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THE APPLICATION OF STATE WORKMEN'S COMPEN-
SATION LAWS TO PUBLIC EMPLOYEES
AND OFFICERS

By EDWIN O. STENE*

WORKMEN'S compensation is a product of statutory law, and therefore an analysis of the statutes would present a fairly complete picture of the protection afforded in the various states. There are, however, many terms the meaning of which have been clarified, and sometimes, it seems, changed by the courts in applying the law. For this reason it is necessary, as it is with most laws, to examine into the court reports as well as the statutes. It is particularly important to do so in order to determine the application of the laws to public servants, because many of the old rules of governmental liability have been carried over by the courts as guides to the construction of the acts.

At the present time all the states except four southern ones have workmen's compensation laws. But in the states of New Hampshire and Texas, and in the Territory of Alaska, the compensation acts fail to mention public employments.¹ The question therefore arises as to the extent to which these laws apply to public entities without expressly including them as employers.

The New Hampshire law applies only to hazardous employments in a few enumerated industries. It is therefore evident that local governments would not be included unless they were engaged in one or more of these enumerated industries.² Nevertheless, many cities and towns have voluntarily accepted the law and are paying their employees under its provisions.³

The Texas compensation law provides that the term "employer," as used therein, shall mean "any person, firm, partnership, association of persons, or corporations (sic.), or their legal representatives, that make contracts for hire."⁴ Because of the legal

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¹New Hampshire has, by separate enactment, authorized the governor and council to pay compensation benefits to injured state employees. Laws 1929, ch. 140. A table classifying the states according to their provisions covering public employments is included at the end of this article.

²Industries which might be engaged in are street railway operation and construction and operation of electric lines, N. H. Public Laws 1926, ch. 178.

³Letter of November 10, 1930 from J. S. B. Daire, Labor Commissioner of New Hampshire.

⁴Texas Revised Civil Statutes, 1925, title 130, art. 8309, sec. 1.

rule that the state and its purely governmental agencies, such as counties and school districts, are not subject to statutory law unless the legislature expressly makes them so, it is evident that they are not included within the Texas definition of "employers."⁵ But what about municipal corporations? May they not be included within the meaning of the term "corporations?" The commission of appeals has held that they are not, that the term means "private corporations," and that municipalities are not included either as to their public or as to their proprietary functions.⁶ This conclusion does not seem to be in accord with the rulings in earlier cases that employers' liability statutes changed the liabilities of municipal corporations in so far as those corporations were liable in tort under the common law.⁷ If the courts insist on carrying over the common law doctrines to construe other provisions of the workmen's compensation laws, why should they not do so in this case? One explanation seems to be that all arguments relative to the principle of workmen's compensation are set forth with businesses operated for profit in mind. It is quite probable, however, that many courts would be more liberal in applying such provisions than the Texas commission of appeals has been.⁸

In Georgia the compensation law was drawn up to apply to all subdivisions of the state, but it has been declared unconstitutional in so far as it applies to counties. The constitution enumerates the purposes for which the legislature may authorize counties to levy taxes, and the courts have held that the enumeration cannot be implied to include any authorization to expend tax monies for the payment of workmen's compensation claims or insurance.⁹

⁵Counties are mere agents of the sovereign state, and "Laws are made for the subject, not for the sovereign." *Forsythe v. Pendleton County*, (1924) 205 Ky. 770, 266 S. W. 639. See also *Gray v. Board of Commissioners of Sedgwick County*, (1917) 101 Kan. 196, 165 Pac. 867.

⁶*City of Tyler v. Texas Employers' Insurance Association*, (Tex. Comm. of App. 1926), 288 S. W. 409; *Adkinson v. City of Port Arthur*, (Tex. Civ. App. 1927) 293 S. W. 191. In the Tyler case the commission of appeals overruled a decision of the court of appeals (*Texas Employers' Ins. Ass'n v. City of Tyler*, (Tex. Civ. App. 1926) 283 S. W. 929, which held that the statute included municipal corporations in so far as they were engaged in proprietary functions.

⁷*Eugene McQuillin, A Treatise on the Law of Municipal Corporations*, sec. 2620, p. 5391; *Josupeet v. City of Niagara Falls*, (1910) 70 Misc. Rep. 638, 127 N. Y. S. 527; *City Council of Sheffield v. Harris*, (1893) 101 Ala. 564, 14 So. 357.

⁸*City of Tyler v. Texas Employers' Insurance Association*, (Tex. Civ. App. 1926) 283 S. W. 929. Application of the law to private functions is suggested in *Forsythe v. Pendleton County*, (1924) 205 Ky. 770, 266 S. W. 639.

⁹*Floyd County v. Scoggins*, (1927) 164 Ga. 485, 139 S. E. 11.

"BUSINESS" AND "PROFIT"

Although the Kansas compensation law specifically includes "county and municipal work" as one of the hazardous employments covered, the courts have so construed the terms as to make them practically superfluous. In part the reason for the construction is to be found in the vagueness of the terms; in part it arose out of the fact that the legislature tried to include certain public employments by casual mention in an act otherwise framed with reference to private employments only.

In defining "workmen" the act of 1911, as amended in 1913, provided that the term "does not include any person employed otherwise than for the purpose of the employer's trade and business," and in another place the act was said to apply to the employer's "trade and business." In applying the statute to municipal corporations, the court argued that "trade and business" implied a business for gain or profit. From this they concluded that the theory of the law is—as it is when applied to private industry—that the cost of compensation can be added to the price of the product. But, the courts argued, most functions of counties and municipalities are not operated for gain or profit. Therefore the compensation law does not apply.¹⁰ The anomalous conclusion was that, while an employer's liability act or possibly a workmen's compensation law in which the terms did not so clearly suggest profit-making, would apply to all proprietary functions, sometimes including such functions as street and sewer construction, the Kansas compensation law was made to apply only to those functions from which municipalities might expect to make profits.¹¹ Since counties are merely agents of the state and do not carry on any business for profit, the term "county work" has been construed to mean only such work as is done for counties by private contractors. Consequently, if a county, instead of having its

¹⁰*Griswold v. City of Wichita*, (1917) 99 Kan. 502, 162 Pac. 276.

¹¹"A city in constructing a lateral sewer, while exercising a proprietary power, is not engaged in an enterprise involving an element of gain or profit, and therefore is not within the operation of the workmen's compensation act." *Roberts v. City of Ottawa*, (1917) 101 Kan. 228, 165 Pac. 869; also quoted with approval in *Redfern v. Eby*, (1918) 102 Kan. 484, 170 Pac. 800.

In the *Ottawa* case the court tried to make its decision consistent with the rule of liberal construction by stating that "the statute must be liberally construed, but the courts cannot go beyond the Legislature and add what was omitted, or change the character and manifest object, purpose, and limitations of the enactment." In the same case the opinion was expressed that if the legislature had intended to include cities, "it is remarkable that no apt or clear language indicating such intention was used."

work done by contract, hires its own employees and furnishes its own machinery to do the work, an employee injured in the course of his duty has no legal claim against it for compensation.¹²

When the Kansas legislature enacted the new workmen's compensation law in 1927, it retained the words "county and municipal work," but eliminated or changed some of the provisions which referred to "business, trade or gain."¹³ Although there have been no decisions of the supreme court applying the law to governmental functions, a decision handed down in 1929—in which a city water department was held to be included within the meaning of the act, because it was "operated for trade and gain"—indicates that the earlier decisions will continue to be followed.¹⁴ Nevertheless, some counties and municipalities have accepted the act without limitations as to employments covered, and the commissioner of workmen's compensation has announced that complete acceptances will be received by him and "the holding of the commissioner will be that such municipalities are within and subject to the provisions of the compensation act and jurisdiction will be taken of accidental injuries in such cases."¹⁵

¹²Gray v. Board of Commissioners of Sedgwick County, (1917) 101 Kan. 195, 165 Pac. 867. Counties are "mere instrumentalities of the state government," and there is an "unvarying rule to relieve (them) from all liability not expressly imposed by the state."

