THE ATTITUDE OF THE COURTS IN CONSTRUING THE WORKMEN'S COMPENSATION ACT

BY

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I. Introduction

The subject as originally assigned was "The Increasing Liberality of the Courts in Construing the Workmen's Compensation Act". This involves a thesis which must be characterized as "important if true", and reflects an opinion very widely held. The opinion appears to be based on the following considerations:

(a) The trend of the times has been distinctly in the direction of an increasing liberality towards injured employees. This tendency has been markedly exhibited in the legislatures, whose duty it is to declare the policy of their respective states. Few legislative sessions go by in any state without one or more additions to the compensation laws; and the proposals for addition outnumber, many times over, those actually enacted. The policy of industrial commissions has generally been in the same direction.

Between the two, the compensation laws have shown a distinct tendency to expand beyond their original scope. They no longer cover merely industrial accidents, but accidents incurred at a distance from the place of employment, in the course of coming to employment or returning home: also accidents incurred in activities linked up to the employment more or less proximately. They provide indemnities based, not on the wage actually earned, but on the wage which would have been earned had the employee been employed for what may be considered a normal working year, month, week or day; or upon the wage which would have been earned had the employee been given opportunity to demonstrate normal increase in working capacity.

Benefits are no longer, in death cases, solely for the relief of the dependents. A number of laws provide for a payment in no dependent cases for the benefit of other injured employees, and in the so-called dower provisions extend the widow's benefit by a

lump sum designed to give her a running start on a new matrimonial essay. Occupational disease benefits have at times been interpreted so broadly as to approximate a general health insurance.

In a recent case (Mobile and Ohio R. R. Co. v. Industrial Commission, 28 Fed. (2nd) 228) the court felt moved to state, "The act is not to be considered as a substitute for disability and old age compensation"; but the extensions and interpretations above cited would indicate that workmen's compensation has proved elastic enough to reach out into a very wide field of social readjustment.

The merits of this development are not now the theme of discussion, it being cited merely for the purpose of showing that this distinctly liberal tendency on the part of the legislative and administrative arms makes a similarly liberal tendency on the part of the courts *a priori* very probable.

(b) The general tendency of the courts, not particularly with regard to workmen's compensation, has been in the direction of an increasing liberality, though, after the fashion of the courts, it is a liberality which must be based on precedent and fortified by logic, and fitted as carefully as may be into the general juristic scheme of things entire. This last, however, is becoming a curious patchwork.

The profound change in economic and social ideals which has taken place in the last two decades assorts very oddly with decisions made in an earlier day. The efforts of the courts to extricate themselves from the grip of the past without an unseemly exercise of judicial legislation, and the controversies between old-school and new-school jurists have brought about some oddly inconsistent results, and nowhere more strikingly than in the Supreme Court of the United States. Here again one is unable to enlarge on the theme.

Undoubtedly the courts have no wish to stand apart from the trend of the times and through their power to construe laws and constitutions to hold the people to an outworn economic system, and have done what they could, without too striking a massacre of recorded decisions, to adopt a liberal viewpoint. This likewise adds *a priori* probability to the theory of an increased liberality with respect to this particular problem.

(c) Last of all, the courts admit they are construing the compensation laws liberally. That is not to be taken as admitting an increasing liberality, which is the point under discussion. It is a very easy matter, every time a decision comes down which upholds a decision of an industrial commission or which adopts a seemingly novel viewpoint, to jump to the conclusion that the courts are letting down the bars further and further.

As to cases of the first sort, it must be borne in mind that in passing on decisions of an administrative commission the court has commonly a limited jurisdiction. Where the right of appeal involves only questions of law, and permits no new trial on the facts, the court can consider only the record. Errors of law can be corrected, but the commission's findings of fact cannot be revised unless there is absolutely no evidence which could justify such findings.

Cases of the second sort are relatively rare. One very recent case in Georgia (Home Accident Insurance Co. v. McNair, 161 S. E. 131), may be taken as an example. This case in effect declared the maximum and minimum limits of weekly indemnity to have no application to the section of the law providing indemnities for specific injuries. Curiously enough, however, the specific case involved the application of a rule more conservative than that contended for by the industrial commission, and is radical only as applied to a considerable class of cases not then before the court. There have been, undoubtedly, radical decisions which are so by intent; but before levelling the charge of increasing liberality, it is necessary to consider, not particular cases, but broader and more general trends of decisions.

II. General Methods Used by the Courts in Construing the Compensation Laws

(a) It may be laid down at the outset that the court's power to construe is limited. Courts may not exercise legislative power. The legislature enacts the law, and its terms are binding on the courts as on everybody else, in so far as they are constitutional. The function of the court is to give effect to the law, not to what they consider the law ought to have been. (12 Corpus Juris 1302.)

(b) In so far as the terms of the law are clear and unambiguous, there is no room for construction. But in a long and involved act, such as the compensation laws, drafted by a legislative process not always conducive to clearness and logic, amended and supplemented at frequent intervals, and expressed in a language not ideally adapted to mathematical clarity of expression, there arise numerous points of doubt. Manifest and obvious errors or omissions occur: mistakes in punctuation and grammar, words capable of more than one meaning, phrases obscurely expressed, and inconsistencies and contradictions between different parts of the law. Difficulties arising from these constitute the field for judicial construction. (36 CYC 1106.)

(c) The law recognizes two general methods of construction. Statutes penal in character or in derogation of common right are strictly construed. Strict construction means that the words used are literally and technically construed, drawing all inferences in favor of the person accused of breach of the law and against the existence of new rights created by the law.

Statutes remedial in character or enacted in the interest of the public welfare are given what is known as liberal, equitable or reasonable construction, designed to carry out the intent of the law. So far as the language will permit, and perhaps a trifle beyond, it will be construed to this end, though the court will not undertake to rewrite the statute in any substantial degree. It may correct an obvious error, or omission, and may disregard obvious mistakes in grammar or punctuation, so long as these are minor matters and the general legislative intent is clear. But it will not undertake to write into the law something which the legislature obviously failed to put in. (36 CYC 1173.)

(d) In dealing with the compensation laws, the courts have generally, and very properly, ruled them to be remedial in character, and therefore, in accordance with the above principles, proper subjects for liberal construction for the purposes of promoting the object of the legislation. The law itself may provide that such construction be given. This provision sometimes appears in a negative and rather cryptic form, namely a requirement that the law shall not be construed as in derogation of the common law. Only a few decisions have ruled the compensation

law to be in derogation of the common law and therefore to be construed "according to its term and as it reads".

Ierardi v. Farmers Trust Co., 151 Atl. 822 (Del.)
Comingore v. Shenandoah Artificial Ice etc. Co., 226 N. W. 124 (Iowa)
Andrejewski v. Wolverene Coal Co., 148 N. W. 684 (Mich.)
Wilcox v. Clarage Foundry & Mfg. Co., 165 N. W., 925 (Mich.)
Zimmer v. Casey, 146 Atl. 130 (Pa.)

One case has definitely ruled that the compensation act is not to be construed as in derogation of the common law, Sadowski v. Thomas Furnace Co., 146 N. W. 770 (Wis.) and this is generally implied in all the cases which call for a liberal construction. Gobble v. Clinch Valley Lumber Co., 127 S. E. 175 (Va.) takes a compromise view, namely that though in derogation of the common law, the act because of its remedial character must be liberally construed. One other case, Brooks v. W. A. Davis Co., 254 Pac. 66 (Okla.) holds the compensation law to be in derogation of the common law, but draws therefrom the amazing conclusion that therefore no common law principle can be invoked to limit its application.

(e) The general principles laid down in compensation cases do not, by and large, contain much that is unorthodox. Heterodoxy comes, if at all, in the application of the general rules to the specific case. Thus, the propositions laid down above are accepted and confirmed in a whole series of compensation cases.

(1) The principle that where the language is clear and unambiguous, the court is not at liberty to expand it by construction beyond its natural meaning is affirmed in the following cases:

Frye's Guardian v. Gamble Bros., 221 S. W. 870 (Ky.)
Moran's Case, 125 N. E. 157 (Mass.)
Comstock's Case, 152 A. 618 (Maine)
Qualp & James Stewart Co., 109 A. 780 (Pa.)
Maguire v. James Lees & Sons, 116 A. 679 (Pa.)
Gordon v. Amoskeag Mfg. Co., 140 A. 705 (N. H.)
Lizotte v. Nashua Mfg. Co., 100 A. 757 (N. H.)
Town of Wonewoc v. Ind. Com., 190 N. W. 469 (Wis.)

(2) Ordinarily, language is to be taken in its ordinary or popular significance.

36 CYC 1114.
Northwestern Iron Co. v. Ind. Com., 142 N. W. 271 (Wis.)
Hall v. City of Shreveport, 102 So. 680 (La.)
Carville v. A. F. Bornot & Co., 135 A. 652 (Pa.)
Carmichael v. J. C. Mahan Motor Co., 11 S. W. 2nd 672 (Tenn.)
Foret v. Paul Zibilich Co., 137 So. 366 (La.)

The legislature may be regarded as having intended the ordinary legal meaning of words.

Waldum v. Lake Superior Tunnel etc. Co., 170 N. W. 729 (Wis.)

But ordinarily the purpose of the act must not be defeated by narrow or technical construction.

Perry v. W. L. Huffman Auto Co., 175 N. W. 1021 (Neb.)
Luyk v. Hertel, 219 N. W. 701 (Mich.)
Drecksmith v. Universal etc. Co., 18 S. W. 2nd 86 (Mo.)
McIntosh v. Standard Oil Co., 236 N. W. 182 (Neb.)
Tate v. Standard Acc. Ins. Co., 32 S. W. 2nd 932 (Tex.)

There is evident, in Carmichael v. J. C. Mahan Motor Co. cited above, a certain feeling that words construed under the employers' liability régime might properly receive a very different construction under the new law. The principle that the legislative intent is controlling might well justify such a conclusion.

In some cases, the court has found it proper to interpret words of the law in accordance with their meaning in other enactments.

Bay Shore Laundry Co. v. Industrial Acc. Com., 172 Pac. 1128 (Cal.)
Eastern Texas Electric Co. v. Woods, 230 S. W. 498 (Tex.)

or, in case of a law drafted under the terms of a constitutional amendment, in accordance with their meaning in that amendment.

Industrial Comm. v. Cross, 136 N. E. 283 (Ohio)

But this should not be done unless consistent with the legislative intent.

Burnes v. Swift & Co., 186 Ill. App. 460

(3) There are certain other rules for the interpretation of words and phrases. They must be read in the light of their context: not of a single section, but of the whole act. It may be taken as the legislative intent that the act be given effect if possible as a consistent and harmonious whole, and only from the whole can the legislative intent be gained.

Oriental Laundry Co. v. Ind. Com., 127 N. E. 676 (Ill.)
In re Cannon, 117 N. E. 658 (Ind.)
Wick v. Gunn, 169 Pac. 1087 (Okla.)
Lahoma Oil Co. v. State Ind. Com., 175 Pac. 836 (Okla.)
Consumers Gas & Fuel Co. v. Erwin, 243 S. W. 500 (Tex.)
Aetna Life Ins. Co. v. Ind. Com., 252 Pac. 567 (Utah)
Smith & McDonald v. State Ind. Com., 271 Pac. 142 (Okla.)
Betz v. Columbia Tel. Co., 24 S. W. 2nd 224 (Mo.)
Workmen's Comp. Exch. v. Chicago etc. R. R. Co., 45 Fed. 2nd 585 (Idaho)
Lumbermen's Recip. Ass'n v. Day, 17 S. W. 2nd 1043 (Tex.)
Petroleum Co. v. Seale, 13 S. W. 2nd 364 (Tex.)

(4) In case of need, where the law itself is not clear as to the legislative intent, it is proper to go beyond the law: to view its history, the condition of law prior to the change, and the occasion, necessity and object of the law. So much is a well-settled rule of construction. As applied to compensation cases, the object of the law is clearly the benefit of the employee, and there are many cases where the court indicates the law is to be construed liberally in the interest of the employee. But this is only another way of stating what is a general rule of construction, that a remedial statute is to be construed liberally in order to fulfil the legislative intent.

State v. District Court of Ramsay County, 158 N. W. 798 (Minn.)
Lesh v. Illinois Steel Co., 157 N. W. 539 (Wis.)
Crooke v. Farmers Mutual Hail Ass'n, 218 N. W. 513 (Iowa)
Jackson v. Diamond Coal Co., 299 S. W. 802 (Tenn.)

(f) The principle of liberal construction is, however, subject to exceptions and limitations.

(1) It admits of considerable elasticity in the treatment of language for the purpose of effecting what the court believes to be the legislative intent. But the courts ordinarily indicate that the principle does not justify adding to the law, rewriting it, or interpolating language, when such procedure would affect the rights of parties.

Proops v. Twohey Bros., 240 Pac. 277 (Ariz.)
Hahnemann Hospital v. Industrial Board of Ill., 118 N. E. 767 (Ill.)
Double v. Iowa-Nebraska Coal Co., 201 N. W. 97 (Iowa)
Frye's Guardian v. Gamble Bros., 221 S. W. 870 (Ky.)
Page v. N. Y. Realty Co., 196 Pac. 871 (Idaho)
Cawley v. American Railway Express Co., 120 Atl. 108 (Pa.)
Bosquet v. Howe Scale Co., 120 Atl. 171 (Vt.)
Pappas v. North Iowa Brick & Tile Co., 206 N. W. 146 (Iowa)
Sullivan v. Mining Corporation, 268 Pac. 495 (Mont.)
Ellis v. U. S. F. & G. Co., 6 S. W. (2nd) 811
Sloss-Sheffield Co. v. Jones, 123 So. 201 (Ala.)
Laurant v. Dendinger, Inc., 120 So. 246 (La.)
Clement v. Minning, 145 Atl. 485 (Md.)
Paterno's Case, 165 N. W. 391 (Mass.)
Bailey v. Texas Ind. Ins. Co., 14 S. W. 2nd 798 (Tex.)
Montello Granite Co. v. Schultz, 222 N. W. 315 (Wis.)
Krebs v. Ind. Com., 227 N. W. 287 (Wis.)
Stone v. Blackmer & Post Pipe Co., 27 S. W. 2nd 459 (Mo.)
Clingan v. Carthage Ice etc. Co., 25 S. W. 2nd 1084 (Mo.)
Kerns v. Anaconda Mining Co., 289 Pac. 563 (Mont.)
Comstock's Case, 152 Atl. 618 (Maine)
Colorado Fuel & Iron Co. v. Ind. Com., 298 Pac. 955 (Colo.)
Kern v. Southport Mill, 136 So. 225 (La.)
Cocklen v. Kansas City Pub. Service Co., 41 S. W. 2nd 608 (Mo.)

This principle the court recognizes as binding on both itself and the industrial commission.

Hahnemann Hospital v. Industrial Board, cited above
Bailey v. Texas Ind. Ins. Co., cited above
Kerns v. Anaconda Mining Co., cited above

It applies even when the statute as it stands seems unequitable or not in accord with legislative intent.

Proops v. Twohey Bros., cited above
Frye's Guardian v. Gamble Bros., cited above
Sullivan v. Mining Corp., cited above

On this last point, however, there are some cases where the court has extended the act to include cases within the intent but not within the strict letter of the law.

In re Duncan, 127 N. E. 289 (Ind.)
Dowery v. State, 149 N. E. 922 (Ind.)
Little v. Crow-Edwards Lumber Co., 121 So. 219 (La.)

(2) It is also a well established principle of statutory construction that where the legislature inserts definitions or lays down rules of construction, these are mandatory on the court. This looks toward a more or less literal interpretation of such definitions and rules.

Moody v. Ind. Acc. Com., 260 Pac. 967 (Cal.)
Murray v. Wasatch Grading Co., 274 Pac. 940 (Utah)

The case of Allen Garcia Co. v. Ind. Com., 166 N. E. 78 (Ill.), however, holds that definitions of "employer" and "employee" are to be broadly construed.

(3) There is a tendency sometimes to construe rather strictly those parts of the act which define its scope, i. e., sections or clauses relating to inclusions or exclusions. Thus in Oklahoma it has been held that "before one is entitled to the benefit of the act he is held to strict proof that he is in the class embraced by its provisions, and nothing can be presumed or inferred in this respect".

Harris v. Oklahoma Natural Gas Co., 216 Pac. 116

Also that to defeat an award under the act, the case must come clearly within the statutory exceptions.

Wick v. Gunn, 169 Pac. 1087 (Okla.)

On this point, too, may be cited

Oriental Laundry Co. v. Ind. Com., 127 N. E. 676 (Ill.)
Cawley v. Am. Railway Express Co., 120 Atl. 108 (Pa.)
McDonald v. Levinson Steel Co., 153 Atl. 424 (Pa.)
Span v. Jackson Walker Coal & Mining Co., 16 S. W. 2nd 190 (Mo.)
National Cast Iron Pipe Co. v. Higginbotham, 112 So. 734 (Ala.)

To the contra, however, are the cases of In re Duncan and Dowery v. State, cited above: also O'Bannon Corp'n v. Walker, 129 Atl. 599 (R. I.), which holds that the act should be construed so as to extend the benefits to the largest possible class of employees, and Texas Employers Ins. Ass'n v. City of Tyler, 283 S. W. 929, which holds that the act should be liberally construed both as to remedies and as to determining the legal entities (employees) to which it applies.

(4) Construction of the procedural provisions embodied in the act has led to a number of cases. In general, the courts have inclined to construe these in no technical spirit. Indeed, the law itself sometimes indicates that meritorious causes are not to be thrown out on technicalities. This is almost a necessity, inasmuch as the intent of the laws is to furnish a quick and simple form of relief available to a class of claimants, many of whom are ignorant; Hence, while there must be substantial compliance with the prescribed procedure, irregularities are commonly not permitted to defeat a meritorious claim.

Thus in Bowman v. Industrial Commission, 124 N. E. 373 (Ill.) the court held that statutory provisions as to notice need not be strictly complied with, if employer had actual notice. In Oriental Laundry Co. v. Industrial Commission, 127 N. E. 676 (Ill.), the court in a case where proceedings were begun in time, but writs were lost so that they were not served within time prescribed by statute, permitted the issuance of alias writs without specific statutory authority.

In Bates and Rogers Co. v. Allen, 210 S. W. 467 (Ky.) the court held that failure to prosecute a claim with due diligence would not be permitted to defeat an award to which he was otherwise clearly entitled.

In Johnson v. Hardy-Burlingame Mining Co., 266 S. W. 635 (Ky.) it was held that only a substantial compliance with statutory procedure is necessary.

In Philps v. Guy Drilling Co., 79 So. 549 (La.) the court held that insufficiency of evidence warranted a reopening of the case rather than dismissal.

In Clark v. Alexandria Cooperage and Lumber Co., 102 S. W. 96 (La.) the court indicated that technical defenses would be permitted only in extreme cases.

In Industrial Commission v. Sodic, 172 N. E. 292 (Ohio) the court held that remedial provisions are to be interpreted with utmost liberality.

In Tate v. Standard Accident Co., 32 S. W. 2nd 932 (Tex.) the court held that procedure under the act should not be so technically construed as to defeat its provisions.

On the other hand, there are cases where the rights of third parties are involved. In McCune v. Wm. B. Pell & Bros., 232 S. W. 43, it was held that sureties on a bond are bound only when the provisions of the act under which bond is given are strictly complied with.

And Texas furnishes what is probably a genuine exception to the rule, holding that statutory provisions making effective rights under the act are "exclusive, mandatory and jurisdictional" and in particular the statutory provisions as to appeals must be strictly complied with.

Texas Employers' Ins. Association v. Price, 291 S. W. 287, 296 S. W. 284
Texas Employers' Ins. Association v. Mints, 10 S. W. 2nd 220
Texas Ind. Ins. Co. v. Holloway, 30 S. W. 2nd 921
Maryland Casualty Co. v. Overstreet, 42 S. W. 2nd 160

(5) A further restriction upon liberal construction comes in dealing with the effect of the compensation acts on other statutes or on the common-law. The compensation acts contain general provisions doing away with common-law rights as to employees and employers within their terms, and removing common-law defenses as to employers electing to remain outside the act. Certain other statutory rights of action such as those under the employers' liability acts, the acts giving a right of action in cases of death caused by unlawful acts, and others were of necessity repealed as to employees coming within the terms of the compensation law.

This was effected in some cases by specific mention of the acts repealed, in other cases by language general in character. The established rule appears to be that the compensation acts are to be construed strictly as to their effect on rights outside their scope, and that rights are not to be abolished or liabilities created merely by implication. Thus, it is held, the effect of the act in removing certain defenses from the non-assenting employer is not to enlarge his common-law liability.

Walsh v. Turner Centre Dairying Association, 111 N. E. 889 (Mass.)
Towne v. Waltham Watch Co., 141 N. E. 675 (Mass.)
Lindebauer v. Werner, 159 N. Y. S. 987 (N. Y.)
American Chemical Co. v. Smith, 8 Ohio App. 361
Bosquet v. Howe Scale Co., 120 Atl. 171 (Vt.)
Wlock v. Fort Dummer Mills, 129 Atl. 311 (Vt.)
Gerthuing v. Stanbaugh-Thompson Co., 1 Ohio App. 176 (Ohio)

The effect of the act is not to abolish contracts for personal service or to restrict the employer from enlarging or diminishing business.

In re Borin, 116 N. E. 817 (Mass.)

Or to impose on the employer burdens not contemplated by the act.

Vandervoort v. Industrial Commission, 234 N. W. 492 (Wis.)
Sherman v. Industrial Commission, 234 N. W. 496 (Wis.)

Similarly, the act does not by implication narrow the rights of employees.

In re Bowers, 116 N. E. 842

Nor does it take away common-law rights, except by direct and specific provisions or by necessary implication.

Ierardi v. Farmers Trust Co., 151 Atl. 822 (Del.)
Castleberry v. Frost-Johnson Lumber Co., 268 S. W. 771, 283 S. W. 141 (Tex.)

As to the effect on other statutes, the following may be noted:

Eldorado Coal & Mining Co. v. Mariotte, 215 Fed. 51 (Ill.) holding that certain liabilities under the mining act are not repealed by the compensation act.

Meese v. Northern Pacific R. R. Co., 211 Fed. 254 (Wash.) holding that compensation act does not repeal the statute giving right of action for death as far as the liability of a person other than the employee is concerned.

U. S. F. & G. Co. v. N. Y., N. H. & H. R. R. Co., 125 Atl. 875 (Conn.) holding that the subrogation section does not relieve the claimant of the duty to prove the liability of a third party.

Markley v. City of St. Paul, 172 N. W. 215 (Minn.) holding that act does not repeal a section of city charter providing compensation for city employees.

Bruce v. McAdoo, 211 Pac. 772 (Mont.) holding that right of action for death is not repealed by Compensation Act save as to such cases as come within its provisions.

Zirpola v. T. & E. Casselman, 204 App. Div. 647. Same point.

State v. Employers Liability Assurance Corp. Ltd., 116 N. E.

513 (Ohio) holding that act does not by implication repeal provisions of code defining powers of insurance companies.

Acklin Stamping Co. v. Kutz, 120 N. E. 229 (Ohio) holding that an employer who does not bring himself within the law is liable under all other statutes of the state.

Judson v. Fielding, 237 N. Y. S. 348, holding that act does not absolve third parties from liability and that existing rights should not be taken away except by clear indication of statutory purpose.

Depre v. Pacific Coast Forge Co., 276 Pac. 89 (Wash.) holding that act does not repeal factory act.

So, too, in case of the compensation act itself.

O'Meara v. Michigan Department of Agriculture, 195 N. W. 418 (Mich.) holding that the provisions of the act as to medical benefits cannot be regarded as repealed by implication.

Eastern Texas Electrical Co. v. Woods, 230 S. W. 498 (Texas) holding that act cannot be held repealed by implication.

Foster v. Department of Labor and Industries, 296 Pac. 148 (Wash.) holding that a statute relating to procedure does not alter or enlarge compensation rights fixed by another statute.

Curry v. Ohio Oil Co., 129 So. 563 (La.) holding that a provision relating to hernia was impliedly repealed by a reenactment of the law omitting the provision.

Generally it may be laid down as a principle that statutes will not be considered as repealed, or new liabilities created merely by implication. It is not necessary that the statutes repealed be specifically named. General words clearly indicating the intent to repeal may be enough.

Colorado v. Johnson Iron Works, Ltd., 83 So. 381 (La.)

If statutes are specifically named in the repealing clause, that raises an implication that statutes not named are not intended to be repealed.

Sutherland Statutory Interpretation, sec. 388

(6) A general principle of construction may also be noted, namely that an act will, if possible, be so construed as to be constitutional.

Pioneer Coal Co. v. Polly, 271 S. W. 592 (Ky.)

(7) A further principle may be noted as an offset to the doctrine frequently affirmed, that the act is to be construed liberally

in the interest of the employee. It does not follow by any means that this can be carried to the point of working a manifest injustice to the employer.

Pacific S. S. Co. v. Pillsbury, 52 Fed. (2nd) 686

This rather protracted statement of the general principles of interpretation is made merely for the purpose of showing that when the courts speak of liberal construction they do not mean a wide-open measure of liberality. They are obliged to conform to the wording of the law. Such legislation as they may perform is very limited in scope, and cannot be carried to the extent of rewriting the law or inserting what is not there. The general principles laid down for interpreting the compensation acts are in general the same as those laid down for interpreting remedial statutes, and it is not often that a court will lay itself open to the charge of having departed from established principles. It knows its decision will be published and read, and this is a very measurable check upon its actions.

To be sure, the laying down of general principles is not the whole matter. In the remainder of the paper some attempt will be made to show how courts have applied these principles to some of the provisions of the act most frequently litigated.

III. What Persons Come Under the Act

A. *Terms and Definitions.*

This depends first of all upon the words used in referring to these persons, then, upon the definitions of those words, if any, and upon the words describing the relations between the parties and the specific exclusions and inclusions of particular types of persons or relations.

(1) "Employer" is most commonly used to describe the persons on whom the act imposes a liability, "employee" to describe those entitled to benefits thereunder, and "employment" to describe the relation. These words have a well-recognized significance. The laws of New Jersey and Pennsylvania define "employer" and "employee" as equivalent to "master" and "servant" and such is the generally accepted meaning. "Employment" is a term broad and general enough to cover all cases where the relation of master and servant exists.

These words standing by themselves without definition would properly be interpreted according to common-law principles, provided, of course, this did not conflict with other parts of the act.

Henry v. Mondillo, 142 Atl. 230 (R. I.)

But almost all acts include definitions. In some cases these are substantially identical with the common law.

