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Recent Decisions

John E. Savord

Lawrence J. Petroshius

William T. Meyers

speak, and others, have also been passed in many states. All of them are tested by the general rules laid down in the Supreme Court cases, and therefore to enumerate them would only be tiresome repetition.

One more question will be considered. It is an important one, but I postponed treating it because it had no particular place in the discussion. Who is entitled to claim the blessings of free speech? The right of free speech in the First and Fourteenth Amendments extends only to citizens and to those aliens who are lawfully in the United States.[34] This is probably the general rule. No contradictory view was found. As to what aliens are lawfully in the United States, the court probably means only those who intend to become citizens and who have taken some step in that direction. Corporations cannot claim the right of free speech. It applies only to natural persons.[35]

With this consideration of the class of persons who enjoy this great right, I will conclude the article. I do not think that it is necessary to recite my views, for the emphasis given the liberal view of the right of free speech should convey my thoughts on the question. This discussion amounts at best to a sketchy treatment of the problem. Books have been written on single phases of it. My only hope is that the different views have been presented with such clarity that the reader has formed his own idea as to what freedom a man should have in exercising his right of free speech.

William P. Mahoney.

RECENT DECISIONS

AGENCY — INDEPENDENT CONTRACTOR AND AGENT. — Purchaser of auto radio sought to have it installed. Mechanic agreed to connect it, but stated that he could not properly tune it until the next day. When the installation was complete, mechanic told purchaser to experiment with the radio and return later. Purchaser replied, "Try it." Mechanic stepped on the auto starter and because the gears were in reverse, the automobile ran over and injured plaintiff. Plaintiff, conceding the independent contractor relationship at the start of the installation, contended that by speaking as he did, purchaser made mechanic his agent. *Held:* Directed verdict for purchaser affirmed by the Court of Appeals of Ohio, as the employer of an independent contractor who asks the independent contractor to perform an act which is the next in order in the performance of the contract does not make the independent contractor his agent. *Maynor v. Tran,* 23 N.E. 2d 328 (Ohio App. 1939).

The distinction between the independent contractor and the agent is well defined in Ohio. The early cases make the test on the sole question of whether the employer had the right and duty of control and direction over the work

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34 U. S. *ex rel.* Turner v. Williams, 194 U. S. 279, 24 Sup. Ct. 719 (1904).

35 Hague Case, *supra,* note 23; Orient Ins Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281 (1899).

which was the object of the contractual relation. If the employer selects the servant or agent with a view to his skill and care, and retains control over all his operations, and has the power to dismiss him at any time for misconduct, the agency relationship exists. On the other hand, it has been held that there is an independent contractor relationship where the employer has no control over the work, or the persons by whom it is executed, but simply the right to require the thing produced, or the result attained, to be such as the contract has provided for. *Carman v. Steubenville and Indiana Railway Company,* 4 Ohio St. 399 (1854); *Clark v. Fry,* 8 Ohio St. 358, 72 Am. Dec. 590 (1858); *Pickens v. Diecker,* 21 Ohio St. 212, 8 Am. Rep. 55 (1871); *Hughes v. Railway Company,* 39 Ohio St. 461 (1883). In accord: *Harris v. McNamara,* 97 Ala. 181, 12 So. 103 (1892); *Bernauer v. Hartman Steel Co.,* 33 Ill. App. 491 (1889); *Waters v. Pioneer Fuel Co.,* 52 Minn. 474, 55 N.W. 52, 38 Am. St. Rep. 564 (1893); *Hexamer v. Webb,* 101 N.Y. 377, 4 N.E. 755, 54 Am. Rep. 703 (1886); *Harrison v. Collins,* 86 Pa. 153, 27 Am. Rep. 699 (1878); *Indiana Iron Co. v. Cray,* 19 Ind. App. 565, 48 N.E. 803 (1897); and *Francis v. Johnson,* 127 Ia. 391, 101 N.W. 878 (1904).

All of the more modern cases have adhered to this doctrine that there must be an exercise of control by the employer before the agency relationship exists. One furnishing an automobile and agreeing with a publisher to deliver newspapers to certain points indicated by the slip attached to each bundle, but who was required to follow no specific directions in route of travel or limited in time, was held to be an independent contractor. *Post Publishing Co. v. Schickling,* 22 Ohio App. 318, 154 N.E. 751 (1926); Affirmed: 115 Ohio St. 589, 155 N.E. 143 (1927). One who submitted himself to the direction of his employer as to the details of work, fulfilling his employer's wishes, not merely as to the result, but also as to the means by which that result was to be obtained, was regarded as a servant, and not as an independent contractor. *Snodgrass v. Cleveland Co-Op. Coal Co.,* 31 Ohio App. 470, 167 N.E. 493 (1929). Other cases holding to the same test include *Goff-Kirby Coal Co. v. Aquila,* 28 Ohio App. 345, 162 N.E. 748 (1928) and *Northwestern Ohio Natural Gas Co. v. First Congregational Church of Toledo,* 126 Ohio St. 140, 184 N.E. 512 (1933). In accord: *United States Cast Iron Pipe & Foundry Co. v. Fuller,* 212 Ala. 177, 102 So. 25 (1924); *Lassen v. Stamford Transit Co.,* 102 Conn. 76, 128 A. 117 (1925); *Best Mfg. Co. v. Peoria Creamery Co.,* 307 Ill. 238, 138 N.E. 684 (1923); *Gall v Detroit Journal Co.,* 191 Mich. 405, 158 N.W. 36, 19 A.L.R. 1164 (1916); *Curran v. Earle C. Anthony, Inc.,* 77 Cal. App. 462, 247 P. 236 (1926); *Howard C. Luff Co. v. Capece,* 61 F. 2d 635 (1933); *Hartley v. Red Ball Transit Co.,* 344 Ill. 534, 176 N.E. 751 (1931), reversing 259 Ill. App. 229 (1930); *Aita v. John Beno Co.,* 206 Ia. 1361, 222 N.W. 386, 61 A.L.R. 351 (1928); *Yellow Poplar Lumber Co. v. Adkins,* 221 Ky. 794, 299 S.W. 963 (1928); *Bell v. State,* 153 Md. 333, 138 A. 227, 58 A.L.R. 1051 (1927); *Nettis v. General Tire Co. of Philadelphia,* 317 Pa. 204, 177 A. 39 (1935); and *Sprecher v. Roberts,* 212 Wis. 69, 248 N.W. 795 (1933).