But where a county had insured its employees under the mistaken assumption that it would be held liable for compensation, the insurance company would not escape payment of compensation on the ground that the county was not liable. Robertson v. Labette County, (1927) 122 Kan. 486, 261 Pac. 934; Board of Commissioners of Labette County v. Federal Ins. Co., (1927) 124 Kan. 712, 261 Pac. 839.

¹³Sec. 6 (new sec. 5), which defined the "Application of the Act," was amended by eliminating the words "which is conducted for the purpose of business, trade or gain." In section 8, defining "workmen" the new law eliminated the words "but does not include a person who is employed otherwise than for the purpose of the employer's trade or business." But section 5 still provides that the act shall apply "only to employment in the course of employer's trade or business in . . . county and municipal work."

¹⁴In McCormick v. Kansas City, (1929) 127 Kan. 255, 273 Pac. 471.

¹⁵Commissioner of Workmen's Compensation (Topeka, Kan.), Bulletin No. 7, "Application of the Workmen's Compensation Act, Chapter 232, Laws of Kansas 1927, to County and Municipal Work," December 28, 1929.

The City of Arkansas City elected to come within the act on February 4, 1928 and did not in any way limit the scope of its election. The election stated that "it engaged in the business of municipal government." Copy of letter written by Harry G. Bauman, member of the Labor Commission, to the Hess Realty Company, Arkansas City, Kansas, on September 20, 1929. On November 17, 1930, fifty-eight cities had elected to come within the provisions of the act, but some limited their election to specified functions, such as "street department," "transmission lines," or "water and light department." A few counties and townships had also accepted the provisions of the act. Letter from Harry G. Bauman, dated November 17, 1930.

In two or three other states the courts have applied a similar construction to acts which used the terms "business," or "gain or profit" with the result that the intentions of the legislatures were practically annulled. Except in Louisiana¹⁶ the decisions are not of great importance at the present time, however, since the Nebraska statute was later amended to eliminate any doubt as to its application, while the New York decisions have not been followed in later cases.¹⁷

A more liberal attitude has been taken by the Supreme Court of Oklahoma in construing the terms "business" and "gain." The compensation law of that state, as passed in 1915, defined "employment" as work carried on in a business for "pecuniary gain." In 1919 the legislature amended the act to include the state and its political subdivisions as employers and to include "construction of public roads" as a hazardous employment; but the definition of "employment" was left unchanged. The court decided, however, that a casual reading of the entire act indicates that the legislature intended to change the old rules of municipal liability and to protect public as well as private employees. Therefore, it was concluded, the provision relating to "pecuniary gain" was either repealed by implication, or it "originally found its way by inadvertence into this otherwise harmonious system of laws."¹⁸ The

¹⁶A recent Louisiana decision, although it is somewhat vague as to the extent of its application, maintains the rule that at least some of the public agencies, including school districts, are not subject to the compensation law because they are not engaged in any "trade, business, or occupation." *Charity Hospital v. Bd. of School Directors*, (La. 1932) 140 So. 60.

¹⁷Before it was amended the Nebraska law specifically included the state and its governmental subdivisions as employers, but provided in another place that the term "employee" "should not be construed to include any person whose employment is casual, or not for the purpose of gain or profit by the employer." This, the court ruled, operated to exclude all enterprises of the state or its subdivisions except those which were conducted for "pecuniary gain or profit." *Ray v. School District of Lincoln*, (1920) 105 Neb. 456, 181 N. W. 140; *Rooney v. City of Omaha*, (1920) 105 Neb. 447, 181 N. W. 143; *Mecomber v. City of North Platte*, (1920) 105 Neb. 464, 181 N. W. 145.

The constitution of New York provides that moneys paid as compensation "shall be held to be a proper charge in the cost of the business of the employer." Because of that provision the appellate division held, in the case of *Krug v. New York City*, (1921) 196 App. Div. 226, 186 N. Y. S. 727, that "where there is no business upon which the compensation can become a charge . . . there is no warrant for the legislation." In later cases, however, the New York courts held that when a public employee is engaged in a function which is listed as hazardous, he is entitled to compensation whether or not he is performing a governmental function. *Hughes v. City of Buffalo*, (1924) 208 App. Div. 692, 203 N. Y. S. 391.

¹⁸*Board of Commissioners v. Whitlow*, (1923) 88 Okl. 72, 211 Pac. 1021.

supreme court of West Virginia has also ruled that the terms "industry" and "business" as used in the compensation law do not refer to public employers, and that the act should be construed liberally so as to include employees engaged in any sort of work, governmental or industrial.¹⁹ Other courts have held that "business" does not necessarily imply trading or profit, and that a county or city may be in the "business of local government."²⁰

APPLICATION OF LAWS TO OFFICERS

In construing terms which involve the application of workmen's compensation laws to public employments, there is perhaps no question which the courts have had to answer more frequently than that of the meaning of the terms "employee" and "employment." The meaning of "employer" is not as frequently questioned because most states expressly provide that the state, counties, municipal corporations, and other subdivisions of the state shall be included as "employers." But no such simple definition is applied by the statutes to the term "employee." Sometimes the term is left undefined, but more frequently the statutes give a general definition such as "any person in the service of another under any contract of hire or apprenticeship, written or implied." Employment is frequently defined as "service under any appointment or contract of hire or apprenticeship," or in other similar terms.

Unless there are provisions in the statute which might be implied to limit its application to certain functions, such as was the case with Nebraska,²¹ the courts have held that the express inclusion of the state and its governmental subdivisions, or any of them, as employers has the effect of including both proprietary and governmental functions as "employments."²² Any other construction would be almost impossible as long as purely governmental agencies of the state are included with municipal corporations.

But the courts are not as ready to conclude that the law covers

¹⁹*Esque v. City of Huntington*, (1927) 104 W. Va. 110, 139 S. W. 469.

²⁰A special policeman was "in the business of the police force." *Lake v. City of Bridgeport*, (1925) 102 Conn. 337, 128 Atl. 782.

The "business" of a county "includes the performance of the duties prescribed by law." *Los Angeles County v. Industrial Commission*, (1928) 89 Cal. App. 738, 265 Pac. 362.

²¹See note 17.

²²*Hughes v. City of Buffalo*, (1924) 208 App. Div. 682, 203 N. Y. S. 391; *Esque v. City of Huntington*, (1927) 104 W. Va. 110, 139 S. E. 469.

all persons in the service of the public entity. The principal reason for strict construction of provisions relating to the application of the laws to the public service has its roots in the old distinctions between "officer" and "employee." When the legislature has used the term "employee"—and that is the term used in practically all workmen's compensation laws—the courts hold, almost without exception, that the intention was to exclude officers unless they were expressly included in the statutory definition of "employee."²³ This conclusion leads us to the question of definition of "officer," and the distinction between officer and employee.