Kelley's Dependents v. Hoosac Lumber Co., 113 Atl. 818 (Vt.)
Stricker v. Industrial Commission, 188 Pac. 849 (Utah)

This is not so in all cases. The definition may be either broader or narrower. If broader, it is so usually by reason of specifically including relations not commonly regarded as coming within the scope of the terms "master and servant"; especially public employers and their public officials and employees. If narrower, it is so usually by the deliberate usage of words designed to limit the scope of the act.

Reed v. Ridout's Ambulance, 102 So. 906 (Ala.)
Georgia Ry. & Power Co. v. Middlebrook, 128 S. E. 777 (Ga.)

(2) "Employer" is used in every act to designate the person on whom the act imposes a liability. The definitions frequently specify that the term includes a person, firm or copartnership, association or corporation. Some acts add the words "including a public service corporation". In the absence of such provisions the courts would doubtless interpret the word as including any person, legal entity or association of persons capable of standing in the relation of "Master": but the express inclusion is perhaps desirable in order to remove any possible question. The specific inclusion of public service corporations is not necessary except in states where the statutes treat of public service corporations in such a way that an intention to exclude them might be read from the fact that they are not specifically designated.

The definitions usually provide that the term shall include the executor or administrator of a deceased employer, or a trustee or receiver. Careful statutory draughtsmanship would probably require this inclusion, since the decease or the financial embarrassment of an employer is humanly common enough; though in the absence of the inclusion the courts would probably be able to effect much the same result by interpretation.

A further very common provision is that the term shall, if an employer is insured, include his insurer if practicable. This,

since the insurer is assuming the liabilities of the employer, seems a desirable provision.

The definitions also set forth in some form or another the functions characteristic of an employer. "Employing" (Alaska, Maryland, Nebraska, New York, Oklahoma), "who employs" (Wisconsin), "carrying on any employment" (District of Columbia, North Carolina), "who has in service" (California, Delaware, Ohio), "that makes contracts for hire" (Texas), "employing another in service or under a contract for hire" (Illinois), "who has in service or under a contract of hire" (Arizona, Colorado, Michigan, Montana, Utah), "who has in service under a contract of hire or apprenticeship" (Nevada), "who shall contract for and secure the right to direct and control the service of any person" (Oregon), differ but little, if at all, from the accepted idea of "employer" or "master". It is possible, of course, that "contract of service" or "service" are a trifle broader than "contract of hire", but the difference, if any, is practically of little importance. On the other hand, the phrases "employing other persons for the purpose of carrying on any form of trade or business" (West Virginia), "who contracts with another to engage in extra-hazardous work" (Washington), "using the services of another for pay" (Connecticut, Georgia, Indiana, Missouri, South Dakota, Tennessee, Virginia), "who employs another to perform service for him, and to whom the employer directly pays wages" (Alabama, Minnesota), "engaged in carrying on a business for trade or gain" (New Mexico), are all distinctly narrower than the simple unqualified words "employer" or "master".

If an act is designed to cover the state or governmental organizations and subdivisions, these inclusions should be specifically set forth. The state is subject to no liabilities save those it specifically assumes, and some portion of the state's immunity attaches to its governmental agencies when acting in a governmental capacity. This is merely noted at the moment, being discussed at more length hereafter.

(3) "Employee" is the term used in the great majority of acts to designate the persons given rights or benefits thereunder. Other terms occasionally appearing in the acts are "workman", "operative", "laborer", "mechanic".

"Workman" in Alabama, New Mexico and Wyoming, "work-

man" and "operative" in Arizona and Ohio are stated to be used interchangeably with "employee" or synonymous therewith; and in Oregon and Washington the term is defined in such a way as to be substantially equivalent to "employee". On the other hand "workman engaged in manual labor" in the New Hampshire Law, "workman" and "operative" in the eighteenth group of hazardous occupations in the New York Law and "laborers, workmen and mechanics" used in the section of the Massachusetts Law relating to public employments, are apparently used with due appreciation that they are narrower in meaning than "employee". "Workman" properly means one engaged in manual labor, and "operative" one operating a machine or working in a factory.

Europe v. Addison Amusements, 131 N. E. 750 (N. Y.)
Clark v. Voorhees, 194 App. Div. 13 (N. Y.)
Westbay v. Curtis & Sanger, 134 N. E. 569 (N. Y.)

As in the case of "employer" the definitions commonly include the legal representatives of a deceased employee. Specific inclusion is frequently made of aliens (probably because of treaty provisions) and minors. Decisions that minors illegally employed are not employees are responsible for the addition in a number of acts of the words "minors, whether legally or illegally employed".

Descriptions of the function which characterizes an employee are as various as in the case of "employer". "In the service of another under any contract of hire" (Alabama, Illinois, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, North Carolina, Ohio, Texas, Utah, Wisconsin). "In the service of another under any contract of hire or performing service for a valuable consideration" (Delaware). "In the service of another under any contract of hire or apprenticeship" (California, Georgia, Indiana, Nevada, North Dakota, Tennessee, Virginia). "Under any contract of service or apprenticeship" (Connecticut, Hawaii, Idaho, Iowa, Kansas). "Under any contract of service or hire" (Missouri). "Who has entered into the employment of, or works under contract of service or apprenticeship" (New Mexico, Rhode Island, Vermont, Wyoming). "In the service of another under any contract of employment" (South Dakota). "In the service of an employer" (Arizona, Maryland, West Virginia). "In the service of any person" (Colorado, New York).

"Any person rendering service to another" (Alaska). "Any person performing service arising out of or incidental to his employment" (Louisiana). "One who performs service for another for a valuable consideration" (Pennsylvania). "An employee of an employer" (District of Columbia), while not necessarily meaning just the same thing, are not greatly different in scope. As aforesaid "contract of hire" does not necessarily mean just the same as "contract of service". The inclusion of apprenticeship specifically is probably of small practical importance, apprenticeship being not very common. There may be some question if a contract of apprenticeship is a contract of hire, but it is probably within the meaning of "service" or "contract of service".

In Oklahoma, however, "employee" is defined as "any person engaged in manual or mechanical labor," about the equivalent of the New Hampshire formula mentioned above, this resulting in a distinct narrowing effect.

In acts which apply to public employments, it is necessary to amplify the definition of "employee" if it is intended to include officers, elective or appointive, their service not being a contract relation. The relation is properly described as "service under appointment" or "service under election" as the case may be, and these terms appear in definitions under acts of this description.

"Employment" undefined, is broad enough to include all cases of the relation of master and servant. Statutory definitions of "employment" are rarer than in case of the other two terms, and are inserted for the purpose of limitation rather than amplification. In the statutory definitions the phrase "for gain" frequently appears, this of necessity excluding religious, charitable and educational employments and the purely governmental functions of public employments. The New York law is thus limited, the phrase being "for pecuniary gain"; but this is probably overlaid by the general language of the 18th group of "hazardous" employments, the exceptions to that group indicating that it does apply to religious, charitable and educational employments.

Definitions of "hazardous" and "extra hazardous" employments appear in the laws of Arizona, Illinois, Kansas, Louisiana, Maryland, Montana, New Hampshire, New Mexico, New York, North Dakota, Oklahoma, Oregon, Washington and West Virginia. The definitions contain a list of employments declared hazardous or

extra hazardous, with or without provisions more general in nature or providing means for bringing other hazardous employments within the class. The object is to define a class as to which the act is compulsory or a class as to which the law is elective, with certain disabilities on the employer who fails to elect. The object of the "extra hazardous" provision in Arizona is uncertain.

Definitions and exceptions establish several classes of employments, not all of which appear in every law.

(a) A class as to which the compensation plan applies absolutely.

(b) A class as to which the compensation plan applies, subject to an election on the part of the employer and usually on the part of employee, but not, so far as the employer is concerned, a free election, his failure to elect entailing the deprivation of common law defenses.

(c) A class exempted from the act, but which may be brought within the compensation plan by free election or agreement.

(d) A class absolutely exempt, which cannot be brought within the act even by election.

(e) A class exempted from the act as to certain of its employees only.

It may be added, that the classes are not always clean cut, especially the third and fourth. If a particular employment is expressly exempted, without express provisions for bringing it within the act, such provisions can hardly be inserted by interpretation; and if the act makes provision for including some exempted employments by election, there is a clear implication of an intent that exempted employments for which such provision is not made may not be brought within the act.

The foregoing may indicate that determination of what persons are and are not within the acts is not the simplest of matters. In fact, there has been a deal of litigation over this part of the act, especially in the case of those states having "hazardous" or "extra hazardous" classes. A liberal interpretation of the law is taken to mean, one which includes as many as possible

within the compensation plan and excludes as few as possible; but as previously indicated, the liberality of the courts is closely tied up to the provisions of the acts. The following is submitted to indicate how the courts have dealt with the matter.

B. *Contract of Service.*

Persons can come within the act only by virtue of a contract of service express or implied.

Acklin Stamping Co. v. Kutz, 120 N. E. 229 (Ohio)
Reitmeyer v. Coxe Bros., 107 Atl. 739 (Pa.)
Nissen Transfer and Storage Co. v. Miller, 125 N. E. 652 (Ind.)
Kronick v. McLean County, 204 N. W. 839 (N. D.)

In Oklahoma the contract must be express or raised by "necessary implication."

Hamilton v. Randall, 276 Pac. 705
El Reno Broom Co. v. Roberts, 281 Pac. 273

This principle may of course be modified by terms of the statute, giving benefits in cases when there is no direct contractual relation between the parties, as in case of provisions establishing liability to employees of subcontractors or lessees; but except for such provisions, the rule is general.

A contract of service requires no particular formalities, and may exist in spite of non-compliance with usual procedure, or with procedure established by rule of the employer.

Illinois Central R. R. Co. v. Ind. Board, 119 N. E. 920 (Ill.)
Porritt v. Detroit United Ry., 165 N. W. 674 (Mich.)

The question of wage or recompense is material only when the statute so requires.

Farmer v. State Ind. Com., 205 (Pa.) 984 (Ore.)
Georgia Ry. and Power Co. v. Middlebrook, 128 S. E. 777 (Ga.)

Service need not be continuous nor for any particular period.

Pfister v. Doon Electric Company, 202 N. W. 371 (Iowa)

The true requisite is, that the parties enter into a relation whereby the one is empowered to control and direct, the other obligated to render personal service under that control and direction.

Shannon v. Western Ind. Co., 242 S. W. 774, 257 S. W. 522 (Tex.)
Press Pub. Co. v. Ind. Acc. Com., 210 Pac. 820 (Cal.)
Western Indemnity Co. v. Pillsbury, 159 Pac. 721 (Cal.)
Pace v. Appanoose County, 168 N. W. 916 (Iowa)
Angel v. Ind. Com., 228 Pac. 509 (Utah)
Skeels v. Paul Smith Hotel Co., 195 App. Div. 39 (N. Y.)

The application of the act depending on the existence of a contract, certain cases where one person renders service to another are by necessary implication excluded from the act.

1. *Volunteers.*

Where services are rendered, not in consequence of any contract, but voluntarily, the parties involved are not employer and employee within the act.

So in case of a person rendering brief, voluntary and uncompensated service.

Supornick v. Supornick, 222 N. W. 275 (Minn.)

Person driving truck in order to get company of truck driver on hunting expedition.

Texas Indemnity Ins. Co. v. Nobles, 1 S. W. 2nd 451 (Tex.)
Nobles v. Texas Ind. Ins. Co., 24 S. W. 2nd 367 (Tex.)

Boy aiding in making deliveries, with no compensation, and no definite working hours.

Lindberg v. Pantoleon, 274 Pac. 1009

Person substituting for sick brother without knowledge of employer.

Board of Commissioners v. Merritt, 143 N. E. 711 (Ind.)

Person helping employee at latter's request without knowledge of employer.

State v. Ind. Com., 193 N. W. 450 (Minn.)
Hogan v. State Ind. Com., 207 Pac. 303 (Okla.)
Arterburn v. Redwood County, 191 N. W. 924 (Minn.)

Former employee voluntarily doing service for former employer.

Hamilton v. Randall, 276 Pac. 705 (Okla.)

Bystander, called on by foreman to lend a hand in emergency.

Harris v. Oklahoma Natural Gas Co., 216 Pac. 116 (Okla.)

The cases, however, which contain the element of knowledge on the part of the person who receives the services touch on doubtful ground. The fact that services are rendered temporarily and in an emergency, and without definite promise of remuneration are not necessarily fatal to employment, and if done with the knowledge and consent and for the benefit of the person receiving the services, the elements of a contract are present.

Thus a substitution for, or the helping of an employee, with

knowledge of the employer, may bring about the relation of employee and employer.

Schullo v. Village of Nashwauk, 207 N. W. 621 (Minn.)
Benson v. Marshall County, 204 N. W. 40 (Minn.)
Herron v. Coolsaet Bros., 198 N. W. 134 (Minn.)
City of Sheboygan v. Traute, 232 N. W. 871 (Wis.)

So of a farmer helping his neighbor to put out a fire.

Gabel v. Ind. Acc. Com., 256 Pac. 564

So of a traveler injured while assisting a truck driver to release a mired truck.

Johnson v. Wisconsin Lumber & Supply Co., 234 N. W. 506 (Wis.)

Volunteers are excluded if the definition of employer or employee indicates that the relation is for pay or for valuable consideration. (Alabama, Connecticut, Georgia, Indiana, Missouri, Minnesota, South Dakota, Tennessee, Virginia, also probably Delaware and Pennsylvania). The only express exclusion of volunteers is in the New York law, but its position in the 18th group of "hazardous" employments would seem to indicate that it applies to that group only.

2. *Cases where a contract of service is contemplated but not yet complete.*

A contract of service is not complete until the last act necessary to constitute a complete meeting of minds has been performed.

Thus, persons who are proceeding to report for work at a place where the work is to be done are not employees until they have reported or been accepted, or until they actually begin work, even though transportation is furnished by prospective employer.

Susznik v. Alger Logging Co., 147 Pac. 922 (Ore.)
California Highway Com. v. Industrial Com., 181 Pac. 112 (Cal.)
The Linseed King, 48 Fed. 2nd 331

Thus, and with more reason, persons sent to the employer by an employment agency.

Wells v. Clark Watson Lumber Company, 235 Pac. 283 (Ore.)
Brewer v. Dept. of Labor and Industries, 254 Pac. 831 (Wash.)

Thus in case of person undergoing training prior to acceptance.

Fineberg v. Public Service Ry. Co., 108 Atl. 311 (N. J.)

Or a person demonstrating ability to operate machine.

Lederson v. Cassidy & Dorfman, 195 App. Div. 613, 197 App. Div. 912 (N. Y.)

Thus where an offer of employment was made, but injury took place before acceptance.

Young v. Petty Stave & Lumber Co., 7 La. App. 294

It must be observed, however, that the actual beginning of labor is not essential to constitute a valid contract of service. Frequently it is the only evidence of acceptance of an offer of employment, but acceptance may be proven otherwise.

Wabnec v. Clemons Logging Co., 263 Pac. 592 (Wash.)

3. *Cases where a contract is terminated.*

As soon as a contract of employment is definitely at an end, the relation of employee and employer ceases.

Thus a taxi driver, injured while taking out a party after his discharge without the employer's knowledge, is not an employee within the act.

Burke v. Industrial Commission, 201 Pac. 891 (Colo.)

A reasonable time after discharge to complete the preparation for departure and to depart, is, however, allowed before the relationship is at an end.

W. B. Davis & Son v. Ruple, 130 So. 772 (Ala.)

Thus in case of a miner quitting work, injured while going down manway of mine to get tools.

Nutshell v. Consolidated Coal Co., 192 N. W. 145

Thus in case of a "bucker" in a logging camp, giving notice in morning that he would quit that night, and assaulted by foreman as after supper he went to the office to receive his compensation.

Perry v. Beverage, 209 Pac. 1102

But where a discharged employee returning for his tools was injured in voluntarily helping a new employee, he could not recover under the act.

Johnson v. City of Albie, 212 N. W. 419 (Iowa)

Termination of a contract is not accomplished by a temporary lay-off for disciplinary purposes or by interruption because of an injury.

Pet Milk Co. v. Workmen's Comp. Board, 10 S. W. 2nd 455 (Ky.)
Pettitti v. Pardy Construction Co., 130 Atl. 70 (Conn.)

But a person discharged or indefinitely laid off, returning to

the employer's premises requires an act of assent on the part of the employer ere the relation is renewed.

Pederson & Voechtung v. Kromrey, 231 N. W. 267 (Wis.)
El Reno Broom Co. v. Roberts, 281 Pac. 273 (Okla.)

A miner trapped in a burning mine cannot claim the contract terminated by reason of the imprisonment.

Wirta v. North Butte Mining Co., 210 Pac. 332 (Mont.)

A transfer of the business by way of sale or of assignment for the benefit of creditors unknown to the employee does not necessarily discharge the former employee from liability under the act.

U. S. F. & G. Co. v. Industrial Com., 163 Pac. 1013 (Cal.)
Palmer v. Main, 272 S. W. 736 (Ky.)

But if the employee had notice, he doubtless could not hold the former employer. This, too, is of necessity the case where the employer dies or goes into the hands of a receiver. If the employee continues to work, it is as the employee of the estate or its legal representatives.

Keohane's case, 122 N. E. 573 (Mass.)
Unrine v. Salina Northern Ry. Co., 178 Pac. 614 (Kans.)

Similarly, where an employee is injured after a transfer of stock in a foreign corporation, but before the forfeiture of charter, the corporation is liable as employer.

Federal Surety Co. v. Shigley, 7 S. W. 2nd 607 (Tex.)

And where a contractor defaults on a contract, his surety may be charged under its contract with the duties of an employer, even before it has actually taken over the work.

National Surety Co. v. Rountree, 147 S. W. 537 (Va.)

4. *Cases where the relationship of the parties is not voluntary.*

Here, obviously, the elements of a meeting of minds are absent. Such a situation arose where members of a longshoremen's union forcibly assumed the loading and unloading of trucks on a certain dock. It was held that one of the members, injured while loading a certain truck, was not the employee of the truck owner.

Hines v. Stetler Inc., 196 App. Div. 622 (N. Y.)

A very similar case has arisen from the practice in coal mining of having the shot firer chosen and supervised by the union miners, and paid through the union treasury. Here, however, the

courts have in two cases held him an employee because of the mine-owner's consent. But the lack of control on the part of the mine-owner makes the relation more nearly resembling independent contract.

In re Duncan, 127 N. E. 289 (Ind.)
Bidwell Coal Co. v. Davidson, 174 N. W. 592 (Iowa)

5. *Cases where the contract is for an illegal employment.*

A contract made for a purpose definitely illegal is void and unenforceable, and parties to such a contract are not employers and employees within the act.

So of a bartender in an illegally operated saloon.

Herbold v. Neff Co., 200 App. Div. 244 (N. Y.)

The same is true of a contract which explicitly contemplates a violation of the Sunday laws. But the courts have been reluctant to apply the rule in absence of clear evidence that the contract between employer and employee definitely contemplated such work.

Wausau Lumber Co. v. Ind. Com., 164 N. W. 836 (Wis.)

and have declined to apply it merely because the employee did some work on Sunday.

Texas Employers Ins. Co. v. Tabor, 274 S. W. 309 (Tex.)
Frint Motor Car Co. v. Ind. Com., 170 N. W. 285 (Wis.)
Aetna Life Ins. Co. v. Schenck, 10 S. W. 2nd 206 (Tex.)
Maryland Casualty Co. v. Ham, 22 S. W. 2nd 142 (Tex.)

or have held a contract, distinctly contemplating seven days' work a week to be for necessary work.

Maryland Cas. Co. v. Marshall, 14 S. W. 2nd 337 (Tex.)
Maryland Cas. Co. v. Garrett, 18 S. W. 2nd 1102 (Tex.)

It may be taken as certain that a breach of law on the employer's part, distinct from the contract of service, is no ground for voiding the contract.

So in case of a breach of the mining law.

Gunnoe v. Glogora Coal Co., 117 S. E. 484

The chief litigation under this heading has been in cases of minors illegally employed. Child labor laws frequently prohibit the employment of minors below a certain age, or for more than a definite number of hours, or in certain industries; and con-

tracts of service involving such employment are in most states treated as void.

Illinois—
Roszek v. Bauerle & Slack Co., 118 N. E. 991
Messmer v. Ind. Board, 118 N. E. 993
Moll v. Ind. Com., 123 N. E. 562
Kowalczyk v. Swift & Co., 160 N. E. 588
Landry v. E. G. Shinner & Co., 176 N. E. 895

Indiana—
New Albany Box & Basket Co. v. Davidson, 125 N. E. 904
Midwest Box Co. v. Hazzard, 146 N. E. 420
In re Stoner, 128 N. E. 938
In re Moody, 132 N. E. 668
Driscoll v. Weidely Motors Co., 133 N. E. 12
In re Morton, 137 N. E. 62
Raggi v. H. G. Christman Co., 151 N. E. 833
Indiana Mfgs. Recip. Ass'n v. Dolby, 133 N. E. 171

Iowa—
Sechlick v. Harris Emery Company, 169 N. W. 325

Maryland—
Tilghman Co. v. Conway, 133 Atl. 593

Michigan—
Kruckzkowski v. Polonia Publ. Co., 168 N. W. 932
Grand Rapids Trust Co. v. Peterson Beverage Company, 189 N. W. 186
Gwitt v. Fess, 203 N. W. 151

Minnesota—
Pettee v. Nazis, 157 N. W. 995
Westerlund v. Kettle River Co., 162 N. W. 680
Gutman v. Anderson, 171 N. W. 303
Weber v. J. E. Barr Packing Corp., 234 N. W. 682

New Jersey—
Hetzel v. Wasson Piston Ring Co., 98 Atl. 306
Boyle v. Van Splinter, 127 Atl. 257
Lesko v. Liondale Bleach etc. Wks., 107 Atl. 275
Mauthe v. B. & G. Service Station, 139 Atl. 245

Ohio—
Acklin Stamping Co. v. Kutz, 120 N. E. 229

Oklahoma—
Rock Island Coal Co. v. Gilliam, 213 Pac. 833

Pennsylvania—
Lincoln v. National Tube Co., 112 Atl. 73

Rhode Island—
Taglinette v. Sydney Worsted Co., 105 Atl. 641

Tennessee—
Manning v. American Clothing Co., 247 S. W. 103
Western Union Tel. Co. v. Ausbrooke, 257 S. W. 858
Knoxville News Co. v. Spitzer, 279 S. W. 1043

Texas—
Galloway v. Lumbermen's Ind. Exch., 238 S. W. 646
Bridgeport Brick & Tile Co. v. Irwin, 241 S. W. 247
Maryland Casualty Co. v. Scruggs, 277 S. W. 768
Carso v. Norwich Union Ind. Co., 293 S. W. 306
Aetna Life Ins. Co. v. Gilley, 12 S. W. 2nd 821; 35 S. W. 2nd 136; 41 S. W. 2nd 1046

Vermont—
Wlock v. Fort Dummer Mills, 129 Atl. 311

West Virginia—
Mangus v. Proctor Eagle Coal Co., 105 S. E. 909
Morrison v. Smith Pocahontas Coal Co., 106 S. E. 448
Irvine v. Union Tanning Co., 125 S. E. 110
Jackson v. Monitor Coal & Coke Co., 126 S. E. 492

Wisconsin—
Stetz v. F. Mayer Boot & Shoe Co., 156 N. W. 971

But some states, whether by interpretation or by virtue of statutory provisions, hold otherwise.

Alabama—
Chapman v. R. R. Fuel Co., 101 So. 879

Connecticut—
Kenez v. Novelty Compact Leather Co., 149 Atl. 679

Georgia—
Horn v. Planters' Products Company, 151 S. E. 552

Massachusetts—
Pierce's Case, 166 N. E. 636

New York—
Noreen v. Wm. Vogel & Bros., 132 N. E. 102, 231 N. Y. 317
Boyle v. Cheney, 193 App. Div. 408
Decker v. Pouvailsmith Corp., 207 App. Div. 853

Washington—
Rasi v. Howard Mfg. Company, 187 Pac. 327

And the courts are not inclined to carry the principle very far. Thus, a violation of another law does not render unlawful the employment of a minor, otherwise lawfully employed.

Pettee v. Nazis, 157 N. W. 995 (Minn.)
Novack v. Montgomery Ward & Co., 198 N. W. 209 (Minn.)

Evidence that a minor worked more than 8 hours does not prove the contract was for such work.

Gilley v. Aetna Life Ins. Co., 35 S. W. 2nd 136 (Tex.)

Employment of a minor contrary to parent's instructions does not void contract.

Garcia v. Salman Brick & Lumber Co., 92 So. 335 (La.)
Byrd v. Sabine Collieries Corp., 114 S. E. 679 (W. Va.)

Employment of a minor in violation of a city ordinance does not void contract.

Plick v. Toye Bros., 124 So. 140 (La.)
Walsh v. Myer Hotel Co., 30 S. W. 2nd 225

Employment in violation of a rule of Department of Labor and Industries does not void contract.

Hess v. Union Indemnity Company, 100 (Pa.) Super. Ct. 108

If the contract is void, it necessarily follows that the compen-

sation act has no application to the parties. Even where a settlement has been agreed to under the act, the agreement does not bar a suit against the employer.

Grand Rapids Trust Co. v. Peterson Beverage Co., 189 N. W. 186 (Mich.)

The states which have expressly or by implication framed their acts to cover minors illegally employed are, Alabama, Arizona, California, Colorado, Georgia, Kentucky, Illinois, Maryland, Michigan, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, North Dakota, Oregon, Texas, Virginia, Washington and Wisconsin.

A number of these states have added an additional liability by way of penalty for illegal employment of minors.

Kentucky gives the minor an election to receive compensation or to sue for damages.

Virginia permits parents of a minor to sue for loss of services in addition to the minor's compensation.

North Dakota permits a suit for damages in addition to the compensation.

Oregon imposes a liability for 25% additional indemnities, up to a maximum of $500.

Illinois imposes a liability for 50% additional indemnities and gives minor option to sue at law.

Washington requires the employer to reimburse the state fund for 50% of compensation benefits paid.

Alabama, Maryland, Michigan, New Jersey and New York provide for the recovery of double indemnities in some cases.

Wisconsin provides for double indemnities in some cases, treble indemnities in others, and a right to recover the entire wage loss in cases where the indemnities do not equal this amount.

Often the extra indemnities are treated as penalties, to be paid by the employer and not by the insurance carrier. Some states provide that agreements by the carrier to pay these penal indemnities shall be void.

6. *Cases where the parties cannot make a valid contract.*

(a) A person at common law cannot make a contract with himself. Hence an employer cannot claim compensation under an insurance policy as employee.

Ind. Com. v. Bracken, 262 Pac. 521

The application of this principle to partnerships and corporations is discussed hereafter.

Three states, North Dakota, Oregon and Washington, have provisions whereby an employer may insure himself in the state fund to receive benefits provided by the law. This is, of course, not compensation insurance but a form of accident insurance.

