

LABOR DECISIONS of THE KANSAS SUPREME COURT

by

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PREFACE

This study has been pursued under the direction, and with the assistance, of Mr. Gagliardo of the Department of Economics, with the aim of reviewing decisions of the Kansas Supreme Court respecting labor and labor legislation. The primary aim has been the review of decisions, legislation being studied as a means to this end.

The purpose of such review has been to show the status of wage-earners in Kansas industries other than agriculture, as determined by decisions of The Supreme Court. This purpose involves some study of legislation under which the cases decided have arisen. For this reason a brief history of the different laws has been given, and cases have been grouped with respect to these laws.

The groups of cases have been studied in the order of the enactment of the laws under which the cases have arisen. The groups in this order are: Mechanics Lien; Railroad Contractors Bond; Eight-Hour Law; Factory Act; Federal Employers' Liability law; Kansas Employers' Liability laws; Federal Safety Appliance Act; Workmen's Compensation Act; Industrial Welfare Commission; Kansas Court of Industrial Relations; Criminal Syndicalism; Miscellaneous Cases.

It is evident that some groups are more important than others. The treatment of the less important, therefore, has been limited. Of the more important, the study has been more thorough. It has been impossible, however, to make an exhaustive review of the most important cases. The plan followed has been to present important cases and to relate others to

these. In some groups, however, a fairly thorough study has been attempted. This is especially true of the Court of Industrial Relations Cases. In some groups, as for example, Mechanic's lien cases, the study has been little more than an annotation of the cases.

No study has been made of cases involving merely the question of breach of contract. This question is fundamental in most cases in agricultural industry and is not, for the purposes of this thesis important. The study is confined to those industries in which the labor conditions have been the subject of legislation.

A primary aim therefore has been that of showing the legality of legislation, regulating conditions and protecting laborers in such industries. This involves abrogation of previous relations, or broadening them. This question necessitated, further, some comparison of the common-law relations of Master and Servant, fellow-servancy, and doctrines of contributory negligence and assumption of risk, with these relations as provided under the different laws.

CHAPTER I.

1
Mechanics' Lien Cases.

Mechanics' liens are statutory rights based upon common-law rights. They are unknown to the English common law except as "retainers rights." These, however, were early in development. They became recognized in the civil law in the United States, and all states have mechanics' lien laws.

The mechanics' lien is a claim to property, due to non-payment of wages, or for labor done, or for materials furnished, in constructing, repairing or removing a building, works or construction. Anyone is entitled to a lien who has made some improvement or addition to the value of property. The lien is an assurance that such person will not lose his wages for labor, or remuneration for materials furnished in the improvement or addition to property value.

The lien attaches to the improvements and also to the land upon which they have been made. In case of a building on property, both the building and the land upon which it rests are subject to the lien, and the property may be sold for the funds to pay the lien claims.

Practically every kind of property may be subject to liens, with the exception of public property. Most of the states do not hold such property subject to a mechanics' lien. The Kansas law, however, does not exempt public property.² Private property, churches, college buildings, etc., are subject to liens, as is also the property of corporations. As seen, this lien extends to any interest in lands, including equitable es-

1. See Jones On Liens - (Third Edition) Vol. I.

2. Bardick on Real Property - p.569, Note 20.

tates, and interests in general, and in most states, to a leasehold.¹

A notice of filing a mechanics' lien must be given in most states. In a few this is not required. The time limit for filing varies in the different states. "Kansas requires no preliminary notice when the contract is made directly with the owner of the real estate. The filing limit is four months after the last item of material is finished, and the operator must sue before expiration of one year after filing in order to enforce collection. When the sale is made to a contractor, Kansas requires that he be served notice when the lien is filed. A sixty-day time limit is set for filing, and the operator must sue to enforce his claim within one year after filing."²

Mechanics' liens, or lumbermen's liens, are employed for collecting debts. "Some distinguishing advantages of a mechanic's lien over the ordinary method of collecting a debt are: First, it is a claim upon the property itself, just as a mortgage is, but without the necessity of the owner signing any papers or explicitly agreeing that it shall be such a claim, being so by virtue of the fact that the owner of the land purchased the material or employed the labor to improve the real estate. Second; it attaches to the real estate, not when it is filed and recorded as does a mortgage, not at the end of litigation as does a judgment, but at the moment the first material is delivered under the contract. ---No sale or mortgage of the property after the first delivery of the material can lessen his,(the seller's), rights or come ahead of his claim, though it may not be actually filed until months later."³

1. Burdick, on Real Property, p. 569, note 20.

2. University of Kansas Studies in Business, Number 4, pp.14, 15.

3. Frank E. Tyler - Lumbermen's Law (Jan. 1926) quoted in Kansas Studies in Business #4.

A mechanic's lien law was enacted in Kansas in 1872 (Laws of 1872 Ch. 141). It has been amended often and many of its features changed. (See Laws of 1909 Ch. 182; Laws 1913 Ch. 242). It is not different from laws of a similar nature in other states except that it allows a lien to attach against public property. (Not since 1913).

Provisions of the Kansas law and annotations of some cases under these provisions are given below.

Provisions of Kansas law and annotations.

(Old Code, Prior to 1909)

The lien may be against property and all appurtenances thereto, for any work of a laborer, his horses and driver, auto-truck and driver, and for materials, fixtures and machinery. This lien has priority over all other liens and encumbrances. The most important cases under this provision are:

Potter v. Conley, 83 Kan. 676; Shaw v. Stewart, 43 Kan. 572.
 Lumber Co. v. Douglas, 89 Kan. 308.
 Weaver v. Sells, 10 Kan. 609.
 Crawford v. Blackman, 30 Kan. 527.
 Hathaway v. Davis and Rankin, 32 Kan. 693.

A lien must be filed within four months from the time of completion of the construction;

Treat v. Sutliff, 24 Kan. 35; Perry v. Conroy, 22 Kan. 716.
 Seaton v. Hixon, 35 Kan. 663.

A subcontractor may file a lien under a contractor, or, persons working under a sub-contractor may file a lien. In these cases the limit of time of filing is sixty days:

Lumber Co. v. Smith, 84 Kan. 190; Rankin v. Rankin, 86 Kan. 899.
 Lumber Co. v. McCurley, 84 Kan. 751; Trummer v. Sells, 87 Kan. 647.

1. Revised Statutes of Kansas 1923, pp. 847-850. (See for complete annotation.)

A contractor or owner may execute a bond to the state, to the sum of not less than the contract price. This is to insure payment of claims and to forestall liens.

Risse v. Planing Mill, 55 Kan. 518; Shores v. Surety Co. 84 Kan. 592.
Lumber Co. v. Mills, 85 Kan. 363; Hotel Co. v. Hardware Co. 56 Kan. 488.
Lumber Co. v. Douglas, 89 Kan. 308.

Any public officer must require a bond of contractors whom they engage to do work or construction of a public nature, when the amount is over \$100 and not less than the contract price. This provision, made in 1913, forestalls the possibility under the Kansas law, of a lien being attached against public property. Thus it is not now possible for a mechanic's lien to attach against public property.

Commissioners of Jewell Co. v. Mfg. Co., 52 Kan. 253.
Freeman v. Chanute, 63 Kan. 573.
Lumber Co. v. Elliott, 59 Kan. 42.
Griffith v. Stucker, 91 Kan. 47.

Action may be had in civil courts to enforce mechanic's liens, if this action is brought within one year from the date of filing the lien, or if a note has been given, one year from the date of the expiration of the note.

Gillespie v. Lovell, 7 Kan. 419.
Seaton v. Hixon, 35 Kan. 663.
Sash Co. v. Heiman, 65 Kan. 5.

A complete review of the numerous cases is not possible, and hence the treatment must be largely in the nature of annotation with respect to provisions of the law. The annotations given are of the Old Code prior to 1909.

CHAPTER II.Railroad Contractors' Bond Cases.¹

The Railroad Contractors' Bond law was enacted in 1872, for the purpose of protecting laborers, mechanics and others in the construction of railroads. It was intended to make the railroads liable for the debts of a contractor of the companies, unless they should require contractors to give a bond for the payment. This bond absolves the railroads from liability for the debts of contractors to others.

The bond is a type of lien in the judgment of the Supreme Court, in the decision in *Wells v. Mehl*, 25 Kan. 142. It was said in this opinion that: "the bond binds the contractor to pay for all labor done upon, and materials used in the construction of, the roads, so far as his contract with the company calls for labor and materials, no matter how many sub-contracts therefor may be made. In this respect it is a quasi-mechanic's lien law, the lien being upon the bond instead of upon the road."²

When the contractor contracts debts for any purpose outside of railway construction, he is personally liable. The first case to be reviewed by the Supreme Court under this law is that of *Railroad Co. v. Cuthbert*, 14 Kan. 168. A contractor of the Santa Fe railroad had contracted debts to Cuthbert, who brought action in the district court of Harvey County, against the railroad. The basis of the action was the contention that the bond which the railroad had required of the contractor was invalid because it contained a clause that "the contractors shall well and truly save, keep, and bear harmless, the said railroad of, and from,

1. Laws of Kansas, 1872, Chapter 136.

2. 25 Kan. 143.

all trouble, damage, costs, suits, judgments and executions arising or to arise by reason of the incurring of such debts."

The lower Court ruled the bond invalid and awarded Cuthbert judgment. The Supreme Court reversed this decision holding the bond valid. The rules established were: 1. That such a clause would be a legal contract. 2. That the liability of the railroad company under the act is purely a statutory liability, and the conditions described in the statute must be shown to exist before that liability can be enforced. The Court held that these conditions did not exist here.

The next case is *Railway Co. v. Brown*, 14 Kan. 423. The case was appealed from Labette district court which had rendered a judgment in favor of Brown. Brown had been ordered by McLeod, a contractor of the railroad company, to furnish supplies to certain workmen in his employ. Brown accepted a note of McLeod made payable to one of the workmen, in exchange for provisions. McLeod refused afterward to pay Brown, who then sued the railroad company. No bond had been required by the company of McLeod the contractor. The railroad lost the case in justice court, in the district court and finally, also, in the Supreme Court.

The defense offered by the company was that it had not given any order to Brown for supplies and that it could not therefore be held liable for the debts of McLeod. The Supreme Court overruled this defense, establishing the rule of law that the company was liable, under the law, not only for the debts of the contractor, but also to the persons to whom the debts may have been transferred. This was due to the failure of the company to require the bond of McLeod, as prescribed by law. It was further established

that a contract between a contractor and his workmen is a contract of the company, when the company has ordered the contractor to perform the work for which the contractor retained the workmen.

The case of *Railway Co. v. Baker*, 14 Kan. 428, established the rule that a person employed as a timekeeper by a railroad is not a laborer in the sense intended by the law of 1872. Baker failed to recover in an action against the company for back pay owed to him by a contractor.

Wells v. Mehl, 25 Kan. 142, is a case involving the question of a sub-contractor. Mehl furnished supplies to a sub-contractor's workman. In default of payment of the debts by the sub-contractor, Mehl sued Wells the original contractor. The ruling of the Supreme Court was, that the lien for the payment of debts, under the law of 1872, is on the bond of the contractor with the company. There being no bond of the sub-contractor either with the contractor or with the company, the law would not apply to debts of a sub-contractor. The decision of the Marian district court, awarding a judgment in favor of Mehl, was reversed.

The case of *Railway Co. v. McConnell*, established the rule that a bridge builder constructing bridges for a railroad company is a contractor in the sense intended by the law. Here the railroad company was held liable for the debts of McConnell, a bridge contractor.

Railway Co. v. Cobb, 25 Kan. 270 is similar to *Wells v. Mehl* above. Here, however, supplies were furnished to a sub-sub-contractor and the decision followed the *Wells v. Mehl* case. Cobb, suing the rail-

road company for the debts of a sub-sub-contractor, recovered in the lower court. The Supreme Court following the reasoning in the Wells case held that there could be no recovery, and reversed the decision of the lower court.

The Wells v. Mehl case determined that persons furnishing supplies to workmen of a sub-contractor are not within the act. The workmen themselves, however, are within the act and may recover from the original contractor. This is the rule established in Mann v. Corrigan, 28 Kan. 137. It is further emphasized in Railway Co. v. Ritz, 30 Kan. 30, and is the governing rule in Parkinson & Co. v. Alexander, 57 Kan. 110. In this case the rule was established that railroad companies are not liable for payment of debts of their contractors for materials not used in construction of railways.

A laborer may recover for wages, but not for the hire of his team. If no specification is made of the amounts due for the laborer's work and for that of his team, the whole sum is considered as being not chargeable to the railroad company. This is the rule in Mann v. Burt, 35 Kan. 10. However feedstuffs for animals used in construction work may be a debt chargeable to the company, according to the rule in Railway Co. v. Graham, 67 Kan. 791.

The failure to file a bond as required by law will not invalidate it if it is a proper bond. In the case of Griffith v. Stueker, 91 Kan. 50, the city of Ottawa let contracts to Stueker for work on its streets. Stueker sub-let a part of the work to Lightfood Bros., requiring a sub-contractor's bond from them. The latter defaulted

and Griffith, a creditor of workmen of Lightfoot Bros., sued Stueker. The contention was made that the original bond was invalid because it had not been filed. The lower court upheld this contention but the Supreme Court overruled the decision, holding that filing of a bond was of secondary importance.

This case is not a railroad contractors' bond case, but is under the laws of 1887, chapter 179, which is similar to the Railroad Contractors' Bond Law. The provisions of this law are that; a bond shall be required for any public work, by any public officer, of any person contracting with him to do public service work. The bond provides for the payment of such debts as any contractor may contract with persons, for materials and provisions, used in the public service work. The amount of the bond is to be a sum not less than the sum total in the contract. Action may be had in the courts by anyone, provided such action is begun within six months of completion of such public work. The bond must be filed with the clerk of the district court of the county in which improvement is being made.¹

Commenting on this law the Supreme Court said in the case of Griffith v. Stueker, 91 Kan. 50-57: "The purpose of the statute was to protect the contributions of laborers and materialmen to public works. Where mechanics' liens are allowed, as upon public buildings, the statute^{ute} furnishes additional security² - - - where mechanics' liens are not possible, as upon street improvements, the purpose was to secure laborers and materialmen against loss by a quasi-mechanics lien,

1. See Laws of 1887; Ch. 179.

2. Commissioners of Jewell County v. Mfg. Co., 52 Kan. 253.

the lien being upon the bond instead of the property - - - The statute under consideration, is analogous to the one enacted to protect laborers and others who aid in the construction of railroads, which requires railroad companies to take from contractors, bonds to pay laborers, mechanics and materialmen, all just debts incurred in carrying on construction work." There are few cases under this law.

Asphalt Co. v. Building Co., 99 Kan. 567, is one of these. The rule in this case was that the responsibility of a surety company or guaranty company, as surety to a contractor's bond does not cease when the contractor defaults his bond. The surety company in this case is responsible for the debt.¹

The last case of this kind is Traction Co. v. Brick Co. It is similar to the Asphalt Company case above, in that the question of the liability of the surety company is uppermost. The case established the rule that the surety company's liability extends to freight charges on materials, in default of the contractor.

Crane Company v. Terminal Railway Co., 98 Kan. 336, establishes the rule that the construction of a terminal railway station is within the provisions of the Contractors Bond Law of 1872, since it is a part of railway construction. A further rule established is, that, where a sub-contractor makes payments for his debts to persons for supplies, he has a right to designate the accounts to which they apply.

Meigen v. Railway Co., 104 Kan. 811, is the last case of this group. It is similar in facts and in rule to others already given.

Railroad Contractors' bond cases show the effect of protective legislation upon the status of mechanics, laborers and materialmen. The law of 1887 protects the state.

Cases cited are: U.S. v. National surety Co., 92 Fed. 549

Chaffee v. U.S. Fidelity & Guaranty Co., 128 Fed. 918.

CHAPTER III.Eight-Hour Law Cases.¹

The first law in Kansas relating to hours of labor is found in the enactments of the legislature of 1891. This is not a general statute, however, but relates only to industries conducted by the state, and work performed for the state. This means also the several divisions of the state, viz., counties, townships, and municipalities.

Known as the Eight-Hour Law, it provides the eight-hour day for all labor, by and for the state or divisions mentioned above. No other industries or kinds of labor are included in the act. There is a law on the Kansas Statutes,² providing the eight-hour day in lead and zinc mines in Kansas, but this is not a part of the Eight-Hour Law. There have been amendments to the act but these have not been changes in the application of the law to other industries, or to other kinds of labor.

Provisions, in brief, of the law are:

Section I. Eight hours shall constitute a day's labor for all workmen, laborers, mechanics who may be employed by, or on behalf of, the state or any divisions thereof, except in cases of extraordinary emergency, where the preservation of life and property make such labor necessary. In such cases, labor will be paid on the basis of the eight-hour day. The current wages of labor in other industry for a day longer than eight hours, will be paid to laborers under the eight-hour law for the eight-hour day. All laborers of contractors and sub-contractors shall be included in the provisions of the law.

1. For Law see Laws of Kansas, 1891, chapter 114.

2. " " " " " " , 1917, " 242.

Section II. All contracts shall be made upon the basis of the eight-hour day. All contractors are responsible for providing that their laborers do not work more than eight hours per day.

Section III. Any officer of the state of Kansas, or any of the divisions; any contractor; any city, township or county of the state of Kansas; or any other person violating the provisions of the act shall be punished for each offense by a fine of \$50 to \$1,000, or imprisonment of not longer than six months, or by both fine and imprisonment.

Section IV. The act shall not apply to existing contracts.

The law was amended in 1923,¹ exempting cities of the second class and the third class from the provisions of the act. Certain kinds of work in counties and townships, and light plants and water plants in cities of the second and third classes were also exempted from the provisions of the act.

Cases reviewed by the Supreme Court under this act are not numerous, and few of them are important. The case of *Atkin v. Kansas*, 64 Kan. 174, is the most important case. This will be given in its proper place.

The first case under the law, reviewed by the Supreme Court, *In Re Ashby* 60 Kan. 101, grew out of the law regarding the working of "free labor" on the public roads in Kansas. Under this law all persons who were subject to road duty, worked on the roads ten hours per day. This was manifestly in conflict with the eight-hour law, providing eight hours for public work and labor. The Supreme Court ruled the law relating to "free labor" unconstitutional and the system of free

1. Revised Statutes of Kansas, 1923, P. 686.

labor was abolished.

The next case was In Re Dalton, 61 Kan. 257, J. C. Zeigler and J. T. Dalton, contractors in the construction of public buildings in Geary County, Kansas, allowed their workmen to work longer than eight hours per day. They were convicted and sentenced to a term of imprisonment. A writ of habeas corpus was taken but denied. On appeal to the Supreme Court it was again denied, and the contractors were forced to serve their sentences. There was no plea of unconstitutionality in the case.

In the case of Beard v. County Commissioners of the County of Sedgwick, the Supreme Court ruled that a person who receives a stipulated salary, instead of wages, is not under the provisions of the law. Beard was a janitor in a public building in Sedgwick County, Kansas, and received a stipulated salary for his services. His duties requiring more than eight hours per day, he entered suit against the County Commissioners to obtain the privileges of the eight-hour day, and to recover a balance of pay as based upon eight hours of work. The Supreme Court denied this claim, establishing the above rule.

