932, Mr. Justice Brandeis, speaking for the court, rendered the opinion reversing the decision of the lower court.

After reviewing the facts and the statutes of the two States, he stated the question involved in the case to be—

* * * Whether the fact that the injury occurred in New Hampshire leaves its courts free to subject the employer to liability as for a tort; that is, may the New Hampshire courts disregard the relative rights of the parties as determined by the laws of Vermont where they resided and made the contract of employment; or must they give effect to the Vermont act, and to the agreement implied therefrom, that the only right of the employee against the employer in case of injury shall be the claim for compensation provided by the statute?

The Court, in considering the principles of conflict of laws, said the New Hampshire courts would be free to determine by their own laws whether to attach legal significance to laws of other jurisdictions if these jurisdictions were foreign countries, "but the conflict here is between the laws of two States; and the company, in setting up as a defense a right arising under the Vermont statute invokes article 4, section 1, of the Federal Constitution, which declares that 'full faith and credit shall be given in each State to the public acts * * * of every other State.'" The argument was made that a State has the power to legislate only within its own territory and can therefore pass no law which will have an extraterritorial effect.

The court, however, was of the opinion that "such recognition in New Hampshire of the rights created by the Vermont act, cannot in any proper sense be termed an extraterritorial application of that act", and pointed to the distinction made where the action is brought in New Hampshire on a statutory cause of action in Vermont, and a case where the statute of Vermont is set up as a matter of defense in a New Hampshire court to an asserted liability. In the former case the court "merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremedial liability." [Cases cited.] Continuing, Mr. Justice Brandeis said:

Moreover, there is no adequate basis for the lower court's conclusion that to deny recovery would be obnoxious to the public policy of New Hampshire. No decision of the State court has been cited indicating that recognition of the Vermont statute would be regarded in New Hampshire as prejudicial to the interests of its citizens. * * * But the mere fact that the Vermont legislation does not conform to that of New Hampshire does not establish that it would be obnoxious to the latter's public policy to give effect to the Vermont statute in cases involving only the rights of residents of that State incident to the relation of employer and employee created

there. [Cases cited.] Nor does sufficient reason appear why it should be so regarded. The interest of New Hampshire was only casual. Leon Clapper was not a resident there. He was not continuously employed there. So far as appears, he had no dependent there. It is difficult to see how the State's interest would be subserved, under such circumstances, by burdening its courts with this litigation. * * *

The circumstances under which the acceptance of the New Hampshire act was filed show that the company did not intend thereby to abandon its rights under the Vermont law in respect to Leon Clapper or other employees similarly situated. It had had occasion to hire in New Hampshire residents of that State for employment there in connection with the operation of its lines in that State. In case of injury of such employees, failure to accept the New Hampshire act would have made the petitioner liable to an action for negligence in which it would have been denied the defenses of assumption of risk and injury by a fellow servant. [Cases cited.] Its acceptance is to be construed as referable only to such New Hampshire employees, and not as bringing under the New Hampshire act employees not otherwise subject to it.

We are of opinion that the rights as between the company and Leon Clapper or his representative are to be determined according to the Vermont act. The judgment of the circuit court of appeals must accordingly be reversed.

WORKMEN'S COMPENSATION—CAUSAL CONNECTION—EVIDENCE—*Powell* v. *Hoage, Deputy Commissioner, et al., Court of Appeals of the District of Columbia (Mar. 21, 1932), 60 Washington Law Reporter, page 349.*—Angus A. Powell had worked as an interior decorator and painter with Edward W. Minte Co., Inc., in the District of Columbia prior to October 9, 1928, when he was injured by a fall when the staging on which he was working collapsed. He received a fracture of a bone of his leg and remained in the hospital for 67 days, having been discharged on December 15, 1928. He was pronounced cured after a thorough examination by the doctors connected with the hospital. He did very little work after that date, however, and on May 13, 1929, he returned to the hospital, where he died of pulmonary tuberculosis.

The compensation commission refused to grant an award of compensation to his widow, Susan N. Powell, as his death was not caused by the injury he received in 1928. The widow thereupon filed suit in the Supreme Court of the District of Columbia to enjoin the commission from refusing to grant the award. The court sustained the commissioner's findings, and from its order dismissing the bill the widow appealed to the Court of Appeals of the District of Columbia. The suit was based upon section 21 (b) of the District of Columbia compensation act, which provides:

If not in accordance with law a compensation order may be suspended and set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order.

In interpreting this provision of the act the court said:

* * * The deputy commissioner's findings of fact must be accepted as conclusive if supported by evidence unless there was some irregularity in the proceedings before him. This is also the effect of the decision of the Supreme Court in *Crowell* v. *Benson*, decided February 23, 1932. In that case the Chief Justice, who delivered the opinion of the court, distinguished cases in which the jurisdiction of the commissioner is challenged; i.e., cases involving the factual question of master and servant, or the question of place of injury (whether on navigable waters or not), and cases involving ordinary questions of fact arising with respect to injuries to employees within the purview of the act, and held, as to the former, the right to trial in the district court de novo, and, as [to] the latter, the conclusiveness of the commissioner's finding when supported by evidence.

We therefore reach the conclusion that the cases in which we may set aside an order of the commissioner as "not in accordance with law" are only those in which it appears that there is an error of law, or in which the order of the commissioner is not supported by substantial evidence, as well, of course, as in those in which it is arbitrary and unreasonable. If the finding, however, is supported by substantial evidence, it is final.

The testimony showed that both doctors who examined the deceased testified that the injury had no causal relation to the death, as no signs of the tuberculosis were found when deceased left the hospital in December 1929. To offset this testimony a third doctor was called. He did not examine the deceased but testified that such an injury as deceased received might cause tuberculosis or might have accelerated a dormant condition. The court found, therefore, that the commission had substantial evidence to support its decision, even though there was also evidence supporting a different view. In concluding the opinion, the court said: "While, therefore, we might have reached a different conclusion on the evidence we feel that we may not, under the rule we have announced, substitute our judgment for that of the commissioner, and, since we may not, it follows that we must affirm the action and decision of the court below."

WORKMEN'S COMPENSATION—CAUSAL CONNECTION—HORSEPLAY—*Borden Mills, Inc.*, v. *McGaha, Supreme Court of Tennessee (Nov. 28, 1930), 32 Southwestern Reporter, (2d), page 1039.*—Tishie McGaha was employed at night work in a mill belonging to Borden Mills, Inc. On the night in question she reported for work shortly

before 6:30 p.m. While waiting for certain frames to be brought up, she sat on a box mounted upon wheels. While sitting in this position another employee came up behind her and began pushing the box, rolling it rapidly along the floor and causing her to be thrown off the box, thereby injuring her wrist.

Petition for compensation was made and the law court of Sullivan County, Tenn., awarded compensation. The employer appealed the case to the Supreme Court of Tennessee. The defenses to the suit were: (1) That no notice was given; (2) that the employee was suffering from a disease not brought about from injury; and (3) that the injury, if responsible for the disease, did not arise out of and in the course of her employment.

Regarding the first defense, the court found notice had been given. It said:

> Within 30 days of the alleged injury the father of the girl called on the superintendent of the employer, told of her condition, and stated her claim. The superintendent expressed the opinion that the girl's condition was not due to any injury she had received, but to disease, and declined unequivocally to pay her any compensation. In view of this flat denial of liability on the part of the superintendent, a written notice would have been an idle ceremony. * * *

As to whether there was a causal connection between the accident and the injury the testimony was divided, and the court said that as the trial judge, upon such proof, had found in favor of the employee, the court would not disturb this finding.

The difficult question for decision was whether the injury arose out of and in the course of the employment, for it had been "held in a number of cases that compensation is not recoverable by employees for injuries sustained through horseplay or skylarking, done independently or disconnected from the performance of any duty of the employment on the ground that such injuries did not arise out of the employment." Continuing, the court said:

> Some of the decisions make a distinction between cases in which the injured employee is engaging in the horseplay or skylarking and cases in which the injured employee took no part therein but was attending to his duties. [Cases cited.]
>
> This seems to us a sound distinction, for, if the injured employee is participating in foolishness, it seems to us a question may then arise as to whether he has so departed from his employment.

The decision of the lower court awarding compensation was therefore affirmed.

The Supreme Court of New Jersey held in a case that an employee was not entitled to compensation in which he was the aggressor in an altercation. (*Merkel* v. *T. A. Gillespie Co., Inc.* (1932), 162 Atl. 250.)

The Supreme Court of Appeals of Virginia held in a case that an employee who was injured while at horseplay and died from a ruptured-spleen operation was entitled to an award of compensation. From the testimony the court was of the opinion that a causal relationship existed between the blow received and the death. (*Fox* v. *Bach* (1931), 158 S.E. 860.)

WORKMEN'S COMPENSATION—CHARITABLE ORGANIZATION—STATUS OF CHARITY WORKER—*Thurston County Chapter, American National Red Cross* v. *Department of Labor and Industries of Washington* (*Feb. 1, 1932*), *7 Pacific Reporter* (*2d*), *page 577.*—The American National Red Cross of Thurston County, Wash., in an effort to relieve the unemployment emergency, arranged with the officials of the county and of the city of Olympia, Wash.—

* * * To employ such men as were sent by the Red Cross in repairing, reconstructing, and maintaining roads and streets, in clearing right of way along such roads, and in the maintenance of city parks. The work was done under the supervision of the county, city, or towns, as the case might be. The county, city, and towns paid nothing for the labor, and the Red Cross furnished each man performing a day's labor groceries, clothing, or medical services to the value of $2.50.

The Department of Labor and Industries of the State of Washington sought to collect industrial-insurance and medical-aid premiums from the Red Cross on the work which had been undertaken by it.

The Red Cross brought this action requesting an injunction to prevent the collection of the above-mentioned premiums, and after the action was instituted, Thurston County intervened. The lower court rendered a judgment in favor of the Red Cross and Thurston County, and the department of labor and industries appealed the case to the Supreme Court of Washington.

This court held that the Red Cross, a purely charitable organization and not operated for pecuniary gain, was not within the workmen's compensation act, saying:

Had the legislature intended to bring within its provisions charitable organizations which were not liable for torts of its agents and servants, except for failure to exercise reasonable care in their selection, it undoubtedly would have said so in plain terms, or, from the language used, it would be necessarily implied. We are of the opinion that it was not the legislative intent that charitable organizations, such as the Red Cross, engaged in work as above stated, should be within the operation of the act.

The next question was whether Thurston County should be required to pay industrial-insurance and medical-aid premiums on account of its permitting men who were employed and paid by the

Red Cross, to work under its supervision. In deciding this the court quoted 39 Corpus Juris, page 35, as follows:

> The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done. Inasmuch as the right to control involves the power to discharge, the existence of the power to discharge is essential and is an indicium of the relationship. A mere authority to direct the course of a third person's servant is not inconsistent with his remaining the servant of such third persons. * * *

It was therefore held that the Red Cross was the employer, and not the county, in that it had the right to terminate the services of the men by refusing to supply the reward for their labor—namely, groceries, clothing, or medical services. Furthermore, the county was not an employer within the meaning of the workmen's compensation act in that it had no pay roll for these laborers on which to reckon the amount of the premium. The decision of the lower court in favor of the Red Cross and Thurston County, Wash., was affirmed.

WORKMEN'S COMPENSATION—CIRCUMSTANTIAL EVIDENCE—SEAMAN INJURED ON LAND—*Union Oil Co.* v. *Industrial Accident Commission et al., Supreme Court of California (Jan. 27, 1931), 295 Pacific Reporter, page 513.*—One Albert Pelle was captain of the Union Oil Co.'s barge *Santa Paula*, which operated in San Francisco Bay, supplying oil to ships, etc. On the afternoon of January 15, 1928, the barge was moored at a wharf, and, as there was nothing to do until the next morning, the crew went ashore.

At about 10 o'clock that night Captain Pelle was returning to the ship with a friend named Twigg. The barge was about 18 inches higher than the wharf. The crew usually grasped the vessel's stanchions and stepped from the wharf to the deck. Twigg climbed on in this way, but Captain Pelle fell into the water and was drowned.

The Workmen's Compensation Commission of California held that the case was within its jurisdiction, because, even though the man was a seaman and died from drowning, the injury was initiated and consummated on land and not on the barge or on navigable waters. The commission accordingly granted an award of compensation to the dependents of the deceased employee. The employer thereupon petitioned the Supreme Court of California to review the award.

In reviewing and approving the award of compensation, the Supreme Court of California discussed three problems presented by the case. In holding that it was within the State jurisdiction rather than admiralty, the court said:

Respondent commission proceeded upon the theory that Captain Pelle fell from the wharf, and that the injury was therefore initiated and consummated with reference to the wharf, and not the barge or the navigable waters. * * *

The correctness of this principle cannot be questioned, and it is clearly applicable to the situation presented by the instant case if the commission is correct in its determination, as a fact, that the injury was initiated and consummated on the wharf.

In regard to the compensation commission's having based its findings upon inferences drawn from circumstantial evidence the court quoted the case of *Mailman* v. *Record Foundry and Machine Co. et al.* (106 Atl. 609), which held:

In cases wherein the evidence is circumstantial and not direct, the line between inference and conjecture is sometimes obscure. * * * If, however, a state of facts is shown more consistent with the commissioner's finding than with any other theory, and the finding is supported by rational and natural inferences from facts proved or admitted, an appeal cannot be sustained.

As to whether the commission was correct in holding that Captain Pelle met his death in the course of his employment, the supreme court said:

The record shows that Captain Pelle was not required to remain on board the barge that night by reason of the rules of his employer. * * * It appears that it was largely discretionary with the captain as to whether he would take the boat out or not, but his discretion was to be exercised for the best interests of his employer. * * *

In the instant case, however, there was a definite compulsion upon deceased to come on board that night. The fact that the compulsion did not arise out of a direct order from his employer is not conclusive; it was none the less a compulsion when it arose out of a required exercise of discretion by the employee himself. It can hardly be disputed that, when a captain of a vessel comes to board her at night, for the purpose of directing her departure on time in the morning, he is rendering service in the course of his employment. The commission so found upon sufficient evidence, and we see no reason to disturb its conclusion.

WORKMEN'S COMPENSATION—CLAIMS—REVIEW—*Enyart* v. *State Compensation Commissioner, Supreme Court of Appeals of West Virginia (Nov. 12, 1930), 155 Southeastern Reporter, page 913.*—On February 14, 1929, Everett Enyart was injured while in the course of his employment in a mine in the West Virginia Coal & Coke Co. at Omar, W.Va. He was allowed compensation from the date of his injury until June 1, 1929, when he was supposed to return to work. He wrote the commissioner that he had recovered and expected to

return to work "within the next few days." However, he claimed his right ankle was crooked and he should be allowed further compensation. He was sent to Charleston, W.Va., for further medical examination, as the medical examiner at Logan was unable to determine the amount of disability. The doctor in Charleston recommended that there be no further allowance, whereupon the commissioner wrote Enyart that his claim was closed.

The letter was written on September 18, and nothing further was heard from the claimant until January 15, 1930, when the commissioner received another request for additional compensation. He replied that the matter had been closed by the letter written in September. Following this letter Enyart sent several letters and statements from several doctors regarding his condition to the commissioner, who consistently replied that the case stood closed. Thereupon Enyart filed an appeal in the Supreme Court of Appeals of West Virginia. After reviewing the facts as stated above, the court affirmed the decision of the commissioner, saying, in part, as follows:

If the claimant was not satisfied with the action of the commissioner in September, he should have proceeded in accordance with the statute to have the matter further investigated, and reviewed if necessary. While procedure in these matters is not strict, and ought not to be strict, there are certain reasonable procedural requirements of the statute which must be complied with in order that there may be some degree of finality. It is not consonant with the efficient administration of the workmen's compensation fund that a claim which has been fully considered by the commissioner and declared by him to be closed can be kept open indefinitely merely through much importuning on the part of the claimant. This is not the legislative policy as indicated by the act itself.

The court also said that even if the case were considered the same as the previously decided case of *Hall* v. *Compensation Commissioner* (153 S.E. 510), which held that "a disability which arises subsequent to the date of the initial award, and not then considered in fixing the amount of compensation, presents a matter going to the basis of claimant's right", the principle did not apply in the present case. For, according to the court, Enyart's right to a review of the commissioner's denial of further compensation was lost because of his "inaction in the matter for nearly 4 months following the commissioner's communication."

In an Ohio case where the court was asked, by virtue of the provisions of section 871–38, General Code, to review an order of the industrial commission, it was held that sections 871–1 to 871–45 constitute what is known as the "safety code", and that section 871–38 does not authorize the review of an order made by the industrial commission under the workmen's compensation act but rather

the review of awards made under the "safety code." This view was sustained by former cases appearing in United States Bureau of Labor Statistics Bulletins Nos. 391 (p. 378) and 517 (p. 256). (*Bowes* v. *Industrial Commission of Ohio* (1930), 174 N.E. 357.)

WORKMEN'S COMPENSATION—COMPENSABLE INJURY—APPENDICITIS—*Watkins* v. *Brunswick Restaurant et al., Supreme Court of Nebraska (May 6, 1932), 242 Northwestern Reporter, page 439.*—The Brunswick Restaurant Co., operating a restaurant in Fremont, Nebr., employed Mrs. Doll Watkins as a waitress. On December 14, 1930, while in the course of her employment, she fell and injured her right side. At the time of the accident she "was standing on a table in the restaurant so that she might reach the overhead shelves, and while in this position she grasped a board which became loosened and she fell backward, striking her right side on a table." She was unable to work due to the injury, and the physicians whom she consulted advised the removal of her appendix. This was done on the fourth day following the accident.

A claim for compensation was filed under the Nebraska workmen's compensation act, and the compensation commissioner awarded her compensation. The award was affirmed by the district court of Dodge County, and the decision was appealed to the Supreme Court of Nebraska. The employer contended that the fall was not the proximate cause of the injury and that the injury did not arise out of and in the course of her employment. In support of this contention two physicians testified that they "had never seen a case of traumatic appendicitis or appendicitis caused directly by an injury." However, one of the physicians who performed the operation testified: "The opinion I have would be that she may have had a diseased appendix; and if she did, having received the blow of that kind might light up this appendix." The other physician present testified that "trauma can cause an appendix that has had previous trouble to flare up." They both agreed that the injury received by Mrs. Watkins aggravated her condition and caused the attack.

In affirming the decision of the district court Mr. Justice Dean, speaking for the court, concluded:

> From a review of the authorities it appears that injuries resulting in the removal of an appendix in the injured person are compensable under the provisions of the workmen's compensation act. And it also appears that, while there is a lack of entire harmony by medical authorities in respect thereof, a trauma or blow may cause appendicitis. In the present case there was no bruise on the plaintiff's abdomen as a result of her fall, but from the evidence of her physicians it appears that a severe trauma might be occasioned to the internal organs without outward evidence of such injury. * * *

We conclude that where the plaintiff, while in the course of her employment, fell and injured her right side, thereby necessitating the removal of her appendix 4 days thereafter, and where the evidence sustains the finding that the fall caused the attack of appendicitis, that such injury is compensable under the provisions of the workmen's compensation act.

The Supreme Court of Minnesota affirmed an award of compensation to an employee who died from acute appendicitis resulting from being struck by an automobile crank during employment. (*Thomaseth* v. *Shapiro Bros. Launderers and Dry Cleaners, Inc.* (1931), 236 N.W. 311.)

The Supreme Court of Michigan denied an award of compensation to an employee who was found lying on the floor, and who claimed to have injured himself while lifting heavy bags. Peritonitis developed. The court held that the employee did not suffer an accidental injury within the meaning of the compensation law. (*Sinkiewicz* v. *Lee & Cady et al.* (1931), 236 N.W. 784.)

WORKMEN'S COMPENSATION — CONSTITUTIONALITY — INTERSTATE COMMERCE—*Boston & Maine Railroad* v. *Armburg, United States Supreme Court (Mar. 14, 1932), 52 Supreme Court Reporter, page 336.*—On March 14, 1932, the United States Supreme Court affirmed a judgment of a Massachusetts court holding that the workmen's compensation act does not impose an unconstitutional burden on interstate commerce.

From the facts in the case it was disclosed that Fred Armburg filed an action to recover for personal injuries received while in the employ of the Boston & Maine Railroad Co. At the time of the injury Armburg was engaged exclusively in intrastate commerce. As a defense to the suit, the railroad company pleaded negligence of a fellow servant and assumption of risk. Armburg then invoked the provisions of section 66 of the Massachusetts workmen's compensation act, which provides that an employer not electing to comply with the act by carrying insurance may not interpose the above defenses in an action by an employee. The company contended that this section, if applied to an interstate carrier, imposed an unconstitutional burden on interstate commerce by requiring an interstate carrier to secure insurance. It was also contended that the employees engaged in interstate commerce were covered by the Federal Employers' Liability Act, and if section 66 of the State workmen's compensation act applied, the State statute would be invading the field already covered by Federal legislation. The United States Supreme Court stated that the Massachusetts workmen's compensation act is made broadly applicable to employees "except masters of and seamen on vessels engaged in interstate or foreign commerce." The State court had already held that the law

is applicable to the employees of interstate carriers engaged in intrastate commerce.

Mr. Justice Stone, in rendering the decision of the court, pointed out that the Massachusetts court in construing the act had ruled that State statutes are intended to operate only upon a subject within the jurisdiction of the legislature, and that the workmen's compensation law is not to be deemed applicable to employees whose rights are governed by the Federal Employers' Liability Act. He quoted from the decision of the lower court as follows:

* * * The act does not require * * * that an employer must insure branches or departments or kinds of business which for any reason are not within the jurisdiction of the general court and thus necessarily outside the scope of the act. An employer, conducting some business within the jurisdiction of the general court and other business outside that jurisdiction, may insure under the act with respect to his employees in the part of his business within that jurisdiction and secure with respect to them all the benefits of the act unaffected by the circumstance that he continues to conduct the part of his business outside that jurisdiction without such insurance; and he may continue to conduct this latter part of his business under the principles of legal obligation governing it, free from any effect flowing from insurance under the act as to the other part of his business conducted within the jurisdiction of the general court.

In view of this construction of the section, the court held that the act does not, on its face, impose any burden on interstate commerce. However, the company further contended that the act "as construed by the State court applies to all employees in intrastate commerce, while the Federal act does extend to and include some employees engaged in intrastate commerce, if at the same moment and in the same service they are also engaged in interstate commerce", and therefore the act does invade the field occupied by Federal legislation. Mr. Justice Stone gave two answers to this suggestion:

First, as was conceded at the trial, the respondent was not engaged in interstate commerce at the time of the accident, and the petitioner cannot object on the ground advanced, to the application of the act to his employment. Second, we do not read the opinion of the State court as placing any such construction on the act. By the language which we have quoted and elsewhere in the opinion, the court states with emphasis that the act is not to be construed as reaching into any part of the field occupied by Federal legislation. Thus construed, it does not purport to extend to employees who, because they are engaged in interstate commerce, are within the Federal act, even though, at the same time their service is also in intrastate commerce.

The decision of the lower court upholding the act was therefore affirmed.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF FEDERAL LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT—JURISDICTION OF COMMISSIONER—*Crowell, Deputy Commissioner*, v. *Benson, United States Supreme Court (Feb. 23, 1932), 52 Supreme Court Reporter, page 285.*—The United States Supreme Court on February 23, 1932, upheld the validity of the Federal Longshoremen's and Harbor Workers' Compensation Act, and the right of Congress to enact the legislation.

In construing the law to be valid, the Supreme Court ruled that the question as to whether the relation of master and servant existed is one which a district court of the United States may determine in a suit to set aside an award made by a deputy commissioner. This was also true, the court said, in determining whether the injury occurred on navigable waters of the United States.

The original action in the case was brought in the United States District Court, and appealed to the Circuit Court of Appeals for the Fifth Circuit, to enjoin the enforcement of an award made by a deputy commissioner of the United States Employees' Compensation Commission for the seventh compensation district in favor of J. B. Knudsen against his employer, Charles Benson. The award was made under the Federal Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, ch. 509), March 4, 1927.

The deputy commissioner found that Knudsen was injured while in the employ of Benson, and while performing services upon the navigable waters of the United States. It was the contention of the employer that the award by the deputy commissioner was contrary to law because Knudsen was not, at the time of the injury, one of his employees, and that the claim was not under the jurisdiction of the deputy commissioner. Later it was charged that the compensation act was unconstitutional in that it violated several provisions of the United States Constitution, i.e., those relating to due process, right of trial by jury, unreasonable search and seizure, and a provision (art. III) respecting the judicial power of the United States.

The judge of the district court denied a motion to dismiss the case and granted a new hearing upon the facts and the law, and expressed the opinion that the act would be invalid if not construed to permit such a hearing. The case was subsequently transferred to the admiralty side of the court. The district court held that Knudsen was not in the employ of Benson and restrained the enforcement of the award (33 Fed. (2d) 137, and 38 Fed. (2d) 306). Upon appeal the decree was affirmed (45 Fed. (2d) 66) by the Circuit Court of Appeals for the Fifth Circuit.

The United States Supreme Court later consented to review the case. In the majority opinion written by Mr. Chief Justice Hughes it was stated that the question of the validity of the law may be considered in relation to its provisions defining substantive rights and procedural requirements. The court stated that the act had two fundamental limitations: (1) It deals exclusively with compensation in respect of disability or death resulting from an injury occurring upon the navigable waters of the United States, and (2) it applies only when the relation of master and servant exists.

The court recited several provisions of the law—defining the words "injury" and "employer", the exclusiveness of the liability of the employer, and the penalty for failure to provide security in the payment of compensation. As the act relates solely to injuries occurring upon the navigable waters of the United States, the court said, it deals with the maritime law as applicable to matters falling within the admiralty and maritime jurisdiction and "the general authority of the Congress to alter or revise the maritime law which shall prevail throughout the country is beyond dispute."

In defining substantive rights the court pointed out that the act "provides for recovery in absence of fault, classifies disabilities resulting from injuries, fixes the range of compensation in case of disability or death and designates the classes of beneficiaries." There appears to be no room, the court said, for objections on constitutional grounds to the creation of the right of the Federal power to alter and revise the maritime law, unless it can be found in the "due process clause of the fifth amendment." However, it cannot be said that either the classifications of the statute or the extent of compensation provided are unreasonable. "Liability without fault is not unknown to the maritime law", the court continued, and "apart from this fact, considerations are applicable to the substantive provisions of this legislation with respect to the relation of master and servant similar to those which this court has found sufficient to sustain workmen's compensation laws of the States against objections under the due process clause of the fourteenth amendment."

The court referred to the objections to the procedural requirements of the act which relate to the extent of the administrative authority conferred, and reviewed the provisions relating to the administration of the act which authorized the establishment of compensation districts, the appointment of deputy commissioners, and the authority to make regulations, etc.

The objection raised by the respondent as to the right of a trial by jury was unavailing, the court said, since the "claims which are subject to the provisions of the act are governed by the maritime law as established by the Congress and are within the admiralty juris-

diction." The court then took up the other objections, namely, the procedure which invokes the due process clause and the provision as to the judicial power of the United States.

As to the questions of law, the court said, the rulings of the deputy commissioner are without finality. Under the due-process clause of the fifth amendment, the question raised was as "to the determination of questions of fact."

On this point the court said that—

Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the act the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. * * * While the exclusion of compensation in such cases is found in what are called "coverage" provisions of the act (sec. 3) the question of fact still belongs to the contemplated routine of administration, for the case is one of employment within the scope of the act, and the cause of the injury sustained by the employee as well as its character and effect must be ascertained in applying the provisions for compensation. The use of the administrative method for these purposes, assuming due notice, proper opportunity to be heard, and that findings are based upon evidence, falls easily within the principle of the decisions sustaining similar procedure against objections under the due-process clauses of the fifth and fourteenth amendments.

Mr. Chief Justice Hughes referred to the contention based upon the judicial power of the United States (art. III), and said that it presented "a distinct question." However, the present case, he said, "is one of private right; that is, of the liability of one individual to another under the law as defined." There is no requirement, it was held, that "in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges."

Continuing, the court said that:

In deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority to prescribe procedure in cases of injury upon navigable waters, regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required. The statute has a limited application, being confined to the relation of master and servant, and the method of determining the questions of fact which arise in the routine of making compensation awards to employees under the act is necessary to its effective enforce-

ment. * * * Findings of fact by the deputy commissioner upon such questions are closely analogous to the findings of the amount of damages that are made according to familiar practice by commissioners or assessors, and the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases. For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law.

The court pointed out that, so far, only the claims of employees within the meaning of the act had been considered. A different question is presented where the fact determinations are fundamental or jurisdictional, "in the sense that their existence is a condition precedent to the operation of the statutory scheme." The fundamental requirements are "that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists." These conditions are essential because "Congress has so provided explicitly", and because the power of Congress to enact such legislation "turns upon the existence of these conditions."

Regarding the question of whether Congress may substitute for constitutional courts an administrative agency, Mr. Chief Justice Hughes pointed out that—

The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

Whenever the validity of any act of Congress is questioned and doubt is raised as to its constitutionality, the majority opinion showed that—

* * * It is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. We are of the opinion that such a construction is permissible and should be adopted in the instant case. The Congress has not expressly provided that the determinations by the deputy commissioner of the fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be final. * * *

It was pointed out that the question in the present case was not whether the deputy commissioner acted improperly, "but whether he has acted in a case to which the statute is inapplicable." As to this the court said:

By providing for injunction proceedings, the Congress evidently contemplated a suit as in equity, and in such a suit the complainant would have full opportunity to plead and prove either that the injury did not occur upon the navigable waters of the United States or that the relation of master and servant did not exist, and hence that the case lay outside the purview of the statute. As the question is one of the constitutional authority of the deputy commissioner as an administrative agency, the court is under no obligation to give weight to his proceedings pending the determination of that question. If the court finds that the facts existed which gave the deputy commissioner jurisdiction to pass upon the claim for compensation, the injunction will be denied insofar as these fundamental questions are concerned; if, on the contrary, the court is satisfied that the deputy commissioner had no jurisdiction of the proceedings before him, that determination will deprive them of their effectiveness for any purpose. We think that the essential independence of the exercise of the judicial power of the United States, in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it.

The court concluded the opinion by stating that the district court did not err in permitting a new trial "on the issue of employment."

Upon that issue the witnesses who had testified before the deputy commissioner and other witnesses were heard by the district court. The writ of certiorari was not granted to review the particular facts, but to pass upon the question of principle. With respect to the facts the two courts below are in accord, and we find no reason to disturb their decision.

The decree of the lower court was therefore affirmed.

Mr. Justice Brandeis delivered a dissenting opinion, in which Mr. Justices Stone and Roberts joined, holding that the decree should be reversed because Congress did not authorize a new trial. The initial question is one of construction of the Longshoremen's Act. The act, the dissenting opinion stated, "does not in terms declare whether there may be a trial de novo either as to the issue whether the relation of employer and employee existed at the time of the injury, or as to any other issue, tried or triable, before the deputy commissioner."

Cases were cited showing that lower Federal courts had uniformly held that "the review afforded must be upon the record made before the deputy commissioner; and that the deputy commissioner's findings of fact must be accepted as conclusive if supported

by evidence, unless there was some irregularity in the proceeding before him." The dissenting opinion pointed out that nearly all of the State courts have construed the State workmen's compensation laws as limiting the review by the courts to questions of law only, and even in other Federal laws similar to the question involved in this case, creating administrative agencies, "have likewise been treated as not conferring the right to a judicial trial de novo."

It was the aim of Congress clearly specified by the provisions of the act "to expedite the relief afforded." The dissenting opinion stated other reasons for objecting to the majority opinion and concluded that—

To permit a contest de novo in the district court of an issue tried, or triable, before the deputy commissioner will, I fear, gravely hamper the effective administration of the act. The prestige of the deputy commissioner will necessarily be lessened by the opportunity of relitigating facts in the courts. The number of controverted cases may be largely increased. Persistence in controversy will be encouraged. And since the advantage of prolonged litigation lies with the party able to bear heavy expenses the purpose of the act will be in part defeated.

WORKMEN'S COMPENSATION—CONTRACT OF EMPLOYMENT—EVIDENCE—*Zietlow et al.* v. *Vickers et al., Appellate Court of Indiana (June 2, 1932), 181 Northeastern Reporter, page 376.*—The town of Center, Ind., contracted with the Tri-State Plumbing & Heating Co. for the installation of the plumbing and heating equipment in a schoolhouse. Part of the contract was sublet, and Herman F. Zietlow received the contract for the installation of a heat-control unit. Zietlow's place of business was in Indianapolis, and one Fox was sent from Indianapolis to Center to install this equipment. All the workmen engaged in work on the schoolhouse were union men, and soon after Fox began to work he was approached by the business agent of the United Association of Journeymen Plumbers and Steam Fitters. Fox was doing the work of a steam fitter, and according to the regulations of the local union he should work as a foreman and secure a journeyman to assist him.

Fox, acting for his employer Zietlow, hired one Vickers, who had been sent by the local union, to act as journeyman. There was no specific contract of employment, as Vickers had been brought out by the agent of the union and shortly thereafter had gone to work. While being transported back to the city in a car owned by Fox, Vickers sustained injuries from which he died.

The Indiana Industrial Board found that the injury arose out of and in the course of his employment and awarded compensation.

The employer appealed to the Appellate Court of Indiana, contending that the employment ceased when the work for the day was over and did not cover the return trip to the city.