(b) At common law, contracts between husband and wife are void. Hence a husband cannot be his wife's employee, nor a wife her husband's.

In re Humphrey, 116 N. E. 412 (Mass.)

This is not necessarily true in all jurisdictions, for the common law has been much modified by statute.

30 C. J. pp. 669, 673, 682

Contracts of a wife with parties other than her husband were void likewise at common law. But the ancient doctrine of coverture has been very largely done away with.

30 C. J. p. 583

The rule that a wife's earnings belong to the husband, which would also prevent contracts of employment between husband and wife, has likewise been much modified.

30 C. J. p. 682

But in any event, a wife working for her husband, in the absence of a specific agreement for wage, would not be his employee.

(c) At common law, the principle that a parent having control and custody of a minor, had the right to his services and earnings would ordinarily prevent a minor, working for his father, being classed as an employee.

Aetna Life Ins. Co. v. Ind. Acc. Com., 165 Pac. 15 (Cal.)

This, of course, has no application when the child is emancipated or comes of age.

Rogers v. Rogers, 122 N. E. 778 (Ind.)
Van Sweden v. Van Sweden, 230 N. W. 191 (Mich.)

Nor does it prevent a minor, working for a firm of which the father is a member, being considered the employee of the firm.

McNamara v. McNamara, 100 Atl. 31 (Conn.)

(This, however, was not the case of a minor, but a son, "mem-

ber of employer's family" under the exception of the Connecticut Law.)

At common law, contracts of a minor with persons other than his parents are not void but voidable. The compensation acts usually make specific inclusion of minors as employees, and the effect is frequently to make a minor under the compensation act practically *sui juris*; so that his elections, and his acceptance of settlements are binding. Where this is not done, provision is made for the performance of necessary acts by parents, guardian or next friend.

Widdoes v. Laub, 129 Atl. 344 (Del.)
Chicago etc. R. R. Co. v. Fuller, 186 Pac. 127 (Kans.)
Gilbert v. Wire Goods Co., 124 N. E. 479 (Mass.)
Rhodes v. J. B. B. Coal Co., 90 S. E. 796 (W. Va.)
Humphries v. Boxley Bros. Co., 135 S. E. 890 (Va.)
Elkhorn Coal Corp. v. Dects, 9 S. W. 2nd 1100 (Ky.)

The same principle renders it necessarily true that a minor cannot change his rights by voiding a contract of service or of independent contract after an injury.

Valente v. Industrial Acc. Com., 228 Pac. 667 (Cal.)
Young v. Sterling Leather Works, 102 Atl. 395 (N. J.)

(d) *Persons non compos mentis* are in a position similar to minors as to ability to contract. The compensation acts generally contain provisions as to the rights of such individuals.

C. *Application of the Acts to Relations Other Than Employment.*

Certain relations which entail the rendition of service are not properly employments, the parties standing to each other in a position other than employer and employee. These may be, and frequently are brought within the acts; but are not within them unless included either specifically or by using words of unusual breadth in the definition of Employer and Employee.

1. *Public Officers.*

All but a very few acts are applicable in some degree to the service of the state, of municipalities and other political subdivisions. These bodies have two distinct classes of functionaries—employees in the generally accepted sense, and public officers.

A public officer is one who by lawful authority is vested with

a portion of the sovereign power of the state. He may occupy a position in the legislative, administrative or judicial departments of the state itself; or in a county, city, town or district. The governor is an officer, and so (usually) is a village policeman or constable. An office differs from an employment in that it is created, not by a contract of service, but by constitution, statute, charter or ordinance. Its duties are established, not merely by the will or direction of a superior, but in part at least by law and usage. It entails a personal responsibility and not infrequently requires the exercise of personal discretion. Positions filled by popular vote are commonly offices. Appointive positions likewise may be offices. Where qualification is by taking oath or giving bond, the presumption is in favor of the place ranking as an office, although these tests are not conclusive or necessary.

As regards the more important positions, there is little room for question as to status. The minor offices are, however, not always clearly distinguishable from employments. To determine whether a particular functionary is an officer or an employee requires careful consideration of the laws under which they come within the public service.

Elective officers are specifically covered by only a few acts. More often they are either absolutely excluded or included to a very restricted degree. Appointive officers are brought within the acts more frequently than elective officers, though there is a tendency here also either to exclude or to restrict particular classes of officers, such as policemen and firemen. Sheriffs, constables and other peace officers are frequently included specifically, though sometimes as specifically excluded.

The ordinary words used to define "employee" are generally not broad enough to cover public officers. A state which covers public officers usually inserts the words "under any appointment" or "under any election". Where public officers are not specifically included, or where these phrases do not appear in the definition of "employee", it raises at least a presumption that public officers, appointed or elected are not within the law. And the specific inclusion of certain officers raises a presumption in favor of the exclusion of all not specifically mentioned.

The mass of litigation on the subject is based so highly on the interpretation of particular statutes that a decision as to the

status of a particular functionary in one state may have very little bearing on a functionary bearing the same general title in another. The discussion may, therefore, be confined to particular classes figuring frequently in the statutes and in the decisions.

(a) Sheriffs and other peace officers.

Sheriffs and their deputies, constables, marshals, and others who have in charge the enforcement of the laws and the making of arrests, are generally classed as officers.

Mono County v. Ind. Acc. Com., 167 Pac. 377 (Cal.)
Bowden v. Cumberland County, 123 Atl. 166 (Me.)

But deputies are not always held public officers.

Rockingham County v. Lucas, 128 S. E. 574 (Va.)
Cinca v. Delta County, 203 N. W. 470 (Mich.)

Nor special deputies and members of the sheriff's posse.

Millard County v. Ind. Com., 217 Pac. 974 (Cal.)
Monterey County v. Rader, 248 Pac. 912 (Cal.)
Vilas County v. Monk, 228 N. W. 591 (Wis.)

So, too, of a village marshal acting outside village on a county warrant.

Village of Schofield v. De Lisle, 235 N. W. 396 (Wis.)

The compensation acts contain a number of instances where these officers are specifically mentioned.

California (which includes all officials) excludes deputy sheriffs and deputy constables not on salary.

Colorado includes sheriffs, deputy sheriffs and members of the posse.

Minnesota includes sheriffs, deputy sheriffs, marshals and peace officers while pursuing or capturing persons charged with crime.

North Carolina includes the sheriff and his deputies.

Oregon includes "salaried peace officers".

South Dakota includes sheriffs, marshals, constables.

Wisconsin has provision like Minnesota.

(b) Policemen and Firemen.

The case of policemen and firemen has been complicated by the presence of provisions of laws granting benefits or provisions; so that in a given case they may be more favorably situated than

under the compensation act. Generally speaking, policemen rank as public officers.

Marlow v. City of Savannah, 110 S. E. 923 (Ga.)
Chicago v. Ind. Com., 125 N. E. 705 (Ill.)
Shelmadine v. City of Elkhart, 129 N. E. 878 (Ind.)
Griswold v. City of Wichita, 162 Pac. 276 (Kans.)
Hall v. City of Shreveport, 102 So. 680 (La.)
Rooney v. City of Omaha, 177 N. W. 166 (Neb.); 181 N. W. 143
Mann v. City of Lynchburg, 106 S. E. 371 (Va.)

So, too, in case of water supply policemen and park policemen

Kahl v. City of New York, 198 App. Div. 30 (N. Y.)
Harris v. City of Baltimore, 133 Atl. 888 (Md.)

and of other public functionaries discharging police functions

Game Warden.

State Conservation Dept. v. Nattkemper, 156 N. E. 168 (Ind.)

Volunteer Deputy Game Warden.

Dept. of Natural Resources v. Ind. Acc. Com., 279 Pac. 987 (Cal.)

Bridge Tender appointed under ordinance.

City of Pekin v. Ind. Com., 173 N. E. 339 (Ill.)

But in the following cases, policemen were held not public officials.

Special Policemen.

Lake v. City of Bridgeport, 128 Atl. 782 (Conn.)
Walker v. City of Port Huron, 185 N. W. 754 (Mich.)

Policemen of incorporated village.

La Belle v. Village of Grasse Pointe Shores, 167 N. W. 923 (Mich.)

Captain of Police, City of Grand Rapids.

Millaley v. City of Grand Rapids, 203 N. W. 651 (Mich.)

Policemen of City of Duluth, not appointed for regular term.

State v. Dist. Court of St. Louis County, 158 N. W. 791 (Minn.)

Policemen of City of St. Paul.

Segale v. St. Paul City Reg. Co., 180 N. W. 777 (Minn.)

Policemen Employed by City.

Fahler v. City of Minot, 194 N. W. 695 (N. D.)

Borough Policemen.

McCarl v. Borough of Houston, 106 Atl. 104 (Pa.)

Village Night Marshal.

Village of Kiel v. Ind. Com., 158 N. W. 68 (Wis.)

Patrolmen or Policemen not appointed under ordinance.

Johnson v. Ind. Com., 158 N. E. 141 (Ill.)
City of Metropolis v. Ind. Com., 171 N. E. 167 (Ill.)

So, too, Firemen are generally held public officers.

Jackson v. Wilde, 198 Pac. 822 (Cal.)
McDonald v. City of New Haven, 109 Atl. 176 (Conn.)
Johnson v Pease, 217 Pac. 1005 (Wash.)
City of Macon v. Whittington, 157 S. E. 127 (Ga.)
(Battalion Chief) Chicago v. Ind. Com., 127 N. E. 351 (Ill.)
(Captain) McNally v. City of Saginaw, 163 N. W. 1015 (Mich.)

But in the following cases were held not public officers.

Firemen and Sub-Officers.

McNally v. City of Saginaw, cited above

Firemen of City of Duluth.

State v. Dist. Court of St. Louis County, 158 N. W. 791 (Minn.)

Firemen of City of St. Paul.

Segale v. St. Paul City Ry. Co., 180 N. W. 777

Volunteer Firemen have been generally held not public officers.

Stevens v. Village of Nashwauk, 200 N. W. 927
Bingham City Corpn. v. Ind. Com., 243 Pac. 113 (Utah)
City of Burlington v. Pieters, 218 N. W. 816 (Wis.)

There are three cases where policemen and firemen were held employees because covered by an insurance policy and their salaries included in the payroll. It is hard to see how by private contract the status of a person could be changed or the scope of the act extended.

Frankfort General Ins. Co. v. Conduitt, 127 N. W. 212 (Ind.)
Maryland Casualty Co. v. Wells, 134 S. E. 788 (Ga.)
Employers Liability Assu. Corp. v. Henderson, 139 S. E. 688 (Ga.)

The variance in the cases is paralleled by a similar variance in the acts. Firemen and policemen are specifically included in the acts of Colorado, Connecticut, Delaware, Colorado, Maryland (officers of state police), and Wisconsin.

They are specifically excluded in the acts of Indiana (if entitled to benefits of pension funds) and Rhode Island, Illinois exclude members of fire department in cities of over 200,000 population.

Volunteer Firemen are specifically included in the laws of Michigan, Missouri, New Jersey, Pennsylvania, South Dakota, specifically excluded from the laws of Colorado. (The effect of general inclusions and exclusions is not here considered) Acts including policemen and firemen generally make specific provision as to cases where they are entitled to pensions.

(c) There are several cases where the service is of a peculiar character, rendering the classification of the person difficult in

the extreme. Members of the National Guard have in some instances been held employees within the act.

Nebraska National Guard v. Morgan, 199 N. W. 557 (Neb.)
State v. Johnson, 202 N. W. 191 (Wis.)
Baker v. State, 156 S. E. 917 (N. C.)

They are specifically included in the act of Virginia; specifically excluded in Colorado.

Officials who are appointed for the convenience of the public and recompensed on a fee basis, such as deputy sheriffs and deputy constables and deputy clerks are excluded by the act of California.

Election Judges and clerks are excluded by the laws of Idaho.

Jurors have been held not officials.

State v. Beaman, 170 N. E. 877 (Ohio)

They are excluded by the law of Idaho.

Other cases, where a person has been held an official, or has been rated an employee within the terms of the act depend so largely upon local statutory law that discussion is inadvisable. The general principles by which an office is distinguished from an employment are set forth at the beginning of the chapter. The decision as to status in a particular case, and the decision as to whether it comes within the provisions of a particular compensation act are dependent entirely upon the terms of the statute under which the person is functioning, and upon the terms of the compensation act.

2. *Officers and Members of Corporations.*

A corporation is an association of individuals engaged in a common enterprise under a charter or certificate of incorporation which enables them for the corporate purposes to act as a legal entity or artificial person. The corporate organization consists of the stockholders, members, a board of directors elected by them, and corporate officers elected in pursuance to the charter and by-laws. This has given rise to the question, is a member or officer of a corporation performing services for the corporation an employee within the meaning of the compensation acts?

There seems to be no reason ordinarily why a stockholder of a corporation may not also rank as employee. The practice of employees acquiring stock ownership in the corporation for which they work is becoming very common and is indeed in many cases

encouraged. The corporate entity is so far distinct from the members that there is no identity in these cases between employer and employee.

Griglioni v. Hope Coal Co., 264 Pac. 1051 (Kans.)

There is, however, a class of corporations where the stock is very closely held: one person or the members of a single family holding substantially the whole of the stock. In such cases the courts have sometimes declined to carry the legal fiction of corporate identity so far as to hold the sole or principal stockholder an employee, considering him to all intents and purposes the proprietor and employer.

Donaldson v. H. B. Donaldson Co., 223 N. W. 772 (Minn.)
Leigh Aitchison Inc. v. Ind. Com., 205 N. W. 806 (Wis.)

This seems to have been the reason for the decision in Bowne v. S. W. Bowne Co., 116 N. E. 364 N. Y., though there the majority stockholder was also president.

But in Kennedy-Kennedy Mfg. Co., 177 App. Div. 56 N. Y., a stockholder holding 95 per cent. of the stock of the company was held an employee. In case of corporate officers and directors, a new question arises, similar to the one raised in case of public officers. They hold by virtue of the by-laws and their appointment or election. There is no contract of service and accordingly, a number of decisions hold that corporate officers as such are not employees within the meaning of the act.

In re Raynes, 118 N. E. 387 (Ind.)
Brown v. Conway Light & Power Co., 129 Atl. 633 (N. H.)
Farr v. Dept. of Labor & Industries, 216 Pac. 20 (Wash.)
Carville v. A. F. Bornot Co., 135 Atl. 652 (Pa.)
Higgins v. Bates Co., 149 Atl. 147 (Me.)
Erickson v. Erickson Furniture Co., 229 N. W. 101 (Minn.)
Enid Sand & Gravel Co. v. Magruder, 297 Pac. 271 (Okla.)

The Oklahoma and New Hampshire cases are probably less illustrative of this principle than of the extremely narrow definition of "employee" used in those states.

Where, however, in addition to duties as an officer, the officer performs such duties as are regularly performed by an employee and receives remuneration based on the performance of such duties, the prevailing tendency is to class him as an employee. In case of a corporation of moderate size, the duties strictly appurtenant to the office are very slight; and a corporate officer very regularly performs a part of the work of the business,

whether as manager or as a workman. The corporation, therefore, has his services and pays him the equivalent of wages; and the principle that if injured while doing the work of an employee he should rank as such is by no means devoid of justice.

In re Raynes, cited above
Dewey v. Dewey Fuel Co., 178 N. W. 36 (Mich.)
Skouitchi v. Chic Cloak & Suit Co., 130 N. E. 299 (N. Y.)
Hubbs v. Addison Light & Power Co., 130 N. E. 302 (N. Y.)
Beckman v. J. W. Oelerich & Son, 174 App. Div. 350 (N. Y.)
Southern Surety Co. v. Childers, 209 Pac. 927 (Okla.)
Eagleson v. Preston, 109 Atl. 154 (Pa.)
Millers' Mutual Cas. Co. v. Hoover, 216 S. W. 475, 235 S. W. 863 (Tex.)
Cook v. Millers' Indemn. Underwriters, 229 S. W. 598, 240 S. W 535 (Tex.)
Small v. Gibbs Press, 225 N. Y. S. 141 (N. Y.)
Zurich Acc. & Liab. Ins. Co. v. Ind. Com. 213 N. W. 630 (Wis.)
Columbia Cas. Co. v. Ind. Com., 227 N. W. 292 (Wis.)
Higgins v. Bates etc. Co., 149 Atl. 147 (Me.)
Black & Sons v. Court of Common Pleas, 150 Atl. 672 (N. J.)
Strang v. Strang Electric Co., 152 Atl. 242
Milwaukee Toy Co. v. Ind. Com., 234 N. W. 748 (Wis.)

The matter has been dealt with in a number of states by statute.

California includes as employees under the act "all officers and members of boards of directors of quasi-public or private corporations, while rendering actual service for such corporation for pay."

Iowa excludes "a person holding an official position or acting in a representative capacity of the employer".

Kutil v. Floyd Valley Mfg. Co., 218 N. W. 613

Montana and Nevada have same provision as California.

New York provides that an executive officer shall be deemed to be included in the compensation insurance contract unless he elects not to be brought within the coverage of the chapter. Election is effected by a writing filed with the carrier. Officers not thus excluded are covered under the policy like other employees and at the same rates. Provisions are added as to estimation of their wage values and their inclusion in the payrolls. An officer who elects not to come within the policy has, of course, no rights as an employee.

Kolpien v. O'Donnell, 130 N. E. 301 (N. Y.)
Weiss v. Baker-Weiss Packing Box Co., 201 App. Div. 97

North Dakota excludes any executive officer of a business concern receiving a salary of more than $2,400.00 a year.

Oregon includes "any member or officer of a corporate employer who shall be carried on the payroll at a salary or wage not less than the prevailing salary of wage".

Texas excludes the president, vice-president, secretary or other officer provided in the by-laws of a corporation, and the directors thereof, notwithstanding they may hold other offices in the corporation and may perform other duties and render other services for which they receive a salary.

The last part of this section was added after the decisions of the Texas cases cited above, and resulted in a subsequent decision in accord with its provisions.

Lumbermen's Reciprocal Ass'n v. Bohlssen, 272 S. W. 813 (Tex.)

Washington has a provision very similar to that of Oregon.

A case somewhat akin to the above is that of the receiver of a corporation. He holds office by virtue of a court appointment and functions as the manager of the corporate business and property. After his appointment, he and not the corporation is the employer, and it is paradoxical enough to hold that he may also be an employee.

Yet there is a case where a miner was designated receiver of a coal mine and after employing a superintendent to manage the mine went to work under him as top boss. The court, following In re Raynes, held him an employee.

Hurst v. Hunley, 141 N. E. 650 (Ind.)

A similar result was reached in a Texas case involving the receiver of an oil lease but the decision was later reversed.

Southern Surety Co. v. Inabnit, 1 S. W. 2nd 412 (Tex.); 24 S. W. 2nd 375

3. *Partnerships.*

(a) The relation of partner to partner is clearly not that of employer and employee. They are common adventurers in an undertaking contemplating the sharing of profits, of losses or of both, and their services are rendered, not for pay, but on account of the common undertaking. There are cases, however, where one or more members of a partnership may contribute their personal service and receive a regular wage therefor; irrespective of the profits which may accrue. This is not unlike an employment, certainly, and an arguable case is raised in favor of holding such

a partner an employee of the firm. On this point the courts have reached opposite conclusions.

It seems clear enough that partners not receiving wages are not employees of the firm.

Thurston v. Detroit Asphalt Paving Co., 198 N. W., 345 (Mich.)
Savant v. Goetz & Lawrence, 107 So. 621 (La.)
Peterson v. Department of Labor & Industries, 295 Pac. 172 (Wash.)

Some states have held a partner receiving wages, irrespective of profits, an employee.

Gallie v. Detroit Auto etc. Co., 195 N. W. 667 (Mich.)
Ohio Drilling Co. v. State Ind. Com., 207 Pac. 314 (Okla.)
Ardmore Paint & Oil Co. v. State Ind. Com., 234 Pac. 582 (Okla.)
Knox & Shouse v. Knox 250 Pac. 783 (Okla.)

More frequently it has been held that a partner, whether or not receiving wages, is not an employee.

Cooper v. Ind. Acc. Com., 171 Pac. 684 (Cal.)
Employers' Liab. Assur. Corp. v. Ind. Acc. Com., 203 Pac. 95 (Cal.)
LeClear v. Smith, 207 App. Div. 71 (N. Y.)
McMillen v. Ind. Com., 13 Ohio App. 310 (Ohio)
Millers' Ind. Underwriters v. Patten, 238 S. W. 240, 250 S. W. 154 (Tex.)
Rockefeller v. Ind. Com., 197 Pac. 1038 (Utah)
Berger v. Fidelity Union Cas. Co., 213 S. W. 235
Wallins Creek Lumber Co. v. Blanton, 15 S. W. 2nd 465 (Ky.)
Gebers v. Murfreesboro Laundry Co., 15 S. W. 2nd 737 (Tenn.)

The matter has been in a number of states settled by statute.

California, Michigan, Nevada and Wisconsin provide that a working member of a partnership receiving wages irrespective of profits shall be deemed an employee.

Washington, Oregon and North Dakota provide a means whereby members of a firm may bring themselves under the coverage of the state fund.

West Virginia provides that a member of a firm shall not be deemed an employee.

(b) The partnership problem enters into the compensation situation in another fashion. A partnership is not a legal entity, though it does as matter of practice do business in the firm name. It occurs not infrequently that a partnership will contract to perform a service of a character and under conditions which would in the case of an individual constitute a contract of employment rather than independent contract. The partnership cannot itself be an employee, which so far as the employee goes is a personal relation.

It has been held in such cases that the individual members of the firm or association are employees, irrespective of the partnership agreement.

Coweta Casing Crew v. Horn, 233 Pac. 475 (Okla.)
Dixon Casing Ass'n v. State Ind. Com., 235 Pac. 605 (Okla.)
Twin State Oil Co. v. Shipley, 236 Pac. 578 (Okla.)
Angell v. White Eagle Oil Co., 210 N. W. 1004 (Minn.)

This problem has also been dealt with by statute. Alaska, California, Nevada and Oregon have a provision that persons associating themselves together under a partnership agreement, the principal purpose of which is the performance of labor on a particular piece of work, shall be deemed employees of the person having the work executed. A special provision is added as to estimation of average weekly earnings.

4. *Bailment.*

Bailment is a contract whereby one takes the property of another to use, with obligation to return the identical property in original or altered form. The relation of bailor and bailee is not that of master and servant. There is one case where the court held a taxicab driver to be a bailee rather than an employee.

Rockefeller v. Ind. Com., 197 Pac. 1038 (Utah)

This, however, is a case to be viewed with some caution as a precedent. If the owner of the vehicle had retained the right to control and direct the driver's activities, there would be little doubt that the contract was one of employment.

5. *Independent Contractors.*

This term comprehends a wide range of contracts, the performance of which necessarily entails labor and service, but wherein the parties to the contract do not stand in the relation of master and servant. An independent contract may involve an extensive operation necessitating the employment of many men and the assembly of large quantities of material and equipment, or it may relate to a mere job, a matter of hours or even minutes, involving merely the labor of a single man. At this end, the distinction between independent contract and contracts of hire for service becomes very vague. But an independent contractor is not within the terms of the compensation acts unless specifically included. Such specific inclusion is occasionally attempted as

will be hereafter discussed; and provisions which under certain circumstances raise a liability on the part of the principal to pay compensation benefits to the employees of an independent contractor are very common. But the inclusions are never so sweeping as to render the distinction between employee and independent contractor unimportant.

(a) *In general.*

The doctrine of "independent contractor" plays an important part in the law of employer's liability. Some courts have indicated a feeling that it is alien to the scheme of workmen's compensation.

Rheinwald v. Builders' Brick & Supply Company, 168 App. Div. 425 (N. Y.)
McDowell v. Duer, 133 N. E. 839 (Ind.)

More generally the courts have recognized the distinction as entirely pertinent to the obligation to pay compensation benefits. The great number of cases, on this point and on others hereafter discussed renders citations inadvisable except to illustrate exceptional points. Since the distinction is in some cases very vague, the principle of liberal construction might justify deciding a close case in favor of employment rather than independent contract.

Domer v. Castator, 146 N. E. 881 (Ind.)

On the whole, however, since the question is jurisdictional and has an important effect on the rights of parties, the courts have not shown anything like a general tendency to depart from what may be regarded as principle.

The nature of the relation between the parties being in either event one of contract, the contract itself is the determining factor. If the contract is in writing, and unambiguous, the contract, on familiar principle, is conclusive as to all details which it covers.

Industrial Com. v. Maryland Cas. Co., 176 Pac. 288 (Colo.)
LaMay v. Ind. Com., 126 N. E. 604 (Ill.)
Opitz v. Hoertz, 161 N. W. 866 (Mich.)

Where the contract is oral, the intent must be determined so far as possible from the language used.

Spickelmier Fuel & Supply Co. v. Thomas, 144 N. E. 566 (Ind.)

But where, as is often the case, the contract is informal and fails to disclose the vital points, those must be determined from usage or from a consideration of all facts relating to the affair.

Many of the cases are founded, not on a single conclusive test, but on a series of tests, no one of which by itself may be sufficient, but which in the aggregate are regarded as justifying the finding. The principal tests used are as follows:

(1) The test regarded as most significant is the measure of control which the principal is entitled to exert.

"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."

39 Corpus Juris 35

"If, however, the employer retains control over the means and methods by which the work of a contractor is done, the relation of master and servant exists between him and servants of such a contractor."

39 Corpus Juris 35

Conversely, an independent contractor is one over whom the principal retains the right to control what result shall be accomplished, but leaves him free to accomplish the result according to his own methods.

This distinction is drawn in case after case, and is generally regarded as conclusive. Every now and then a court indicates that it is not absolutely conclusive or not the sole test.

Barrett v. Selden Breck Construction Co., 174 N. W. 866 (Neb.)

But more generally it is accepted as the governing principle and in any event the existence of the right to control carries great weight.

There are many cases, to be sure, where there is no specific agreement as to the method of work and very little that can be determined from the acts of the parties to show an intent one way or the other. At times this has been held to justify a finding that there was no right of control, and that, therefore, the relation was independent contract.

Fidelity & Deposit Company v. Brush, 168 Pac. 890 (Cal.)
Battey v. Osborne, 115 Atl. 83 (Conn.)

The fact can hardly be regarded as conclusive and may easily be overridden by other evidence. It is not inconsistent with the

relation of master and servant to give the employee considerable discretion and leave him without supervision for long periods.

It is generally agreed that it is the right to control, rather than the actual exercise, which is important. If the employer has the right to intervene and direct the method of doing the work, that settles the status as employment, even though the right was never exercised.

But to constitute an employment there must be a right to control. Mere voluntary acquiescence in supervision is not enough.

Industrial Com. v. Maryland Cas. Company, 176 Pac. 288 (Colo.)