The most important case under this law is Kansas v. Atkin, 64 Kan. 174. W. W. Atkin was employed, as a contractor, by the City of Kansas City, Kansas, for the work of paving Quindaro Boulevard in that city. Atkin allowed his men to work longer than eight hours per day. He was indicted, tried, and fined \$50 on each of two counts for violating the Eight-Hour law. He appealed to the Supreme Court on the ground that the work of paving city streets was not intended by the law. The Supreme Court, however, affirmed the decision of the lower court.

The case was appealed to the United States Supreme Court which

in a decision (191 U.S. 207, 124 Sup. Ct. Rep. 124) in 1903, affirmed the opinion of the Kansas courts. The contention of Atkin was that the law was unconstitutional because it denied freedom of contract and equal protection of the law. The opinion held that, on the authority of *Holden v. Hardy* (169 U.S. 366), the state of Kansas had the legal right to pass such an act as the Eight-hour law, also that since no employees liberty of contract is absolute, there was no infringement of liberty by the law. The decision was not unanimous. From the opinion, given by Mr. Justice Harland, Mr. Chief Justice Fuller, Mr. Justice Brewer and Mr. Justice Peckham dissented. (No opinion given.)

The last case reviewed is that of *State v. Ottawa*. Here, action was brought to compel the City of Ottawa to observe the eight hour law in its employment of firemen and engineers at the city water plant and light plant. These were being required to work longer than eight hours per day in their duties. The district court ruled that since the work was performed at intervals during the day, there being intervals when no work was necessary, but the presence merely, of the workmen being required during these intervals, the city was within its rights in requiring the workmen to remain at their jobs twelve hours. The Supreme Court overruled this decision. The fact that there were intervals of idleness in the duties of the workmen, was held not to be a release of responsibility under the eight-hour law, and that the intermittent character of the labor did not effect responsibility for hours of employment. The decision of the lower court was reversed.

There are no further cases under the Eight-Hour Law. Nor are there cases under the eight-hour law for lead and zinc mines. The

provisions of this law are similar with respect to lead and zinc mining to the Eight-Hour law in respect to public work.

CHAPTER IV.Factory Act Cases.

Factory legislation began in England in 1802. Laws were passed more or less erratically until the Workshop Act of 1878 when a fairly logical system of labor legislation was completed. In the interim the conditions of labor legislation had been chaotic.¹

"Additional legislation took place in 1885, 1889, 1891, 1895 and 1897, which restored the old state of chaos and rendered it necessary to do the work of 1878 over again. This was done by the act of 1901, which, subject to the alterations which it in its turn has received in 1903, 1906 and 1907, is therefore a complete code of the law relating to factories and workshops."²

In the United States this type of legislation began in 1836 in Massachusetts. Practically all the states having factories have enacted legislation regulating labor and conditions. The Kansas "Factory Act" was passed in 1903. It is typical of factory legislation in the United States.

Some of the provisions of the Kansas law are:³

Section I. Providing for inclosing of elevator shafts, well-holes and elevators in all factories in Kansas.

Section II. Providing for handrails for stairways and regulations for closing doorways.

Section III. Providing for fire escapes for all buildings.

Section IV. All machinery operated by pulleys from line shafts must be fitted with shifters for belts operated without danger

1. Lee /ol. 82, Kansas Reports Page 613
2. Hedgroves Factory Acts 11th Ed. (1909) Introduction P. XXI.
[Quoted in Vol. 82 Kansas Reports P. 613, and following.
3. Laws of Kansas, 1903, Chapter 356.

from machinery. All dangerous machinery must be guarded for the purpose of preventing or avoiding death of employees

Section V. Where neglect of these safeguards is responsible for the death of an employee, a personal representative of the employee may maintain an action in the courts for damages. In case of injury, the employee shall have this right.

Section VI. Proof of failure of employer to comply with the law shall be sufficient to obtain an award for damages.

Section VII. Manufacturing establishments mean, and include, all smelters, oil refineries, cement works, mills of every kind, machine and repair shops and any kind or character of manufacturing establishment which converts raw products into finished products.

Section VIII. The word person used in the act shall mean any person or persons, partnership, corporation, or receiver, trust or trustee, or combinations of persons, either natural or artificial.

These provisions have a bearing to change the operation of the fellow-servant rule, and the common-law doctrines of assumption of risk and contributory negligence. These doctrines will be shown in the study of cases which will follow.

The first case reviewed, under the act, by the Supreme Court is *Madison v. Clippinger*, 74 Kan. 700, appealed from Wyandotte district court in 1906. Madison, a minor, was injured on a ripsaw which he was operating, and which was unguarded. The lower court, Wyandotte County, in its opinion in Madison's suit for damages, held that Madison had known the risk in the case and had voluntarily assumed the risk. It held that he was guilty of contributory negligence, also, and that he was not entitled to judgment, for these reasons. The

Supreme Court found there was no error in this judgment and affirmed the lower court's decision.

The case is important in defining the application of the doctrines of assumption of risk and of contributory negligence. In the Supreme Court's opinion, rendered by Mr. Justice Smith, it was said: "That the violation of a duty expressly imposed by a statute upon an owner or operator of machinery, dangerous to employees or to the public, is negligence, which, prima facie, imposes liability for damages resulting therefrom, is well settled law (21 A & E Encyclopedia of Law P.478). Also that negligence on the part of the party seeking to recover damages, which so far contributes to the injury that it may be said the injury would not have occurred but for such contributory cause, defeats a recovery, is equally well settled, (K.C. Ft. Scott & G. Rld. Co. v. McHenry, 24 Kan. 501)"¹

This ruling determines that companies may not employ the defenses of contributory negligence and assumption of risk, when they are in violation of the law, but on the other hand, if an employer is guilty of assumption of risk and contributory negligence, his action for damages will be thereby defeated, or his award of damages will be mitigated.

Manufacturing Co. v. Bloom, 76 Kan. 128 is a case involving the same question as that in Madison v. Clippinger above, as also does the case, Rank, a minor, v. Packing Box Co., 92 Kan. 917. In the first case the opinion of Mr. Chief Justice Taft of the United States Supreme Court, in the case of Narramore v. Cleveland, C.C. and St. L. Rld. Co.,

1. Kan. Reports, Vol. 74, P. 700.

96 Fed. 298, was quoted. This was that a plea of assumption of risk is a waiver of benefit of the statute, since this is a tacit admission by employers of violation of the law.

Fowler Packing Co. v. Engenperger, 77 Kan., 406, is a case involving the question of liability of employers, for accidents due to open elevators. Engenperger, while working on a freight elevator of the Packing Co. was injured when a barrel fell upon him from another elevator above him, both elevators being merely open platforms. The elevators were used in hauling meat in trucks from floor to floor of the plant. The district court, Wyandotte County, awarded judgment to Engenperger in his action for damages. The Supreme Court affirmed the opinion. There was no question here, except the negligence of the company, both courts ruling that the company was manifestly in violation of Section 1 of the Factory Act.

In Kansas Buff Brick Mfg. Co. v. Stark, 77 Kan. 652, damages were awarded to Eli Stark and Mary M. Stark for the death of their son, Arthur, in the plant of the company. Stark was killed when his clothing became entangled in an unguarded line shaft which was near the place where he was working. The decision of the Supreme Court affirmed that of the lower court. The question here as in above cases was that negligence of factory owners defeats their defenses, if and when they are in violation of the law themselves.

The case of Henschell v. Union Pacific Railway Co., 78 Kan. 411, established the rule that railway shops are, for the purposes of the Factory Act, a "factory". Employers are liable under the provisions of the law in cases of injury here. Bubb v. Railway Co., 89

Kan. 303, considers the same question, and follows the rule of law of *Henschell v. Ry. Co.* *Truman v. Railway Co.*, 98 Kan. 761, is similar. See also *Slater v. Railway Co.*, 91 Kan. 226.

A group of cases determine whether other establishments are "factories". The case of *Menke v. Hauber*, 99 Kan. 171, is in point. Menke was injured in making barrels in a shop where no machinery was used and in which the workmen furnished their own tools. He began action for damages and recovered in the lower court, but the Supreme Court overruled this decision on the ground that such a shop could not be regarded as a factory under the Factory Act, since there was no machinery in the shop.

Jeffries v. Elevator Co., 102 Kan. 811, established the rule that a grain elevator is a "factory" as intended by the law, overruling the defense. See also *Buchanan v. Blair et. al.* 90 Kan. 420.

Pack v. Grimes, 107 Kan. 705, determines the status of a Monument works, where machinery is used, as being a "factory" for the purposes of the act.

Caspar v. Levin, 82 Kan. 605, determines that a works operating to reduce scrap-iron to marketable size and form is a factory.

In the above cases the principal questions were the status of these establishments, that is, whether they are to be considered factories. The minor questions of negligence or assumption of risk are decided following the rules established in previous cases.

A number of cases involve primarily the questions of assumption of risk, contributory negligence and the negligence of employers. These are: *Brick Co. v. Fisher*, 79 Kan. 411; *Howell, a minor v. Sola*

Portland Cement Co., 86 Kan. 283; Raines v. Stone, 87 Kan. 116; Casillas v. Cement Co., 89 Kan. 365; Baillard v. Grain Co., 193 Kan. 775; Smith v. Bowersock, 95 Kan. 96; Florence Hackman, minor, v. Candy Co., 104 Kan. 94; Gambill v. Bowen, 82 Kan. 840; Sibley v. Cotton Mills Co., 85 Kan. 256; Weeks v. Seman Pckg. Co., 90 Kan. 305; Myrick v. Mfg. Co., 96 Kan. 17, Alkire v. Cudahy, 83 Kan. 373.

The case of Ballenger v. City of Hill City, 116 Kan. 604, involves an unusual circumstance and, for this reason, is given. Ballenger lost his life in the light plant of Hill City when his clothing became entangled in unguarded machinery. He was not a workman, having entered the plant, on the invitation of authorities, to study operations, with a view to becoming an employee, when he should have become sufficiently familiar with the plant machinery. The question in the case, was, therefore, whether his status would justify a claim for damages. The ruling held that since he had been asked to come into the plant, by employers, his status was that of an employee and that the city should pay damages for his death.

Byland v. Powder Co., 93 Kan. 288 involves an unusual circumstance also. Byland was injured in an explosion in a powder factory. The explosion was caused by bits of metal striking a spark into the powder. The question in the case was whether the explosion was due to negligence of the company. The Supreme Court ruled that since the explosion could not have been foreseen, and hence could not have been forestalled, the company was in no degree responsible. Byland was, therefore, not entitled to recover damages.

Shode v. Cement Co., 92 Kan. 146, is a case involving conflict

with the Workmen's Compensation Law of 1911, and is important in defining the limits of that law as well as of the Factory Act. Shode was injured in the employ of the company, and entered suit under the Factory Act. He did not elect not to avail himself of the benefits of the Workmen's Compensation Act. The employers did so elect, but after the accident. The Compensation Act provides that employers and employees are presumed to be within its provisions unless they have filed a statement not to be governed by its provisions.

The injury occurred March 13, 1913, and the Compensation Law went into force March 12, 1913. The statement of election of the Cement Company, therefore, was made after the accident and injury, so that at this time neither the employer nor the employee could be without the scope of the act. The lower court therefore dismissed the case because it was begun under the Factory Act rather than under the Compensation Act. The case was appealed to the Supreme Court, which ruled that the lower court was right in that the case should have been begun under the Compensation law, but that the court should not have dismissed the case, but should have tried it under the proper law. The case was therefore remanded for a new trial.

The same question is considered in *Smith v. Cement Co.*, 94 Kan. 501. Smith was injured in the employ of the Cement Company and was awarded judgment under the Factory Act. It was claimed by the defense that the Workmen's Compensation Law covered the case rather than the Factory Act. The Supreme Court ruled that the Factory Act was not to be regarded as repealed by the Workmen's Compensation Act, but that its provisions may not be invoked when both employee and employer have

elected to accept the Workmen's Compensation Law. (See Shode v. Cement Co. above).

An employee may have right of action in common law liability, or under Factory Act provided he shall file a statement not to be governed by the Workmen's Compensation Act. This right is also reserved to employers.

The Workmen's Compensation Law in effect superseded the Factory Act, although not ostensibly doing so. For the reason that the former law provides more lenient and certain terms of liability, employers elect to come within its provisions. Cases under the Factory Act therefore have been few, since the enactment of the Workmen's Compensation Law. The differences of terms of employer's liability will be considered further in the study of Workmen's Compensation cases.

CHAPTER V.Federal Employer's Liability Act Cases.¹

The Federal Employer's Liability Act, passed in 1908, is modeled after the English Lord Campbell Act, passed in 1846. The former law provides that compensation will be paid for injuries and death of employees of any common carrier in the United States, when such injury or death is due to negligence of the carrier, and when such employees are engaged in interstate commerce at the time of the accident causing injury or death.

Concurrent jurisdiction is provided, i.e. action may be begun in either Federal courts or state courts. When begun in either, an action may not later be transferred to the other. Employers when negligent may not plead the defenses of contributory negligence and assumption of risk of employees. The latter however, will operate to mitigate the amount of damages.

The first case reviewed by the Supreme Court, *Barker v. Ry. Co.*, 88 Kan. 767, establishes rules as to contributory negligence and assumption of risk by employees. Barker, a fireman, was injured in an engine wreck. He recovered damages in the district court of Sedgwick County. On appeal, the Supreme Court ruled that the lower court's instruction was erroneous, since it ruled out the defenses of contributory negligence and assumption of risk. The carrier is privileged to use them when not in violation of the law or of the Safety Appliance Act. They may be used also when a violation by the carrier does not contribute to the injury. The decision was given reversing the ruling

1. 35 U. S. Statutes at Large 65, Chapter 149.

of the lower court.

The Supreme Court defines the difference between the assumption of risk doctrine and that of contributory negligence, in citing authority:

"Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent, that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk can not be said to be guilty of contributory negligence, if, having in view the risk of danger assumed, he uses care reasonably commensurate to the risk to avoid injurious consequences".¹

This distinction is valuable in this case and in general. The case involved the application of the doctrines and a distinction was necessary. A further question of the case was the application of the definition of interstate commerce. This is important but secondary in the case. It was established that a railroad transporting water for its own use, from one state to another, is engaged in interstate commerce. It was therefore held that Barker, in the above case was entitled to recover damages for his injury, since he was engaged in work of interstate nature at the time of his injury.

In the case of Thornbro v. Railway Co., 91 Kan. 684, the doctrines of assumption of risk and contributory negligence are further

1. See Narramore V. Cleveland C.C. & St. L. Ry. Co., 37 C.C.A. 499, See also Mfg. Co. v. Bloom. 76 Kan. 127; Caspon v. Lewin 82 Kan. 604.

explained. Thornbro, a brakeman was killed while he was standing between two cars in order to effect a coupling. He stumbled and fell under the wheels and was killed. The coupling apparatus of one of the cars was defective, making it necessary for him to go between the cars. This was a violation of the Safety Appliance Act and constituted negligence of the company. The district court ruled that the estate of Thornbro was therefore entitled to recover damages, and awarded judgment therefor.

The Supreme Court affirmed this opinion, overruling the defenses of the company of assumption of risk and contributory negligence. The court held that the company was not entitled to employ them inasmuch as it was in violation of the Safety Appliance law, and this contributed to the death of Thornbro.

A further ruling is made of the application of the interstate commerce provision, the court holding that a brakeman on a train which is engaged in interstate commerce, is still within the purview of the interstate commerce provision when he is engaged in shunting cars from that train to a siding, even though the cars may be in intrastate movement. (See cases: Van Brimmer v. Texas Pacific Ry. Co. 190 Fed. 394; De Atley v. Chesapeake and Ohio Ry. Co., 201 Fed. 591; Behrens v. Illinois Central Ry. Co., 192 Fed. 581). The Supreme Court ruled that the status of the workman was not changed by the temporary change in the status of his employment.

This opinion in entirety was reaffirmed in the opinion on rehearing of the case, 92 Kan. 681.

The next case, that of Cole v. Railway Co., 92 Kan. 132,

establishes the rule that the Federal Employer's law supersedes state laws on the same subject, and that the question of whether the federal law or the state law will apply depends upon whether the employer and employee were engaged in interstate commerce when injury or death was sustained. In this case, Cole was injured when he fell from the top of a car. He was trying to fasten a defective door, and an engine shunted another car against the car upon which he was standing, with such force that Cole was thrown to the ground. The lower court ruled that the company was liable on account of the defective car, but that Cole was negligent in going upon the car at night without telling members of the switching crew that he was working there. It therefore awarded damages but did not diminish the amount by whatever sum the negligence of Cole may have contributed to the injury. The Supreme Court affirmed the judgment for damages but remanded the cause for a better adjustment of the award of damages, due to failure to mitigate the amount.

This is in keeping with the rule that the contributory negligence of an employee may not be used as a defense by an employer when he (the employer) is in violation of the law but that such negligence will affect a diminution of the amount of damages.

Martin v. Railway Co., 95 Kan. 681, is a further discussion of the questions in the foregoing cases. Martin, a brakeman, was ordered by his conductor to act as fireman, while he, the conductor, did the work of the engineer. The reason for this arrangement was that the regular fireman and conductor could have time for lunch, without the

necessity for stopping the train. Martin was injured while engaged in this work. He began action for damages and was awarded judgment by the lower court. The railroad company appealed the case on the ground of error in that the brakeman assumed the risks when he went into the work of the fireman.

The Supreme Court ruled, however, that the brakeman was working under orders of the conductor at the time of the accident, and hence could not be said to have assumed the risk. The ruling of the lower court was affirmed on the authority of similar cases cited: (Chicago & N.W. Ry. Co. v. Bayfield, 57 Mich. 205, and Rodman v. Michigan Central R.R. Co., 55 Mich.)

In the case of Ross v. Railway Co., 95 Kan. 517, the question of mitigation of damages by negligence of employee is considered again. The case followed the above cases having this question, it being reiterated that contributory negligence of an employee could not be pleaded as a complete defense but would operate in diminishing damages.

Where equipment of a railroad company is not inspected, as intended by the Safety Appliance law, before being used in interstate commerce, the company is in violation of the law and may not claim contributory negligence of any employee who may be injured. This is the rule in Smith v. Railroad Co., 95 Kan. 451. Here Smith, a brakeman, was injured while repairing a car which had not been inspected before being used. He obtained judgment in the lower court and the Supreme Court affirmed, on the ground of the company's negligence.

Where a workman loses his life due to his own negligence, when ample warning had been given, his estate has no claim for recovery

of damages. The company being in such case absolved from all liability. The case of *Spinden v. Railway Co.*, 95 Kan. 474, establishes this rule. Spinden was working on a railroad bridge helping repair it. Being warned of danger by his foreman, and while "planking" the bridge he fell through a hole in the bridge and was killed. The Supreme Court ruled that he could have no cause for action. The defense was offered that the company was negligent, and that although Spinden likewise was negligent, his estate showed he awarded damages in a mitigated amount. The Supreme Court ruled that the railway was absolved from liability when its foreman had given warning of the danger.

When two persons, employees, are negligent, and the negligence contributes to injury, the rule of mitigated damages will operate. This was established in *Ross v. Railroad Co.*, 95 Kan. 517. In *Hackney v. Railway Co.*, 96 Kan. 30, this question was considered. A freight train crew left a switch open after their train pulled onto a siding. A passenger train ran into the open switch and being shunted onto the siding, collided with the rear end of the freight train. Hackney, the passenger train fireman was killed. Action was begun for damages. The lower court ruled that this was a case of negligence of both crews. The freight crew was negligent in leaving the switch open and the passenger crew was negligent in not observing the danger signals. It therefore awarded a mitigated amount of damages for the death of Hackney. The amount of mitigation of damages due to contributory negligence, is to be determined by the jury, in the opinion of the Supreme Court.