A recent Ohio case, *Plost v. Avondale Motor Car Co.,* 55 Ohio App. 22, 8 N.E. 2d 441 (1935), declaring the activities of automobile salesmen to be those of an independent contractor, considered the problem as presented in THE RESTATEMENT OF THE LAW OF AGENCY, §220, which stated that the determination of the question of whether the status was that of the independent contractor or of the agent was based, not only on the extent of the employer's control or right to control with respect to the physical conduct in the performance of the service, but also on the further considerations, among others, of whether or not the work is a part of the regular business of the employer, the length of time for which the person is employed, the skill required in the particular occupation, and finally the test of whether or not the parties believe they are creating the relationship of master and servant.

This rule was specifically followed in *Cushman Motor Delivery Co. v. Bernick,* 55 Ohio App. 31, 8 N.E. 2d 446 (1936), which declared that a merchandise trucker might be an independent contractor. See also: *Ryan v. Associates Investment Co. of Illinois,* 297 Ill. App. 544, 18 N.E. 2d 47 (1938). The general principle of the employer's control governed the decisions in *Kraemer v. Bates Motor Transport Lines, Inc.,* 56 Ohio App. 427, 11 N.E. 2d 105 (1937) and in *Miller v. Metropolitan Life Ins. Co.,* 134 Ohio St. 289, 16 N.E. 2d 447 (1938).

This represents the state of the law in Ohio up to the present time. The principal case, without question, conforms to this well-settled rule. If the question is solved on the point of the employer's control alone, the result can only be that the suggestion on the part of the defendant did not amount to an assertion of control. The contract of installation called for two acts, the installation and the regulation of tone. The most that can be said is that the defendant asked the mechanic to perform a little more of the contract that afternoon instead of waiting until the next day.

Turning to the considerations as laid down in the Plost case (above), the answer is the same. The installation was not a part of the regular business of the employer, there was a particular skill involved in the task, and it can only be concluded that it was not the intent of either party to create, by a single suggestion, the master and servant relationship.

This case, adding an additional link to the well-settled rule, serves only as an adjudication of another set of facts arising out of the employment relationship.

John E. Savord

SEARCH AND SEIZURE—CONSTITUTIONAL IMMUNITY FROM UNREASONABLE SEARCH AND SEIZURE—WAIVER OF SUCH IMMUNITY AND EFFECT OF WAIVER.—Defendant, convicted of carrying a concealed weapon, brought error on the grounds that his constitutional immunity of freedom from unreasonable search had been violated. In the trial court the evidence disclosed that the defendant had consented to the search of his person when accosted by the officers, and the concealed weapon had been found upon him. The defense of the defendant is that his constitutional immunity had been violated, even though he consented to the search.

The court held that a party carrying a concealed weapon who consented to the search of his person waived all rights to complain of invasion of his constitutional immunity from illegal searches and seizures; and affirmed the conviction of the lower court. *People v. Betts,* 24 N.E. 2d 878 (Ill. App. 1940).

The Illinois Constitution of 1870, Art. 2, Sec. 6, contains the provision:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized."

The question in this case is to determine whether or not the immunity guaranteed by the constitution can be waived, what constitutes such waiver, and what is the effect of such waiver. In *People v. Preston,* 341 Ill. 421, 173 N.E. 383 (1930), the court held that the constitutional right to be secure in person and effects against unreasonable searches and seizures may be waived. The court also held that where a person consented to the search of his person and the taking of his property, he thereby waived his constitutional right in that respect, and could not complain of violation thereof. In the case of *United States v. Shules,* 65 Fed. 2d 780, (1933), the court held that the constitutional immunity against

unreasonable searches and seizures is a personal right capable of waiver. Thus these two cases hold that the constitutional immunity of the person from search and seizure is a mere personal right capable of waiver, and this holding is uniformly adopted. See *Miller v. State*, 89 Ind. App. 510, 165 N.E. 554 (1929); *Cook v. State*, 44 Okla. Cr. 226, 280 P. 626 (1929); *State v. Hall*, 157 Tenn. 648, 51 S.W. 2d 868 (1932); *State v. Littleton*, 108 W. Va. 494, 151 S.E. 713 (1930).