Neither does an interference without right change the relation from independent contract to employment.

McCormick v. Sears, Roebuck Company, 236 N. W. 785 (Mich.)

What constitutes direction and control is frequently an issue. A degree of supervision is consistent with the relation of independent contractor, provided it goes no further than assuring that the contract is being performed in accordance with the agreement; or that there is a proper co-operation between the different contractors engaged on a single piece of work. But the relation of independent contractor implies a free hand to accomplish the results contracted for in his own way; and a control that goes into his methods is inconsistent with this freedom, and establishes the relation of master and servant.

Anything like a review of the mass of cases involving this point is impossible. It is sufficient to observe that a very slight control has at times been held sufficient to establish an employment and that under circumstances where practically for a long time no control could be exerted, as in case of persons employed to drive an automobile between distant points, or even more strikingly, an aviator doing advertising work.

Schonberg v. Zinsmaster Baking Co., 217 N. W. 491 (Minn.)

(2) A line of distinction almost equally conclusive is drawn upon the point whether the parties have the right to terminate the relationship at will.

"Inasmuch as the right to control involves a power to discharge, the existence of the power to discharge is essential and an indicium of the employment."

39 Corpus Juris 35, 36

Likewise, if the workman has the right to quit work at will, he is an employee rather than an independent contractor. The independent contractor is one who undertakes to bring about a certain result. By virtue of his contract, he has a right to bring about the result and to earn the recompense agreed upon, and is liable in damages if he fails to carry out the contract. Hence, if either party may without liability terminate the relation at will, an employment is indicated rather than an independent contract.

This point is frequently cited as decisive. There are a few cases, however, where the test has been held not conclusive.

Wagoner v. A. A. Davis Constr. Co., 240 Pac. 618 (Okla.)
Western Indem. Co. v. Shannon, 242 S. W. 774, 257 S. W. 522 (Tex.)
Royal Indem. Co. v. Ind. Acc. Com., 285 Pac. 912 (Cal.)

And to the general rule there are two well-defined exceptions. It is entirely consistent with the relation of independent contractors to reserve a right to rescind or terminate the contract for failure to do the work properly or for failure to live up to specifications. This is of course very different from the broad power involved in a contract of employment to terminate the relation at will.

Odle v. Charcoal Iron Co. of America, 187 N. W. 243 (Mich.)
Swartz v. Borough of Hanover, 122 Atl. 215 (Pa.)

Also, it is a common enough practice in contracts of employment to stipulate for a notice or to contract for a definite term.

Eng-Skell Company v. Ind. Acc. Com., 186 Pac. 163 (Cal.)

(3) A lack of definiteness in the contract may serve to mark it as a contract of employment rather than independent contract. An independent contractor is, as indicated above, one who agrees to achieve a certain result. His work should, therefore, contemplate a more or less clearly defined job. But the test furnishes no very clear-cut line. Definiteness is a matter of degree, and in transactions between man and man, seldom complete or universal. One employed generally at a given recompense and for no particular time is probably an employee. If the task is definite, if the duration of the work is specified, or the amount to be accomplished, the relation may be either employment or independent contract.

Contracts for piece work, such as cutting wood and lumber at a price per cord or per thousand feet, or contracts for hauling lumber or goods at a price regulated by the amount hauled may

under particular circumstances be decided by the courts as cases of employment or as cases of independent contract. The existence of this uncertain middle ground prevents the test being regarded as conclusive, though it is frequently adverted to. All that can be said is, that to establish a relation of independent contract, some degree of definiteness, an obligation to accomplish something is necessary.

(4) Control over hours of labor is sometimes accepted as furnishing a distinction between employee and independent contractor. If a man agrees to give all his time to a particular task, or to devote definite and substantial working hours such as are usually worked by employees, that may suffice to mark him as an employee. If he is free to come and go as he pleases, is not required to report at any particular time or to make record of his time of leaving, or is not required to give any specific time to the work at all, being held merely to the accomplishment of the task, the relation may well be that of an independent contractor. The test is, however, not conclusive. An employee is not necessarily held down to a strict time schedule, nor is an independent contractor necessarily the complete master of his time. Freedom or the lack of it, in point of hours of labor, is merely an indication, persuasive but not conclusive.

(5) Working for more than one employer, or the right to do so, may in a given case be an element in deciding a person an independent contractor rather than an employee. If one carries on a regular business of contracting or jobbing, and the work done is that which he regularly does for any who call for his services, that may be an important element in marking the particular service as an independent contract. But if one in connection with a more or less regular contract of service does odd jobs for others, the latter fact does not necessarily operate to fix the status of the former relation, particularly if the odd jobs are of less consequence than his regular job. One may be the joint employee of several employees, or may serve several employers severally at different times, ranking as employee of the one for whom he happens to be working at the time. Or one may be an employee during regular hours and an independent contractor for the same employer or for other employers in his odd

time. Nothing is more common than for one regularly employed to take on additional work of an evening or on Saturday afternoons and holidays. The value of the test therefore depends on the particular facts.

Press Pub. Co. v. Ind. Com., 210 Pac. 820 (Cal.)
Sinclair Refining Co. v. Ind. Com., 148 N. E. 291 (Ill.)
Western Metal Supply Co. v. Pillsbury, 156 Pac. 491 (Cal.)
Famous Players-Lasky Corp. v. Ind. Acc. Com., 228 Pac. 5 (Cal.)
Hall v. Ind. Acc. Com., 206 Pac. 1014 (Cal.)
In re Clancy, 117 N. E. 347 (Mass.)
Winslow's Case, 122 N. E. 561 (Mass.)
Chisholm's Case, 131 N. E. 161 (Mass.)
Gallagher's Case, 134 N. E. 344 (Mass.)
Dyer v. James Black Masonry & Contracting Co., 158 N. W., 959 (Mich.)
Woodhall v. Irwin, 167 N. W. 845 (Mich.)
Zoltowski v. Ternes Coal & Lumber Co., 183 N. W. 11 (Mich.)
Sargent v. A. B. Knowlson Co., 195 N. W. 810 (Mich.)

(6) The mode of paying compensation may have some bearing on the nature of the relation, but is not very significant. An employee may be paid in any way: by regular wage, daily, weekly or otherwise: on a piece-work basis: in a lump sum for a particular job: by commissions or fees, or by a share in the profits of a particular work: and there are cases where he may receive no compensation at all or may pay for the privilege of working. Very nearly as wide a range in methods of paying compensation appears in cases classed as independent contractor. To be sure, the payment of a regular wage is more consistent with employment than with independent contract, and payment by lump sum for a particular job or by share in profits more consistent with independent contract than with employment; but the circumstance is in itself not enough to justify the drawing of a conclusion. The mode of paying compensation may, however, be significant in states which define "employee" as one working "for pay" or as one "to whom the employer directly pays wages".

Arterburn v. Redwood County, 191 N. W. 924 (Minn.)

(7) Furnishing of tools and equipment, supplies and material, and agreements for paying expenses or reimbursing the principal for services rendered are of no great weight. An employee may, in connection with his service, do all these things, and the independent contractor may use the tools and equipment and the supplies and material furnished by his principal. There are cases, however, where the furnishing of tools and equipment and the

procuring of supplies and materials is so important and extensive as to indicate an independent contract rather than a contract of service.

(8) The fact that the agreement gives a person the right to employ labor may have some bearing on his status as employee or independent contractor. If the person has no obligation to render personal service, if he may at will employ his own assistants, control and direct them or discharge them, he is almost certainly an independent contractor. If, however, the principal has the right to exercise acts of control over the persons hired, then the principal is the employer of the person and of those employed by him. The circumstance that the principal pays the persons hired, or even puts them on his payroll, is not conclusive evidence of control. Neither is the fact that the subordinate hires and pays his own help conclusive to determine him an independent contractor.

An employee may be vested with authority to engage assistants, and whether they are paid by him or by the employer makes very little difference. (But see Arterburn v. Redwood County, cited above.) The authority may be expressed or implied. The question whether persons hired by an employer are employees of the employer depends on the law of agency. If the employee acted within the scope of an express authorization, or if such employment came within the apparent scope of his authority, then there is a valid contract of service between the employer and the persons hired by the employee. Otherwise the persons hired have no relation to the employer, ranking as employees of the employee.

What constitutes control or the right to control has been previously discussed. One case may be noted where the right to settle disputes between an employee and persons hired by him was treated as sufficient to set up the relation of employer and employee.

Root v. Shadbolt & Middleton, 193 N. W. 634 (Iowa)

(9) Notice may be made of other elements which have entered into discussions on the question of employee or independent contractor.

A stipulation in the agreement that subcontractor and his

employees should be considered as employees of the principal contractor held to settle the relation.

Burke v. Ind. Com. of Utah, 286 Pac. 623 (Utah)

Fact that principal agreed to protect subordinate with workmen's compensation insurance held not sufficient to prove relation of employment.

Svolos v. Harry Marsch & Co., 195 App. Div. 674 (N. Y.)

Fact that principal helped independent contractor in a minor way held not to constitute latter employee.

Beach v. Velzy, 143 N. E. 805 (N. Y.)

Fact that contractor agreed to furnish compensation insurance for his employees held to show relation of independent contractor.

Barrett v. Selden Breck Const. Co., 174 N. W. 866 (Neb.)

Fact that a contractor is bound not to subcontract without consent of principal has some bearing in question whether his relations with subordinates are employment or independent contract.

Herron v. Coolsaet Bros., 198 N. W. 134 (Minn.)

Fact that principal regarded subordinate as employee and so reported him to the Department of Labor and Industries held material.

Hector v. Cadillac Plumbing and Heating Co., 198 N. W. 211 (Mich.)

The fact that the employer would be liable to a third person for injury caused by negligence of worker indicates latter employee.

Clark's Case, 126 Atl. 18 (Me.)

Contracts containing guarantees held independent contract

F. & C. Co. v. Ind. Acc. Com., 216 Pac. 578 (Cal.)
Hall v. Ind. Acc. Com., 206 Pac. 1014 (Cal.)

The above does but scant justice to the great wealth of cases on the subject. As above indicated, the most vital tests are the degree of control vested in the principal and the right to terminate relations. The others are more or less indicative but not conclusive.

(b) *Statutes which specifically include or exclude independent contractors as employees.*

Independent contractors are specifically excluded from the definition of employee in Iowa. Delaware accomplishes the same

in effect by providing that contractors and subcontractors shall be deemed employers and not employees.

Alaska and California exclude "independent contractors" from the definition of "employer", but define the term as "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 the result is accomplished".

This definition is somewhat narrower than the common-law definition of "independent contractor", and the result is to include as employees "a certain number of independent contractors whose service consists of manual labor".

Pryor v. Ind. Acc. Com., 198 Pac. 1045 (Cal.)

Alabama and Minnesota, in the provision of law dealing with schemes for evading the act, provide that this shall not apply to contracts let in good faith and add that a person is not to be deemed a contractor or subcontractor who does work on the employer's premises and with the employer's tools and appliances, nor one who does piecework (the Minnesota act differs from the Alabama act in adding "or under the employer's direction"; also in adding after the provision regarding piece workers: "or in any way when the system of employment used merely provides a method of fixing wages").

It is uncertain from the position of this limitation whether it is intended to make the act generally applicable to the independent contractors included in the limitation, but it is presumed that such is the effect.

Arizona has a definition of "independent contractor", generally in accord with the common-law definition.

"A person engaged in work for another who, while so engaged is independent of the employer in the execution, not subject to his rule or control, but engaged only in the performance of a definite job or piece of work, and subordinate to the employer only in effecting a result in accordance with the employer's design is an independent contractor."

Exceptionally, the provisions of the laws which hold a principal responsible in certain cases for the payment of compensation benefits to the employees of contractors and subcontractors include a liability to contractors and subcontractors as well.

(See laws of Arizona, Colorado, Missouri, Montana, Utah.)

Somewhat more commonly, the provisions of the laws setting up a liability of similar character against lessors of mining property extend the liability to cover the lessees and their contractors and subcontractors, as well as their employees.

(See laws of Arizona, Colorado, Missouri, Nevada, Utah. The Missouri act applies to leases other than of mining property. Under the Kansas law the owner is joint employer with lessee, and presumably not liable to the lessee.)

(c) *Acts raising a liability to pay compensation to the employees of contractors and subcontractors.*

The possibility of using independent contracts as a means for evading liability under the compensation acts, and the feeling that one who employed a contractor or subcontractor owed some duty to the employees from whose labor he derived a benefit, even if he were not their direct employer, led to the enactment of statutes in many states raising a liability in such cases to pay compensation benefits. In California, the laws ran into a constitutional objection.

Carstens v. Pillsbury, 158 Pac. 218
Sturdevant v. Pillsbury, 158 Pac. 222
Western Ind. Co. v. Ind. Acc. Com., 158 Pac. 1033
Thaxter v. Finn, 173 Pac. 163

Hence, in California the principal has no duties to pay compensation to the employees of an independent contractor.

Freiden v. Ind. Acc. Com., 210 Pac. 420

Elsewhere there seems no constitutional objection, the principle involved differing not materially from that behind the statutes for mechanics liens.

All states except Alaska, California, Delaware, District of Columbia, Iowa, Maine, North Dakota, Rhode Island and West Virginia have such statutes. The provisions of the laws exhibit some little variation, and since it is not possible to set them out in detail, it may suffice to indicate the following types of law:

(1) Laws which raise a liability in case of a plan or scheme, fraudulent or otherwise, to avoid the provisions of the compensation act.

(2) Laws which raise a liability in case of a contractor subletting to a subcontractor.

(3) Laws which raise a liability in case of an employer letting out on contract work which is part of his regular business and not merely incidental thereto, and which is conducted on his premises or under his control.

(4) Laws which raise a liability in case of anyone employing a contractor.

This is not an exhaustive list by any means, there being acts which do not fall exactly into any of these four classifications. As indicated in the preceding section, only a few laws raise a liability to pay compensation to the contractor himself: generally they are for the protection of employees.

Centrello's case, 122 N. E. 560 (Mass.)

The character of the liability, too, varies greatly. In some cases the principal appears to be jointly and severally liable with the immediate employer, the employee being free to proceed against either (if both are subject to the act) or against both. He can, however, recover but a single award of benefits.

Kloman v. Ind. Com., 195 N. W. 404 (Wis.)
Burt v. Clay, 269 S. W. 322 (Ky.)
McEvilly v. L. E. Meyers Co., 276 S. W. 1068 (Ky.)

More commonly, the liability of the principal is secondary: one which arises only in case the immediate employer does not comply with the terms of the act, either as to electing to come within the act or as to furnishing the necessary security for the payment of benefits.

Clark v. Monarch Engineering Co., 221 N. Y. S. 93, 161 N. E. 436 (N. Y.)
Corbett v. Starrett Bros., 143 Atl. 352 (N. J.)
Lumsden v. Dwight P. Robinson Co., 162 N. E. 512 (N. Y.)
Artificial Ice & Cold Storage Co. v. Waltz 146 N. E. 826 (Ind.)

In Georgia, it has been held that an employee of a subcontractor must found his claim to proceed against the principal by first presenting his claim to his immediate employer.

Zurich General Acc. & Liab. Co. v. Lee, 136 S. E. 173 (Ga.)

But elsewhere the subcontractor's employee need not show he cannot collect compensation from the subcontractor in order to recover against his employer's principal.

The nature of the obligation of the principal is somewhat peculiar. The act makes him, not the employer, but a quasi-

employer. At the same time, the real employer retains his duties and obligations, whatever they may be. The liability of the principal, in other words, does not avoid the pecuniary liability of the immediate employer.

Kloman v. Ind. Com., 195 N. W. 404 (Wis.)
Artificial Ice & Cold Storage Co. v. Waltz, 146 N. E. 826 (Ind.)

The case of Corbett v. Starrett Bros. cited above states that the liability of the principal is merely a guarantee of the obligations of the subcontractor to insure liability. But this is so only in a very general way. The principal under the terms of the law becomes liable under certain circumstances to pay compensation to the employee exactly as if he were the true employer. In some acts indeed the phrase appears "in any case when such employer would have been liable for compensation if such employee had been working directly for such employer".

But this may set up a liability to pay compensation distinctly different from the liability of the true employer. In numerous cases the true employer is not liable to pay compensation benefits at all, either because he has not complied with the act, or because he is otherwise not subject to its terms. Take the very common case of an employer of less than a certain number of men.

It has been held, in a state where the limit is set at five, that if the principal employs more than five, an employee of a subcontractor who does not come within the terms of the act may still recover compensation benefits from the principal.

Bello v. Notkins, 124 Atl. 831 (Conn.)

This does not hold true in Ohio, where the act seems to call for a different rule. There, in order for the employee of an uninsured subcontractor to have a right against the principal, the principal and the subcontractor must each individually employ regularly at least five workmen.

Ind. Com. v. Everett, 140 N. E. 767 (Ohio)
DeWitt v. State, 141 N. E. 551 (Ohio)

So in Missouri it is held that an employer who has accepted the act is liable to pay compensation to the employee of a subcontractor who has not accepted the act.

De Lonjay v. Hartford Acc. Co., 35 S. W. 2nd 911

A similar result was reached in Wisconsin. This case is notable in that it holds that, irrespective of the fact that the subcontrac-

tor was not under the act, the principal, paying compensation benefits, was entitled to recover the cost from the subcontractor.

Milles v. McCabe, 190 N. W. 81

And the right against the principal apparently exists where the right against the immediate employer has been lost.

Palumbo v. G. A. Fuller Co., 122 Atl. 63

Or where the employee cannot collect damages from his immediate employer.

Machae v. Fellenz Coal Dock Co., 197 N. W. 198 (Wis.)

And in a late case recovery was allowed in case of one who was not an employee, but an unemancipated minor working for his father.

Pruitt v. Harker, 43 S. W. 2nd 769 (Mo.)

The converse case occasionally arises—a case where the employer would not have been liable under the act but for the character of the work done by the contractor. Thus, under the peculiar provisions of the Illinois act which limits the scope of the provision making the principal liable to two classes of employments, the one in question being persons engaged in the business of erecting, maintaining, etc., buildings, the courts declined to hold a college liable for compensation to the employee of a plumber, hired to repair a gas leak.

Lombard College v. Ind. Com., 128 N. E. 553

So, too, in case of a Cooperage Company to the employee of one contracting to paint smokestacks on its factory.

T. Johnson Co. v. Ind. Com., 137 N. E. 789

A series of questions arise under the statutes as to their effect on other rights and liabilities of the parties. Apart from the act, a principal is liable to the employee of his contractor for an accident caused by his own wrongful act; and the circumstance that the immediate employer is under obligation to pay compensation for this accident does not affect the principal's liability.

Tralle v. Hartman Furniture Co., 217 N. W. 952 (Neb.)

The question is, does the act by imposing a liability on the principal affect this other liability? He is at most a quasi-employer, and the argument for exempting him from liability to action at law is not the same as in case of his immediate employer.

It has been held that the same accident cannot be the basis of both an action against the principal to recover compensation and an action at law, this double liability being, according to the court, unconstitutional.

Reed v. Cleveland etc. R. R. Co., 220 Ill. App. 6

Also, that the secondary liability of the principal does not preclude an action at law against him for the wrongful death of the employee of a subcontractor.

Clark v. Monarch Engineering Co., 221 N. Y. S. 93

As to whether this is true in cases where the subcontractor has insured his liability under the act to pay compensation, thus complying with the act, the courts differ. In New York it is held that this circumstance does not bar an action for damages against the principal

Clark v. Monarch Engineering Co., 161 N. E. 436 (N. Y.)
Lumsden v. Dwight P. Robinson Co., 162 N. E. 512 (N. Y.)

But elsewhere it is held that the employer's liability to action at law ceases.

White v. Geo. A. Fuller Co., 114 N. E. 829 (Mass.)
White v. Geo. B. H. Macomber Co., 138 N. E. 239 (Mass.)
Fox v. Dunning, 255 Pac. 582 (Okla.)
New Amsterdam Cas. Co. v. Rinehart & Donovan Co., 255 Pac. 587 (Okla.)

The same problem exists when the principal is under obligation to pay compensation benefits and the immediate employer is not. Assuming that the latter is guilty of a wrongful act, does the fact that another is under the law bound to pay compensation to his employee furnish him a defense? The Wisconsin case cited above would indicate that there the employee may elect to sue or to claim compensation.

See also, Artificial Ice and Cold Storage Co. v. Waltz, 146 N. E. 826 (Ind.)

There is a good argument for either view. On the one hand, the general intent of the compensation laws is not to raise a double right, and a result which gives one indirectly employed rights which a direct employee would not have is peculiar. On the other hand, it is equally anomalous to consider a right of action to which the employee is entitled as having been modified or taken away by the act of a third party.

In most cases where the principal is but secondarily liable,

the secondary liability is avoided by requiring the independent contractor to take out insurance.

Houlihan v. Sulzberger & Sons Co., 118 N. E. 429 (Ill.)
Trumbull Cliff Furnace Co. v. Schackovski, 161 N. E. 238 (Ohio)
Clark v. Monarch Engineering Co., 161 N. E. 436 (N. Y.)
Lumsden v. Dwight P. Robinson Co., 162 N. E. 512 (N. Y.)

And the principal, paying compensation has a right to recover from the immediate employer, even in cases where the immediate employer could not have been held to pay compensation.

Miller v. McCabe, 190 N. W. 81 (Wis.)

Under acts when principal and immediate employer are jointly liable, the one paying compensation should be entitled to contribution from the other.

Burt v. Clay, 269 S. W. 322 (Ky.)
McEvilly v. L. E. Myers Co., 276 S. W. 1068

Requirement of the subcontractor to take out compensation insurance means a real requirement. A mere demand that he insure his liability is not enough.

Butler St. Foundry & Iron Co. v. Ind. Bd., 115 N. E. 122 (Ill.)

Nor is the statute satisfied by a mere agreement of the contractor to protect the principal against liability for injuries to two employees.

Sherlock v. Sherlock, 201 N. W., 645 (Neb.)
(but see Byrne v. Henry A. Hitner's Sons Co., 138 Atl. 826 (Pa.))

As a rule, the statute is not satisfied by anything short of an actual insurance by the subcontractor.

Parker Washington Co. v. Ind. Board, 113 N. E. 976 (Ill.)
Corbett v. Starrett Bros., 143 Atl. 352 (N. J.)

The Indiana law lays down a specific requirement, that the principal require the subcontractor to produce a certificate from the Industrial Board that he has given security to pay compensation as required by law. Under such a provision, nothing less than the actual production of the certificate will serve to discharge the principal.

Chicago etc. R. R. Co. v. Kaufmann, 133 N. E. 399 (Ind.)
Zainey v. Rieman, 142 N. E. 397 (Ind.)
Artificial Ice & Storage Co. v. Waltz, 146 N. E. 826 (Ind.)
Moore v. Copeland, 163 N. E. 235 (Ind.)

The following may be indicated as to the various types of act previously outlined. Acts which impose the liability because of

a plan or scheme, fraudulent or otherwise, to avoid the act, have only occasionally come before the courts. That an actual and definite intent to avoid the act would be illegal may be assumed, and a contract made in pursuance of such a design would be void.

Parker Washington Co. v. Ind. Board, 113 N. E. 976 (Ill.)

But a contract which avoids the compensation act is not necessarily illegal.

McCormick v. Sears, Roebuck Co., 236 N. W. 785 (Mich.)

Under an act which does not use the word "fraudulent", an agreement by a constructor to protect the owner against liability for injuries has been held a "scheme, artifice or device."

Sherlock v. Sherlock, 201 N. W. 645 (Neb.)

On the other hand, an arrangement whereby a subcontractor assigned to a bank the benefit of a contract for the construction of a ditch, the bank's officers becoming his sureties, was held not to be a conspiracy to avoid the workmen's compensation act.

Erickson v. Kricher, 209 N. W. 644 (Minn.)

Acts of this type are, due to the vagueness of their terms, an uncertain protection to the employee and a potential hazard to the principal.

Certain acts apply solely to contractors and subcontractors. Acts of this kind do not raise a liability against a principal employer or owner who is not himself a contractor.

Siskin v. Johnson, 268 S. W. 630 (Tenn.)
Halpin v. Ind. Com., 149 N. E. 764 (Ill.)

If an act applies to contractor and subcontractor, the principal's liability is not limited to the employees of his immediate subcontractors, but extends to the employees of their subcontractors also.

Palumbo v. G. A. Fuller Co., 122 Atl. 633 (Conn.)

And this even if the original contractor had no knowledge of subsequent subcontracts.

Qualp v. James Stewart Co., 109 Atl. 870 (Pa.)

But the liability does not extend to cases where the parties are not in the relation of contractor and subcontractor.

Morrison v. Weber King Mfg. Co., 6 La. App. 388

So, in case of two contractors working on the same premises, but operating under different contracts with owner.

Qualp v. James Stewart Co., cited above

So, in case of a city, letting a contract to clear street of snow

Brooks & Buckley v. Banks, 139 Atl. 379 (Pa.)

So, in cases where contracts may be regarded as terminated

Lange Canning Co. v. Ind. Com., 197 N. W. 722 (Wis.)
Pruno v. Westine, 203 N. W. 330, 204 N. W. 576 (Neb.)

And the liability extends only to operations covered by the contract between the principal and the subcontractor. It is not a general liability to all employees of the subcontractor, however they may be engaged.

Thus in Pruno v. Westine, cited above, the decision turned in part on the fact that the contract was for blasting merely, whereas, the employee was injured in removing rocks after the blast.

Thus in Crane v. Peach Bros., 137 Atl. 15 (Conn.), compensation was refused to a truck driver working for a subcontractor, injured while repairing an automobile chain.

Thus in Rinebold v. Bray, 227 N. W. 712 (Mich.), compensation was refused to the employee of a contractor hauling pipe, injured while picking up tools which had fallen from a truck sent to repair a truck of the contractor.

Acts which raise the liability against owners or proprietors who sublet by contract work, which is a regular part of their business and not merely incidental, furnish a fruitful field of discussion as to what operations may be considered a regular part of their business and what fall into the category of purely incidental.

Operations of construction and repair are commonly regarded as incidental, and not a regular part of the business.

Thus held, in case of a plumber's employee, injured in repairing a gas leak in a college building.

Lombard Coll. v. Ind. Com., 128 N. E. 553 (Ill.)

In case of a cooperage company letting contract to paint its smokestacks on its factory.

T. Johnson Co. v. Ind. Com., 137 N. E. 789 (Ill.)

In case of a machinist, sent by a machine shop to repair machine of principal.

Texas Refining Co. v. Alexander, 202 S. W. 131 (Tex.)

In case of the employee of a contractor erecting a standpipe for a city as part of its water works.

Bamber v. City of Norfolk, 121 S. E. 554 (Va.)

In case of the employee of contractor repairing building for manufacturing company.