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The common-law rules of fellow-servancy are not changed by the

Employer's liability law. The members of the two train crews were not fellow-servants, not being engaged in the same work. Hence the railroad company was liable for negligence of the crews. In fellow-servancy the employer is not liable for their negligence causing injury to each other.

Assumption of risk and contributory negligence were pleaded in the case of *Brizendine v. Railroad Co.*, 96 Kan. 691. Brizendine lost his life in the employ of the company, while working in a coal chute. A system of elevating buckets ran backward when control was lost, and crushed the workman. In the action for damages his estate was awarded judgment, the lower court ruling out the company's defenses, since the accident was due to the company's negligence. The Supreme Court on review, affirmed this opinion.

The case of *Pyles v. Railway Co.*, 97 Kan. 455, is very similar to the Hackney case above, in that there was negligence of two crews. Pyles, a member of one crew, was killed in a collision of two trains. The courts awarded damages in mitigated amount. The lower court failed to mitigate the award but the Supreme Court remanded the case for this adjustment.

King v. Railway Co., 97 Kan. 769, involved negligence of one train crew in causing a collision in which King was killed. The lower court awarded damages to the estate of King and the Supreme Court upheld the decision. Since the negligence was entirely of one crew, there was no mitigation of the award as in the above cases.

The question of the applicability of the Federal Employer's liability act is the leading question in the case of *Giersch v. Railway*

Co., 98 Kan.455. It is similar to Cole v. Railway Co., 92 Kan. 132. Giersch, a switchman, was killed while engaged in interstate commerce. Action was brought under the state employers' liability laws. The Supreme Court ruled that for this reason the case could only be brought under the Federal Act.

The common law is to determine what constitutes negligence in cases under the Federal Act. This rule is established in the case of Roebuck v. Railway Co., 99 Kan. 544. It is also a rule of this case that a criminal assault by one servant upon another does not cause liability of employer unless this is done within the scope of employment. Roebuck, foreman of a section crew, was stabbed to death by a Mexican laborer who was employed under his direction. Roebuck had previously "fired" the Mexican as a dangerous character, and had appealed to his superiors not to be asked to allow the man to return to his employ. His superintendent requested him to allow the man to work and promised that no harm should come to him. The lower court awarded damages for his death against the company. The case was appealed to the Supreme Court, which ruled that the killing was not done in the scope of the employment. Mr. Chief Justice Johnston and Mr. Justice West dissented from this ruling. (No dissenting opinion given).

Forbes v. Railway Co., 101 Kan. 477, is a case involving only the question of the amount of damages. Chong Wha Kim, employed as engine wiper by the Atchison, Topeka and Santa Fe Railway, was killed while working on an engine in motion, when he was crushed between the engine and the edge of a roundhouse door. His estate was awarded \$2,000 damages. This was claimed to be excessive, in the appeal to the Supreme

Court, since the Chinaman's wife, for whom the suit was brought, and who had been living in Korea during thirteen years prior to the death of her husband, had received only \$110 from him during that time. The Supreme Court upheld the decision, ruling that such a measure of loss was not a fair one.

The rule of mitigation applies in the case of *Thomas v. Railway Co.*, 101 Kan. 528. Thomas, a freight train conductor in the employ of the Atchison, Topeka and Santa Fe Railway Co., was killed when he was run down by a passenger train. He had stepped upon the track of the passenger train in trying to avoid water from the tender of his freight engine. He was struck and killed by the oncoming train, which he had not seen. Evidence showed the engineer of the passenger train had not given proper warning that his train was approaching. Also that the company was negligent because of the faulty engine tender of the freight train, which caused the conductor to step upon the main track. The lower court awarded a judgment of \$10,000, but mitigated this amount by \$3,000 on account of the contributory negligence of Thomas in not looking before stepping in front of the passenger train.

McAdow v. Railway Co., 96 Kan. 423, involves the question of insurance collection for injuries. McAdow, a motorman of the Kansas City Western Railway Co., was injured. He had made an oral contract with the company, that in consideration of the sum of 50¢ per month deducted from his wages, he was to receive half-time wages during time lost due to any injuries received, not longer than one year. McAdow brought his action against the railway company instead of the insurance company, notwithstanding he had recovered damages from them (the railroad company) in a

previous suit. The defense pleaded that, in view of the company having paid the first award, McAdow could have no further right of action against it but action should be against the insurance company. The lower court returned a judgment in keeping with this contention but the Supreme Court ruled that there was a right of action with the railroad company on the basis of the oral contract. It therefore reversed the case and remanded it for a new trial.

The rule was established that a company has the right to make such contracts for insurance of its employees; that the fact of an award for damages to an employee does not bar his right to recover for his insurance payments.

This case was reviewed again, 100 Kan. 309. The plea of the railway company in this rehearing was that it had the right (Under section 5, Chapter 149, Part 1, 35 U.S. Statutes at Large) to set off against the judgment of the court for damages, any sum paid to the employer for insurance, indemnity, or relief benefit, on account of the injury for which he had been awarded damages.

The history of the case from the beginning is necessary in this review: McAdow was injured and received a judgment for \$7,500 in Jackson County, Missouri. He later brought action in Wyandotte County, Kansas, for insurance based upon an oral contract. (See above case 96 Kan. 423). He recovered judgment here also.

The company desired to obtain a judgment for the amount of the insurance judgment, as a setoff against the original \$7,500. The Supreme Court ruled that when a contract existed between employers and

employee, as in this case, the employer could have no right of setoff for the insurance against the original claim. It ruled that from the evidence submitted, such contract had been made by the company with McAdow through the superintendent of the company, and this was a valid contract, binding upon the company. The decision was therefore against the company.

The question whether an employee, a freight train conductor, who is accustomed to use his train caboose as his sleeping quarters, and who is ordered to prepare to go out with his train, and is injured while preparing to go, when a car was backed against his caboose, is entitled to receive damages, is the question in *Brunstead v. Railway Co.*, 99 Kan. 589. It was held that the accident was not within scope of his employment and hence there was no liability of the company.

Where the danger of an act is not realized and appreciated by a workman, he does not bar his right to recover when he assumes the risk. This is the rule of law established in the case of *Durran v. Railway Co.*, 100 Kan. 189. *Durran*, working in the shops of the Atchison, Topeka and Santa Fe Railway Co., dismantling a railway coach and breaking the boards to use in a furnace, was injured. A splinter struck one of his eyes and injured it. He was breaking the boards in a way which was dangerous. He was allowed to recover damages because of low intelligence making it improbable that he comprehended his danger. The Supreme Court affirmed the judgment on appeal but Mr. Justice Porter, Mr. Justice Burch and Mr. Justice Dowson dissented. (No dissenting opinion given). The authority cited was *Barker v. Railway Co.*, 88 Kan. 767. On rehearing of the case,

the same opinion was given, with the same division in the court, as in the first hearing.

The rule established in the case of *Briggs v. Railway Co.*, 102 Kan. 441 is that an experienced employee, fully cognizant of the dangers he is incurring, assumes risk of them and is not entitled to damages, for injury or for death. Briggs, a fireman, and his engineer, were eating lunch, having stopped their train, in Topeka. When the engineer had finished his lunch, he went to his engine and started the train. The fireman boarded the rear of the train as it passed, and started forward to the engine on the tops of the cars. In the darkness he fell between cars and was killed. The lower court ruled that there was no negligence of the company and that Briggs assumed the risk of his acts. The Supreme Court affirmed.

This case is an example of the application of the law to assumption of risks as stated above, *Barker v. Railway Co.*, 88 Kan. 767, i.e. an employer may employ the defenses of contributory negligence and assumption of risk when he is not in violation of the law himself.

Where an employee knowingly violates a rule of his employer, promulgated for his safety, he can not recover damages, for an injury incurred, according to the rule of *Rosk v. Railway Co.*, 103 Kan. 440. Rosk, an engineer of a freight train which was approaching Hutchinson, Kansas, seeing tracks occupied at a switch, did not slow his train in time to avoid a collision. He was injured and brought action. He recovered in the lower court, but the Supreme Court ruled that he had no right of action, since he had assumed the risk, and that there was no liability

of the company.

The case of *McDougall v. Railway Co.*, 106 Kan. 135, is another case of contributory negligence of an employee barring recovery of damages. The rule of law was established, that, in case of an engineer being killed while leaning out of his cab and looking backward, when his head struck a steel girder of a bridge, and where the clearance was two feet, the engineer had no right to recover award, since he assumed the risk. Cases were cited as in point: *Tuttle v. Milwaukee Railway*, 122 U.S. 189; *Clark v. Missouri Pacific Railway Co.*, 48 Kan. 654; *Briggs v. Railway Co.*, 102 Kan. 441. (See also *Waymire v. Ry. Co.*, 107 Kan. 90).

A workman does not assume the risk when he uses a tool or a machine of a dangerous character, without a protest, under the Federal statute. That is, the employer should be, and is, responsible for the character of this machinery. Under the common-law rule, a workman does assume the risk if he uses the machine without a protest. Under the Federal statute, he may see danger, and yet, if he does not appreciate it very thoroughly, he does not assume the risk. The case of *Smith v. Railway Co.*, 108 Kan. 151, establishes these rules. Smith was injured when he fell from a scaffold while assisting to repair a bridge on a railroad. The lumber of which the scaffold was made was defective, allowing the scaffold to collapse. He was given an award for damages on the ground that he did not fully appreciate his danger although aware of it, and that there was some negligence of the company in the matter of the defective lumber. The Supreme Court on review of the case

affirmed the decision of the lower court.

In the case of *McIntosh v. Railway Co.*, 109 Kan. 246, McIntosh, a brakeman, failed to compare his train order with that of the conductor. Later a collision occurred, in which McIntosh was injured. He brought action against the company for damages due to the company's negligence. The company contended that McIntosh was negligent due to failure to compare the train orders. These being compared later were found to have been the same. The Supreme Court ruled that failure to compare the orders could not have caused the collision. This opinion reversed the lower court, which had ruled that this failure should mitigate damages.

An engine repairer is held to be within the law when injured while making repairs on an engine engaged in interstate commerce, according to the rule in *Akins v. Railway Co.*, 109 Kan. 474. The crew of a switch engine is engaged in interstate commerce when switching cars in the railroad yards of a city. (See *Stice v. Railway* 110 Kan. 763.).

Where a brakeman is forced to stand between cars due to a defective coupling, and is injured when he falls beneath the car wheels, the railroad company is in violation of both the employers' liability act and the Safety Appliance Act. This is the ruling in the Case of *Northcutt v. Railway Co.*, 113 Kan. 444.

The employers' liability act permits of two recoveries of damages for death or injury. The right of the injured person does not bar the right of his dependents. The English Lord Campbell Act does not permit this double recovery. In *Goodyear v. Railway Co.*, 114 Kan. 557, this question is discussed. The Supreme Court ruled that the double

liability feature should be followed in this case. (See *Davis v. Railway Co.*, 53 Ark. 117 and *Bower v. Boston*, 155 Mass. 344). The *Goodyear* case contains a complete discussion of the differences between the two acts, and also a history of both. (See 114 Kan. 557.).

As in *Northcutt v. Railway Co.*, above, both the Safety Appliance Act and the liability act were violated in the case of *Flannigan v. Railway Co.*, 108 Kan. 134. The rule is important. The lower court ruled that action in such a case may be brought under either, but election must be made as between the acts. The Supreme Court ruled that action may be brought under both, since violation of the Safety Appliance Act is also violation of the liability act.

CHAPTER VI.Kansas Employers Liability Cases

The first employers' liability act in Kansas was passed in 1874, (Laws of Kansas 1874, Chapter 93 Sec. 1). The law was amended in 1903, 1905, 1907, 1909, 1911 and 1913.

The law provides that all railroads or other common carriers shall be liable for injuries to their employees where such injuries are due to negligence of the employer in using defective equipment. Details of the law are similar to the Federal liability act except that they deal with intrastate commerce. The rules concerning assumption of risk and contributory negligence do not apply quite as in the Federal statute. The Kansas law eliminates these defenses entirely, when the company is in violation of the law. Under the Federal act they are allowed to mitigate the amount of damages.

The cases arising under the Kansas law are very similar to those considered under the Federal act, the only difference lies in the limiting of the latter to intra-state commerce. The Kansas cases will be merely listed for reference. This list is as follows.

Law of 1874.

Union Trust Co. v. Thomason,	25 Kan.	1
Mo. P. Rly. Co. v. Haley, Adm,	25 "	35
K.P. Rly. Co. v. Pevvey,	29 "	169
Solomon Rly. Co. v. Jones,	30 "	601
Rly. Co. v. King,	31 "	708
Rly. Co. v. Mackey,	33 "	298

(This case affirmed by U.S. Supreme Court, 127 U.S. 205)

Rly. Co. v. Harris,	33	Kan.	416
Rly. Co. v. Koehler	37	"	463
Rly. Co. v. Brown,	44	"	584
Railway Co. v. Pontious, (affirmed by U.S. Supreme Court, 157 U.S. 209)	52	"	254
Rouse v. Harry,	55	"	589
Railway Co. v. Schroeder,	56	"	731
Railway Co. v. Medaris,	60	"	151
Railway Co. v. Bricker,	65	"	321
Railway Co. v. Hamlin,	67	"	476
Railway Co. v. Sledge,	68	"	321
Railway Co. v. Johnson,	69	"	721
Brinkmeier v. Railway Co.,	69	"	738
Higgins v. Railway Co.,	70	"	814
Railway Co. v. Frank,	74	"	519
Mfg. Co. v. Bloom,	76	"	127
Sewell v. Railway Co.,	78	"	1
Caspar v. Lewin,	82	"	604

Law of 1903.

Railway Co. v. Burgess,	72	Kans.	454
" " v. Little,	75	"	716
" " v. Green,	75	"	504
" " v. Schroll,	76	"	572

Law of 1905.

Railway Co. v. Hastings,	79	Kan.	499
Smith v. Railway Co.,	82	"	248
Harper v. Railway Co.,	95	"	201
Ruckhold v. Railway Co.,	97	"	715
Dowell v. " "	85	"	562
Young v. " "	82	"	332
Brooks v. " "	95	"	732

Law of 1911.

Palomino v. Railway Co.,	91	Kan.	556
Trumen v. " "	98	"	761
Defenbaugh v. " "	102	"	569
Kaspar v. Ry. Co.,	111	"	267
Hisle v. " "	91	"	572
Harwood v. " "	101	"	215
Quinlantan v. Ry. Co.,	109	"	111

For annotation of cases see Revised Statutes of Kansas 1923,

CHAPTER VII.Federal Safety Appliance Act Cases.

The Federal Safety Appliance act was passed by Congress in 1893, (27 U.S. Statutes 531 Chapter 196; U.S. Comp. Statutes 1918 Section 8657). It has been amended several times. The dates of the amendments are: 1903, 1908, 1910, 1911, and 1915. Some of the provisions of the act are:

All cars must be equipped, by all common carriers with devices to protect workmen. These are grab irons, hand brakes, ladders, holds, automatic couplers, so that there will be no necessity of workmen going between cars, and automatic air brakes.

All locomotives, except electric and oil locomotives, are to be equipped with ash pans for dumping ashes without the necessity of workmen going under the engines, and must have driving wheel brakes.

All locomotives and cars are to be inspected before being put into traffic, and undergo frequent inspection thereafter, so that no equipment will be used if it is in bad order, or defective.

A chief inspector and two assistants are appointed by the President for the inspection of boilers and equipment. These report to the Interstate Commerce Commission annually, which has charge of regulating carriers and establishing standards as well as enforcing them.

Any carrier violating provisions of the act is liable for damages due to injury or death of employees. Where such carrier is in violation, the defense of assumption of risk may not be used. The common-law rule of contributory negligence holds however under the safety appliance act. The cases arising often involve the Federal Employers Liability Act, for, violation of the Safety Appliance Act is also violation of the

liability act.

The first case considered is *Thornbro v. Railway Co.*, 91 Kan. 684. Thornbro, a brakeman in the employ of the K.C., Mexico and Orient Railway, was killed when he went between cars to effect uncoupling. In the lower court, Sumner County, his estate was awarded damages for his death. The question in the case was not whether the company was in violation of the law, for this was conceded, but whether Thornbro could be said to be engaged in interstate commerce at the time of his death. He was assisting in moving a car from a switch to put it in a train. The car was to move only within the State of Oklahoma, and hence it was contended that there could be no interstate commerce.

The Supreme Court ruled that in absence of a United States Supreme Court ruling decision, and in view of conflicting decisions of various state courts, that its opinion would follow that in the case of *Behrens v. Illinois Central Railway Co.*, 192 Fed. 581. This case ruled that in such conditions an employee would be held to be engaged in interstate commerce. Other cases cited are: *De Atley v. Chesapeake & Ohio Ry. Co.*, 201 Fed. 591, *Lamphere v. Oregon R. & Nav. Co.*, 196 Fed. 336; *Pedersen v. Del. Lack. & Western R.R. Co.*, 229 U.S. 146.

On the other side, i.e. ruling that such an employee would not be in interstate commerce, is the case of *Van Brimmer v. T. & P. Ry. Co.*, 190 Fed. 394. This case held that such employee could not recover damages. The Kansas Supreme Court held that the former rule was held in a majority of cases and that the rule would be followed in this case. It therefore upheld the decision of the lower court.

The next case is that of *George v. Railway Co.*, 102 Kan. 774.

George, a brakeman for the Atchison, Topeka, and Santa Fe Railway Co., was injured when he was caught between two cars while uncoupling an air hose. The cars moved together when the brakes were released, catching and severely injuring his head. He began action in the Cowley district court for damages on the ground of negligence of the company in not equipping coaches with buffers; for having a defective coupling on one of the cars; and for having a hose apparatus which necessitated workmen going between cars to operate it. The lower court awarded a judgment for damages.

The Supreme Court on review of the case, reversed the opinion, for the reason that the Safety Appliance Act makes no provision for buffers in the list of safety appliances, nor for air hose equipment which may be operated without going between cars. Another reason was that the lower court disregarded the matter of the defective coupler, the inference being, although not so stated, that this was the only ground upon which a recovery could have been had.

The next case, that of Flannigan v. Railway Co., 108 Kan. 153 involves questions as to application of the act and also of the Employers' Liability act. Flannigan, a switching-crew foreman, was killed while assisting in removing a defective car from a bad order track to a rip track for repairs. The car had no drawbar and was being moved with chains. Action was begun in the Wyandotte County Court. The case was a violation of both of the above acts. The lower court required the plaintiff to elect between the two acts. He brought action under the Employers' Act for violation of the Safety Appliance Act, and was

awarded damages. The lower court barred testimony showing that the plaintiff was engaged in interstate commerce. The Supreme Court on review ruled that there could not properly be an award under the Employers' Act without ascertaining that the workman was engaged in interstate commerce. The lower court also barred evidence showing contributory negligence of Flannigan. The Supreme Court ruled that there could not properly be recovery under the Safety Appliance Act, unless this evidence had been allowed. The Safety Appliance Act does not change the common-law rule of contributory negligence. The Supreme Court ruled therefore, that the decision of the lower court was inconsistent, and remanded the cause for re-trial.