Many cases holding that the right to immunity from search and seizure of property may be waived, and such waiver cannot be later objected to, may be found. In *People v. Reid*, 336 Ill. 421, 168 N.E. 344 (1929), the defendant had given his permission to search and disclaimed interest in the premises when charged with robbery, and the court held that he could not complain of the search and seizure of the stolen goods. In *People v. McDonald*, 365 Ill. 233, 6 N.E. 2d 182 (1936), the court held that one who consented to the search of his property waived his constitutional right subsequently to complain that the search and seizure were unlawful. Thus the courts hold that the right to immunity from search and seizure of property can be waived, and once waived cannot be complained of. Cases in accord: *Milyonico v. United States*, 53 Fed. 2d 937 (1931); *Flynn v. United States*, 50 Fed. 2d 102 (1929); *State v. Uotila*, 71 Mont. 351, 229 P. 724 (1924); *Hodges v. United States*, 35 Fed. 2d 594 (1929); *Wiley v. Commonwealth*, 246 Ky. 425, 55 S.W. 2d 41 (1932). The cases are thus seen to uniformly hold that the immunity from search and seizure of both person and property is a personal right capable of waiver, and when such right is waived, the waiver cannot be later objected to, or disaffirmed.

The constitutional provision protects against unreasonable searches, and makes persons and property immune from such search. Yet the question of determining the reasonability of the search does not come up in this case, for there is consent to the search and waiver of the immunity. Assuming that the search were unreasonable, there would still be no cause for complaint, for consent to such search constituted a waiver of the constitutional immunity. Another question which may arise is that of objection to evidence obtained by unreasonable search, where such search was not consented to at the time it took place. Failure to object to the introduction of such evidence may imply consent to the unreasonable search, but that problem is not present here because the consent was given at the time of the search; hence there is not need to discuss that problem in conjunction with this case.

The only other element which may arise is that of consent to such search, and what constitutes waiver of the immunity. The leading Illinois case on this subject is that of *People v. Dent*, 370 Ill. 33, 19 N.E. 2d 1020 (1939), wherein the court held that the constitutional right to be secure against unreasonable searches and seizures, being a personal right, cannot be indiscriminately waived by the acts of another. Thus the cases hold that remarks by the wife, brother or other kin of the defendant to go ahead and search the person or the premises were held not to show consent to search on the part of the defendant. *Arnold v. State*, 110 Tex. Cr. R. 529, 7 S.W. 2d 1083 (1928); *Cofer v. United States*, 37 Fed. 2d 677 (1930); *State v. Bonolo*, 39 Wyo. 299, 270 P. 1065 (1928); *Potowick v. Commonwealth*, 198 Ky. 843, 250 S. W. 102 (1923). The invitation to search must be free from coercion or fraud. *Meno v. State*, 197 Ind. 16, 164 N. E. 931 (1925); *Marple v. State*, 51 Okla. Cr. 240, 1 P. 2d 836 (1931). Consent given by owner to officers to search premises without warrant must be unequivocal and specific. *Karwicki v. United States*, 55 Fed. 2d 225 (1932); *Tobin v. State*, 36 Wyo. 368, 255 P. 788 (1927); *United States v. Lydecker*, 275 Fed. 976 (1921). Where the defendant stated to officers to "Go ahead!" who stated they had a warrant to search his home for stolen goods, the court held that this did not constitute a waiver of constitutional rights and consent to search.

The cases uniformly hold that the constitutional right to immunity from unreasonable search and seizure is a mere personal right capable of being waived; that invasions made under waiver of such right or consent to search cannot be complained of; that such waiver cannot be given by anyone but the defendant or his agent; that such consent must be unequivocal and specific and free from fraud or coercion; and that once such waiver is given the defendant giving it cannot complain of evidence gained or violation of his constitutional right. Hence the holding by the court in the principal case of *People v. Betts* is uniformly upheld by the courts of all of the states.

Lawrence J. Petroshius.

WORKMEN'S COMPENSATION ACTS — AGGRAVATION OF PREEXISTING DISEASE. — Defendant in error while in the employment of plaintiff in error was injured by being struck by a door blown shut by the wind. Defendant, now thirty-two, had suffered attacks of epilepsy at the age of fourteen and seventeen, but for fifteen years prior to the injury he had not been affected. However, shortly afterwards, he suffered from dizziness and headaches resulting in another attack ten months later. For this, he was discharged and since then has not found suitable employment. Plaintiff in error claims that there was no injury arising out of and in course of employment as the epileptic seizure was not superinduced or brought about by the blow. *Held*: Defendant in error may recover under Workmen's Compensation where preexisting, latent disease is brought to active stage by a blow arising out of and in course of employment. *Chicago Park District v. Industrial Commission,* 24 N.E. 2d 358 (Ill. 1939).

This comment is not concerned with showing that the blow was an industrial accident. The problem involved is whether or not one should recover as permanently disabled where a latent disease is a large contributing cause. The purpose of this comment is to determine whether there is recovery for an aggravation of a disease by an industrial accident.