There are numerous cases in which the courts have defined the term "officer," but there is perhaps no definition so clear as to remove all doubt as to its meaning when it is applied to particular positions or persons. Judges have held that every office "implies an authority to exercise some portion of the sovereign power of the state, either in making, executing, or administering the laws,"²⁴ that an officer renders a "public service; a service in which the general public is interested;"²⁵ and that an officer may be distinguished from an employee by the greater "importance, dignity and independence" of his position.²⁶ But more concrete guides to the distinction may be found in the method by which the position is created and the incumbent selected, the source from which his powers are received and his duties imposed, and the condition under which he enters upon his duties. If a position has been created by statute, charter, or ordinance, and if the powers and duties are prescribed by such enactments, the courts will consider the position an office.²⁷ Furthermore, a commission of appoint-

²³*City of Macon v. Wittington*, (1931) 42 Ga. App. 622, 157 S. E. 127. *Mann v. City of Lynchburg*, (1921) 129 Va. 453, 106 S. E. 371; *Kahl v. City of New York*, (1921) 198 App. Div. 30, 189 N. Y. S. 547; *Youngman v. Town of Oneonta*, (1923) 204 App. Div. 96, 198 N. Y. S. 217.

²⁴*Olmstead v. Mayor, etc., of New York*, (1877) 42 N. Y. Super. Ct. 481. See also *Pennel v. City of Portland*, (1924) 124 Me. 14, 125 Atl. 143; *State Conservation Dept. v. Nattkemper*, (1927) 86 Ind. App. 85, 158 N. E. 168.

²⁵*Smith v. Dooling*, (1911) 145 Ky. 240, 140 S. W. 197.

²⁶*Pennel v. City of Portland*, (1924) 124 Me. 14, 125 Atl. 143.

Public office "clearly embraces the idea of tenure, duration, fees or emoluments, rights and powers, as well as duties; a public station or employment; an employment confirmed by appointment." *Kahl v. New York*, (1921) 198 App. Div. 30, 189 N. Y. S. 547.

²⁷*Pennel v. City of Portland*, (1924) 124 Me. 14, 125 Atl. 143; *Burrell v. City of Bridgeport*, (1921) 96 Conn. 555, 114 Atl. 679; *City of Chicago v. Industrial Commission*, (1919) 291 Ill. 23, 125 N. E. 705; *Blynn v. City of Pontiac*, (1915) 185 Mich. 35, 151 N. W. 681; *Johnson v. Industrial Commission*, (1927) 326 Ill. 553, 158 N. E. 141.

ment and the requirement of an oath are frequently indications of the existence of an office.²⁸ A person who is elected is considered an officer,²⁹ and one who has been appointed by the chief executive of the state or of a municipality is more likely to be regarded as an officer than is one who has been appointed by some inferior officer.³⁰ Finally, the power to exercise discretion is a sign of the existence of an office, since it involves independence and authority.³¹

But the actual operation of the legal distinction between officers and employees when applied to workmen's compensation laws can be illustrated more clearly by showing how some of the common positions have been classified. Peace officers—sheriffs, constables, marshals, general or special police—are, in almost all cases, held to be public officers, and are therefore not covered by compensation laws which apply only to employees.³² But, in a few cases, where policemen have not been provided for by charter or ordinance, or where they have been treated as employees by the cities, the courts have held them to be employees within the law.³³ A fireman is in most cases held to have a status similar to that of

²⁸*Olmstead v. Mayor*, (1877) 42 N. Y. Super. Ct. 481; *Pennel v. City of Portland*, (1924) 124 Me. 14, 125 Atl. 143; *Blynn v. City of Pontiac*, (1915) 185 Mich. 35, 151 N. W. 681.

²⁹*Town of Wonewoc v. Industrial Commission*, (1922) 178 Wis. 656, 190 N. W. 469.

³⁰*McDonald v. City of New Haven*, (1920) 94 Conn. 403, 109 Atl. 176; *Burrell v. City of Bridgeport*, (1921) 96 Conn. 555, 114 Atl. 679.

³¹*McCendon v. Board of Health*, (1919) 141 Ark. 114, 216 S. W. 288; *Pennel v. City of Portland*, (1924) 124 Me. 14, 125 Atl. 143.

³²*Shelmandine v. City of Elkhart*, (1921) 75 Ind. App. 493, 129 N. W. 878; *Blynn v. City of Pontiac*, (1915) 185 Mich. 35, 151 N. W. 681; *Hall et al. v. City of Shreveport*, (1925) 157 La. 589, 102 So. 650.

A policeman remains a public officer even though he is detailed to work of an elemental nature, such as caring for a police station. *Ryan v. City of New York*, (1920) 228 N. Y. 16, 126 N. E. 350.

A state game warden is an officer. *State Conservation Dept. v. Nattkemper*, (1927) 28 Ind. App. 85, 156 N. E. 168.

³³*McCarl v. Borough of Houston*, (1919) 263 Pa. 1, 106 Atl. 104.

A policeman merely appointed by resolution or by approval of the recommendation of a department head, without any provision for policemen in either the charter or ordinance, is an employee. *La Belle v. Village of Grosse Pointe Shores*, (1918) 201 Mich. 371, 167 N. W. 923; *Johnson v. Industrial Commission*, (1927) 326 Ill. 553, 168 N. E. 141.

The test of whether a policeman is an officer or an employee depends upon (1) the charter provisions, and (2) how he was recognized by the city. Where the city had regarded a policeman as an employee and had paid him workmen's compensation as such, it cannot later contend that he was an officer. *Millely v. City of Grand Rapids*, (1925) 231 Mich. 70, 203 N. W. 651.

a policeman.³⁴ The status of road or bridge supervisors, hospital superintendents, or persons in other similar positions depends primarily upon the provisions of the law and the nature of their appointments.³⁵

An exception to the general rule of excluding officers from the application of the compensation laws unless they are specifically mentioned is found in the attitude taken by the supreme court of North Dakota. The law of that state, after defining "hazardous employments" so as to include practically all employments except farm labor and domestic service, defines "employee" as "every person engaged in a hazardous employment, under any appointment, or contract of hire, or apprenticeship, express or implied, oral or written."³⁶ A policeman was killed in the performance of his duty, and the court held that his dependents were entitled to compensation, on the ground that an officer was an "employee" of the city, within the meaning of the law. In explaining its conclusion, the court argued that "in the portion of the law devoted to the definition of terms . . . there is an evident tendency toward generalization in definition rather than restriction." This was indicated by the use of such terms as "every person" and "any employment." The courts should, therefore, construe the provisions liberally. Furthermore, the words "under any appointment" indicated that officers were to be included.³⁷

Whether or not the legislatures intended in such cases to include officers under a definition of the term "employee" is diffi-

³⁴McDonald v. City of New Haven, (1920) 94 Conn. 103, 109 Atl. 176.

But if a city insures its firemen under the mistaken conception that they are employees, the insurance company is not thereby excused from fulfilling its part of the agreement. Frankfort General Ins. Co. v. Conduitt, (1920) 74 Ind. App. 584, 127 N. E. 212. The same rule has been applied in Georgia. City of Macon v. Whittington, (1931) 171 Ga. 643, 156 S. E. 674, 157 S. E. 127. But in that state the courts hold that even though the compensation insurance policy covers municipal officers, the municipality and the insurance company are not estopped from denying the existence of the relationship of employer to employee. City of Macon v. Whittington, (1931) 171 Ga. 643, 156 S. E. 674, 157 S. E. 127; also Parker v. Travelers' Ins. Co., (Ga. 1932) 163 S. E. 159, 161.

³⁵A road supervisor was held to be an officer in Youngman v. Town of Oneonta, (1923) 204 App. Div. 96, 198 N. Y. S. 217.

But the superintendent of a city hospital appointed by the board of overseers of the poor and "subject to its jurisdiction and control," was held to be an employee. Pennel v. City of Portland, (1924) 124 Me. 14, 125 Atl. 143. Similarly a "superintendent of city bridges," under the direction of the director of public works, was held to be an employee. Burrell v. City of Bridgeport, (1921) 96 Conn. 555, 114 Atl. 679.

³⁶North Dakota, Acts 1919, ch. 162, sec. 2. This is a common definition of the term "employment."