The lower court was held to be in error also on the question of laws, ruling that Flannigan should not have been required to elect between laws but that he was privileged to go to trial on as many grounds as the evidence warranted. Other rules established were:

- (1) That the Federal Employers' liability law can not be employed unless the carrier is engaged in interstate commerce.
- (2) The Safety Appliance does not allow the defense of assumption of risk but does allow that of contributory negligence.
- (3) The lower court should have allowed testimony as to contributory negligence and as to interstate commerce.

The above cases show the differences between the two laws in the matter of assumption of risk and of contributory negligence. The liability act does not abrogate the common-law rules except when

employers are negligent or in violation of the Safety Appliance Act. Contributory negligence is a partial defense in that it mitigates the amount of damages. The Safety Appliance Act leaves the common-law rule of contributory negligence unchanged.

The laws of Kansas with respect to safety appliances for common carriers are not so definite as the Federal statute, the provisions of the state employers' liability act covering the cases of appliances under the head of negligence of employers.

CHAPTER VIII.Workmen's Compensation Law Cases.

1

Workmen's Compensation laws began in 1884, in Germany, and were soon enacted in most of the countries of Europe. The first law of the kind in the United States was passed in 1902. Thirty-two states, Hawaii, the Canal Zone, and Alaska now have such laws. The Kansas law was enacted in 1911.² This was amended in 1913.

Some of the most important provisions are as follows:

Employers in "hazardous" industries, that is, any industries wherein dangerous machinery, or explosive or inflammable material are used, are liable for compensation of employees injured. Liability does not apply to injuries self-inflicted, nor for injuries causing a loss of time of less than one week.

Sub-contractors are not liable for injuries of their employees, liability going back to contractors or owners. Contractors may sue a sub-contractor in case they (the contractors) have been forced to pay for injuries of workmen of a sub-contractor.

The law does not apply to employments not under the control of state legislation, as for example those engaged in interstate commerce nor to industries employing less than five workmen continuously for one month prior to the accident, unless such industries elect to come within the act. All mines are under the law.

A guardian may sue in the stead of a minor or an incompetent

1. See Herwold on Workmen's Compensation Vol. I. P. 3.
2. Laws of Kansas, 1911, Chapter 218.

person and no limitation of time obtains while the person is a minor or incompetent, and has no guardian.

In case of death the amount of compensation to dependents (totally dependent) is three times his earnings for the preceding year, but not over \$3600 nor less than \$1200. If dependents are not residents or citizens of the United States or the Dominion of Canada, payment does not exceed \$750 (This clause has been held unconstitutional). If dependents are only partially dependent, their compensation is in proportion to the injury to the dependents. If no dependents are left, the compensation is the amount of expense and burial, not exceeding \$100. Marriage of a dependent, on attaining the age of 18, terminates compensation for that person but not for others. For total incapacity, a sum equal to 50 per cent of average weekly earnings, payable weekly, is awarded, but not less than \$6 per week nor more than \$15 per week. In partial incapacity, 25 per cent to 50 per cent, payable weekly, of average weekly earnings. If person is a minor or earning less than \$10 per week, payment is not less than 75 per cent of his average earnings, not less than \$3 nor more than \$12 per week, these payments to run not longer than 8 years. (Sec. 11).

"Average earnings" means the average rate of earnings for the 52 weeks prior to the accident. In case of partial incapacity the payment shall be equal to 50 per cent of the difference between the wages before the accident and wages afterward. (Sec. 12). Payments are to be paid just as wages are paid, except that a judge of any court having jurisdiction may prescribe different arrangements of payment. (Sec. 13).

Payments of compensation are not assignable except for medicine, medical attention or nursing. (Sec. 15).

An employee must submit to a physical examination after an injury, by a physician selected by the employer. The employee may however have his own physician participate in examinations. Unless the employee's physician is allowed to participate, the employer's physician may not afterward give evidence of the condition of the employee. No other disqualification of physician's testimony, than this, is to obtain. (Sec. 17).

The court may order a neutral physician, (Sec. 18), who may examine employee in court (Sec. 19). Physicians examining must give employer and employee certificates of condition (Sec. 20). Refusal of examination by employee deprives of the right of compensation. (Sec. 20).

Written notice of accident must be given within ten days by employee to employer, and any claim for compensation must be made within three months, (Sec. 22), or within six months, in case of death.

Compensation may be settled by agreement, or by a committee agreeable to both parties, or by an arbitrator appointed by the court. The arbitrator is not bound by rules of procedure but must be reasonable and fair. His fees are paid by parties to the arbitration and he has a lien on payments for his fees. His awards are made in writing, (Sec. 23-27), and he must file awards, agreements, and releases within sixty days of date made, in the office of the district court. (Sec. 28).

An award, agreement or release, may be cancelled by a judge of the district court, within one year of time of filing, if there is

found to have been fraud, misconduct, mutual mistake of parties or that it is grossly excessive, or grossly inadequate. (Sec. 29).

A judge of a district court may stay proceedings, if an employer makes a bond for payment of the compensation or shows the certificate of an insurance company that the compensation is insured. The judge may also award a lump-sum judgment of 80% of all payments due. (Sections 30 and 31). Employer may after six months of payment, pay 80 per cent of the remaining amount due and be discharged from all liability. (Sec. 33).

A workman's right to compensation may, in absence of agreement or arbitration, be enforced by any court of competent jurisdiction. The case will then be tried without a jury unless either party requests a jury. Payments thus provided may be for a lump-sum of the full amount of compensation due, with interest on those overdue, or they may be periodical, in the discretion of the court. (Sec. 36).

All employers entitled to come within the act are presumed to have done so unless they file with the secretary of state, at Topeka, a written statement of election not to come under the act. Notice of election shall be posted by employer about place of business.

Employers shall not plead the defenses of (1) Contributory negligence, (2) Want of care of a fellow-servant, (3) Assumption of risk by employee; where they have not elected to come within the act: But if employees do so elect and employees elect not to come within the act the defenses will be allowed. (Sects. 47 and 48).

The schedule of rates of compensation for loss of, or injury to, members, is as follows:

For loss of a thumb,	50%	of average weekly wages during	60 weeks
" " " " 1st finger	" " "	" " "	37 "
" " " " 2nd	" " "	" " "	30 "
" " " " 3rd	" " "	" " "	20 "
" " " " 4th	" " "	" " "	15 "

Loss of a first phalange of the thumb or any finger equals loss of 1/2 of finger.

Loss of a first phalange and any part of 2nd phalange of a finger equals loss of 2/3 of a finger.

Loss of a first phalange and any part of 2nd phalange of a thumb equals loss of entire thumb.

Loss of first two phalanges and any part of 3rd of a finger equals loss of entire finger.

Loss of a great toe, compensation is 50% of average weekly wages during 30 weeks.

Loss of any other toe, compensation is 50% of average weekly wages during 10 weeks.

The same rules obtain in consideration of injuries to phalanges of the toe as in those of a finger.

For Loss of a hand, 50% of average weekly wages during 150 weeks.

" " " An arm	" " "	" " "	210 "
" " " a foot	" " "	" " "	125 "
" " " leg	" " "	" " "	200 "
" " " eye	" " "	" " "	110 "

" " " hearing of both ears 50% of average weekly wages during 100 weeks.

For Loss of hearing of one ear 50% of average weekly wages during 25 weeks.

Amputation or severance between elbow and wrist shall be considered as the loss of a hand. Amputation at or above the elbow shall be considered as the loss of an arm. Amputation between knee and ankle shall be considered as the loss of a foot. Amputation at or above the knee shall be considered as the loss of a leg.

Permanent loss of use of a member is to be taken as total loss of a member.

The cases appealed to the Supreme Court under the Workmen's Compensation Act are very numerous, and a study of them will necessarily be confined to most important cases; these will involve questions of:

1. Constitutionality of the law,
2. Inclusive and exclusive phases,
3. Master and servant relations; of fellow-servancy; and doctrines of assumption of risk, and contributory negligence.

Treatment will necessarily be brief, many cases will be omitted. Others are referred to leading cases.

The first case reviewed by the Supreme Court is that of Shade v. Cement Co., 92 Kan. 146. Shade was injured in the employ of the Cement Company, March 13, 1913. The Workmen's Compensation Act went into effect on March 12, 1913. Thus it would be presumed that both the employer and the employee were under the provisions of the law. The district court (Neosho County) ruled that this was true but that the court had no jurisdiction since Shade brought his action under the Factory Act, however not electing to be governed by the Workmen's Compensation Act. The employers had elected not to be governed by the act, on March 17, 1913.

The lower court ruled that this did not effect the status of the company, however, for both they and the employee were already under the provisions of the act. It therefore dismissed the case because of lack of jurisdiction, in that the case should have been brought under the Workmen's Compensation Act.

The Supreme Court, reviewing the case, held that the lower court was in error in dismissing the case, that it had jurisdiction, even though the case was truly under the Workmen's Compensation Act. The decision therefore remanded the case for a new trial under the Workmen's Compensation law.

The Supreme Court upheld the lower court's ruling that at the time of the injury both employer and employee were under the Workmen's Compensation law, and that statements of election were then too late to effect a change from the Workmen's Compensation law. This established the important rule that where neither employer nor employee have elected to come under other laws, the Workmen's Compensation law will govern, and this is the only prescribed remedy in such a case. That is, common-law liability will not be considered, nor liability as under other laws.

A rehearing was granted for this case. The opinion is given in 93 Kan. 257. The question here was the constitutionality of the law, in addition to the questions in the original hearing. The Supreme Court reaffirmed its opinion given in the former case as to the latter questions, and ruled that the law was not unconstitutional, as in violation of the process clause of the 14th amendment to the Federal Constitution.

The basis of this opinion was the cases of : *Diebekis v. Link-Belt Co.*, 261 Ill. 454. ; *Matheson v. Minneapolis Street Railway Co.*, 148 N.W. 71. The rule of these is shown in the opinion in the *Link-Belt* case. "Being elective, the act does not become effective as to any employer or employee unless such employer or employee chooses to come within its provisions. Having once elected to come within the provisions of the act, as long as such election remains in force the act is effective as to the party or parties making the election, and in case an employer and an employee both elect to come within the provisions of the act, the act itself then becomes a part of the contract of employment and can be enforced as between the parties as such". The Supreme Court held that this rule was to be followed, since there could be no violation of due process of law when the matter of deciding as to the law was left a privilege to both parties. For other cases cited in strengthening this position see *Kansas Reports*, Vol. 93. P. 261.

McRoberts v. Zinc Co., 93 Kan. 364, brings the question of the exclusive feature of the Workmen's Compensation Law when it is in operation. Here both employer and employee were within the act, but the lower court allowed a verdict based on a common-law rule of damages for pain and suffering throughout lifetime. The Supreme Court overruled this verdict and reversed the case because such a ruling was not provided for in the Workmen's Compensation law, and this law is exclusive when both parties are within its provisions.

The case of *Correll v. Bottelle*, 93 Kan. 370, established rules that:

1. Award may be in lump-sum.
2. Compensation awarded is for loss of earning power, due to incapacity, as shown by inability either to do work obtainable, or to obtain work.

Gorrell was injured when a piece of steel struck one of his eyes. He lost the sight of the eyes to such a degree that he was rendered incapable to do work. The court ruled that he should be compensated at the rate of \$6 per week for the period of total disability, 18 weeks, and at the rate of \$3 for the remainder of the eight year period or seven years and thirty-four weeks, and that this award should be in lump-sum. The Supreme Court affirmed this rule.

The question of conflict of the Compensation Act with the Factory Act is found in *Smith v. Cement Co.*, 94 Kan. 501. Smith brought action under the latter act although electing to the former. The employers elected not to accept the act however, and this gave the right to action under the Factory Act by the employee. This was affirmed by the Supreme Court. The further rule as to the Factory Act was that it was not repealed by the Compensation law, but that it could not be employed by a workman when he has elected to be governed by the Compensation Act, unless the employer should elect not to be governed by the act. Where either employer or employee rejects the act no action can be sustained under it. (94 Kan. 503).

The questions of assumption of risk and contributory negligence are raised in *Spottsville v. Cement Co.*, 94 Kan. 258. Spottsville was injured in a quarry when a rock fell upon him. He was awarded a

judgment of \$1 but was later granted a new trial. The Cement Company appealed from the decision in this trial which awarded \$5000 compensation. The grounds for the appeal were that the company's defenses of contributory negligence and assumption of risk by Spottsville, were denied except in mitigation of damages. The Supreme Court affirmed the opinion holding that the company had not elected to come within the provisions of the Workmen's Compensation Act, and hence were not allowed to use these defenses.

This case establishes the important rule with respect to the above doctrines, viz., that employers may not employ them unless they have elected to come within the law, except in mitigation of damages.

The constitutionality of this feature of the law is questioned in the case of *Hovis v. Refining Co.*, 95 Kan. 505. It was contended that denying these to an employer who has elected not to be governed by the Workmen's Compensation Act, and granting them to the employer who elects to be governed by the law, is unconstitutional. The Supreme Court held that this contention was invalid however, on the authority of the case of *Borguis v. Folk*, 147 Wis. 327, a case involving the same question as the above case. The question was considered again in *Potocan v. Coal Co.*, 120 Kan. 526, where the above rule was followed. (See also *Swoder v. FlourMills Co.*, 103 Kan. 578).

The question of lump-sum award is considered in the case of *Goodwin v. Packing Co.*, 104 Kan. 747. In addition to the rule in *Correll v. Bottelle* above, that such an award may be made, it was decided in this case that, when an injury is not objectively ascertainable, no lump-sum

award may be made. Lump-sum awards must only be made by the courts or by mutual agreement (*Gilmore v. Mining Co.*, 111 Kan. 158). Courts may award either in lump-sum or in periodic payments, (*Cain v. Zinc Co.*, 94 Kan. 679; *Anderson v. Oil and Refining Co.*, 111 Kan. 314).

Some decisions relating to the application of the law to industries are given, without going into a study of the cases in detail.

The law applies to only "especially dangerous" industries (*Mousou v. Bottelle*, 102 Kan. 208). Clerical employees in city clerk's office are not within the act (*Udey v. City of Winfield* 97 Kan. 279); agricultural pursuits are exempt from the act (*Bevard v. Coal Co.*, 101 Kan 207); an oil well or a gas well is not a "mine" within the purposes of the act (*Hollingsworth v. Berry*, 107 Kan. 544); less than five employees in an industry prevent it from being considered under the act (*Hollingsworth v. Berry* 107 Kan. 544); (*McIlvain v. Oil and Gas. Co.*, 110 Kan. 266); (*Stover v. Davis* 110 Kan. 808); an independent contractor is not within the act, *Monghelle v. Mining Co.* (99 Kan. 412); (*McIlvain v. Oil and Gas. Co.*, 110 Kan. 266); construction of a sewer by a city is without the act (*Roberts v. City of Ottawa* 101 Kan. 228); as also a police officer killed on duty (*Griswold v. City of Wichita*, 99 Kan. 502); nor is street-resurfacing work under the act (*Gray v. Sedgwick County*, 101 Kan. 195); neither is motor vehicle transportation, (*Dodson v. Sales Co.*, 110 Kan. 481).

Somewhat similar are cases deciding whether certain accidents of an unusual nature are held to be comprehended under the law.

A workman injured while going from one mine to another is

held to be without the act, (*Bevard v. Coal Co.*, 101 Kan. 207); Accidents, to recover an award, must have happened "on, in, or about" the operating plant; and this must be within the zone of danger, (*Alvarado v. Rock Crusher Co.*, 109 Kan. 192); a truck driver injured while delivering meat not "on, in or about" the plant is without the law (*Hicks v. Swift and Co.*, 101 Kan. 760); an injury on a runway between factories is held to be within the act, (*Godberry v. Egg Case Filler Co.*, 104 Kan. 72), aliens may sue under the Compensation law, (*Wolf v. Packing Co.*, 105 Kan. 317); (*Vietti v. Fuel Co.*, 109 Kan. 179), and are entitled to its benefits.

Further cases of a more unusual nature are considered in the following: A laborer incapacitated as the result of an assault upon him by his foreman, cannot recover compensation unless his employer knew or anticipated that injury would result if the men continued working together. (*Pevvey v. Contracting Co.*, 112 Kan. 637) (*Romerez v. Swift and Co.*, 106 Kan. 844). Where a workman is injured by playfire act of a fellow-employee, he is entitled to recover compensation (*Stuart v. City of Kansas City*, 102 Kan. 307). A workman who has long been suffering from epilepsy can not recover for injuries during an epileptic fit coming upon him while he was working, (*Cox v. Refining Co.*, 108 Kan. 320). But a sufferer from pleurisy, having this condition aggravated by the nature of his work, is entitled to recover, (*Vassar v. Swift & Co.*, 104 Kan. 198). Similar cases are: *Hoag v. Laundry*, 113 Kan. 513; *Taylor v. Swift and Co.*, 114 Kan. 451; *Brownrigg v. Swift & Co.*, 114 Kan. 115. A workman who was injured at the noon intermission while riding on a truck,

at play, is entitled to recover, (Thomas v. Manufacturing Co., 104 Kan. 432).

Cases covering the amount of compensation to be recovered, and the computation of earnings as a basis for this are given in Revised Statutes of Kansas, 1923, Pp. 694, 695. A complete annotation of all workmen's compensation cases may be found in Chapter 44, Sections 501-547.

Vietti v. Fuel Co., 109 Kan. 199, considers this phase, viz., amount of compensation. It also establishes the rule of unconstitutionality of that feature of the law relating to compensation to dependents outside the United States. The law (Section 3) provides that in case there are dependents who are citizens of a foreign country, (other than the Dominion of Canada), of a workman in the United States, these may not receive compensation in excess of \$750. This was ruled as in violation of the spirit of the treaty between the United States and Italy, and was declared invalid.

The facts of the case are as follows: Victor Vietti, 18 years of age, and son of unnaturalized Italian parents who had been residing in Kansas during sixteen years prior to the accident and action for compensation, was killed in the employ of the Mackie Fuel Company. The parents were citizens of Italy, having completed a part, but not all of their naturalization. They began action for compensation in the Cherokee district court for the death of their son. The district court awarded damages for \$3,435.12. The case was appealed to the Supreme Court on the ground that damages could not exceed \$750, in the meaning of Section 3 of the law.

The Supreme Court ruled that the provision of Section 3, which states that dependents, not citizens of the United States or Canada and residing at the time of the accident in the United States or Canada, may not recover for more compensation than \$750. The Supreme Court held that the lower court had misinterpreted the law, in that it had found that through being residents of this country, although not citizens, they were not within the provisions of Section 3. The law states: "Citizens of, and residing - - - in the United States or the Dominion of Canada". The Supreme Court held that unless both these conditions are met, no recovery of full compensation could be given. These were not met under this case. The interpretation given by the lower court was: "Citizens of, or residing - - - in the United States or the Dominion of Canada".