Corbett's case, 170 N. E. 56 (Mass.)

In case of employees of contractor for the erection of factory buildings and collateral necessary construction and reconstruction.

Horrell v. Gulf & Valley Cotton Oil Co., 131 So. 709 (La.)

Construction and repair operations may, however, be legitimate parts of the work of the employer.

Thus, one engaged in building and selling houses was held liable to employee of a contractor engaged in erecting houses.

Clementine v. Richie, 1 La. App. 296

Subcontractor's employee injured in removing fire-escape held injured in work not purely incidental to contract of building contractor.

Willard v. Bancroft Realty Co., 159 N. E. 511 (Mass.)

Cases not in accordance with that rule are:

Purkable v. Greenland Oil Co., 253 Pac. 219 (Kans.) Where an oil lessee was held liable to the employer of a contractor injured while constructing a derrick.

Burt v. Munishing Woodenware Co., 193 N. W. 895 (Mich.), where a manufacturer was held liable to the employee of a contractor injured while repairing a boiler.

Window Washers have figured in two cases. In American Radiator Co. v. Finnegan, 254 Pac. 160 (Colo.) the employee of a window cleaning company was held not entitled to compensation from manufacturing company.

In Fox v. Fafnir Bearing Co., 139 Atl. 778 (Conn.), the opposite conclusion was reached.

Contracts involving unloading and transportation have produced a variety of decisions.

Employee of contractor undertaking to unload coal held not entitled to compensation from refining company.

Indiahoma Refining Co. v. Ind. Com., 142 N. E. 527 (Ill.)

Employee of contractor undertaking to remove sawdust from a sawmill held not entitled to compensation from sawmill owner.

Farmer v. Purcell, 201 Pac. 701 (Kans.)

Employee of contractor undertaking to convey lumber owned by manufacturing company to a point where it could be shipped to company's factory held entitled to compensation from company.

O'Boyle v. Parker Young Co., 112 Atl. 385 (Vt.)

Driver for independent contractor hauling coal from coal yard held entitled to compensation from company.

Ind. Com. v. Continental Inv. Co., 242 Pac. 49 (Colo.)

Employee of contractor undertaking to move picks, shovels, etc., for contractor constructing building, held entitled to compensation from principal contractor.

In re Comerford, 113 N. E. 460 (Mass.)

Employee of independent contractor undertaking to move material from employee's yard to building held entitled to recover compensation from employee.

In re Comerford, 118 N. E. 900 (Mass.)

Employee of stevedoring firm, unloading sugar from vessel on pier controlled by refining company held not entitled to compensation from refining company.

McGrath v. Penn Sugar Co., 127 Atl. 780 (Pa.)

City held liable as principal to employee of contractor for removal of garbage.

City of Milwaukee v. Fera, 174 N. W. 926 (Wis.)

Gas Co. operating oil wells held liable as principal to employee of teaming contractor hauling pipe between oil wells.

Seabury v. Arkansas Natural Gas Corp'n, 127 So. 25, 130 So. 1 (La.)

The dividing line should properly come on the point whether the unloading or transportation is a normal part of the operations of the employer or merely an occasional incident; but it cannot be said that the cases are consistent.

For other cases, see

Fish v. Bonner Tie Co., 232 Pac. 569 (Idaho)
McIlvain v. Blue, 203 Pac. 701 (Kans.)
Helton v. Tall Timber Logging Co., 86 So. 729 (La.)
Hasenfuss v. Ind. Com., 199 N. W. 158 (Wis.)

In acts of this type liability is frequently limited to accidents occurring in the course of the employee's work or on premises owned by him or under his control.

For cases on this point, see

Halpin v. Ind. Com., 149 N. E. 764 (Ill.)
In re Comerford, 118 N. E. 900 (Mass.)
Williams v. Buchanan, 261 S. W. 660 (Tenn.)
Siskin v. Johnson, 268 S. W. 630 (Tenn.)

Acts of the fourth type, namely: acts extending liability in all cases where the employer has failed to require a certificate that

the contractor has given security as required by law present little room for argument.

(6) *Lessor and Lessee.*

The relation of landlord and tenant does not ordinarily involve a situation where the compensation acts could apply. But a lease may involve undertakings by the tenant actually outside the normal obligations of tenancy. One well marked instance is in case of leases of mineral properties which are used as a means of exploiting those properties for the benefit of both lessor and lessee. The relation is apparently so similar to a contract of service that a number of states have inserted in these laws provision raising a liability in the lessor to pay compensation to lessees and their employees.

Such provisions appear in the laws of Arizona, Kansas, Nevada and Utah. The Kansas law does not give benefits to lessee, but constitutes the lessor joint employer with lessee.

The Colorado and Missouri laws have broader provisions, treating lessors and lessees substantially on the basis of principals and independent contractors. The Oklahoma law contains a provision as to lessors and lessees which is a masterpiece of obscurity.

Green v. State Ind. Com., 249 Pac. 933 (Okla.)

If a lease is purely incidental to a contract the case is probably within the laws relating to independent contractors.

Wisinger v. White Oil Co., 24 Fed. 2nd 101

Cases involving the relation of lessor and lessee under the laws cited above are not of frequent occurrence.

Under the Kansas law, it is probably necessary to show that an employee claiming compensation from the lessor was under the direction and control of the lessor.

Maughlelle v. J. H. Price & Sons, 161 Pac. 907 (Kans.)

Under the Colorado law, the lessor is liable to an employee of the lessee.

The lessee's agreement to carry insurance does not relieve the lessor.

The lessor's liability exists in cases where the lessee employed only two men, a number insufficient to bring the lessee under the compensation law.

Index Mines Corp'n v. Ind. Com., 259 Pac. 1036

Independently of statute a lessor under a bona fide lease, not made with intent to avoid the compensation act, is not liable to employees of lessee.

Burks v. Glenmora Service Station, 2 La. App. 530
Blake v. Am. Fork & Hoe Co., 131 Atl. 844 (Vt.)

D. *Application of the Acts to Employments Exempt in Whole or in Part by the Operation of Law.*

1. *The United States Government and its Agencies.*

A sovereign state cannot be held liable in contract unless the incurring of the liability is authorized by its constitution or by statute. It cannot be held liable in tort unless it has voluntarily assumed liability.

36 Cyc. 881

This principle, and the fact that the United States Government has never consented to be subject to state compensation laws, and had indeed adopted a compensation law for its employees some years before the earliest state compensation law, so effectively removes the United States from the possibility of being subject to a state compensation law as an employer that no state except North Carolina has even thought it necessary to state that federal employees are not within the act. The provision in the act of the District of Columbia, exempting employees of the United States subject to the Federal Compensation Act, has of course, a real excuse for being.

There is, however, a familiar principle, that while the sovereignty of the state extends to its public corporations, that is to say, corporations created for governmental purposes wherein the sovereign retains the entire beneficial interest, the immunity applies only so long as they engage in purely governmental pursuits. If the state goes into business through a public corporation, it is to that extent so far divested of its sovereign character that the corporation becomes subject to the rules of law governing private corporations.

14 Corpus Juris, P. 75 and cases cited, note 39

This principle has appeared in a few compensation cases.

The Director General of Railroads, during the war was held subject to a state compensation act. Here, however, a presiden-

tial order was involved which made him subject to "all statutes and orders of regulating commissions" of the several states.

Hines v. Meier, 273 Fed. 168

The United States Shipping Board Emergency Fleet Corporation was held subject to the Pennsylvania Compensation Act, and this holding the Supreme Court declined to reverse on writ of error.

U. S. Shipping Board etc. Corp. v. Sullivan, 76 Pa. Super. Court 30
261 U. S. 146

During the war the army sent a company of drafted soldiers to work with civilian employees of a lumber company, getting out timber for the government. One of these soldiers being injured was declared entitled to the benefit of a state compensation act.

Rector v. Cherry Valley Timber Co., 196 Pac. 653 (Wash.)

Similarly, the employee of a contractor, holding a contract for the delivery of U. S. mail, was held entitled to the benefit of a state compensation act.

Comstock v. Bivens, 239 Pac. 869 (Colo.)

There are two cases which involve employees of contractors for the National Forest Service working on land wholly controlled by the government. In both cases the compensation laws were applied:

State v. State Ind. Acc. Board, 286 Pac. 408 (Mont.)
Nickell v. Dept. of Labor & Industries, 3 Pac. 2nd 1005 (Wash.)

Doubtless a state may not exercise its police power in such a way as to hinder the governmental functions of the federal government. But the immunity of the state does not in all cases extend to its functionaries. They are amenable in some degree to the laws of the states in which they are, and there seems no good reason to believe that the cases listed above are at all unorthodox.

2. *Federal Territorial Jurisdiction.*

The Federal Government has territorial jurisdiction and, under Article 1, Section 8, Paragraph 17 of the Constitution, exclusive legislative authority over the District of Columbia and over land ceded to it, or acquired with consent of the state. Doubtless a state can cede its jurisdiction so completely as to bar it from applying its compensation laws to employments operating in the

ceded territory; and in one case it was held that this was the fact.

Willis v. Oscar Daniels Co., 166 N. W. 496 (Mich.)

Ordinarily, however, it seems proper to regard the United States as having the same rights over such territory as any state. A state may extend its compensation law to cover all employers and employees within its territorial jurisdiction. Since the relation is founded on contract, if the contract was made within its bounds, the state has authority to annex to it such conditions as are within its constitutional powers, and can therefore cause the statutory incidents of the compensation acts to go with the contract wherever it is to be executed. But the state cannot prevent a state which gains jurisdiction over both the parties to an employment from regulating that employment within its bounds. In the two cases cited above, involving the Federal Forest Service, state compensation laws were applied to injuries sustained within territory within the control of the United States.

3. *Federal Jurisdiction Over Interstate Commerce.*

Under the provisions of Act 1, Section 8, clause 3 of the Federal Constitution, Congress has power to regulate commerce with foreign nations and among the several states and with the Indian tribes. This power when exercised is sole and exclusive. A state may regulate commerce purely intrastate, and may exercise a police jurisdiction over those transacting interstate commerce within its bounds so long as this does not regulate, prohibit or burden interstate commerce itself. It may, too, with reference to local needs, when the matter regulated is not of a national character and where uniformity is not necessary, make regulations until Congress sees fit to act.

12 Corpus Juris 13-17

But once Congress has acted, this action not only supersedes all state laws on the subject, but excludes additional or further regulation by the states.

In the matter of regulating the rights and duties of employers and employees engaged in interstate commerce, Congress has acted. The Federal Employers' Liability Act (35 Statutes at Large, c. 149), applies to common carriers by railroad while engaging

in commerce between the several states, the District of Columbia or foreign nations. It gives a right of action in tort, based on negligence, in cases where at the time of the injury both the carrier and the employee were engaged in interstate commerce. It does not apply to carriers not operating by railroad, to carriers not engaged in interstate commerce, nor to employees of carriers engaged in interstate commerce, who were not at the time of the injury engaged in interstate commerce.

Congress had therefore acted, but not in a way that covered all the ground covered by the compensation acts. A New Jersey case (Rounsaville v. Central R. Co., 94 Atl. 392) took the position that the compensation act, adding merely a statutory incident to the contract of service, might still have application, although admittedly it could not bar the remedy provided by the Federal Act. Winfield v. N. Y. C. & H. R. R. Co., 110 N. E. 614 (N. Y.) and Erie R. Co. v. Winfield, 96 Atl. 394 (N. J.) took the position that since the Federal Act did not cover injuries not caused by negligence, the compensation acts might apply to such cases. And there were cases which expressed the opinion that compensation acts elective in form might apply to interstate carriers by railroad and their employees if both elected to be subject thereto (Connole v. Norfolk & Western R. R. Co., 216 Fed. 823).

To these points the Supreme Court of the United States registered an emphatic negative.

N. Y. Central R. R. Co. v. Winfield, 244 U. S. 147
Erie R. R. Co. v. Winfield, 244 U. S. 170

The court in these cases took the ground that since the Federal Act had adopted the principle that liability based on negligence governed rights to compensation for personal injuries, this of necessity precluded the states from setting up any other standard; and that Congress intended the act to be comprehensive of those instances in which it excluded liability, as of those in which liability was imposed. It was further indicated that the states might not interfere with the operation of the act, either by putting the carriers and their employees to an election or by attributing such election to them through a statutory presumption.

Accordingly, any award of compensation must be reversed whenever it appears that the employee is the employee of a rail-

road engaged in interstate commerce, and was at the time of the injury himself engaged in interstate commerce.

Philadelphia R. Ry. Co. v. Hancock, 253 U. S. 284

The court had already held that a state act was applicable to railway employees not engaged in interstate commerce.

N. Y. C. R. R. Co. v. White 143 U. S. 188

The question, when is an employee engaged in interstate commerce, belongs properly to the interpretation of the Federal Employers' Liability Act. This has been extensively litigated, and the compensation cases of necessity follow the principles laid down.

Briefly, it may be indicated that with regard to those, actually operating trains or otherwise actually facilitating the transit of goods or persons carried in interstate commerce or maintaining the roadbed and equipment used therein, no question can arise.

Winfield v. N. Y. Central R. R. Co., 244 U. S. 147
Erie R. R. Co. v. Winfield, 244 U. S. 170
P. & R. Ry. Co. v. Hancock, 253 U. S. 284
Paden v. Rockford Palace Fur. Co., 207 Ill. App. 534, 257 U. S. 645
Runge v. Chicago Jct. Ry. Co., 226 Ill. App. 187

When it comes to the case of those engaged in construction, repairs and other incidental operations, the best that can be said is that each case must stand on its own merits as to whether it is part and parcel of interstate commerce or merely incidental. No general rule has been evolved.

Ind. Com. v. Davis, 259 U. S. 182

Without, therefore, going into the interpretation of the Federal Employers' Liability Act, it will suffice to cite a few compensation cases.

The compensation acts do not apply to employees engaged in interstate commerce, even though the Federal Act gives them no redress.

Walker v. Chicago I. & L. Ry. Co., 117 N. E. 969 (Ind.)
Matney v. Bush, 169 Pac. 1150 (Kans.)

If both employer and employee are under the Federal Act, the employee cannot maintain a third party suit under the compensation act.

Schultz v. C. G. W. R. R. Co., 226 Ill. App. 559

A railroad becoming an assenting employer under the Massachu-

setts Act need not insure its employees employed in interstate commerce.

Armburg v. B. & M. R. R. Co., 177 N. E. 665 (Mass.)

Where a flagman employed jointly by an interstate and an intrastate carrier is killed by a train of the interstate carrier, at a time when a train of the intrastate carrier is passing at the same time, the Industrial Commission may grant compensation against the intrastate carrier.

San Francisco & Oakland Terminal Ry. v. Ind. Acc. Com., 179 Pac. 386

There is no reason why the compensation acts cannot apply to carriers other than railroads engaged in interstate commerce. Thus common carriers by water have been held subject to the act.

Lindstrom v. Mutual S. S. Co., 156 N. W. 669 (Minn.)

Likewise express companies

Pushor v. Am. Ry. Express Co., 183 N. W. 839 (Minn.)

and telegraph companies

Western Union Tel. Co. v. Boyd, 294 S. W. 1099 (Tenn.)

To the foregoing should be added a note as to statutory provisions bearing on the subject.

In the District of Columbia, Massachusetts, Nevada, New Hampshire, New Jersey, Pennsylvania, Rhode Island and Wisconsin, there is no provision relative to railroads engaged in interstate commerce. In these states, therefore, the rule would appear to be that the state act applies to railroads save insofar as they and their employees come within the scope of the Federal Act: that is to say, except when both the railroad and its employees are engaged in interstate commerce.

The acts of Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Missouri, South Dakota and Vermont contain statutory provisions in effect establishing exclusions in accordance with the laws of the United States.

A provision appearing in the laws of California, Kansas, New Mexico and Wyoming, that the act shall not apply "to employees or employments which, according to law, are so engaged in interstate commerce as not to be subject to the legislative power of the state, nor to employees injured while they are so engaged" has probably the same effect.

A provision appearing in the laws of Arizona, Maryland, Michi-

gan, New York, Ohio, Utah and West Virginia, that the act shall apply "to employers and their employees engaged in intrastate and also in interstate and foreign commerce for whom a rule of liability or method of compensation has been or may be established by the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separate and distinguishable from interstate or foreign commerce" sets up a rule differing from the above, if at all, in being a trifle narrower. In Maryland, Michigan, New York, Ohio and West Virginia, addenda are made contemplating possible future actions by Congress, or providing means whereby through election or waiver, the state might perchance be enabled to "muscle in". West Virginia having done so much, however, adds a proviso that "this chapter shall not apply to employees of steam railroads or steam railroads partly electrified or express companies engaged in interstate commerce". Why the elaborate provisions preceding this summary proviso are longer necessary is not immediately apparent.

Of the other states, Alabama and Tennessee provide that the act shall not apply "to any common carrier (doing an interstate business) while engaged in interstate commerce"—an exclusion far broader than that required by the Federal Act, which applies only to carriers by railroads. The exclusion contains no reference to the occupation of employees.

Alabama excepts from its act "the operation of railroads as common carriers". Colorado excepts "common carriers engaged in interstate commerce or their employees". Georgia excepts any common carrier by railroad engaging in interstate commerce and any person receiving injury or death while employed by such carrier in such manner. The act does not apply to intrastate common carriers operating by steam power. Kentucky excepts "steam railways or such common carriers other than steam railways for which a rule of liability is provided by the law of the United States".

Minnesota excepts "any common carrier by steam railroad".

Montana excepts railroads engaged in interstate commerce, but declares act applicable to railroad construction work.

Nebraska declares railroads engaged in interstate or foreign commerce subject to the powers of Congress and not within the provisions of the act.

North Carolina excludes railroads and railroad employees.

North Dakota excludes "any employment of a common carrier by steam railroad".

Oklahoma excludes "operating any railroad engaged in interstate commerce".

Oregon excludes railroads engaged in interstate commerce, but permits them to come within the act as to any hazardous operation other than railroad operation and maintenance.

Texas excludes employees of any person, firm or corporation operating any steam, electric, street or interurban railway as a common carrier.

Washington excludes all railroads engaged in interstate and foreign commerce and their employees. It in substance enacts the Federal Act for the benefit of employees of such railroads not covered by the Federal Act and provides for the inclusion of clearly separable intrastate enterprises and industries carried on by such railroads, and also specifically includes railroad construction work.

The provisions of the West Virginia law are noted above.

Most of the above acts exclude more than is required by the Federal Act, creating a class of employees subject neither to the Federal Act nor to the compensation act. Some apparently exclude all employees of the carriers, whether engaged in interstate commerce or not. Some exclude carriers other than those engaged in interstate or foreign commerce by railroad. The interpretation of the specific acts by the courts is not here undertaken.

4. *Employments Coming Within the Maritime Jurisdiction of the United States.*

The maritime jurisdiction of the United States is derived from two sources.

The so-called "commerce" clause, previously adverted to, gives the United States paramount jurisdiction to regulate commerce with foreign nations and between the states. This naturally includes commerce by water as well as by land, and carries by necessary implication rights to control the uses of the navigable waters of the United States. Article III, Section 2, defines the judicial power of the United States as extending "to all cases of admiralty and maritime jurisdiction". This by necessary impli-

cation confers power to regulate the rights and duties of parties within the sphere ordinarily appertaining to admiralty and maritime matters.

Admiralty jurisdiction, as far as the courts are concerned, is a peculiar type of procedure, the characteristic feature of which is the enforcement of rights, whether in contract or in tort by means of an action *in rem,* brought not against individuals, but against the vessel. The Judiciary Act of 1789, by constituting the Federal District Courts as Courts of Admiralty, effectively barred the state courts from exercising this form of process. The act, however, contained a clause "saving to suitors the right of a common-law remedy where the common law is competent to give it"; and under this saving clause, both the Federal and State courts can entertain proceedings at common law; in the form of actions for damages against individuals based either on maritime contracts or maritime torts.

1 Corpus Juris 1253

The jurisdiction of the admiralty courts, in matters of contract, is limited to contracts maritime in character. For non-maritime contracts, or for contracts only partly maritime, the peculiar admiralty process does not obtain.

1 Corpus Juris 1266, note 15
1 Corpus Juris 1267, note 20

What constitutes a contract maritime in character has been extensively litigated. The term is not confined to contracts involving services wholly on water; nor has it reference to the place when the contract is made or to be performed. Generally, it may be said that it is a contract which relates directly to navigation and commerce on navigable waters.

1 Corpus Juris 1266, notes 16, 17, 18

The jurisdiction of the admiralty courts in tort is based on the *locus delicti,* the place where the tort is committed. A tort upon navigable waters of the United States is a maritime tort. Navigable waters of the United States are those which form in their ordinary condition, by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water. It does

not apply to waters wholly within a state, having no navigable outlet. It does apply to canals connecting navigable waters.

1 Corpus Juris 1257, notes 93, 94, 95

The law applied in the courts in maritime cases, in the absence of Federal legislation, is the maritime law. Congress has a right, coincident with the jurisdiction of the admiralty laws, to enact legislation governing the rights and duties of parties in cases of maritime torts. The right of the states to legislate in this field is similar to their right in matters of interstate commerce. They can enact regulatory legislation for local purposes, providing this legislation does not prohibit or interfere with maritime commerce itself; and there is an undefined field wherein they can legislate in the absence of legislation by Congress. But, as was said in Southern Pacific R. R. Co. v. Jensen, 244 U. S. 205, "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, and as transportation between the states including the importation of goods from one state into another, Congress alone can act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter is free."

A certain degree of state legislation in the marine field had, prior to the enactment of the compensation acts, been sustained by the Federal courts. The instance most nearly akin to the compensation problem was the providing of an action for death caused by wrongful act—an action unknown to the common law. The Federal courts not only permitted the state courts to apply these statutes in cases of death caused by maritime torts, but upheld them themselves in appropriate cases.

American Steamboat Co. v. Chase 16 Wall 522
The Hamilton, 207 U. S. 398
La Bourgogne, 210 U. S. 95

The compensation acts, however, raised a peculiar problem. They affected the remedy for actions in tort, substituting therefor a remedy sounding in contract; and the remedy thus provided was exclusive. Question at once was raised, whether a state could apply its compensation laws to contracts of service maritime in character, and as to whether a state law, extraterritorial in character, was applicable to cases involving maritime torts.

The application of state compensation acts to maritime cases was halted by the case of Southern Pacific R. R. Co. v. Jensen, 244 U. S. 205. This involved the case of a stevedore injured on board a vessel. The employment was maritime in character, the injury sustained on navigable waters of the United States. The court held that to such a case the state compensation act had no application. The precedents regarding state death statutes were regarded (in the majority opinion) as not controlling, this not being an attempt to supplement the maritime law, but to abrogate it and set up an exclusive remedy of a different character. The court also felt that this was a matter wherein the usages of maritime commerce required uniformity.

Clyde S. S. Co. v. Walker, 244 U. S. 255, very similar in its facts, was decided in the same way

The case of Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, involved, not the compensation act but the right of a state to do away with the well-known maritime rule that a seaman's right of recovery for injuries was limited to wages, maintenance and cure, and to substitute the full indemnity rule of the common law. This the court held the state might not do. Subsequently the Congress passed the act of June 5, 1920 c. 250, which in substance applied the Federal Employers' Liability act to seamen. This operated to remove conclusively cases involving seamen from the compensation laws. The act has been rather liberally applied to include cases of non-seamen doing work customarily performed by seamen.

International Stevedoring Co. v. Haverty, 269 U. S. 549, 272 U. S. 50
Employers' Liability Assur. Corp. v. Cook, 281 U. S. 233

The case of Peters v. Veasey, 251 U. S. 121, was the case of a longshoreman injured on a vessel while removing cargo. The decision was in accord with Southern Pacific S. S. Co. v. Jensen. In this case mention was made of the act of October 6, 1917, c. 97, passed in consequence of that case, and amending the clauses of the Judiciary act saving to suitors the right of remedy at common law by adding the words "and to claimants the rights and remedies under the Workmen's Compensation Law of any state". This was passed after the cause in suit arose, and the court held it had no retroactive effect.

The case of Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, involving the death of a bargeman drowned while doing work of

a maritime nature, rendered it necessary to pass directly upon the merits of this law. The court held it invalid as involving an unconstitutional delegation of legislative power. Congress made a second attempt to legislate on the subject, in the Act of June 10, 1922, c. 216, substituting for the clause declared invalid the phrase "and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any state, district, territory or possession of the United States". For the reason given above, this was later declared unconstitutional.

State of Washington v. W. C. Dawson Co., 264 U. S. 219
Industrial Accident Commission v. Rolph id.

The matter was finally settled by the enactment of the United States Longshoremen's & Harbor Workers' Compensation Act, applying to injuries sustained on waters of the United States by certain maritime employees.

Meantime, the court had established two points in development of the principle laid down in Southern Pacific S. S. Co. v. Jensen, which, it will be recalled, was the case of a maritime employee injured on navigable waters of the United States.

In State Ind. Com. v. Nordenholt Corp., 259 U. S. 263, involving the case of a longshoreman injured on the dock, the court held that the contract of employment, though maritime in character, did not contemplate any dominant Federal rule concerning employers' liability in damage: and held that it made no difference whether the compensation liability was predicated upon an implied agreement of employer and employee, or otherwise, since in either case there would be no conflict with any Federal statute, and no material prejudice to any characteristic feature of the general maritime law. This in effect permitted the compensation acts to apply to injuries on shore, even though the injured persons were engaged in maritime employment.

The second point was developed through the case of Western Fuel Co. v. Garcia, 257 U. S. 233. This involved an action for damages on account of death by accident on shipboard. In its decision the court stated, "The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts, when following the common

law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."

This rule was applied to compensation cases. In Grant Smith Porter Co. v. Rohde, 257 U. S. 469, involving an action for damages by a carpenter injured while at work on a partially completed barge lying in a navigable river, the court indicated that this was a case where the remedy under the above rule was properly under the state compensation law.

In accordance with this rule were decided the cases of

Millers Indemnity Underwriters v. Braud, 270 U. S. 59, the case of a driver killed while removing obstructions from navigable waters. Remedy declared to be under compensation law.

Alaska Packers Ass'n v. Ind. Acc. Com., 276 U. S. 467, the case of one employed by a California corporation as seaman, fisherman and for general work in and about a cannery, injured after fishing season was over, while standing upon the shore and endeavoring to push a stranded fishing boat into deep water so that it might be floated to the place where it was to be stored for winter. Award of compensation upheld.

The case of Lahti v. Terry & Tench Co., 148 N. E. 527, involved the case of an employee injured while standing on a raft in navigable waters, engaged in constructing a pier. The Industrial Commission's award of compensation was reversed by the court on the ground that the injury occurred on navigable waters of the United States. This was reversed on certiorari (269 U. S. 548, 273 U. S. 639) in accordance with Millers' Indemnity Underwriters v. Braud; but the case is somewhat different, being a non-maritime employment.