71 C. J. 358 states that an aggravation or acceleration of a preexisting or latent infirmity or physical condition may constitute a disability of such a character as to come under the workmen's compensation act even though the accident would have caused no injury to a perfectly normal healthy individual. The acts contemplate latent or dormant ailments. It is not necessary for an employee to recover compensation for injury that he must have been in perfect health or free from disease at the time of the injury, *O'Gara Coal Co. v. Industrial Commission,* 320 Ill. 191, 150 N.E. 640 (1926), allowing recovery for a hernia received in lifting although it was due to a weakened condition caused by gall stones. The employer takes the employee as he finds him and assumes the risk of a diseased condition aggravated by injury. *Powers Storage Co. v. Industrial Commission,* 340 Ill. 498, 173 N.E. 70 (1930) Compensation is not dependent on the health of the employee but is awarded for an injury which is a hazard of the employment. Also it is this hazard acting on the employee in his particular condition of health and not on a healthy or average employee. *Carson Payson Co. v. Industrial Commission,* 340 Ill. 632, 173 N.E. 184 (1930). If the injury is the proximate cause of the disability, the previous condition of the employee is unimportant, and a recovery may be had for the injury independent of any preexisting disease. *West Side Coal and Mining Co. v. Industrial Commission,* 321 Ill. 61, 151 N.E. 593 (1926); *Springfield District Coal Mining Co. v. Industrial Commission,* 300 Ill. 28, 132 N.E. 752 (1921). The injury must arise from the employment. Thus, in *Perry County Coal Corp. v. Indus-*

trial Commission, 311 Ill. 261, 142 N.E. 455 (1924), the court refused compensation as the disease, pneumonia, was accelerated by taking a bath rather than from the industrial accident to his chest.

The fact that the law has recognized this principle that aggravation of a preexisting, latent disease is compensable is shown by the uniformity of the court decisions. In *Peoria Railroad Terminal Co. v. Industrial Board,* 279 Ill. 352, 116 N.E. 651 (1917), it was held that a fireman killed by a fall from the engine could recover even though death would not have resulted except for a soft spot in his brain due to syphilis. The court said that the workman carries a disability with him and the meeting with an injury which a healthy man would not have met with is no answer to the claim. In *Walker v. Minnesota Steel Co.,* 167 Minn. 475, 209 N.W. 635 (1926), the court held that as the disease, paresis, did not impair ability to work, recovery may still be had even if the accident accelerates the disease to a degree of disability. In *Rockford City Traction Co. v. Industrial Commission,* 295 Ill. 358, 129 N.E. 135 (1920), the court allowed recovery for the loss of sight despite the fact that the sight in his right eye had previously been impaired. In *Keller v. Industrial Commission,* 302 Ill. 610, 135 N.E. 98 (1922) and in *Jakub v. Industrial Commission,* 288 Ill. 87, 123 N.E. 263 (1919), the court held that there is no recovery where the disability is due solely to a preexisting disease; but there is when the injury aggravates or accelerates the disease. In the *Case of Green,* 266 Mass. 355, 165 N.E. 120 (1929), the claimant, suffering from genital tuberculosis, injured himself while lifting a "trough." The court held that as the injury accelerated the preexisting condition and hastened the genital tuberculosis the employee should recover compensation even though the injury did not cause the disease but only accelerated it. In *Chicago and Alton Railroad Co. v. Industrial Commission,* 310 Ill. 502, 142 N.E. 182 (1924), the employee died from lifting a car. The strain resulting was due partially to adhesions in his bowels, yet the court held that where a workman dies from a preexisting disease or condition, if the disease or condition is accelerated under circumstances which can be said to be accidental, his death is an industrial accident. In accord with this is *Great Lakes Supply Co. v. Industrial Commission,* 309 Ill. 68, 140 N.E. 2d (1923), where the injury aggravated hypostatic pneumonia and meningitis; *Ayer & Lord Tie Co. v. Industrial Commission,* 324 Ill. 504, 155 N.E. 292 (1927), where the injury aggravated and increased a prostatic abscess; and *Ralph H. Simpson Co. v. Industrial Commission,* 337 Ill. 454, 169 N.E. 225 (1929), where the injury increased preexisting sarcoma. In *Van Meter v. E. R. Morehouse, Inc.,* 13 N. J. Misc. 558, 179 A. 678 (1935), the claimant, a farm laborer, sprained his back while pulling out weeds. This injury aggravated an old arthritic condition. The court held that it was compensable as the diseased condition, except for the accident, might have remained dormant. In *Hahn v. Industrial Commission,* 337 Ill. 59, 168 N.E. 652 (1929), the employee had a rupture causing a heart lesion. He fell from a ladder and died. The court held that death from an accidental injury is compensable even though a preexisting disease accelerated it.

A diseased condition does not necessarily bar compensation where an accident or personal injury arising out of the employment accelerates the disease. *Philadelphia & Reading Coal & Iron Co. v. Industrial Commission,* 334 Ill. 58, 165 N.E. 161 (1929). In accord: *La Veck v. Parke, Davis & Co.,* 190 Mich. 604, 157 N.W. 72 (1916); *Guyer v. Equitable Gas Co.,* 279 Pa. 5, 123 A. 590 (1924); *Slack v. C. L. Percival Co.,* 198 Ia. 54, 199 N.W. 323 (1924); *Knock v. Industrial Accident Commission,* 200 Cal. 456, 253 P. 712 (1927); *Mausert v. Albany Builders' Supply Co.,* 250 N.Y. 21, 164 N.E. 729 (1928); *Warlop v. Western Coal and Mining Co.,* 24 F. 2d 926 (1928); *Chicago & Northwestern Railroad Co. v. Industrial Commission,* 341 Ill. 131, 173 N.E. 161 (1930); and *Cruzan v. Industrial Commission,* 357 Ill. 335, 192 N.E. 196 (1934). The court reached

the same conclusion in *Calhoun v. Rayville Ice & Fuel Co.*, 161 So. 660 (La. App. 1935), where a previous high blood pressure condition resulted in angina pectoris after the injury. In *Ohlson v. Industrial Commission*, 357 Ill. 335, 192 N.E. 196 (1934), the employee was suffering from tuberculosis of the bone. He fell while painting and injured his arm. The arm would not mend due to the disease. The court held that the fact of a previous disease did not of itself bar recovery.