³⁷Fahler v. City of Minot, (1923) 49 N. Dak. 960, 194 N. W. 695.

cult to determine. In fact, the intent may vary from state to state. The advocates of exclusion might point to the fact that a large number of states exclude officers specifically. On the other hand, it may be pointed out that in some states a decision construing the law to exclude officers is almost immediately followed by an amendment to the statute by which such persons are expressly included.³⁸

In the states where all officers are specifically excluded from the application of the compensation laws the results are the same as where the courts have held them to be excluded by the mere use of the term "employee."³⁹ But in several states certain classes of officials, usually those who are elected, are specifically excluded from the application of the law.⁴⁰ The effect of such provisions is to include other officers by implication, since the rule applied by courts that to mention some of a class excludes all others operates here in a negative sense.⁴¹ In other states some officers—usually firemen and peace officers—are specifically included within the definition of the term "employee," with the result that they are protected even though officers in general are excluded by the statute.⁴² When the legislature has clearly de-

³⁸In *Mono County v. Industrial Accident Commission*, (1917) 175 Cal. 752, 167 Pac. 377, elected officers were held to be excluded. In the same year the legislature amended the law to include such officers. Cal. Laws 1917, ch. 586.

In 1920 the supreme court of Connecticut held that policemen were not included under the compensation law. *McDonald v. City of New Haven*, (1920) 94 Conn. 403, 109 Atl. 176. In 1921 the legislature specifically included policemen. Connecticut, Laws 1921, ch. 306.

³⁹*City v. Industrial Accident Commission*, (1919) 291 Ill. 33, 125 N. E. 705; *Hall v. City of Shreveport*, (1925) 157 La. 589, 102 So. 680.

⁴⁰The Colorado law defines "employee" as any person, "under any appointment or contract of hire, express or implied," but specifically excludes elected officials. Colorado, Code 1921, sec. 4383. See also Nebraska, Compiled Statutes, sec. 3038; West Virginia, Laws 1915; Michigan, Public Acts 1912, Act No. 10, as amended.

⁴¹The Minnesota law excluded "any official . . . who shall have been elected or appointed for a regular term of office." A policeman appointed for an indefinite term was held to be included under the application of the law. The court held that there was no need of deciding whether or not a policeman was an "officer" within the general meaning of the term, because he was not included within the definition of officers excluded by the statute. *State ex rel. Duluth v. District Court*, (1916) 134 Minn. 26, 158 N. W. 790.

⁴²See Mason's 1927 Minn. Stat., sec. 4326; Oregon General Laws (Olson) 1920, sec. 6624, as amended by ch. 311, Laws of 1921, ch. 133, Laws of 1925, and ch. 312, Laws of 1927; South Dakota, Revised Code of 1919, sec. 9490, as amended by ch. 253, Laws of 1929. Wisconsin, Statutes 1927, sec. 102.07.

fined a term used in a statute, its intention is known and the courts need not apply the general meaning of the term.⁴³

DEPUTIZED CITIZENS

Another class of persons who are in a position much the same as that of officers—so far as employment status is concerned—are deputized citizens temporarily assisting sheriffs or other peace officers. As is the case with officers, there is question whether such persons are “employees” and—if the term “employee” is defined—whether they have any contract of hire or apprenticeship with the governmental agency which the deputizing officer represents.

In 1920 the attorney general of Minnesota rendered an opinion in which he held that a deputized citizen was not protected by the compensation law. The basis of his opinion was that “the statute implies a contract of hire, and in a general way, at least, the relation of master and servant.” No such relationship existed between the political entity and a deputized citizen, for the duty performed by the latter was merely “one of the incidental duties of citizenship.”⁴⁴ A similar distinction between the “duties of citizenship” and employment has been applied by a California court of appeals.⁴⁵

But where the peace officers have themselves been included within the application of the compensation laws, citizens deputized to assist such officers have generally been held to be protected. A citizen temporarily deputized by a sheriff is compelled to perform duties of a deputy sheriff, and has therefore assumed the risks and the protection incident to that office.⁴⁶

⁴³State ex rel. Duluth v. District Court, (1916) 134 Minn. 26, 158 N. W. 790.

But in Virginia a deputy sheriff was excluded from the application of the compensation law even though he was within the definition of the statute, because the constitution provided that “counties shall not be made responsible for the acts of the sheriffs.” Board of Supervisors of Rockingham County v. Lucas, (1925) 142 Va. 84, 128 S. E. 574.

⁴⁴Department of Labor and Industries, State of Minnesota, Bulletin No. 17, Court Decisions, Attorney General’s Opinions, Department of Labor Advice Relative to the Workmen’s Compensation Act, 1920, p. 54.

⁴⁵City of Los Angeles v. State Industrial Accident Commission, (1917) 35 Cal. App. 31, 169 Pac. 260. In this case a judge of elections was held not to be an employee, because he was performing a public duty “which may be imposed upon any citizen.”

⁴⁶Monterey County v. Rader, (1926) 191 Cal. 221, 248 Pac. 912.

A deputized citizen killed while making an arrest, was “doing police duties” and was therefore covered by a workmen’s compensation which defined “employee” as including policemen. Village of West Salem v. Industrial Commission, (1916) 162 Wis. 152, 155 N. W. 929.

OTHER QUESTIONS OF EMPLOYMENT STATUS

In addition to public officers there are other persons who may frequently perform services for a political entity, but who are not employees within the meaning of the law. The most common of these is the independent contractor or his employee. When a person has entered into a contract with the state or with one of its subdivisions and hires other persons to help him carry out his obligations under the contract, it is clear that neither he nor the persons working for him are employees of the political entity. But where the agreement involves such a small amount that no written contract is entered into and where the service requires the work of only one or two persons, it is frequently difficult to determine whether the relationship is one of employment or of independent contract.

In determining whether a particular person is an employee of the political entity or an independent contractor, the courts and commissions apply three or four important rules. First, an employee must perform the required services personally, while a contractor may generally hire others to perform them if he wishes.⁴⁷ Second, an employee is "subject to the directions, supervision and control of the employer as to the means and time of performing such service," while a contractor "is obligated merely as to the result of the work."⁴⁸ Furthermore, a contractor more frequently has his own equipment with which to perform the work called for.⁴⁹ The method of paying for services, although not conclusive in itself, may sometimes be suggestive of the nature of the relationship.⁵⁰

But the above mentioned rules do not hold in all cases. If the employer knows that an employee has another person substitute

⁴⁷*Peterson v. Town of Prairieville, Minnesota Industrial Commission, (1925) 3 Minnesota Workmen's Compensation Decisions, 155; Potter v. Scotts Bluff County, (1924) 112 Neb. 318, 199 N. W. 507; Hays v. Board of Trustees of Clinton School City, (1927) 86 Ind. 460, 158 N. E. 234.*

⁴⁸*Preston v. Adams County, Ninth Biennial Report of the Workmen's Compensation Service of Iowa, 1930 p. 106, Morganelli's Estate v. City of Derby, (1927) 105 Conn. 545, 135 Atl. 911.*

⁴⁹*Potter v. Scotts Bluff County, (1924) 112 Neb. 318, 199 N. W. 507.*

⁵⁰*Potter v. Scotts Bluff County, (1924) 112 Neb. 318, 199 N. W. 507.*

It is probable that the states frequently follow the federal employees' compensation commission in holding that advertising and bidding is an indication of contractual relationship, although that point has not been emphasized in compensation cases.