The court said the only question for decision was whether there was material competent evidence to sustain the award. This question hinged entirely upon the contract of employment. The customary contract used by members of the local union was introduced in evidence. This contract provided among other things that the employer should pay "the regular rate of wages" until the employee returns to the city after the day's work. In sustaining admission of this contract as competent evidence the court said:

> Where such a contract was made, which contract was silent upon the foregoing essential elements of any contract of employment, the court will turn to the best evidence available to show what the terms of the contract were. * * * Had there been no written agreement setting out what those terms were, the best evidence would have been the testimony, both of the master plumbers and all members of the plumbers' union as to what the customary terms of employment were between them. The mere fact that in this particular instance that agreement had been reduced to writing could not detract from the proof, but rather added to its sufficiency and credibility, so that the written agreement which was merely a written expression of the customary terms and conditions of employment was, not only material and competent evidence, but it was the best evidence available to show what the terms of employment were between appellee's decedent and Zietlow when he employed appellee's decedent through his agent Fox, who was certainly at that time acting within the scope of his apparent authority.

The decision of the industrial board awarding compensation was therefore affirmed.

WORKMEN'S COMPENSATION—COVERAGE—AGRICULTURAL EMPLOYEE—NURSERY EMPLOYEE—*Ginn* v. *Forest Nursery Co.*, *Supreme Court of Tennessee* (*July 23, 1932*), *52 Southwestern Reporter* (*2d*), *page 141.*—A nursery employee is a "farm or agricultural laborer" and therefore is not entitled to recover compensation for injuries under the Tennessee workmen's compensation law, according to the supreme court of that State.

The facts in the case were not controverted. The Forest Nursery Co. operated a nursery, growing shrubs, evergreens, and shade trees. The company owned two places, one in the town of Minnville, Tenn., and the other near the town. Ginn, an employee, was working at the place in the town and was injured while digging a shrub. Ginn filed a claim for compensation under the Tennessee compensation law. The circuit court of Warren County dismissed the claim on

the ground that "at the time petitioner received said injuries he was a farm or agricultural laborer" and such laborers are excluded from the Tennessee compensation law. (Code, 1932, sec. 6856.)

From this decision Ginn appealed to the Supreme Court of Tennessee, contending that he was not engaged as a farm laborer at the time he received the injury. No Tennessee cases were cited determining the question involved, but the court relied upon *Dowery* v. *State* (149 N.E. 922), an Indiana case, and *Peterson* v. *Farmers' State Bank* (230 N.W. 124), a Minnesota case, in which the courts held that the correct test to be applied in determining whether the employee was covered by the act was the "character of the work which the employee is hired to perform" and not the general occupation of the employer nor the place of the work. Applying this test to the present case, the court found Ginn was engaged in agricultural pursuits at the time of his injury and therefore could not recover under the compensation act. Continuing, the court said:

The employment of the plaintiff in error in the case before us required him to till the soil, to tend growing plants, shrubs, and young trees, to prepare them for market, and to deliver them to a shipping point. The harvesting and marketing of grain, the transplanting and care of tobacco plants, and the delivery of a bale of cotton from farm to shipping point, are all ordinary incidents of farm labor. The work and labor performed by plaintiff in error differed from that of the ordinary farmer only in the kind and nature of the products of the soil grown and prepared for market. No difference in hours of labor, hazard, or remuneration is pointed out which might induce a legislature to include the one and exclude the other from the operation of the statute. The labor performed by plaintiff in error and contemplated by his employment was agricultural in the literal sense and meaning of the word, and we think we would not be justified in holding that he was not a "farm or agricultural laborer."

The Supreme Court of Idaho held that under the Idaho compensation act, which allows employers engaged in agricultural pursuits to elect to come under the act, the employer must make such election prior to an injury suffered by the employee to be within the protection of the act. (*Kindall* v. *McBirney et al.* (1932), 11 Pac. (2d) 370.)

WORKMEN'S COMPENSATION — COVERAGE — AGRICULTURAL EMPLOYEE—WOODS RIDER—*Pridgen* v. *Murphy et al., Court of Appeals of Georgia (Oct. 3, 1931), 160 Southeastern Reporter, page 701.*—An employee engaged as a woods rider in a turpentine business was injured while trying out or testing a horse which he was subsequently to use in the business. The Industrial Commission of Georgia made an award to the dependent of the deceased employee. Upon appeal to the State superior court of Colquitt County, Ga., the award was set aside upon the grounds that a woods rider in a turpentine business

was a "farm laborer", and therefore excluded from the Georgia compensation act. The State court of appeals, to which court an appeal was taken by the dependent widow, at first agreed with the findings of the lower court, but later a rehearing was granted and the court said that—

After continued and painstaking research and deliberation, we have now reached a contrary conclusion, and will hold that the decedent was not a farm laborer within the meaning of the statute. Many decisions and statutes have been examined, but this opinion will be limited to a discussion of the very few authorities that we deem to be directly in point.

The court held that this was true even though the person engaged in such business is sometimes referred to as running a "turpentine farm" and the trees may be worked in groups described as "crops."

A Florida case (*Griffith* v. *Hulin*, 107 So. 354) which provided for a lien "in favor of any person performing any labor in, or managing or overseeing, the cultivation or harvesting of crops" was cited as being directly in point and authoritatively expressive of the principles involved. The court in that case held that—

The chipping, scoring, or streaking of pine trees, by which the bark is torn away and the fiber of the tree exposed, so as to induce the flow therefrom of the sap or crude turpentine, rather than being a process of cultivation, is a process destructive in its nature, however beneficial in its results to mankind the lesion thus produced on the tree may be. There is no tilling of the ground or fertilizing of the soil around the tree, but a destruction of a portion of the tree in order to obtain the annual flow of the valuable sap which nature has already produced in its body.

The Georgia Appeals Court was of the opinion that the expression in the Florida case was one of authority, "since the turpentine business is perhaps more common in the State of Florida than in any other part of the country."

There was no reason, therefore, the court said, for disagreeing with that decision and it would therefore follow the reasoning in the case "as an authoritative expression as to the essential character of the turpentine business." The court said:

In principle, the Griffith case answers in the negative the question of whether a person employed as a woods rider in a turpentine business is a "farm laborer" within the meaning of this language as used in the compensation act.

The court also referred to two Federal court cases (*United States* v. *Waters-Pierce Oil Co.* (C.C.A.), 196 Fed. 767, and *Union Naval Stores Co.* v. *United States*, 240 U.S. 284), which have held that the turpentine business is not "agriculture."

The judgment of the lower court was therefore reversed.

WORKMEN'S COMPENSATION—COVERAGE—DEPENDENCY—ILLEGITIMATE CHILD—*Favre* v. *Celotex Co.*, *Court of Appeal of Louisiana* (*Mar. 8, 1932*), *139 Southern Reporter, page 904.*—Mrs. Alida Parks Favre filed suit against the Celotex Co. in the seventeenth judicial district court, Parish of Lafourche, La., to recover the payment alleged to be due as compensation under the State workmen's compensation act.

The claim was based upon the death of Joseph Favre, her son, who was employed by the Celotex Co. at the time he was accidentally killed. The district court awarded compensation in the sum of $1,535.53, and the company appealed the case to the Court of Appeal of Louisiana.

The sole question in dispute was whether the mother was a legal dependent of the deceased employee. It was alleged that the deceased employee was an illegitimate child of the claimant. Evidence was introduced tending to show that the first husband of the claimant, Antoine Billard, the presumed father of the deceased employee, had been absent and unheard of since January 1908, and because of his continued absence the claimant was granted permission by the court to enter into a second marriage in January 1927.

Objection was made to the introduction of the above evidence on the following grounds:

> The above evidence is objected to on the ground that, under the articles of the civil code and the jurisprudence of this State, the question of the legitimacy of a child born under these circumstances can only be put at issue by the father during his lifetime, and by his children within a limited time after his death. That the law and jurisprudence forbid his legitimacy to be attacked, unless the party upon whom the attack is made is made a party to the proceedings. And the jurisprudence is, carrying out the articles of the code, that the child born during the existence of the marriage is presumed to be the child of the husband.

The court upheld this objection and agreed with the lower court in refusing to allow the question of legitimacy to be challenged. The court quoted from the case of *Succession of Saloy* (10 So. 872), in which the court said that: "Where aware of the circumstances under which he might have exercised the right of repudiation, the husband, who is the sovereign arbiter of his honor, fails to do so, the door is forever closed, and no one can afterwards assert a right strictly personal to him."

The decision of the lower court awarding compensation was therefore affirmed.

WORKMEN'S COMPENSATION—COVERAGE—EMPLOYEE—CONVICT LABOR—*Greene's Case, Supreme Judicial Court of Massachusetts* (*Oct.*

18, 1932), 182 Northeastern Reporter, page 857.—A prisoner injured while working in a county jail under a sentence of 3 months for failure to pay a fine of $125 is not an "employee" within the meaning of the Massachusetts workmen's compensation act.

The petition for compensation was filed by Thomas F. Greene against the Charles Street jail and Suffolk County, Mass. Greene had been "sentenced to the Charles Street jail for 3 months to work out a fine of $125", and while there he was directed to assist in cleaning the jail. While performing this work he fell into some boiling water and received severe burns. He remained in the hospital during the balance of his term (80 days).

The claim was dismissed by the industrial accident board and the superior court, Suffolk County, affirmed the decision. From this decree Greene appealed the case to the Supreme Judicial Court of Massachusetts. The only question involved was whether Greene was an "employee" at the time he was injured. The term is defined by the compensation act to include "every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of the trade, business, profession, or occupation of his employer * * *."

The court was of the opinion that the fact that a person confined in jail was compelled to perform labor "did not constitute him an employee of the county 'under any contract of hire, express or implied, oral or written.'" The term "contract of hire" was considered as suggesting a "voluntary relation between the parties" and not one applicable to a prisoner.

The decree of the lower court dismissing the claim for compensation was therefore affirmed.

WORKMEN'S COMPENSATION—COVERAGE—POLICEMAN, ETC.—CONSTRUCTION OF STATUTE—*Ogilvie et al.* v. *City of Des Moines et al., Supreme Court of Iowa (Dec. 9, 1930), 233 Northwestern Reporter, page 526.*—On July 11, 1930, Harry Ogilvie was shot and killed while performing his duties as a policeman in the city of Des Moines, Iowa. The minor children of the deceased policeman petitioned the industrial commission for an award of compensation. The arbitration committee denied an award, and on review by the commissioner the order was affirmed. The district court, Polk County, Iowa, also affirmed the order and the case was then appealed by the dependents to the Supreme Court of Iowa. The question involved on appeal was whether a policeman in Des Moines is covered by the Iowa workmen's compensation law.

A policemen's pension fund is maintained by the city of Des Moines and each policeman contributes approximately 1 percent of his annual salary to this fund. Section 6318, Code 1927, provides:

Upon the death of any acting or retired member of such [police] departments, leaving * * * minor children * * * there shall be paid out of said fund as follows: * * * 3. To the guardian of each surviving child under 16 years of age, $8 per month.

Section 1361, Code of 1927, which is part of the Iowa workmen's compensation law, provides in part as follows:

The provisions of this act shall not apply as between a municipal corporation, city or town and any person or persons receiving any benefits under, or who may be entitled to, benefits from any "firemen's pension fund" or "policemen's pension fund" of any municipal corporation, city or town.

The two sections referred to above were the basis for the adverse decision of the commissioner, and the district court also held that by such sections a policeman in Des Moines was not covered by the compensation act.

Those claiming compensation relied on section 1422, Code 1927, which is an amendment to the compensation law, and reads in part:

That henceforth any policeman (except those pensioned under the policemen's pension fund created by law), * * * who shall while in line of duty or from causes arising out of or sustained while in the course of their official employment, meaning while in the act or making or attempting to make an arrest * * * be killed outright, or become temporarily or permanently physically disabled or if said disability result in death, shall be entitled to compensation, the same to be paid out of the general funds of the State for all said injuries or disability. * * *

It was contended that as Ogilvie was not a pensioned policeman he was not within the class excluded by the amendment and that this amendment repealed the provisions in section 1361. As there was no repealing clause in the amendment the court held that if the former provision was repealed it would have to be a repeal by implication and such a repeal is not favored by the court. The court said, "It is a fundamental rule of construction that, when there are two statutes which relate to the same subject matter they shall be construed, if it can reasonably be done, so that both may stand and have force and effect."

After examining the statutes to see if there was an irreconcilable conflict the court reached the following conclusion:

The statutory law relative to the policemen's pension fund applies only to cities, and only to such cities as have an organized police department. * * * It is quite apparent that it was the legislative intent, by the enactment of section 1422, Code 1927, and by the

language therein used, to include within the provisions of said statute those policemen in cities and towns not having an organized police department and a policemen's pension fund, and to exclude from the provisions of said statute those policemen in cities having an organized police department and a resultant policemen's pension fund to which they are required to contribute, and are beneficial thereunder. By this construction there is no conflict or inconsistency between paragraph 4 of section 1361 and section 1422, and the effect to be given to both.

The court held that "the deceased policeman during his lifetime was not entitled to compensation under the workmen's compensation act and that his dependent children are not entitled to an award under said act." The decision of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION—COVERAGE—STREET ACCIDENT—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*New Amsterdam Casualty Co.* v. *Hoage, Deputy United States Employees' Compensation Commissioner, Court of Appeals of District of Columbia (Jan. 6, 1931), 46 Federal Reporter (2d), page 837.*—On August 14, 1928, James N. Bradley was employed by the Royal Glue Co., a corporation engaged in business in the city of Washington, D.C. Bradley had been in the employ of the company for a period of about 40 years, and on the morning of August 14 he reported for duty at the usual hour, and shortly thereafter informed his immediate superior, "I am going up the street on a little business and will be right back." He accordingly left the premises of the company and went directly to a bank located in the financial district of the city, for the purpose of cashing a personal check. As he was crossing an intersection he was struck by a street car and killed. From the circumstances it appeared that Bradley was on his way to transact another private errand when he was killed, although, on the other hand, there was some indication that he might have been en route to one of several stores in which the company occasionally made purchases. An official of the company testified that it was customary for Bradley to ask permission when he left the plant on private business. No such request was made on the day of the accident. Bradley's immediate superior also stated that he had no knowledge of the employee's errand. No evidence was produced of any necessary purchases for the company. The deputy commissioner of compensation for the District of Columbia, however, made an award in favor of the deceased employee.

In an appeal by the insurance carrier the Supreme Court of the District of Columbia dismissed the case. The insurance carrier thereupon appealed to the Court of Appeals of the District of

Columbia. The court of appeals referred to several sections of the District of Columbia compensation act, and especially to the provision relative to the procedure in the event a compensation order was not in accordance with the law.

The main question then for determination by the court of appeals was whether the award was "in accordance with law." The court said that a presumption usually arises upon proof of injury and the existence of the employer and employee relationship, and a claim for compensation therefore "comes within the provisions of this act." If, however, substantial contrary evidence is introduced, and no other counteracting evidence is presented by the claimant, the presumption is therefore rebutted.

In the view of the court of appeals "there was substantial evidence in this case that Bradley at the time of his injury was not performing services 'arising out of and in the course of' his employment, and that there is no substantial evidence to the contrary."

The court continuing, said that it would be indulging in pure conjecture, inconsistent with the established facts, "to infer that when he sought permission to go up the street on a little business, he meant that he was going out to make an emergency purchase for the company, that he cashed the check for the purpose of obtaining money to pay for that purchase, and, when killed, was on his way to make the purchase."

An award, therefore, the court concluded, "based upon conjecture inconsistent with established facts and circumstances is manifestly so arbitrary and unreasonable as to be 'not in accordance with law.'"

The decree of the Supreme Court of the District of Columbia was therefore reversed.

WORKMEN'S COMPENSATION—COVERAGE—WATCHMAN—INTERSTATE COMMERCE—YARD POLICEMAN—*Southern Railway Co.* v. *Varnell, Supreme Court of Alabama (Dec. 18, 1930), 131 Southern Reporter, page 803.*—G. L. Varnell, while employed as yard policeman by the Southern Railway Co., arrested two hobos and removed them from one of the company trains. While searching the men at the station some distance off but still on the railway premises, Varnell was shot and subsequently died. The widow, Julia M. Varnell, proceeded under the Alabama workmen's compensation act against the Southern Railway Co. to recover compensation on account of the death of her husband.

The Jefferson County, Ala., circuit court awarded compensation to the widow, and the employer appealed the case to the Alabama Supreme Court on the ground that the deceased employee was en-

gaged in interstate commerce at the time of the accident and was therefore covered by the Federal Employers' Liability Act rather than by the Alabama workmen's compensation act.

The facts as to the nature of Varnell's duties were undisputed. He was to guard the premises, including cars or trains made up or standing in the yard, whether they were interstate or intrastate, and it was his duty to arrest trespassers on the railway's yard or trains.

After reviewing these facts the court said:

We find nothing in the evidence to show or indicate that Varnell's duties were connected with or contributed to the operation of trains, as they were merely that of a local policeman or watchman, and in no way concerned with making up or operating trains or of doing work by giving signals or aiding, directly or indirectly, in the formation or movements of same, and, unless his duties related in some way as an aid in the operation of trains or in furnishing the necessities therefor such as fuel, water, etc., or in mending or repairing the machinery therefor, it cannot be said that he came within the influence of the Federal Employers' Liability Act (45 U.S.C.A. sec. 51–59).

The court reviewed a number of Federal decisions interpreting the Federal Employers' Liability Act, and in concluding the opinion which affirmed the judgment of the lower court, said:

We think that the holding that the Federal act does not apply to a local policeman, whose duties are those of guarding and protecting the railroad's property within a certain locality, although the railroad may be engaged in interstate commerce, is sound and rational.

Moreover, if it be conceded that the intestate was engaged in interstate work when removing the hobos from the train and had been injured through the negligence of those in charge of the train that, under those circumstances, there would be a liability under the Federal statute, yet this relationship had, in effect, terminated when he had taken them some distance off and was engaged in searching and questioning them a considerable time after the arrest. In other words, at the time he was shot the interstate relationship had terminated, if it ever existed.

WORKMEN'S COMPENSATION—DEATH—HIGH BLOOD PRESSURE—PHYSICAL INJURY—*Industrial Commission of Ohio* v. *O'Malley*, *Supreme Court of Ohio* (*Nov. 25, 1931*), *178 Northeastern Reporter*, *page 842*.—On the night of August 23, 1928, John O'Malley was working as night watchman for the Worthington Co. The company was covered by the Ohio workmen's compensation law and the State insurance fund. An iron gate closed an alleyway between the building owned by the Worthington Co. and the adjoining building, and it was part of O'Malley's duty as night watchman to open and close this iron gate. About 3 a.m. on the morning of August 23 a door in the adjoining building was discovered open and the police were called.

O'Malley, after opening the iron gate for the police, accompanied them to the rear of the alley and immediately returned to the front of the Worthington Building, where he seated himself in a chair on the sidewalk. Shortly thereafter a second police squad appeared upon the scene and found O'Malley seriously sick. When they inquired as to what was the matter, he told them he had high blood pressure and that the excitement was too much for him, and asked to be taken to a hospital. He died within a few minutes after arrival at the hospital, and a post-mortem examination disclosed that there was no evidence of injury and that death resulted from "acute pulmonary edema."

The widow applied for compensation, and the application was denied by the Ohio Industrial Commission. Suit was brought in the court of common pleas and the order of the commission was reversed. The court of appeals, Cuyahoga County, affirmed this judgment and the case was appealed to the Supreme Court of Ohio for review.

In reversing the judgment of the lower court and denying compensation to the widow, the Ohio Supreme Court said: "The only evidence relating to the cause of O'Malley's death is his own statement that he had high blood pressure and that 'the excitement of it all' was the cause of his illness. If O'Malley's death was caused by excitement merely, it was not caused by any physical injury contributing to his death." The court therefore held that death caused by excitement was not compensable under the Ohio law. The decision of the lower court was reversed, and judgment was entered in favor of the Industrial Commission of Ohio.

WORKMEN'S COMPENSATION—DEATH BY FREEZING—DELEGATION OF AUTHORITY TO REFEREE—*King et al.* v. *Alabam's Freight Co. et al., Supreme Court of Arizona (Apr. 30, 1931), 298 Pacific Reporter, page 634.*—In January 1930, the Alabam's Freight Co. was operating two freight trucks from Phoenix to Jerome, Ariz. The trucks left Phoenix on the evening of January 10, 1930, but, because of a severe snowstorm, became stalled at Congress Junction. The agent in Jerome was notified, but the telegram did not reach Jerome until January 13. Meanwhile, when the trucks were 6 hours overdue, the agent made preparations to go over the mountain, to take off the newspapers and perishable freight, and bring them to Jerome. He employed one King to go with him, because King was an experienced driver on this particular road.

The following day their truck was found a half mile beyond the first summit of the mountain, and a mile beyond were the frozen bodies of the two men. King's widow proceeded under the workmen's compensation act for compensation for his death while acting

in the course of his employment. Compensation was refused, and Mrs. King requested a review by the Supreme Court of Arizona of the order of the industrial commission denying compensation.

In the petition for review, the procedure followed by the industrial commission was attacked, and also the findings that the evidence was insufficient to establish that King was an employee of Alabam's Freight Co., or that he was performing any duty for it.

The Supreme Court of Arizona agreed with Mrs. King's charge that the evidence on rehearing was heard by a referee, and quoted a former Arizona case (*Johnson* v. *T. B. Stewart Construction Co.*, 293 Pac. 20), as follows:

> We think it is implicit in the workmen's compensation act that all orders and awards must be the deliberate act of the commission. It is the duty of the commission as a body to consider and deliberate upon the evidence and all of the evidence * * * and bring to bear their best and most conscientious judgment with a view of reaching a just, fair, and equitable conclusion. The commission cannot delegate this imperative duty to anyone.

In regard to the findings of the commission referred to above, the court said:

> Kirkpatrick was the agent of this company in Jerome and it was his duty to do what was necessary to keep things going in that vicinity. Three months before he had employed Allen McDonald, who was still with the company, as a truck driver around Jerome. He had the right, the president of the company testified, to hire someone to help him unload heavy stuff " and if a truck was broken down he would have authority to get whatever assistance he would need to get it in." Nothing more than this statement is needed to show that he was acting within the scope of his authority in hiring King to go with him a few miles out of Jerome to aid the drivers of his employer's trucks, which he felt sure were stalled in the snow.

The decision of the industrial commission was therefore reversed.

WORKMEN'S COMPENSATION—DEATH OF MINOR—PARTIAL DEPENDENCY—*Correia's Case, Supreme Judicial Court of Massachusetts (Apr. 14, 1931), 175 Northeastern Reporter, page 731.*—Frank Correia received an injury arising out of and in the course of his employment with the American Laundry Machine Co. At the time of the injury he was 19 years old and living with his mother. She testified that he " turned in his pay envelope to her each week." Her other two sons did the same thing. She bought food and clothing for them and gave them spending money. The industrial accident board found that the mother was dependent upon the earnings of the minor son, and the superior court ordered compensation paid to the mother upon this basis. The Maryland Casualty Co. appealed from the de-

cision of the lower court, contending that "the employee did not contribute all his earnings to his mother" and, consequently, that she was not "100 percent partially dependent" upon his earnings for support. The court held that the deceased employee's mother had received all of his earnings in the exercise of her common-law right to the earnings of an unemancipated minor, and since she was partially dependent upon him, money given to her in accordance with this right was "contributed by the employee" to her within the meaning of section 31 of the workmen's compensation law. On the other hand, the court said, although she had a corresponding duty to furnish reasonable support to the minor son, money expended by her for such support was expended for her own purposes, and it should not be deducted in determining the amount of his contributions to her. In regard to the allowance for spending money, the court said:

> An allowance by a parent to a minor child for "spending money" used "for entertainment", stands on a somewhat different footing from expenditures which the parent is required by law to make for the support of such a child. The cases, however, do not turn on the fact that the expenditures were necessary, but on the fact that they were made by the parent for his own purposes. It cannot be ruled as matter of law that an allowance to a minor child for "spending money" which is reasonable in the circumstances of the case is not an expenditure for the parent's purposes, though doubtless an allowance so large as to be disproportionate to the parent's resources would have a strong tendency to show that the parent was acting "as banker for the child by keeping the wages of the latter for his use" rather than exercising "the common-law right of receiving and using as his own the earnings of his minor child."

The decree of the superior court was affirmed by the Supreme Judicial Court of Massachusetts.

WORKMEN'S COMPENSATION—DEPENDENCY—RESIDENCE IN FOREIGN COUNTRY—*Bodnarik* v. *Empire Floor & Wall Tile Co., Court of Errors and Appeals of New Jersey (Oct. 19, 1931), 156 Atlantic Reporter, page 450.*—John Tirpak lost his life in September 1926 in the service of his employer, the Empire Floor & Wall Tile Co. It appears that Tirpak had come to this country from Czechoslovakia some years before his death, but that his wife remained in her native land, where she partially supported herself. Tirpak sent her $1.50 per week. The workmen's compensation bureau awarded the widow the full amount of compensation allowed to a widow, wholly dependent. The Empire Floor & Wall Tile Co. appealed the case to the court of common pleas, and then to the Supreme Court of New Jersey, contending that this amount was not justified under

the law. The New Jersey workmen's compensation law (Acts of 1911, ch. 95, sec. 12, as amended) provides that one person wholly dependent shall receive 35 percent of the wages of deceased employee for a specified time and then declares that for partial dependents "except in the case of the widow and children who were actually a part of decedent's household at the time of his death, the compensation shall be such proportion of the scheduled percentage as the amounts actually contributed to them by the deceased for their support constituted of his total wages, and the provision as to $10 minimum shall not apply to such compensation."

Both courts affirmed the award made by the workmen's compensation bureau, but on final appeal to the Court of Errors and Appeals of New Jersey, the judgment was reversed, the court saying:

> Although as a general proposition it is true that, by reason of the marital relation, a wife is entitled to complete support from her husband, the statute referred to recognizes the fact that such complete support is not always furnished, and that the wife very frequently partially supports herself. * * * In the present case, under the facts stated, it is clear that the wife of the decedent was only partially dependent upon the husband for her support, and that she was not a member of his household at the time of his death, and, by the express language of the statute, she therefore is not entitled to the full 35 percent of the wages which her husband was receiving at the time when he lost his life.

WORKMEN'S COMPENSATION—DEPENDENTS—AWARD—REMARRIAGE OF WIDOW—*Finley et al.* v. *Keisling Lumber Co. et al., Supreme Court of Tennessee (Feb. 21, 1931), 35 Southwestern Reporter (2d), page 388.*—Following the death of Robert B. Finley, an employee of the Keisling Lumber Co., in February 1924, the widow and two minor children were awarded compensation of $5 per week for 400 weeks. In May 1927 one of the minor daughters married, and in April 1928 the widow remarried. Payments of compensation ceased after May 5, 1928. A petition was filed which sought a decree in favor of the two minor children for the balance due on the award. The circuit court, Overton County, Tenn., adjudged that the portion of the original award remaining unpaid should be paid to the two minor children, even though one of them was married.

The Lumber Co. appealed the judgment to the Supreme Court of Tennessee, contending that on the marriage of one of the daughters her right to compensation wholly ceased, and that the other minor child was not entitled to receive the full award of $5. In support of this contention the company cited subsection 14 of section 30, chapter 123, of the Acts of 1919, which in comprehensive terms reads as follows:

If compensation is being paid under this act to any dependent, such compensation shall cease upon the death or marriage of such dependent, unless otherwise provided herein.

The court also considered the sections of the act which provide that compensation previously awarded to the widow and children passes to the children under 18 years of age upon the remarriage of the widow. The court said, however, that "the compensation act as a whole appears to recognize women having living husbands as dependents on such husbands." Therefore the judgment of the lower court was modified so as to award the entire sum of $5 per week to the remaining minor child under 18 years of age, and allow no compensation to the minor child who was married.

WORKMEN'S COMPENSATION—DEPENDENTS—COMMON-LAW WIFE—SUFFICIENCY OF THE EVIDENCE—*Hoage, Deputy Commissioner, United States Employees' Compensation Commission et al.* v. *Murch Bros. Construction Co. et al., Court of Appeals of District of Columbia (June 1, 1931), 50 Federal Reporter (2d), page 983.*—Turner Sutton, a resident of the District of Columbia, was employed as a laborer by the Murch Bros. Construction Co. On December 3, 1928, he was injured and subsequently died. Sadie Sutton, as the surviving common-law wife, claimed compensation under the District of Columbia workmen's compensation act. The deputy commissioner found that the parties had lived together for a period of about 3 years as husband and wife and had so represented themselves to the public, and that the wife was dependent upon the husband for her support at the time of his death. He therefore awarded her compensation.

The Construction Co. and the insurance carrier opposed the award of the commissioner on two grounds: (1) The evidence did not sustain the findings of the commissioner; and (2) that even if the evidence did sustain the findings the common-law marriage relationship did not exist in the District of Columbia, and was therefore illegal.

The insurance company obtained an injunction in the Supreme Court of the District of Columbia, on the ground that the finding of the commissioner that the claimant had entered into a common-law marriage in the District of Columbia did not entitle her to compensation, since no such marriage was legal under the laws of this jurisdiction.

The deputy commissioner thereupon appealed to the Court of Appeals of the District of Columbia. The main question for consideration by the appeals court was whether or not a common-law marriage was valid in the District of Columbia. At common law,

the court pointed out, no formal ceremony was essential to a valid marriage. No peculiar ceremonies were even required, the consent of the parties being the prime requisite. Even the Roman lawyers, it was stated by Chancellor Kent of England, "strongly inculcated the doctrine that the very foundation and essence of the contract consisted in consent freely given, by parties competent to contract."

After the year 1753, common-law marriages were forbidden in England. The act, however, as adopted in England, the court said, "was never adopted in any of the States of the United States."

In this country it has been generally held that—

A marriage according to the common law is valid and binding, in the absence of a statute prohibiting or declaring void a marriage not solemnized in accordance with its provisions, and also it has been held, by the greater weight of authority, that statutory provisions as to solemnizing marriages, not containing words of nullity, are directory merely, and do not affect the validity of common-law marriages.

A case which was decided in Maryland (*Denison* v. *Denison*, 35 Md. 361) holding a contrary view was followed in a former decision by the court of appeals (*De Forest* v. *United States*, 11 App. D.C. 458), but the court pointed to the fact that the Maryland law was continued in force in the District of Columbia by an act of February 27, 1801 (2 Stat. 103). By a subsequent change, however (Code of 1929, ch. 3, title 1), all references to the laws of Maryland are omitted. Congress has enacted a complete marriage and divorce law for the District of Columbia, and the court said:

It is to these laws, rather than to those preserved out of the past relationship with the State of Maryland, that we must look for guidance and control in the determination of the question now before us, and hence we do not think we can safely follow the decision of the Court of Appeals of Maryland in *Denison* v. *Denison*, supra, in which it was held that under the Maryland marriage act of 1777, to constitute a lawful marriage, "there must be superadded to the civil contract some religious ceremony", for this is not true under the marriage laws of the District.

The court referred to a case (*Meister* v. *Moore*, 96 U.S. 76), decided by the United States Supreme Court, in which the validity of common-law marriage in Michigan was involved, and also to a more recent case (*Travers* v. *Reinhardt*, 205 U.S. 423) in which the doctrine in the former case was reaffirmed, and continuing said:

We think, therefore, that it cannot now be controverted that an agreement between a man and woman per verba de praesenti to be husband and wife, consummated by cohabitation as husband and wife, constitutes a valid marriage, unless there be in existence in the State in which the agreement is made a statute declaring the marriage to be invalid unless solemnized in a prescribed manner,

and we think it equally true that the rule now generally recognized is that statutes requiring a marriage to be preceded by a license, or to be solemnized by a religious ceremony, without express words of nullity as to marriages contracted otherwise, are directory merely, and failure to procure the license or to go through a religious ceremony does not invalidate the marriage.

The court, in concluding the opinion, referred to several sections of the 1929 code of the District of Columbia on the subject of "Marriage", and announced that—

There is nothing in the statute which declares that a marriage shall not be valid unless solemnized in the prescribed manner, nor does it declare any particular thing requisite to the validity of the marriage. . The act confines itself wholly with providing the mode of solemnizing the marriage and to the persons authorized to perform the ceremony. Indeed, the statute itself declares the purpose underlying the requirements to be to secure registration and evidences of the marriage rather than to deny validity to marriages not performed according to its terms, and, since the legislative intent to abrogate the common-law right may not be presumed, unless clearly expressed (*Meister* v. *Moore*, supra), we are necessarily brought to conclude that the decision of the lower court that common-law marriages in the District are invalid is not supported by law and is wrong. The case of *Meister* v. *Moore* was decided in 1877, and *Travers* v. *Reinhardt* in 1907, and we must assume that Congress knew of these cases. Much water has since passed over the dam, and the statutes on the subject in the District have remained unchanged; and if, as was said by the Court of Appeals of Virginia in *Offield* v. *Davis*, 100 Va. 250, 40 S.E. 910, the doctrine of common-law marriage is contrary to public policy and public morals, it is for Congress and not the courts to do what is needful by appropriate legislation to declare such unions null and void.

The decree of the lower court was therefore reversed, and the award of the deputy commissioner to the widow was allowed according to the provisions of the District of Columbia workmen's compensation act.