From these decisions, the view of the courts can be seen — they hold that an employer takes the employee as he is and assumes the risk of a diseased condition being aggravated by injury. This view is absolutely sound on grounds of public policy. As the aggravation is due to the injury, industry should bear the burden rather than having the injured become wards of the general public. The fact that the industrial accident would have resulted in negligible injury to a normal man should not preclude the employee from receiving the actual damages for the injury to himself. Compensation is not dependent on the employee being in good health. In this way and in this way alone the individual employee is protected against the hazards of employment.

William T. Meyers

WORKMEN'S COMPENSATION — INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT. — Claimant was employed by a construction company to service the trucks and tractors and to act as night watchman. Claimant alleged that, having left his place of employment at 8:30 at night in his own automobile, he was on his way to a drugstore to procure new batteries for his flashlight because the employer had no batteries in stock, and then intended to go to a restaurant to eat, and then to return to his room until time to resume work at 11:00 that night. While en route to the drugstore, his auto collided with a street car, and claimant was injured. *Held*: Decision of Court of Appeals of Ohio reversed by Ohio Supreme Court and original judgment by the Industrial Commission of Ohio denying compensation affirmed, declaring that the injuries were not compensable as "arising out of and in course of employment." *Ashbrook v. Industrial Commission*, — Ohio St. —, 24 N.E. 2d 33 (Dec. 1939).

The basis of the workmen's compensation laws is the principle of business that injuries to workmen suffered in the course of and arising out of their employment are to be regarded as charges upon the business in which they are engaged. The fund created by contributions from industry is intended to cover only those risks and hazards to be encountered by the employee in the discharge of the duties of his employment, and to assure compensation for injuries sustained as the result of such risks and hazards. *Fassig v. State ex rel. Turner, Atty. Gen.*, 95 Ohio St. 232, 116 N.E. 104 (1917); *Industrial Commission v. Weigandt*, 102 Ohio St. 1, 130 N.E. 38 (1921); *Industrial Commission v. Ahern*, 119 Ohio St. 41, 162 N.E. 272, 59 A.L.R. 367 (1928); *Industrial Commission v. Lewis*, 125 Ohio St. 296, 181 N.E. 136 (1932); *Industrial Commission v. Baker*, 127 Ohio St. 345, 188 N.E. 560 (1933); *Industrial Commission v. Bankes*, 127 Ohio St. 517, 189 N.E. 437 (1934); *Industrial Commission v. Gintert*, 128 Ohio St. 129, 190 N.E. 400, 92 A.L.R. 1032 (1934); *Highway Oil Co. v. State ex rel. Bricker, Atty. Gen.*, 130 Ohio St. 175, 198 N.E. 276 (1935); *Bower v. Industrial Commission*, 61 Ohio App. 469, 22 N.E. 2d 840 (1939).

The Ohio Statute specifically states, "The term 'injury' as used in this section and in the workmen's compensation act shall include any injury received in the course of, and arising out of, the injured employee's employment" (*General Code*

of Ohio, § 1465-68). See also: *N. Y. Cahill Cons. Laws* 1930, c. 66, § 2; *Burns Indiana Statutes* (1933 Rev.) § 40-1701; *Illinois Revised Statutes* (1937) c. 48, § 138. Interpreting the phrase "in the course of, and arising out of, the injured employee's employment" is not easy. If the injury can be seen to have followed as a natural result of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then the injury arises "out of" the employment. It is not necessary that the injury be foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a reasonable consequence. Judge Thomas A. Jones of the Ohio Supreme Court, in the Ahern case (above), stated that the established rule of the court was that the Workmen's Compensation Law should be liberally construed in favor of the employee, "but in any case the employee in order to recover compensation must be 'in the service' of the employer."

As this general topic is too large for the bounds of this comment, the scope shall be limited to the question of compensation for injuries suffered by the employee during meal periods. The principal case is the first Ohio case on the subject, compensation being denied because claimant's duties were definite and specific and were to be performed at a designated locality. Th court held that the claimant was on a journey primarily for his own purposes, and was not "under the supervision, authority, or direction of his employer." The contention that the claimant was acting within the scope of his employment in so far as he was on his way to procure fresh batteries for his flashlight was dismissed on the ground that the purpose of the journey was not known to the employer or to anyone representing him. Claimant acted on his own volition and then intended to go four or five miles in the opposite direction to procure his meal. The court said that it would not allow the claimant to bring himself within the scope of his employment "by the mere subsequent announcement that at the time of the accident he had in his mind an intent and purpose to do some act or procure some article or instrument that would thereafter be used in the service and possibly for the benefit of his employment."