Barring these exceptions, the court has adhered to the rule that the rights of persons engaged in distinctly maritime employments and injured on navigable waters are governed by the maritime law.

Robins Dry Dock & Repair Co. v. Dahl, 266 U. S. 449
International Stevedoring Co. v. Haverty, 272 U. S. 50
Great Lakes Dredge & Docks Co. v. Kierejewski, 261 U. S. 479
Gonsalves v. Morse Dry Dock & Repair Co., 266 U. S. 171
Messel v. Foundation Co., 274 U. S. 427
Northern Coal & Dock Co. v. Strand, 278 U. S. 142
Baizley Iron Works et al v. Span, 281 U. S. 222
Employers' Liab. Assur. Corp. v. Cook, 281 U. S. 233

The same rule is applied in determining the application of the U. S. Longshoremen's & Harbor Workers' Act.

Nogueira v. N. Y., N. H. & H. R. R. Co., 281 U. S. 129

The substance of these cases appears to be as follows:

(a) Federal maritime jurisdiction does not apply to cases of injury on land, even when the employment is maritime in character, and state compensation acts are properly applied to such cases.

(b) In case of employments clearly maritime in character, where injury is sustained on navigable waters of the United States, the rights of the parties are governed generally by the maritime law and the state compensation act has no application.

(c) In case of non-maritime employments and maritime employments of such a nature that they may be regarded as local in character, and where the modification of the maritime law will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law, state compensation acts may be regarded as applicable, even though the accident occurs on navigable waters of the United States.

(d) Where the United States has enacted a law covering the rights and duties of the parties to maritime contracts and the rights and duties of parties affected by maritime torts, that law is paramount and exclusive.

It may be noted that the third rule establishes a very indefinite line, which can only be made definite by judicial decisions. The act of June 5, 1920, establishing a rule of liability in case of seamen, and the United States Longshoremen's & Harbor Workers' Compensation Act have definitely removed two extensive classes of marine cases beyond any possibility of application of the state compensation acts. The line doubtless remains of importance as defining the application of the U. S. Longshoremen's & Harbor Workers' Act, but the question as to which of two compensation acts applies is by no means so important as a fighting issue as the question of whether the remedy is by compensation or by action at law.

The cases in state and federal courts are very numerous; but in view of the paramount authority of the supreme court cases, need not be discussed. It may be noted that the tenor of the Supreme Court cases is strikingly conservative: surprisingly so in view of the liberality of that tribunal in the passing on the constitutionality of workmen's compensation acts.

Statutory treatment of the subject appears in several states.

The District of Columbia Act excepts from its act the masters or crews of vessels. These are also excepted from the U. S. Longshoremen's & Harbor Workers' Act.

Louisiana excepts from its act "the master, officers or any members of the crew of any vessel used in interstate or foreign commerce, which said vessel is not registered or enrolled in the State of Louisiana".

Maine excepts employees engaged in maritime employment or in interstate or foreign commerce who are under the exclusive jurisdiction of the maritime law of the United States.

Maryland, which defines as "extra hazardous" the operation and repair of vessels, excludes "vessels of other states or countries used in interstate or foreign commerce".

Massachusetts and Texas exclude "masters of and seamen of vessels engaged in interstate or foreign commerce".

Washington excludes masters and crews of vessels. The act applies to other maritime employments "for whom no right or obligation exists under maritime law for purposes of injury or death".

The statutory provisions regarding interstate commerce, cited under the preceding heading, sometimes are broad enough to apply to interstate or foreign commerce of maritime character. In view of the Federal decisions and legislation, they are not of practical importance.

5. *Public Employments.*

Public employments, that is to say, employments by the state or by other governmental agencies, are frequently brought specifically within the compensation laws. Unless so included, they do not ordinarily come within the general definition of "employer" and, indeed, the immunity of a sovereign state and its agencies when engaged in governmental functions, from any contract liabilities except those incurred by it under the constitution

or under statute, and from liabilities in tort except those which it assumes, prevents its inclusion in any general phrase.

There is one exception to this. Where a governmental body engages in work private in character, its governmental immunity ceases. This would not ordinarily be true of the state, but might be true of municipalities or other public corporations.

Brown v. City of Decatur, 188 Ill. App. 147
Forsythe v. Pendleton County, 266 S. W. 639 (Ky.)
Texas Employers Ins. Ass'n v. City of Tyler, 283 S. W. 929 (Tex.)
McCormick v. Kansas City, 273 Pac. 471 (Kans.)
Dunaway v. Austin Street Ry. Co., 195 S. W. 1157 (Tex.)

While as aforesaid, public employments are in most states brought within the act, there is a deal of uncertainty as to the effect of the act. Some governmental bodies are not statutory, but created by the constitution or given a constitutional status; and unless the act conforms to the constitutional provisions, it is, of course, ineffective.

Thus, a general inclusion of the state in the compensation act is not sufficient to include the Agricultural Board, or Agricultural College when those are given a separate status by the constitution.

Agler v. Michigan Agricultural College, 148 N. W. 341 (Mich.)

Thus, in Texas, the legislature has no power to make the compensation act applicable to cities and towns, or to authorize them to make insurance for their employees.

City of Tyler v. Texas Employers Ins. Ass'n, 288 S. W. 409
Georgia Casualty Co. v. Lackey, 294 S. W. 276

Thus in Georgia, the legislature has no power to make the act applicable to counties or their agencies.

Floyd County v. Scoggins, 139 S. E. 11
Murphy v. Constitution Ind. Co., 157 S. E. 471
Perdue v. Maryland Casualty Co., 160 S. E. 720

Similarly, where the compensation act is passed under a special constitutional provision, the wording of that provision may limit the application to particular governmental organizations.

Thus in New York, question has been raised as to the application of the act to governmental organizations, due to the word "business" in the amendment.

Beeman v. Board of Education, 195 App. Div. 357
Krug v. City of New York, 196 App. Div. 226

The point, however, seems very narrow, and has been overlooked in later decisions.

Bailey v. School Dist. No. 3, 204 App. Div. 125
Hughes v. City of Buffalo, 208 App. Div. 682

The point was raised in California under both the constitutional provisions empowering the enactment of a compensation law and the provisions relating to the City of Sacramento. Here, however, the court gives both provisions a liberal interpretation: particularly in respect to the word "persons", which ordinarily would seem hardly sufficient to include all the bodies to which the California Act applies.

City of Sacramento v. Ind. Acc. Com., 240 Pac. 792

Other questions arise in case of governmental bodies created by special act. As a general rule of construction, an act general in character is presumed not to modify special acts. This presumption may, of course, be overcome by evidence of the legislative intent. Whether the compensation act applies to such a body at all, or if it applies, what construction shall be given to special charter provisions inconsistent therewith, have given rise to a number of cases.

City of Superior v. Ind. Com., 152 N. W. 151 (Wis.)
McNally v. City of Saginaw, 163 N. W. 1015 (Mich.)
Millaley v. City of Grand Rapids, 203 N. W. 651 (Mich.)
Walker v. City of Port Huron, 185 N. W. 754 (Mich.)
State v. Dist. Court of St. Louis County, 158 N. W. 790 (Minn.)
Segale v. St. Paul City R. R. Co., 180 N. W. 777 (Minn.)

The inclusion often brings up questions tending to limit the application apparently intended. Where, for instance, the definition of "employee" or "employment" is limited to a trade or business carried on "for gain", there is a real question as to whether the state or any of its subordinate divisions are under the act with respect to their governmental activities, which are certainly not carried on for gain.

Thus, a city constructing a sewer is not engaged in a "gainful enterprise" within the act.

Roberts v. City of Ottawa, 165 Pac. 869 (Kans.)
Redfern v. Eby, 170 Pac. 800 (Kans.)

Thus, the janitor of a schoolhouse was held not within the act.

Ray v. School Dist. of Lincoln, 181 N. W. 140 (Neb.)

Thus, a city policeman

Rooney v. City of Omaha, 181 N. W. 143 (Neb.)

Thus, of a school teacher. In this case the act provided that hazardous employments carried on by a state, municipal corporation or other subdivision are within the act, notwithstanding the

definition. But since the list of hazardous occupations did not include school teaching, the definition of employment as a business carried on for "pecuniary gain" was held to bar compensation.

Beeman v. Board of Education, 195 App. Div. 357 (N. Y.)

Thus, the State of New York was held not engaged in business for gain while constructing a state highway.

Allen v. State, 173 App. Div. 455 (N. Y.)

But the New York Law as amended does not require a town to be engaged in a trade or business for pecuniary gain in order to be subject to the act.

Kittle v. Town of Kinderhook, 214 App. Div. 345

and in Oklahoma the point as to pecuniary gain does not appear to apply to municipalities.

Oklahoma City v. State Ind. Com., 298 Pac. 577 (Okla.)

See also

East St. Louis Board of Education v. Ind. Com., 131 N. E. 123 (Ill.)

Similarly, question has been raised as to whether governmental work is a "business" within the act.

Gray v. Board of Commissioners of Sedgwick County, 165 Pac. 867 (Kans.)
Beeman v. Board of Education, 195 App. Div. 357 (N. Y.)
Krug v. City of N. Y., 196 App. Div. 226 (N. Y.)
Robertson v. Board of Commrs. of Labette County, 252 Pac. 196 (Kans.)

On the other hand, this narrow rule was very definitely rejected in California, the case holding that a county engaging a woman to act as election inspector was engaged in "business" within the act.

Los Angeles County v. Ind. Acc. Com., 265 Pac. 362

See also

Bailey v. School Dist., 204 App. Div. 125 (N. Y.)

The question as to whether the inclusion applies to all acts of a governmental body or merely to those performed in a non-governmental character is more or less involved in the above. But in favor of the more liberal construction, see

City of Atlanta v. Hatcher, 121 S. E. 864 (Ga.)
Hughes v. City of Buffalo, 208 App. Div. 682 (N. Y.)

When governmental organizations are included within the act,

the presumption is that all provisions as to "hazardous" employments apply to them.

City of Rock Island v. Ind. Com., 122 N. E. 82
O'Brien v. Chicago City Ry. Co., 127 N. E. 389 (Ill.)
City of Chicago v. Ind. Com., 129 N. E. 112 (Ill.)
East St. Louis Bd. of Education v. Ind. Com., 131 N. E. 123 (Ill.)
Board of Education v. Ind. Com., 134 N. E. 70 (Ill.)
Gray v. Board of Commrs. of Sedgwick Co., 165 Pac. 867 (Kans.)
People Ex rel Terbush & Powell v. Dibble, 159 N. Y. S. 29, 132 N. E. 901 (N. Y.)
Ponca City v. Grimes, 288 Pac. 951 (Okla.)
Mashburn v. City of Grandfeld, 286 Pac. 789 (Okla.)
Oklahoma City v. State Ind. Com., 298 Pac. 577 (Okla.)
Bd. of Trustees v. Ind. Com., 299 Pac. 155 (Okla.)
City of Muskogee v. State Ind. Com., 300 Pac. 627 (Okla.)

Question has been raised as to whether the laws creating a statutory liability to employees of independent contractors apply to governmental bodies.

Saxe's Case, 136 N. E. 104 (Mass.)
Rader v. County Court of Roane County, 119 S. E. 479 (W. Va.)

This matter is frequently specifically covered by statute; but there is one case which, notwithstanding a statute providing that the employee of an independent contractor should not be considered an employee of the city, held such an employee entitled to compensation from the city.

City of Chicago v. Ind. Com., 129 N. E. 112

The penal liability for employing a minor without permit has also been enforced against a municipality.

Town of New Holstein v. Daun, 209 N. W. 695 (Wis.)

There are also certain statutory provisions as to the appointment and employment of public employees, such as the civil service law, which are doubtless not affected by the compensation act, and which constitute a certain limitation on the definition of "employee". A public employee must be lawfully employed in order to obtain compensation.

The tendency indicated by the above cases is to treat public employments as on the same basis as private employments: that is to say, assuming that each and every provision defining "employee" and "employment" and raising a liability of employee to employer apply to the public employers and those employees covered by the act. In some cases this is entirely proper, but the decisions which have applied the phrases "trade

or business" or "trade or business carried on for profit or gain" to public employments have worked a restriction so notable as to make the inclusions of public employments little more than a gesture. Almost none of the state's activity is carried on for gain or profit, and it cannot be strictly regarded as trade or business. It is to be taken as an instance where the practice of the courts in construing strictly all acts relating to state or municipal powers and obligations has prevailed over any tendency towards liberal construction of the compensation laws.

The extent to which public employments are covered depends also upon the terms used. The familiar rule of construction *"expressio unius est exclusio alterius"* causes specific inclusions to act automatically as exclusive of all others, and in the present case the rule is strengthened by the principle of the immunity of the sovereign. Public employments are carried on under organizations created by constitution and by statute, and the number and variety of such organizations is in some states prodigious. Consequently the formula for inclusion differs widely in the several states. Some effect a broad coverage by means of a few broadly inclusive terms; others, in particular California and Missouri, consider it necessary to make many specific inclusions.

The terms describing public employments appearing in the various acts are as follows:

(a) *"The State."*

This applies to the state organization proper, including its departments and commissions, but not its subsidiary organizations, not directly operated by the state. Even a state department recognized by the constitution may not come within the act by virtue of a general inclusion of the state.

Agler v. Michigan Agricultural College, 148 N. W. 341 (Mich.)

(b) *General Terms.*

Political subdivisions is a term broad enough to cover any division which the state sees fit to make of its governmental power, whether to corporations, public or quasi-public, or to unincorporated agencies.

Political subdivisions of counties are referred to in Oregon; *of municipalities* in Kentucky and New York. Towns are in some states treated as political subdivisions of counties, otherwise

these more limited terms would appear to refer to allotments of governmental duties and functions among districts or agencies. A road district has been held to come within the terms in Louisiana.

Hicks v. Parish of Union, 6 La. App. 543
See also Bettencourt v. Ind. Acc. Com., 166 Pac. 323 Cal.

Public Corporations refers to corporate bodies devoted exclusively to the public interest wherein the entire proprietary interest is in the state or other governing body. The term includes municipal corporations and other corporations of a public character.

Bouvier's Law Dictionary, title "Corporations"

It does not include an unincorporated agency.

Bettencourt v. Ind. Acc. Com., cited above
State v. State Ind. Board, 286 Pac. 408 (Mont.)

Quasi-public corporations or as in Delaware, *corporations public quasi*, refers to corporations wherein the proprietary interest is private but which are charged with public duties or vested with special powers in excess of those granted private corporations. In general, public service corporations.

Bouvier's Law Dictionary, title "Quasi-Public Corporations"

Municipal Corporations refers to a public corporation created by the state consisting of the inhabitants of a particular district, empowered to conduct local affairs of government and to exercise a limited power of local legislation. The term includes cities, and also incorporated counties, towns and villages; but does not refer to counties, towns and villages when unincorporated.

Bouvier's Law Dictionary, title "Municipal Corporations"
Dillon on Municipal Corporations, sec. 32

Municipality and *municipal work* (used in Kentucky) probably mean the same thing. *Municipality,* however, properly refers to the municipal organization rather than to the corporation.

Bouvier's Law Dictionary, title "Municipality"

Municipality or *municipal corporation* do not include associations.

Canadian County v. Burgess, 5 Pac. 2nd 752 (Okla.)

Quasi-municipal corporations appears in the law of Maine, referring to unincorporated districts. The term is applied to counties, towns or districts not incorporated.

Bouvier's Law Dictionary, title "Municipal Corporations"

Body Politic appears in the law of Illinois. It appears broad enough to include any incorporated body of persons, from the state itself down to private corporations.

State Agencies and *Public Agencies* used in the California law and *governmental agencies* used in Nebraska, Pennsylvania and West Virginia, are terms of magnificent breadth, sufficient to include any organization for carrying on governmental work, corporate or unincorporate.

See Nebraska National Guard v. Morgan, 199 N. W. 557 (Neb.)
Bettencourt v. Ind. Acc. Com., cited above
Rusk Farm Drainage District v. Ind. Com., 202 N. W. 204 (Wis.)

(c) *Specific Terms.*

Counties—A county is a civil division of the state, made for judicial and political purposes. It is primarily an instrument of the state, rather than of local self-government. In some states it ranks as a public or municipal corporation; elsewhere it is not incorporated and ranks as a "political subdivision."

Bouvier's Law Dictionary, title "County"

City and County—A body exercising both county and municipal functions. It appears in the laws of California, Nevada and Montana. In California the term includes Los Angeles and San Francisco.

It is to be suspected it came into the laws of the other states by the copying process.

City—A city is a municipal corporation, incorporated either by special legislative charter or under the terms of a general law. In New England is a real line of cleavage between cities and towns, based on the distinction between direct and representative government. The line of distinction elsewhere is by no means so clear. In some states a city is merely a big town, distinguished by title or by a different statutory treatment based on size and population.

Dillon on Municipal Corporations, sec. 32, note

These are specified in the laws of Idaho and Missouri.

Cities under Special Charter—The term "city" seems broad enough to cover cities under special charter and cities under general laws. The specification is perhaps designed to avoid any presumptions that the compensation act did not modify the terms

of a special act. Special provisions of city charters have on occasion, as previously noted, figured in compensation litigation.

Cities under Commission Form of Government—Specified also in Idaho and Missouri. Possibly under the impression that a city under commission form of government is a hybrid organization. Generally, the term "city" would appear inclusive of a city under commission form of government.

Town—A town when incorporated ranks as a municipal corporation, and is such generally in New England, and frequently elsewhere. But it is sometimes no more than a subdivision of a county ranking as a quasi-corporation or a political subdivision.

Township—Is used in a number of laws. In some states "township" is used as "town" is used elsewhere. But under the Acts of Congress it refers to a subdivision of public land.

See Bouvier's Law Dictionary, title "Town," "Township"
Hop v. Brink, 217 N. W. 551 (Iowa)

Village—Appears in a number of laws, some of which specify "Incorporated village". The term means properly an assembly of houses; but under the laws of some states villages are incorporated and rank as municipal corporations. Elsewhere they are quasi-corporations or political subdivisions.

Bouvier's Law Dictionary, title "Village"

Borough—Appears only in the laws of Minnesota. The term is used in Pennsylvania, Connecticut and New Jersey to designate a political subdivision organized for municipal purposes.

Bouvier's Law Dictionary, title "Borough"

Parish—Peculiar to Louisiana, where it refers to a political division similar to a county.

District—Appears rather frequently in the laws. Massachusetts (districts having the power of taxation), Washington (other taxing districts), and California and Montana (all other districts) cover districts generally. Elsewhere they are included specifically. School districts occur frequently in the laws; less frequently irrigation districts, drainage districts, sewer districts, highway and road districts, water districts, swamp districts, levy districts and "conservancy" districts.

Districts are political subdivisions of a state, county or municipality, created for particular purposes and exercising limited gov-

ernmental powers, notably powers of taxation. Districts have figured in several compensation cases.

In California, the words "school districts and all public corporations therein" were found too narrow to include a reclamation district, the court holding it not a corporation, but a governmental mandatory or agent.

Bettencourt v. Ind. Acc. Com., 166 Pac. 323

In Wisconsin, a drainage district was held, not a corporation, but a governmental agency, and not within the terms of the act.

Rusk Farm Drainage District v. Ind. Com., 202 N. W. 204

In Louisiana a road district was held to come within the term "political subdivision".

Hicks v. Parish of Union, 6 La. App. 543

(d) *Other Terms Occasionally Used*

State Department (Kentucky, Oregon, West Virginia)

Probably not necessary if the state is included, save in the exceptional case presented in Agler v. Michigan State Agricultural College, 148 N. W. 341.

Otherwise an employee of a department or commission would be an employee of the state.

Smith v. State Highway Com., 109 S. E. 312 (Va.)
Dept. of Game & Inland Fisheries v. Joyce, 136 S. E. 651 (Va.)

Boards (Missouri and New Jersey) and *Administrative Boards* (Colorado and New Mexico) may have reason for being if the law does not contain some broadly inclusive phrases such as "public agency" or "political subdivision".

Huseth v. State, 229 N. W. 560

Public Institutions (Colorado, New Mexico) see Peck's Case, 145 N. E. 532.

School Boards (Missouri).

Boards of Education (Missouri, New Jersey)

Regents (Missouri)

Curators (Missouri)

Managers (Missouri)

Control Commissions (Missouri)

Commissions (New Jersey)

Other Governing Boards (New Jersey)

Other Public Employees (Minnesota)

need no discussion.

The number of terms used is sufficient indication that the terms of an act must be scanned with great care; and the varying meanings for some of the terms point a warning against assuming too quickly that such terms if not specifically included can be brought within the meaning of more general terms.

6. *Employments within the Jurisdiction of Another State.*

A state's jurisdiction goes no further than its own bounds. Within those bounds it may, within the limits of the constitution, regulate the relation of employer and employee so long as both are within its jurisdiction. As regards contracts made within its bounds, it may, within constitutional limits, impress upon them such incidents as it sees fit, and may therefore ordain that its compensation law shall govern the rights and duties of the parties wherever it is to be performed.

This is subject, however, to a limitation. Other states have exactly the same rights, and when both employer and employee come within their jurisdiction are not necessarily bound by the act of the state where the contract was made. If both states insist on their full rights, an employee may have a double right to compensation: a right under the law of the state where he is, and a right under the law of the state where the contract was made.

What the state can do and what the state actually does are, of course, two very different things. It is common enough for a state to provide for the contingency that a contract made within the state may be partly performed outside. It is less common to attempt to cause the state law to follow the contract in cases where the work is wholly to be performed outside the state. Likewise, where the law of a state is elective, there is a certain practical difficulty in applying it to contracts made outside the state. No conclusive presumptions that the parties have accepted the state law can be raised as to such a contract. This difficulty does not, of course, arise when the law is compulsory.

Darsch v. Thearle Duffield Fire Works Display Co., 133 N. E. 525 (Ind.)
Barnhart v. American Concrete Steel Co., 125 N. E. 675 (N. Y.)

The cases therefore exhibit some variety in results.

In case of a contract made within the state to be performed

wholly within the state, there is, of course, every reason why the state act should apply.

In case of a contract made within the state, which is to be performed or which is performed partly outside the state, the general tendency is to grant compensation, under the state law providing the law permits the commission to take cognizance of injury sustained outside the state.

Ind. Com. v. Aetna Life Ins. Co., 174 Pac. 589 (Colo.)
Jenkins v. T. Hogan & Sons, 177 App. Div. 36 (N. Y.)
Hagenbach v. Leppert, 117 N. E. 531 (Ind.)
Pierce v. Bekins Van & Storage Co., 172 N. W. 191 (Iowa)
Crane v. Leonard, Crossette & Riley, 183 N. W. 204 (Mich.)
State v. Dist. Court Hennepin Co., 166 N. W. 185 (Minn.)
State v. Dist. Court, Rice County, 168 N. W. 177 (Minn.)
Stansberry v. Monitor Stove Co., 183 N. W. 977 (Minn.)
Madderns v. Fox Film Company, 143 N. E. 764 (N. Y.)
Holmes v. Communipaw Steel Co., 186 App. Div. 645 (N. Y.)
Grinnell v. Wilkinson, 98 Atl. 103 (R. I.)
Smith v. Van Noy Interstate Co., 262 S. W. 1048 (Tenn.)
Pickering v. Ind. Com., 201 Pac. 1029 (Utah)
Foughty v. Ott, 92 S. E. 143 (W. Va.)
Anderson v. Miller Scrap Iron Co., 170 N. W. 275; 171 N. W. 935 (Wis.)

In Anderson v. Jarret Chambers Co., 210 App. Div. 543 (N. Y.) the compensation was refused, there being no evidence that the defendant was transacting in New York a business that brought him within the New York law.

In case of a contract made within the state which is to be performed or which is performed wholly outside the state, the prevailing tendency is to grant compensation.

Globe Cotton Oil Mills Co. v. Ind. Acc. Com., 221 Pac. 658 (Cal.)
Empire Glass & Decorating Co. v. Bussey, 126 S. E. 912 (Ga.)
Hulswit v. Escanaba Mfg. Co., 188 N. W. 411 (Mich.)
McGuire v. Phelan Shirly Co., 197 N. W. 615 (Neb.)

In Perlis v. Lederer, 189 App. Div. 425 (N. Y.) compensation was refused.

In Mitchell v. St. Louis Smelting & Ref. Co., 215 S. W. 506 (Mo.), the court held a suit for liability barred because the parties contracted with understanding that laws of place where contract was to be performed should govern.

In Pettiti v. T. J. Pardy Co., 130 Atl. 70 (Conn.) the grant was on the basis that the parties had contracted with regard to the Connecticut Law.

In case of a contract made outside the state to be performed wholly within the state, the presumption is that they contracted

with regard to the law of the place of performance, and compensation should be allowed.

Douthwright v. Champlin, 100 Atl. 97 (Conn.) (But here parties had accepted Connecticut Act.)
Banks v. Howlett Co., 102 Atl. 822 (Conn.)
Johns Manville v. Thrane, 141 N. E. 229 (Ind.)

In case of a contract made outside the state to be performed or actually performed only in part within the state, the tendency is to refuse compensation. Cases where compensation has been granted:

Carl Hagenbach & Great Wallace Show Co. v. Randall, 126 N. E. 501 (Ind.)
Carl Hagenbach & Great Wallace Show Co. v. Ball, 126 N. E. 504 (Ind.)
Smith v. Heine Safety Boiler Company, 112 A. 516 (Me.)

Cases where compensation was refused:

Hall v. Ind. Com., 235 Pac. 1073 (Colo.)
Hopkins v. Matchless Metal Polish Co., 121 Atl. 828 (Conn.)
Darsch v. Thearle-Duffield Fire Works Display Co., 133 N. E. 525 (Ind.)
Barnhart v. Am. Concrete Steel Co., 125 N. E. 675 (N. Y.) (Here compensation was granted but according to the law of the state where the contract was made.)

The case of Farr v. Babcock Lumber & Land Co., 109 S. E. 833 is probably an exception. Here a liability suit was allowed in spite of the Tennessee compensation law, the place where contract was made, on account of derelictions from duty committed in North Carolina.

In case of a contract made and performed outside the state, compensation is naturally refused.

Thompson v. Foundation Co., 188 App. Div. 506 (N. Y.)
Hamm v. Rockwood Sprinkler Co., 97 Atl. 730 (N. J.)
Baggs v. Standard Oil Co., 180 N. Y. S. 560

Actions for liability are likewise denied if they would be barred by compensation act of state where contract was made and to be performed.

Proich v. N. Y. C. & H. R. R. Co., 183 N. Y. S. 77 (N. Y.)
Harbis v. Cudahy Packing Co., 241 S. W. 960 (Mo.)
Verdicchio v. McNab & Hurlin Mfg. Co., 178 App. Div. 48 (N. Y.)