If other conditions make the relationship clear, the method of paying for services has no effect. *Rouse v. Town of Bird Island, (1926) 169 Minn. 367, 211 N. W. 327.*

for him and approves of the practice, the substitute, as well as the person with whom a contract of employment has been made, is protected by the compensation law while he is actually performing his duties.⁵¹ This rule does not apply, however, if the substitute is obtained without the knowledge and consent of those authorized to engage employees, or if the employee and his helper are both working at the same time.⁵² The extent of the power of direction over workers on the part of the political entity is a question of fact rather than of law, and it is frequently difficult to determine; but if determined, it is a more definite guide than either the personal requirements of the work or the ownership of the equipment.⁵³

In many cases the question is not whether a person is an employee or an independent contractor, but rather one of whether there is any contractual relationship at all between the employing public and the person claiming compensation. As the writer has pointed out above, one reason which the courts have given for excluding officers and deputized citizens from the operation of compensation laws is that they have no contract of employment with the political entity. It has also been pointed out that no person can become an employee of another without the other's consent. This leads us to the question of who is authorized to give consent when the employer is a political entity. It is evident that a person who does not have the power to appoint employees or officers cannot bind the public to pay compensation to one illegally appointed. But if an appointment is made by one not having the authority and the wage bills are later approved by the person or body of persons having authority to appoint or hire employees, that approval constitutes valid appointment so far as the right to disability compensation is concerned.⁵⁴

⁵¹Where one of two brothers was appointed foreman of a gravel pit by the county engineer, with the understanding that the brother of the appointee might substitute as such foreman, the substitute was an employee entitled to workmen's compensation. *Benson v. Marshall County*, (1925) 163 Minn. 309, 204 N. W. 40.

In another case a man had bid for work of collecting garbage at \$100 per month, and his father did the work. Warrants were made out to the father, and the court held him to be an employee of the village—overruling the industrial commission's decision. *Schullo v. Village of Nashwauk*, (1926) 116 Minn. 186, 207 N. W. 621.

⁵²"No one can become an employe of another without the consent of the other." *Arterbum v. Redwood County*, (1923) 154 Minn. 338, 191 N. W. 924. See also *Board of Commissioners v. Merrit*, (1924) 81 Ind. App. 488, 143 N. W. 711.

⁵³*Rouse v. Town of Bird Island*, (1926) 169 Minn. 367, 211 N. W. 327.

⁵⁴Where one member of a town board told a road patrolman to get a

HAZARDOUS EMPLOYMENTS

In several states the application of the compensation laws—or of their compulsory provisions—is limited to occupations which are designated as “hazardous” or “extra-hazardous.” The occupations so designated are generally enumerated, or the nature of the work defined. The public employments most commonly enumerated are construction work of all kinds, operation of public utilities, and the work of peace officers and firemen.⁵⁵

Due to the fact that hazardous employments are enumerated, most of the questions which arise thereunder relate to the meaning of particular enumerations, which are often peculiar to one state. Nevertheless a few generalizations may be drawn from the decisions. In the first place, the courts, in determining whether or not a particular employee is covered by the law, look at the nature of the occupation as a whole rather than at the task being performed at the time of the accident. Thus, a person who is ordinarily engaged in a non-hazardous employment but who is temporarily performing some hazardous task is generally not protected by the compensation law.⁵⁶ On the other hand, a per-

helper and cut brush along the road, and where the town board later approved the helper's wage bill, that helper was an “employee” of the town. *Reed v. Township of Monticello*, (1925) 164 Minn. 358, 205 N. W. 258.

“A workman . . . does not run the risk of losing the benefits of the compensation act if he is mistaken as to the law relative to the powers of the town board acting in good faith in a matter entrusted to its care.” *Gabler v. Bertha Township*, (1927) 169 Minn. 413, 211 N. W. 477.

But in Wisconsin the state law (Statutes of Wisc., sec. 40.24) provides that “no act authorized to be done by the [school] board shall be valid unless voted at its meeting.” As a result a person hired by the clerk of a school district with the informal approval of the board was not an employee, notwithstanding the fact that he had performed his work and had received wages with the approval of the board for two winters. *School Dist. No. 4 v. Industrial Commission*, (1927) 194 Wis. 342, 216 N. W. 844.

⁵⁵Montana, Political Code 1921, secs. 2647-2852, as amended by ch. 117, Laws of 1925, secs. 2862-2863 as amended by ch. 121, Laws of 1925; New York, Consolidated Laws, ch. 67, sec. 3; Oklahoma, Compiled Statutes 1921, ch. 56, secs. 7283-7284, as amended by ch. 61, Laws of 1923; Oregon, General Laws (Olson) 1920, sec. 6624 as amended by ch. 311, Laws of 1921, ch. 133, Laws of 1925, and ch. 312, Laws of 1917; Washington, Compiled Statutes, (Remington) sec. 7694 as amended by ch. 310, Laws of 1927, and sec. 7694a as added by ch. 128, Laws of 1923; Wyoming, Compiled Statutes 1920, sec. 4318, as amended by ch. 138, Laws of 1921 and ch. 60, Laws of 1923.

In North Dakota a “hazardous employment” is defined as any employment in which one or more persons are regularly employed. Ch. 162, Acts of 1919, as amended by ch. 142, Acts of 1921, and ch. 222, Acts of 1925. The New York law applies to “any employment by the state.” Consolidated Code, ch. 67, sec. 3, group 16.

⁵⁶In Illinois road building was not listed as hazardous in 1917, but occupations in which high explosives were handled were so listed. The

son employed in a hazardous occupation is protected while performing incidental tasks not enumerated in the law.⁵⁷ In the second place, the meaning of a particular term is frequently determined by its association with other terms. For example, the word "engineering work," when listed in the same part of a section as "factories" and "gas works," was construed not to apply to the work of a highway engineer, but instead to shops where engineering work is done.⁵⁸ Finally, general terms, such as "other hazardous occupations" are construed to be limited by the specific terms, with the result that the other occupations must be of the same general type as those listed.⁵⁹ This construction would probably limit the power of the Industrial Commissions to declare new occupations to be extra-hazardous when such power is granted by statute.⁶⁰

When the statute applies only to "workmen," "laborers," or "mechanics,"⁶¹ the effect is much the same as though it were limited to hazardous occupations, since the enumerations in the latter include practically all persons in the laboring classes. Such provisions, like those relating to hazardous employments, are intended to apply to classes of employees rather than to the nature of the work being performed at the time of the injury.⁶² But the

court held that the occasional use of dynamite in road building did not make that occupation one of the hazardous ones within the meaning of the statute. *McLaughlin v. Industrial Board*, (1917) 281 Ill. 100, 117 N. E. 819. See also *Charity Hospital v. Bd. of School Directors*, (La. 1932) 140 So. 60.

⁵⁷*Lanigan v. Town of Saugerties*, (1917) 180 App. Div. 227, 167 N. Y. S. 654; *Sexton v. Public Service Commission of New York City*, (1917) 180 App. Div. 111, 167 N. Y. S. 493.

⁵⁸*Board of Commissioners v. Grimes*, (1919) 75 Okl. 219, 182 Pac. 897.

But in Illinois the term "workshop" was held to include a manual training workshop in a school. *Board of Education v. Industrial Commission*, (1922) 301 Ill. 611, 134 N. E. 70.

⁵⁹*Board of Education v. Industrial Commission*, (1922) 301 Ill. 611, 134 N. E. 70. The Oklahoma court extended the application of the law on the ground that the legislature showed by the enumeration that it intended to cover work of a "manual and mechanical nature." *Bd. of Commissioners v. Jackson*, (1921) 83 Okl. 48, 201 Pac. 998.

⁶⁰In *Moore v. Industrial Accident Fund*, (1927) 80 Mont. 136, 259 Pac. 825, the court implied such a construction by pointing out that "if" the Industrial Accident Board had power to declare the occupation of road supervisor hazardous, that body and not the court should do so.