It is the general rule in the United States that if the accident occurring during the meal period takes place on the employer's premises, the injury will be compensable, all other things being equal, as the employee is usually where he should be at the time, as where an employee of a manufacturing concern was eating his lunch in the factory, in accordance with custom, and a pile of crude rubber fell upon him, it was held that he was performing a service growing out of and incidental to the employment. *Racine Rubber Co. v. Industrial Commission*, 165 Wis. 600, 162 N.W. 664 (1917). And in *Johnson Coffee Co. v. McDonald*, 143 Tenn. 505, 226 S.W. 215 (1920), an employee was held to be acting within her employment who was injured in her employer's elevator as she returned to his building to eat the lunch she had purchased outside. In accord: *Donlon v. Kips Bay Brewing & Malting Co.*, 189 App. Div. 415, 179 N.Y. Supp. 93 (1919); *Flanagan v. Charles E. Green & Son*, 121 N. J. Eq. 327, 2 A. 2d 180 (1938); *Schier v. James J. McCreery & Co.*, 13 N.Y. Supp. 2d 546 (1939) reversing 10 N.Y. Supp. 2d 724 (1939).

The application of this doctrine is extended to injuries resulting from the employees' amusements while on their employer's premises during the meal period. An employee who injured himself when he fell on a basketball floor in employer's building just after noon hour while watching employees' game was allowed to recover. *Kingsport Silk Mills v. Cox*, 161 Tenn. 470, 33 S.W. 2d 90 (1930). Compensation was granted to a street railway machinist who was struck in the eye by a baseball bat while he watched an indoor baseball game carried on by employees' teams during the lunch hour on the employer's premises.

Conklin v. Kansas City Public Service Co., 226 Mo. App. 309, 41 S.W. 2d 608 (1931). See also: *Hale v. Savage Fire Brick Co.*, 75 Pa. Super. 454 (1921) and *Oldinsky v. Philadelphia & Reading Coal & Iron Co.*, 92 Pa. Super. 328 (1928).

If the injury occurs through any disregard of employer's rules, though occurring on the premises, the employee is not within the scope of his employment. *Drummond v. Employers' Liability Assur. Corp.*, 43 Ga. App. 595, 159 S.E. 740 (1931); *Nagle's Case* (Mass.) 22 N.E. 2d 475 (1939).

On many occasions, the employer gains benefit from the fact that the employee remains on the premises, though strictly he is not engaged at his work. An injury under these circumstances is compensable, as where a physician's office assistant, eating lunch near the office so as to be able to answer telephone calls, suffered chemical poisoning. *Krause v. Swartwood,* 174 Minn. 147, 218 N.W. 555, 57 A.L.R. 611 (1928). In *Humphrey v. Industrial Commission of Illinois,* 285 Ill. 372, 120 N.E. 816 (1918), the dependents of an employee who was expected to eat lunch and spend the noon hour at the factory so he could operate an elevator as the occasion demanded, and who was found crushed to death under the elevator, were adjudged entitled to compensation. See also *Tragas v. Cudahy Packing Co.*, 110 Neb. 329, 193 N.W. 742 (1932), where the employee recovered for an injury received while sharpening his chisel during the noon hour.

After a consideration of these cases, it is apparent that the Ohio courts are off on the right foot in deciding this problem. What at first glance appears to be a close case because of the gain accruing to the employer where the claimant was making certain that his flashlight was in working condition disappears in the face of the court's finding that the employer had no notice nor knowledge of the employee's intention. The accident occurred some distance from the construction project so that the factor of the employer's premises as the site of the injury did not enter into consideration, nor did the closer question of liability when the injury is suffered at the entrance to or exit from the employer's premises. The fact that the claimant was entirely free from control, in his own automobile, and acting under orders from no one were of importance in the decision, as was the claimant's plan to return to his room until time to resume work. If the claimant had gone out to get his lunch with the intention of returning immediately, a liberal court might have had trouble in denying compensation, but under the facts presented, the compensation was rightfully denied.

John E. Savord.

WORKMEN'S COMPENSATION — POLICEMAN AS EMPLOYEE — INJURY INFLICTED BY THIRD PARTIES. — A group of citizens and merchants organized to cooperate with the city to furnish more police protection. The organization incorporated to aid the city in paying merchant police and recommending appointees. Deceased qualified for the position of policeman and took the oath of office. His duties consisted in protecting business premises and performing all functions of a regular patrolman under the direction of the chief of police. While he was making a night deposit for an establishment, a fellow patrolman, firing at a hit-and-run driver, shot and killed the deceased. Defendants claimed that the deceased was not under Workmen's Compensation Act as he was an officer and the injury did not arise out of the employment. Judgment for plaintiff affirmed. *Krawiec v. Industrial Commission,* 25 N.E. (2d) 27 (Ill., 1939). Rehearing denied, Feb. 1940.

This comment is concerned with showing that the deceased was an employee and that the injury, although unforeseen and unexpected, arose out of his employment.