WORKMEN'S COMPENSATION—DISABILITY—CHANGE OF STATUS—"ECONOMIC CONDITIONS"—*General Accident Fire & Life Assurance Corporation et al.* v. *McDaniel, Court of Appeals of Georgia (July 17, 1931), 160 Southeastern Reporter, page 554.*—Lamar McDaniel, while in the employ of the Eastern Carolina Service Corporation, sustained an injury which resulted in a hernia. He underwent an operation for its cure, but before he was able to return to work the hernia recurred and a second operation was not advised. He was awarded compensation for temporary total disability, and later when he secured selected employment for himself the award was changed to partial disability. He continued in this employment until April

1930, when the plant shut down, and since that date has been unable to find work suitable to his impaired physical condition. He therefore applied for an increase in compensation due to a change in conditions, and the industrial commission allowed compensation for temporary total incapacity. The superior court, Chatham County, Ga., affirmed the award, but upon appeal to the Court of Appeals of Georgia the decision was reversed, "there being no finding of fact by the commission that the claimant was unable to do any work, or that he was unable, by reason of his injury to resume his former occupation, or that he was unable, by reason of his injury, to procure remunerative employment at a different occupation suitable to his impaired physical condition." In denying a motion for rehearing, the court said:

The fact that an employee may be partially disabled, and thereafter is able to find and does find remunerative employment suitable to his impaired physical condition, which he continues to perform until the work itself is shut down, for reasons in no wise connected with his previous injury, and that on account of economic or other conditions he is unable to find other work suitable to his impaired physical condition, does not authorize a finding that the original injury rendered him totally incapacitated to perform physical labor. * * * The injured employee, after successfully working at other and different employment suitable to his impaired physical condition, became idle on account of economic or other causes entirely disconnected with his injuries, and we, therefore, think that the only compensation he is entitled to under the findings of fact as made by the commission is the compensation originally allowed as compensation for his partial impairment.

In the case of *Maryland Casualty Co. et al.* v. *Wheeler* (1931) (159 S.E. 139), the same court affirmed an award of compensation as for total disability to an employee partially disabled but unable to find work and not offered work by employer.

The Supreme Judicial Court of Massachusetts held that the evidence was sufficient to support a finding that employee's injury (the amputation of a part of the ring finger and the tip of the thumb, both on the right hand) was the cause of his unemployment, even though he had gone back to work with no reduction of wages and had been discharged because of the business depression. (*Riley's Case* (1932), 179 N.E. 690.)

WORKMEN'S COMPENSATION—DISABILITY—DEGREE OF—CONSTRUCTION OF STATUTE—*Fanning* v. *W. E. Wood Co. et al., Supreme Court of Michigan (Oct. 30, 1931), 238 Northwestern Reporter, page 627.*—William Fanning received an injury which arose out of and in the course of his employment with the W. E. Wood Co. It was an accidental injury resulting in the loss of two thirds of the distal phalange of the index finger of the right hand. He filed a claim for compen-

sation and was granted an award by the Department of Labor and Industry of Michigan for the loss of half the right index finger. His employer appealed from this order to the Supreme Court of Michigan, contending that as the workmen's compensation act provided for compensation only for the loss of the whole finger or half a finger there should be no award for the loss of any other part.

The portion of the Michigan workmen's compensation act providing for specific losses, applicable to this case, reads as follows:

The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of one half of such thumb, or finger, and compensation shall be one half the amounts above specified. (Comp. Laws 1929, sec. 8426.)

The court considered its former decision in the case of *Packer* v. *Olds Motor Works* (162 N.W. 80) controlling. In that case the court held: " The statute nowhere provides for the loss of a part of a phalange in its list of specified injuries and presumed disability arising therefrom." As there was not such a loss as the statute specifies in its schedule, the court held there could be no recovery for such a loss.

The award of the department of labor and industry was therefore reversed.

WORKMEN'S COMPENSATION — DOMESTIC SERVICE — PRACTICAL NURSE—CASUAL EMPLOYMENT—*Cantwell* v. *Delaney et al., Supreme Court of New Jersey (May 25, 1932), 160 Atlantic Reporter, page 679.*—One Mrs. Cantwell, a practical nurse, was employed to care for a patient, " and to do washing, cooking, and general housework for a period of 3 weeks and such further time as her services might be required." She was a member of her employer's household and while performing her duties was accidentally injured.

The Workmen's Compensation Board of New Jersey awarded compensation. The court of common pleas of Essex County affirmed the award, and the employer requested the supreme court of the State to review the case. The employer raised four points:

(1) Petitioner was an independent contractor; (2) petitioner's employment was casual; (3) the award was excessive; (4) the common pleas court failed to hear, review, and determine the case de novo.

In reply to the above four points the court said:

As to the employment of petitioner, we conclude that the compensation bureau, and the court of common pleas rightly held that it was within the compensation act, and that it was not casual. The proofs reasonably show that it was for at least 3 weeks and such further indefinite period as her services might be required. The work

was of such a character as to constitute her a regular employee in the household of prosecutors. [Cases cited.]

Our reading of the testimony persuades us that the amount awarded as compensation for temporary and permanent disability was reasonably supported by the testimony and should not be disturbed.

The contention that the court of common pleas did not consider the evidence and reach an independent conclusion there is not supported by the determination and rule for judgment of the common pleas. The contrary appears to be the fact.

The judgment of the workmen's compensation board and the lower court was affirmed.

WORKMEN'S COMPENSATION—EMPLOYMENT FOR GAIN—CHARITABLE CORPORATION—*Lincoln Memorial University* v. *Sutton, Supreme Court of Tennessee (Nov. 14, 1931), 43 Southwestern Reporter (2d), page 195.*—The Lincoln Memorial University is an educational institution incorporated and chartered under the laws of Tennessee for the general welfare and not operated for profit. The university owns extensive property, including a waterworks plant which supplies water for the university grounds and also to the town of Cumberland Gap and vicinity. One Sutton was employed at this plant as a carpenter and while working in the course of the employment he was injured. He began proceedings under the State workmen's compensation act in the circuit court, Claiborne County, and received an award. The trial judge, after hearing the evidence, reached the following conclusions:

That about one fourth of the water distributed was used by the university and about three fourths sold in Cumberland Gap and vicinity; that to meet requirements of insurance companies plaintiff in error undertook the construction of another reservoir to maintain a uniform supply of water in Cumberland Gap; that reservoirs previously constructed would have insured uniformity of supply to the university proper; that the defendant in error was employed as a carpenter in the construction of this new reservoir by the plaintiff in error; and that, while engaged in such employment, the defendant sustained injuries, arising out of and in the course of said employment, for which he sues.

The university appealed the case to the Tennessee Supreme Court on the ground that, as an eleemosynary institution, it was not subject to the provisions of the workmen's compensation act. The court cited cases in which it had recognized the so-called trust theory and held that a charitable corporation was not liable in tort for negligence of the servant. "The idea is", said the court, "that the tolerance of such liabilities might eventuate in the destruction of the charity and discourage donors, to the detriment of the public welfare."

The case of *Gamble* v. *Vanderbilt University* (200 S.W. 510), was cited by Sutton. In that case Vanderbilt University was held liable for the negligence of the servant in the operation of a building owned as an investment, and not strictly a part of the educational plant. The court considered this case controlling and said:

We think that *Gamble* v. *Vanderbilt University* supra, is controlling here. The reservoir, in the construction of which the employee was injured, was being constructed to insure the uniform delivery of water to customers in Cumberland Gap. The sale of water was undertaken by plaintiff in error for profit, just as the office building was operated by Vanderbilt University for profit. Each enterprise was conducted for income. Neither effort immediately touched educational work.

The judgment of the court below directing that the award be paid only out of the income from the waterworks was therefore affirmed.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—AVIATION—INDEPENDENT CONTRACTOR—*Murray* v. *Industrial Accident Commission of California et al., Supreme Court of California (Sept. 16, 1932), 14 Pacific Reporter (2d), page 301.*—Hamilton Murray, a resident of California, was engaged in business as a land appraiser, and airplane flying was his hobby. In February 1931 he purchased a plane from the Curtiss-Wright Airplane Co. in Robertson, Mo.

On June 3, 1931, he was given the bill of sale, and authorized one Long, a licensed pilot who was seeking to increase his flying service in order to secure a commercial license, to accept delivery of this machine, and to fly the plane from Missouri to California. The next day when Long called at the plant he was informed by the superintendent that the plane ordered was not ready, but another plane was offered. Long accepted the substitute plane without communicating with Murray, and flew back to California in it. However, he was severely injured before delivering the plane to Murray, and he asked compensation for his injuries. The industrial commission awarded compensation, and the award was carried for review to the District Court of Appeal of California.

The court annulled the award on the ground that the relation of employer and employee did not exist. Two reasons were advanced for this view. First, the court said the relation, if existing at all, was that of an independent contractor. Murray had no control over Long as to the time the flight was to begin or end, nor control over the route to be taken, the speed to be used, or the time or places Long might stop along the route. The court concluded that "this total absence of control negatives the relation of master and servant."

The court, however, pointed to another fact that tended to show the absence of this relation, which was that Long was using a substitute plane at the time of the injury. He had authority to accept one particular plane which had been sold to Murray, and he accepted the substitute without the knowledge or consent of Murray.

The court said that "if any relation of employer and employee had existed * * * it existed solely for the purpose of delivering to the petitioner the plane which he had purchased from the Curtiss-Wright concern."

The award of the industrial commission was therefore annulled by the district court of appeal (10 Pac. (2d) 97).

The case was then appealed to the Supreme Court of California, which rendered an opinion on September 16, 1932. The first question involved was whether Long was an employee or an independent contractor. The attention of the court was called to the case of *Hillen* v. *Industrial Accident Commission* (250 Pac. 570), which held that the question as to whether the person injured was an employee or an independent contractor was a mixed question of law and fact and that the finding of the commission, if supported by evidence, is binding on the court. The court is not empowered to set it aside unless there is such an entire absence of evidence in the record as to render the finding unreasonable, or in excess of the powers of the commission. Continuing, the court said:

> Applying the principles of law approved in that case to the facts in the instant action, we think it must be held that the evidence before the commission was sufficient to support its finding that Long was an employee, and not an independent contractor. He was rendering service for Murray, and for this service Murray paid Long compensation. * * * Nothing was left to Long's discretion except the choice of the route. As to all other matters Murray gave Long express directions. * * *
>
> In this case we have evidence that Murray gave Long numerous suggestions and some direct orders as to the method and manner to be followed by Long in flying the airplane on the proposed trip. * * * Taking the evidence as a whole, we think that there can be no question but that it was sufficient to justify the finding of the commission that Long was an employee of Murray at the time he sustained the injury for which he now seeks compensation.

The evidence also disclosed that Murray was employed as a "dealer" for the sale of airplanes from the Curtiss-Wright Co. He admitted that he intended to use the plane Long was flying in securing additional sales and that he planned to sell the plane sometime in the future. Therefore the court held that the commission was justified in holding that the employment of Long was not casual. Even though Murray's regular business was land appraising, he had engaged in an entirely new field of activity and had

employed Long in connection with this new business. As to whether Long departed from the course of his employment when he accepted another machine than the one purchased by Murray the court said:

We fail to find any evidence that Long was ever informed by Murray or anyone else that Murray had purchased any particular machine from the Curtiss-Wright Co. or that Long was directed by Murray to get from the company any particular machine. Murray had purchased a machine from the company and he wrote Long to call, get the machine, and drive it to Murray's home. * * *

Continuing the court concluded:

In fact, he had no information from Murray, or from any other person, for that matter, which would have enabled him to determine whether the machine delivered to him was or was not the machine Murray purchased. Under the circumstances, he was justified in accepting from the company the machine it delivered to him as the machine which Murray had purchased and as the machine which Murray had hired him to fly to California. * * * We think there is substantial evidence to support the conclusions of the commission that Long did not knowingly depart from the course of his employment, but to the best of his knowledge and information was attempting to comply with the instructions of Murray, his employer, when he accepted machine no. 10984 from the company. As he was injured while flying this machine, the award of the commission compensating him for his injuries so received should be sustained.

The award of the industrial commission was therefore affirmed.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—CASUAL EMPLOYMENT—ELEEMOSYNARY INSTITUTION—*Gardner* v. *Trustees of Main Street Methodist Episcopal Church of Ottumwa et al., Supreme Court of Iowa (Oct. 19, 1932), 244 Northwestern Reporter, page 667.*—The Main Street Methodist Episcopal Church of Ottumwa, Iowa, had under construction a church building. The city had carried on the excavation work as a part of its program for relieving unemployment during April 1931. The excavation work was near completion on April 6, 1931, when the work was taken over by the church trustees. Frank Gardner was employed by one of the trustees to assist in completing the excavation. He began work on April 8 and worked until May 1, when he was injured by a bank of earth falling upon him. He was crushed by the earth and died on May 24, 1931.

Compensation was awarded to the dependents of Gardner by the Industrial Commission of Iowa, and the award was later affirmed by the district court of Wapello County. The insurance carrier and the employer thereupon appealed the case to the Supreme Court of Iowa. Two questions were raised in the case on appeal as a defense

to the payment of the award: (1) The church was an eleemosynary institution, and not subject to the workmen's compensation law; and (2) Gardner at the time of his injury was a casual employee and his employment was not for the purpose of the employer's trade.

The court discussed the latter of these questions first, and referred to section 1421 of the Iowa compensation act (Code, 1931), which provides that the following persons shall not be deemed workers or employees: "(a) A person whose employment is purely casual and not for the purpose of the employer's trade or business."

In determining whether a certain employment is "purely casual" the court followed the rule laid down in *Consumers' Mutual Oil Producing Co.* v. *Industrial Commission* (124 N.E. 608) as follows:

* * * Where the employment for one job cannot be characterized as permanent or periodically regular but occurs by chance, or with the intention and understanding on the part of both employer and employee that it shall not be continuous, it is casual. * * *

As applied to the facts in the instant case, Gardner was employed without any understanding that his employment would be continuous. He was one of the many men employed by chance to assist in this work. There is no showing that the job could be characterized as "permanent" or "periodically regular." Applying this rule, therefore, to the facts in the instant case, we must hold that the employment here was purely casual.

The court was also of the opinion that the employment was not "for the purpose of the employer's trade or business", for the court said, "It is our opinion that the church organization here had not a trade or business," and was not, therefore covered by the workmen's compensation act.

The decision of the lower court was therefore reversed.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—FIREMEN—*City of Macon* v. *Whittington, Supreme Court of Georgia (Nov. 15, 1930), 156 Southeastern Reporter, page 674.*—On December 23, 1927, a member of the fire department of the city of Macon, Ga., was killed. His employment was subject to the civil-service rules and regulations of the city of Macon, and such regulations did not define his status as being either that of an officer or of an employee. Compensation was awarded following a finding by the commission that the person killed was an "employee" as defined by the compensation act. Appeal was taken to the courts for a review of the finding of the commissioner, and the court of appeals certified the question to the Supreme Court of Georgia for settlement.

The court reviewed the civil-service rules and regulations which govern the employees of the city of Macon and found nothing to indicate whether the fireman killed was an "employee" or an "offi-

cer." It then cited the case of *Marlow* v. *Savannah* (110 S.E. 923), in which a similar question was raised regarding a policeman. In that case the court of appeals held:

The term "employee" in section 2 (b) of the workmen's compensation act (Ga. Laws 1920, p. 167), which provides that the term "employee" shall include "every person * * * in the service of another under any contract of hire," etc., does not apply to a policeman of a municipality. The relation of employer and employee does not exist between a municipality and a policeman so as to create a liability and benefits under the act; for a policeman is a public officer. * * * Under the agreed statement of facts in this case, the court did not err in holding that a policeman of the city of Savannah is not an employee under a contract, express or implied, and in reversing and setting aside the award against the mayor and aldermen of the city of Savannah by the commission acting under the workmen's compensation act.

In the case of *McDonald* v. *New Haven* (109 Atl. 176), the Connecticut courts applied the same interpretation in regard to a fireman, and held that a fireman was not an "employee" within the law. The provision in the Connecticut workmen's compensation act defining an "employee" is substantially the same as that in the Georgia act.

Relying upon these two decisions, the Georgia Supreme Court held that where there were no other facts to indicate whether the fireman killed was an officer or an employee of the city, the industrial commission was not authorized to find that the fireman killed was an "employee" within the meaning of the Georgia compensation act.

Upon a petition for a rehearing the court denied the motion.

A call fireman, who received a wage of $5 per year plus 75 cents per hour while on duty, was requested to use the fire-department ladders to rescue a cat from a tree. He acted under the direction of the chief of the fire department. He received an injury while thus engaged, and was denied workmen's compensation. The Supreme Judicial Court of Massachusetts affirmed the decision of the lower court and denied compensation on the ground that the employee was performing duties of a fireman, and not those of a laborer, workman, or mechanic in the employ of the town. (*In re Randall's Case* (1932), 180 N.E. 669.)

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—ILLEGAL CONTRACT—*Snyder* v. *Morgan, Court of Common Pleas of New Jersey (Feb. 4, 1931), 154 Atlantic Reporter, page 525.*—A contract to act as bartender for the unlawful sale of liquor is an illegal contract and the employee is without the benefit of the workmen's compensation law, according to a decision of the New Jersey Court of Common Pleas.

George E. Snyder was employed by Frank Morgan as a bartender in "Kay's Club," which was owned and operated by Morgan. On September 6, 1929, Snyder was hit in the face with a bottle when he refused to serve five or six persons who invaded the barroom where he was employed. As a result he suffered the loss of his left eye, and he filed a petition for compensation. The petition was dismissed by the New Jersey Bureau of Workmen's Compensation, and the appeal was taken to the Court of Common Pleas of New Jersey.

It was alleged by Snyder that he was employed merely to sell near beer. The court found, however, that the contract of hire was to dispense liquor in violation of the law. The court said that such a "contract to act as bartender for the sale of liquor was an illegal one, and both the employer and employee were subject to indictment and conviction for conspiracy to violate the prohibition laws."

The court cited the case of *Hetzel* v. *Wasson Piston Ring Co.* (98 Atl. 306), in which it was held that the workmen's compensation act did not apply to contracts which the legislature had already prohibited. The court also quoted in part the opinion of Chief Justice Gummere, of the Court of Errors and Appeals of New Jersey, in the case of *Boyle* v. *Van Splinter* (127 Atl. 257), as follows:

> It is only in those cases where the contract of hiring is valid that the workmen's compensation act is applicable. Contracts which are prohibited by express legislative enactments do not come within the cognizance of the bureau.

Snyder contended that he was entitled to his compensation claim under chapter 257 of the Public Laws of New Jersey, 1922. As to this the court said:

> This act provides a right of action to any person or to the estate of any decedent who sustains an injury or damage caused by any intoxicated person or by reason of the intoxication of, or the sale of any intoxicating liquor to, any person in violation of law. Obviously it does not affect the workmen's compensation acts, but applies to the long and dreadful train of injuries and damages which are likely to result either to the consumer or to innocent third persons from the illegal dispensation of liquor.

The judgment of the workmen's compensation bureau dismissing the petition was therefore affirmed.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—INDEPENDENT CONTRACTOR—*Reigel* v. *J. B. Finch Timber Co., Inc., Supreme Court of Minnesota (Jan. 9, 1931), 234 Northwestern Reporter, page 452.*—Charles Reigel was engaged in the occupation of farming about 2 miles from Deer River, Minn. During his spare time he worked for loggers about Deer River. The J. B. Finch Timber Co., located

in Duluth, about 90 miles away, had some piles stored on skids in one of the logging yards. In August 1929 the timber company called Reigel by telephone from Duluth, and asked him whether there was a carload of piling on the skids, and whether he could load a car. Reigel replied in the affirmative and was thereupon directed by the company to cut the piling into the required size and ship a carload to a given address in Superior.

In order to perform this "rush order" it was necessary to secure help, so Reigel hired three additional men. They were all paid 1 cent per lineal foot and the money was sent to Reigel who divided it among the men.

During the course of the work Reigel was injured and he filed claim for compensation. The Minnesota Industrial Commission awarded compensation, and the timber company appealed to the Supreme Court of Minnesota on the ground that Reigel was not an employee at the time of his injury. It was its contention that he was an independent contractor, engaged in shipping the piles.

The court found that the evidence did not support this contention and in affirming the decision of the industrial commission said:

He was working for hire and was an employee within the definition of the compensation act, General Statutes 1923 (1 Mason, 1927), sec. 4326(f), (g)(2), and sec. 4268. It hardly would be different if the defendant had sent its men from Duluth. It properly took advantage of its acquaintance with the plaintiff and his ability to do the slight supervision required. He was not conducting a business or contracting for himself. He was not hiring men and doing a contract job. He was working for hire for the defendant at a fixed price per hour for cutting and a specified price per lineal foot for loading. He was getting wages. Those working with him were not working for him; they were working for the defendant.

The Supreme Court of Nebraska held in the case of *Claus* v. *DeVere* (1931), (235 N.W. 450), that a person employed as caretaker of a carload of poultry shipped to market in another State was an employee within the compensation law, even though he furnished his own tools and used his own judgment in performing the work.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—MEMBER OF FIRM, ETC.—*Manfield & Firman Co. v. Manfield, Appellate Court of Indiana (Oct. 5, 1932), 182 Northeastern Reporter, page 539.*—In order to entitle a stockholder, director, or officer of a corporation to compensation under the Indiana workmen's compensation act, "he must be an employee whose remuneration is popularly designated as wages, rather than salary; * * * whose labor is manual or of a like degree of industrial or commercial importance as manual labor when viewed from the standpoint of individual accomplishment."

This decision was handed down by the Appellate Court of Indiana in a suit to recover compensation under the Indiana workmen's compensation law. Manfield & Firman Co. is a corporation composed of three stockholders, Manfield, Firman, and Schlossberger. It is engaged in the business of selling junk in Terre Haute, Ind., and is managed by Firman and Manfield. Their activities are so divided that Manfield does most of the work on the inside, while Firman handles the outside work. When one is sick the other usually performs the duties of both. Firman received $6,500 per year and held the title of president, while Manfield was designated secretary and treasurer and received $6,800 per year.

It became necessary for one of the members of the company to go to Peoria, Ill., to secure three railroad frogs for use in the business of the corporation. As Firman was sick at the time, Manfield went to Peoria in the company's car. While en route on the return trip from Peoria to Terre Haute, an accident occurred which resulted in the loss of an eye.

Manfield filed application before the Indiana Industrial Board and, by a 5 to 2 decision, was awarded compensation at the rate of $16.50 per week for 150 weeks. The company appealed from the decision of the board to the Appellate Court of Indiana.

In reviewing the testimony the court found that Manfield had testified that he was the manager and supervisor of the company. Two employees also testified that they considered Manfield the man in authority and that they received instructions from him. Many cases were cited which clearly defined the distinction between employer and employee under the workmen's compensation act. The court quoted from these cases that while "a person may be a stockholder and even a director or an officer of a corporation and at the same time be an employee and entitled to compensation," such was not the meaning of the term "employee" in its ordinary use. Continuing, the court said:

> By the provisions of the workmen's compensation act, the award is on the basis of certain percentage of what is designated as average weekly wages rather than the salary of the workman involved, and we are unable to see how in this case, where the appellee received a salary of $6,800 per year as secretary and treasurer of the corporation, the board was able to arrive at any amount of weekly wage.
>
> In a technical sense, all persons who are officers and directors of a corporation are employees, for the reason that a corporation can only function through agents and employees, but, when we consider the workmen's compensation act, a substantial distinction is recognized.
>
> Those who own the majority stock, dictate the policy of the corporation, and manage its prudential affairs, are considered in the same category as partners in the management of a business.

Manfield and Firman in real essence owned this business and managed it in form as a corporation, but in substance it was their business. * * *

The claimant in this case was not an employee or a workman entitled to compensation under the law.

The award of the industrial board was therefore reversed.

WORKMEN'S COMPENSATION—EMPLOYMENT STATUS—PARTNER—JURISDICTION—REVIEW OF AWARD—*Georgia Casualty Co.* v. *Hoage, Deputy Compensation Commissioner, Supreme Court of the District of Columbia (May 31, 1932), 60 Washington Law Reporter, page 510.*—The Georgia Casualty Co., an insurance carrier, filed suit in the Supreme Court of the District of Columbia to secure an injunction to restrain the deputy compensation commissioner from enforcing an award of compensation payable to the dependents of one Raines, an employee of C. R. Matthews & Co. The court dismissed the case and appeal was taken to the Court of Appeals of the District of Columbia. The issue involved was whether Raines, at the time of his death, was an employee or partner of C. R. Matthews. The original proceeding was before the deputy compensation commissioner, and award was made in favor of the dependents. Subsequent to the decision in the District of Columbia Supreme Court affirming the decision of the commissioner, the case of *Crowell* v. *Benson* (285 U.S. 22) was decided by the United States Supreme Court, and counsel for the insurance carrier contended that the effect of that decision required the court of appeals to send the case back to the District of Columbia Supreme Court for a new trial, as the commissioner was without jurisdiction. The appeals court held, however, that the rule established by the United States Supreme Court in *Crowell* v. *Benson* did not apply to the case, because no new trial had been requested of the lower court nor was any new evidence offered. Therefore the court looked only to the record before it in rendering its decision.

From the record it appeared that Matthews and Raines were formerly fellow-employees in an awning company in Washington, D.C. In 1925, Matthews started a business of his own and persuaded Raines to join him. Raines became the practical awning maker and did most of the outside work; he also kept the books for the company. This evidence, coupled with the fact that his earnings varied according to the volume of business, and that the company's bank account was subject to the check of Matthews and Raines jointly, formed the basis for the contention by the insurance carrier that Raines was a partner rather than an employee of Matthews. There was evidence, however, of the opposite view, for Raines never put any money into the business and after paying him Matthews took

all the profits. Matthews directed Raines in his work and on two or three different occasions had discharged him for being drunk, and later reinstated him. Raines had never claimed to be a partner and had never contributed anything to the business except his personal services for which he was paid.

The court held, in affirming the decision of the lower court, that there was no "community of interests" or a "joining as principals in carrying on business for joint profit" as was necessary to the existence of a partnership. The amount paid Raines was in the nature of compensation for his labor and not as his share as the result of a common adventure or enterprise. The court also pointed to the fact "that the premium paid to the carrier was based upon the amount of wages paid to employees" and therefore the insurance carrier had the opportunity of showing that Raines' wages were not included in computing this premium, but it offered no proof regarding this fact and in such a case the court said "the presumption is that such proof, if offered, would have been against its interest." As no other essential fact was in dispute, the court held the relation of master and servant did exist and the compensation awarded should be paid.

WORKMEN'S COMPENSATION — EVIDENCE — MISTAKE — FINDINGS OF COMMISSION—*Hughes' Case, Supreme Judicial Court of Massachusetts (Feb. 25, 1931), 175 Northeastern Reporter, page 95.*— Alfred Hughes was employed by John L. Stevens and the Appleton Co., in cleaning and painting the interior of a building. On the morning of November 26, 1929, he told one of his fellow employees that he was going to get a drink of water at the "bubbler" on the floor below. He was found later at the bottom of the elevator shaft and died 3 days later.

In going to the "bubbler" it was necessary to pass the fire door to the elevator shaft, which was 45 inches from the stairway door, and painted the same color. On the morning in question, the door to the elevator shaft was slightly closed and the gate inside had been removed.

The single member of the industrial accident board viewed the premises:

He found and ruled that, upon all the evidence including what he observed on his view, the employee, mistaking the fire door for the door leading upstairs, fell through the opening to the bottom of the elevator well thereby causing his injury and death, and that the accident arose out of and in the course of his employment.

The reviewing board affirmed and adopted the findings of the single member and the superior court affirmed the decision of the

board. The insurer appealed the case to the Supreme Judicial Court of Massachusetts. The court cited numerous cases holding that an injury to an employee arising from a mistake in doors is a hazard of employment and that the findings of the industrial accident board will be sustained if there is any evidence to support them, affirmed the decision of the lower court, saying in part:

The present case does not rest upon mere surmise and conjecture. It is a reasonable and natural inference that the deceased went to the bubbler and obtained a drink of water and thereafter started to return to his work on the third floor; that in so returning as the two doors were in proximity to each other and were painted the same color, he mistook the fire door for the door leading upstairs and fell down the elevator well. He was upon the premises of his employer and it is a reasonable inference that the accident occurred as found by the single member and by the board. Although under the act a claimant must sustain the burden of proof, he is not required to produce evidence which will exclude every possibility that the injury and death did not arise out of the employment.

Compensation was denied under the Nebraska workmen's compensation law where the employee did not prove by a preponderance of the evidence that the inhaling of gasoline vapors from a spraying machine caused pneumonia a few days later. (*Townsend* v. *Loeffelbein et al.* (1932), 244 N.W. 418.)

WORKMEN'S COMPENSATION — EXTRATERRITORIALITY — COMITY— *London Guarantee & Accident Co., Ltd., et al.* v. *Balgowan Steamship Co., Ltd., et al., Court of Appeals of Maryland (June 11, 1931), 155 Atlantic Reporter, page 334.*—A negligent act committed in one State, resulting in death, is not actionable in another State on the basis of the statutory laws of the former State unless the local statutes are substantially similar to those on which the action is based, according to a decision of the Court of Appeals of Maryland.

The facts of the case disclose that in November 1928 Davis Hawkins was employed by the Gulf Stevedoring Co. at Galveston, Tex., in loading bales of cotton on the steamship Balgowan, owned by the Balgowan Steamship Co. In the course of his work he received injuries, due to the negligence of the steamship company. Compensation under the workmen's compensation law of Texas, in the sum of $5,500, was awarded to the widow and children of Hawkins and paid by the London Guarantee & Accident Co., Ltd., the insurance carrier for the Gulf Stevedoring Co. Thereupon the insurance carrier filed suit for damages against the steamship company in the superior court of Baltimore City, Md. From its adverse decision the insurance carrier appealed to the Court of Appeals of Maryland, contending that the right of action given it by the Texas statutes was actionable in the courts of Maryland.

In regard to this right the court of appeals said:

Inherently no State statute has any extraterritorial force, and is administered in a foreign State as a matter of grace, not of right, upon principles of comity. [Cases cited.] And there seems to be no sound reason why any State should lend the use of its judicial machinery for the enforcement of rights created by foreign statutes or laws in favor of nonresidents, unless by its own laws and statutes similar in substance to the foreign laws and statutes like rights are granted to its own citizens.

In this case plaintiff's claim is based not only upon the death statute of Texas (tit. 77, Rev. Civ. Stat.), but also upon the workmen's compensation law of that State (tit. 130, Rev. Civ. Stat.), and its limitations statute (tit. 91, Rev. Civ. Stat.), so that it becomes necessary not only to compare title 77 and title 91 of the Texas statutes with article 67, Maryland Code, but also to compare title 130 of the Texas statute with article 101 of the Maryland Code.

Comparing the relevant statutes of the two States, the court found that in important particulars the Maryland statutes differed from the Texas statutes, and the court said "the conclusion is manifest that those differences are of such a character that the Texas statutes will not be administered in the courts of this State."

In pointing out the differences between the workmen's compensation laws of the two States, the court said:

The important differences between these provisions of those two statutes is, first, that under the Texas statute no settlement of any action brought to enforce the defendant's liability can be made without the approval of the Texas Industrial Accident Board, while under the Maryland act such litigation may be settled, adjusted, or compromised at any time by the parties; second, under the Texas act, such an action may be brought to enforce such liability only by the insurer, and neither the injured employee nor his dependents can enforce it, nor can they compel the insurer to do so, while under the Maryland statute the liability may be enforced by the employer or the insurer, or, if they or either of them fail to act within 2 months after the award, by the employee, or, in the event of his death, his dependents.

By the subrogation provision of the workman's [sic] compensation law of Texas the right to enforce the liability of a person, other than the employer whose wrongful act caused injury to an employee entitled to compensation under that act under circumstances creating a liability to pay damages in respect thereof is given to the insurer, while under the Maryland statute that right is given first to the insurer, and then, in the event of his failure to exercise it, to the injured employee, or, in case of death, to his dependents.

Under the Texas workman's compensation law, there can be no adjustment or compromise of the liability without the approval of the Texas Industrial Accident Board, while under the Maryland statute that right is in the parties interested.

These and other differences to which reference has been made indicate a dissimilarity in the relevant statutes of the two States so im-

portant and substantial that under the rule stated in *Ash* v. *Baltimore & O. R. Co.* (19 Atl. 643), and *Dronenburg* v. *Harris* (71 Atl. 81), no principle of comity could justify the courts of this State in administering the Texas statutes.

The judgment of the lower court was therefore affirmed.

The Supreme Court of Nebraska held that the workmen's compensation act of Nebraska was not applicable, where the contract of employment was made in another State for services to be performed there, and the employer was not engaged in an industry in the State of Nebraska to which the services covered by the contract were incidental. (*Freeman* v. *Higgins et al.* (1932), 242 N.W. 271.)

WORKMEN'S COMPENSATION—EXTRATERRITORIALITY—DOUBLE RECOVERY—*Interstate Power Co. et al.* v. *Industrial Commission of Wisconsin et al., Supreme Court of Wisconsin (Feb. 10, 1931), 234 Northwestern Reporter, page 889.*—On April 10, 1925, Vernon Oehler was accidentally killed by electrocution at Lancaster, Wis. At the time Oehler was killed he was employed by the Interstate Power Co., a Wisconsin corporation licensed to do business in both Wisconsin and Iowa, with its principal office located in McGregor, Iowa. In 1924 Oehler entered the employ of the power company for work in Iowa. The contract of employment was made in Iowa and he worked exclusively in that State from April 1924 to February 1925. During this time he lived at home with his parents and at the time of his death left his parents, partially dependent upon him for support, as sole survivors.

In February 1925 he was temporarily transferred to Lancaster, Wis. He left all his belongings, other than those necessary for his immediate needs, with his parents at Decorah, Iowa, which place he continued to call his home. He continued to receive his orders and checks from the Iowa office.