But according to the rule of the Supreme Court, this question was not the most important ruling, for the real question was the violation of the spirit of existing international treaties. The treaty of the United States with the Italian government is quoted as follows:

"The citizens of each of the High Contracting Parties shall receive in the States and Territories of the other, the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault, and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are, or shall be, granted to nationals, provided that they submit themselves to the conditions imposed on the latter." (38 U.S. Stat. 1670). The court held this treaty

to be a part of our own constitutional law, and binding on the courts. If there is a conflict between the treaty and state law such law must be controlled by the treaty. The Federal Constitution in the second clause of article six provides:

"This Constitution, and the Laws of the United States, which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding". The Supreme Court ruled that this case was one as intended by the treaty and that "plaintiffs were entitled to be placed upon an equality with our own citizens as to the amount recoverable as compensation" (Vol. 109 Kan. Reports P. 182). As to the constitutionality of the law therefore, the Court in the same opinion said: "It may be added that the statutory limitation is also in contravention of the fourteenth amendment of the Federal Constitution which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws'. Aliens lawfully resident in the state are within the protection of this clause. - - - It must be held that the statutory limitation in question cannot be applied as against the plaintiffs (See cases: Wong Wing v. the United States, 163 U.S. 228; The United States v. Wong Kim, Ark, 169 U.S. 649).

The most important case under the Workmen's Compensation law is that of Stefan v. Elevator Co., 106 Kan. 369. Stefan was injured in the employ of the Red Star Mill and Elevator Co., in Sedgwick County in 1917, and applied to his employers for compensation. The Millers'

Mutual Casualty Company took over the work of compensation by reason of being surety for the Elevator Company. After making some payments to Stefan, the Surety Company ceased paying. Stefan complained to the Elevator Company, and asked arbitration, but the company refused to arbitrate. Stefan then began action in the courts against his employers. The lower court returned a verdict for \$5,296.40. The employers appealed.

Stefan's injuries resulted in partial paralysis and also in a permanent injury to the eye. The injury to the eye was such that it caused double vision and hence it was necessary to keep the injured eye closed in order that there might be sight from the other. The lower court did not regard the injury to the eye but made the award on the basis of the partial paralysis of the injured man. This was in keeping with the contention of the defense that payment of compensation for one injury stops payment for any other. The Supreme Court held, however, that under the meaning of the law this could not be the case. "The legislature evidently believed the loss of a specific member or organ deserved the compensation stated, whatever else occurred. If, however, additional injury should increase the workman's partial disability, either permanently or temporarily, he should receive additional compensation". (Vol. 106 Kan. Reports P. 373).

The opinion of the Court was, then, that Stefan was entitled to compensation, in addition to that awarded for paralysis, also for the permanent loss of his eye, and reversed the case and remanded it for new trial of this award according to the opinion. It affirmed the award already made, but held that this was insufficient. The rule of laws was established that a workman is entitled to recover compensation

for each specific injury contributing to disability.

A further phase of the case is that the amount of compensation could not be determined by the schedule of rates for disability. The law, (Sec. 19) provides for this: " - - - In case of partial disability not covered by schedule the workman shall receive during such period of partial disability, not exceeding 8 years, 60 per cent of the difference between the amount he was earning prior to said injury as in this act provided and the amount he is able to earn after such injury", but where this amount is less than \$6 per week for this period, he is to receive this latter amount. "The compensation to be in no case less than \$6 per week nor more than \$12 per week" (Sec. 5). This allows, as will be shown later, a recovery of a greater amount of compensation for partial disability than for total disability.

The case of *Clase v. Mining Co.*, 105 Kan. 257, first raised this question. The opinion of the court in this case (105 Kan. 258) states this fact of the law: "It may well be that the loss of a leg might, in some instances work less incapacity for earning wages than an injury thereto; at any rate, the schedule of the section already referred to expressly allows for the loss of the leg 50 per cent of the average weekly wages during 200 weeks, while the same section, subdivision 19, provides that - 'In case of partial disability not covered by schedule, the workman shall receive during such period of partial disability, not exceeding eight (8) years, 60 per cent of the difference between the amount he was earning prior to said injury, as in this act provided, and the amount he is able to earn after such injury.'

The trial court in following this provision committed no error

for this the law is written". It is further treated in subsequent cases and the amounts of differences are given in dissenting opinions in these cases. They will be studied.

In Emry v. Cripes 110 Kan. 693, the "60% rule" as established in the above cases was applied. Emry, a minor, brought action through his father for damages for injuries to his hand, which was crushed in a bread-moulding machine in the bakery of A.T. Cripes. The lower court awarded damages for \$1500. This award was made as for a permanent partial disability, amounting to 50% to 75% of total disability, and therefore deserving 50% to 75% of the compensation allowable for total disability, which is 50% of the average weekly wages over a period of 8 years. The average wage being \$20 in this case, 50% of this for 8 years would be, $\frac{52 \times 20 \times 8}{2} = \4160 . Allowing 50% of this for proportional disability, the award since it was allowed on a proportional basis, should have been $\frac{\$4160}{2}$ or \$2080. The plaintiff therefore appealed because the award was too small, while the defendant appealed on the ground that it was too large. The plaintiff also contended for the 60% of difference rule.

The Supreme Court ruled that no such proportion-to-total-disability award was legal, but that the 60% rule would operate. The case was remanded for a new trial. The opinion of the court was not unanimous however. A dissenting opinion given by Mr. Justice Dawson with the concurrence of Mr. Justice Marshall and Mr. Justice Porter was in brief as follows:

"I do not assent to any result which can lead to an allowance of two or three times as much for a permanent partial injury to

plaintiff's hand as the legislature has specifically fixed for the total loss of it or a total loss of its use. I cannot assent to thrusting into the schedule a case not covered by the schedule and one expressly excluded therefrom; and while I would by no means disregard an express statutory provision, I deem it proper, always, to search for an interpretation of a statute which will avoid giving it an illogical result. Take the example of the lost thumb again. The minimum allowance is \$360; the maximum is \$720; but for a permanent partial loss of it, the minimum, under the rule here applied, must be \$2496 and this minimum must be awarded however slight the disability, if it is sufficiently serious to require any compensation at all. To this extent I dissent". (110 Kan. Reports Pp. 697-698).

This division of opinion of the Supreme Court is continued in the case of Anderson v. Refining Co. 111 Kan. 514. Anderson was caught in machinery of the Company's plant with the result that his arm was broken in six places, a number of ribs broken and his body badly bruised. A fragment of a broken bone punctured one of his lungs, and other injuries were sustained. The jury returned a verdict for \$7,433.65. This the lower court awarded partly in lump-sum and partly in periodic payments. The Supreme Court on review affirmed the award, overruling the contention that it was excessive, although it was in excess of the amount of compensation for total disability.

Dissenting opinion was made by Mr. Justice Dawson with the concurrence of Mr. Justice Marshall and Mr. Justice Porter. This is as follows: "I am not unmindful of the potency and general usefulness of the rule of stare decisis, that a judicial principle repeatedly

declared should be followed until the legislature corrects or changes it -- yet this court has repeatedly emancipated itself from the bondage of a prior fallacious ruling or precedent. We gave a typical example of this not long ago in *Adkinson v. Noonan*, 110 Kan. 335, where an important provision of the state constitution came up for re-examination, and in which the interpretation given thereto in *Pruitt v. Squires*, 64 Kan. 885, twenty years before, was overruled. In that case there was room for debate as to which was the proper interpretation. Here as I understand it, there is no room for debate that the interpretation of sub-paragraph 19 of section 3 of the Workmen's Compensation Act as given in the *Stefan* case is erroneous, --- as a general rule of interpretation applicable to all cases. It was not until the *Emry-Cripes* case came before us a month or two ago that the interpretation --- was discovered to be incapable of general application without doing violence to justice and legislative intent. I therefore submit a tabulated computation of the scheduled allowances for partial loss or partial disability of members of the body, and also the allowances for partial loss or partial disability under the rule of the *Stefan* case, to demonstrate that the rule works injustice and obviously perverts the legislative intent not occasionally as suggested in *Clase v. Mining Co.*, supra, but in every case which can arise, (Laws 1917 Ch. 226. Pp. 306-307)."

Table of Computation of Compensation

	Statutory allowance for total loss or total disability.		Stefan rule allowance for partial disability.	
	Minimum	Maximum	Minimum	Maximum
1. Thumb	\$360	\$720	\$2496	\$4992
2. 1st finger	222	444	"	"

	Statutory allowance for total loss or total disability.		Stefan rule allowance for partial disability.	
	Minimum	Maximum	Minimum	Maximum
3. 2nd finger	\$180	\$360	\$2496	\$4,992
4. 3rd "	120	240	"	"
5. 4th "	90	180	"	"
7. Great toe	180	360	"	"
8. Any other toe	60	120	"	"
11. Hand	900	1800	"	"
12. Arm	1260	2520	"	"
13. Foot	750	1500	"	"
14. Leg	1200	2400	"	"
15. Eye	660	1320	"	"
16. Hearing (both ears)	600	1200	"	"
17. " (one ear)	150	300	"	"

"The precedents relied on are so recent, and so clearly wrong, that they should be disregarded and sub-paragraph 19, section 5 should be simply construed to mean that for any partial disability not covered by the schedule, the workman's compensation should be 60% of the difference between the amount he was earning prior to said injury, and the amount he is able to earn after such injury - - - during such period of partial disability not exceeding 8 years, without any maximum or minimum restrictions, which are neither within the text nor the intent of the sub-paragraph pertaining thereto". (110 Kan. Pp. 516-518).

The Stefan rule is followed, however as being the majority rule

of the court, although this does allow in some cases greater award for partial disability than for total disability. The Supreme Court has held that the matter of changing this feature was not for the courts, but for the legislature.

The cases reviewed in this chapter have been a few of the most important. Cases are too numerous to permit of a more thorough review. The rules of law as to the abrogation of common-law rules have been shown and this has been an important aim in the study of the cases.

CHAPTER IX.Industrial Welfare Commission Cases

The Industrial Welfare Commission is important in that it is the forerunner of the Kansas Court of Industrial Relations. Some cases arising under its functions were transferred to the Industrial Court and for this reason a study of the Industrial Welfare Commission is given.

The Commission was established by the legislature of 1915, to enforce provisions of an act providing for fixing of wages, and determining hours and standard conditions of labor, particularly for women, learners, apprentices and minors employed in industries in Kansas. The Commission functioned until the enactment of the law in 1920, creating the Court of Industrial Relations. Thereafter the work of the Commission was taken over by the Industrial Court.

In order therefore to fully appreciate the duties of the Court of Industrial relations, it will be necessary to review those of the Industrial Welfare Commission. These are prescribed in the Laws of Kansas, 1915, Chapter 275.

Section 1 of this chapter states public policy of the State of Kansas in regard to employment of women, learners, apprentices and minors as follows: "That the State of Kansas exercising herewith its police and sovereign power, declares that inadequate wages, long-continued hours and unsanitary conditions of labor, exercise a pernicious effect on the health and welfare of women, learners, apprentices and minors".

Section 2 provides: "That it shall be unlawful to employ women, learners, apprentices and minors in industry, or occupation within

the State of Kansas under conditions of labor detrimental to their health or welfare, and it shall be unlawful to employ women, learners, apprentices and minors, in any industry within the State of Kansas at wages which are not adequate for their maintenance and for more hours in any day than is consonant with their health and welfare, except as hereinafter provided.

The Commission as provided in section 3, was composed of three members, one of whom was a woman. The Commissioner of Labor was a member, under the provisions of the act. The other members were appointed by the governor.

The duties of the Commission were, chiefly, to inquire into, and investigate labor conditions with respect to such features as were comprehended in the act, and to take such steps as were necessary to remedy conditions found to be detrimental to public policy as stated in the law. The Commission had power to subpoena witnesses; compel the production of evidence; administer oaths; compel the testimony of employers and employees; and to conduct hearings of a public nature for consideration of conditions. The Commission was able to compel an employer, or employers, to present their books for the scrutiny of the Commission. It was authorized to issue licenses^{*} authorizing the employment of certain classes of persons at a wage less than that fixed by the Commission.

One of the provisions of the act was that a woman receiving less than the minimum wage authorized, could bring suit to enjoin enforcement of the legal wage, notwithstanding her agreement to work for less, and to recover wages due as well as attorney fees and costs of

action in the courts.

The Commission had power to appoint a "Board" consisting of at least seven members, three from the industry, and representing it, three representing the employees, and one or more representing the public at large. The Board had power to make findings concerning wages, hours, and conditions of labor, and to make reports to the Commission, which reviewed the report and approved it, or re-submitted it for further consideration and alteration. A report having been approved, the Commission published weekly, for a period of at least four weeks, a notice in the official state paper that the Commission would conduct a public hearing, on a given day, in which all persons interested in the changes in the given industry could be heard by the Commission. Thus employers and employees, as well as any other persons had the right to appear before the Commission to make complaints or recommendations. The Commission, after completing the hearing formulated an order embodying the proposed changes, and requiring obedience of employers, under penalties prescribed by the law for violations. Action in the courts might be had by the Commission to enforce its orders.

As has been said, the Kansas Court of Industrial Relations Act, transferred the functions of the Industrial Welfare Commission to the Court of Industrial Relations, abolishing the Commission. The Industrial Court thereafter directed all investigations into labor conditions, which had been the duty of the Industrial Relations Committee prior to the passage of the Industrial Relations Court Act.

1. See 119 Kansas Reports P. 12. Also Laws of Kansas 1920 Chapter 20. Sections 3, 5 and 7.

The cases of importance here are those of two Topeka, Kansas, companies viz., The Topeka Laundry Co., and the Topeka Packing Co. v. The Kansas Court of Industrial Relations, 119 Kan. 12. These cases began under the Welfare Commission and were disposed of by the Kansas Supreme Court, under the tenure of the Court of Industrial Relations.

The history of the cases in detail is as follows: The Industrial Welfare Commission issued orders to the Topeka Laundry Company and the Topeka Packing Company, respecting labor conditions in these plants, and fixing minimum wages for women employed. The companies attempted to enjoin the Commission's orders on the ground that they, and the statute authorizing them, were not within the police power of the state and were violative of the Fourteenth Amendment to the Constitution of the United States. The district court (Shawnee County), sustained the orders and the companies appealed to the Supreme Court. In the interim, the Industrial Welfare Commission ceased to exist and the action was taken over by the Court of Industrial Relations. The Supreme Court reviewed both cases in a single opinion (119 Kan. 12).

The orders of the Industrial Commission were based on general investigations instituted in 1920. These investigations were concerning wages, hours of labor, and conditions of working women in Kansas. The Commission had obtained the cooperation of the Women's Bureau of United States Department of Labor, in making a survey of conditions of women labor in Kansas. This information compiled, was published in a report, as bulletin Number 17 of the Women's Bureau of the Department of Labor, and entitled "Women's Wages in Kansas".

Under order of the Court of Industrial Relations an investigation relating to the cost of living of wage-earning women in Kansas, was made in a report to the court August 1921, under the title: "Cost of Living Survey of Wage-earning Women of the State of Kansas". Subsequently the court ordered hearings to be held in various cities of the state. At these hearings the two surveys were introduced in evidence and employers were permitted to cross-examine and to introduce evidence in their own behalf. At the conclusion of the hearings and on April 11, 1922, the court made a preliminary finding, that in certain occupations, including laundries and factories, the conditions, wages, etc., were prejudicial to the health and welfare of a substantial number of female employees, and that wages were inadequate to supply the necessary cost of living and maintain the workers in health. A public hearing was ordered, which, after due notice, was held on May 9th. On May 19, 1922, the orders in controversy were promulgated. They required that all adult women employed in laundries and factories were to be paid a minimum wage of \$11 per week.

The action to enjoin enforcement of the orders commenced on July 17, 1922. The Topeka Laundry Company employed experienced workers who were not able to earn the minimum wage. The order interfered with a plan to reorganize the company, and as one effect, required the payment of \$10 per week to one grade of employees. The company was required pending the suit to deposit the difference between wages paid and the minimum wage prescribed. The Topeka Packing Company likewise deposited this wage difference with the court. Upon denial of the injunction, the cases were appealed to the Supreme Court (119 Kan. 12).

The companies would have been subject to fines if they had

not obeyed. They were not obliged to do so, in the ruling of the court, unless this was legal. This involves a consideration and interpretation of the fourteenth amendment. The Supreme Court in its review of the cases held this fact to be one of the questions to be decided and that another was, whether the legislative intent was being followed in these orders and their details.

Commenting, the court said in its opinion: "If the Court were free to exercise its independent judgment it would answer these questions in the affirmative and would hold the statute and the orders pursuant thereto valid. The Court is not free however to deal with the subject independently. The Supreme Court of the United States is final interpreter of the Constitution of the United States. Its decision interpreting the Constitution are binding on this court and the decision in the case of *Adkins v. Children's Hospital* (261 U.S. 525), holding the minimum-wage act of Congress for the District of Columbia, to be violative of the fifth amendment to the Constitution of the United States makes it necessary for this court to declare the minimum-wage law of this state to be void as controvening the fourteenth amendment."

The decision of the court was given by Mr. Justice Burch. Mr. Chief Justice Johnston and Mr. Justice Hopkins dissented but gave no opinion. Mr. Justice Harvey dissented on the ground that the case of *Adkins v. Children's Hospital* did not apply to these cases.

The dissenting opinion of Mr. Justice Harvey held that the review of cases within the District of Columbia by the United States Supreme Court was more persuasive than authoritative, that is, similar to the jurisdiction of any state Supreme Court over other courts within

that state. The question in the case cited related to the wage-fixing statute as applying to women workers in hospitals and in passenger elevators. This work is not to be regarded as analogous to the work in Kansas factories, and as comprehended in the Kansas Minimum Wage Act.

The opinion cites further decisions in support of this position, showing that the states generally have upheld statutes or orders of authorized commission with reference to hours of service, and working conditions made to promote the general welfare under the police power of the government. (*Holden v. Hardy* 169 U.S. 366; *Bunting v. Oregon*, 243 U.S. 426; *Muller v. Oregon* 208 U.S. 412; *Rodice v. New York*, 264 U.S. 292.).

It also cites similar statutes of the other states which have been upheld. More than a dozen states have statutes fixing a minimum wage for women, and minors, or authorizing such fixing by commissions. These are:

Arizona,	Laws of 1917 Chapter	53
Arkansas ¹	" " 1915 "	191
California	" " 1913 "	324
Kansas	" " 1915 "	275
Massachusetts	" " 1912 "	706
Minnesota	" " 1913 "	547
North Dakota	" " 1919 "	174
Oregon	" " 1913 "	62

1. Since declared unconstitutional by the United States Supreme Court Feb., 1927.

South Dakota,	Laws of 1923 Chapter 309
Texas	" " 1919 " 160
Utah	" " 1913 " 65
Washington	" " 1913 " 174
Wisconsin	" " 1913 " 712

In at least five, constitutionality of these laws has been established in the courts (State v. Crowe 130 Ark. 272),¹ (Holcombe v. Crezmer, 231 Mass. 99), (Williams v. Evans, 139 Minn. 32), (Stettler v. O'Hara, 69 Oregon 519), (Simpson v. O'Hara, 70 Ore. 261), (Larson v. Rice, 100 Wash. 642).

The Oregon cases were appealed to the United States Supreme Court and affirmed by an equally divided court (245 U.S. 629). The United States Supreme Court has upheld statutes fixing the amount, time and manner of payment of wages of adult men employees (Wilson v. New, 243 U.S. 332); Patterson v. Bark Eudora, (190 U.S. 169); McLean v. Arkansas (211 U.S. 539). Finally Mr. Justice Harvey said: "Our statute has been in effect ten years. Generally speaking it has been beneficial both to employees and to employers. Also to the public-at-large - - - We should use our judgment as to the validity of this statute, rather than to be controlled by a decision of another jurisdiction which at best, is persuasive rather than authoritative".