⁶¹The Massachusetts law applies only to those public employments in which "laborers, workmen, and mechanics"—including foremen and inspectors—are engaged. Ch. 636, Acts of 1914; ch. 125, Acts of 1918. But by separate acts policemen, firemen, and members of the National Guard are entitled to the benefits of the compensation law. Chs. 157 and 291, Acts of 1927.

⁶²A teacher in an industrial school, injured while demonstrating automobile mechanics, was not a "mechanic" in the sense the term was used in the compensation law of Massachusetts. The law, said the court, intend-

classification of a position in the local civil service rules does not determine whether or not the holder of the position is a "laborer."⁶³

SPECIAL EXEMPTIONS

A few other provisions which are frequently found in workmen's compensation laws have important bearings upon the application of the laws to persons in the public service. Among such provisions are those excluding farm labor, those exempting employers who hire less than a stated number of workers, and those excluding employments which are "casual and not in the employer's trade or business."

The effect of the exclusion of farm labor would seem to depend upon whether such exclusion were so stated as to modify the entire definition of "employee" or "employment" or whether it might apply only to private employments. If, as in many cases, one paragraph defines "employee" as related to the state and its subdivisions, and another paragraph defines "employee" as related to private business, the exclusion of farm laborers in the latter definition would not result in the exclusion of persons engaged in agricultural labor on state owned or county owned farms.⁶⁴ On the other hand, if a common definition is given for both public and private employees, and persons employed as farm laborers are excluded, the public status of his employer would not entitle a worker to compensation under the law.⁶⁵

The same rule would apply to provisions exempting employers who employ less than a stated number of workers. In most states the exemptions are so stated that they clearly apply to private

ed "to distinguish certain well known classes of servants from other classes." *Lesueur v. City of Lowell*, (1917) 227 Mass. 44, 116 N. E. 483.

A policeman is not a "workman employed for wages." *Harris v. Mayor, etc., of Baltimore*, (1926) 151 Md. 11, 133 Atl. 888.

⁶³A school janitor, although classified in the "official service" instead of the "labor service," was a "laborer." "The question of whether a janitor is or is not within that class (covered by the workmen's compensation law) must be the same throughout the commonwealth." *White v. City of Boston*, (1917) 226 Mass. 517, 116 N. E. 481. This decision did not follow that of *Devney v. City of Boston*, (1916) 223 Mass. 270, 111 N. E. 788, in which the court held that an engine horseman was an official, because his position was classified in "the official service" and because the legislature was presumed to have known the civil service classifications at the time the act was extended to public employees. The two cases may be distinguished, however, by the fact that firemen are frequently classed as officers.

⁶⁴See *Mason's 1927 Minn. Stat., Sec. 4326*.

⁶⁵Whether a laborer is a farm employee or not depends upon the character of the work, not upon the general business of the employer. *Dowery v. State*, (1925) 84 Ind. App. 37, 149 N. E. 922.

employers only. But in Kansas, where the statute enumerated "county and municipal work" as hazardous, but did not specify counties or municipalities in the definition of "employers," the law was held not to apply to a city which engaged fewer than fifteen persons in hazardous employments.⁶⁶

The provisions excluding from the benefits of the compensation law persons whose work is "casual and not in the course of trade, business, profession, or occupation of the employer" seldom if ever operate to exclude persons employed by political entities. The work may at times be casual, but it seems that it would always be a part of the "business" of the employer. Otherwise it would be difficult to justify as public the purpose for which wages were paid to the worker.⁶⁷ But if the employment need only to be casual to be excluded, certain public employments may be affected.⁶⁸

DUAL SUPERIORS

In consequence of the fact that officers and employees frequently serve in dual capacities as agents of two governmental jurisdictions, questions occasionally arise as to which superior is liable for the payment of disability compensation. Ordinarily county officers, although carrying out state laws, are regarded as county employees when included under the compensation law.⁶⁹ Similarly, national guardsmen are entitled to compensation from the state, notwithstanding the fact that the National Defense Act established a system of close supervision by the national govern-

⁶⁶Ubey v. City of Winfield, (1916) 97 Kan. 279, 155 Pac. 43. The Kansas law now exempts employers engaging fewer than eleven persons in hazardous work.

⁶⁷A person engaged to load gravel for street repairing may have been a casual worker, but he was engaged in the course of his employer's business. State v. District Court, (1915) 131 Minn. 352, 155 N. W. 103. See also Reed v. Township of Monticello, (1928) 164 Minn. 358, 205 N. W. 258.

A special policeman assigned to a theatre was "in the business of the police force." Lake v. City of Bridgeport, (1925) 102 Conn. 337, 128 Atl. 782. But see Charity Hospital v. Bd. of School Directors, (La. 1932) 140 So. 60.

⁶⁸Idaho, Compiled Statutes 1919, sec. 6216; Nevada, Laws 1913, ch. 111, sec. 7½ (a).

⁶⁹A person deputized by a county sheriff was a county "employee," although he was deputized for the purpose of helping the state warden recapture an escaped prisoner. Curran v. Delta County, (1925) 230 Mich. 694, 203 N. W. 470.

But the Iowa statute provides that disabled peace officers shall be paid compensation from the general funds of the state. Iowa, Code 1927, sec. 1922.

ment.⁷⁰ But where a state officer or body has direct control over a county officer with power to approve or disapprove the latter's appointment and power to remove him, the county officer will probably be classed as a state employee.⁷¹ In all such cases, however, the source from which the salary or wages are paid is an important factor in determining liability.⁷²

COMPULSORY AND ELECTIVE ACTS

In most states the workmen's compensation laws are compulsory for those public employments which are included within the definition of "employer" and "employee."⁷³ In those states where the laws are optional, however, the court decisions alone will not indicate the extent of the protection afforded to public servants. It is therefore necessary to look into the actual acceptance of the provisions of the law, as well as into the provisions for alternative liability, in cases of non-acceptance.

In five or six states the compensation laws are in form optional, but in effect compulsory. Election to come within the application of the law is presumed in absence of notice to the contrary. If an employer elects to reject the act, or, in some states, if he fails to insure his compensation liability, he may be sued for damages, and he loses the common law defenses of contributory negligence, negligence of a fellow servant, and the assumption of risks by the employee.⁷⁴ There is no doubt but that a municipal corporation which rejected the provisions of a compensation act would lose these defenses in a case arising out of the exercise of its proprietary functions. But if an employee or officer were injured in the exercise of a governmental duty, the political entity, when sued at

⁷⁰The National Guard is only a potential part of the United States Army. *State v. Johnson et al.*, (1925) 186 Wis. 1, 202 N. W. 191.

⁷¹*Foyle v. Commonwealth of Pennsylvania*, Penn. Workmen's Compensation Board, Feb. 13, 1930, (1930) 17 Labor and Industry 17-23.

A similar view was taken by the U. S. Employees' Compensation Commission where a county agricultural agent was paid by three jurisdictions but was subject to direction and removal by the U. S. Secretary of Agriculture. United States Employees' Compensation Commission, Second Annual Report, p. 63.

⁷²In the case of *Foyle v. Commonwealth*, Penn. Workmen's Compensation Board, Feb. 13, 1930, 17 Labor and Industry 17-23, the county superintendent and his assistant were paid from assessments apportioned among the districts with no district superintendent, not by the county as such. See also *Peck's Case*, (1924) 250 Mass. 261, 145 N. E. 532.

⁷³See Tables I and II, pp. 185-86.