Soon after the employee's death his partially dependent parents made a settlement for compensation payment with the power company. This settlement of $1,775.20 was approved by the Iowa Industrial Commission, thereby having the force and effect of a judgment in the State of Iowa. In May 1928 a lump-sum payment was made to the parents, who executed a receipt as final payment. Later the Industrial Commission of Wisconsin made an award of $1,600, under section 102.49 (4m) (f), Statutes of 1923, which reads as follows:

In each case of injury resulting in death, leaving no person wholly dependent for support, the employer or insurer shall pay into the State treasury such an amount, when added to the sums paid or to be paid on account of partial dependency, as shall equal four times the deceased employee's average annual earnings, such payment to the State treasury in no event to exceed $1,000.

The employer appealed from the award to the circuit court of Dane County, Wis., where the award was reduced to $1,000 as prescribed in the law. The power company then appealed the case to the Supreme Court of Wisconsin contending that the case was governed exclusively by the workmen's compensation act of Iowa, where the contract of employment was made. In answering this question the court reviewed many cases and cited the pertinent sections of both acts and concluded by saying:

On this point we entertain no doubt that the State of Wisconsin has jurisdiction to regulate the conduct of industries within the State, and to prescribe as one of the conditions upon which performance of an out-of-state contract of hiring shall be permitted in this State, compliance with the provisions of the Wisconsin workmen's compensation act. [Cases cited.] In our judgment this does not mean that the State of Iowa has no jurisdiction to extend the benefits of its act to injuries received outside the State of Iowa in the course of an employment initiated by an Iowa contract.

Having settled the jurisdictional question in this manner, the sole remaining question was the construction of the Wisconsin compensation act. Among the cases cited by the court was the one of *Wandersee* v. *Industrial Commission* (223 N.W. 837), in which the court said:

As soon as he performs service for another in the State of Wisconsin under a contract of hire, then the act enters into and becomes a part of the contract, "not as a covenant thereof, but to the extent that the law of the land is a part of every contract" [cases cited] and he is entitled to compensation under the act for injuries sustained while rendering service under the contract, whether it be within or without the State.

Continuing the opinion, the court said:

At the time the act was passed there were differences of opinion in different States of the Union as to the wisdom of such legislation, as well as to its proper extent. This State adopted a very liberal act, and it is reasonably to be inferred that the legislature was more concerned with making certain that workmen within its jurisdiction should get all the benefits of the act than they were with any conflicts or legal difficulties which might arise out of any lack of uniformity. Our plain duty is to give to the act its intended effect, and to leave to the legislature the enactment of provisions designed to limit its operation in the interest of uniformity.

The contention was also made that the award of the Iowa commission should be given full faith and credit by the Wisconsin court. The court held, however, that the Iowa commission was without jurisdiction insofar as proceedings under the Wisconsin act were concerned and therefore need not be given full faith and credit.[5]

[5] See *Bradford Electric Light Co., Inc.*, v. *Clapper*, p. 188.

The court also held that double compensation would not be paid as the Wisconsin commission credited the employer with all sums paid under the Iowa act, and the court saw no reason why this should not be done.

The judgment of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION — EXTRATERRITORIALITY — INCIDENTAL EMPLOYMENT—*Smith* v. *Aerovane Utilities Corporation et al., Court of Appeals of New York (Apr. 26, 1932), 181 Northeastern Reporter, page 72.*—The Aerovane Utilities Corporation, with offices in the city of New York was engaged in the advertising business. Francis M. Smith was employed by this company and after doing several jobs in the State of New York, was sent into Pennsylvania. When he had worked in Pennsylvania for about 10 days Smith was injured, and the New York Workmen's Compensation Board awarded compensation. The appellate division reversed the decision of the board and the case was carried to the Court of Appeals of New York. This court reversed the decision of the appellate division and affirmed that of the State industrial board, granting compensation for the injury, citing several prior decisions as authority. It said the language of the statute expressly included such an employee "as he was * * * away from the plant of his employer and under the employer's express direction."

In affirming the award of compensation the court stressed the point that Smith was out of the State on work of a temporary nature. The evidence showed that he lived at a hotel and motored out to various places where signs were being set up and that he would have been employed in work in New York State upon his return, had he not received the injury.

The court also quoted from the case of *Smith* v. *Heine Safety Boiler Co.* (119 N.E. 878), as follows:

> A duty is imposed by law on employers conducting a hazardous employment in New York to insure their workmen against injury, and the insurance covers injuries incidental to that employment though suffered in another State.

WORKMEN'S COMPENSATION—EXTRATERRITORIALITY—NO SPECIFIC CONTRACT—*MacArthur* v. *North Dakota Workmen's Compensation Bureau et al., Supreme Court of North Dakota (Sept. 7, 1932), 244 Northwestern Reporter, page 259.*—Peter MacArthur was employed as a deputy sheriff of Cass County, N.Dak. In December 1930, while in the course of his employment he attempted to arrest a robber. MacArthur pursued the robber across Red River into Minnesota

and secured the aid of Minnesota officials in apprehending him. In so doing MacArthur was shot and seriously injured. Cass County, N.Dak., had complied with the requirements of the North Dakota workmen's compensation act and the employees of the county were therefore entitled to the benefits of the act. However, there had been no special contract of extraterritorial coverage. The compensation bureau therefore denied a claim by MacArthur for compensation on the ground that the injury was received outside the State of North Dakota, and as no special contract was entered into the county employees outside the State were not covered by the act.

An appeal was taken to the district court of Cass County to determine whether a person having received an injury outside the State for which he claims compensation is entitled to receive an award under the North Dakota workmen's compensation act.

In deciding this question the court quoted a part of the North Dakota workmen's compensation act. Section 10 (sec. 396a 10, 1925 Supplement) provides in part:

> * * * No compensation shall be paid on account of injuries occurring outside of the State of North Dakota, nor because of death due to an injury occurring outside of the State of North Dakota unless the employer and the bureau shall have previously contracted for insurance protection for employees while working outside of the State in the employment in which the injury occurred: *Provided*, That no such contract shall be issued to any employer unless his principal plant and main or general office is located in North Dakota and at least two thirds of whose entire pay roll is used or expended for work performed in the State of North Dakota.

The North Dakota workmen's compensation act was amended in 1931 to the effect that a special contract was required for extraterritorial coverage, "unless such employee is an appointive peace officer of any county of this State receiving injury or meeting with death outside of the State of North Dakota in the course of his employment * * *."

Section 2 of this amending act (Acts of 1931, ch. 313) provides that such officers who had received injuries prior to the passage of the act could not be compensated out of the fund provided, but provision was made for their compensation though their claims had already been denied.

MacArthur based his appeal upon this amending act and contended that he should receive an award of compensation. The record showed that MacArthur received the injury in December 1930. The claim was disallowed by the bureau on December 26, 1930. On February 21, 1931, an appeal was filed, and on March 11, 1931, the amendment to the North Dakota compensation act was approved. The court therefore concluded that MacArthur had filed

his claim subject to the original section of the law and not upon the 1931 amendment. The ruling of the bureau was right under the law as it stood when the claim was presented, and as the bureau had exclusive original jurisdiction to pass upon the claim its decision was final, subject only to the right of appeal to the district court. On such appeal the district court was limited in its consideration to the law as it existed at the time of the bureau's action upon the claim. Therefore the court said that MacArthur "could not in the district court, nor can he now on appeal to this court, invoke and rely upon the provisions of chapter 313, S. L. 1931."

The order of the district court overruling the decision of the bureau denying compensation was reversed.

WORKMEN'S COMPENSATION—FAILURE TO INSURE—AMOUNT OF RECOVERY—*Stevenson* v. *Douros*, *Supreme Court of South Dakota* (*Mar. 30, 1931*), *235 Northwestern Reporter, page 707*.—Charley Stevenson was employed as a cook at the Palace City Cafe, owned and operated by T. Douros. Neither Stevenson nor Douros had served notice to exempt themselves from the operation of the workmen's compensation law of South Dakota, and the employer had failed to secure the insurance required by the workmen's compensation law.

Stevenson suffered a personal injury while employed and instituted suit against his employer to recover $6,611 as damages. Douros stated that "the complaint did not state facts sufficient to constitute a cause of action." The employer's contention was overruled by the circuit court, Davison County, and Douros appealed to the Supreme Court of South Dakota. The question for decision on appeal as stated by the court, was as follows:

When an employee, in an employment falling within the ambit of the workmen's compensation law, who has not exempted himself from the operation of the law, brings civil action for personal injury against the employer who has failed to provide insurance as required by the workmen's compensation law, must the employee plead and prove actionable fault (as understood at the common law and prior to the workmen's compensation law) on the part of the employer, or does he sufficiently establish his cause of action by pleading and proving merely that the injury arose out of and in the course of the employment?

The court held that an employer who has failed to provide insurance is covered by the provision of section 9444 of the South Dakota workmen's compensation act (Rev. Code, 1919), which section provides that "if the employee elect to operate under the law and the employer elects not to operate under it, the employer shall

not be permitted to defend in any action by the employee or his representatives to recover damages for personal injury or death upon the grounds of contributory negligence, negligence of fellow servant, or assumption of risk." The court found nothing in the act which would further penalize the employer by making him subject to a suit "by his employee with no limitation whatever upon the amount of recovery, * * * without any pleading or proof of actionable fault on the part of the employer."

Continuing the opinion, the court said:

We think a noninsuring or exempting employer, with one exception, stands just as he did before the enactment of the workmen's compensation law. The employee may recover if there has been actionable fault on the part of the employer, or any one for whose fault the employer is legally responsible, and the amount of the recovery is not limited by the compensation schedule of the workmen's compensation act. The only change in the situation is that in an action by the employee for such recovery, the employer cannot assert the defenses of contributory negligence, negligence of fellow servant, or assumption of risk; but the employee is not relieved of the necessity of proving actionable fault.

The decision of the lower court was therefore reversed.

WORKMEN'S COMPENSATION—FEDERAL LONGSHOREMEN'S AND HARBOR WORKERS' ACT—CONSTRUCTION—AWARD FOR TEMPORARY TOTAL DISABILITY—*Baltimore & Philadelphia Steamboat Co. et al.* v. *Norton, Deputy Commissioner, United States Supreme Court (Jan. 11, 1932), 52 Supreme Court Reporter, page 187.*—The United States Supreme Court was called upon in a suit by the Baltimore & Philadelphia Steamboat Co. against Norton, deputy compensation commissioner, to construe the provision in the Longshoremen's and Harbor Workers' Act which provides for awarding compensation for temporary total disability and for partial disability.

While employed as a longshoreman for the steamboat company upon a vessel in the navigable waters of the United States, Emil Bruno Gube received an injury to his left arm. In accordance with the provisions of the act he filed claim for compensation. The findings of fact by the deputy commissioner showed that his average weekly wage was $36.06, and that he had suffered total disability for 34 weeks, followed by permanent partial disability amounting to 40 percent. An award was made for compensation at the rate of $24.04 per week for 146 weeks. The insurance carrier contended that the award was excessive by 20.4 weeks as the amount required by the act would be 40 percent of 314 weeks, which is 125.6 rather than 146.

The amount the act required the employer to pay was the only question raised in the case, which had been appealed to the Supreme Court from a judgment dismissing the suit in the Circuit Court of Appeals for the Third Circuit. The pertinent provisions of the act read as follows:

SEC. 8. Compensation for disability shall be paid to the employee as follows.

(*a*) In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. * * *

(*b*) In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(*c*) In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, and shall be paid to the employee as follows:

(1) Arm lost, 312 weeks' compensation. * * *

(18) Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member. * * *

(22) In case of temporary total disability and permanent partial disability, both resulting from the same injury, if the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in subdivision (*c*) of this section: Arm, 32 weeks; * * *

In any case resulting in loss or partial loss of use of arm * * * where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in subdivision (*c*). * * * (33 U.S.C.A. sec. 908.)

The temporary total disability continued 34 weeks, which was 2 weeks in excess of the compensation period prescribed in the above statute for temporary total disability. The amount awarded for temporary total disability was computed by securing two thirds of $36.06, the average weekly wage, and multiplying it by 34, the total number of weeks the temporary total disability lasted. The company contended that as the statute limited the time of recovery for temporary total disability to 32 weeks the computation was erroneous, since 32 (the period allowed by the statute) should have been used rather than 34 (the actual number of weeks the temporary total disability lasted), and the 2 excess weeks should have been added to the time allowed for partial disability, as provided in section (*c*) (22) of the statute.

In making the award for permanent partial disability the commissioner computed the number of weeks for which compensation was payable by adding the 2 weeks over the period of temporary total disability to the 312 weeks allowed by statute and then subtracting the 34 weeks allowed as temporary total disability, leaving 280 weeks. As the disability was only 40 percent the number of weeks was only 112. To this sum was added the 34 weeks allowed for temporary total disability and the result multiplied by $24.04 (two thirds of the average weekly wage). The company contended that the computation should have been made by adding the 2 excessive weeks to the 312 prescribed in the statute and taking 40 percent of that—i.e., 125.6 weeks rather than 146—thereby counting only the period of permanent partial disability. In reviewing the arguments presented by the company the court said:

In support of their computation, petitioners call attention to the second paragraph of (*c*) (22) that in any case resulting in the loss or partial loss of the use of an arm, or other specified member, where the temporary total disability does not extend beyond the periods for which payments are required, compensation shall be limited to the schedule, (1) to (13) contained in subdivision (*c*). And they contend that if claimant had not been totally disabled for more than 32 weeks he would not have been entitled to any allowance at the full rate on account of the temporary total disability but only to the proportionate rate for the entire period, or, according to the method of computation adopted, the full rate for the proportionate number of weeks. And they argue that it is inconsistent to hold that, merely because total disability continued 2 weeks in excess of the prescribed healing period, claimant was entitled to an allowance at the full rate for the period of total disability.

Mr. Justice Butler, in delivering the opinion of the court, said that the court should construe the provisions of the act "liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results," as the act was intended to relieve persons suffering misfortunes and to make a distribution of this cost among the industries. Continuing, Mr. Justice Butler placed the following interpretation upon the provisions in question:

Section 8 establishes the rule that the full rate shall apply during continuance of total disability, whether permanent or temporary, (*a*) and (*b*), and during the specified compensation period for partial permanent disability due to loss of a listed member, (*c*) (1) to (13), inclusive, and it specifically provides: "Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member." The provisions of (*c*) (22) have no bearing on the question whether the full rate or a proportionate one shall be allowed. They relate to the periods during which payments

are to be made when temporary total disability and permanent partial disability result from the same injury and establish the rule that, if temporary total disability continues for more than the prescribed healing period, the excess shall be added to the total compensation period specified in the schedule in subdivision (*c*), and that if actual duration of the temporary total disability does not exceed such healing time then the applicable period specified in such schedule shall not be increased.

It is clear, when the related parts of section 8 are considered together that Congress intended to distinguish between temporary total disability (*b*), permanent partial disability due to the total loss of the use of a member (*c*) (1), and permanent partial disability due to the partial loss of such use (*c*) (18) (19), and that its purpose was to require payments on account of the loss of earning capacity resulting from each. The language of (22) on which petitioners rely, when taken in context and construed in harmony with the purpose of the act, means that the full rate shall be allowed for the duration of the healing time and that the proportionate rate shall apply to the balance of the established compensation period.

As the court was of the opinion that the allowance for temporary total disability should have been for 32 rather than 34 weeks, the decree was modified in that respect and as modified was affirmed.

WORKMEN'S COMPENSATION—FINDING OF FACT BY COMMISSION—EVIDENCE—*Heissler* v. *Strange Bros. Hide Co. et al., Supreme Court of Iowa (June 20, 1931), 237 Northwestern Reporter, page 343.*—Strange Bros. Hide Co., located in Sioux City, Iowa, was engaged in the business of buying hides. One Heissler was employed by the company in connection with this work. Heissler had no set territory but traveled about in a car furnished by his employer, purchasing hides from farmers throughout the State of Iowa. Each week Heissler's territory was assigned to him. As he was returning from the territory assigned to him he was injured in an automobile accident.

He filed a claim for compensation and the commission rendered an award in his favor which was affirmed by the district court, Woodbury County, Iowa. The employer thereupon appealed the case to the Supreme Court of Iowa, contending that the injuries did not arise out of and in the course of the employment. The basis for this contention was that Heissler was not engaged in his employer's business when traveling to Sioux City, as he had completed his work in his territory and, it was alleged, was going to Sioux City for purely personal reasons. The court adopted the finding of the commission on this question and held that it was the reasonable and natural thing for a salesman to return to his business headquarters for the week-end after having completed his work in the territory.

The court also held that, as the commissioner's finding that the injury arose out of and in course of the employment was essentially a question of fact, it was binding upon the supreme court. The award of the commission was therefore affirmed.

WORKMEN'S COMPENSATION—GOING TO AND FROM WORK—EMPLOYMENT RELATION—*Phifer's Dependents* v. *Foremost Dairy, Inc., et al., Supreme Court of North Carolina (Dec. 19, 1930), 156 Southeastern Reporter, page 147.*—H. T. Phifer was in the employ of the Foremost Dairy, Inc., as a route foreman. His duties were to collect the company's accounts and sometimes deliver milk. He was subject to call at any time after 3 a.m. as a substitute for a driver who failed to report for duty. He lived about three miles from the plant and prior to January 1, 1930, had owned a car which his employer maintained for his use. However, the dairy company later provided him with a truck for use in the performance of his duties and in going to and from his home to the plant.

On February 9, 1930, about 6:30 a.m. while driving the truck en route to the plant, Phifer was struck by an automobile and killed.

The North Carolina Industrial Commission granted an award of compensation which was affirmed by the superior court, Mecklenburg County. The employer and insurance carrier appealed the case to the Supreme Court of North Carolina, contending that the injury did not arise out of and in the course of Phifer's employment, and that the relation of employer and employee did not exist at the time of the injury.

The court cited cases showing that the general rule was that the employment relation "is usually suspended when the servant at the end of his day's work leaves the place of his actual employment, and is resumed when the servant puts himself in a position where he can again do the work at the place where it is to be performed." The court found this rule to be subject to the following exception:

> If an employer furnishes transportation for his employee as an incident of the employment, or as a part of the contract of employment, an injury suffered by the employee while going to or returning from the place of employment in the vehicle furnished by the employer and under his control arises out of and in the course of the employment. [Cases cited.]

After reviewing decisions by both American and English courts the North Carolina Supreme Court affirmed the decision of the superior court approving the award of compensation.

The Supreme Court of California held that where a trolley company furnished free transportation an employee injured by an automobile after leaving the car and while crossing the street to his place of employment, was not

an accident "arising out of or in the course of employment." (*Dellepiani et al.* v. *Industrial Accident Commission et al.* (1931), 295 Pac. 826.)

An injury to an employee while disembarking from employer's truck in returning home, "arose out of and in course of employment," regardless of whether transportation was part of contract, according to a case decided by the Georgia Court of Appeals. (*Johnson* v. *Thompson-Starrett Co.* (1931), 157 S.E. 363.)

WORKMEN'S COMPENSATION—GOING TO AND FROM WORK—IMPLIED CONTRACT—*Western Fruit Co. et al.* v. *Rau et al., Supreme Court of Wisconsin (Nov. 10, 1931), 238 Northwestern Reporter, page 854.*—Fred E. Rau was president and general manager of the Western Fruit Co. He was killed in an automobile collision while driving home. At the time of the accident Rau was also driving home two employees of the company. The practice of taking these employees home began during a rush period when much overtime work was done. After the overtime work ceased Rau continued to take the employees home, or if he was busy or away from the office he usually called a taxi for them. The automobile he was using at the time of the accident belonged to the company, which also paid the expense of operation.

On the evening of the accident Rau made a delivery of merchandise to a customer of the company, and then returned to the office on a personal errand before starting home with the two employees. The accident occurred before he had reached either home of these employees. Evelyn Rau, the widow, was awarded compensation by the Wisconsin Industrial Commission and this action was brought in the circuit court of Dane County, Wis., to set aside the award. The circuit court affirmed the award and appeal was taken to the Wisconsin Supreme Court. It was contended that "the company was under no legal obligation to take the women home from work," and that they were taken home only as a matter of courtesy, and therefore no compensation should be awarded. The argument in support of the award was based upon an implied contract to take these employees home.

After reviewing the facts, the court reversed the decision of the lower court and entered a judgment vacating the award. The court said in part:

Under our statute, section 102.03(2), for liability to exist it is essential that "at the time of the accident, the employee is performing service growing out of and incidental to his employment." It is especially provided that while going to and from work in the usual way, "while on the premises of the employer," an employee shall be deemed within the statute. * * *

The respondents seek to support their claim of implied contract by urging that the transportation home was done as compensation for

overtime work or for the purpose of enhancing the quality or quantity of the service done by the women through engendering a spirit of loyalty and gratitude, and that it thus became a part of the women's wage or compensation. That the transporting was done for this purpose must rest on inference only. There is no evidence that it was done for such purpose. * * * The obligation of the company to take the women home, if it existed, is a conclusion of law from these facts, so that the conclusion of the commission is not binding upon the court as it would be if it were one of fact.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—STREET ACCIDENT—SALESMAN—*Oklahoma Publishing Co. et al.* v. *Molloy et al., Supreme Court of Oklahoma (Dec. 9, 1930), 294 Pacific Reporter, page 112.*—Eddie Molloy was employed by the Oklahoma Publishing Co. as a member of a "sales crew." He traveled by automobile delivering sample copies and getting subscriptions to the Daily Oklahoman and the Oklahoma City Times, newspapers published by his employer. On February 7, 1930, while in performance of his duty, in Wetumka, Okla., he fell on an icy sidewalk when going from one house to the next, and injured his leg.

The State industrial commission granted Molloy $288 compensation for temporary total disability for 16 weeks.

The Oklahoma Publishing Co. carried the case to the Supreme Court of Oklahoma for review, contending that the State workmen's compensation act applies only to employees engaged in mechanical or manual labor of a hazardous nature and does not apply to one employed as a traveling salesman. The Supreme Court referred to Oklahoma Compiled Statutes, 1921, section 7283 (as amended 1923, ch. 61), in which printing, electrotyping, and stereotyping plants where machinery is used are listed as hazardous, and compensation is provided for injuries sustained in them. The court, however, emphasized the fact that some departments of a business would fall within the compensation act and some without it, that the legislature did not intend to include all employees of all business concerns, and that a traveling salesman could not be held to be engaged in manual or mechanical work of a hazardous nature. The court quoted a former Oklahoma case (*McQuiston* v. *Sun Co. et al.*, 272 Pac. 1016) and set aside the award of the compensation board, directing that the case be dismissed, saying:

We think the case at bar comes within the rule announced in the McQuiston Case. To hold otherwise would be to include practically all of the employees of the Oklahoma Publishing Co. down to and including the newsboys who sell the paper on the streets and those who deliver the paper on their various routes. We do not think the legislature ever intended to include employees of this character. It is not enough to show that the employee was engaged in manual or

mechanical work or labor, but it must be shown that such work or labor is of a hazardous nature as that term is used in the industrial act. We do not think the claimant has brought himself within this rule.

WORKMEN'S COMPENSATION—HEAT PROSTRATION—ACCIDENT—*New Amsterdam Casualty Co.* v. *Humphrey, Circuit Court of Appeals, Fifth Circuit (Feb. 19, 1931), 47 Federal Reporter (2d), page 57.*—One Humphrey was in the employment of the Kosack Construction Co., Dallas, Tex. On August 9, 1928, while engaged in mixing mortar to be used on one of its jobs, Humphrey became overheated and suffered sunstroke and died. The widow, Bell Humphrey, filed claim for compensation and, aggrieved by the award of the Industrial Accident Board of Texas, filed suit under the provisions of the Texas compensation law in the District Court of the United States for the Northern District of Texas. This court rendered a verdict in favor of the widow, and the insurance carrier appealed the case to the Circuit Court of Appeals, Fifth Circuit.

The insurance carrier, the New Amsterdam Casualty Co, argued that the suit should be dismissed because heat prostration is not an accidental injury compensable under the Texas statutes, and even if it was the employee must prove that the sunstroke was the result of a hazard "which the conditions of his employment subjected him to over and beyond that of the general public."

The court ruled out the first contention and cited numerous Texas cases holding "that injury or death occurring from sunstroke or heat prostration as the result of the hazards of employment is compensable."

The court also held that the evidence presented in the lower trial was sufficient to warrant the verdict and that it was unnecessary specifically to allege "that the conditions inducing the deceased's heat stroke were different from those to which the general public was exposed." The court below had defined the word "accident" as having the same meaning as it had in its popular sense, i. e., "any mishap or any untoward event not expected or designed." Objection was made to this definition, but the court upheld the lower court in its definition.

The judgment of the lower court was therefore affirmed.

WORKMEN'S COMPENSATION—HEAT PROSTRATION—ACCIDENTAL INJURY—PLACE OF INJURY—*Cowan et al.* v. *Watson et al., Supreme Court of Oklahoma (Mar. 17, 1931), 296 Pacific Reporter, page 974.*—E. C. Watson was employed by Cowan Construction Co., in Ada, Okla. The evidence showed that, on July 16, 1929, while Watson was shoveling a pile of gravel and sand, he became overheated—

apparently he had a sunstroke. He was thereafter totally disabled up to the date of the hearing, February 19, 1930.

After the hearing the workmen's compensation commissioner awarded Watson compensation at the rate of $10.77 per week for a period of 50 weeks and "continuing until the termination of the disability or until otherwise ordered by the commissioner."

The Cowan Construction Co. carried the case to the Supreme Court of Oklahoma and raised three propositions for determination.

The construction company contended the finding that Watson "suffered an accidental injury is not reasonably supported by any evidence and is contrary to law, as the gradual overheating of a man 62 years of age in poor health and unable to do heavy manual labor, cannot be termed accidental." In reply to this the court said:

We have very carefully read the entire testimony in the case and are of the opinion that the evidence is amply sufficient to establish the fact that claimant did sustain an accidental injury arising out of, and in the course of, his employment with petitioners. * * *

We say it does not require an expert to determine at what age one may sustain a sunstroke. It is common knowledge that sunstroke may be sustained by persons of all ages, from infancy to old age. The evidence is this case does not support the argument of petitioners that claimant's age and ill health was the cause of the sunstroke. It is only an ingenious effort to overcome the truth.

In regard to the contention that the commission erred in awarding claimant $10.77 per week, computed on a basis of an average wage of $2.80 per day, the court replied:

It was stated in the original petition filed by the commission that this claimant was receiving wages at the rate of $2.80 per day. This was not denied and under the rules of the commission it was taken as true. (*Maryland Casualty Co.* v. *Johnson et al.*, 272 Pac. 833.)

In reply to the last charge, that the award of compensation for more than 4 weeks after the date of injury, was unjust and not reasonably supported by evidence, the court said—

With which contention we cannot agree. The evidence does reasonably support the testimony that the claimant in this case would never recover. Dr. Welborn, attending physician, testified: "That the respondent was 100 percent totally disabled; that he might live 6 months or a year."

In affirming the award of the industrial commission, the court held that the findings of fact made by the State industrial commission are binding on the court in reviewing an award and are, therefore, not reviewable.

The Supreme Court of Oklahoma also affirmed an award of compensation to an injured employee who suffered a sunstroke while working in a place surrounded by piles of sand and rock which prevented the free circulation of air. (*Lobert & Klein et al.* v. *Whitten et al.* (1931), 300 Pac. 636.)

The Supreme Court of Minnesota held that sunstroke suffered by a person while engaged in his usual occupation is an accident causing injury by accidental means. (*Tate* v. *Benefit Association of Railway Employees* (1932), 243 N.W. 694.)

WORKMEN'S COMPENSATION—HOSPITALIZATION CONTRACT—SICKNESS DEFINED—*Murray Hospital* v. *Angrove, Supreme Court of Montana (Mar. 29, 1932), 10 Pacific Reporter (2d), page 577.*—An injury to an employee's knee received when he was struck by an automobile en route to work was held, by the Montana Supreme Court, to constitute "sickness" and come within the provisions of the hospitalization contract.

William Angrove, employed as a hoisting engineer by the Anaconda Copper Mining Co., while en route to work on December 24, 1928, was struck by an automobile and sustained an injury to his knee. He worked as usual for several days, but was later taken to the Murray Hospital, where he remained until he was completely cured. Thereafter the hospital filed suit against him in the District Court of Silver Bow County, and recovered a judgment of $25 as the reasonable value of the services rendered. Angrove thereupon appealed the case to the Montana Supreme Court, contending that the cost of hospitalization should be paid by the employer under a mutual contract entered into by the employer and employee with the hospital.

It appears that the employer was operating under "Plan No. 1" (self-insurer) of the Montana workmen's compensation act (Rev. Codes 1921, sec. 2970, et seq.), which requires the employer to furnish an injured employee, in addition to compensation, "all necessary and reasonable medical, hospital, and surgical services for a period not to exceed 6 months and of a value up to $500, with additional and like services if found by the board to be necessary." Regarding this provision the supreme court said:

> This provision is for the restoration of the injured employee, and is comparable to repairs of machinery or restoration of the plant after injury by fire; it applies, however, only in case the injury received is such as would entitle the injured person to compensation, as it refers back to "the injury" theretofore discussed in the act and for which provision is made for compensation. It is a part of the compensation for the injury.

To recover compensation or hospitalization under the workmen's compensation act, the court pointed out, the injury must arise out of and in the course of the employment. In the present case the court held that the injury was not within the act. It said:

> Here the defendant was merely traveling a city street where he was subjected only to the hazards common to all pedestrians, and although he was on his way to work, under all of the authorities his

injury did not arise out of and in the course of his employment, and by reason thereof he was neither entitled to compensation nor to hospitalization under the general provisions last quoted.

Section 2907, Revised Codes 1921 (as amended by Acts of 1929, ch. 177), however, allows the employer and employees to waive the provisions of the section referred to above and enter into a mutual contract with a hospital for hospitalization. This was done by the parties in the case. The contract between the employer and the Murray Hospital provided for hospital treatment for employees under two circumstances: "(1) For injuries received in, arising out of, and in the course of, the employment; (2) for sickness contracted during the time when the man is employed by the contracting employer, save and except for venereal diseases and sickness which has resulted from intoxication." It was under the second provision of this contract that Angrove claimed the employer was bound to pay the hospital bill.

The question involved was the meaning of the term "sickness" as used in the contract. Many definitions were cited and court decisions which defined it in its narrow technical sense and also cases which defined it in more general and inclusive terms. The court, however, said the definitions were immaterial, for the term "must be considered in its common acceptation and understanding, in the light of the object and purposes of the act under which the contract was made, and the intention of the parties in interest and in a liberal construction of the act and the contract."

In concluding the opinion reversing the judgment of the district court, the Montana Supreme Court said:

It seems clear from the wording of section 2907 above, considered in the light of the purposes of the act, that, having in so far as possible provided for the shifting of all loss and expense which might be incurred in those cases for which provision was theretofore made in like acts, from the employee to the industry, when our lawmakers determined to go a step further and cast the burden of restoration of a unit of the industry, incapacitated otherwise than by the industry, upon the industry, they intended the effect of the further provision to be the same as that of the provision already covered.

We conclude that the legislature used the term "sickness" in its "popular significance," and intended that each employee specified should receive hospitalization for "any affection of the body which deprives it temporarily of its power to fulfill its usual functions," save and except those which develop because of his own vice.

WORKMEN'S COMPENSATION—ILLEGITIMATE CHILD—DEPENDENT PARENT—*Marshall* v. *Industrial Commission et al., Supreme Court of Illinois (Dec. 18, 1930), 174 Northeastern Reporter, page 534.*—

One Mary Allesch had an illegitimate son. After her subsequent marriage, the son assumed the surname of the man Mary married, and was known as Frank Allesch, though he was not adopted by, nor was he the son of, Allesch.

After the death of Frank Allesch compensation was awarded Mary Allesch as his dependent parent. The award was confirmed by the circuit court of Cook County, Ill., and the case was taken to the Supreme Court of Illinois for review.

In reply to the first contention that the mother of an illegitimate child is not a parent within the provisions of the workmen's compensation act, the court defining "parent" as one who begets, or brings forth, offspring, said that the workmen's compensation act indicated that it used the word in its ordinary sense. The court then referred to the harsh doctrine of the common law, which gave an unwedded mother and her illegitimate offspring little standing or protection, and traced the development of laws which have abrogated the common-law rule and extended the rights of illegitimates, until at the present time, the statute of descent is construed to—

> Establish a rule of descent with reference to illegitimates consonant with the finer sense of justice and right, and not to visit the sins of the parents upon the unoffending offspring. * * * The object of the framers of such act seems to have been to remove the common-law disability of inheritance by illegitimates through the maternal line, and in that regard place such persons upon the same footing as legitimate persons. [Cases cited.] It is our opinion, therefore, that the mother of an illegitimate child is its "parent" within the provisions of the workmen's compensation act.

With regard to the second contention that Mary Allesch was not in fact dependent on her illegitimate son, the court said the evidence showed that the deceased had contributed $500 to the Allesch family the year before he died. Of this amount $100 was paid to claimant's husband, $50 to their son, and the balance, $350, was paid to Mary Allesch herself. It was shown that her living expenses were about $700 per year; one half of this was obtained from the farm on which she lived and the rest was contributed by her illegitimate son. In concluding its decision affirming the judgment of the circuit court, the court said in part:

> Dependency is established when it is shown that the claimant relied upon the deceased for his or her means of living. * * * In this case the evidence clearly shows that the claimant relied on the contributions of deceased for half her livelihood, and dependency is thus established.