The Supreme Court, in majority opinion thus upheld the contention as to the validity of the wage-fixing law, made by the companies and ruled the orders of the Industrial Welfare Commission, and the

1. Since declared unconstitutional by the United States Supreme Court Feb., 1927.

law granting these powers, and the Court of Industrial Relations, in this respect, invalid.

The cases are important as helping to define the functions of the Court of Industrial Relations, which was likewise, along with the law creating the court, declared unconstitutional, by the United States Supreme Court. The cases under the Court of Industrial Relations will be considered in a following chapter.

CHAPTER X.The Kansas Court of Industrial Relations Cases.

The Court of Industrial Relations is unique in the field of labor legislation and regulation of labor disputes in the United States. Created by act of the special session of the Kansas legislature of 1920, it was intended to meet the demands of disturbed industrial conditions existing in Kansas at that time. These unsettled conditions had been occasioned by strikes in the Kansas coal mines in 1919, and the law was intended to forestall a repetition of such disturbances, and resultant harmful effects, in the future.

The public had been aroused as the result of the coal strikes, and the struggle between capital and labor. When the production of coal was stopped, due to inability of employers and employees to agree as to wages and conditions of labor, practically all other industries in the state were suffering. The sentiment of the people of Kansas as shown by the Industrial Court Act was not against either capital or labor, so much as against both. The feeling was expressed that the public, the third partner in industry, was being made to suffer unduly from the lack of harmony between the other partners. This resulted in a plan whereby the public would be protected while disputes between employees and employers were being settled by arbitration. Both employers and employees fought the act and later the Industrial Court. This fight was never stopped until the courts declared the Court, and the law unconstitutional.

It is probable that the act providing the Court of Industrial

Relations could never have been enacted in a normal stage of industrial conditions. Otherwise the features of the law which are unconstitutional would have undergone closer scrutiny, and it is probable that they would not have been adopted. But in a condition of disturbed industrial relations, such defects passed into law more easily because of the fact that the public was biased in favor of regulation, on account of their sufferings.

The court had many friends, however who regarded its functions as constitutional. William Reynolds Vance, Professor of Law, Yale University School of Law, said of it: "So far from being an injury to the employees, the Kansas Act if it is wisely administered by a court of sense and vision, and supported by a strong executive, will prove an inestimable blessing to them. A man with - - - an intelligence of the cave-man grade, will very sincerely believe that the most effective way to secure a satisfactory settlement is to approach his neighbor with a club prepared to beat him to death if he does not comply with his demands. But a more intelligent claimant would perceive the possibility of violent resistance by the neighbor - - - with serious consequences to himself - - - The strike is a cave-man remedy, and has no proper place in the twentieth century. Where access to a competent court of industrial relations exists, the pursuit of social betterment by direct action substitutes force for law, violence for right, coercion for education by persuasion and enlightenment, sectional domination for the self-government of the community. - - - The Kansas experiment - - - must encounter - - - many difficulties - - - but it is fundamentally right and will prevail."

This optimism was shared by many others. There was bitter antagonism by Labor however, as shown in the following statement of Samuel Gompers, then president of the American Federation of Labor, writing in "The American Federationist" for November, 1920 (page 1011), he said: "It (The Kansas Law) is a law calculated to produce what its proponents call industrial 'peace', yet there has been no more bitter industrial warfare in the United States than in Kansas since this law was enacted."

There was much regret that the "Kansas experiment" was declared not in keeping with the Constitution, for many looked upon it as a possible solution to the problems of adjusting industrial relations.

The Canadian Industrial Disputes Act of 1907 and the Colorado Act of 1915, giving states compulsory powers for arbitration of industrial disputes, afforded precedents for the Kansas Act of 1920. Australia and New Zealand also have laws for compulsory arbitration. The Court of Conciliation and Arbitration, of Australia, established in 1904 has all the powers of a court of record and in which all the functions of such a court are exercised. Strikes and lockouts are forbidden and arbitration is enforced by the courts.¹

The Kansas Court had no such prerogatives as the Australian Court, however, and there was no intention to exercise compulsion to such a degree as in the latter. The word "Court" was in fact a misnomer, since the Court had no judicial functions, nor any other than purely

1. See Yale Law Journal Vol. 30. Pp. 468, 469.

administrative. It could compel action by employing other courts to assist in this work, but this was more in the nature of the function of the Industrial Welfare Commission, than of a court of judicial powers. An opinion of the Kansas Supreme Court (109 Kan. P. 392), states the status of the Court as follows: "The Court of Industrial Relations is, in fact, a public service commission, the word 'Court' having been employed merely as a matter of legislative strategy - - The appellate jurisdiction of this court not being available because the Court of Industrial Relations is a non-judicial body, its constitutional jurisdiction in mandamus was utilized. This jurisdiction is precisely the same as that of any other court - - - that is to say, plenary, may be exercised to control the action of inferior tribunals."

The Court as prescribed by law consisted of three members, judges, appointed by the governor, by and with the consent of the Senate, for a term of three years, in such manner that one judge would be appointed annually. The presiding judge of the Court was the member having the longest service in the Court. The duties of the Court, in part, were to be those of the Public Service Commission, which it abolished. (Laws 1920. Ch. 29. Sec. 2). It also, as has been seen, took over the functions of Industrial Welfare Commission. The Court was thus dual in its intent, having power, in addition to regulating public utilities, to control and regulate conditions in the five major industries in Kansas, with power to conduct investigation and issue orders to employers to make changes which the Court should deem necessary, or advisable. The latter powers are those of the Industrial Welfare Commission. The courts were to be employed in enforcing its orders.

The law provided that any person violating the act in refusing to be guided by the Industrial Court, or by bringing pressure to bear upon any person who was being guided by the Court's orders, should be subject to fine and imprisonment or both.

The act did not prohibit strikes by employees, but for seeking to induce others to quit work, for the purpose of hindering, delaying, or causing suspension of operation of any industry, or by intimidation, abuse or picketing, to delay, or seek to delay, or reduce production, the penalty was fine or imprisonment or both. While not ostensibly a means of compulsory arbitration, the law was in effect, of such a nature. The Court could compel obedience to its orders; it could make any orders it might find to be commensurate to needs. This power therefore easily amounted to compulsion in adjusting of wage disputes, though not necessarily doing so. A strike, though not necessarily illegal, was nearly certain to be in defiance of a Court order, and then it would become illegal.

Organized labor therefore, fought the Court because it threatened to take away the chief weapon, viz. the strike. Employers fought it because it infringed upon wage-fixing prerogatives, such infringement, it was contended by them, being a violation of the 14th amendment. Cases were bitterly fought both in the lower courts and in the Superior Courts. The tests of unconstitutionality were applied in some degree in nearly all these cases.

The Court continued to function from Feb. 2, 1920 to October 1924, when the law was finally declared unconstitutional. Certain features of the law had already been condemned, in previous decisions. These will be given in a study of cases.

The Court continued to function from Feb. 2, 1920 to October, 1924, when the law was finally declared unconstitutional. Certain features of the law had already been condemned, in previous decisions. These will be given in a study of cases.

In taking over the functions of the Public Service Commission, created in 1911, (Laws of 1911, Chapter 238; Gen. Stat. 1915 Ch. 1917), the Industrial Court had power to review the field of Public Utilities in the same manner as that commission had functioned. "Had the statute been enacted in this form (i.e. separate statute), there would have been two tribunals, each having jurisdiction over a district and separate field. Section 2 and a tying-in sentence in section 4, were simply injected into this scheme of legislation. The result is, that while the public utilities commission was abolished, its jurisdiction was committed in whole and intact, together with appropriate methods of procedure and review, to the Court of Industrial Relations. While the Court of Industrial Relations under the molding power conferred by both the Public Utilities Act and the new law, will doubtless have but one procedure for itself, orders made in the public utilities field are to be reviewed as before - - - and orders in the field of industrial relations are to be reviewed according to the method - - - prescribed by the new law" (Vol. 107 Kan. Reports Pp. 172,173).

Thus it is seen that the Court of Industrial Relations had jurisdiction in the case of Telephone Association v. Telephone Co. 107 Kan. 169, a case involving the Public Utilities phase of the law. The case was the result of action to compel one telephone company at Clay Center, Kansas, to allow another company a switchboard connection in that city. The matter was referred to the Court of Industrial

Relations which denied the right of the applying company to such a connection except by contract agreement. It held that the Industrial Court would have no jurisdiction in this case involving only a matter of contract. The Supreme Court affirmed the decision of the lower court.

The importance of the case, the first to be reviewed by the Supreme Court under the Court of Industrial Relations Act, lies in the fact that it is a tacit expression of the right of the Court to regulate public utilities. The case above, involved no question of public interest and the Court held that it did not merit interference by the Court. No question of constitutionality of the act was raised, and, in this matter, the Supreme Court said: "The constitutionality of a statute is inquired into no further than is necessary to the determination of the case before it."

In the second case to come to the Supreme Court, *The State ex. rel. v. Howat*, 107 Kan. 423, the question of constitutionality is raised and rulings of the Court are made on the point. The facts are:

Alexander Howat and three others were adjudged guilty of contempt of court in Crawford County in 1920, and were sentenced to jail. The district court had issued subpoenas to Howat and the others to appear before the Industrial Court. They refused to obey the district court orders. On a trial for contempt of court they were found guilty and sentenced to jail. They appealed to the Supreme Court on the ground that the Court of Industrial Relations and the act creating it were unconstitutional, and hence the district court had no power to compel their attendance upon the Industrial Court.

It was the contention of the defense that the Court commingled legislative, executive and judicial functions, as had the Court of Visitation and which had been declared unconstitutional (61 Kan 803). It was further contended that the Industrial Relations Court interfered in the field of Federal jurisdiction as intended by the Clayton Act (Part 1 38 U.S. Stat. at Large 730), which forbids federal courts enjoining strikes of workmen, and the Lever Act (Part 1 38 U.S. Stat. at Large 276), providing for governmental control of the production and distribution of food and fuel until termination of the (World) War. A further plea was that the governor had no authority to call for special legislation for such a law as the Industrial Court Act.

The opinion of the Supreme Court on these contentions was, that, the federal statutes, while limiting the action of state courts in this field do not bar their action to such extent as to render the Kansas Act unconstitutional (P. 433). The Supreme Court also held that the Industrial Court had no judicial function, and was purely administrative, and thus could not commingle functions. If the Industrial Court had possessed judicial functions it would not have been necessary for the district court to intervene. The Court had the power to compel action in the Courts (Laws 1920 Ch. 29, Sec. 11). This answers the question of commingling of functions. As to the governor's power to call a special session for enactment of the Industrial Court Act, that power was ruled to be in the discretion of the governor himself and not for the courts to decide. (P. 430) (See also *Farely v. Cole* 60 Kan. 356.). The Supreme Court therefore affirmed the judgment of the district court, establishing the following rules of law:

1. That the Industrial Court was constitutional.
2. The Court did not commingle functions.
3. The Act was not in conflict with federal statutes.
4. Courts of jurisdiction could be employed by the Court of Industrial Relations to enforce its orders.

A case of identical title with the above case was reviewed in 109 Kan. 376. The case is not a continuance of the above, but is a different case, although involving the same persons, and similar questions. The facts are as follows:

District Number 14 of the United Mine Workers of America comprises the Kansas counties of Cherokee, Crawford and Osage, and in these counties are most of the coal mines of Kansas. In April 1920, Alexander Howat was president of District 14, August Dorchy was vice-president, and Thomas Harvey was Secretary-treasurer. On April 5, 1920, action was begun by the State Attorney-general against District 14 and its officers seeking an injunction against these officers, stating that they were conspiring and confederating with others to block the work of the Kansas Court of Industrial Relations. President Howat of District 14 had stated that he intended with the help of 12,000 miners to fight the Court until it was nullified. The plan to be pursued was the calling of a general strike in all the coal mines in Kansas.

A temporary injunction was granted against the officers and trustees of District 14, which on final hearing was made permanent.

In February the officers called a strike in two mines, Nos. 498 and 310, which was carried through by the miners. The district court of Crawford County received an affidavit charging Howat and the

other officers with contempt of court in violating the injunction.

After a hearing the Court ordered their arrest, and that they be brought into Court to answer the affidavit. The Court then ordered that a formal indictment be filed against Howat and some of the trustees of District 14, for contempt, Harvey and others being dismissed. On final hearing, without a jury, the Court ordered them to be committed to jail for one year and that they pay costs of the prosecution. They appealed to the Supreme Court.

The grounds for the appeal were, that their legal counsel being unable to attend the court proceedings, they should not have been arraigned, in the absence of counsel and that they were compelled to testify against themselves which was not legal. The principal contention of their counsel however, was that the act creating the Court of Industrial Relations was against the Constitution of the State of Kansas as well as against the United States Constitution, in that it violated the Fourteenth Amendment, in infringing upon personal privileges and depriving employees as well as employers of property and rights without due process of law. For this reason it was contended that the injunction of the district court and all its proceedings in the case were invalid.

The Supreme Court, considering these, ruled that the proceedings of the district court were the usual proceedings in cases of contempt of court, citing the case of Eilenberger v. Plymouth County 154 U.S. 31 as authority. As to the validity of the injunction, the ruling was that although the writ was erroneous, that Howat and his associates should have employed the proper channel for correction, which is appeal to the

Supreme Court, rather than defying the authority of the district court. The disobedience of Howat, therefore, was held to constitute contempt of court notwithstanding the error. (State ex. rel. Pierce, 51 Kan. 241). The cases cited by the defense, (State v. Vaughan 81 Ark. 117, and The People v. Condon 102 Ill. App. 449) were ruled to have been misinterpreted as construing too narrowly the cases of Magler v. Kansas 123 U.S. 625 and In. Re Debs Petitioner, 158 U.S. 564. The latter cases define the Court's power to issue injunctions abating a nuisance. On the authority of these the defense had pleaded that the lower court, being a court of equity, had no authority to enjoin criminal action. The Supreme Court held that the cases cited admit of no such interpretation, but that they grant such power to courts of equity.

The contention of unconstitutionality of the Industrial Court Act was dismissed by citation to the opinion given in The State ex. rel. v. Howat, 107 Kan. 423. The Supreme Court, however, in a lengthy opinion defended its former ruling upholding the validity of the Court of Industrial Relations. As authorities for powers to decry strikes, and as a plea for the Industrial Court, the Supreme Court cited the case of United States v. Debs, 64 Fed. 724. Commenting upon this opinion the Supreme Court said: "The Debs pattern has been used for many a subsequent strike" and further: "Between April 6, 1917 and November 11, 1918, the period of our participation in the World War, there were more than 6,000 strikes in the United States, some of which imperiled winning the war. When the - - -

flower of this country went forward as willingly as a bridegroom goes to his bride to hurl themselves into the raging pit of Hell in Western Europe, their fate there depended upon patching up strikes at home." Still further in the opinion: "Sometimes under the stress of genuine emotion, sometimes in rout, and sometimes in misguided ignorance, labor speaks of its 'right' to strike as 'God-given'. Right to strike is God-given in the same sense that right indicated by the word 'property' is God-given - - - as in the case of property, abuse and misuse are not to be tolerated."

That the State has authority to regulate industry, is held by the Supreme Court on the basis of the cases of *Munn v. Illinois*, 94 U.S. 113, and *German Alliance Insurance Co. v. Kansas*, 233 U.S. 389, and this fact is quoted as authority for the Industrial Court law. The decision of the lower court was therefore affirmed with no dissenting opinions. This opinion upheld the former rule of law.

This case came before the Supreme Court again in November 1921. The lower court had committed Howat and the other officers to jail after the above ruling of the Supreme Court. The basis of the appeal was, again, the unconstitutionality of the law. The Supreme Court merely cited its former opinion, (See above), and affirmed the action of the district court.

The case was then appealed to the United States Supreme Court for review of the Kansas Supreme Court's decision in both its hearings. The grounds were unconstitutionality of the Industrial Court law and the Court proceedings in the cases of the State ex. rel. v. Howat. The U.S. Supreme Court, (*Howat v. State of Kansas*, (two cases), 42 Sup. Ct. Rep. 277) dismissed the plea of unconstitutionality in the cases as not being

demanding by them, but ruled that as to the injunction order of the district court, that Howat and his associates should have obeyed it, regardless of whether the act was invalid or valid. This was an affirmation of the opinion of the Kansas Supreme Court. The opinion was given by Mr. Chief Justice Taft in October 1921 with no dissenting opinions. This decision put an end to the Howat cases for a time. A later case arose, however involving Howat and Dorchy. This will be studied later.

A case which began early in the history of the Court of Industrial Relations and which is important as deciding the unconstitutionality of the Court and the law providing it, is that of *The Court of Industrial Relations v. Wolff Packing Co.*, 109 Kan. 629. Like the above case, the Packing Company Case had a long and turbulent life, alternating between the Kansas Courts and the United States Supreme Court until final decision by the latter.

The case began early in 1921. The Chas. Wolff Packing Company of Topeka, was ordered, in March 1921, by the Court of Industrial Relations to institute a certain wage scale, and to observe hours of labor as prescribed by the Court. The Packing Company refused and the Industrial Court instituted original proceedings in mandamus in the Kansas Supreme Court to compel compliance. In the hearing, the Packing Company offered as defense, that:

1. The Industrial Court had no power to sue in its own name.
2. Mandamus proceedings were improper, since employees should have brought suit against the Company for wages due them, rather than through the Court of Industrial Relations.
3. The Industrial Court and hence the Supreme Court, exercised

legislative rather than judicial functions.

4. The orders of the Industrial Court were not effective until affirmed by the Kansas Supreme Court, and no affirmation had been secured.
5. The Industrial Court could not legally regulate wages except in emergency, and none existed here.
6. The Industrial Court, and the law providing it, were unconstitutional.

The Supreme Court ruled on these contentions as follows:

1. The Industrial Court had authority to bring the above action in the Supreme Court. "A person authorized by statute may bring an action without joining with him the person for whose benefit it is prosecuted".

(Section 27. Code of Civil procedure). The Industrial Court was so authorized by Statute. (See also sections 8446, 8447, 8367, Gen. Statutes, Kansas 1915).

2. Mandamus proceedings were proper by the Court, since the action was, not to compel payment of wages, but to compel the Packing Company to obey an order by the Court.
3. The power of the Supreme Court is not legislative, since it does not have power to determine rates but to compel the Industrial Court to determine rates, etc. Hence the Industrial Court's power was delegated, and was not legislative.
4. An order of the Industrial Court was effective when given and did not depend upon the Supreme Court's Affirmation.

5. The Industrial Court found that an emergency existed due to the dispute between employers and employees in the Wolff Packing Company plant and its orders therefore were not unconstitutional.
6. The Industrial Court and its orders were not unconstitutional. Cases where mandamus has been resorted to in compelling compliance with orders are numerous and the right is unquestioned. (Northern Pacific Ry. Co. v. Dustin, 142 U.S. 492; City of Potwin Place v. Topeka Ry. Co., 51 Kan. 609; City of Topeka v. Water Co., 58 Kan. 349; Brooks-Scanlon Co., v. R.R. Commissioners 251 U.S. 396; Atkin v. Kansas 191 U.S. 207; Holden v. Hardy 169 U.S. 366, and many others. (See Pp. 640-643 Vol. 109 Kansas Reports).