Whether or not the deceased was an officer depends on the municipal ordinances. as at the common law a policeman was not an officer. *Moon v. Mayor,* 214 Ill. 40, 73 N.E. 408 (1905). In the principal case, Section 1 of the ordinance established a police department; Section 2 and Section 11 created the office of chief and lieutenant of police; Section 14 provided for the appointment of police patrolmen; and Section 15 ordained that the patrolmen should take the oath provided by law for city offices. Sections 2 and 11 definitely create an office as the ordinance begins with, "There is hereby created the office of." However, Section 14 only states that, "The city council shall annually on the first Monday in May appoint an operator and such number of police patrolmen, as the council may determine necessary, who shall hold their office for one year." Thus no office was created which was not definitely stated. Also the difference in the wording of the sections shows no intent to create an office. With such a situation, deceased comes under the compensation act, which excludes "officials of an incorporated village." In accord: *Stott v. City of Chicago,* 205 Ill. 281, 68 N.E. 736 (1903), which declared that the office must be created by municipal ordinance or otherwise no office legally exists.

Similar ordinances have been construed in the same manner by many jurisdictions. In *Johnson v. Industrial Commission,* 326 Ill. 553, 158 N.E. 141 (1927), a motorcycle policeman employed by the village of Elmwood Park died as the result of a collision with an automobile. The compensation act provides that the act shall apply automatically to every incorporated village and its employees (SMITH-HURD REV. ST., 1939, ch. 48, § 3). Section 15 of this act provides that every person in the service of an incorporated village, who is not an official of such shall be considered as an employee. Thus the deceased in this case was an official only if an ordinance created the office. But the only ordinance referring to police officers was one relating to the powers of the village marshal and members of the police force and providing penalties for misdemeanor. As this created no office, deceased was not an officer *de jure.* The taking of an oath and performing the usual duties of the office did not make the deceased an officer, as there is no officer *de jure* or *de facto* where there is no office to fill. In accord: *People v. Welsh,* 225 Ill. 364, 80 N.E. 313 (1907), and *Norton v. County of Shelby,* 118 U. S. 425, 6 U. S. Ct. 1121, 30 L. Ed. 178 (1886).

In *Walker v. Port Huron,* 216 Mich. 361, 185 N.W. 754 (1921), the court held that a special police officer, hired by the commissioner of parks, was an employee although he took an oath of office. It further said that whether he was an employee or officer depended on the provisions of the charter and ordinances and his duties. Here there was no provision for any such office as "special officer." In *City of Metropolis v. Industrial Commission,* 339 Ill. 141, 171 N.E. 167 (1930), the court held that a night policeman whose office was not created by an ordinance but by an appointment by the city council was an employee. The creation of an office by an ordinance is a condition precedent to the making of an appointment to fill it. *Curothers v. Stanton,* 257 Mich. 107, 241 N.W. 178 (1932) held that the chief of a volunteer fire department was an employee. In *Hall v. Montague,* 228 Mich. 484, 200 N.W. 133 (1924), it was held that a village marshal and a street commissioner were employees. *Scholfield v. Industrial Commission,* 204 Wis. 84, 235 N.W. 396 (1931) held that a marshal of a village killed while assisting a sheriff in making an arrest under a county warrant was an employee. *State ex rel. Alcorn v. Beaman,* 34 Ohio App. 382, 170 N.E. 877 (1930) held that county deputy officers are not "officials" as no part of the sovereign functions of government are exercised by them for the benefit of the public. In *Millaley v. City of Grand Rapids,* 231 Mich. 10, 203 N.W. 651 (1925), it was held that a captain of police was an employee rather than an officer in view of the city's charter not creating the "office" as such. In *La Belle v. Village of Grosse Point Shores,* 201 Mich. 371, 167 N.W. 923 (1918), the court held that the policeman was an em-

ployee as the provision for the appointment of agents or officers to carry out ordinances and regulations did not create the office of policeman. In *Murphy v. Industrial Commission,* 355 Ill. 419, 189 N.E. 302 (1934), the claimant, a policeman, injured his hand while discharging his duties. The court said that in Illinois it is well settled that before a policeman can be said to be an officer, an ordinance must be adopted creating the office of policeman as such, as at the common law there is no such office. Here there was no specific ordinance creating the office and so claimant was an employee.

But all jurisdictions have not taken the same view. Contrary decisions have been reached in *Macon v. Whittington,* 171 Ga. 643, 156 S.E. 674 (1930); *Shelmadine v. Elkhart,* 75 Ind. App. 493, 129 N.E. 878 (1921); *Hall v. Shreveport,* 157 La. 589, 102 So. 680 (1925); Krug v. New York, 196 App. Div. 226, 186 N. Y. Supp. 727 (1921); however the better view seems to be that if the act itself doesn't expressly exclude policemen and the city ordinance does not create the "office" of policeman, the policeman is to be regarded as an employee and so subject to the Compensation Act.