> The amount of compensation due the claimant was correctly determined, and the judgment of the circuit court of Cook County is affirmed.

WORKMEN'S COMPENSATION—INDEPENDENT CONTRACTOR—JOINT EMPLOYMENT—*Becker et al.* v. *Industrial Accident Commission et al., Supreme Court of California (May 1, 1931), 298 Pacific Reporter, page 979.*—Francis N. Rogers, was employed as a general messenger by O. W. Becker, an insurance broker in San Francisco, Calif. Rogers was 67 years old and had been an accountant prior to entering the employment. His duties usually consisted of "calling for and delivering insurance policies and other papers in various offices in San Francisco," and he worked only during the morning of each day. He was paid at the rate of $3 per day and at the end of each day he and Becker would agree as to what fraction of the day he had worked.

This employment as messenger frequently took him to the office of Charles R. Holton, an attorney at law. In February 1930 Holton employed Rogers to attend his office during the noon hour, paying him at the rate of 50 cents per hour.

On April 1, 1930, while Rogers was still working for both Becker and Holton, he was killed while alighting from a street car.

A tax receipt was found in his pocket, so it was evident that he had gone to the city hall and paid the taxes as directed by Becker, then boarded a Mission Street car for the purpose of serving a summons for Holton.

Adele L. Rogers, the widow, filed claim for compensation and the industrial accident commission found that at the time of the accident Rogers was jointly employed by Becker and Holton, and rendered an award against both Becker and Holton in the sum of $2,667.60.

Both Becker and Holton appealed to the Supreme Court of California to have the award annulled. Holton contended that Rogers was an independent contractor. He testified that he "gave no specific instructions to Rogers as to how or when the service of summons should be made." He agreed to pay Rogers $1 for making the service and gave him two addresses for his assistance. The court quoted the definition of an independent contractor as given in the California workmen's compensation law and concluded that Rogers came within the definition, saying in part as follows:

An independent contractor has been expressly defined by section 8 (b) of the workmen's compensation act (Stat. 1917, p. 835, sec. 8 (b)) to be "any person who renders service, other than manual labor, for a specified recompense for a specified result, under the control of his principal, as to the result of his work, only and not as to the means by which such result is accomplished." It seems clear that at the time of Rogers' fatal injury he was engaged in rendering service for a specific recompense for a specific result, under the control of his principal as to the result of his work only and not as to the means by which such result should be accomplished, and that, this being so, there is no escape from the conclusion that he came within

the above-quoted definition, and that his status at that time was that of an independent contractor and not that of an employee.

The court was also of the opinion that the hiring of Rogers to serve the summons was in no way connected with his regular employment during the noon hour in Holton's office. The award against Holton was therefore annulled.

It was urged in behalf of Becker that he was in no way liable to pay compensation to the widow for when injured Rogers "was on an errand for an entirely different employer and at a place far removed from the natural route to be followed in connection with the payment of the taxes and going home therefrom."

The court sustained this contention for there was no evidence to show that "after he had finished paying the taxes at the city hall and had alighted from a street car preparatory to serving the summons for Holton, he was still in the course of his employment by Becker." For this reason the award against Becker was also annulled.

WORKMEN'S COMPENSATION—INJURY—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DISOBEDIENCE OF ORDERS—WILLFUL MISCONDUCT—*Barkanich* v. *Jeddo-Highland Coal Co.*, *Superior Court of Pennsylvania* (*May 4, 1932*), *160 Atlantic Reporter, page 137.*—George Barkanich was door tender in the mines of Jeddo-Highland Coal Co. His duty was to open six doors on various gangways, and in going from one to the other, he was allowed to ride on the train of mine cars. He was instructed, however, to ride on the motor at the rear of the train, and not to ride between the cars or on the front end of the train.

While riding on the front of the train he suffered an injury which caused the loss of his hand. The decision of the referee, awarding compensation, was sustained by the workmen's compensation board and affirmed by the court of common pleas, Luzerne County, Pa. The coal company appealed the case to the Superior Court of Pennsylvania.

The only question to be decided was whether Barkanich's violation of positive instructions not to ride on the front of the train prevented him from recovering compensation.

The superior court affirmed the decision of the lower court upon the authority of *Dickey* v. *Pittsburgh & Lake Erie R. Co.* (146 Atl. 543) and *Walker* v. *Quemahoning Coal Co.* (99 Pa. Super. Ct. 252), saying—

The Dickey case is authority for the proposition that injuries resulting from acts which are in direct hostility to and in defiance of positive orders of the employer are compensable if the employee's duties include the doing of the act that caused the injury, or where

his duties were so connected with the act that caused the injury, that as to it, he was not in the position of a stranger or trespasser.

In concluding its opinion the court said:

We adopt the following reasoning in the opinion of the court below: "The riding of the cars was a part of his duty as door tender and at the time of his injury he was disregarding the positive orders of his employer in riding on the front end of the trip, and there was sufficient evidence upon which to base the findings of fact of the referee and the board, that his conduct was negligent and a willful misconduct in the performance of his duties, which was held insufficient * * * to prevent compensation." Under our compensation law, a forfeiture of compensation does not result from the employee's "willful misconduct."

WORKMEN'S COMPENSATION—INJURY—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PERSONAL ERRAND—*Bellamy* v. *Great Falls Manufacturing Co. et al., Supreme Court of North Carolina (Apr. 29, 1931), 158 Southeastern Reporter, page 246.*—Ethel Bellamy was employed in the spinning department of a mill operated by the Great Falls Manufacturing Co. According to regulations this department stopped each day at 11 o'clock. During a 30-minute rest period she went to the first floor with a friend to see about getting her a job. In returning on the elevator from the first to the fourth floor she was caught between the elevator and the floor, while attempting to get off, and was seriously injured.

The North Carolina Industrial Commission denied an award of compensation on the ground that the accident did not arise out of and in the course of her employment. Upon appeal, the superior court of Richmond County reversed the judgment of the commission and instructed it to make an award in accordance with the law The employer appealed to the North Carolina Supreme Court for a review of this decision. After citing authorities from many different States the North Carolina Supreme Court affirmed the judgment of the lower court. In concluding the opinion the court said:

Plaintiff [Ethel Bellamy] was compelled to stay in the mill until 11:30 a.m. She was "on duty" and was injured before the time expired for her to go off duty. The mission she went on, while she was "on duty" in the mill, was a temporary purpose and not such a departure from the employer's business that we could say from a liberal construction of the act that it was not in the course of the employment. In fact, she went with a friend to get her employment in the mill, and in doing so did not leave the mill. Under the facts and circumstances of the case and the conduct of plaintiff, what she did was too casual to bar a recovery.

The Court of Appeals of Ohio held that, although an employee was injured 12 minutes after he was due to begin work, and as he was in the act of stepping

onto the curb near the employer's premises, it was not within the scope of his employment. (*Auberger* v. *Industrial Commission of Ohio* (1930), 175 N.E. 628.)

WORKMEN'S COMPENSATION—INJURY—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—STREET ACCIDENT—DEVIATION—*Parrish* v. *Armour & Co. et al., Supreme Court of North Carolina (Apr. 22, 1931), 158 Southeastern Reporter, page 188.*—On February 20, 1930, at about 7 o'clock in the evening, Ewell C. Parrish was injured as the result of an automobile collision on the streets of Durham, N.C. At the time of the injury he was employed by Armour & Co. in the capacity of salesman and collector. He filed claim for compensation under the North Carolina workmen's compensation law and received an award. The employer appealed the decision to the superior court, Durham County, contending that the injury did not arise out of and in the course of the employment. The award was approved by the superior court and appeal was taken by the employer to the Supreme Court of North Carolina. The evidence disclosed that Parrish at the time of the injury was going to Paschall's Bakery, a customer of Armour & Co., to make an adjustment in an order. He had been to the bakery about 6 o'clock and upon finding Paschall busy, had gone home to supper. It was while returning to the bakery that he went several blocks out of his way, going by a pharmacy to purchase some cigars to give prospective customers when the accident occurred.

He testified that he had no regular hours, but usually began work about 7 o'clock in the morning and sometimes he would be back by 3 o'clock in the afternoon and sometimes it would be later in the evening.

After considering the evidence and the authorities on the subject, the court concluded:

> The plaintiff [Parrish] was on duty for Armour & Co. when he left his home to see the customer, and the deviation for the cigars, etc., we do not think such as would bar his recovery under the liberal construction generally given by this and other courts to the workmen's compensation act. We think plaintiff's injury was "by accident arising out of and in the course of the employment." When plaintiff left home he was on duty for his employer, and the deviation was incidental to his employment.

The judgment of the court below approving the award of the industrial commission was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—SUNSTROKE—*Burris* v. *Hoage, Deputy Commissioner, Court of Appeals of the District of Columbia (June*

20, 1932), 60 Washington Law Reporter, page 574.—The Court of Appeals of the District of Columbia held that an employee who suffered a sunstroke while at work in the open thereby sustained an injury within the meaning of the District of Columbia workmen's compensation law.

From the facts in the case it appeared that the employee in question was at work with other laborers, removing certain material from a street in the city of Washington. The day was very hot and the place where the employee was at work was not protected by shade trees. About 11 o'clock in the forenoon the employee left his place of employment and started toward a water barrel to quench his thirst. While he was so doing he collapsed and died several hours later from heat prostration or sunstroke.

The deputy commissioner of workmen's compensation in the District of Columbia denied an award of compensation to the widow. An appeal was taken to the Supreme Court of the District of Columbia and on a petition for an injunction the court considered the deputy commissioner's conclusion in error and entered an order setting aside his finding. Upon appeal to the District of Columbia Court of Appeals, this court had to consider the question of whether an employee who suffers a heat stroke while at work in the open sustains an injury arising out of the employment within the meaning of the District of Columbia compensation law.

The insurance carrier contended that the injury was due to the abnormal heat to which the general public was subjected and not to any special hazard resulting from the occupation in which the employee was engaged at the time of the injury.

In reviewing the case, the District Court of Appeals was of the opinion that there was no evidence to sustain the deputy commissioner's findings. While it was conceded by all parties concerned that the deceased employee was engaged in manual labor on an unshaded street and on an intensely hot day, the high court was of the opinion that the employee's work required him to remain exposed to the sun's rays, which was not true of the community in general, and that his employment therefore exposed him to a risk essentially arising out of the work. The decision of the case, the court thought, depended upon the answer to two questions: (1) Is death from sunstroke an accidental injury, (2) did the sunstroke arise "out of and in the course of his employment?" The court said that both questions should be answered in the affirmative, and pointed out that accidental injury, within the meaning of the compensation act, included "any unexpected misfortune or mischance resulting in some form of bodily injury—an injury due to accident or caused by some sudden or unexpected occurrence."

In reviewing the circumstances under which the deceased employee was laboring on the day of his death the court thought it proper to say that, except for the conditions existing, the injury would not have occurred, and death would not have necessarily ensued. The statement of the facts of the case, the court continued, showed that the deceased was exposed to a hazard in the course of his employment that did not apply generally to the community and whenever this condition occurred and injury necessarily resulted such injury might be said to arise out of and in the course of the employment. This in fact would be the proximate cause of the injury and therefore within the terms of the District of Columbia workmen's compensation act. In conclusion the court pointed out that the underlying purpose of all compensation laws is to provide money indemnity in the case of injury where there is no assignable fault. Mr. Justice Groner concluded his opinion by saying that—

Accidents in industry are inevitable, and the enactment of compensation laws grew out of a general recognition of a duty owing by society to an injured employee to secure him protection, and this the act seeks to accomplish through the means of insurance built up by premiums paid by employers. Where there is doubt it should be resolved in favor of the injured employee or his dependent family. In the circumstances shown in the record here we think petitioner established a case of accidental death arising out of the employment and compensable under the statute. To reach a different conclusion would be to indulge subtlety at the expense of the plain purpose and intent of the law.

WORKMEN'S COMPENSATION—INJURY—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—VOLUNTEER—*Lumbermen's Mutual Casualty Co.* v. *Hoage, Deputy Compensation Commissioner, et al., Court of Appeals of the District of Columbia (May 2, 1932), 60 Washington Law Reporter, page 491.*—William E. Clarke was in the employ of the N. Auth Provision Co., a corporation engaged in business in the District of Columbia. He served as a car washer and helper in the company's public garage, and Schwartz, a fellow employee of Clarke, worked as a mechanic. On Sunday morning, March 30, 1930, Schwartz's car broke down while he was riding in Virginia. He left a note at the garage that morning asking permission to use the towing car. Schwartz was off duty that day and did not return until about 5 o'clock in the afternoon, at which time he found that the superintendent had put his "O.K." on the note asking for permission to use the towing car.

Clarke had worked all that day and his duties ended when the night watchman reported for duty. Schwartz told Clarke of the superintendent granting permission to use the towing car and asked him to help pull the car in. While in the course of towing the car,

the rope broke and as Clarke got out of the car to fix it, he was hit by a passing car and fatally injured. Mrs. Mary E. Clarke, his mother, petitioned the compensation commission for an award. Compensation was awarded, and the insurance carrier brought suit in the Supreme Court of the District of Columbia to enjoin enforcement of the award. The court dismissed the suit and the case was appealed to the District of Columbia Court of Appeals. The question involved was whether the injury arose out of and in the course of the employment. There was testimony to the effect that Clarke was accustomed to working overtime without additional pay, and also that Schwartz would be charged for the use of the towing car belonging to the garage. The court held that under the compensation law the court must affirm the decree if there was substantial evidence before the commissioner that Clarke was performing services arising out of and in the course of his employment at the time of his injury. In affirming the decision of the lower court the court of appeals said:

When Schwartz informed Clarke that he had obtained permission from Stalfart to use the service car of the company to tow in his car and requested Clarke to accompany him and perform a service which Clarke had frequently performed in towing other cars, we think the circumstances were such as to justify Clarke in assuming that in acceding to Schwartz's request he would be performing a service for his employer. Had a similar service been performed for one other than an employee, the charge, according to Stalfart's testimony, would have been based on mileage, and that would have covered "the expense of towing", including the driver's services. As an employee, Clarke must have known that every employee "pays for what he gets." He therefore would have been justified in assuming that Schwartz would have to pay for the tow service based on mileage, and that this tow service would have entitled Schwartz to have a driver furnished for the tow car.

WORKMEN'S COMPENSATION—INJURY—BURNS FROM SMOKING—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Lovallo* v. *American Brass Co., Supreme Court of Errors of Connecticut (Mar. 3, 1931), 153 Atlantic Reporter, page 783.*—The essential facts of this case show that one Lovallo was employed by the American Brass Works as a scrap sorter. The scrap metal was often oily and greasy, and the workmen wore jumpers and overalls, and aprons made of burlap bags. The burlap aprons and parts of the overalls often became saturated with grease or oil, and became highly inflammable.

On the night of April 24, 1929, Lovallo finished his lunch and started to light his pipe. The match ignited his oily clothing, and he died as the result of the burns.

Lovallo's widow made claim for his death under the Connecticut workmen's compensation act, but compensation was denied. The case was appealed to the superior court, and the judgment of the compensation commissioner was affirmed. On appeal to the Supreme Court of Errors of Connecticut, the claim was sustained for the following reasons: That the employee was in a place where he might reasonably be; that he was reasonably discharging his duties by working overtime; that he was doing, with the employer's permission, what he could reasonably be expected to do; and that the inflammable character of his clothing was the result of the conditions of his employment, exposing him to greater risks than where such conditions did not exist. The injury, therefore, the court said, arose out of and in the course of the employment. The court also said that while smoking was not an obligatory duty, yet the employer permitted it at that time and place for the convenience and comfort of the men, and that it was obvious "that the permission to smoke was thus to the mutual advantage of the employer and the employee." The superior court was therefore directed to sustain the appeal, and to send the case back to the commissioner to render an award in favor of the employee's widow.

WORKMEN'S COMPENSATION—INJURY—INFECTION—BONE FELONS—*Industrial Commission of Ohio* v. *Weimer*, *Supreme Court of Ohio* (*June 3, 1931*), *176 Northeastern Reporter, page 886.*—Stanley Weimer worked for the C. H. Yeager Co. as an upholsterer in its repair department. Constant irritation caused two of his fingers to become inflamed. In August 1928 Weimer contracted what is commonly called a bone felon on each of the two fingers. Upon his application the industrial commission denied him compensation for this alleged "injury." The court of common pleas of Summit County, Ohio, affirmed the decision of the industrial commission, but this decision was reversed by the court of appeals upon the ground that the lower court erred in directing a verdict, and that the "cause ought to have been submitted to the jury upon the evidence." The case was carried to the Supreme Court of Ohio for review.

The industrial commission contended that the condition had developed gradually, that there was no evidence of any injury or accident and therefore no basis for an award of compensation.

The court said it had repeatedly held that it was necessary to establish injury or trauma in order to recover compensation, and that section 1465–68 of the General Code "does not include diseases which are contracted as distinguished from diseases which are occasioned by or follow from physical injury. [Cases cited.]"

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

However, in this case there was some evidence of injury sustained by Weimer, in that the skin became worn down with the work of upholstering, and thus ultimately suffered small lacerations through which infection entered. Undoubtedly, if there were in the record evidence of a cut or a definite abrasion of the skin, this would constitute an injury. The testimony of the doctor that the constant irritation of the finger, together with even the slightest abrasion of the skin, or infection getting in through the skin, plus trauma or very little trauma, would cause such an infection, constituted some evidence to the effect that trauma must have been present to produce the result. Since the doctor testified that conditions of that sort are caused only by infection plus trauma, and since he stated that there must have been an abrasion of the skin to produce this particular result, and since the uncontradicted evidence shows presence of the infection described, there was evidence in the record requiring submission of the case to the jury. The infinitesimal character of the abrasion does not change its character. If it exists it constitutes an injury.

WORKMEN'S COMPENSATION—INJURY—MEMBER OF RELIGIOUS ORDER—*Blust* v. *Sisters of Mercy et al., Supreme Court of Michigan (Dec. 8, 1931), 239 Northwestern Reporter, page 401.*—The Supreme Court of Michigan, in a 6-to-2 opinion, declared that one injured while performing duties as a probationer, intending to qualify for admission to membership in a religious order, was not entitled to workmen's compensation.

It appeared that Loretta Blust was injured while cleaning the drum of a laundry mangle at Mount Mercy Academy in Grand Rapids on November 16, 1929. She presented a claim against the institution and against the Hartford Accident & Indemnity Co. for compensation.

The matter came up for hearing before a deputy commissioner of the Michigan Department of Labor and Industry, and an award was entered in favor of the petitioner. The insurance company appealed to the department of labor and industry, and upon a final hearing the award of the deputy commissioner was reversed and the claim of compensation denied.

The case was thereupon appealed to the supreme court of the State. The main question involved was whether the petitioner was an employee within the meaning of the Michigan workmen's compensation law. The contention of the insurance company was that, in order to recover under the compensation law, the injury must "arise out of and in the course of an employment." The relation of employer and employee and a contract must be involved, the company said, and the only basis of such a contract, either express

or implied, would be the relation of employer and employee. Mr. Justice Potter, in a written opinion in which Mr. Chief Justice Butzel concurred, reversed the award of the department of labor and industry and held that the facts of the case disclosed the relationship of master and servant. In support of this conclusion several cases were reviewed, one in particular in which a question arose whether a student brakeman was a railroad employee. (*Atchison, Topeka & Santa Fe Railway Co.* v. *Fronk*, 87 Pac. 698.) Exception to the opinion of Mr. Justice Potter was taken by six other judges of the supreme court who, in an opinion written by Mr. Justice Wiest, affirmed the decision of the department of labor and industry.

Mr. Justice Wiest pointed out that the plaintiff in the case had joined the Sisters of Mercy, an established charitable organization, as a probationer intending to qualify for admission to membership in the order. The various stages of noviceship were recited, and it was shown that "her relation as a novitiate was that of free-will devotion of efforts and talents to the religious and charitable purposes of the order." According to the rules of the order she was to receive instruction calculated to qualify her for various services upon reaching full membership and was to be provided suitable care, food, clothing, and shelter, but was to receive no remuneration for such services. Upon receiving injuries which rendered her totally disabled, the order cared for her, met all expenses, which according to the rules it was bound to do, and there was no interruption of her relation to the order during the incapacitated period. Mr. Justice Wiest said:

> I find no analogy between instances of work without pay in industrial and professional pursuits, in order to qualify for work with pay, and an instance of entering a charitable and religious order as a novitiate with intent to qualify for membership and a life devoid of pecuniary purpose. In the one instance there is the relation of master and servant and a semblance of hiring, though without wage, but with commercial earmarks, while in the other there is no relation of master and servant, no hiring, and no commercialism, but a devotion to charitable purpose without hope of pecuniary reward.

Although it was shown and determined that the Sisters of Mercy had employees for hire and had even elected to come under the Michigan workmen's compensation law, members of the order and novitiates were not covered and the insurance company did not indemnify the society for the expense of caring for any injured members. The court pointed out that the workmen's compensation law requires the relation of employer and employee under a contract of hire. In this case, it was pointed out, there was no hiring and "it would be unfortunate to hold that the Sisters of Mercy hire persons

to submit to training for membership in the sisterhood. The work of the Sisters of Mercy, in the care of indigent and sick and infirm persons, and in no manner, directly or indirectly, for private profit, constitutes a public charity. The compensation law allows nothing for pain and suffering."

In the testimony brought out at the trial it was shown that, even though an award was made, such would not come to the injured probationer but would belong to the order by virtue of her relationship to it. Regarding this the court said:

Neither at common law nor under the compensation act can plaintiff have remedy against the Sisters of Mercy. It would be a strange situation, indeed, to permit the Sisters of Mercy, one defendant herein, to reimburse itself for expenses, incurred in caring for a novitiate, in the manner here attempted. Plaintiff has no interest in any recovery of an award. She recognizes that her interest in an award is only that of the Sisters of Mercy.

In concluding, the court inquired, "If a novitiate is held to be an employee and the Sisters of Mercy an employer, then what is the contract of hire?" It cannot be stated, the court said, "for there is none."

WORKMEN'S COMPENSATION—INJURY—MUSCULAR CONTRACTION—*Reardon's Case, Supreme Judicial Court of Massachusetts (Feb. 26, 1931), 175 Northeastern Reporter, page 149.*—An injury to a molder's hand, occasioned by the gradual breaking down of tissue as the result of many years of continuous labor requiring use of the hand, was not the result of a personal injury arising "out of and in the course of employment", and was not compensable according to the Supreme Judicial Court of Massachusetts.

The facts showed that for a period of approximately 25 years prior to March 1928, John Reardon worked for the American Tube Works. His work as a molder required the constant handling of large crucible tongs and the lifting of other heavy objects. A callous formed on his right hand in 1923 or 1924 and gradually developed without much pain, but hindered his ability to perform the work. In 1928 he discontinued his employment with the American Tube Works and was engaged in sewer work for several months. Following this employment he worked for the Boston & Albany Railroad for about 4 months—"until they had no more work for him." From January 1 to September 25, 1929, he was unable to work on account of the condition of his hand. On the latter date he entered the Boston City Hospital, where the condition of his hand was diagnosed as "Dupuytren's contracture." He submitted to an operation and was discharged from the hospital on October 29, 1929,

completely cured. Thereupon he filed claim for compensation to cover the period of his disability. The Industrial Accident Board of Massachusetts affirmed the report of the single member that the employee had received a personal injury arising out of and in the course of his employment with the American Tube Works. On November 5, 1930, the superior court of Middlesex County, after a hearing, affirmed the award. The insurer thereupon appealed to the Massachusetts Supreme Judicial Court, where the decree was reversed.

The court said in part as follows:

The claimant has not proved with reasonable certainty that the injury to his hand arose out of and in the course of his employment. There is no evidence of a physical lesion during the long course of the claimant's employment with the American Tube Works which produced a chronic inflammation of the palm of his hand. It takes 15 to 20 years to bring about a condition of the palm of the hand such as the claimant has, and it is consequently found only in men who are getting along in years. It is not a condition peculiar to the trade of a molder; it is occasioned by any work continued over a period of years that requires the grasping of any article which causes a continuous pressure upon the palm of the hand. There is no similarity between the injury sustained by the claimant and an injury which an employee may sustain through the absorption of poisons. No disease is here traceable directly to a personal injury peculiar to the employment of a molder. The condition of the claimant's hand marks the gradual breaking down of tissue as the result of many years of continuous labor, and is not the result of a personal injury within the meaning of the act. * * * The decree must be reversed and a decree be entered for the insurer.

WORKMEN'S COMPENSATION—INJURY—TOTAL DISABILITY—TERMINATION OF AWARD—*Postal Telegraph-Cable Co.* v. *Industrial Commission et al., Supreme Court of Illinois (Oct. 23, 1931), 178 Northeastern Reporter, page 187.*—On March 12, 1929, Godfrey Liss, an employee of the Postal Telegraph-Cable Co., was struck a severe blow in the left temple by his immediate superior. After this injury, Liss developed a twitching of the face, and a jerking and nodding of the head. After working with difficulty for 2 weeks, Liss quit, and was treated by a number of physicians.

It was not disputed that Liss received the injury in the scope of his employment, and the industrial commission sustained the award of the arbitrator granting him compensation of $10.50 per week for 357 weeks, and one week at $1.50, a pension of $25 per month for life, and $798 medical and hospital expenses. This decision was affirmed by the circuit court of Cook County, Ill. The employer took the case to the Supreme Court of Illinois for review. The

court reviewed the facts and testimony of the physician attending Liss and concluded that:

His condition as established by the testimony indicates that it would be exceedingly difficult, if not impossible, for him to find employment in any gainful occupation, or, in his present condition, to successfully perform the duties of such an employment if he could secure it. The arbitrator, as well as the industrial commission, observed the condition of Liss, and had an opportunity, other than by the testimony offered, to judge his physical and mental condition during the several days of hearings. The award was justified by the condition of the employee at the time of the injury, and from the fact, as shown by the record, that since that time he had exhibited no improvement in his condition. Whether his disability was caused entirely from the physical blow struck or a mental condition arising out of the injury makes no difference.

The court pointed out, however, that the nature of the injury was such that it may or may not be permanent. The present award however was made upon the basis of his present disability and if there was a change in his condition, at some time in the future the employer would be allowed then to appear and have the award modified or set aside.

The judgment of the circuit court upholding the award of compensation was therefore affirmed.

WORKMEN'S COMPENSATION—INJURY AT LUNCH PERIOD—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Kingsport Silk Mills* v. *Cox*, *Supreme Court of Tennessee* (*Nov. 28, 1930*), *33 Southwestern Reporter* (*2d*), *page 90.*—On October 21, 1929, Virgie Cox, an employee of the Kingsport Silk Mills, fell on the floor of the main building of the factory, while watching the employees engage in a basketball game during the lunch and recreation period. The game was being played by permission of the employer, and was encouraged by him as a means of recreation for the employees during the noon hour. It appeared that the floor was slippery, due to the smooth surface.

A petition was filed by the employee for compensation under the Tennessee workmen's compensation act in the chancery court of Sullivan County, and this court rendered a decree awarding compensation. The Kingsport Silk Mills thereupon appealed the case to the Tennessee Supreme Court, where the decree awarding compensation was affirmed. The supreme court found that the lower court was correct in holding that the accident arose out of and in course of the employment, and held that by reason of the injury the employee was permanently and totally incapacitated from working at any occupation which would bring her an income.

The supreme court stated that the underlying principle of the case is stated in Bradbury's Workmen's Compensation (3d ed.) 524, as follows:

The relation of master and servant, insofar as it involves the obligation of master to protect the servant, is not suspended during the noon hour, where the master expressly, or by fair implication, invites his servants to remain on the premises in the immediate vicinity of the work.

The court cited a leading Kansas case (*Thomas* v. *Procter & Gamble Mfg. Co.*, 104 Kan. 432, 179 Pac. 372), in which it was held that a 17-year-old girl was entitled to recover compensation for an injury received during the half-hour intermission at noon. In this case the employee, after eating lunch, was injured while engaged with other employees in the customary practice of riding on a truck drawn by a fellow employee.

In comparing the facts in the two cases the Tennessee Supreme Court stated, however, that the rule would be different " where, at such time, an employee is injured while engaged in some forbidden act, or while in a place where she has no right to be."

The decision of the lower court awarding compensation was therefore affirmed.

The Court of Appeals of the District of Columbia held that an injury received by an employee during the lunch hour on the property of the employer was considered incidental to and arising out of and in the course of the employment. (*Woodward & Lothrop* v. *Mary A. Lineberry* (1931), 50 Wash. L. Rep. 435.)

The Supreme Court of North Dakota held in the case of *Pillen* v. *Workmen's Compensation Bureau* (1931) 235 N.W. 354, that an employee injured on a public highway en route to a hotel to get his lunch during the noon hour was not entitled to compensation. This was so, the court held, even though he was riding on a truck belonging to the employer and driven by a fellow employee, and was paid $2.50 per day for his living expenses. The court held the employer had no control or authority over the public street where the accident occurred.

WORKMEN'S COMPENSATION—INJURY TO ARTIFICIAL MEMBER—AWARD—CONSTITUTIONALITY OF STATUTE—*Pacific Indemnity Co.* v. *Industrial Accident Commission et al., Supreme Court of California (Apr. 29, 1932), 11 Pacific Reporter (2d), page 1.*—The California Industrial Accident Commission handed down a decision granting an award of compensation to one John Driscoll, who while working as a teamster lost his balance and fell.

In falling from the wagon his artificial leg was caught between the footboard and the seat of the vehicle and was broken. Driscoll was otherwise uninjured, but was not able to continue his work without

an artificial leg, and he had no funds with which to purchase one. The effect of the industrial commission's order was to compel the insurer either to buy a new artificial leg or to make weekly disability payments.

The decision of the commission was at first upheld by the California Supreme Court by its refusal to review the decision upon appeal by the insurance carrier. The majority of the judges considered, in view of their refusal to hear the case upon appeal, that the wooden leg should be mended or a new one purchased by the insurer. Later by a vote of 4 to 3 the judges of the California Supreme Court reversed its original holding in the case and upon appeal ruled against the claim. They held that compensation could not be allowed for an injury to personal property, and that there was no constitutional or other legal provision for such payment and that a man's artificial leg was not a part of his body as covered by the provisions of the compensation act (5 Pac. (2d) 1). A rehearing was granted and the record was again reviewed by the California Supreme Court and the decision of the commission as to the liability of the insurer for injuries to the artificial leg was upheld.

The decision of the commission was based upon section 3 (4) of the California workmen's compensation act which provides: "The term 'injury' as used in this act shall include any injury or disease arising out of the employment including injuries to artificial members * * *."

The insurer contended that this section was unconstitutional as it goes beyond the scope of the constitutional provision under which the workmen's compensation law was enacted. It was urged that this provision only authorized compensation legislation providing for awards to be made for injuries to workmen and not their personal property, and that an injury to an artificial member is not an injury to a workman.

The constitutional provision referred to above reads as follows:

> The legislature is hereby expressly vested with plenary power, unlimited by any provision of this constitution, to create and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. * * *

In determining the constitutionality of the provision of the compensation act enacted under the authority of the above constitutional provision, the court followed the cardinal rule that "presumption is in favor of constitutionality and the contravention of the constitu-

tion must be clear and unquestionable before it can be so declared." Continuing the court said:

Bearing with these matters in mind, we are satisfied that this statute comes within the scope of the legislative power. It should be noted that section 21 permits compensation for injury or disability. There can be no question but that a man who has lost the use of an artificial limb is disabled. Indeed, where is the fundamental difference between injury to a real and an artificial member? * * *

Here is a man who is placed by an industrial accident in the identical position; that is, he has lost the use of the remainder of the limb and requires an artificial leg to relieve him from the consequences of the accident. But this man, it is contended, is not entitled to that relief because the amputated leg was wood and not flesh. Nothing in the constitutional provision can be made to sanction this absurd result. In plain words, it permits compensation for "injury or disability" to "workmen." If a man with a wooden leg is fully able to perform his duties, and thereafter, upon the loss of the said leg, is unable to perform his duties, how can it be said, in defiance of the legislative declaration, that he is uninjured? And even if we take this extreme and arbitrary view of the term "injury" to say that this man is not disabled is directly to contradict the physical facts. We cannot annul this award without wiping out of the constitution the words "or disability" which were added by the people in 1919.

The insurance carrier expressed the fear that this award was "the forerunner of others for injuries to clothes, tools, automobiles, or other personal property"; but the court anticipated no such results as the constitution only authorized "compensation for injuries to the body of the workman, including every part thereof, natural or artificial, which is essential to its proper functioning."

The commission had awarded $383.44 payable immediately and $19.45 per week beginning October 2, 1930, until termination of disability, and also cost of medical treatment. The court held that the award should be only for the amount necessary to furnish another artificial limb and to compensate the employee during the time he was disabled due to the loss of the artificial limb. The award was therefore annulled and the case returned to the commission for an award in accordance with the opinion expressed above.

WORKMEN'S COMPENSATION — INSURANCE — POWER TO REGULATE RATES—BASIS OF FIXING RATE—*State ex rel. Powhatan Mining Co.* v. *Industrial Commission of Ohio et al., Supreme Court of Ohio (Apr. 20, 1932), 181 Northeastern Reporter, page 99.*—The Supreme Court of Ohio held that the State industrial commission was justified in imposing on an employer a premium rate exceeding that pre-

vailing in the same industry but based on the accident experience of the individual employer. Under the provisions of section 1465–54, paragraph 4, of the Ohio General Code, the industrial commission is empowered to apply a form of merit-rating system which it considers most equitable, predicated upon the basis of the individual industrial accident experience. Acting under this authority, the industrial commission imposed upon the Powhatan Mining Co. a premium rate higher than the basic rate for the coal-mining industry. The company contended that neither the constitution of the State nor any statute gave the commission authority for this action. The rating system, it insisted, was required to be imposed upon occupation groups according to their degree of hazard and could not be applied to individual employers composing the class.