These cases establish the authority of the states to regulate industry and this was the intent of the Industrial Court Act. The constitutionality of the act was upheld in the Howat Cases, and the Supreme Court merely referred to these opinions in answering the question. The Supreme Court therefore ordered the Packing Company to obey the orders of the Court of Industrial Relations.

The Court of Industrial Relations, pursuant to this order sought to enforce its orders to the Packing Company. These were as follows:

1. Open shop policy to be observed by the Packing Company.
2. Employees, whether organized or unorganized, to receive schedule wages as prescribed by the Court.
3. The eight-hour day, with time and one-half for overtime,

- to be enforced.
4. Sufficient work must be furnished to enable workers to earn a fair wage.
 5. When plant was not to operate, employees were to be notified if possible.
 6. Change of hours of beginning the day's work were to be told employees.
 7. Enforcement of "seniority rule" could be undertaken by the Company.
 8. Rules and regulations of labor, hours, etc. were to be posted about the plant.
 9. Women workers were to be paid the same wages as men for the same work.
 10. Women's toilets and dressing rooms were to be in charge of women.
 11. Piece-work rates were to be paid according to schedule.
(The Court's)
 12. Details causing grievances, were to be referred to a committee of employers and employees.
 13. Women were not to work longer than 9 hours per day and 54 hours per week.
 14. Workers by the week were to be paid at the same rates as other workmen.
 15. The Court's temporary order was to stand until changed.
(May 1921).
 16. A suitable lunchroom to be supplied by the Company apart

from certain parts of the plant.

17. Enforcement of a schedule of minimum wages was to be observed.
18. Higher wages than the minimum were to be paid when desirable.
19. Where departments operated continuously, night and day, the employees were to have one day off per week, and time and one-half for Sundays and legal holidays.

The Packing Company appealed to the Supreme Court for a rehearing, on the ground that no emergency existed in the plant as contemplated in the act. The Supreme Court ruled, however, that where a controversy had arisen and the employees were about to strike, but elected to submit their claims to the Court of Industrial Relations, instead, such an emergency did exist and the Court had power to regulate. The opinion held that paragraphs 1, 5, 6, 7, 8, 10, 12, and 13 of the orders were not within the jurisdiction of the Court of Industrial Relations, due to failure to give proper notice to the employers with respect to them. The Supreme Court affirmed the action of the Industrial Court with respect to the others, however, and issued a peremptory writ to the Packing Company to obey the remaining paragraphs.

From this opinion, given by Mr. Justice Marshall, Mr. Justice Burch dissented with the concurrence of Mr. Justice Porter. The dissenting opinion held that in view of the small size of the plant, there was improbability of a strike resulting at all, and in view of the laws against picketing, there was improbability of such damage resulting even in event of a strike, as to render the situation an emergency, as contemplated in the law. Hence Mr. Justice Burch with the concurrence

of Mr. Justice Porter, held that no emergency, was threatened, and that there should have been no interference by the Court of Industrial Relations.

The Packing Company appealed its case to the United States Supreme Court, which in an opinion rendered by Mr. Chief Justice Taft, (October 1922, 43 Sup. Ct. Rep. P. 630), reversed the opinion of the Kansas Supreme Court. This opinion held that the Industrial Court Act insofar as it permitted wage-fixing in the Wolff Packing Company's plant was unconstitutional, violating the Fourteenth Amendment. The grounds for this opinion were that, the conditions of railroads, public service corporations and those charged with the public interest, are not analogous to those in a small packing plant. That is, the latter is not charged with the public interest in the sense that the railroads and others are, and as comprehended in the case of *Munn v. Illinois* and others cited by the Kansas Supreme Court.

The case was remanded to the Kansas Supreme Court with the following proviso: "That this cause be and the same is hereby remanded to the Supreme Court of Kansas for further proceedings not inconsistent with this opinion".¹ Instructions were given to strike out clauses of the Kansas Court's opinion pertaining to this feature, if the section in question were separable from the general law. If not separable, it rendered the entire law invalid.

In July 1923, the Kansas Supreme Court obeyed this mandate

1. 43 Sup. Ct. Rep. 630 and following.

and granted the writ of mandamus, thus modified. (Court of Industrial Relations v. Packing Co., 114 Kan. 304). This applied to only three of the original nineteen paragraphs, viz., 3, 14, 19. From this decision of the Kansas Supreme Court, issuing the modified mandate, Mr. Justice Burch again dissented as in 111 Kan. 501. Mr. Justice Harvey dissenting, believed that the mandate required a complete reversal of the former decision.

The case was again appealed to the Kansas Supreme Court (Vol. 114 Kan. Rep. P. 487), by both the Packing Company and the Industrial Court. The Industrial Court asked that paragraph 3, relating to overtime be reinstated, this having been omitted in the former decision. The Supreme Court reinstated the paragraph holding that the provision for overtime wages is not price-fixing. Mr. Justice Harvey dissented, holding that overtime wages was a part of wage-fixing. He also restated his opinion given in 114 Kan. 304, that the former opinion of the Kansas Supreme Court should be reversed. Mr. Justice Burch maintained his dissent, that no emergency had existed and hence the action was invalid.

The Packing Company contended that the Kansas Supreme Court no longer had jurisdiction in the case after the United States Supreme Court had issued its mandate. The Supreme Court overruled this however on the ground that the mandate did not preclude the possibility of correction of error. The Packing Company again carried its cause to the United States Supreme Court (1924), asking that the Kansas Supreme Court's opinion be reviewed, At the same time it entered an appeal from the

original opinion of the Kansas Supreme Court. Both were considered in *Packing Co. v. Court of Industrial Relations*, (45 Sup. Ct. Reporter 441). The opinion in the first, the appeal from the later decision of the Kansas Supreme Court, was that the Kansas Court's decision was final, and left nothing for review. The appeal was therefore dismissed.

The second case, i.e. appeal from the original opinion of the Kansas Supreme Court, was tried upon the contention of unconstitutionality of the law providing the Kansas Court of Industrial Relations. The United States Supreme Court had already ruled that price-fixing clauses in the law deprived employers of property and liberty of contract without due process of law and hence were unconstitutional. The opinion was now given, rendered by Mr. Justice Van Deventer, that the entire law was unconstitutional because the Kansas Industrial Court under the law could compel arbitration and that this and other features of the law, viz., price-fixing, hours of labor, were not separable from the act, but were a necessary part of a general scheme of compulsory arbitration. The opinion in part is as follows: "We recognize that in its usual acceptance, the term ("arbitration") indicates a proceeding based entirely upon the consent of the parties, and we recognize also that this act dispenses with their consent. Under it they have no voice in selecting the determining agency or in defining what that agency is to investigate and determine, and yet the determination is to bind them, even to the point of preventing them from agreeing on any change in the terms fixed therein, unless the agency approves. To speak of a proceeding with such attributes merely as an arbitration. - - - The system of compulsory arbitration which the act establishes is intended to compel, and if sustained will compel, the owners and employees to continue the

business on terms which are not of their own making. It will constrain them, not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms - - - Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment. - - - The authority which the act gives respecting the fixing of hours of labor is merely a feature of the system of compulsory arbitration, and has no separate purpose - - - It follows that the state court should have declined to give effect to any part of the order of the state agency.¹ This decision definitely put an end to the powers of the Court of Industrial Relations for compulsory arbitration. The unconstitutionality of the law would no doubt have been ruled upon earlier in the history of the Industrial Court, but cases appealed to the United States Supreme Court did not question the validity of the law, and it was ruled that no decision upon validity of the law would be given unless the case merited it. The final case however brought this question forward with the result as given in the above opinion, declaring the law void as in violation of the Fourteenth Amendment.

Some other cases will be given, however, for one, at least, is important. This is, State of Kansas v. Dorchy 112 Kan. 235. This was a recurrence of the troubles of the Mine Unions in District 14, which were involved in the Howat cases already studied. Howat and Dorchy had already lost two cases against the Court of Industrial Relations, and this case arose from defiance of the Court. The

point which made their conviction inevitable was that they also defied the district court of Cherokee County, thus being convicted for contempt of court. This fact destroyed all force of their fight against the Court of Industrial Relations.

The facts of the case are: Dorchy, Howat and others, officers of District Number 14, United Mine Workers of America, a labor union, were sentenced to serve six months in the Cherokee County jail, and to pay a fine of \$500, for calling a strike in violation of an order by the Court of Industrial Relations. (See 112 Kan. 235). The Kansas Supreme Court affirmed the opinion.

Dorchy appealed to the United States Supreme Court, 44 Sup. Ct. Rep. 323, on the grounds that his arrest and the court proceedings were unconstitutional. The Wolff Packing Company case had not yet been decided, but the opinion had been given that the act was invalid in the respect to price-fixing in Packing plants. (See above). The decision in the Dorchy case was given in 1923. This decision was that section 19 of the law was invalid if it was an intimate part of the system of compulsory arbitration declared invalid in the Packing Company case. Since this opinion (i.e. Packing Company case) was rendered after the Kansas Supreme Court had ruled on the Dorchy case, the case was reversed and sent back to the Kansas Supreme Court with the mandate to vacate its original opinion in order to ascertain whether section 19 was separable from the general scheme of compulsory arbitration. The opinion was given that the whole scheme was invalid if this section was not thus severable.

The Kansas Supreme Court pursuant to the mandate of the United States Supreme Court, vacated its original opinion and reviewed the case again, in the light of the decision of the latter Court in the Packing Company case. The opinion in this rehearing was given in July, 1924. *State v. Howat et. al.* 116 Kan. 412. It held that section 19, in question was so far severable from the general scheme of legislation as to constitute an independent statute. The Kansas Supreme Court gave as authority for this opinion the cases of the State ex. rel. v. Howat, 109 Kan. 376, and the Court of Industrial Relations v. Packing Co., 114 Kan. 487, as based upon section 28 of the Industrial Court act. This section is as follows: "If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be found to be invalid by any court." (Revised Statutes Kansas 1923, 44-628). This rule was followed in the above case and the Kansas Supreme Court ruled that the sections held invalid by the United States Supreme Court, did not render the entire act void. The original opinion was reaffirmed.

The case was appealed to the United States Supreme Court, and in an opinion given in October 25, 1926 (U.S. Sup. Ct. Advance Opinions November 1, 1926-1927, 71 L.ed. Page 23.), that court affirmed the opinion of the Kansas Supreme Court. The opinion was held that section 19, having been ruled by the Kansas Court as severable from the general scheme of legislation, and having the legal force of an independent

statute, would be thus regarded by the United States Supreme Court. The rule established was that "The Supreme Court of the United States is bound by the construction given state statutes by the courts of the State" (See Syllabus Paragraph 1). The opinion held therefore that the only question was whether section 19, standing alone was unconstitutional.

The opinion is important as defining the power of legislatures to enact laws against strikes. The rules were stated in the syllabus:

3. Interference without just cause, with the right to carry on business is unlawful.
4. A strike may be illegal because of its purpose, however, orderly the manner in which it is conducted, both at common law and under the Federal Constitution.
5. A strike to collect a stale claim of a fellow-member of a labor union, who was formerly employed in the business, is unlawful.
7. The legislature may subject to punishment officers of a labor union who use the power or influence incident to their office in the union to order a strike for the enforcing payment of a stale claim by a former employee of the business, for wages alleged to be due and unpaid.

The Supreme Court (U.S.) held that the action of Dorchy was unconstitutional because of his purpose in calling the strike in District 14. This purpose was, to force the employers to pay a claim for wages made by a former employee. The opinion as rendered by Mr. Justice Branders, is in part as follows: "To enforce payment by a strike

is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise. Compare *People v. Barondess*, 8 N.Y. Crim. Rep. 234; 41 N.Y.S.R. 659; 16 N.Y. Supp. 436; 133 N.Y. 649; 31 N.E. 240. And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law, nor the 14th Amendment, confers the absolute right to strike. Compare *Aikens v. Wisconsin*, 195 U.S. 194, 204, 205; 49 Led. 154, 159, 160; 25 Sup. Ct. Rep. 3". The section 19, in question was therefore given the effect of an independent statute, and held to be constitutional. The decision of the Kansas Supreme Court was therefore upheld. There were no dissenting opinions.

Dorchy and Howat were therefore ordered to jail to serve their sentence. They were both pardoned later however before completing their sentences.

There is a seeming conflict of opinions in the cases of *Wolff Packing Co. v. Court of Industrial Relations*, and the *Dorchy* case. As has been seen, the United States Supreme Court ruled in the former that several parts of the Industrial Court law were not severable from the general scheme of compulsory arbitration, and hence sharing in their invalidity of the whole. ¹ In the *Dorchy* decision, above, given after the *Packing Company* decision, the validity of Section 19 of the act as based upon section 17 of the same act, was upheld. It will be remembered however that the *Packing Co.* decision found the law in its entirety void, after the decision of the Supreme Court of Kansas had declared section 19

1. See *Wolff Packing Co. v. Court of Industrial Relations* 69 U.S. L.ed. 785; 45 U.S. Sup. Ct. Rep. P. 444.

severable and having the legal force of a complete statute. Section 19 therefore ceased to be an intimate part of the Industrial Court Act, when the Supreme Court of the United States held in the Dorchy case, (Syllabus R. 1.), that the state court's construction of the statutes of the state would hold in the United States Supreme Court, and when the Kansas Supreme Court's decision thus became final, this antedated the United States Supreme Court's decision in the Pecking Company case by three months, (July, 1924 - October, 1924). The power of the legislature, as defined by sections 17 and 19 is therefore held to be constitutional, as they applied to the Industrial Court Act specifically and as intimate parts they were not valid, but being set forth as independent statutes, they were thus held to be valid powers, in that they had universal application and validity as guaranteed under the common law, and were not in controvention of the 14th Amendment.

The dissenting opinions of Mr. Justice Burch and Mr. Justice Harvey, in the matter of severability of section 19 of the Industrial Court Act, are interesting though not important as to the final ruling opinions. Mr. Justice Harvey believed that the United States Supreme Court opinion rendering the Industrial Court Act invalid as applying to the employers in industries supplying food, clothing and fuel, tacitly implied invalidity also as applying to employees in those industries. That is, releasing the employers, the law should not bind the employees. He therefore held that the Kansas Supreme Court should have reversed its original opinion.

Mr. Justice Burch held, that in ruling section 19 severalty from the act, the majority of the Kansas Court were upholding a provision

only, after the law as a whole had been rendered useless, and hence the provision itself was virtually useless.

Other cases under the act are important only as showing the power of the Court of Industrial Relations Act. "Picketing" was the question raised in the State v. Personett, 114 Kan. 691. T. L. Personett was adjudged guilty of picketing, by the Franklin district court. He attempted to persuade workmen to quit work when the Carmen's Union declared a strike at Ottawa, Kansas in 1922. In the court action he contended that this persuading of workmen did not constitute picketing. The lower court, however, ruled that the term "picketing" included such persuasion, and returned a judgment against him. He appealed to the Supreme Court, where the judgment was affirmed.

Mr. Justice Harvey dissented however, holding that a definition of picketing did not permit of such construction, as the courts had given. He said that "picketing" consisted of posting members at approaches to works in order to use such influence in their power to prevent workmen from continuing in their employment. He did not believe that Personett had violated this meaning of the law, and therefore that the opinion should have been reversed.

The State v. Scott 109 Kan. 166 was an early case under the Industrial Court Act. Action was begun in 1921 raising the question of unconstitutionality of the law, alleging a duality of functions of the Court of Industrial Relations. Scott was charged with violation of the law in attempting to induce others to quit work in industries charged with public interest. Action was begun in the Wyandotte

district court. Scott took a motion to quash the proceedings of the State, on the ground that the law violated the provisions of the Kansas constitution requiring that: "No bill shall contain more than one subject which shall be clearly stated in its title". The lower court sustained this motion to quash and the State appealed to the Supreme Court.

The Supreme Court ruled the contention that the Court of Industrial Relations possessed judicial functions was groundless. The word "Court" was not to be understood in a technical sense (State ex. rel. v. Howat, 107 Kan. 425). It applied only in the sense that the term "Municipal Corporations" apply to townships, which are merely quasi-corporations. The Industrial Court was ruled to have power to make such orders as necessary to regulate industrial relations, without exercising any judicial power.

The Court held that a title of an act is not objectionable on the ground of generality, as long as its scope and purposes are fairly indicated and was surreptitiously passed. "Everything connected with the main purpose and reasonably adapted to secure the objects indicated by the title, may be embraced in the act without violating the constitutional inhibition" (See Lynch v. Chase 55 Kan. 367). It was ruled therefore, that the title of the act creating the Court of Industrial Relations was on this authority, broad enough to cover the prohibition of the acts charged against Scott. It therefore reversed the action of the lower court.

The important rule established was that the title of the Court of Industrial Relations law was broad enough to cover the

prohibition of conspiring to induce workers to quit work in industries clothed with public interest, and making such inducing, or conspiring to induce, a misdemeanor punishable in the courts.

These latter cases are not as important as those given above. The Howat and Dorchy cases were given in succession, in all their stages in order to show their progress through the courts. This is true also of the Packing Company case. The Industrial Court cases thus could not be reviewed in the order of their appearance in the Kansas Supreme Court.

The Court of Industrial Relations Act was declared unconstitutional for the reason that the industries which it intended to regulate by compulsory arbitration, were not sufficiently clothed with the public interest to justify their inclusion in the category of such industries as defined in the United States Supreme Court ruling in the celebrated case of *Munn v. Illinois*, which controls.

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In *Munn v. Illinois*,¹ the rule was established that the State has the right under the common law and constitutional provision to regulate industries charged with the public interest. This right comes from the English common law and has numerous cases as precedents. The question in the *Munn* case was whether grain elevators in the city of Chicago were clothed with the public interest to the extent that storage rates for grain could be regulated and prescribed by the Illinois legislature. The Illinois Supreme Court in a majority opinion decided that such was true. The United States Supreme Court, likewise in a majority opinion, affirmed this decision, holding that the strategic

1. 94 U.S. 113 (1876)

position of the elevators in controlling the passage of grain from the Western States to markets, constituted a "virtual" monopoly of processing features and hence were clothed with the public interest to such extent as to justify regulation.

The five major industries of Kansas included only two which might be classified as coming within the scope of public interest industries. These, railroads and public utilities are largely controlled by other agencies than the individual state. The remaining industries, viz., those providing fuel, clothing and food, were held not to occupy such a strategic position as to constitute them in any sense monopolies, and therefore not to be clothed with public interest.

The unconstitutionality of the compulsory arbitration feature of the Kansas law, hinged upon this distinction, so that the theory of the Court of Industrial Relations law is unsound only in that it interpreted "Public interest" too liberally, infringing upon the rights of private property, as defined in the Munn case.

That this is true may be seen in the Kansas Supreme Court opinion in *State ex. rel. v. Howat*, 109 Kan. 376, where the theory of the act as interpreted by the Court was given as follows: Heretofore the industrial relationship has been tacitly regarded as existing between two members, industrial manager and industrial worker. They have joined wholeheartedly in excluding others. The legislature proceeded on the theory that there is a third member of these industrial relationships which have to do with production, preparation and distribution of the necessaries of life - the public. The legislature also proceeded on the theory that the public is not a silent partner.

Whenever the dissensions of the other two become flagrant, the third member may see to it that business does not stop".