⁷⁴See *Mason's 1927 Minn. Stat.*, secs. 4262-4263; *Connecticut. Revised Laws 1918*, title 53, sec. 5339; *Nebraska. Compiled Statutes*, ch. 28, sec. 3035.

common law or under an employer's liability act, would interpose the defense of non-liability in governmental functions. The question therefore arises as to whether or not a political entity which has rejected the provisions of the workmen's compensation act loses its immunity from liability in governmental functions when an employee is injured. Few cases have been decided on that point, probably because of the general acceptance of the acts; but the view taken by courts in three states indicates that the defense would be considered as lost. The laws are remedial and should be liberally construed, and if the legislature included governmental functions under the compensation system, it must have intended to protect such employments the same as other employments.⁷⁵ Thus it may be observed that, while the alternative liability provisions are in the nature of employers' liability laws, the courts have extended their application further than they would if the liability provisions were found alone.

But this construction of the compensation law would hardly apply to the state itself. Here the courts would no doubt apply the rule that any act waiving the state's immunity from liability and from suit should be strictly construed.⁷⁶ One decision went so far as to say that the provision entitling state employees to compensation had no effect because the state had failed to make a special appropriation for the payment of compensation claims.⁷⁷

⁷⁵The intention of the legislature was to exclude all common law defenses, although the three most common ones were enumerated. The court added that it need not account for the reason why the legislature chose one method of exclusion rather than another. *Fahler v. City of Minot*, (1923) 49 N. D. 960, 194 N. W. 695.

The statute should be liberally construed to include governmental functions. *Esque v. City of Huntington*, (1927) 104 W. Va. 110, 139 S. E. 469. The West Virginia decision did not draw any conclusions from, or refer to, the fact that the law of that state expressly provides that the state shall retain its common law defenses even though it does not elect to come under the compensation act. Ch. 131, Laws of 1919.

In Oklahoma the court decided that a county which failed to take out compensation insurance was not liable in tort for injuries to an employee, although a private employer failing to insure would have been so liable. The decision pointed out, however, that the employee still had the right to sue for workmen's compensation. *Whiteneck v. Board of Commissioners*, (1923) 89 Okl. 52, 213 Pac. 865.

⁷⁶*Miller v. Pillsbury*, (1912) 164 Cal. 199, 128 Pac. 327; *Babcock v. State*, (1919) 190 App. Div. 147, 180 N. Y. S. 3.

⁷⁷*Smith v. State Highway Commission*, (1921) 131 Va. 571, 109 S. E. 312. The Virginia Code 1919, sec. 2582, provided that no judgment or decree, "unless otherwise provided for," shall be paid without special appropriation. This, the court held, prohibited the industrial commission from granting any award against the state until the legislature had appropriated money to pay the award.

But injured state employees in Virginia are receiving compensation not-

In most states the compensation law is in itself an acceptance of its provisions by the state, or else it clearly indicates that the state loses no defenses for failure to accept.⁷⁸ For that reason there are apparently no cases bearing directly on the question of the state's own alternative liability.

An interesting, as well as unusual, case involving the question of a state's alternative liability was decided recently by the supreme court of North Dakota. The legislature of South Dakota, in compliance with a declaration in the constitution to the effect that the mining, distribution, and sale of coal was "a public necessity in which the state may engage," purchased coal mines in North Dakota. A coal mining commission was created with power to hire labor and operate the mines. The North Dakota compensation law provided that any employer who failed to insure his employees in the state fund would lose his common law defenses in a suit for damages. A citizen of South Dakota, employed in the said mines, was injured, and sued the state of South Dakota in the courts of North Dakota. He contended that since the state was engaged in a private function outside of its own jurisdiction, it had lost its sovereign rights and was liable to suit the same as a private employer. The court denied the contention, however, and held that it would not decide what jurisdiction it had in the case, because, as a matter of comity, it should not take jurisdiction. It was also pointed out that the injured employee was entitled to the benefits of the South Dakota compensation law.⁷⁹

withstanding the fact that no special appropriations are made. In reply to an inquiry from the writer, a member of the industrial commission gave the following explanation:

"The general assembly of Virginia does not make regular appropriations for the purpose of meeting awards under the provisions of the compensation act, and I am confident that no provision has been made by the legislature to cover cases parallel with the Smith Case, which you cited.

"The greater portion of the state departments carry a policy of insurance, on account of which the carriers, of course, actually assume all liability. There are a few of the state departments, however, which self-insure, that is, carry their own insurance, these departments paying compensation direct to the injured employees. I do not know the source from which these funds are made available, but I am confident that there has been no special legislation covering the same." Letter from the Secretary of the Industrial Commission of Virginia, January 5, 1931.

⁷⁸See note 67.

⁷⁹*Paulus v. State of South Dakota*, (1924) 52 N. Dak. 84, 201 N. W. 867.

"The initial question here is not as to whether the courts of North Dakota might have or might assume jurisdiction of the plaintiff's case, but whether, as a matter of comity they should do so."

The court did not stop with this, but went on to deny the plaintiff's

In most of the states which have semi-compulsory compensation laws the employees may elect not to be subject to the laws; but if they do, the employers retain their common law defenses.⁸⁰ Such election by public employees seldom or never occurs.

In about half a dozen states the compensation laws are purely elective for all municipalities and other local governments. The provisions of the acts do not apply unless the local governing bodies elect to accept them and file notice of such acceptance with the state department which administers the law.⁸¹ Employees are generally presumed to have elected to accept the acts in the absence of notice to the contrary. There is no added liability imposed upon public employers if they do not accept the compensation laws.

In these states the protection afforded to public employees and officers depends almost entirely upon the extent to which the local governments have elected to accept the acts. The actual acceptance varies greatly from state to state, ranging from two cities in Rhode Island and fourteen in Kentucky, to all cities in Massachusetts. But on the whole one can probably say with safety that not more than one fourth of the employees and officers of local governments in the states with purely elective systems are protected by the workmen's compensation laws.⁸²

contention that South Dakota was engaged in a private function. At least it was not for the courts of North Dakota to hold that South Dakota has engaged in a private function. "Where the courts of South Dakota have not so held, but, on the contrary the people of that state, by constitutional provision and legislative enactment, have declared otherwise, we should hesitate to challenge the propriety of that declaration." As to the matter of extra-territorial jurisdiction, the court answered that the state of North Dakota did not bring this case, and therefore "North Dakota makes no complaint."

⁸⁰Connecticut, Revised Laws 1918, title 53, secs. 5340; Mason's 1927 Minnesota Stat., sec. 4264; Nebraska, Compiled Statutes, ch. 28, sec. 3035; New Mexico, Laws 1929, ch. 113; Kentucky, Laws 1916, ch. 33.

West Virginia has no provision for rejection by the employee.

⁸¹Alabama Code 1923, sec. 7543; Maine, Laws 1929, ch. 300; Vermont, General Laws 1917, sec. 5769.

⁸²In November, 1930, the writer sent letters to the departments of labor in states having elective compensation systems, inquiring about the extent of acceptance of the laws by cities. The replies were as follows:

All cities in Massachusetts have accepted the law.

In Kansas 58 cities had accepted.

In Missouri 21 cities had accepted.

In Kentucky 14 cities and towns had accepted.

In Rhode Island two cities and no towns had accepted.

In New Hampshire "many of the cities and towns" had accepted.

In Vermont "comparatively few"—possibly 30 of the 288 cities and towns in the state—had accepted.