The brief filed by the counsel for the coal company cited the constitution as empowering the legislature "to authorize the industrial commission to fix rates of contribution by employers to the State insurance fund according to the classification of industry. It clearly does not authorize the establishment of a rate in addition thereto based upon the individual experience of an employer." The Supreme Court of Ohio, however, speaking through Justice Jones, stated that in its opinion the legislative authority conferred was far more comprehensive than such a construction of the constitution would allow.

It was evident, the court said, that the purpose of the constitutional provision was to provide compensation for workmen and to establish a State insurance fund created by compulsory contributions from the employer and to be administered by the State, and in addition the State was empowered to determine the terms and conditions upon which payment should be made from such fund. The court in citing that part of the constitutional provision relative to the point under consideration, noted that the legislature had authority to classify, not industries or groups in industries, but "all occupations according to their degree of hazard." There is no doubt, the court observed, that the legislature could apply a rating system to groups of employers if it so desired, but there was no language in the constitution prohibiting the legislature from departing from the group classification if it was determined at any time that the group system was inequitable or unwise. The legislative authority to "classify all occupations", the court said—

> Comprehends a classification of each and every occupation according to the degree of hazard affecting the individual occupation engaged in by an employer. The various provisions of the constitution connote that meaning; their underlying spirit contemplates a purpose, not only to provide compensation to workmen and their dependents, but to preserve, as far as possible the factor of safety in the conduct of an employer's particular business, and to prevent loss

of life and injuries to his employees. That this was the purpose of the constitution was shown by the following significant clause: "Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, * * * to be expended by such board * * * for the investigation and prevention of industrial accidents and diseases."

The court in rendering its opinion gave a brief history of the nature and purpose of the State fund and stated that—

Those employers who, in the language of the statute, do "encourage and stimulate accident prevention", are naturally interested that the fund shall not be depleted, thereby entailing heavier contributions on their part. It would be inequitable to impose upon the careful employer not only an amount of premium sufficient to cover his own individual risk, but also an additional premium necessary to pay for heavy casualties sustained by other less careful employers. There are some individual employers in a group of similar occupations who are more diligent than others in the conduct of their particular plant operation, and in the prevention of accidents, and by such conduct impose a lesser burden upon the State insurance fund.

The court reverted to the history of the legislative powers derived from the State constitution. In the early years following the adoption of the constitution, the legislature, acting under its general police powers confined the classification to groups of industries conducting similar businesses, and established a system of rating for such groups. On the basis of further experience it later made the provision authorizing application of the rating system on a more equitable basis of classification, i.e., on the basis of the "individual accident experience."

This language the court held was "clear and explicit."

It was pointed out that the classification employed by the commission embraced two classes, both based upon the accident experience: (1) Those employers who carry on their operations with care, and (2) those who, although they may be in the same group, so carelessly manage their individual businesses as to cause a higher percentage of injuries to their employees. The merit of this classification is that it assures that employers shall pay into the State fund an amount of premium which will substantially cover their own individual risks; but it does not impose upon the careful employer the additional burden of paying a further and higher premium rate to cover risks incurred in a similar business not operated with the same degree of care. The court answered the argument advanced by the company, namely, that employers in the latter class are sufficiently penalized by the imposition of additional awards for failure to comply with specific requirements, by saying that this does not always meet the situation, since a particular business may be

conducted unskillfully where no such requirements have been authorized.

The court was of the opinion that the legislature had adopted a reasonable basis for classification of individual occupations according to their degree of hazard, by basing its action upon individual accident experience, and that the provision (sec. 1465–54, par. 4) was not opposed to either the Federal or State Constitutions, since the classification was neither unreasonable nor arbitrary. The basis of this classification, the court held, has been sustained both by State and Federal courts. In substantiation of this contention the court cited the two following decisions by the United States Supreme Court.

In the case of *Middleton* v. *Texas Power & Light Co.* (249 U.S. 152), it was said: "There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people; that its laws are directed to problems made manifest by experience; and that its discriminations are based upon adequate grounds," and in the case of *Lindsley* v. *Natural Carbonic Gas Co.* (220 U.S. 61), that—

> A classification having some reasonable basis does not offend against that clause (the equal-protection clause) merely because it is not made with mathematical nicety, or because in practice it results in some inequality. * * * When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

The court therefore denied the writ which sought to prohibit the Ohio Industrial Commission from canceling the protection afforded to the coal-mining company under the State workmen's compensation act and imposing upon it any rate or premium paid to the State fund other than that applicable to the classification of the industry to which the coal-mining company belonged.

WORKMEN'S COMPENSATION—INTENTIONAL AND WILLFUL ACT—ALTERCATION—INJURY BY THIRD PARTY—*Toney* v. *George A. Fuller Co. et al., Court of Appeal of Louisiana (Oct. 5, 1932), 143 Southern Reporter, page 541.*—George Toney was employed as night watchman about the grounds of the new State capitol building which was being constructed by the George A. Fuller Co. The Louisiana State University, where George Sevier was employed as watchman, adjoins the capitol grounds.

On February 4, 1931, Toney was killed by Sevier while he was on the grounds of the capitol building. These two watchmen had previously been on friendly terms and frequently visited each other.

On the night before the killing occurred Sevier asked Toney to return a light bulb which he had taken from the premises of the university. An argument occurred when Toney returned the bulb, and the following night as Sevier was going across the capitol grounds he was accosted by Toney and ordered off the premises. The two men began fighting after a brief argument, and according to Sevier's testimony Toney struck him across the head and knocked him down. As he was getting up and saw Toney about to hit him again, Sevier began to shoot. Toney hit him on the head several times, badly bruising him. Sevier then shot again, killing Toney almost instantly.

Toney's widow filed suit against the George A. Fuller Co., under the Louisiana employers' liability act, to recover compensation for the death of her husband. The district court, parish of East Baton Rouge, denied compensation, and the widow appealed to the Court of Appeal of Louisiana. She contended that "Sevier was a trespasser on the capitol grounds when Toney, acting in the discharge of his duties as watchman and in attempting to eject him therefrom, was killed, and that his dependents are entitled to compensation."

The court, however, reviewed the evidence and reached the same conclusion as the lower court, holding that Toney was the aggressor and that Sevier acted in self-defense when firing the fatal shot. It was also shown by the evidence that Toney had been instructed not to carry a gun and was specifically prohibited from using force in performing his duties. He had been instructed to call upon the police if anyone resisted his authority. The court concluded that "when a watchman acting under such restrictions uses brutal force, even against a trespasser, he indulges in the commission of an act not only against his instructions but beyond the scope of his employment thus limited by his employer."

The court then quoted section 28 of the compensation statute which provides: "That no compensation shall be allowed for an injury caused (1) by the injured employee's willful intention to injure himself or to injure another * * * or (4) by the employee's deliberate breach of statutory regulations affecting safety of life or limb."

In applying these provisions of the statute to the facts before it, the court concluded:

> We find, as before stated, that Toney was actuated by a feeling of revenge and that his act was therefore deliberate. If we be mistaken in the motive thus ascribed to him, it, however, clearly appears that in beating up Sevier with his pistol, and before Sevier had drawn his pistol or attempted to defend himself, Toney was acting with the "willful intention" of injuring Sevier, which brings the case directly under the provisions of the statute quoted under heading one.

Our statutes, unquestionably, forbid the commission of such offenses as assault and battery and which are enacted for the protection of "safety of life or limb." The breach of those "statutory regulations" is prohibited by our laws. It is therefore obvious that when Toney committed an unprovoked assault on Sevier he was guilty of the "deliberate breach of statutory regulations affecting safety of life or limb", and had debarred himself, if he had lived, from any right to recover under our compensation statute, which precludes his widow and dependents from relief under that law.

The Court of Appeals of Georgia held in a case that a night watchman who was shot by a robber received an injury which arose out of the employment. (*American Mutual Liability Ins. Co.* v. *Herring* (1931), 158 S.W. 448.)

WORKMEN'S COMPENSATION—INTENTIONAL AND WILLFUL ACT—EVIDENCE—LOSS OF EYE—*Bradley* v. *State Compensation Commissioner, Supreme Court of Appeals of West Virginia (Feb. 10, 1931), 157 Southeastern Reporter, page 42.*—On March 8, 1929, Claude Bradley was injured by an explosion while in the course of his employment with the Buffalo-Eagle Mines, Inc., at Bracholm, Logan County, W.Va. As a result of the injury he suffered the complete loss of one eye and practically total blindness of the other. He filed claim for compensation and on January 29, 1930, the compensation commission denied the claim on the ground that "he was at the time of the injury using a short fuse in violation of the mining laws of West Virginia."

On appeal to the Supreme Court of Appeals of West Virginia the question for decision was whether the alleged use of the short fuse in violation of the statute constituted willful misconduct so as to prevent recovery under the State workmen's compensation law.

The evidence showed no rule adopted by the employer to regulate the length of the fuse to be used, the sole basis for the employer's contention being part of section 63, chapter 88, Acts of 1925, which provides: "* * * No fuses shall be used unless permission is granted by the mine foreman and in no case shall fuses be used of less length than the drill hole." However, Bradley denied that the use of a short fuse caused the accident.

Much evidence was introduced regarding the condition of the mine after the explosion. Some of the evidence disproved Bradley's story and some upheld it. There was also evidence that the company had attempted to have Bradley prosecuted for the alleged violation of the mining law, but he had gone into another State before service was made upon him.

After considering all the evidence the court concluded:

In view of the time that had elapsed after the accident before the examination of the working place, the inconsistencies in the evi-

dence of those claiming to have made the investigation, and other circumstances casting doubt upon the alleged discoveries, we are of opinion that the employer has not carried the burden of disproving the story of the claimant and establishing the theory that the injury resulted from his use of short fuse.

WORKMEN'S COMPENSATION—INTRASTATE COMMERCE—CHOICE OF REMEDIES—EMPLOYEE OF LOGGING RAILROAD—*Kidder* v. *Marysville & A. Railway Co. et al., Supreme Court of Washington (June 16, 1931), 300 Pacific Reporter, page 170.*—An administratrix proceeding under the workmen's compensation law of Washington is prohibited from suing for the death of an employee engaged in the intrastate commerce business of a railroad, according to a recent decision of the Supreme Court of Washington.

Under chapter 28 of the Washington Session Laws of 1917 and the amendments thereto, if a common carrier by railroad is engaged in both interstate and intrastate business, its employees engaged in intrastate business do not come under the provisions of the act providing for workmen's compensation, but there is thereby created as to them a statutory right of action practically identical with that which the Federal act provides for employees of railroads engaged in interstate commerce.

It appears that Kidder, the deceased employee, was in the employ of a logging railroad at the time of his death. The administratrix presented to the industrial insurance division of the department of labor and industries her claim for compensation for the death of her husband. This claim was allowed, the department finding that Kidder came to his death "in the course of employment within the jurisdiction of the division of industrial insurance on or about the 24th day of March 1927; that at the time of the injury, as alleged, the workman was engaged in work within the jurisdiction of the division of industrial insurance."

The administratrix was awarded $5,911.75, payable in monthly installments of $35, and $150 for funeral expenses. These monthly payments were accepted by the widow from June 1927 until a few days before the trial of this action in October 1929. It seems the widow had filed a petition for a rehearing, contending that the statute referred to above (which placed liability upon a common carrier engaged in both intrastate and interstate commerce, for injuries to persons engaged in intrastate commerce) applied rather than the compensatory provisions of the statute. She had previously sued the railroad company, claiming that she was entitled to recover under the Federal Employers' Liability Act, but the court upheld

the ruling of the department of labor to the effect that the logging railroad in question was a private intrastate carrier and therefore not within the scope of the Federal act. The department of labor had classified the railroad for many years under the State workmen's compensation act and assessed percentages upon its pay roll.

After considering the facts and the remedies available, the court reversed the judgment in favor of the widow and instructed the trial court to dismiss the action. The court said:

We are satisfied that by her conduct and by the adjudication made by the department upon her claim, respondent is estopped from maintaining this action under the State statute above referred to, and that it must be held that she is limited to the remedy which she sought by way of a claim for compensation, her rights under that branch of the statute having been definitely and finally fixed and determined by the proper officers of the department. No appeal was taken from this adjudication, respondent accepted the benefits thereof, and the same has become final.

WORKMEN'S COMPENSATION—JURISDICTION—HEAT PROSTRATION—COMPUTATION OF AWARD—*Baltimore & Ohio Railroad Co.* v. *Clark, Deputy Commissioner, Circuit Court of Appeals, Fourth Circuit (June 13, 1932), 59 Federal (2d), page 595.*—Julius Ellis was employed by the Baltimore & Ohio Railroad Co. as a coal trimmer. On August 25, 1931, he was assigned work as a coal trimmer on vessels lying in navigable waters at the Baltimore pier. While thus employed he was "required to work in the bunkers of the vessels in close proximity to their engine rooms, in a dusty atmosphere considerably above that of the air outside."

In the course of his employment he developed symptoms of heat prostration which became very violent during the night of August 26, 1931. The next day he attempted to work in a coal pit on land but was unable to do so and later in the day he was taken to a hospital where on the day following he died as a result of the heat prostration.

Two dependent children filed a petition for compensation under the Longshoremen's and Harbor Workers' Compensation Act alleging that Ellis died "as a result of heat stroke sustained while in the service of the railroad company upon the navigable waters of the United States." An award was entered in favor of the dependent children. The railroad company brought suit to enjoin the enforcement of the award made by Lindley D. Clark, Deputy Commissioner of the United States Employees' Compensation Commission. The United States District Court for the Maryland District affirmed the

award and the case was appealed to the Circuit Court of Appeals, Fourth Circuit. The three questions presented for consideration on appeal were stated by the court as follows:

* * * (1) Whether the deputy commissioner had jurisdiction to make the award, the contention of appellant being that the injury which resulted in the death of Ellis occurred upon the land and not upon the navigable waters of the United States; (2) whether death resulting from heat prostration not due to unusual and extraordinary conditions in the employment is an accidental death compensable under the statute; and (3) whether the amount of the award was properly fixed under the applicable provision of the act.

In answering the first question regarding the jurisdiction of the deputy commissioner the court held that under the ruling of the Supreme Court in *Crowell* v. *Benson* (285 U.S. 22) the court was not bound by the findings of the deputy commissioner as to the place of the injury. The company contended that the accident occurred while the employee was employed in the coal pit on land and not while at work in the vessels on navigable water. The court reviewed the evidence and concluded by saying that "the judge, below, after considering the evidence, finds the facts in accordance with the findings of the deputy commissioner; we will not reverse such findings unless clearly wrong. Here we are satisfied upon the evidence they were clearly right."

The second contention made by the company was that the heat prostration was due in part to conditions inherent in the employee and not attributed to the conditions of employment. The court, however, was of the opinion that it was not necessary to produce evidence showing unusual or extraordinary conditions of employment as the compensation act did not contain such requirements; it merely defined a compensable injury as an "accidental injury or death arising out of and in course of employment." Continuing the court said:

A workman who sustains heat prostration as the result of the working conditions under which he labors, has sustained an injury "arising out of and in the course of his employment"; and the fact that other workmen may not have been affected or that he may have been rendered more readily susceptible to injury than they were by reason of his physical condition cannot affect the matter. * * *

The question as to whether heat stroke is to be deemed an accidental injury within the meaning of workmen's compensation acts has been frequently before the courts. In some cases distinction is made between injuries caused by natural and those caused by artificial heat; and in a few it is said that the injury must be caused by some unusual or extraordinary condition. The rule supported by the weight of authority, however, is that heat prostration which results from the employee's engaging in the employment, whether

due to unusual or extraordinary condition or not, is to be deemed an accidental injury within the meaning of the statutes.

In rendering the award the amount was computed by the deputy commissioner by multiplying the daily wage which Ellis received at the time of his injury by 300 to get his annual wage. The third contention of the railroad company was based upon this procedure. It was alleged that the employment was intermittent and discontinuous. The facts showed that during the 12-month period prior to August 1, 1931, he had earned $527.30 in his employment with the company while the amount as computed by the deputy commissioner showed his annual income to be more than twice that amount. The court held that such a computation was in error and that the amount should have been ascertained under section (c) which provides that the annual earnings shall be "such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury."

In conclusion the court said:

It is clear that the amount of his average annual earnings should have been ascertained under section (c); but this does not mean, as the company contends, that the deputy commissioner must fix same at the amount paid him by the company during the preceding year. The sum fixed must be such as will reasonably represent the earning capacity of Ellis, having regard not only to his previous earnings but also to those of "employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality."

The court therefore held that as to questions (1) and (2) regarding the jurisdiction of the deputy commissioner and whether the injury was compensable, the decision of the lower court was affirmed. However, insofar as the decision affirmed the commissioner's basis of determining the annual income it was reversed and remanded for change in accordance with this opinion.

WORKMEN'S COMPENSATION—LIABILITY—EMPLOYER AND DEPENDENT—*Independent Indemnity Co.* v. *Boss et al.*, *Supreme Court of Wisconsin* (*Oct. 11, 1932*), *244 Northwestern Reporter, page 566.*—On May 15, 1931, the Wisconsin Industrial Commission granted an award of compensation to one Minnie Boss, a widow, because of the death of her son, Christian Boss. The son was killed by accident aris-

ing out of and in the course of his employment on a farm operated by the claimant. He was struck on the head by a falling limb and death resulted. The employees on the farm were covered by workmen's compensation insurance and the premiums paid by Minnie Boss were based upon the pay roll which included the salary of Christian Boss.

The award of the commission was affirmed by the circuit court of Dane County, Wis., and appeal was taken to the Supreme Court of Wisconsin by the insurance carrier, contesting its liability to pay upon the ground that the employer and the claimant were the same person and therefore no liability existed because of the injury. As there was no finding by the court below of liability on the part of the employer, the insurance carrier contended that there was no liability upon the company. The industrial commission had said, however, that—

> It makes no difference that the dependent is also the employer, that the insurance carrier is liable to the dependent, even though the dependent was the employer, and that, in any event, the insurance carrier should be held liable on grounds of estoppel because it accepted premiums calculated on the basis of wages paid to the employees of Minnie Boss, including those paid to her son, Christian.

The Supreme Court of Wisconsin did not concur in this view, however, and in support of its view that liability of the insurance carrier attached only when there was liability on the employer, the court referred to several sections of the compensation law in which the employer's liability is referred to as the basis for the requirement for insurance. From these sections the court implied the meaning that the employer's liability was necessary before the insurance carrier could be held. The court said:

> It is our conclusion from a careful consideration of the act that, in the absence of liability on the part of an employer to an employee or dependent, there can be no liability of an insurance carrier. If this were not true, situations would arise where the liability of the insurance carrier would be greater than that of the insured employer, or where there would be liability of the insurance carrier, which assumed the compensation risk of the employer, with no liability on the part of the insured. Were a compensation insurance carrier to be held liable where no liability exists on the part of the employer, the policy would, in effect, be simply an accident or life-insurance policy. There is nothing in the act to suggest that such a result was ever intended by the legislature or that such a risk shall be assumed by a compensation carrier. * * *
>
> We conclude that, since there was no liability on the part of Minnie Boss as employer to pay to herself as dependent the death benefit, there can be no liability of her insurance carrier.

The court was not impressed by the argument that "the company should be held to be estopped because it collected premiums based on the wages paid to Christian as well as to others employed * * *."

The court held that the widow was not misled to her prejudice by the company, nor was she induced to do anything that she would not have done otherwise, if she had known that her insurance coverage was limited to her liability as an employer.

The decision of the circuit court and industrial commission was reversed and the award set aside.

WORKMEN'S COMPENSATION—LIGHTNING STROKE—ACCIDENTAL INJURY—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Consolidated Pipe Line Co.* v. *Mahon et al., Supreme Court of Oklahoma (Oct. 6, 1931), 3 Pacific Reporter (2d), page 844.*—Death by lightning constitutes an "accidental injury" arising out of and in the course of the employment, if the nature of the employment exposes the workman to risk of such injury, according to the rule laid down by the Supreme Court of Oklahoma.

Mahon was employed by the Consolidated Pine Line Co., engaged in taking up a pipe line some 8 miles north of Wewoka, Okla. Shortly before noon a rainstorm came up, and Mahon, together with some of his associates, took refuge in an old, dilapidated frame house which had no doors or windows. Mahon was struck by lightning while in the house, resulting in an injury for which compensation was awarded him by the State industrial commission.

A petition was later filed in the Supreme Court of Oklahoma to review the award of the industrial commission. The principal question involved was whether the injury sustained by Mahon by reason of the lightning stroke "arose out of his employment."

The court reviewed the facts and cited a number of cases on the subject, some of which allowed compensation and others which held such an accident did not arise out of the employment. The general rule laid down by the court as the test was whether the causative danger was peculiar to the work or common to the neighborhood. Under the facts and circumstances of this case the court held the causative danger was peculiar to the work. The court said:

Would it be contended that his employment in removing a pipe line would not necessarily accentuate the natural hazard from lightning? If the claimant was exposed to injury from lightning by reason of his employment, something more than others in the same locality are exposed, if his employment necessarily accentuated the natural hazard from lightning, and the accident was natural to the employment, though unexpected or unusual, then a finding is sustained that the accident from lightning was one "arising out of the employment."

The court also said that obtaining shelter was not only necessary to the preservation of his health but was incident to his work, and was an act promoting the business of his master, for the master would

have been liable for medical expenses had Mahon remained at work and become ill from the exposure to the elements.

In holding that the employment exposed Mahon more than the public in general, the court said:

We think it is a matter of common knowledge that, when a sudden and unexpected rainstorm occurs in the locality or neighborhood 8 miles north of Wewoka, the persons living and laboring in that locality, in seeking refuge from such a storm, are not required to enter an old dilapidated house without windows or doors which no one has occupied for quite a while, but, on the contrary, such persons may under such circumstances seek shelter in houses with doors and windows and constructed so as to minimize danger from the elements. It is generally known that an old house in the condition of the one in which Mahon sought shelter is much more liable to be struck by lightning or blown down by the wind than the average house in the same locality which is habitable and inhabited. So we think the State industrial commission was justified in holding that the employment of Mahon exposed him more to the elements than the public generally in the neighborhood are so exposed.

WORKMEN'S COMPENSATION—MALPRACTICE—NEGLIGENCE—CHOICE OF REMEDIES—*Jordan* v. *Orcutt, Supreme Judicial Court of Massachusetts* (*June 29, 1932*), *181 Northeastern Reporter, page 661.*—In this case an employee received compensation for his injuries, and the insurer brought action against the physician, charging negligence in treating the injury. The supreme court of Suffolk County rendered a verdict in favor of the physician. The insurer appealed the case to the Supreme Judicial Court of Massachusetts. This court set aside the verdict of the lower court and granted a new trial, saying that the—

Right to resort to an action at law for negligence against that third person is left to the employee if he prefers it to the right to compensation created and bestowed by the act. He cannot have both rights. He must choose between them. (*Tocci's Case*, 168 N.E. 744.) If he choose compensation under the act, then the legislature has allotted the rights in tort for negligence, which the employee has given up, to the insurer who has paid compensation; but it also has required that insurer to pay over to the injured employee four fifths of the excess of the amount recovered above what has been paid. The employee does not take this amount as an owner of the tort claim. He receives it as additional compensation granted by the legislature under the act. Thus there is no true subrogation. What the insurer obtains is a legislative grant to proceed at law which is its own. [Cases cited.] The injured employee cannot control it or successfully demand that the insurer proceed to exercise it. [Cases cited.]

The court further said:

A physician, if found by a trial tribunal to be in fault, cannot escape liability as a result of the employee's election to proceed for compensation under the act instead of damages at law. In stating an injury to an employee who has received compensation under General Laws, chapter 152, payment of such compensation, and pain and suffering resulting to the employee from alleged negligent acts of a physician who treated the employee for the injury, the insurer stated a case. It was error to direct a verdict thereon for the defendant. The verdict must be set aside and a new trial be had.

WORKMEN'S COMPENSATION—MALPRACTICE—PERMANENT INJURIES—ADDITIONAL COMPENSATION—*Smith* v. *Golden State Hospital et al., District Court of Appeal, Second District of California (Feb. 11, 1931), 296 Pacific Reporter, page 127.*—In California an allowance of additional compensation under the California workmen's compensation act in consequence of permanent injuries is no bar to an action against the hospital and physicians for malpractice, according to a decision of the California District Court of Appeal for the Second District.

Lawrence W. Smith, according to the facts of the case, received during the course of his employment personal injuries resulting in disability. He instituted the proper proceedings under the California workmen's compensation act and was allowed compensation and medical treatment. Thereafter he filed an action against his employers and the hospital and physicians to whom he had been referred for medical treatment by the employers, asking damages for alleged permanent injuries subsequently incurred as a result of malpractice. Pending trial of this action, the industrial commission allowed additional compensation in consequence of the permanent injuries. The superior court of Los Angeles County, Calif., dismissed the suit and Smith appealed to the district court of appeal. On appeal Smith named only the hospital and physicians as parties defendant and the sole question for determination was the right of the employee to maintain an action against the hospital and physicians for malpractice, after allowance of compensatory relief from the employers.

In deciding this question the court cited section 21, article 20, of the California Constitution, which granted power to create and enforce a workmen's compensation system covering injuries received by workmen "while in the course of their employment." The court then pointed out that this section measured and limited the power of the legislature in delegating authority to the industrial accident

board. The board had jurisdiction over only those cases between employer and employee where the injury was incurred "in the course of the employment"; and the rights of the employee against an independent third party, where the injury did not occur within the course of the employment, were not affected by the compensation act. In rendering the opinion Judge Craig said:

That independent professions by the fact of business contact with the employer should be absolved of responsibility for mistake, avoidable or unjustified neglect resulting in secondary affliction, seems obnoxious to the purpose and spirit of such a statute. To so hold might induce industry to encourage quackery and place a premium upon negligence, inefficiency, and wanton disregard of the professional obligations of medical departments of industry, toward the artisan. Such is the view entertained by courts of last resort in other jurisdictions where the subject has required specific attention.

The court quoted from the case of *Ruth* v. *Witherspoon-Englar Co.* (98 Kans. 179, 157 Pac. 403), in part, as follows:

A part of the loss occasioned by an accidental injury to a workman is cast upon the employer, not as reparation for wrongdoing but on the theory that it should be treated as a part of the ordinary expense of operation. So much of an employee's incapacity as is the direct result of unskillful medical treatment does not arise "out of and in the course of his employment", within the meaning of that phrase as used in the statute. (Laws 1911, ch. 218, sec. 1.) For that part of his injury his remedy is against the persons answerable therefor under the general law of negligence, whether or not his employer be of the number.

The decision of the lower court was therefore reversed.

WORKMEN'S COMPENSATION—MALPRACTICE—THIRD PARTY—SUBROGATION—*Lakeside Bridge & Steel Co.* v. *Pugh; McNutt* v. *Pugh* (*two cases*), *Supreme Court of Wisconsin* (*Nov. 10, 1931*), *238 Northwestern Reporter, page 872.*—Robert N. McNutt received an accidental injury arising out of and in course of his employment with the Lakeside Bridge & Steel Co. He was treated by Dr. G. J. Pugh, and through his alleged malpractice the injury was aggravated. The injured employee filed suit against the doctor to recover damages for malpractice, and the employer—the Lakeside Bridge & Steel Co.—having paid compensation to McNutt, filed suit against the doctor upon the ground that the right to sue had passed to it upon the payment of the compensation to McNutt.

Both suits were combined and argued as one case. Section 102.29 (subdivision (4), ch. 624, Laws of 1917) of the Wisconsin workmen's

compensation act, in force at the time of the injury, provides as follows:

Nothing in sections 2394–3 to 2394–31, inclusive, shall prevent an employee from taking the compensation he may be entitled to under said sections and also maintaining a civil action against any physician or surgeon for malpractice. The measure of damages, if any be recovered in such action, shall be the amount of damages found by the jury less the compensation paid to the employee under said sections, due to such malpractice.

The court cited several cases interpreting this section and concluded that it left "unimpaired the cause of action of the employee for malpractice, merely modifying the damages to be recovered." The court also found no statutory assignment of this cause of action to the employer. However, the court said, "It is plainly not the statutory intent that the employee shall recover even as trustee of the employer the amount which he has paid as compensation for the results of the malpractice." It was conceded that the employer would be liable for the aggravated damages caused by the malpractice and that he should have a remedy against the third party causing the increased liability. Regarding this the court said:

It is also plainly the legislative intent that the employer who has paid compensation for injuries which have been caused or aggravated by the tortious acts of a third party shall have a remedy against such third party. The fact that the employee cannot recover the portion of his malpractice damages which he has already received in the form of compensation, and the evident intent of the legislature to make the third parties who have caused or aggravated the injury responsible to the employer, lead to the conclusion that the statute creates in the employer an original and independent cause of action for the compensation which he has paid by reason of the malpractice. To hold otherwise would mean that neither the employer nor the employee could recover such sums as had theretofore been paid by reason of the malpractice, and this we believe to be contrary to the clear legislative purpose. It is our conclusion, therefore, that each of these complaints states a cause of action against the defendant.

The court also held that the actions against the doctor were not premature because the industrial commission had not previously separated the compensation payable because of the original injury from that payable because of malpractice.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL TREATMENT—MALPRACTICE—*Barnsdall Refining Co.* v. *Ramsdall et al., Supreme Court of Oklahoma (May 19, 1931), 299 Pacific Reporter, page 499.*—According to the Supreme Court of Oklahoma, an employer is liable for all legitimate consequences following an accident within

the provisions of the workmen's compensation act, including unskillfulness or error of judgment of the attending physician.

On March 2, 1925, H. B. Ramsdall received a fractured arm while employed by the Barnsdall Refining Co. The injury resulted in temporary total disability, and compensation was paid and medical services furnished Ramsdall from the date of the injury until July 1, 1930. The physician secured by the employer prescribed a bone graft at the site of the fracture. This was unsuccessfully attempted three times; first a piece of bone was taken from the left arm, next a piece was taken from the right leg, and then a piece from the left leg, in order that the operations might be performed. Each time, however, the arm was again fractured in the same place within several months.

Ramsdall filed a petition requesting an additional award of compensation, alleging a 60 percent permanent partial disability of the left arm and a 10 percent permanent partial disability of each of the legs. The Oklahoma Industrial Commission rendered an award of $18 per week for 200 weeks. Thereupon the employer appealed to the Oklahoma Supreme Court, contending that the arm was broken by Ramsdall again after it had been set and placed in a cast, and that there was no evidence from which the court could determine that the subsequent breaks were due to the original injury.

It was the contention of the company that after the arm of the employee was set and placed in a cast he "caused it in some manner to be again broken." The employee denied the allegation and contended that "a good union had not been obtained" by the first attending physician furnished by the employer. However, the court did not sustain this view and in affirming the award of the industrial commission said, in part, as follows:

> The record shows that respondent's arm was broken under facts making the injury compensable. The medical treatment of the respondent was furnished by the petitioner. The petitioner does not charge that the respondent willfully broke his arm on the subsequent occasions and does not undertake to say under what circumstances the subsequent breaks occurred. The record tends to show, and there is sufficient evidence to support a finding of the State industrial commission to that effect, that the present condition of the respondent is the legitimate consequence of the injury received, aggravated and increased by the intervening failure of employer's selected physician to give the respondent proper medical and surgical attention.
>
> We must conclude, in the absence of substantial evidence to the contrary, that the condition of the respondent was not occasioned by the willful intention of respondent to bring about the injury to himself. With that presumption there is sufficient evidence to show that his present condition is the legitimate consequence following the accident.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL TREATMENT, REFUSAL OF—*Gildersleeve et al.* v. *Industrial Accident Commission et al., Supreme Court of California (June 15, 1931), 1 Pacific Reporter (2d), page 1.*—O'Neill suffered a fractured spine while employed by Charles H. Gildersleeve as a laborer. He received some medical treatment at the camp where he worked, and chiropractic treatment in the home of a private nurse. He recovered only partially.

The State industrial accident commission awarded O'Neill compensation for his disability but denied an award for medical and surgical treatment on the ground that the employee had refused to accept an offer of medical and surgical treatment. After reviewing the case, the district court of appeal reversed the order, holding that the records showed no such offer had been made either by the employer or the insurance carrier.

New proceedings were then brought before the industrial accident commission, and new testimony taken. The commission made an order granting reimbursement to the employee for hospital and nursing expense. Thereupon, Mr. Gildersleeve and the insurer obtained a hearing before the Supreme Court of California.

On February 16, 1931, the supreme court affirmed the commission's findings, saying:

> The testimony does show a recommendation of hospital treatment made by two of the physicians who originally attended the employee, but it does not satisfactorily establish that these recommendations were authorized tenders made on behalf of the insurance carrier or employer. * * * The statute, of course, requires a denial of an award for medical expense only when the employee's refusal is unreasonable. In the face of conflicting evidence, and considering all of the circumstances, the commission concluded that there was no sufficient, unequivocal tender, and hence no unreasonable refusal, and this conclusion we cannot disturb (*Gildersleeve et al.* v. *Industrial Accident Commission et al.*, 295 Pac. 1033).