But not where there is no evidence of a remedy by way of compensation in any other state.

Simpson v. Atlantic Coast Shipping Co., 134 N. E. 560 (N. Y.)

Cases where right to compensation has been recognized in spite of a right to or recovery of compensation under another act.

Gilbert v. Des Lauriers Column Mould Co., 180 App. Div. 59 (N. Y.)
Anderson v. Jarrett Chambers Co., 210 App. Div. 543 (N. Y.)
Pickering v. Ind. Co., 201 Pac. 1029 (Utah)

Apart from statutory provisions, it would seem proper to give effect to the intent of the parties in such cases as to what law should govern. If this intent is not expressed in the contract, the inference would be that they intended the law of the place where the contract was made, where the parties were both residents of the state and contracted with regard to employment wholly or in part within the state, or with regard to employment ambulatory in character, not to be performed in any one state. The presumption is slightly weakened when the parties are residents of different states. With regard to contracts wholly to be performed in another state, the law of the place of performance would be presumed, and this would be strengthened if the employee were a resident of that state.

E. *Other Employments Expressly Excepted.*

The exceptions heretofore discussed have been those arising from the operation of a rule of law, or by statute enacted in consequence of such rule. Those embraced under this heading are exceptions made as pure matter of state policy.

The constitutional principle of "equal protection of the laws" acts as a certain restraint upon the states in enacting compensation laws applicable to some employers and not to others. But the courts permit the states broad powers of classification, and are disinclined to declare a classification unconstitutional unless it is clearly arbitrary and unreasonable.

1. *Farm Labor.*

Most compensation acts contain some form of exemption of farming as an employment, farmers as employers or farm laborers as employees. Connecticut and New Jersey do not make this exception.

Massie v. Ct. of Common Pleas, 151 Atl. 205, 156 Atl. 377 (N. J.)

The form in which the exception appears varies not a little. As above indicated, it may apply to the employment, the employer or the employee. "Farming", "farmers" and "farm laborers" are perhaps the most common terms, though "agriculture" or (in Illinois) the "tilling of the soil" are also used. To the general terms are sometimes added specific terms such as "horticulture", "viticulture", "dairying", "ranch labor", "stock raising" and

"poultry raising". All of these are operations which might be carried on in regular farming operations, and might be included in the more general terms, even if carried on as an exclusive specialty.

Beyer v. Decker, 150 Atl. 804 (Md.)
Gordon v. Buster, 257 S. W. 220 (Tex.) (ranch laborer)
Davis v. Ind. Com., 206 Pac. 267 (Utah) (sheep herder)
Fleckles v. Hille, 149 N. E. 915 (Ind.) (poultry farm employee)
Greischar v. St. Mary's College, 222 N. W. 525 (Minn.) (dairy farm employee)
Georgia Cas. Co. v. Hill, 30 S. W. 2nd 1055 (Tex.) (nurseryman's employee taking heifer to be bred)
Robinet v. Hawk, 252 Pac. 1045 (Cal.) (driver of ranch wagon)

Farming comprehends a wide variety of activities. In olden times, the farm constituted a little industrial center where in addition to regular agricultural operations many domestic arts and trades were carried on. The varied industries of New England were in many cases built up by men who had learned the rudiments of the art on the farm. Spinning and weaving, shoemaking, butchering, smoking and preserving of meat, drying and preserving of fruits and vegetables, harnessmaking, making of agricultural implements are all very proximately derived from farm industries. Separated from the farm and carried on independently, they have, of course, but little reminiscence of their origin.

The process of separation is still going on, and a series of mechanical trades and operations closely connected with farming, but carried on independently are growing up: such as threshing operations, corn husking, corn shredding and the like. Hence, there is an uncertain and debatable ground in the application of the general exception: both as to what constitutes a farmer and as to what constitutes a farm laborer.

(a) "Farming" may be taken to have reference to the cultivation of land for the production of agricultural crops with "incidental enterprises."

Pridgen v. Murphy, 160 S. E. 701 (Ga.)

"Farm labor," to labor engaged in the production of "hay, grain, vegetables, etc., from the soil".

Krobitzsch v. Ind. Acc. Com., 185 Pac. 396

Thus in the one case the court declined to extend the exception to cover the turpentine business; in the other to cover the opera-

tions of a fish hatching business. This latter industry the court declared was not brought within the exception of "stock raising" which referred to the breeding of domestic animals.

(b) The exception does not necessarily cover all business carried on by a farmer.

Marietta v. Quayle, 137 N. E. 61 (Ind.)

Thus, in case of coal mining operations

Hanna v. Warren, 133 N. E. 9 (Ind.)

Saw mill operations

Peterson v. Ind. Com., 146 N. E. 146 (Ill.)
Durrin v. Meehl, 204 N. W. 22 (Minn.)
Farrin v. State Ind. Com., 205 Pac. 984 (Ore.)
Freeman v. Ind. Acc. Com., 241 Pac. 385 (Ore.)

Lumber operations not connected with farm.

Strunk v. Keller, 75 Pa. Super. Ct. 462

House moving operations.

Vandervort v. Ind. Com., 234 N. W. 492 (Wis.)
Sturman v. Ind. Com., 234 N. W. 496 (Wis.)

(c) Nor does it necessarily cover all employees employed by a farmer. While anyone employed on work properly incidental to the farm is doubtless a farm laborer although the work taken by itself is not characteristically farming, the tendency is to regard work outside the regular course of farm work as not within the exception. Thus one employed to drill and blast holes, in preparation for planting trees and vines, was held not within the exception.

Helmuth v. Ind. Acc. Com., 210 Pac. 428 (Cal.)

Thus of one employed to poison prairie dogs.

C. C. Slaughter Cattle Co. v. Pastrana, 217 S. W. 749 (Tex.)

As to those engaged in construction and repair of buildings, they were held not within the exception in

Miller & Lux v. Ind. Acc. Com., 162 Pac. 651 (Cal.)
Peterson v. Farmer's State Bank of Eyota, 230 N. W. 124 (Minn.)

Held within the exception in

Uphoff v. Ind. Bd., 111 N. E. 128 (Ill.) (But the provisions of the Illinois Law seem to require this.)
Coleman v. Bartholomew, 175 App. Div. 122 (N. Y.)
Anderson v. Last Chance Ranch Co., 228 Pac. 184 (Utah)

The rule is laid down in Peterson v. Farmer's State Bank of Eyota, that neither the task on which the employee is engaged

when injured nor the place of performance determine whether he is a farm laborer; but the whole character of the employment must be considered.

(d) The exception may cover farming operations carried on by those engaged in other business and also their employees while actually engaged in farming operations. See

Seggebruch v. Ind. Com., 123 N. E. 276 (Ill.)
Shafer v. Parke Davis & Co., 159 N. W. 304 (Mich.)
Bates v. Shaffer, 185 N. W. 779 (Mich.)
C. C. Slaughter Cattle Co. v. Pastrana, 217 S. W. 749 (Tex.)
Dowery v. State, 149 N. E. 922 (Ind.)
Ocean Acc. & Guar. Corp. v. Ind. Com., 256 Pac. 405 (Utah)
Greischar v. St. Mary's College, 222 N. W. 525 (Minn.)

But there is a point where the connection with farming is too casual to come within the exception.

Thus in case of one clearing land, used by employer as a summer resort.

Klein v. McCleary, 192 N. W. 106 (Minn.)

One pruning trees on farm bought for improvement and sale

O'Dell v. Bowman, 189 App. Div. 386 (N. Y.)

Coal yard employee temporarily assisting workers on employer's farm

Matis v. Schaeffer, 113 Atl. 64 (Pa.)

Teamster injured in caring for horses in barn of employer not operating farm

Carroll v. General Necessities Corp., 207 N. W. 831 (Mich.)

Employee doing both industrial and farm work but injured while doing industrial work

Austin v. Leonard, Crossett & Riley, 225 N. W. 428 (Minn.)

One injured while spraying chickenhouse of retired business man living within city limits.

Adams v. Ross, 230 App. Div. 216 (N. Y.)

There is on record a case in California, where a janitor and caretaker was held a farm laborer and denied compensation because injured while pruning a fig tree to admit more light to the apartment. The findings the court allowed to stand

George v. Ind. Acc. Com., 174 Pac. 653 (Cal.)

See also

Kramer v. Ind. Acc. Com., 161 Pac. 278 (Cal.)

But in a later case (La Coe v. Ind. Acc. Com., 293 Pac. 669) where a different result was reached under an amendment to the California statute, the court indicated that the spirit of the act did not encourage forced constructions in order to bring a case within the exception.

(e) Operations collateral to farming, particularly operations involving the use of machinery have to a degree been recognized in the statutes.

The Arizona Act excepts agricultural workers "not employed in the use of machinery".

The Illinois Act extends the exception to a number of extra hazardous operations carried on by farmers or on a farm or country place.

Kentucky includes in the exception of agriculture the operation of threshing machines.

Maryland includes in the exception "any agricultural service including the threshing or harvesting of crops" whether carried on by the farmer or his contractor.

Minnesota stipulates that the term applies to farmers doing their own work in threshing grain, shredding or shelling corn, barley, hay or straw, but not to such operations performed by commercial threshmen or commercial balers.

Walker v. Wading, 230 N. W. 274 (Minn.)

New York extends the exception to persons employed either by direct employment or by contracting in logging or wood cutting operations conducted by a farmer on his own farm, consisting of felling timber, cutting it into dimension length, and hauling it to market or to transportation ports, provided not more than four persons are so employed at any one time by such farmer, and provided that the exception does not extend to the sawing of timber or wood.

North Carolina excepts those engaged in selling agricultural products for the producers, provided the product is prepared for sale by the producers.

Oklahoma extends its exception to farm buildings and farm improvements.

South Dakota excludes from the exception the operation of threshing machines, tractor engines and separators.

The mechanical operations mentioned in these citations have figured in a number of cases.

Threshing when performed by a farmer himself is undoubtedly farm labor, and his employees come within the exception.

Hill v. Ind. Com., 178 N. E. 905 (Ill.)

This principle has been extended to cases where farmers combine to purchase a threshing machine even when they do work for others.

Keefover v. Vasey, 199 N. W. 799 (Neb.)
Jones v. Ind. Com., 187 Pac. 833 (Utah)

But as to employees of threshing outfits moving from place to place, there are a number of cases holding them not within the exception.

Industrial Com. v. Shadowen, 187 Pac. 926 (Colo.)
White v. Loades, 178 App. Div. 236 (N. Y.)
Vincent v. Taylor Bros., 180 App. Div. 818 (N. Y.)
In re Boyer, 117 N. E. 507 (Ind.)
Hoshiko v. Ind. Com., 266 Pac. 1114 (Colo.)

In the following cases they were held within the exception:

Cook v. Massey, 220 Pac. 1088 (Idaho)
State v. Dist. Court of Watonwan County, 168 N. W. 130 (Minn.)
(But see statute cited above.)

Corn shredders employed by commercial outfit held not within exception.

Boyer v. Boyer, 227 N. W. 661 (Minn.)

Held within exception.

Slycord v. Horn, 162 N. W. 249 (Iowa)

See also

Hillman v. Eighmy, 208 N. W. 928 (Wis.)

Employee of commercial corn husking outfit held within exception.

Roush v. Heffelblower, 196 N. W. 185 (Mich.)

Tractor driver plowing land of another under employer's direction, held entitled to compensation.

Heal v. Adams, 221 N. W. 389 (Wis.)

One employed on steam dredge in drainage operation held not within exception.

Daily v. Barr, 196 N. W. 266 (Minn.)

Employee of plumber engaged to construct windmill head for farmer held not within exception.

Marever v. Marlin, 174 N. E. 517 (Ind.)

There is, therefore, some tendency apart from statute to construe the exceptions as not applying to operations incidental to farming carried on by commercial contractors, though as indicated above some acts expressly include contractors. That the exception was not generally intended to include hazardous operations involving the use of machinery and carried on by those who specialize in such operations and have no general connection with agriculture otherwise may be taken for granted.

2. *Domestic Servants.*

Exception of domestic servants is very commonly made. The phraseology used includes "domestic servants", "private domestic servants", "household domestic servants", "domestic employment", "domestic service", "household domestic service".

The Missouri Act excludes "domestic servants including family chauffeurs." The New York Act excludes "domestic servants" from the definition of "Employee" and excludes "domestic servants other than private or domestic chauffeurs employed as such in cities of two million inhabitants or over" from the 18th group of "hazardous" employments.

The exception has entered but seldom into litigation. The exception clearly applies to those employed in the home,—not to persons doing maid's work in a sanitarium or hotel.

Gernhardt v. Ind. Acc. Com., 185 Pac. 307 (Cal.)
Barres v. Watterson Hotel Co., 244 S. W. 308 (Ky.)

The exception covers all engaged exclusively in the care of the home. It is not necessary that they reside in the home. Thus it applies to a caretaker, living in a separate cabin.

Eichholz v. Shaft, 208 N. W. 18 (Mich.)

Also may be cited

Lamar v. Collins, 252 Ill. App. 238
Murray v. Strike, 287 Pac. 922 (Utah)

The latter case covers merely the common law rights of action of an injured domestic.

3. *Irregular Employments.*

These are excepted by most states. Employments excepted fall in two categories: (a) Employments which are casual; (b) Employments not in the usual course of the trade, business, profession or occupation of the employer. While many employments coming within one category fall also within the other, the two are not identical, though the acts of both Tennessee and Montana treat them as synonymous.

The first category is generally described as above. The phrases "employments which are but casual", "purely casual", or "merely casual" add little, if anything, to the meaning. Casual employment is defined in the law of Nebraska as meaning "occasional, coming at certain times without regularity in distinction from stated or regular". New Jersey defines it more elaborately "If in connection with the employee's business, as employment the occasion for which arises by chance or is purely accidental, or if not in connection with any business of the employer, as employment not regular, periodic or recurring." Either definition gives a fair idea of the meaning of the term. California and Nevada add a concrete test, limiting the term to employments where the work is to be completed in not exceeding ten working days, without regard to the number of employees and where the total labor cost is less than $100. Missouri provides that one who is employed by the same employer for more than 5½ consecutive working days shall be considered a regular and not a casual employee.

The second category is most commonly described as above, but also as employments "not for the purposes of the employee's trade or business" or "not incidental to the operation of the usual business of the employee". The difference in meaning between the several forms is probably not great.

California defines "course of trade, business, profession or occupation" as including "all services tending towards preservation, maintenance or operation of business, business premises or business property of employer". And defines "trade, business, profession or occupation" as including "any undertaking actually engaged in by him with some degree of regularity".

Apart from variation in phraseology and those caused by definitions, the forms of the exception fall into four classes:

(a) Those excepting only casual employments. Idaho.

(b) Those excepting only employments not in the usual course of the trade, business, profession or occupation. Georgia, Illinois, Louisiana, Maine, South Dakota, Texas and Wisconsin. Owing to the definition of "casual employment" alluded to above, Montana and Tennessee belong in this group, and possibly Virginia as well.

(c) Those excepting employments which are casual *or* not in the usual course of trade, business, profession or occupation. Hawaii, Missouri.

(d) Those excepting employments which are casual *and* not in the usual course of trade, business, profession or occupation. Alabama, Arizona, Colorado, Delaware, District of Columbia, Iowa, Minnesota, Montana, Nebraska, North Carolina, Wyoming.

California, Indiana and Nevada use the formula "both casual and". Connecticut, Rhode Island and Vermont use a slightly different formula, but belong in this group.

Since the two categories are not identical, it is obvious that group (c), which excludes employments coming within either category is the broadest: and that group (d) which excludes only employments coming within both categories is the narrowest. The difference is not great, but great enough to make some difference in the results.

Roman Catholic Archbishop of San Francisco v. Ind. Acc. Com., 230 Pac. 1 (Cal.)
Herbig v. Walton Auto Co., 182 N. W. 204 (Iowa)
Charles v. Harriman, 118 Atl. 417 (Me.)

The decisions, therefore, cannot be profitably reviewed in detail since they depend to some extent on the nature of the specific exemption.

It may be noted that the application of the exemption depends, not on the nature of the work performed, but on the nature of the contract of employment.

Western Union Tel. Co. v. Hickman, 248 Fed. 899 (W. Va.)

The Nebraska definition of "casual" appears to be taken bodily from "Words and Phrases" first series, which gives as antonyms, "regular, systematic, periodic and certain".

Porter v. Mapleton Electric Light Co., 183 N. W. 803 (Iowa)

Thus, an employment may be removed from the category of "casual" by any circumstance which imparts a degree of regularity and certainty, though the work itself may have an element of uncertainty. If, for instance, an employment is to make repairs when needed, or to do hauling when required, the arrangement being of a standing character, it is not casual. If there is no such arrangement, but the employee is called in from time to time as need arises, this employment may be casual. Job work is frequently casual in character, especially when the job is in its nature brief and transitory; but employment for a job of substantial duration is not casual. As to what constitutes employment in the usual course of the trade, business, profession or occupation, the decisions show no little variance. Generally the tendency may be said to be in the direction of not splitting hairs to bring a case within the exception.

4. *Employments Involving Less Than a Stated Number of Employees.*

While the compensation acts frequently cover small employers, they were primarily designed for large employers.

Kloman v. Ind. Com., 195 N. W. 404 (Wis.)

This fact, and the difficulty of applying the act to the smaller units of industry has caused most states to set up something in the nature of a minimum limit. Such a limit is not at all necessary, nor is it always present. Compulsory acts are sometimes applied irrespective of the number of employees. Provisions adopted may be in the form of a direct exception or by limitation of the definition of "employment" or "employee".

The minimum number of employees varies, running from 1 to 16. Reference is usually made in one way or another to employees "regularly" employed. Sometimes a further limitation is introduced, such as "employed or regularly engaged in the same business or occupation" or "about the same place of employment". In some cases employment of the minimum number for a definite statutory period is required. Considering the number of provisions, and the opportunities for questions, the amount of litigation under these exceptions is relatively small.

One of these limitations (which was introduced, however, for the purpose of broadening the compulsory feature of the law)

went to the Supreme Court of the United States. The earlier decisions on compulsory compensation acts laid some stress upon the inherent hazard as justifying the legislature in making its law compulsory as to classes of hazardous employments. New York ultimately broadened its list of hazardous classifications by adding a class of employers regularly employing four or more workmen or operatives. This, the Supreme Court, in the case of Ward & Gow v. Krinsky, 259 U. S. 503 held constitutional, indicating that the fact that an accident had occurred showed there was an inherent hazard. Since this reasoning would justify any conceivable classification, it may be taken that the states have apparent authority to make their acts compulsory to any desired degree.

This New York provision has led to several interesting decisions, turning on the words "workman" and "operative" already discussed. It is an odd situation where the compensation act is applicable to a large orchestra merely because it employs four stage hands.

Europe v. Addison Amusements, 131 N. E. 750

and where the act does not apply to a large brokerage establishment, since its clerks, stenographers, telegraph operators, porters and messengers are not workmen or operatives.

Westbay v. Curtis & Sanger, 198 App. Div. 25

and yet does apply to a news company, because of its newsboys,

Ray v. Union News Co., 198 App. Div. 149

and to a delicatessen store because of its cook, waiter, general utility man and counterman.

Jurman v. Hebrew Nat'l Sausage Factory, 198 App. Div. 456

Later the court reverted to the more strict construction, by declaring a salesman not a workman, even though he had to open boxes and stock merchandise on the shelves.

Cohen v. Rosalsky, 230 App. Div. 604

To return to the exceptions under consideration, what is meant by "regularly employed" depends on the established mode or plan used in conducting business. Thus it was held, in a case under the Alabama law, that checkers employed by a steamship company were "regularly" employed, although they did not work continuously or at required periods, but only when a steamship

came to dock, and although the personnel of the force varied from time to time.

Mobile Liners v. McConnell, 126 S. 626

Similarly, the Utah court declined to recognize men and boys permitted to wait at taxi stands and occasionally as volunteers driving taxis to meet an unusual demand, as employees within the statutory provision limiting the act to employers of three employees.

Rockefeller v. Ind. Com., 197 Pac. 1038

In the absence of a requirement as to regularity of employment, the statute is satisfied if at the time of accident the employer was in employ of the statutory member, even if two are but temporary employees, drafted to meet an emergency.

Shockley v. King, 117 Atl. 280 (Del.)

In the absence of restricting words, the statutory limit is complied with, although the required number of employees were not working at the place of injury or on the same job.

Colbourn v. Nichols, 109 Atl. 882 (Del.)
Vantrease v. Smith, 227 S. W. 1023 (Tenn.)

Where the statute prescribes that they shall be employed "in or about the same place of employment" or "in the same business or occupation", the reference is to the business of the employer rather than to the particular work of the employee.

Reliance Coal & Coke Co. v. Smith, 266 S. W. 1094 (Ky.)

And the fact that the injured workman was engaged in a distinct activity (silica mining) in which less than the statutory number were employed, is immaterial where this is carried on in close connection with a larger activity (brick making) where more than the required number are employed.

Ind. Com. v. Funk, 191 Pac. 125 (Colo.)

Under the Connecticut act, where a statutory time limit appears, there are two cases indicating that the application of the limitation depends upon the number of men regularly employed throughout the period; and that the average daily number of employees, the existence of a definite quota or standard number of them, or the total number entering and leaving employment during the period have no bearing on the matter.

Schneider v. Raymond, 130 Atl. 73
Sorrentino v. Cersosimo, 130 Atl. 672
See also Stover v. Davis, 205 Pac. 605 (Kans.)

To satisfy the requirement, it is permissible to count only those employed by the employer in the same capacity in which he employed the person injured. Thus, where a plumber employed personally less than the statutory number, a claimant was not permitted to count employees in a partnership of which the plumber was a member.

Coady v. Igo, 98 Atl. 328 (Conn.)

The operation of the exemption is, of course, to leave the employer free to elect to come under the act or to stay out. If he is without the act, he cannot plead the act in bar to a suit for damages.

Dillard v. Justus, 3 S. W. 2nd 392 (Mo.)

If he is within the terms of the act, however, and fails to elect, he is liable in damages on mere proof of negligence.

Thorne v. F. C. Johnson Co., 111 Atl. 410 (Me.)

For other cases see:

Ind. Com. v. Hammond, 236 Pac. 1006 (Colo.)
Hollingsworth v. Barney, 192 Pac. 763 (Kans.)
McMillan v. Ellis, 192 Pac. 744 (Kans.)
Southwestern Grocery Co. v. State Ind. Com., 205 Pac. 929 (Okla.)
Pine v. State Ind. Com., 235 Pac. 617 (Okla.)
La Croix v. Frechette, 145 Atl. 314 (R. I.)

5. *Outworkers.*

Outworkers are excepted by the acts of Connecticut, Delaware, Idaho, Missouri, Nebraska and Pennsylvania.

The Idaho law specifies merely "outworkers". The other laws set forth the exceptions at more length. The Pennsylvania law, for instance, excepts "persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired or adapted for sale, in the worker's own home, or on premises not under the control or management of the employer". The other laws describe the exception in much the same way.

An outworker may be an employee, or under some circumstances an independent contractor. He is to but a limited extent under the control of the employer, and not at all so during working hours. The reason for excepting outworkers is based partly on the fact that he is not subject to hazards inherent in the business of the employer except during such times as he is

on the employer's premises, and is therefore not within the reason that lies at the base of the compensation acts. The risk cannot be reduced as to him by any manner of safety engineering and the audit of payroll in case of workers paid by the piece is attended with some difficulty. On the other hand, to except them from the act affords a facile means of avoiding the act, thus encouraging a type of industry which has in some cases led to grave social evils. The question as to whether outworkers are employees has been litigated, but there seem to be few if any cases touching the exceptions.

6. *Persons Receiving More Than a Certain Amount per Year.*

Such exceptions are made in a number of states. The theory appears to be that the act is properly for the protection of the lower-paid workers, and not of those able to look after their own interests.

Arizona excepts public officials receiving more than $2,400 per annum. Hawaii excepts public officials receiving more than $1,800 per annum. Idaho excepts employees whose remuneration exceeds $2,400 per annum. Missouri excepts employees whose average annual earnings exceed $3,600. New Jersey excepts public employees receiving more than $1,200 per annum. Rhode Island excepts employees whose remuneration exceeds $3,000 per annum. Vermont excepts employees and public officials whose remuneration or salary exceeds $2,000 per annum.

Maryland once had a limitation of $2,000 but apparently it is not in the present law.

This exception has been before the courts on several occasions and has been rather strictly construed. The laws which refer to an annual salary or annual remuneration apparently apply only to employees working under a definite contract for a year or more, at a determined or determinable wage amounting to more than the statutory limit.

Hauter v. Coeur d'Alene Mining Co., 228 Pac. 259 (Idaho)
Kelley's Dependents v. Hoosac Lumber Co., 113 Atl. 818 (Ver.)
E. H. Koester Bakery v. Ihrie, 127 Atl. 492 (Md.)
O'Bannon Corp. v. Walker, 129 Atl. 599 (R. I.)
Livingstone Worsted Co. v. Toop, 138 Atl. 183

Thus the question of what is actually received, or the rate of weekly remuneration are by no means conclusive on the question whether the employee comes within the exception or not. In

several of these cases the employee had weekly earnings which if continued for the year would have amounted to more than the amount limited in the statute; but no definite contract for a year. Thus applied, the exception has a limited scope. This is not true, of course, in Hawaii, where the limitation is on a weekly basis. The New Jersey exception is notable for the bizarre conclusion reached by the courts that it applies to cases of injury but not to death cases.

Jersey City v. Borst, 101 Atl. 1033
Plumstead v. Roxbury Tp., 151 Atl. 489

7. *Clerical Work.*

Exceptions appear in the laws of several states as follows:

Iowa excepts "persons engaged in clerical work only; but clerical work shall not include anyone who may be subject to the hazards of the business"

Oklahoma excepts (from certain hazardous occupations) "employees employed exclusively as clerical workers"

Wyoming excepts "Those engaged in clerical work and not subject to the hazards of the business"

To these may be added the exclusion in the New York law, from the 18th group of hazardous employments "Persons engaged in a clerical or trading capacity in or for a religious, charitable or educational institution."

The exceptions have been litigated to some extent, the question raised being as to whether the particular employee was subject to the hazard of the business. The reason for the exception is a feeling that the acts were designed to protect real workmen rather than the white collar class. For a discussion of this, see

Westbay v. Curtis & Sanger, 198 App. Div. 25 (N. Y.)

8. *Members of the Employer's Family Dwelling in His Home.*

This exception appears in Connecticut and Idaho.

In McNamara v. McNamara, 100 Atl. 31 (Conn.) it was held that the exception does not bar the claim of a son dwelling with his father against a firm of which his father is a member.