No reply was received from Delaware, but its law applies at most to

The elective system also applies to the non-hazardous employments in states whose compensation laws are compulsory for hazardous employments. The extent of acceptance is difficult to determine because no state has any compiled records of such acceptances. New York is probably the only state in which there has been any substantial acceptance, and in that state the acceptance has arisen out of the practice, and perhaps a legal requirement, of insuring all employees. Self-insuring cities do not as a rule bring non-hazardous employments within the scope of the system.⁸³

CONCLUSION

From the above discussion it should be apparent that the extent of the protection afforded to public servants varies greatly from state to state. There are forty-four state compensation laws, hardly any two of which are alike even in their definitions of "employer" and employee." Furthermore, although a number of rules of construction have been established, the courts are not in agreement on their interpretation of the statutory provisions. Finally, the extent of the application of the laws depends, in several states, upon the acceptance by local governments. Where such acceptance is formal and where records of acceptance are compiled by state departments, one may determine the approximate scope of the protection. But in some states no records are kept and no central department is established with which acceptances are filed.⁸⁴ Besides there may be acceptances without formal notice in other states, either through payment of compensation without contest to persons legally not entitled thereto, or through insuring without legal liability on the part of the political entity. In a general way, however, the statutory provisions with judicial interpretations thereof and the records of formal acceptances present a fair picture of the extensiveness of protection afforded to public servants against disability in the course of their duties.

There is no doubt that, in the absence of other extensive

only a few designated jurisdictions.

In Tennessee "about 5 per cent of the cities and counties" had accepted. Very few of the larger cities have elected to accept optional laws.

⁸³Letter from the Director of the Bureau of Workmen's Compensation of New York, November 14, 1930.

The director of the Washington Department of Labor and Industries replied that not more than two or three cities in that state have come under the elective adoption clause of the compensation act. Letter of November 19, 1930.

relief provisions for public servants, there is need for broadening the scope of the workmen's compensation laws in many states. For non-hazardous employments the cost of compensation is small, while in the hazardous employments the social evils resulting from lack of protection make the greater cost worth while. Because of the uncertainty of acceptance by local governments, and because of the confusion which may result from alternative liability provisions, the compensation laws should be made automatic and compulsory for the state and all of its governmental subdivisions. Finally, in view of the attitude taken by many courts in construing the compensation laws, the statutes should specify clearly which public servants are to be covered by the law. Legislators should keep in mind the statement of one court that if the legislature intended to include certain public employments, "it is remarkable that no apt and clear language indicating such intention was used."⁸⁵

The following tables indicate in a general way the scope of the workmen's compensation laws of the various states and territories as applied to public employees and officers. States have been classified according to statutory provisions as construed, in so far as can be determined, by the courts.⁸⁶

⁸⁴In Alabama the employer who elects to accept the law files notice of such acceptance with the probate judge of his county. Alabama Code 1923, sec. 7543.

⁸⁵*Roberts v. City of Ottawa*, (1917) 101 Kan. 228, 165 Pac. 869.

⁸⁶A number of statutory details relating to the inclusion or exclusion of particular officers or employees have been omitted, because of misunderstandings which might result with regard to other states.

TABLE I
APPLICATION OF COMPENSATION LAWS TO
STATE GOVERNMENTS

	Covers all officers and employees	Excludes elected officers and others as noted	Covers all employees; excludes officers	Covers workers in certain "hazardous" employments	No provision for state employees
Automatic Coverage	California Idaho Nevada Utah	Arizona ¹ Colorado Michigan Minnesota ² Nebraska ² New Jersey ³ No. Carolina ⁴ No. Dakota So. Dakota ² Virginia ⁴ Wisconsin ⁵ Hawaii ¹ Philippine Islands ⁵	Connecticut Illinois Indiana Louisiana Maine New York Ohio Pennsylvania Rhode Island	Alabama ⁹ Georgia ⁹ Iowa ^{10, 11} Maryland ¹² Massachusetts ¹³ Montana New Mexico Oklahoma Oregon ¹¹ Tennessee ⁹ Vermont ⁹ Washington ¹¹ Wyoming Porto Rico ¹⁰	Kansas Missouri ¹⁴ Texas Arkansas ¹⁵ Florida ¹⁵ Mississippi ¹⁵ So. Carolina ¹⁵ Alaska
Optional with Administrative Departments		Delaware ⁷ West Virginia	Kentucky New Hampshire ⁸		

¹Excludes officers with salaries above a stated amount.

²Excludes officers appointed for regular terms.

³Excludes persons with salaries over \$1200 a year; hence few officers included.

⁴Excludes officers appointed by the governor or legislature.

⁵Excludes officers except those subject to the control of any superior officer or officers.

⁶Excludes all persons with salaries above a stated amount.

⁷Election by the governor.

⁸The governor and council "may" pay compensation.

⁹Laborers in highway department only.

¹⁰Excludes persons engaged in purely clerical work.

¹¹Includes peace officers.

¹²Specifically includes state police.

¹³Applies to "laborers, workmen, and mechanics."

¹⁴The state may elect "by law." There has apparently been no such election.

¹⁵Has no workmen's compensation law.

TABLE II
APPLICATION OF COMPENSATION LAWS TO LOCAL GOVERNMENTS.

	Covers officers and employees	Excludes elected, and/or some appointed officers	Covers employees; excludes officers	Covers workers in certain "hazardous" employments	No provision for public employment
Compulsory	California Idaho ¹ Nevada Utah	Arizona ² Colorado ³ Michigan New Jersey ² No. Carolina ⁴ No. Dakota So. Dakota ^{1, 5} Virginia ⁴ Wisconsin ^{5, 6} Hawaii ² Philippine Islands ²	Georgia ¹⁰ Illinois Indiana Maine (except towns) Ohio ¹¹ Pennsylvania ¹²	Iowa ^{5, 10} Louisiana Maryland ¹⁷ Montana New York ¹⁷ Oklahoma Oregon ^{6, 17} Washington ^{6, 17} Wyoming ^{2, 18} Porto Rico ^{15, 18}	Texas Alaska Arkansas ²⁰ Florida ²⁰ Mississippi ²⁰ So. Carolina ²⁰
Semi-Compulsory		Minnesota ^{4, 5, 7} Nebraska ^{4, 7}	Connecticut ^{7, 12}	Kansas ¹⁰ New Mexico ^{3, 7}	
Optional	Missouri ¹²	West Virginia ⁸ Delaware ⁹	Alabama Kentucky ⁸ Maine (towns) New Hampshire ¹⁴ Rhode Island ^{2, 16} Tennessee	Massachusetts Vermont ^{2, 13}	

¹Excludes judges and clerks of elections, and jurors.

²Excludes persons whose salaries exceed a stated amount. (Missouri, \$3600 a year; Arizona officers \$2400; New Jersey, \$1200; Hawaii, \$1800; Philippines, 800 pesos; Rhode Island, \$3000; Vermont, \$2000.)

³Excludes members of volunteer fire departments.

⁴Excludes officers appointed for regular terms.

⁵Peace officers specifically included even though elected.

⁶Excludes all officers except those "subject to the direction and control of a superior officer or officers" of the county, city, etc.

⁷Election to come within the application of the act presumed in absence of notice to the contrary. An employer who rejects the act loses the three important common law defenses of contributory negligence, negligence of fellow servant, and assumption of risks.

⁸Common law defenses (7 above) lost by non-electing employer; but since election is not presumed, the act is regarded here as optional.

⁹Act applies only to the cities of Dover and Wilmington and to the counties of Kent and Newcastle. Election exercised by the mayor of Wilmington and by the governing bodies of the other jurisdictions named above.

¹⁰Does not include county employees.

¹¹Specifically excludes policemen and firemen eligible to benefits of any local pension funds.

¹²Municipalities authorized to insure or pay disability compensation to volunteer firemen.

¹³Paid members of fire and police departments expressly included.

¹⁴Act does not mention local public employments, but several municipalities pay compensation under it.

¹⁵Cities and towns, in electing, may specify which employees shall be covered.

¹⁶Purely clerical employees excluded. Other employments covered.

¹⁷Acceptance of act optional for non-hazardous employments.

¹⁸Firemen specifically included, whether paid or unpaid.

¹⁹Hazardous employments for "gain or profit." Option as to other employments.

²⁰Has no workmen's compensation law.