On June 15, 1931, the case was reheard by the Supreme Court of California, and further consideration given the question whether there had been a valid tender of medical aid to the employee. The court quoted a letter addressed to the counsel for the injured employee, which said:

> Referring to the proceedings now pending before the industrial accident commission. * * * We are * * * listing a panel of three other surgeons in accordance with the workmen's compensation and safety act, one of which the injured may select in the event that it is found reasonable by the industrial accident commission that applicant should be sent to San Francisco for medical and hospital treatment. * * *

The supreme court again affirmed the award of the commission and, in regard to the letter quoted above, said:

The commission was apparently of the opinion that this tender was unsatisfactory, for the reasons, first, that it was not directed to the employee himself; and, second, that it was made contingent upon a determination by the commission in the employee's favor. We think this last point is sound. The tender * * * must be unequivocal; it must be an offer which the employee could and should accept, when made. * * * If he had accepted it when it was made, he would not have received medical treatment at all, but would have been forced to await the termination of the proceedings before the commission. Under these circumstances, the commission concluded that the failure to accept this tender was not unreasonable, and we are satisfied that this conclusion finds support in the record.

The Supreme Court of Wisconsin affirmed a decision of the industrial commission holding that a chiropractor is not a physician within the meaning of the compensation act, and that the only medical treatment contemplated under the section of the act which allows the recovery of the medical expense is medical treatment administered by a physician. (*Corsten* v. *State Industrial Commission et al.* (1932), 240 N.W. 834.)

Under the Nebraska workmen's compensation law an injured employee cannot recover for services of a nurse rendered him by his wife. (*Claus* v. *DeVere* (1931), 235 N.W. 450.)

WORKMEN'S COMPENSATION—MEDICAL FEES—*Ross et al.* v. *Austin Drilling Co., Supreme Court of Kansas (Dec. 6, 1930), 293 Pacific Reporter, page 757.*—According to a decision of the Supreme Court of Kansas, physicians making reasonable charges for services to injured employees are not bound by the medical-fee provisions of the workmen's compensation act.

One Earl Armstrong was an employee of the Austin Drilling Co., and while so engaged sustained injuries which were compensable under the Kansas workmen's compensation act. Armstrong was taken to a hospital and one Doctor Ross was called to treat him. The employer notified the insurance carrier and it was agreed that Doctor Ross was to take charge of the injured employee, and to call in any other doctor to assist him if it was necessary, and to render all medical attention possible. The physicians treated Armstrong in the hospital for 5 or 6 weeks, and rendered a bill of $968. Upon presenting an itemized bill to the insurance carrier and to the Austin Co., the physicians were advised by the company that it would not be responsible for more than $200—the maximum amount provided in the Kansas workmen's compensation act for hospital and surgical attention.

An action was brought in the district court of Sedgwick County, Kans., by the physician to recover for the medical services. A judg-

ment in favor of the company was rendered by the court on the ground that the physicians were bound to know the limitations under the workmen's compensation act and, notwithstanding the language used, there could be no liability in excess of the maximum provided by the compensation act. The case was appealed to the Supreme Court of Kansas, where the judgment of the lower court was reversed. The court said:

Physicians are not within the class of persons who can elect to come under the provisions of the act. The compensation act, therefore, does not represent a contract either between the physicians and the injured workman or between the physician and the employer of the workman. There is nothing in the compensation act which prevents either an employer or employee from making a contract with the physician for services, as such contracts are usually made, and a contract when so made with the physician is free from the terms of the compensation act, unless, of course, that act is specifically made a part thereof. [Cases cited.]

The trial court took the further view that in the absence of an express contract, and in view of the fact that defendants were obligated by the workmen's compensation act to the injured employee to furnish him medical attention to the amount of $200, the implied contract, as disclosed by the record, should not be held to obligate defendants further to plaintiffs than they were obligated to the injured workman. This view is erroneous for the reason that the plaintiff physicians were in no way concerned with the workmen's compensation act. They were entitled to reasonable compensation for their services from some one, irrespective of the amount which defendants were obligated by the terms of the compensation act to pay for medical services in the way of compensation to the injured employee or his dependents. If defendants decided to limit their liability to the terms of the compensation act, they should have so informed plaintiffs. They might well have known that the services being rendered at their request were of the value much in excess of $200.

In the case of *Tyrrell* v. *Standard Underground Cable Co.* (1932) (160 Atl. 763), the facts show that in May 1927 James Kozak was seriously injured in an accident in the course of his employment. After examining the unconscious employee Dr. Tyrrell communicated with the superintendent of the Standard Underground Cable Co., advising him of Kozak's serious condition. The superintendent requested Dr. Tyrrell to do all that was necessary to aid in the injured man's recovery. Upon Dr. Tyrrell's bringing action to recover $184 for the services rendered, the cable company refused to pay upon two grounds: (1) That the agreement should have been in writing, and (2) that the physician came within the provisions of the compensation act. The court held that the physician had acted at the request of the superintendent who had a right to bind the company, and in rendering a judgment of $184 in favor of the physician, further said:

The compensation statute is only binding upon the parties to the statutory contract and they and they only are entitled to the benefits and are bound by its terms. The plaintiff is not bound by the compensation act.

WORKMEN'S COMPENSATION—MEDICAL TREATMENT REFUSED—DEPENDENTS—*Hughes et al.* v. *Elliott et al.*, *Supreme Court of Tennessee* (*Feb. 12, 1931*), *35 Southwestern Reporter* (*2d*), *page 387.*—On October 13, 1927, Arthur Hughes stuck a nail in his foot while in the employ of Robert Elliott. On the 20th of that month he developed tetanus from which he died 3 days later. His dependents filed claim for compensation. The circuit court of Davidson County found that "within 5 minutes after the accident defendant (the employer) directed deceased to go across the street to its physician and surgeon for examination and treatment; that this instruction was repeated from time to time; that defendant made arrangements to have deceased taken to the hospital for treatment; that deceased refused to accede to these demands; and that his death was due to his persistent refusal to accept the medical and hospital treatment offered to him by his employer." The court further found that his wife acquiesced in this refusal of medical treatment. Thereupon the court dismissed the petition on the ground that if deceased had lived he could recover no compensation because of his refusal of medical treatment, and since he could not recover, his dependents should be in no better position.

Appeal was taken to the Supreme Court of Tennessee on the ground that the refusal to accept the proffered medical services did not bar his minor dependents from recovering compensation. The court was of the opinion, however, that "these minor dependents stand on no higher ground than their grandfather did", and in concluding the opinion affirming the judgment of the circuit court said:

> The act requires the employee to accept medical treatment; he is presumed to know the law; the trial court found that death was due to his "continuously and steadfastly refusing at all times to accept any of the medical services and treatment offered by the defendants or to permit him to be removed to the hospital or examined or treated by the physicians of the defendants."
>
> Under the finding of the trial court, if deceased had complied with his agreement, and had done those things which the statute made mandatory upon him, he would not have died as a result of this injury. To require the defendant to pay compensation in such circumstances would violate the spirit of the act and prostitute justice.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—DOUBLE COMPENSATION—PRIOR RECOVERY—*Damato* v. *De Lucia*, *Supreme Court of New Jersey* (*Mar. 1, 1932*), *159 Atlantic Reporter*, *page 526.*—Anthony Damato was employed by one De Lucia, who operated a bakery in the town of Raritan, N.J.

The employee was under 16 years of age and was, under the child-labor law of New Jersey (Laws of 1923, ch. 80), illegally employed. While employed at the bakery he was caught in a mixing machine and his arm and hand were injured.

A petition claiming compensation was filed under the compensation law of New Jersey. While this petition was pending an action was instituted in the Supreme Court of New Jersey seeking damages under the common law.

Upon trial of the case, a judgment was rendered for the employee of $4,500 and for his parents of $1,315.25. Upon the judgment being satisfied, the employee then proceeded under the petition to the Workmen's Compensation Bureau of New Jersey and was awarded double compensation for 175 weeks. The employer objected, contending that the employee had no right of recovery other than the one at common law which he had successfully pursued. The court in rendering its opinion held that the contention of the employer ran counter to the course of the court's decisions and to the intention of the workmen's compensation law as construed from time to time by the courts.

Prior to the act upon which the employee relied, the court had served notice that "where a minor under 16 years of age was employed to operate a laundry machine in violation of [the] factory act, * * * the common-law liability of employer was not affected by the workmen's compensation act, for that act applies only where the contract of hiring is a valid one."

The court in the present case stated that it was conceded by the parties that the employment was prohibited by the statute, and repeated the statement contained in the employer's brief as follows:

> Essentially this review involves a question of the construction and possibly the constitutionality of chapter 159 of the Laws of 1924 which amends section 2, paragraph 9 of the act commonly known as the workmen's compensation act. This statute provides, among other things, that if the minor is between 14 and 16 years of age and is employed in violation of the labor law the compensation award shall be double the amount allowed in the schedule set forth in the workmen's compensation act and that the employer and not the insurance carrier shall be liable for the extra compensation. * * * Nothing in this act contained shall deprive an infant under the age of 16 of the right or rights now existing to recover damages in a common law or other appropriate action or proceeding for injuries received by reason of the negligence of his or her master.

The full bench of the Supreme Court of New Jersey cited several cases in which the proviso under consideration had already been construed by the courts. One was the case of *Mauthe* v. *B. & G.*

Service Station (139 Atl. 245), in which a minor of the age of 15½ years was illegally employed and subsequently injured. It was held in this case that the common-law remedies were not affected by the workmen's compensation act. In the case of *Terlingo* v. *Belz-Parr, Inc.* (147 Atl. 480), a recovery was had by the father of a child illegally employed. In this case it was argued that the compensation act as amended took away the right of recovery for death and provided for recovery only under the statute. This contention, however, was held to be unsound by the court, which reasoned that by an express legislative enactment the child was not deprived of any rights which existed either at common law or by virtue of any other appropriate action. The court in this case further held that the words of legislative purpose could not be construed so as to deprive the representative of the deceased child of existing rights.

Another contention raised by the employer was that the provision by which a minor was allowed to recover double compensation against the employer in addition to his recovery at common law was in violation of the constitution of the State of New Jersey. The court, however, dismissed this contention and held that the act was not unconstitutional in the respect claimed by the employer.

The judgment of the New Jersey Workmen's Compensation Bureau was therefore affirmed.

Upon appeal to the Court of Errors and Appeals of New Jersey the decision of the New Jersey Supreme Court was reversed (166 Atl. 173). The decision was based upon the case of *Watson* v. *Stagg* (158 Atl. 820), which held that recovery under a common-law action was a bar to a recovery under the workmen's compensation statute.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—DOUBLE RECOVERY—ESTOPPEL—*Thomas* v. *Morton Salt Co., Supreme Court of Michigan (Apr. 7, 1931), 235 Northwestern Reporter, page 846.*—Harold James Pringle, a minor between 17 and 18 years of age, was employed by the Morton Salt Co. as an electrician's helper, in its plant at Marysville, Mich. On February 21, 1929, he was directed to oil an electric motor which was suspended over a large steel vat, containing boiling hot brine. The motor was reached by means of a ladder at the side of the vat, and a platform running under the engine. While working upon the engine the platform gave away and he fell into the hot brine. He was rushed to the hospital where he died.

His parents filed a claim for compensation with the department of labor and industry. Later an action was taken to discontinue the proceedings for compensation, but proved unsuccessful, and an award of compensation was made.

On August 12, 1929, a suit at common law was brought by the parents against the employer. A trial in the circuit court of St. Clair County resulted in a judgment for $20,000 in favor of the parents. The case was appealed to the Michigan Supreme Court by the Morton Salt Co. on the ground that the award of compensation was a bar to the common-law action. The parents, on the other hand, argued that as the deceased was a minor, the contract of employment was therefore void, and the relation of employer and employee did not exist. The part of the workmen's compensation act applicable to the case reads in part as follows:

That any minor between the ages of 16 and 18 years whose employment at the time of injury shall be shown to be illegal shall, in the absence of fraudulent use of permits or certificates of age, in which case only single compensation shall be paid, receive compensation double that provided elsewhere in this act.

In upholding the constitutionality of this provision, the court said:

Act No. 162, Public Acts 1927, brought the workmen's compensation law into harmony with the statute of 1925 regulating the employment of children. The legislature had a right to consider the size, age, and probable discretion of the minor, the ease with which he might perpetrate fraud upon the employer inducing his employment, and to provide that, if injured or killed, if he had fraudulently induced his own illegal employment, the same compensation should accrue as if he were legally employed. The employer, acting in good faith, ought not to be penalized. On the other hand, it could well consider that the statute prohibited the employment of minors between 16 and 18 years of age without a permit, and hold the employer liable for double compensation, in case such minor was wrongfully employed, without such permit. * * *

The court also held that as the parents had first sought the benefit of the compensation act they were estopped to deny its validity.

The decision of the lower court was therefore reversed.

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE—BENZOL POISONING—DATE OF DISABILITY—*Textileather Corporation* v. *Great American Indemnity Co. et al.* (*two cases*), *Court of Errors and Appeals of New Jersey* (*Oct. 19, 1931*), *156 Atlantic Reporter, page 840.*—Bruno Iannazzo first went to work for the Textileather Corporation in August 1927. He was in sound health at the time, but soon showed symptoms of benzol poisoning. He worked until November 18, 1927, and shortly thereafter died of the disease. Benzol poisoning is an occupational disease under the New Jersey workmen's compensation law and an award of $2,900.86 was made.

The American Mutual Liability Insurance Co. had insured the Textileather Corporation's risks subsequent to November 18, 1927.

Prior to that date the corporation's risks had been carried by the Great American Indemnity Co. The question presented was which company was liable to pay the insurance.

The circuit court of Essex County, N.J., entered a judgment of $2,900.86 against the American Mutual Liability Insurance Co., and the suit against the Great American Indemnity Co. was dismissed. The American Mutual Liability Insurance Co. appealed from the judgment, and the Textileather Corporation also appealed from the judgment, dismissing the suit against the Great American Indemnity Co. In the Court of Errors and Appeals of New Jersey the two cases were combined.

In affirming the decision of the lower court and holding the American Mutual Liability Insurance Co. liable to make compensation, the court quoted *In re Johnson* (104 N.E. 735) as saying: "The injury was received when he became sick and unable to perform labor. Until then he had received no 'personal injury' although doubtless the previous absorption of lead into his system since July 1, 1912, finally produced the conditions which terminated in the injury." The court also said:

> There was no dispute in the present case as to when the employee was disabled for work after exposure to benzol poisoning in the employer's business. His disability and death from the occupational disease occurred within the period insured by the defendant's policy, and neither the bureau nor the court below were concerned with a determination as to when the first exposure to the poison occurred. * * * When the disability occurs is the time fixed for compensation, and, as in the case of an accident, disability occurs either when death or incapacity occurs and not when the first quantities of poison, which may prove of no effect, are absorbed.

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE—DERMATITIS—EVIDENCE—*Perangelo's Case, Supreme Judicial Court of Massachusetts (Oct. 5, 1931), 177 Northeastern Reporter, page 892.*—John Perangelo had been in the employ of the Plymouth Cordage Co. for 14 years. He was engaged in spinning sisal on a motor-driven machine.

In October 1929 he was troubled with a breaking out on his arms and consulted a Dr. Hill, who treated him. He continued to work, however, until December 1929, when he ceased work. Dr. Hill advised him to consult a Dr. Cheever in Boston, who was an expert in dermatology. He also went to the Massachusetts General Hospital, and the records show the diagnosis as "dermatitis venenata", a skin disease due to some kind of poison.

An agreement for compensation payment, between Perangelo and his employer, was "to be open for future agreement or

hearing by the industrial accident board." Payments under this agreement ceased on May 3, 1930, and Perangelo filed a claim with the industrial accident board. The board made an award in the employee's favor, and the employer appealed the case to the superior court, Suffolk County, Mass., where the award was reversed, and Perangelo appealed to the Supreme Judicial Court of Massachusetts. The question in dispute was whether Perangelo had suffered a personal injury within the meaning of the workmen's compensation act. The court quoted from *Maggelet's Case* (116 N.E. 972), in which the rule in Massachusetts was stated: "A disease of mind or body which arises in the course of employment, with nothing more, is not within the act."

The court reviewed the medical evidence and concluded that it would "not support a finding that the employee had suffered an injury in the course of his employment and arising out of his work." Both the report of the specialist and the final report of the impartial physician stated that he had not received such an injury. In concluding the opinion, affirming the decision of the lower court denying an award, the court said:

> There is thus nothing but an outbreak of dermatitis, or eczema, occurring while the employee was at a work which he had been engaged in for years without similar outbreaks, to indicate that the work caused the outbreak. That is insufficient in law to support a finding of causal relation. * * * Something more than a probability must be shown or the finding is speculative only, insufficient to support a determination of right or liability. We are unable to find that something in the evidence.

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE—INSURANCE—NOTICE—LIMITATIONS—*State ex rel. Polaski* v. *Industrial Commission, Supreme Court of Ohio (Nov. 26, 1930), 174 Northeastern Reporter, page 11.*—Alex Polaski contracted an occupational disease in the course of his employment. Within 4 months from the beginning of the disease he made application to his employer for compensation to cover the damages resulting from his being incapacitated for work. The employer had not complied with the provisions of the workmen's compensation law, and had not contributed to the workmen's compensation fund, nor acquired the right to pay his employees directly. He did not compensate Polaski.

Some time later Polaski filed an application for compensation with the Ohio Industrial Commission. His claim was dismissed by the industrial commission because it had not been filed within 4 months from the commencement of the disease, as required by the workmen's compensation law. Thereupon Polaski instituted proceedings to

compel the industrial commission to pass upon his claim. In holding that the claim was barred by the limitation of 4 months, and that the industrial commission was justified in dismissing the claim, the court said:

The facts in this case are not in dispute. The employee did not file with the industrial commission any application for an award until long after the expiration of the time limited in the statute, 4 months. The application for compensation that he did file with his own employer was of no avail for the reason that the employer was not one of the class of employers named in the law to whom such application should be made, although the employee in this case might have brought an action direct against his employer for compensation to cover damages sustained by the occupational disease acquired.

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE—MERCURY POISONING—EVIDENCE—NOTICE—*Farrell* v. *Ferry Hat Co., Supreme Court of New Jersey (Mar. 2, 1932), 159 Atlantic Reporter, page 153.*—Fred Farrell worked for the Ferry Hat Co. for over 23 years. During the latter part of that period he suffered from mercury poisoning, contracted from handling the materials used in making hats. One of the symptoms is a shaking or nervousness known as "hatter's shakes."

The disease grew worse and the employee was finally awarded compensation by the workmen's compensation bureau, which award was affirmed by the court of common pleas.

The case was carried to the Supreme Court of New Jersey for review, the hat company contending that the compensation board and the lower court had erred in their decision.

First, it was contended that notice required by the statute was not given by the employee. It was admitted that the employee had not given formal notice of his illness; but the court held that, under the statute, this was not necessary where the employer had actual knowledge of the contraction of the disease during the employment. The foreman testified as to his knowledge of the existence of the disease. The court held that knowledge of the foreman was knowledge of the employer, and the judgment should not be disturbed on the ground of lack of notice.

The court concluded its opinion affirming the judgment of the compensation board and the lower court by saying that "there was evidence to support the finding of the bureau and the court of common pleas. Two independent tribunals having agreed on the facts, this court will not reverse unless there is no evidence reasonably to support such finding."

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE—PAINT POISONING—*Buenker* v. *Union Furniture Co.*, *Appellate Court of Indiana* (*June 2, 1932*), *181 Northeastern Reporter, page 294.*—At the time of his illness and death Frank L. Buenker had been employed by the Union Furniture Co. for 30 years. He was foreman of the finishing room where he sometimes mixed his own paints. The gilt which was used contained two thirds of copper and one third zinc, and another decorative paint contained a zinc-sulphate base. At times the gilt and paint got on Buenker's clothing and hands. He usually had apples and chewing tobacco in his clothing or on his desk and would occasionally peel and eat an apple and take a chew of tobacco without first removing the paint from his hands.

On November 21, 1929, Buenker became ill and died 4 days later. The attending physician stated that metal poisoning or acute painter's colic was the cause of death, but there was no evidence to show that Buenker had done any unusual work, or that he " inadvertently * * * took internally any quantity of any material used in his work."

The employee's widow filed claim for compensation under the Indiana workmen's compensation act, but the board denied compensation, finding that Buenker's death was the result of an occupational disease, and not an accident within the meaning of the Indiana workmen's compensation act. The case was appealed to the Appellate Court of Indiana, where the decision of the industrial board denying an award was affirmed.

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE—SILICOSIS—EMPLOYMENT STATUS—INTERPRETATION OF STATUTE—*Wisconsin Granite Co.* v. *Industrial Commission of Wisconsin et al.*, *Supreme Court of Wisconsin* (*Apr. 5, 1932*), *242 Northwestern Reporter, page 191.*—On December 4, 1928, the Wisconsin Granite Co. shut down for repairs. One John Swafford at the time was in the employ of the company. In the course of his employment he was exposed to granite dust containing silica and contracted pneumoconiosis. The disease was not identified, and disability did not result until 2 weeks after the plant was closed for repair. He had, however, experienced symptoms of the disease a short while prior to December 4. Following his death on April 13, 1930, his widow filed claim for compensation, and the industrial commission awarded her compensation. The award was set aside by the circuit court of Dane County upon review, and the judgment of that court was appealed to the Supreme Court of Wisconsin.

The first question considered by the court was whether the facts satisfied the requirement of section 102.03 (2) of the Wisconsin

workmen's compensation act, which requires that at the time of the accident the employee must be "performing service growing out of and incidental to his employment." The court had held in prior cases that in occupational disease cases, the accident or injury is said to occur at the time of the disability. In answering this question the court commented upon the inherent difference between a sudden accident or injury and an occupational disease, which "occurs as the result of years of inoculation."

If the requirement of section 102.03 is construed strictly, the court said, that an employee who was stricken in the nighttime, on Sunday, or on a holiday, "so that he cannot drag himself back to his employment, where he may abandon his bench or his tools as a result of disability", would not be entitled to compensation for occupational disease. Continuing the court said:

> Plainly such a situation is utterly repugnant to the manifest purpose of the legislature to provide compensation for occupational disease. Occupational disease, unlike an accident, does not strike in a moment of time. It gradually gathers its force and power within the human system throughout the years. It comes as a growth and development which eventually overcomes its victim and brings about ultimate incapacity. In order to constitute occupational disease, a ravage which justifies the burdening of industry with its consequences, there is no apparent reason why the ultimate disability should be held to have occurred at the moment when the employee was "performing service growing out of and incidental to his employment." This is not true of industrial accidents. * * *

The court then considered the amendment of 1919 (ch. 668, Laws of 1919) which added occupational diseases to the list of compensable injuries. It provides that the provisions of the act are extended to cover "all other injuries, including occupational diseases, growing out of and incidental to the employment." The court said the clear intent of the legislature was to compensate occupational diseases, and this section should be interpreted together with section 102.03 so that the intention of the legislature will be carried out.

> The dominant legislative purpose in adopting chapter 668, Laws 1919, plainly was to compensate occupational diseases growing out of and incidental to the employment. * * *
>
> It seems plain that the legislature never intended that the exact date of incapacity should have a controlling influence upon the question of whether an employee afflicted with an occupational disease should be compensated therefor. We cannot impute to the legislature the purpose of saying in one breath that occupational disease shall be compensated and in another that a provision written into the statute having a just and material bearing upon an industrial accident shall be invoked for the purpose of denying compensation to the employee suffering from occupational disease, when such provision has no legitimate or moral bearing upon the right of the em-

ployee to be compensated for such disease. * * * We therefore arrive at the conclusion that it is not necessary, in order to entitle the employee to compensation for occupational disease, that his incapacity by reason of such disease, must arise at a time when he is performing service growing out of and incidental to his employment.

Having answered the question of whether an employee not at work when disability occurred should receive compensation, the court turned its attention to the second question presented. Was Swafford an employee at the time of his disability? It was contended that as the plant had closed down and Swafford was not working, the contract of employment had ended. Regarding this point the court said:

The workmen's compensation act, section 102.07, defines employee as "every person in the service of another under any contract of hire, express or implied, oral or written", not within certain exceptions. Under this act the status or relationship must be established by contract, express or implied, oral or written. It is the initial contract that establishes the status. But when this status is once established, how long does it continue, and how may it be terminated? That the status does not exist except during the period of working hours, when the employee is rendering actual service to the employer, is repugnant to any social or economic conception of the relation. The relation once established should be presumed to continue until affirmative proof has been produced that it has been terminated. When the employee leaves work Saturday night with the intention of returning to work Monday morning, the relation continues. Similarly, if the work of the employer is suspended temporarily for repair of the plant, or any similar reason, the relation continues to exist, in the absence of an affirmative termination thereof by one of the parties, where it is assumed and expected that the employee will return to work when the employer's work is resumed. In short, the status once established will be presumed to continue until terminated by the affirmative act of one of the parties.

The decision of the circuit court was therefore reversed and the case returned to the industrial commission.

WORKMEN'S COMPENSATION—POWERS OF COMMISSION—ATTORNEY'S FEE—PENALTY—*McCormack et al.* v. *Shadburn, Court of Appeals of Georgia (Dec. 18, 1930), 156 Southeastern Reporter, page 277.*— The Industrial Commissioner of Georgia awarded compensation to Naomi McCormack for injury received while in the employ of R. T. Shadburn. A review of the award by the full commission was requested, and upon review the industrial commission affirmed the commissioner's award of compensation, with the addition of a penalty of $153 and an attorney's fee of $306. The law provided a penalty for willful failure on the part of the employer to comply with

the provisions of the act, "by either rejecting the act, insuring as required by the act, or by securing the permission of the industrial commission to pay compensation direct."

The employer appealed to the superior court, Gwinnett County, Ga., where the award of compensation was affirmed. The assessment of the penalty for failure to comply with the act and the allowance of the attorney's fee were both disapproved and reversed. The employee appealed from the decision to the Court of Appeals of Georgia, upon the ground that the findings of the commission, in question were essentially findings of fact which cannot be disturbed upon appeal. After carefully reviewing the record, the appeals court said:

Although the bill of exceptions appears to be duly certified as true, and as containing all the evidence and specifying all of the record material to a clear understanding of the errors complained of, our careful inspection fails to disclose any evidence whatever upon the question of whether there was willful neglect on the part of the employer to comply with the act, as a result of which the commission was warranted in assessing the penalty and allowing the attorney's fee.

Assuming, as we must in the circumstances, that there likewise was no evidence on the subject before the superior court, it follows that the superior court erred in reversing the finding of the industrial commission. In our view of the statutory intent, "willful neglect" ought to be presumed in all such cases, where the employer furnishes no evidence of mitigating circumstances.

The decision of the superior court regarding the penalty and attorney's fee was therefore reversed and the finding of the industrial commission reinstated.

WORKMEN'S COMPENSATION—POWERS OF COMMISSION—BLOOD PRESSURE—HEAT PROSTRATION—*Bailey* v. *Mitchell et al., Supreme Court of Errors of Connecticut (Nov. 4, 1931), 156 Atlantic Reporter, page 856.*—Hilda L. Bailey made claim under the workmen's compensation act for the death of her husband, who was employed as a steam-shovel operator by Peter Mitchell. The compensation commissioner dismissed her claim, and she appealed to the superior court, Fairfield County, Conn. The facts of the case show that Bailey was taken to the hospital with heat prostration on the afternoon of July 8, 1929. He left the hospital on July 22, 1929, worked for a while, and again entered the hospital and died in a short time. He had suffered with high blood pressure for some time, and the heat prostration aggravated this trouble.

It was also shown that Bailey had operated the steam shovel for some days prior to the day of his prostration. On this day as the work was nearly completed, he operated the shovel only about five

times of approximately 10 minutes each. During the intervals between these periods of work he was at liberty to walk around, talk, and get a drink of water. While operating the steam shovel he was protected by a roof, and his head and shoulders were above the ground level.

Upon the facts as briefly stated above, the commissioner held that, while the heat prostration occurred in the course of Bailey's employment, it did not arise out of that employment, and his claim was dismissed.

Upon appeal the superior court made changes in the findings of the commissioner eliminating certain statements and adding others. This action of the superior court in changing the findings and the resulting reversal of the commissioner's decision are the main points presented by the appeal to the Supreme Court of Errors of Connecticut.

In holding that the finding of fact may be corrected by the trial court only when the inference is one which a reasonable man could not have drawn, and in sending the case back to the superior court, with directions to dismiss the appeal, the court said in part, as follows:

> It is entirely well settled, although not always recognized in the taking of appeals as to corrections of findings of compensation commissioners, that the finding as to subordinate facts cannot be changed by the superior court unless the record discloses matters found to be facts without evidence or fails to include material facts which are admitted or undisputed. * * *
>
> The finding in paragraph 10 that the decedent was not subjected to lack of air in the excavation must be taken in connection with the finding immediately preceding as to his situation when standing upon the shovel so that his head and shoulders, at least, were above the ground level. So considered, it was at least a permissible inference from the situation so disclosed. The vitally important correction was the insertion in the finding that, during most of the time, when the decedent was not actively operating the shovel, he was nevertheless standing or sitting at the bottom of the excavation. * * * Paragraph 11 of the finding concerning the exposure of the deceased as compared with that of the community is a conclusion from subordinate facts. As to such, the conclusions of the commissioner can be attacked, on appeal, only as reviewable errors in law, either because resulting from an incorrect application of law to subordinate facts, or because resulting from an inference illogically drawn from such facts.

WORKMEN'S COMPENSATION—POWERS OF COMMISSION—TO COMPEL TESTIMONY—*In re Hayes, Supreme Court of North Carolina (Jan. 27, 1931), 156 Southeastern Reporter, page 791.*—On March 3, 1930, Dr. R. B. Hayes, was called as a witness before the North

Carolina Industrial Commission. He refused to answer a question propounded by the chairman, and was thereupon adjudged in contempt of court. The physician was arrested and held in custody by the sheriff by order of the chairman of the board. The case in which the physician was to testify involved the claim of an employee to compensation for injuries received while in the course of his employment. At a hearing held in behalf of the employee the physician, Dr. R. B. Hayes, was present as a witness. The doctor had attended the employee at the time he was injured and had also filed his report of the case with the commission. He was therefore a material witness. After the doctor had been sworn and testified, he was examined by the chairman of the board. The commissioner ruled that there was but one question to be decided by him—whether or not the condition of the employee at the date of the hearing was the result of the accident—and thereupon attempted to interrogate the physician, who refused to answer unless he received a fee as an expert witness. The arrest and incarceration of the doctor followed. He petitioned the superior court of Orange County, N.C., for release, but this court held that he was not entitled to be discharged. An appeal was subsequently taken by Dr. Hayes to the Supreme Court of North Carolina. The main question in the case, on appeal to the supreme court, was whether the chairman of the North Carolina Industrial Commission had the power to adjudge the doctor in contempt and imprison him.

The supreme court reviewed briefly the creation of the industrial commission, and added, that "it is primarily an administrative agency of the State, charged with the duty of administering the provisions of the North Carolina workmen's compensation act" (ch. 120, Acts of 1929). Power is expressly conferred, the court said—

> To subpena witnesses for either party to a cause, pending before said commission, to attend and testify at a hearing before the full commission or before any member thereof. A witness, when a subpena has been duly served on him, is required to attend the hearing, and to testify after he has been duly sworn. * * * If a witness in attendance at a hearing, after having been duly sworn, can refuse to answer a question propounded to him, which is pertinent to the matters in dispute between the parties, with impunity, then it is manifest that the North Carolina Industrial Commission, created by statute to administer the provisions of the North Carolina workmen's compensation act, and to determine the rights and liabilities of employers and employees, subject to its exclusive jurisdiction under the provisions of the act, is without adequate power to perform its duties prescribed by statute, to the people of this State and to the parties to a cause pending before the said commission.

Section 54 (c) of the workmen's compensation act provides for the superior court to enforce any attendance and testimony of witnesses, etc., yet the court said that—

This provision is clearly not adequate for a situation such as that disclosed by the record of the hearing at which the petitioner herein, upon the facts found by the commissioner and set out by him in the record, was adjudged in contempt and punished therefor. Under this provision, in proper cases, the superior court has the power to aid the commission in procuring the attendance of witnesses at hearings before the commission or before any member or deputy thereof. It does not, however, by its express terms, or by implication, deprive the commission or any member thereof, while conducting a hearing as required by statute, of the power to compel a witness, in attendance at said hearing, after having been duly sworn, to testify.

The courts of North Carolina and of other States have uniformly held that "the power to punish for a contempt committed in the presence of the court is inherent in the court, and not dependent upon statutory authority." Without regard as to whether the North Carolina Industrial Commission is a court or not, the supreme court said that—

We are of the opinion that the commission or any of its members, when conducting a hearing for the purpose of deciding questions upon which the rights and liabilities of an employer and an employee, under the North Carolina workmen's compensation act, are to be determined by the commission or by one of its members, has the power to adjudge a witness who has deliberately and persistently refused to answer a question propounded to him in contempt, and to punish such witness for such contempt by fine or imprisonment.

Hearings before an industrial commission are in their nature judicial proceedings, and upon the contemptuous refusal of a witness to testify the court said:

The commission or commissioner presiding at the hearing has the power to adjudge the witness in contempt and to punish for such contempt, within the limitations prescribed by statute.

Although the question raised by the doctor, relative to the right of refusing to testify without receiving the fee of an expert witness, was not presented to the supreme court, yet this court in passing said that, while the question had never been decided by that court, it had been presented and decided by courts in other jurisdictions. In a few cases the court observed that a witness cannot be adjudged in contempt upon his refusal to give testimony unless he received the expert fee, yet the better opinion was that an expert summoned to testify who refused to answer questions without compensation other than his witness fee is in contempt.