9. *Public Charities.*

Georgia excepts "employees of institutions maintained or operated as public charities".

Idaho excepts "employment by charitable organizations".

"Charities," "charitable organizations" and "public charities" are broad terms, covering establishments for religious and educational purposes as well as those dispensing medical assistance and poor relief. On grounds of public policy, such institutions have commonly a very restricted liability in tort. In a number of states, they are not liable at all for the wrongful acts of their servants or agents. In others, they are responsible only in cases where they have failed to exercise due care in the selection or the retention in service of the person committing the wrongful act. There are a very few states where their liability is that of a private employer.

11 Corpus Juris P. 274, 275, notes 95, 96, 97

This restricted or non-existent liability, in any state whose law is not compulsory, makes the question as to whether public charities are within the law of minor importance, because their failure to elect or their decision not to elect entails no very serious consequences. But the same public policy which operates to exclude liability in matters of tort would seem to operate in the direction of excluding liability to pay compensation. If the statute makes reference to a "business" or "enterprise" in describing "employment" or "employer", much more if it makes reference to a business carried on for gain or profit, there is additional reason for holding them excluded. Accordingly, there are several cases holding public charities not within the act.

Any public charity

Zoulalian v. N. E. Sanatorium & Benevolent Ass'n, 119 N. E. 686 (Mass.)

University

North v. Board of Trustees of University of Illinois, 201 Ill. App. 449 (Ill.)

Religious Corporation

Dillon v. Trustees of St. Patrick's Cathedral, 137 N. E. 311 (N. Y.)

Hospital

Rugg v. Norwich Hospital Association, 205 App. Div. 174 (N. Y.)

Curiously enough, Illinois, while holding a university not an "enterprise" within the meaning of the act, reaches the opposite result as to a hospital.

Hahnemann Hospital v. Ind. Board, 118 N. E. 767

The status of charitable institutions operated by the state or by

its public corporations involves considerations discussed under "Public Employments"

Agler v. Michigan Agricultural Hospital, 148 N. W. 341 (Mich.)
Peck's Case, 145 N. E. 532 (Mass.)

The status of certain charitable organizations in New York is involved in some doubt since the enactment of the amendment to section 3 of the act, adding to the list of "hazardous employments" a group including employees of four or more workmen or operatives. This group contains two exceptions:

(a) "Except persons engaged in a clerical, trading or non-manual capacity in or for a religious, charitable or educational institution"

(b) A minister, priest or rabbi, or a member of a religious order is not to be deemed an employee.

The natural inference from the exceptions is that otherwise religious, charitable or educational institutions come within the group, provided they employ four or more workmen or operatives.

10. *Miscellaneous.*

Logging Operations.—Maine excepts "employees engaged in the operations of cutting, hauling, rafting or driving logs or work incidental thereto, unless incidental to any business conducted by an assenting employee."

It will be recalled that New York excepts small logging and lumbering operations carried on by farmers.

Airmen.—Idaho excepts "airmen or individuals, including the person in command, and any pilot, mechanic or member of the crew engaged in the navigation of aircraft while under way".

"Blacksmiths, wheelwrights and other rural employments" excepted in Maryland.

"Any totally blind person" excepted in Illinois. The Wisconsin act provides that epileptics and blind persons may elect not to be subject to the act for injuries resulting because of such epilepsy or blindness and still remain subject to the act for all other injuries. The object of these provisions is doubtless to facilitate the employment of these unfortunates.

"Persons prohibited by law from being employed" excepted in West Virginia; but the exception seems superfluous.

"Persons engaged in voluntary service, not under contract of hire" excepted in New York (from the 18th group of "hazardous employments"). As indicated previously, volunteers are ordinarily ruled not within the act.

"Employment not carried on for pecuniary gain." This appears as an exception in the law of Idaho. The same result is effected in several other states by defining "employment" or "employer" as a business carried on, or one carrying on business, for pecuniary gain.

"Any member of a fire insurance patrol maintained by a board of underwriters" appears in the law of Illinois.

To the whole subject, this comment may be added. The practice of making exceptions is natural enough. The multiplication of exceptions, however, tends to defeat the general legislative intent that the act should be liberally construed. The courts must regard the legislative intent with regard to exceptions as entitled to the same consideration as with regard to the act in general; and in case of the exception of farm labor, and casual employments have at times tended to construe them broadly, and to indulge in what seems a refinement of logic to keep particular cases from coming within the act. The general rule of liberal construction would, as previously indicated, call for a construction which brings as many cases as possible within the act, in other words, a fairly strict construction of the exceptions.

F. *Application of the Act to Complex Employments.*

Not all contracts of service are simple transactions between one employee and one employer. That is the normal situation, and the situation which best accords with the language of the acts. But there are cases where a single contract of service may bring more than one person within the definition of employer, or raise a question as to which of two or more persons is the employer. Similarly the contract may embrace only a single employee or include in that category a firm, or a principal employee and his sub-employees. Once in awhile a case arises where it is uncertain as to which of the parties is employer and which employee. These cases, unless specifically provided for in the act, present problems to be determined by construction.

1. *Agency cases.*

Employment by and through an agent is one of the commonest of incidents. The compensation questions involved are determined in accordance with the principles of the law of agency.

(a) Where a servant acts within the scope of his authority, express or implied, he is not liable to pay compensation benefits as an employer.

Yolo Water & Power Co. v. Ind. Acc. Com., 168 Pac. 1146 (Cal.)
Fischer v. Ind. Com., 134 N. E. 114 (Ill.)
Franks v. Carpenter, 186 N. W. 647 (Iowa)
Sledge v. Hunt, 12 S. W. 2nd 529 (Tenn.)

This is apparently the case, irrespective of whether wages are paid by employer or by servant.

Roberts v. U. S. F. & G., 157 S. E. 537 (Ga.)

(b) If the servant acts within the apparent scope of his authority, the principal is liable; though if he has in matter of fact exceeded his authority, the principal has a right of action against him for damages.

(c) If the servant employs others without authority, actual or apparent, the principal is not liable to pay compensation.

Minarcsik v. Blank, 132 Atl. 251 (N. J.)

(d) If the servant fails to disclose his principal, but acts within his authority, the principal is bound by his contracts, and the employee upon becoming cognizant of the facts may at his election hold either the servant or the principal to the contract.

Scott v. O. A. Hankinson Co., 171 N. W. 489 (Mich.)
Frandsen v. Ind. Com. of Utah, 213 Pac. 197 (Utah)
Holloway v. Ind. Com., 271 Pac. 713 (Ariz.)

2. *Joint Employments.*

Where several persons enter into a single contract of service with a single employee, they are presumably joint employers; that is to say, jointly liable to pay compensation benefits. The most common case of joint employment in compensation cases is that of night watchmen employed to cover the premises of several employers.

In case of a true joint contract, the employers are jointly liable irrespective of the premises on which the accident occurs.

Sargent v. A. B. Knowlson Co., 195 N. W. 810 (Mich.)
Page Engineering Co. v. Ind. Com., 152 N. E. 483 (Ill.)
Frederick A. Stresenreuter Inc. v. Ind. Com., 152 N. E. 548 (Ill.)

Of course, if the contract is not single, but entered into by the employers individually, the obligation is not joint but several; that is to say, each employer is individually liable for injuries incurred in his services or on his premises, but not liable for injury incurred on the premises of others.

Western Metal Supply Co. v. Pillsbury, 156 Pac. 491

The case of a night watchman hired by a detective agency to guard the premises of a person does not involve a contract of service with the owner of the premises, the employer being the agency.

Similarly, one of two joint owners of a building may make a contract of service with a night watchman, which will bar him from remedy against either owner save under the compensation act.

Gibbons v. Gooding, 190 N. W. 256 (Minn.)

The same is true of a contract of service made with one member of the partnership as employer. If within the scope of the firm's business, the employee is employee of the partnership.

Klemmens v. North Dakota Work. Com. Bureau, 209 N. W. 972 (N. Dak.)

Joint obligations are common enough to receive statutory treatment in several states.

California disposed of the watchmen problem by excluding them from the act as employees.

Alabama, Delaware, Georgia and Missouri have statutes providing for contribution by the joint employers in proportion to their wage liability,—an obviously just rule.

Alabama deals with a situation where only a part of the employers are subject to the act, the effect of which is to make those subject to the act liable jointly for a portion of compensation benefits proportionate to the amount of the employee's total wage paid by them. This is an enlargement of the common law, for strictly speaking, a joint obligation cannot be enforced at all unless it can be enforced against all the joint obligors. Missouri goes one step further, declaring the liability joint and several, i.e., making each individually liable for the entire compensation, with right of contribution from the rest.

Maine has a provision somewhat different, dealing not with joint employments but with several employments: that is to say,

where an employee is employed concurrently by two or more employees, serving one at one time, another at another. This problem is discussed under the next heading.

Colorado has a provision concerning employees loaned to another by the employer, a problem hereafter discussed.

3. *Several Employments.*

It is not necessary that an employee work exclusively for one employer to be his employee.

Empire Glass & Decoration Co. v. Bussey, 126 S. E. 912 (Ga.)

The case of a person having separate contracts of service with two or more employers is not uncommon.

Thus in cases of watchmen.

Western Metal Supply Co. v. Pillsbury, 156 Pac. 491 (Cal.)
San Francisco-Oakland Terminal Rys. v. Ind. Acc. Com., 179 Pac. 386 (Cal.)

Case of insurance company employee, acting in spare time as local reporter for newspaper.

Kinsman v. Hartford Courant Co., 108 Atl. 562 (Conn.)

Case of employee in power station, spending part of his time operating transformers for railroad company, part of his time in operating power company's machinery.

Bamberger Electric R. R. Co. v. Ind. Com., 203 Pac. 345 (Utah)

Case of plumber employed to install gasoline pumps, though doing work for others while not so engaged.

Sinclair Refining Co. v. Ind. Com., 148 N. E. 291 (Ill.)

Case of minister making European trip to obtain material for lectures under auspices of church, and at same time receiving pay from a tourist organization for conducting a party.

Taylor v. St. Paul's Universalist Church, 145 Atl. 887 (Conn.)

The cases present no great difficulty as to liability. The employer for whom the common employee is working at the time of the accident is solely liable. The perplexing question is, what is the measure of his weekly wage—the wage received from the employer for whom he is working, or the wage received from all? There is a tendency to assess compensation benefits on the basis of his entire earning capacity, and this rule is embodied in the Maine statute previously mentioned.

4. *Employees hired out or loaned by their employer.*

In some occupations, particularly in contracting, the hiring out or loaning of an employee by one employer to another is an extremely common incident. There is the possibility here of two simultaneous contracts of service, one general and the other special, the latter superimposed on the first.

The general rule is stated in 39 Corpus Juris, p. 36, see 5, as follows: "The general servant of one person may become the servant of another by submitting himself to the direction and control of the other with respect to a particular transaction or piece of work, and even though the general employee has no interest in the special work; but such relation between the borrower and the servant is not established unless it appears that the servant has expressly or by implication consented to the transfer of his services to the new master. Where a master gives the labor of his servant to another, the master retaining supervision and control, the loaned servant is not the servant of the borrower, but is, while so engaged, the servant of the general master."

The Indiana Courts have expressed an opinion that the "fiction" of general and special employee has no place in the administration of the compensation act.

McDowell v. Duer, 133 N. E. 839 (Ind.)
Latshaw v. McCarter, 137 N. E. 565 (Ind.)

This, however, is an exception. Generally, the courts have followed very much the lines laid down above—lines pertaining to the general law of master and servant. Thus, it is generally held that where an employee is loaned or hired out he may, under some circumstances become, for the purposes of the compensation act the servant of the person to whom he is loaned or hired.

The vital factor in determining whether such a special contract of service exists is not the question as to whether the special employer pays him wages, though this may have some significance. The true test is, whether he passed into the control of the special employer, so as to owe him a duty of obedience with respect to the matter in hand. If the general employer retains control, he is employer.

Rongo v. R. Waddington & Sons, 94 Atl. 408 (N. J.)
Pruitt v. Ind. Acc. Com., 209 Pac. 31 (Cal.)
Fed. Mut. Liab. Ins. Co. v. Ind. Acc. Com., 210 Pac. 628 (Cal.)
Stacey Bros. Gas Const. Co. v. Ind. Acc. Com., 239 Pac. 1072 (Cal.)
Kirkpatrick v. Ind. Acc. Com., 161 Pac. 274 (Cal.)

Crawfordsville Shale Brick Co. v. Starbuck, 141 N. E. 7 (Ind.)
Scribner's Case, 120 N. E. 350 (Mass.)
Chisholm's Case, 131 N. E. 161 (Mass.)
Tarr v. Hecla Coal & Coke Co., 109 Atl. 224 (Pa.)
Famous Players-Lasky Co. v. Ind. Acc. Com., 228 Pac. 5 (Cal.)
Tilling v. Indemnity Ins. Co. of No. America, 283 S. W. 565 (Tex.)
Torsey's Case, 153 Atl. 807 (Me.)
De Nardo v. Seven Baker Bros., 156 Atl. 725 (Pa.)
Byrne v. Henry A. Hitner's Sons Co., 138 Atl. 826 (Pa.)
Sgattone v. Mulholland & Gotwals, 138 Atl. 855 (Pa.)
Ocean Acc. & Guar. Co. v. Ind. Acc. Com., 263 Pac. 823 (Cal.)
U. S. F. & G. Co. v. Stapleton, 141 S. E. 506 (Ga.)
Ideal Steam Laundry Co. v. Williams, 149 S. E. 479 (Va.)

The consent of the employee, expressed or implied, and his knowledge that he is passing temporarily into the service of another is generally held a vital element.

Murray v. Union Ry. of N. Y. City, 127 N. E. 907 (N. Y.)
Knudson v. Jackson, 183 N. W. 391 (Iowa)
Seaman Body Corp. v. Ind. Com., 235 N. W. 433 (Wis.)
Wilson & Co. v. Locke, 50 Fed. 2nd 81 (N. Y.)
Spodick v. Nash Motor Co., 232 N. W. 870 (Wis.)

There is one case to contra: Emack's case, 123 N. E. 86 (Mass.)

The amount of control necessary to establish the relation must be substantially complete.

Allen Garcia Co. v. Ind. Com., 166 N. E. 78 (Ill.)

Mere authority to indicate what is to be done, is not enough: and absence of evidence of right to control will indicate that employee remains in service of general employer.

Hogan's Case, 127 N. E. 892 (Mass.)
Golden & Boter Transfer Co. v. Brown & Sehler Co., 177 N. W. 202 (Mich.)
Schweitzer v. Thompson & Morris Co., 127 N. E. 904 (N. Y.)
Lewis v. S. M. Byers Motor Car Co., 156 Atl. 899 (Pa.)

and the special employment is strictly limited to what is done exclusively for special employer.

Centrello's case, 122 N. E. 560 (Mass.)

Generally the liability is single, i.e., the question is, whether the general or the special employer should pay compensation. There are cases, however, which indicate a double liability.

Independence Indemnity Co. v. Ind. Com., 262 Pac. 757 (Cal.)
De Noyer v. Cavanaugh, 116 N. E. 992 (N. Y.)
Schweitzer v. Thompson & Morris Co., 127 N. E. 904 (N. Y.)
Jaabeck v. Theodore A. Crane's Sons, 206 App. Div. 574 (N. Y.) (but see 144 N. E. 625)
Diamond Drill Contracting Co. v. Ind. Acc. Com., 250 Pac. 862 (Cal.)
Employers' Liab. Assur. Corp. v. Ind. Acc. Com., 177 Pac. 273 (Cal.)

The Colorado statute, mentioned above, provides that the general employer shall remain liable for compensation unless there is a new contract of employment with the employer to whom he is loaned. In the interest of the employee, a statutory rule even more rigid might be warranted. It is a distinct hardship on the latter to speculate as to which of two he must look for compensation.

Very similar to the above are the cases of golf caddies, who are in several cases held employees of the club but who are indubitably in the pay or under the direction of the player.

Claremont Country Club v. Ind. Acc. Com., 163 Pac. 209 (Cal.)
Indian Hill Club v. Ind. Com., 140 N. E. 871 (Ill.)

The point as to whether a caddie is also a special employee of the player has not figured as yet in the decided cases. Save in case of a professional, the caddie would undoubtedly come under the head of casual employees.

It may be noted that under some statutes which specify employments as businesses carried on for gain or profit, country clubs do not come within the law.

Maryland Casualty Co. v. Stevenson, 288 Pac. 954 (Okla.)
Francisco v. Oakland Golf Club, 193 App. Div. 573 (N. Y.)

Cases involving nurses have raised some very similar questions:

Brown v. St. Vincent's Hospital, 222 App. Div. 402 (N. Y.)
Renouf v. N. Y. C. R. R. Co., 229 App. Div. 58, 173 N. E. 218 (N. Y.)
Visiting Nurses Ass'n v. Ind. Com., 217 N. W. 646 (Wis.)

5. *Alternating Employments.*

Cases where one person may be both employer and employee are found in those states where compensation is awarded working members of partnerships, though this is legally an anomaly. A more legitimate case is that of an association of farmers who agreed to help each other fill their silos. This was held not a partnership but a genuine contract of service for pay on the part of each member with every other member. The one for whom the work was being done was, of course, the employer; and when the work shifted to another farm he became an employee.

Smith v. Jones, 129 Atl. 50 (Conn.)

6. *Classes of Employment.*

The effect of the compensation acts is to divide employments into classes differing as to rights and duties. Four such classes may be distinguished.

(a) Employments as to which the act is compulsory, i.e., where the compensation plan applies conclusively to both employer and employee.

(b) Employments as to which the act is semi-compulsory, i.e., where the plan is normally elective as to employer, to employee or to both, but where failure to come under the plan entails removal of common law defenses or other disability.

(c) Employments as to which the act is elective: that is to say, where employer and employee are free, without prejudice to their rights, to elect or to reject the plan.

(d) Employments to which the act cannot apply even by election.

A given employer may be in one class as to a part of his employees and in another class as to another part. Similarly, an employee may as to part of his activities come within one class, as to another part in a different class. This is in part unavoidable, but in part a consequence of the development of the compensation acts. These were originally subject to considerable doubt as to constitutionality, and therefore drawn in a manner often strikingly constrained and artificial. They had to overcome a degree of prejudice on the part of both employers and lawyers, and therefore at times contain more restrictions and exceptions than are at all desirable. Now that the air has cleared, there have appeared acts drawn on simple and inclusive lines, well adapted to eliminate some at least of the manifold causes of litigation, and therefore afford a remedy simpler and surer.

The most conspicuous example is afforded by those provisions of a number of acts which apply the compulsory or semi-compulsory portion of the law, not by means of a broad and simple definition, but by means of a list of employments denominated as "hazardous" or "extra hazardous". Certain expressions of the United States Supreme Court in the earlier compensation cases

gave basis to a belief that the constitutionality of a compulsory act depended upon the hazardous character of the employment. This the case of Ward and Gow v. Krinsky, 259 U. S. 503, practically dispelled; but the belief, coupled with a desire to restrict the application of the act, caused a number of acts to be cast in this form.

Thus the compulsory features of the acts of Illinois, Kansas, Maryland, New York, Oklahoma, Washington and Wyoming, and the semi-compulsory features of the laws of Montana, New Hampshire, New Mexico and Oregon are founded upon lists of "hazardous" or "extra hazardous" employments. The list of extra hazardous employments in the Arizona law seems to serve no useful purpose.

These provisions have led to a deal of litigation, particularly in New York and Illinois. The classifications were not always clearly defined, some embracing not only businesses but incidental activities of many businesses not otherwise classed as hazardous. The Illinois classification of businesses subject to regulation by law or ordinance might, if interpreted literally, cover all occupations whatsoever. There was uncertainty as to the effect of the law upon a business of which only part of the operations were hazardous, or upon an employee engaged in non-hazardous work for an employer classed as hazardous, or engaged in hazardous work for an employer classed as non-hazardous. To review the decisions is not desirable, partly because it requires a study of each state individually, partly because the states wherein litigation raged the hottest have taken effective means to broaden or define their laws.

New York, for instance, by introducing a provision classing as hazardous all employments wherein four or more workmen or operatives were employed, rendered the other classifications of importance chiefly in cases of relatively minor industries; and by a second provision, permitting an employer, by furnishing the security required by law to come under the compulsory provisions, broadened the class still further. Other states have added provisions, as in Maryland and Montana, for inclusion of employments hazardous in fact but not specifically enumerated, and as in Louisiana and Washington for the determination as hazardous of classifications not enumerated by finding of court or commission.

It suffices therefore to note merely these points:

(a) Where the legislature condescends to be specific, the courts have no option but to say *Ita lex scripta est* and take the law as it is written. It is not too much to say that the general tendency in interpreting these provisions has, with some exceptions, inclined towards strictness.

(b) The provisions designed to broaden the laws by providing for the inclusions of classifications not enumerated has been limited by the application of the rule of *ejusdem generis*. The substance of this rule is, that where a statutory provision sets forth a detailed list of items and adds a general clause, the general clause is taken to include only items of the same or similar nature to those specifically mentioned.

Page v. N. Y. Realty Co., 196 Pac. 871 (Mont.)
State v. Eyres Storage & Distributing Co., 198 Pac. 390 (Wash.)

This further point may be noted as to excepted employers, employees and employments. The extent to which these can be included in the law by voluntary election depends upon the statute: that is, except in cases excluded because beyond the jurisdiction of the state. There are only scattered cases where the law specifically says an excepted employment cannot be included, as in the case of farm labor in Alabama. Some laws provide specifically for inclusions by election, but others while providing that some excepted employments may be thus included are silent as to others. There is a well established rule that the specific inclusion of certain named items indicates an intent to exclude all others.

The mischief of the situation is that, while the parties in such case may go through the form of election and thereby effectively estop themselves from denying that they are within the law, this does not broaden the jurisdiction of the industrial commission, nor does it necessarily act as a bar to the rights of others, not parties to the election: as for instance, a husband bringing suit for loss of services of a wife, a parent for loss of services of a minor child, or those authorized by law to bring action in case of death by wrongful act.

IV. Conclusion

The purpose of traversing this large and varied field is to obtain some idea of the general methods of the courts in construing the compensation acts. Practically it was possible to cover only a limited portion of the act, but the portion selected is the one which not only lies at the very foundation of the liability to pay compensation but contains the greatest number of purely legal questions bearing upon the effect produced by the compensation acts upon the general law of Master and Servant. It is a very easy thing to base almost any conclusion upon a particular case or upon a limited group of cases. There are undoubtedly many cases where there is much to criticize in the result. The foregoing study, covering a broad field, seems to warrant the following conclusions:

(a) The courts in dealing with the definitions of "employer", "employee" and "employment" have started on the basis of the contract of service as it had previously been defined in the laws, and barring such modifications and limitations as were necessitated by the statutory definitions, have in the main clung to established legal principles. To this there are two exceptions:

1. The decisions to the effect that a partner receiving the equivalent of a wage as distinct from profits may be considered for the purposes of the act as an employee of the firm. But these decisions are confined to a very few states, the prevailing opinion being the other way.

2. The decisions as to illegal contracts, more particularly, that minors illegally employed may be considered employees for the purpose of the compensation acts. But here again, the courts which have awarded compensation in such cases apart from statutory requirement are relatively few in number. It is not thought that those courts would award compensation to an employee who was himself in the course of his employment in flagrant violation of law: as, for example, an employee of a gambling house or a house of prostitution.

The concept that an officer of a corporation may also be, under some circumstances, an employee of the corporation is a novel development, but by no means without clothes of reason.

(b) In dealing with questions involving the jurisdiction of

the state, such as employments coming under the control of the United States by virtue of the commerce clause, employments touching upon the maritime jurisdiction of the United States and employments passing beyond the territorial boundaries of the state, the decisions displayed an early tendency to stretch the state jurisdiction somewhat further than sound reason would warrant, but ultimately settled down along very orthodox lines. In the case of decisions relative to the maritime jurisdiction of the United States, the decisions of the Supreme Court made some departure from orthodoxy, but in the direction of curbing rather than extending the operation of the compensation laws.

(c) In dealing with questions touching the extent to which the state and its political subdivisions and agencies have been brought within the scope of the compensation acts, the law has been on the whole strictly interpreted.

(d) In dealing with the application of principles familiar to the law of employers' liability, such as the relation of independent contractor and general and special employee, the courts have occasionally indicated an opinion that it was questionable if these concepts had proper place in the scheme of workmen's compensation. But the tendency which has prevailed is to apply them insofar as the statutes will permit.

Hence the theory outlined at the beginning of this paper, namely, that the liberality of the courts is a very different and far more a constrained matter than the liberality of the legislatures or administrative officials, seems justified. The courts have desired to interpret the compensation acts liberally but this has not involved a radical revision of established principles. To the extent that these principles were unmistakably changed by statute, the court had no option but to recognize the law as written. But when the court could, they have based their decisions upon familiar and well established rules of construction and have embodied in the law as much as was possible of the existing law relating to contracts of service. Far from being an increasing liberality, the tendency has been if anything the other way.

It was in the early stages of the compensation laws that decisions showed a tendency to strike out along novel lines. The longer the courts have dealt with compensation problems, the

greater the tendency to adhere as closely as possible to established principles. There is one well established case of increasing liberality, though not strictly speaking a liberality in construction of the compensation law, namely, an increasing liberality on the part of the United States Supreme Court on questions of constitutionality. The reasoning and the *obiter dicta* in the earlier compensation cases are flatly incongruous on many points with the later decisions.

Barring this, there seems on the whole little reason to charge the courts with an increasing liberality. It seems probable likewise that the enthusiasm of legislatures in broadening the compensation acts has in the more progressive states gone to its practicable extent, and the present tendency is to make much of rather trifling amendments. The practice of industrial accident boards, in some cases fairly chargeable with criticism for having stretched the compensation acts a deal further than logic and sound principle warranted, seems to have settled into a soberer and more reasonable course.

The compensation acts, novel in principle, extensive in scope and not always as clearly and scientifically expressed as they might have been, gave rise to a host of questions which thronged in upon those charged with construing and applying the law a deal faster than was conducive to sane and orderly decision. That both commissions and courts have under these circumstances made some wild decisions was no more than might have been expected. That the courts have on the whole exerted their powers in the direction of order, consistency and logic and with an appreciation that, while the acts were designed for the benefit of the employee, the rights of the employer must also be considered, is I think, borne out by the general trend of decisions.

On this point it is pertinent to quote from a late case (Pacific S. S. Co. v. Pillsbury, 52 Fed. 2nd 686) a phrase well worth preserving as expressing an eminently sane view with regard to the general interpretation of the compensation acts.

> "The act in question is wise in its conception and beneficent in its operation. It must be interpreted and enforced with such care that it shall not be an agency of unfairness either to the employer or to the employee. Its careful and fair administration is the best guaranty of its permanence."