The defendants also contend that the injury did not arise out of or in the course of the employment, and was not to be anticipated. This view is substantiated by the case of *Borgeson v. Industrial Commission,* 368 Ill. 188, 13 N.E. (2d) 164 (1938), in which a music salesman was hit by a bullet intended for a colored woman while he was leaving his hotel to keep a sales appointment. The court refused recovery under the act. But in this case, the hazard was applicable whether the salesman was employed or not. The test of recovery is that the injury not only had its origin in the nature of the employment, but was the direct result of the risks he was exposed to by the nature and incidents of the employment. As this risk was common to the neighborhood and applicable to the employment, there could be no recovery. In *Heideman v. American District Telegraph Co.,* 230 N. Y. 305, 130 N.E. 302 (1921), the defendant employed the claimant as a nightwatchman to furnish subscribers with protection against burglary. A policeman accidently shot him in pursuit of the burglars. The court allowed recovery. In the opinion, the late Mr. Justice Cardozo said, "The sudden brawl, the 'chance medley' are dangers of the streets, confronting with steady menace, the men who watch while others sleep. Casual and irregular is the risk of the belated traveler, hurrying to his home. Constant, through long hours, was the risk for the claimant, charged with a duty to seek, where others were free to shun. The difference is no less real, because a difference of degree. The tourist on his first voyage may go down with the ship, if evil winds arise. None the less in measuring his risk, we do not class him with the sailor for whom the sea becomes a home. The night, too, has its own hazards, for watchmen and wayfarer. Death came to claimant in the performance of his duty, face to face with a peril to which the summons of that duty called him."

In *Ohio Bldg. Safety Vault Co. v. Industrial Commission,* 277 Ill. 96, 115 N.E. 149 (1917), an enemy assaulted and beat a nightwatchman to death with a four foot gas pipe. The court allowed recovery as his duties exposed him to contact with desperate men and he must necessarily incur the danger of being assaulted by them. The court held that the risk must be peculiar only to the employment and whether it is a more than ordinary normal risk is not important. In *Frigidaire Corp. v. Industrial Accident Commission,* 103 Cal. App. 27 283 P. 974 (1929), the view was even more liberal. In this case recovery was had for death from a stray bullet while deceased was awaiting a train on the platform to carry him back to headquarters. The court held that if the work itself involves exposures to perils of the street, strange, unanticipated, and infrequent, though they may be, the employee passes along the streets when on his master's occasions under the protection of the statute. In *Ridenour v. Lewis,* 121 Neb. 823, 238

N.W. 745 (1931), the robber assaulted and killed the employee while the latter was collecting accounts for his employer. The court held that when an employee is sent into the public street on his master's business, his employment necessarily involves exposure to all risks of the street, and any injury from any such cause, not involving an act of God, arises out of employment under the act. In *Central Illinois Public Service Co. v. Industrial Commission,* 291 Ill. 256, 126 N.E. 144 (1920), a tornado blew down the building in which the employee was working. As a result, the coils in the ammonia tank broke and the fumes killed him. The court allowed recovery. They held that if by reason of his employment he was exposed to a risk of being injured by a storm which was greater than the risk of the public; or if the employment accentuated the natural hazard of the storm, which increased hazard contributed to the injury, it was an injury arising out of the employment although it was unexpected and unusual. In *Coombes v. Industrial Commission,* 352 Ill. 399, 186 N.E. 190 (1923), the court held that the shooting of a janitor while investigating a suspicious intruder was an accident within his employment; as where the duties of an employee are such as are likely to cause him to have to deal with persons who in the nature of things are likely to attack him, an assault upon him while he is in the performance of such duties by a marauder arises out of his employment.

Also the injury need not be foreseen or expected in order to recover as within the scope of the employment. In *Baum v. Industrial Commission,* 288 Ill. 516, 123 N.E. 625 (1919), a striker stabbed an employee who for the sake of his employer resisted the entry into the plant. The court held that although this injury could not be foreseen or expected, there is recovery as its origin is in the nature of the employment. In *Pekin Cooperage Co. v. Industrial Commission,* 285 Ill. 31, 120 N.E. 530 (1918), there was recovery for an injury incurred in a dispute with a fellow employee although this could hardly be foreseen or anticipated. In *Empire Health & Accident Insurance Co. v. Purcell,* 76 Ind. App. 551, 132 N.E. 664 (1921), a robber killed an insurance agent. The court said that although this injury was unforeseeable, there was recovery; for if it hadn't been for his employment, the claimant wouldn't have been in that locality at the time. *Malone v. Detroit United Ry.,* 202 Mich. 136, 167 N.W. 996 (1918) held that the injury, as long as its origin was in the risk of employment, need not be foreseen or expected. In accord: *Babington v. Yellow Taxi Corp.,* 250 N.Y. 14, 164 N.E. 726 (1929) and *Alexander v. Industrial Board,* 281 Ill. 201, 117 N.E. 1040 (1917).

Thus in this case recovery was given to the widow of the slain policeman under the Workmen's Compensation Act — first, on the ground that he was an employee and not an officer; and, secondly, on the ground that the injury, though not foreseeable, had its origin in the nature of the employment. The better view as to whether a policeman is an employee or an officer seems to be that he is an employee unless the act itself excludes policemen or a city ordinance creates the "office." In this case, neither had been done and so the deceased was under the act. The fact that the injury arose out of or in the course of the employment is clear. As Cardozo said in *Heideman v. American Dial Telegraph Co.,* 230 N. Y. 305, 130 N.E. 302 (1921), "The duties of a policeman bring him into the perils of the night and into the dangers of the community. Where crime and riot and disturbance occur, there the patrolman must go. Service takes him upon the public ways and the evils lurking there are the dangers of his calling, the very nature of which accents the threat of harm by violence." Such a danger of death was inherent in the deceased's employment. That it occurred at the hands of a brother officer, and was thus unforeseen and unexpected, does not exclude recovery under the Act. The court is sound in allowing recovery.

William T. Meyers.