WORKMEN'S COMPENSATION—RELEASE—DEDUCTION — INTERPRETATION OF STATUTE—*McLaughlin's Case, Supreme Judicial Court of Massachusetts (Jan. 13, 1931), 174 Northeastern Reporter, page 338.*—One Guy McLaughlin, a resident of Boston, was hired by the E. A. Abbott Co., at its place of business in Boston, to work as a carpenter at Cornish, N.H. The company paid the railroad fare of the employee to Cornish. While so engaged on April 22, 1929, McLaughlin was injured and incapacitated for approximately 3 weeks. A claim adjuster of the insurer interviewed the employee after his return to work and paid him $42.50 for his lost time, and $14 additional for medical attendance incurred by the employee.

The employee thereupon signed a common-law release. A recurrence of the injury subsequently followed, and the employee went to a Boston hospital and later applied for compensation under the Massachusetts workmen's compensation act. The Industrial Accident Board of Massachusetts made an award of $359.15 in his favor. The award was later affirmed by the State superior court. The insurer thereupon carried the case to the Massachusetts Supreme Court, contending that the employee was bound by the release and could not recover under the Massachusetts compensation statute. It was the contention of the employee that he could collect under the compensation laws of both States, and deduct under the Massachusetts law the $42.50 paid in New Hampshire.

The Massachusetts statute (Gen.L., ch. 152, sec. 24, as amended by Acts of 1927, ch. 309, sec. 2) provided that an employee who had not given notice to his employer at the time of hiring that he claimed the right of action at common law was deemed to have waived his right, and likewise, section 26 of the above law (sec. 3 of the amending act) provided that—

> 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 * * * 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 important question, therefore, in the case was whether the receipt of money in New Hampshire from the insurer and the giving of the release barred the employee from proceeding under the Massachusetts workmen's compensation act.

Mr. Justice Carroll, in construing section 3 of chapter 309 of the Acts of 1927, said that—

An employee working under a contract such as is here shown, who is injured outside the State, retains his rights under the workmen's compensation act, unless he has given notice under the statute that he claims his right under the jurisdiction wherein the injury happens, and he does not forfeit this right to proceed here to recover compensation because he received money from the insurer and gave it a release of "all claims and demands, actions and causes of action * * * and compensation on account of" the accident. There is nothing in the statute which prevents the employee from recovering compensation here, although he accepted the money and gave the release. The money received should be deducted from the amount he is permitted to recover, but he retains the protection of the Massachusetts act, although he has given the release.

The intent of the statute, Mr. Justice Carroll stated, was that—

If rights under the act were to be waived, the waiver must be in accordance with the statute; that is, by written notice at the time of contract.

"The purpose of the statute," the court said, evidently "was to protect the injured employee and to safeguard him from any attempt to deprive him of the benefits of the act, unless this was fully understood and was done in the manner provided."

Other sections of the statute were quoted by the court showing the protection which the law gave to the employee "to the same extent in New Hampshire as here." These sections "apply equally to an injury outside as well as within the Commonwealth," the court continued.

In the opinion of Judge Carroll, "the Massachusetts contract should be enforced in accordance with the terms of the Massachusetts statute. We do not think it necessary to consider whether in any event the employee came within the class of employees entitled to compensation under the New Hampshire compensation act. The board found that he gave no notice of 'his claim of rights of action under the laws of New Hampshire,' and from the nature of the injury it is difficult to understand how he could have any right of action at common law."

The construction which the court placed on the statute did not render it in conflict with the full faith and credit clause of the Federal Constitution since—

The matter never came before the courts of New Hampshire "* * * no principle of law is defeated by attaching to such contracts (under the workmen's compensation act) the same duties and rights as incidents to acts abroad that are lawfully imposed as inci-

dents to the same acts occurring within the geographical limits of the State." (*Quong Ham Wah Co.* v. *Industrial Accident Commission of California*, 184 Calif. 26, 36, 255 U.S. 445.)

In answering the contention of the insurer that no time was stated in the statute for giving notice (written or otherwise) and that the release and receipt of money was notice of a claim of a right of action under the New Hampshire law, the court said:

Section 26 does not in so many words say that the notice is to be in writing, nor does it specify when it shall be given; but insofar as rights under our workmen's compensation act are concerned, it refers to section 24, and we must read both sections together, having in mind the purpose and scope of the act. Under section 24 the notice is to be in writing and is to be given at the time of the contract of hire. There is nothing in the statute to support the construction that the giving of the release and accepting the money amounts to the giving of notice of a claim under the laws of New Hampshire. To adopt such an interpretation of the statute would take away the protection intended by it.

The amount of compensation which the employee was entitled to under the Massachusetts law was therefore awarded, minus the amount which was received in New Hampshire.

The Supreme Court of Errors of Connecticut held in a case that an injured employee could receive full compensation for injuries and sue the third party causing the injury for damages. The case was one in which the railroad company owned and operated a bus company. This fact did not preclude recovery against the railroad company for injuries sustained by a bus driver in a collision at the railroad crossing. (*Wheeler* v. *New York, N. H. & H. R. Co.* (1931), 153 Atl. 159.)

WORKMEN'S COMPENSATION—RELEASE—THIRD PARTY—MALPRACTICE—MEDICAL TREATMENT—*Pedigo & Pedigo* v. *Croom, Court of Civil Appeals of Texas (Mar. 13, 1931), 37 Southwestern Reporter (2d), page 1074.*—On or about December 22, 1927, H. C. Croom sustained a fracture of the femur of his right leg while in the course of his employment. He was taken to a hospital and placed under the care and treatment of Drs. W. S. and P. C. Pedigo, practicing physicians in Strawn, Tex. This suit was instituted by him to recover damages for alleged malpractice on the part of the doctors in the manner of their treatment of his broken leg. The case was submitted to the jury and on the verdict judgment was rendered in Croom's favor for $15,000. Appeal was taken to the Court of Civil Appeals of Texas by the doctors. Numerous assignments of error were made and the court reversed the decision and sent the case back to the trial court on questions of evidence, and the method used in determining the amount of damage. The appeals court also considered the effect of the compensation payment received by Croom

upon his right to recover damages. His employer at the time of the injury was a subscriber to the Texas Employers' Insurance Association and upon final payment of compensation Croom had executed a release. This release, it was contended, constituted a bar to any recovery from the doctors. Regarding this contention, the court said:

The authorities from other jurisdictions relied on by appellants seem to support the contention, but that question has been definitely resolved by our courts in favor of an employee's right to maintain a suit against a third person whose negligence caused his injury, even though he had first proceeded under the compensation law. This right is granted the injured employee under the provisions of article 8307, section 6a, as construed by our courts. [Cases cited.]

The court interpreted the provision of the workmen's compensation act as meaning that the right of an injured employee to sue for damages after having received an award under the compensation act was barred only when the negligence of such third person was the proximate cause of the original injury. Here, the court pointed out, the suit was based upon a second injury growing out of the first. In discussing the effect the compensation award should have on the amount of damages allowed, the court said:

In this case appellee received at least a part of his compensation by virtue of the original accident, for which appellants were in no sense liable. The question suggested is, whether, in the event appellee should again be successful in his suit, there should be deducted from his judgment, the full amount of compensation received, or only the amount received, on account of the additional loss of time, if any, suffered by him by reason of the alleged negligence of appellants. If the trial court entertains a doubt upon this question, we take the liberty of suggesting that the consequences of an erroneous decision of it may be minimized by submitting an issue on the question of how much additional compensation, if any, was paid to appellee on account of the alleged malpractice. With such a finding in the record the appellate court will be enabled, upon another appeal, to apply the law, whichever way it may be determined, to the findings without the necessity of another trial.

Under the North Carolina compensation law, an employee suffering an additional injury through the malpractice of an insurance carrier's physician does not have the right to bring an independent suit against the employer, but the results of malpractice are deemed part of the injury resulting from the accident, and as such are compensated. (*Hoover* v. *Globe Indemnity Co. et al.* (1932), 163 S.E. 758.)

WORKMEN'S COMPENSATION—SECOND INJURY—CONCURRENT AWARDS—*Sanders Lumber Co.* v. *Watkins et al., Appellate Court of Indiana (Feb. 17, 1932), 179 Northeastern Reporter, page 919.*—Coleman E. Watkins died on November 17, 1930, four days after an

injury received while in the employ of the Sanders Lumber Co. His dependents filed an application for compensation and also filed a request that the Sanders Lumber Co. be ordered to pay the dependents the balance on an award for an injury received on April 10, 1929.

The industrial board found that the dependents of Watkins were entitled to an award of $11.82 per week for 116 weeks, which was the balance of the former award due and payable at the time of Watkins' second injury and subsequent death. It was held that, in addition to this, Watkins' dependents were entitled to compensation for 300 weeks at the rate of $12.45 per week as death benefits under section 37 of the Indiana workmen's compensation act of 1929.

The Sanders Lumber Co. appealed from this award, claiming that the award made the compensation for 116 weeks and that for 300 weeks run concurrently instead of consecutively. It was error, they contended, to give a total of 416 weeks' compensation, "whereas in no event should it exceed 300 weeks"; and that it was error to state that Watkins was an employee of the Sanders Lumber Co. at the time of his injury.

The Appellate Court of Indiana did not agree with these contentions. It held that the award of compensation made on July 12, 1929, of which 116 weekly payments remained unpaid at the time of Watkins' second injury and death, was an entirely separate and distinct claim from the compensation claimed because of employee's accidental death. The court said:

> We hold that inasmuch as Watkins died as the result of an injury, other than the one for which he was receiving compensation at the time of his death, that his dependents were under the provisions of sections 37 and 38 entitled to an award of compensation for the injury causing his death, and that under the provision of section 36 of the act of 1915, supra, they were also entitled to receive the unpaid balance of the compensation which had been awarded to Watkins for the injury received by him previous to the one causing his death. There is no provision in the workmen's compensation act which prevents them from running concurrently.

In regard to the contention that Watkins was an independent contractor, the appellate court held that there was evidence to support the finding that he was an employee of the lumber company. The appellate court said, however, it will not weigh the evidence and will be bound by the finding of the board where there is evidence to support such finding.

WORKMEN'S COMPENSATION—SECOND INJURY—EYE INJURY—*Haas v. Globe Indemnity Co., Court of Appeal of Louisiana (Jan. 26, 1931), 132 Southern Reporter, page 246.*—On June 4, 1929, John A.

Haas was injured while employed as manager of a gasoline filling station in Opelousas, La. He was struck in the left eye by a tire tool which slipped while he was attempting to remove the tire from the rim of the wheel. He filed a petition for compensation against the insurance carrier, alleging that it became necessary to remove his eye as a result of the accident.

In answering the petition the insurance company contended that the loss of the eye was due to another injury to the eye which Haas had sustained 4 or 5 years before, when he was shot by an air rifle.

The district court, parish of St. Landry, awarded him compensation in the sum of $20 per week for 100 weeks for the total loss of his left eye. The case was carried on appeal to the Court of Appeal of Louisiana. The appeal court answered the three questions involved in favor of Haas, and affirmed the decision of the lower court.

First, it found from the evidence that an accident had occurred, and was the cause of the loss of the eye. The second question was whether the court should take into consideration the impairment of the eye by a prior injury in awarding compensation. In answering this question in the negative, the court said:

> The defense of comparative vision or the prior loss of the industrial use of the eye seems to be presented here for the first time in our jurisprudence; but if we are to give consideration to the adjudications of appellate courts in other jurisdictions where, in workmen's compensation statutes, like in ours, compensation is allowed "for the loss of an eye", we are bound to hold, under the weight of authority, that the doctrine does not apply here.

The third question raised by the insurance carrier was whether the amount furnished Haas by his employer in the way of board and lodging, laundering, etc., should be considered in computing his average weekly wage. The court affirmed the decision of the trial judge and held that such things, if actually received as part of his wages, should be properly considered in computing his average weekly wage, even though they were not entered upon the books of the employer.

WORKMEN'S COMPENSATION—SECOND INJURY—LOSS OF EYE—AWARD—*Hubbard Drilling Co. et al.* v. *Moore et al.*, *Supreme Court of Oklahoma* (*June 28, 1932*), *12 Pacific Reporter* (*2d*), *page 900.*—On June 12, 1931, while in the course of his employment with the Hubbard Drilling Co., I. S. Moore sustained an injury to his left eye. Prior to this accident he had suffered an accidental injury resulting in the permanent loss of his right eye. At the time of this prior injury he was also in the employ of the Hubbard Drilling Co. and

the same insurance carrier, the Commercial Casualty Co., was carrying the insurance at the time of both accidents.

As a result of the prior injury Moore had received compensation for 100 weeks at the rate of $18 per week. He filed application for compensation for the second injury and received an award. The industrial commission awarded him compensation upon the basis that he "sustained a 75 percent permanent loss of vision of his eyes due to said accidental injuries of November 11, 1930, and June 12, 1931", and compensation was awarded in the sum of $4,950 or 275 weeks' compensation at the rate of $18 per week on account of the 75 percent loss of vision. This was in addition to the award made in 1930, as compensation for the injury to the right eye.

The employer appealed from this ruling by the commission to the Supreme Court of Oklahoma, contending that the award should be for only the injury to the left eye, and that the commission had no right to make an additional award covering the injury to both eyes when the right eye was the only eye injured in the accident occurring June 12, 1931.

The court said the law regarding compensation payments in the case of injuries to the eyes, occurring at different times, had been well settled by this court in the case of *Maryland Casualty Co.* v. *State Industrial Commission* (282 Pac. 293). In affirming the award of the industrial commission the court quoted from the case referred to above, as follows:

> This court had a somewhat similar question before it in the case of *Nease* v. *Hughes Stone Co.* (114 Okla. 170, 244 Pac. 778), wherein an employee who had previously lost the sight of his left eye, received an injury in the course of his employment, destroying his right eye, thereby leaving him permanently and totally disabled. The contention was made that the claimant was only entitled to compensation for the loss of one eye. The opinion by Mr. Justice Clark calls attention to the two lines of authorities in other States, and follows the majority rule, which is supported by the better reasoning, and holds that the claimant was entitled to compensation for permanent total disability to the same extent as if he had lost both eyes in said accident. * * *
>
> Under the workmen's compensation act, there is a specific provision for the loss of an eye and another for the loss of both eyes. An award for partial impairment of both eyes should be fixed from the latter provision, and not by taking the award for the total loss of one eye and adding it to the award for the partial impairment of the other eye.

WORKMEN'S COMPENSATION—STATUTE OF LIMITATIONS—NOTICE—*Taylor* v. *American Employers' Insurance Co. of Boston, Mass., et al., Supreme Court of New Mexico (Aug. 13, 1931), 3 Pacific Reporter (2d), page 76.*—The requirement of the New Mexico workmen's com-

pensation law that an employee must file a compensation claim within 60 days was held by the supreme court of that State to be an absolute limitation on the right of action.

The requirement of the New Mexico workmen's compensation act (Laws of 1917, ch. 83, as amended), is that the employee must file his claim for compensation in the office of the clerk of the district court not later than 60 days after the failure or refusal of the employer to pay compensation. This provision was used as a defense in an action brought by Will Taylor against the insurance carrier, American Employers' Insurance Co., of Boston, Mass. The employee claimed that he was led by the representations of the insurance company to believe that payment of the claim was not refused and that it would be paid, and relying upon such representation and belief, he did not file his claim within the time required by statute.

The district court, Eddy County, N. Mex., dismissed the claim, and the employee thereupon appealed to the New Mexico Supreme Court, contending that the facts alleged were sufficient to remove the statutory bar of limitations and to prevent the company from pleading such statute as a defense. Regarding this allegation the court said, in part, as follows:

> This really involves two question. It is conceded that, if the doctrine of waiver or estoppel may not be invoked in respect to the limitations of time for taking certain steps by the injured workman, then the decision in *Caton* v. *Gilliland Oil Co.*, 33 N.Mex. 227, 264 Pac. 946, is controlling. In that case we said: "An employer having knowledge of the injury, must, within 31 days after its occurrence, pay the first installment of compensation. If the employer fails or refuses so to do, the workman must, within 60 days thereafter, file his claim for compensation. If he does not, his claim, his right, and his remedy are forever barred."

In discussing the general scheme of the New Mexico workmen's compensation act, the court said:

> The whole scheme of the workmen's compensation act is designed to work out a speedy adjustment and payment of claims for industrial accidents in a summary and simple manner. The act shall be construed as creating a new right and special procedure for the enforcement of the same. The act is remedial and to be liberally construed; but not unreasonably or contrary to legislative intent. * * *

Several cases were considered, supporting the judgment of the district court in dismissing the claim. In conclusion the court quoted from a case decided by the Supreme Court of Connecticut (*Walsh* v. *A. Waldron & Sons*, 153 Atl. 298), which held that a failure to give notice of claim within the statutory period precluded further relief under the statute. The court quoted, in part, as follows:

"The liability of an employer * * * was not fixed by the simple fact of injury to the employee arising out of and in the course of his employment," but the element of notice and the time within which it must be given, enter "into the very essence of the injured party's claim and the extent of it. * * * The making of the claim and the time thereof are matters going to maintenance of the right of action. * * * Where a statute gives a right of action which does not exist at common law and fixes the time within which the right must be enforced, the time fixed is a limitation or condition attached to the right—it is a limitation of the liability itself as created and not of the remedy alone. Being a limitation upon the right of action it must be strictly complied with." [Cases cited.]

The judgment of the district court dismissing the claim for compensation was therefore affirmed.

WORKMEN'S COMPENSATION—VOLUNTEER—EMPLOYMENT STATUS—CONCURRENT EMPLOYMENT—*Southland Cotton Oil Co. et al.* v. *Renshaw et al., Supreme Court of Oklahoma (Mar. 24, 1931), 299 Pacific Reporter, page 425.*—F. R. Renshaw was a regular employee of the Southwestern Cotton Oil Co., Oklahoma City, Okla. He worked on the night shift, but sometimes during the day he often dropped into the plant of the Southland Cotton Oil Co. and assisted a friend. Renshaw was not on the pay roll of the Southland Cotton Oil Co., but he testified that the boy for whom he substituted would pay him, or the boy would come over to the Southwestern Cotton Oil Co.'s plant at night and help him in return. While thus helping out, Renshaw cut his index finger in a machine, and amputation followed. The superintendent of the Southland Cotton Oil Co.'s plant testified that he knew Renshaw and was aware he was around at times, but that he had not hired him, and at the time of the injury was not aware that he was in the plant.

The Industrial Commission of Oklahoma awarded Renshaw compensation at the rate of $13.46 per week for 25 weeks and 5 days, the period of temporary total disability. The Southland Cotton Oil Co. appealed to the Supreme Court of Oklahoma, which upheld the decision of the industrial commission that a "volunteer" injured while assisting or taking the place of a regular employee was an employee and entitled to compensation, saying:

We accept as true the contention of the petitioners that the claimant in the instant case was a volunteer. We add, however, that he was also a substitute having been invited by a regular employee of petitioners who was performing labor for petitioners; that regular employees of the cotton mill were permitted under some circumstances to hire and substitute other persons in their stead when necessity demanded it. * * *

In conclusion the court quoted from the case of *Rook* v. *Schultz et al.*, 198 Pac. 234, as follows:

But, while a volunteer may not recover on the basis of service, he yet may be entitled to the exercise of that degree of care owed to persons rightfully on the premises of the employer and may found his right of recovery on the general principles of negligence.

WORKMEN'S COMPENSATION—VOLUNTEER—INJURY ARISING OUT OF EMPLOYMENT—*Davis* v. *North State Veneer Corporation et al., Supreme Court of North Carolina (Jan. 27, 1931), 156 Southeastern Reporter, page 859.*—Tom Davis was employed on the day shift for the North State Veneer Corporation in Thomasville, N.C. His home was in Lexington, N.C., and he went home only on week-ends. His employer allowed him to sleep on the premises. One evening about 9 o'clock a piece of machinery broke down. The superintendent was not present, as it was customary for him, before going home, to give the orders for the night. When the machinery broke down, Davis, knowing where the foreman lived, volunteered to go and get him to repair the machine. None of the employees knew how to repair the machine and had it not been repaired certain veneer would have been ruined. Several times before Davis had gone for the foreman and had never received any remuneration for the trips. This time, however, he punched his time clock before leaving the plant. While en route to the foreman's home he was struck by an automobile and seriously injured, and 2 or 3 days later died.

The widow filed claim for compensation and received an award, which was affirmed by the superior court, Davidson County, whereupon appeal was taken to the Supreme Court of North Carolina.

After reviewing the facts, the court said:

His time card showed a punch at 9:32 at night, indicating that the deceased employee was expecting to receive pay for his services in making the trip to the home of the foreman in order to notify him that the engine had broken down and would not run. There was no request made by any person in authority, or even by a fellow employee, that the deceased should make the journey to the home of the foreman. * * * Under the facts set out in the record, it is manifest that the injury did not occur during working time or at the place where the employee was assigned to work, nor did the injury occur in the performance of any duty incidental to the work assigned by the employer.

It was contended that Davis should receive compensation because he acted in an emergency involving the safety of life or limb of fellow employees and the property of his employer. Cases were reviewed in support of this contention, but the court said:

These cases cover the field of injuries resulting from fires, riots, explosions, drowning, shooting, and other events portending immediate peril and foreboding serious injury or destruction. The breakdown of a piece of machinery or its failure to function could not be reasonably classified as an emergency. Certainly any sort of machinery trouble would entail some degree of loss upon the employer.

Great reliance was also placed upon the fact that it was customary for him to make trips of this nature. The court answered this suggestion by saying:

There was no request and no evidence of custom. It is true that there was evidence that the deceased employee had notified the foreman of the breakdown on one or two previous occasions. A witness testified: "All I remember is him going once before, something like that, maybe twice." In order to impose liability by virtue of custom, the character of proof must be clear and convincing as to the antiquity, duration, and universality of the usage in the locality where it is claimed to exist.

The decision of the superior court affirming the award was therefore reversed.

WORKMEN'S COMPENSATION—WAGES—BASIS OF AWARD—*Harris* v. *Lambros, Court of Appeals of the District of Columbia (Feb. 1, 1932), 60 Washington Law Reporter, page 167.*—The Court of Appeals of the District of Columbia recently interpreted the meaning of the word " wages " as applied in the District of Columbia workmen's compensation law.

Harry Lambros was the proprietor of several restaurants in the city of Washington, and under the provisions of the District of Columbia compensation act Lambros was required to carry insurance. The insurance coverage was provided by the plaintiff in error in the case, Louis E. Harris. The insurance premium which Lambros was required to pay was based on the entire remuneration earned by all employees during the policy period. At the time the policy was issued it was impossible to determine the actual value of all remunerations, and it was agreed that the insured proprietor should pay an estimated advance premium and the balance due, if any, at the end of the insurance policy period. Lambros thereupon paid the premium in advance and at the end of the policy period an audit was made.

The main question in the case concerned whether in determining the total remuneration there should be included therein the value of the meals (some $24 per person per month) furnished by the employer to his employees.

From the statement of facts in the case it was shown that all of the employees were paid on a straight weekly wage basis and no

agreement was made as to meals or other gratuities, and no food was purchased by the proprietor for the purpose of feeding his employees. It was shown, however, that it was the custom of employees at meal times to eat whatever they desired of certain foods, within reasonable limits. According to subsection 13 of section 2 of the District of Columbia workmen's compensation act the term "wages" is defined as follows:

> The money rate at which the service rendered is recompensed under the contract of hiring in force at the time of injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

By the terms of the policy Lambros agreed to pay a premium based on the entire remuneration earned by all of the employees during the insurance-policy period. The problem of the court of appeals was therefore to determine whether the terms "wages" and "entire remuneration" should be held to include the value of the food furnished to the employees. The court of appeals, in determining the question, stated that, since all compensation acts are based upon the fundamental idea that the measure of compensation paid to an employee in the event of injury is based on the amount of his earnings, "it is altogether reasonable that the premium paid to the insurer should likewise be based on the same conditions."

The word "wages" the court continued, "should be construed alike in ascertaining the premium and in fixing the indemnity." The court thought that Congress had in mind "that the wage base of compensation should be the real wage earned and not alone that part which is expressed in terms of money." The court cited the fact that gratuities are almost always expected in the case of Pullman porters and baggage porters, and "this because it is well understood the wages paid such employees are nominal and the gratuity their means of livelihood."

In these and in many other cases, the court said, the beneficient purpose of the workmen's compensation act would be ineffective "if in the event of injury for which compulsory compensation is provided the basis were the actual money wage." To provide against this and to avoid contentions as to the scope and meaning of the act, the court thought that Congress had wisely included all earnings embraced in the contingencies. However, the case under consideration, the court thought, was somewhat different from the cases which were used for illustration. In this case the restaurant employees were paid on a straight weekly basis without any express agreement that they would be furnished meals, and even though there was no express agreement the court said:

There was admittedly a custom which had on [all] the force and effect of an agreement, and it is not too much to say that the refusal of defendant to permit his employees to feed themselves from the "leftovers" or to use his coffee, tea, and milk within reasonable bounds, would have evoked as much surprise and protest as the unthinkable refusal of the ordinary housewife to extend the same privilege to domestic servants in her employ.

Again the situation is not altered, Mr. Justice Groner said, by the fact that the employer was silent, in engaging his help, with relation to the right to be fed at his expense. It is the fact that controls, the court said, and—

Here we have a case in which employees, by reason of the nature of their employment, are relieved of the burden of providing food for themselves, and the money value of that benefit is fixed by stipulation so that we are not left to speculation as to it.

In concluding the opinion, the court held that the money compensation and board embraced the term "wages" as defined by the workmen's compensation act, and embraced likewise the remuneration on which the premium was calculated within the meaning of the act. The court said that the reason for this was "plain and simple." Since the whole purpose of the workmen's compensation act is to provide indemnity to an injured employee "based upon the wage loss sustained by him as a result of the injury," the loss to the employee in the case under consideration would not be his wages alone but "his wages and his food, since each was a benefit which he enjoyed while employed and is deprived of when injured." The exclusion of either in determining his indemnity would therefore be a violation of the act, the court held, and since that is true it must follow "that the premium which is predicated upon the obligation to discharge the indemnity must likewise be calculated and paid on the same basis."

The court therefore reversed the opinion rendered by the municipal court of the District of Columbia.

WORKMEN'S COMPENSATION — WAGES — TIPS — COMPUTATION OF EARNINGS—*Powers' Case, Supreme Judicial Court of Massachusetts (June 1, 1931), 176 Northeastern Reporter, page 621.*—The Massachusetts Supreme Court on June 1, 1931, affirmed a decree of the industrial accident board holding that "tips" received by a waitress constituted part of her "earnings" within the meaning of the "average weekly wages" provision of the compensation law.

Ethel Powers was employed as a waitress in a restaurant and received injuries while in the course of her employment. Before a single member of the industrial board the findings were made that

according to the contract of employment the employee was to receive $8 per week and whatever tips should be given her by the patrons of the restaurant. The tips averaged $12 a week.

The full board affirmed and adopted the findings of the single member, but also ruled that the tips received were part of the average weekly wages, which therefore amounted to $20. Upon appeal by the employer to the superior court it was held that $8 constituted the average weekly wage. The decree of this court caused the employee to seek a ruling by the State supreme court as to whether the tips so received might be considered part of her average weekly wages.

By definition under the Massachusetts workmen's compensation law (Gen.L., 1921, ch. 152, sec. 1 (1)), "average weekly wages" are the "earnings of the injured employee during the 12 calendar months immediately preceding the date of injury." As to whether tips constituted part of the "average weekly wages", the supreme court said that the question was a new one before that court, and further that there were only a few American decisions "pertinent to this point." Several cases under the English act were cited in which it was held that the "earnings" included "tips." This interpretation of the English statute had been given long before the passage of the Massachusetts act. The American decisions referred to by the court arose in New York, and involved tips received by a taxicab driver and by a Pullman porter, and it was held in those cases that the tips received with the knowledge of the employer were to be included in ascertaining the average weekly wages as the basis of compensation. The court also referred to a ruling of the Massachusetts Industrial Accident Board in 1914, in Hatchman's case, in which the board so interpreted the act "that tips were to be included in ascertaining the average weekly wages or earnings." In the absence of an adjudication by the State supreme court, this interpretation has been followed since 1914.

Mr. Chief Justice Rugg, in delivering the opinion of the court, said:

> It seems plain that, from the standpoint of the employee, the tips in the case at bar were in the nature of wages or earnings. The stipend paid to her by the employer was the smaller part of the actual income received by her as a consequence of her labor for him.
>
> The situation was fully understood and freely assented to by the employer. There was no deception. No divided duty was thereby created on the part of the employee. Her loyalty to the employer was not alloyed by the courtesy and efficiency rendered to patrons, which were the basis of their gratuities to her. As to each customer of the employer the tip to the employee was a gift and not founded on an obligation, but the aggregate thus received was dependable although fluctuating according to the amount of patronage coming to the employer.

Service may be rendered upon a reasonable expectation of reward without forming the basis of a debt. The tips were in the nature of part payment for the service received by the patrons at the place of business of the employer. Payments made to his employee by his patrons with the approval of the employer under the protection of his place of business and for his benefit, bear a close analogy to wages paid by him.

There was nothing illegal in the retention of tips by the employee in these circumstances. If the employer had established a rule of his restaurant forbidding tips, the direct-wage expense to him probably would have been increased to make up in substance for the loss in revenue to the employees, and that doubtless would have been reflected in an increase in the prices charged to patrons. The employer, in effect, saved in direct outgo for wages the amount received by the employee in tips.

During the course of the opinion the court referred to several jurisdictions, in which statutes have been enacted relative to tips, and observed that—

The idea of tipping is distasteful to some people who would prefer to pay in increased charges enough to enable the appropriate wage to be paid directly to the employee by the employer. There is a feeling that tips are not in harmony with the spirit of American institutions and that they tend to put the recipient in a dependent or servile position and to undermine independence of character.

The court, continuing, said that there is in certain employments in the State a tipping custom existing which must be recognized since—

It has in those employments a vital effect upon the terms and conditions of labor and the relations of employer and employee. It is a custom by which the employer in the case at bar reaped a financial benefit in the lower payments made by him each week to secure the services of the employee.

Although some difficulty may arise, the court said, in fixing the insurance rate in a case in which the pay roll of the employer discloses all of the earnings of the employee, and in one in which it does not, still the principle cannot be affected. The employee in the latter case is bound "to make full disclosure for the purpose of enabling just insurance rates to be fixed."

In concluding the opinion reversing the decree of the lower court, the supreme court said:

We are of opinion that the finding of the board to the effect that the tips constituted a part of the average weekly wage cannot be pronounced unwarranted in law. It hardly needs to be added that this decision is confined strictly to the facts here disclosed.

The result is that the decree is reversed and a decree is to be entered in favor of the employee on the basis of average weekly earnings of $20.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—DEPENDENTS—*Red Jacket Consolidated Coal & Coke Co., Inc.*, v. *State Compensation Commissioner et al., Supreme Court of Appeals of West Virginia (Jan. 19, 1932), 162 Southeastern Reporter, page 665.*—On April 29, 1930, one Garcia was killed while engaged as a coal loader for the Red Jacket Consolidated Coal & Coke Co. in a mine located in Mingo County, W.Va.

Proceeding under the West Virginia workmen's compensation act the commissioner awarded compensation to Garcia's dependents, and the coal company appealed the case to the Supreme Court of Appeals of West Virginia, alleging that Garcia "was guilty of violation of the mining laws of the State and of the rules of the company and that his manner of procedure was willful misconduct." This contention is based upon the fact that at the time of his death, which was caused by an explosion, Garcia was using "short fuzes" and attempting to set off more than one shot at a time.

The court held that as the exact manner in which Garcia met his death was speculative, "compensation could not be denied upon the ground that he was firing more than one shot at the same time even if the statute inhibiting that practice were construed as applying to 'doby mining'." The court also found that Garcia was in the habit of using short fuzes in work of this nature. The evidence showed that he had been reprimanded and fined by the Safety Club for using short fuzes and had been threatened with dismissal by the foreman if he continued to engage in that practice. The evidence indicated that he had continued using short fuzes. However, the court found no definite rule of the company nor statutory inhibition which he was violating at the time of his death, even though the practice in which he was engaged was commonly known to be dangerous. The knowledge that it was a dangerous practice, coupled with the fine by the Safety Club and the admonition by the foreman was, however, considered by the court as sufficient conduct on his part to constitute "willful misconduct" as contemplated by the workmen's compensation statute. Continuing the opinion the court said:

An employee who takes "short cuts" involving dangerous practices, known to him to be dangerous and to be disapproved by his fellow workmen because of the danger, and in express violation of the instructions of his foreman, assumes entire responsibility as to what may happen to him as a result of such improper practices. Because of such willful misconduct an employee may not himself receive compensation if his injury is not fatal, nor are his dependents entitled to compensation if he incurs fatal injury. It would be harsh indeed to impose liability on an employer in such circumstances.

The court therefore reversed the finding of the commissioner.

Cumulative Index

[In addition to the present volume this index covers Bulletins Nos. 112, 152, 169, 189, 224, 246, 258, 290, 309, 344, 391, 417, 444, 517, and 548—years 1912 to 1932]

List of Cases

[In addition to the present volume this list covers Buls. Nos. 112, 152, 169, 189, 224, 246, 258, 290, 309, 344, 391, 417, 444, 517, and 548—years 1912 to 1932]