CHAPTER XI .Criminal Syndicalism Cases.

The Kansas law against criminal syndicalism was passed by the special session of the legislature in 1920, which enacted the Court of Industrial Relations Act. The two statutes were the result of public sentiment against organized labor. This was aroused by the coal strikes and by the activities of the Industrial Workers of the World, a labor union advocating violence in effecting its aims and ends.

The Criminal Syndicalism law is protective in its intent and is directed against such violence and predatory practices as the I.W.W. were employing in Kansas. It is designed to protect owners of property and employers. The protective legislation that has been studied thus far, has been designed to benefit employees.

The activity of the I.W.W. in agricultural industry and in oil industry in Kansas was thought to threaten the welfare of property owners in these industries, and to be seriously interfering with production. The law was intended to drive from the state such syndicalism practices as the I.W.W. were employing, by providing heavy penalties, or to prevent interference with production in Kansas industries.

The law was defined as follows: "An act defining criminal syndicalism, and the word "sabotage"; prohibiting the advocacy, teaching or affirmative suggestion thereof; and prohibiting the advocacy, teaching or affirmative suggestion of crime, physical violence, or the commission of any unlawful act or thing as a means to accomplish industrial

or political ends, change or revolution, or for profit; and prohibiting assemblages for the purpose of such advocacy, teaching or suggestions; declaring it unlawful to permit the use of any place, building, rooms or premises for such assemblages in certain cases; and providing¹ penalties for violations thereof".

Criminal syndicalism is defined as "The doctrine which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political revolution or for profit" (Section 1).

Sabotage is defined as "Malicious, felonious, intentional or unlawful damage injury or destruction of real or personal property of any employer or owner, by his or her employee or employees or by any employer or employers, or by any person or persons, at their own instance or at the instance, request or instigation of such employees, employers, or any other persons" (Section 2).

Violators are those who practice syndicalism and sabotage, or aid or abet their being practiced, either by word of mouth or by using the press, or by printed matter. These are guilty of a felony and are subject to imprisonment in the state penitentiary for a period of from one to ten years, or to pay a fine of not more than \$1,000 on being sentenced both to pay fine and to imprisonment. (Section 3).

Owners of buildings, rooms, or places where such doctrines are practiced or taught under any of the above conditions, if they knowingly permit it, are guilty of a misdemeanor, and are subject to less severe

penalties of fine and imprisonment. (Section 4).

The law went into effect early in 1920. There was no case for review by the Supreme Court until January 1921. The first case was the State v. Berquist 109 Kan. 368. C. E. Berquist was charged with violating the criminal syndicalism law in being a member of the I.W.W. in Kansas, which organization teaches syndicalism. The lower court, Montgomery County, sustained a motion to quash the proceedings for the reason that "It, (the information) fails to state that the defendant was a member of such organization which teaches or advocates said unlawful doctrines as mentioned in the information, within the state of Kansas or within the jurisdiction of the Court". It was also contended that the information was defective because of its omission to state that Berquist became a member of the organization referred to, in Kansas.

The Supreme Court upheld the opinion of the lower court for the reasons that the lower court gave, holding that these reasons were not in error. The opinion of the court as rendered by Mr. Justice Mason is, in part: "The statute makes it a felony for a person to become a member of a society which teaches what is defined as criminal syndicalism. The essence of the offense is the uniting with such organization, joining it, and thereby assuming an obligation to cooperate with its members in accomplishing its purposes. In order for this act to be punishable in Kansas, it must take place here. But where a person joins in this state, a society of that character, he could not escape liability by showing that it had never made Kansas a field of its propaganda - - - The information however, does not allege that the

defendant in Kansas became a member of the Industrial Workers of the World - but merely that being in Kansas he was a member of it. Under its allegations it may be that he joined the society in some other state - - - and that he has not within this jurisdiction conspired or conferred with others concerning them. The mere coming into this state of one who had theretofore become a member of such an organization as the statute condemns does not, according to its terms, render him subject to prosecution here - - - We hold the information to be subject to a motion to quash because it does not allege that the defendant became a member of the Industrial Workers of the World in this state. - - - The judgment is affirmed".

The case went off on the question of being a member of the I. W. W. in Kansas and becoming a member in Kansas. The opinion held that a prosecution of a person coming into Kansas, and who had been a member of such syndicalistic society prior to his coming might be *expost facto* and hence illegal.

The opinion shows, also, the difference between the Kansas statute and the similar statute of the state of Washington. Quoting the opinion on this point: "The correctness of this conclusion is the more evident from the fact that the language of our statute is different - - - from that of the Washington act which obviously was to some extent consulted by the draughtsman in framing it. There the penalty is imposed upon whoever shall organize or help to organize, give aid to, be a member of, or voluntarily assemble with, any group of persons formed to advocate, advise or teach crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any

industrial, economic, social or political change (Laws of Washington, 1919, Ch. 174). Because of the use of the expression 'be a member of' as distinguished from 'become a member of', the Washington court has held that a prosecution under this clause may be maintained in a county other than that in which the defendant joined the organization (State v. Hennessy (Wash.) 195 Pac. 211, 217-218). Thus in Washington, a member of the I.W.W. could not but violate the law if it had been held that the I.W.W. is syndicalistic, that is, the fact of his being a member would be a violation. Nor could a member in another state remove to Washington without becoming in violation of the law, under the above condition. Hence the I.W.W. must be regarded as non-syndicalistic by the Courts of Washington. Under the Kansas statute as shown however, the stress of importance is upon becoming a member of such syndicalistic society in Kansas. In neither state could such a society exist but the Kansas statute would allow members in other states to enter the state whereas the Washington statute does not.

The next case was The State v. Breen, 110 Kan. 817. The Trego district court found Breen guilty on three counts of violation of the criminal syndicalism law. He was charged, also, with having become a member of a syndicalistic society in Kansas, but was acquitted of this charge. The second charge was that of affirmative suggestion and advocacy of syndicalism and sabotage as a means of effecting social and political revolution. The third count was that Breen with three others was a member of an assemblage of persons in Trego County, assembled for the purpose of teaching sabotage. The fourth count was an accusation of the

I.W.W. in Trego county as being syndicalistic and engaged in distributing printed materials advocating the doctrines held by the I.W.W. Breen was a member of this organization.

The district court acquitted him on the first count but found him guilty of the other three. The case was appealed to the Supreme Court. This court ruled that the lack of precision in the manner of drawing up the case defeated its purpose. This lack of precision was in failing to follow the language of the statute so that it was impossible for the lower court to have followed the law. The Court reversed the case, on account of the inconsistency, with instruction to quash the information due to lack of evidence.

The State v. Murphy, 112 Kan. 816, is a continuation of the Breen case. Murphy was convicted on the same charges as were lodged against Breen but had a separate trial. His appeal was made upon the same contentions as in the Breen case, and the same evidence was used. The same opinion was given, viz., that the case be reversed due to failure of evidence to show an offense.

The State ex. rel. v. Industrial Workers of the World, 113 Kan. 347, is one of the most important cases under the Syndicalism Act. Many facts concerning the organization, methods, and teachings of the I.W.W. are shown. The spirit of the Syndicalism statute is interpreted by the Court as condemning the I.W.W.

The case began in 1913 in the Butler district court when a petition for an injunction against the activities of the I.W.W. in Butler County was granted. The purpose of the injunction was stated as follows: "To restrain commission in Kansas of depredation against

property, inimical to the general welfare, by the Industrial Workers of the World, its executive board and its officers, agents and members." A demurrer to the petition for injunction was overruled by the lower court and the case was appealed to the Supreme Court.

The I.W.W. in its organization and administration was described, as well as the branches operating in Kansas, as: "Agricultural Workers Industrial Union No. 400"; "Agricultural Workers Organization of the I.W.W. No. 400"; "Oil Workers Industrial Union No. 450"; and O.W.I.U. No. 450". Certain practices of these were held to be in violation of the syndicalism statute.

Large numbers came to Kansas after the court action began in Butler County, and, commenced depredations with the intent to put a stop to work in the wheat fields and in the oil industry in Kansas, and to form conspiracies to effect their purposes. The petition for injunction stated "That if the purposes of said defendants are accomplished, the public health and the lives of the people of the state of Kansas will be endangered, production will be decreased and a great amount of personal and real property - - - will be maliciously and wilfully destroyed by said defendants, for the purpose of carrying out the plans of their organization, and that each and all of said defendants are insolvent".

The opinion of the Supreme Court, rendered by Mr. Justice Burch, was in part as follows: "Kansas ranks fourth among the states of the union in the production of petroleum - - - Kansas produces more wheat than any other state in the union - - - These statistics

are given to show why misguided and miscreant members of the Industrial Workers of the World swarmed into Kansas just before the wheat harvest of 1920. If successful in their efforts they could paralyze two essential industries, not only of the state but of the nation, while the country was still suffering from the disastrous strikes of 1919 and 1920. The action was one to enjoin them from execution of their nefarious designs."

"The argument in support of the demurrer to the petition consists of variations upon the theme 'A court of equity has no power to enforce a criminal statute by executive order'. It is said - - - no property rights of the state of Kansas were affected; the proceeding was an attempt to inflict involuntary servitude on members of the order; and the proceedings were violative of constitutional rights of the defendants under both the state and Federal statutes."

"The theme and variations were considered in the State ex. rel. v. Howat, 109 Kan. 376 - - - The action had nothing whatever to do with administration of the criminal law and an authority of the Howat case, the Court holds the petition stated a cause of action as against all the objections urged - - - The judgment of the district court is affirmed".

The State v. Fiske, 117 Kan. 69, is the last case to be reviewed by the Supreme Court. It was appealed from the Rice district court in July, 1924. Fiske was convicted of violating the Syndicalism law by teaching syndicalism, and by seeking to obtain members for the I.W.W. in Rice County. He solicited and obtained two members. He admitted this fact, but contended that, since he had done this work in Reno County, the Court of Rice County could have no jurisdiction. He further urged the invalidity of the Syndicalism Act, as violating the

Bill of Rights of the Federal Constitution which guarantees the right of free speech and freedom of the press. In addition it was contended that the law violated the Fourteenth Amendment.

The opinion of the Supreme Court, rendered by Mr. Justice Mason, affirmed the decision of the lower court. A part of this opinion states that: "Statutes penalizing the advocacy of violence in bringing about governmental changes do not violate guarantees of freedom of speech. Their wisdom and justice are matters for the determination of the legislature". The other contentions were dismissed as being contrary to evidence. The decision of the lower court was affirmed.

CHAPTER XII.Miscellaneous Cases.

In this group will be included several cases involving other laws than those stated in the foregoing pages.

The first of these is the case, *The State v. Coppage*, 87 Kan. 752. It involves the violation of sections 4674 and 4675 of the General Statutes of Kansas 1909, which prohibit employers bringing pressure to bear upon employees, to induce them, as a condition of employment to refrain from memberships in a labor union. The facts of the case are: T.B. Coppage, Superintendent of the "Trisco" railway in 1911, attempted to persuade A.R. Hedges, an employee of the Railway Company at Fort Scott, Kansas, to sign a written agreement to withdraw from the Switchmen's Union, a labor organization. Hedges refused and was discharged. He began action against Coppage in the Bourbon district court. A motion to quash the information on account of failure to show offense, was overruled, and the case was appealed to the Supreme Court after Coppage was convicted in the lower court.

The Supreme Court on review, cited the case of *Adair v. United States*, (208 U.S. 161). In this case an employer had discharged an employee on account of membership in a labor union. The Federal Court ruled this action a criminal offense. The United States Supreme Court on appeal, ruled the opinion of the Federal Court, unconstitutional, and an act of Congress of 1898, making such discharge a criminal offense, invalid. Another case, *The State v. Daniels (Minn)* 136 N.W. 584, was also cited. The Daniels case, wherein an employee was induced to make an agreement not to remain a member

of a union, was decided following the rule in the Adair case, that is, that employers have the right to make such demands as a condition of employment.

The opinion of the Kansas Supreme Court in the Coppage case held that the Adair case and the Daniels case were not to be followed. It held also that the cases of Brick Co. v. Perry, 69 Kan. 297; Railway Co. v. Brown, 80 Kan. 312; and State v. Julow, 129 Mo. 163, which rule that statutes making discharge of employees on account of membership in a labor union a criminal offense, are unconstitutional, do not apply to the Kansas statute under which the Coppage case arose. The reason is that the Kansas law is very different from the other statutes. The latter place the emphasis upon making discharge of employees a criminal offense, and this is held unconstitutional. The Kansas law makes criminal the coercing of employees by employers. The decision of the lower court was therefore affirmed, not following the above cases. The opinion of the Court was given by Mr. Justice Smith.

Mr. Justice West dissented, giving no opinion. Mr. Justice Porter dissented, giving the opinion that the Adair case and the others quoted show conclusively the employer's right to discharge laborers for any reason, and that membership in a union may be a lawful reason.

The case was appealed to the United States Supreme Court, which in a bare majority opinion, (236 U.S. 456, 59 L.ed.) reversed the judgment of the Kansas Supreme Court, on the ground that the Kansas law abridges the freedom of contract of employers.

The second case in this group is Railway Co. v. Brown, 80 Kan. 312. This involves the violation of the law against blacklisting of

employees by employers (See Chapter 144. Laws of 1897). A.W. Brown was employed by the Atchison, Topeka and Santa Fe Railway Company as brakeman. The Company employed a detective, who, garbed as a "tramp" boarded the train upon which Brown was employed, ostensibly stealing a "ride". Brown was reported by the detective, to have received forty cents from him as fare, and that Brown appropriated this to his own use. Brown was discharged by his company. He demanded a statement in writing, of the true cause of his discharge. The statement of the Company was that Brown was "Discharged for cause". Brown presented this statement to several other companies applying for work but all refused employment. He brought action against the Santa Fe Company and recovered an award of \$300 damages. The case was appealed.

The Supreme Court overruled this decision on the ground that the spirit of the statute did not intend that employers should be forced to lay themselves open to libel charges as they might do if they stated the real cause of discharge.

There is a law (Ch. 187 Laws of Kansas 1893 (Revised 1923)) in the statutes of Kansas which provides that all corporations except those engaged in farm and dairy production must pay their employees weekly, not later in the week than Friday. Steam railways and the above-mentioned corporations make payment semi-monthly. In case of delay of payment certain percentages of wages must be paid in addition as penalties. Where an attorney is employed to collect wages, the fee of the attorney was to be paid by the employers, in addition to the other penalties.

Under this law, the case of Anderson V. Oil Co., 106 Kan. 483, is given. This establishes the unconstitutionality of the clause relating to attorney's fees. The case of Howell v. Machine Co. 86 Kan. 537 established the rule that when an employee accepts payment in full, even though payment was delayed, he may not afterward recover for the amount of the penalties.

Claim for wages are superior to material-men's liens, and mechanic's liens, when the assets of employers are liquidated by a receiver for assignment for creditors. Wages are to be paid from the first moneys coming into the hands of receivers. (See Laws of Kansas 1901 Chapter 229 Sec. 1.). In Geppelt v. Stone Co., 90 Kan. 539, the receiver of the Stone Company did not pay wages claims from the first moneys. Action was brought and the case appealed to the Supreme Court on the question of continuity of the claims. The rule was established that failure to pay, did not defeat the claims nor render them void.

A few cases are given in brief which involve the status of workers under the mining laws. The case In Re Williams, Petitioner involves the constitutionality of Chapter 250, Laws of 1907, relating to the sale of blasting powder to miners. The law prescribes that powder shall be sold in original packages containing $12\frac{1}{2}$ pounds of powder. Williams was fined \$50 for violation of this law. He refused to pay his fine and was committed to jail. He sued a writ of Habeas Corpus and petitioned directly to the Supreme Court pleading the unconstitutionality of the act. The Supreme Court ruled that the right of the state to govern mining regulations was established by precedents, and remanded the petition.

Employees in mines assume the risk inherent in the mining business. (Coal Co. v. Britton, 3 K.A. 292). Where employers are in willful violation of mining statutes they may not employ the defenses of contributory negligence and assumption of risk. (LeRoy v. Railway Co. 91 Kan. 548). This case also establishes the rule that liability of employers is not shifted by negligence of an untrustworthy employee. For annotation of these cases see Revised Statutes of Kansas 1923, Pp. 749-751.

The last case to be given is State v. Johnson et. al. of-
ficers of the Court of Visitation of the State of Kansas, 61 Kan. 805. The Court of Visitation was established in 1898 (See Laws of Kansas, 1898 Ch. 26), for the purpose of regulating railways.

The Court was composed of three members, a chief judge and two associate judges, a marshal and a court clerk. The Court was authorized to try all cases relating to freight rates, switching and demurrage charges, and other charges made by carriers; to apportion charges between connecting roads or carriers and to regulate charges for part-car-load and mixed-car-load freight lots; to regulate railway construction and facilities, operations and service; to regulate crossing intersections, the movement of trains and the safety of employees and the public; to force railroads to obey their charters. The Court had power, as a court of equity, to summon juries and to select juries as directed by rules of its own choosing.

A state solicitor was provided, by the law, to be appointed by the governor whose duty it was to receive all complaints to the Court of Visitation and to present these as information before the Court. The Court through its clerk, issued a citation and a copy of

the complaint to the sheriff of the county in which the defendant lived. The county sheriff issued this as a summons charging the usual fee. The defendant was required to answer the citation within 25 days. After this time, the information was listed on the docket of the Court whether answered or not. The trial was set for a day in the succeeding month. The Court was authorized to issue any order in keeping with the above provisions. Refusal, on the part of railway companies, to obey Court orders would result in sequestration of the Company's property, and the appointing of a receiver to control the property in compliance with orders. Final review by the Supreme Court was provided. The Court was in continuous session at the State Capitol.

The case in discussion came about as follows: In February 1900, the state solicitor filed an information with the Court to determine charges and rates for shipment of cattle on the Atchison, Topeka and Santa Fe railway in Kansas, to make a schedule of rates and to enjoin the railroad company from making any other, and stating that the railroad company was making excessive charges. The Court refused to take steps in the matter, holding that such action would be abuse of its powers. The State Attorney-general then filed a petition in the Supreme Court praying a writ of mandamus to issue to the clerk and judges of the court commanding them to hear the case.

The opinion of the Supreme Court on this petition was in part as follows: "The framers of the Constitution of the United States were influenced by the doctrines of Montesquien, then in the height of its influence, that the powers essential to governments should be distributed among three separate bodies of magistrates, viz., Legislative, Executive

and Judicial. - - - All writers on Constitutional law are agreed that the functions of the three departments should be kept as distinct and separate as possible. The Court of Visitation is endowed with complete common-law and equity powers, lavishly conferred. - - - The attorneys for the state unitedly agree that the Court of Visitation is a judicial tribunal and that the powers conferred upon it are in large part, purely judicial - - - Being a court, the vital question - - - is whether such tribunal has been endowed with legislative powers to an extent destructive of that separation of governmental functions ordained by the constitution."

"We start - - - in considering the boundaries of judicial and legislative power under our Constitution and system of government, from a fixed monument, to determine whether the legislative power to make rates may be conferred upon the judicial tribunal known as the Court of Visitation."

"The rate-making power, being essentially legislative in its nature - - - can no more be imposed on or be exercised by the judicial department than can the pardoning power of the governor or any other distinctively executive function. It is a cardinal principle of representative government that the making of laws and rules regulating the future conduct and fixing the rights of parties belongs to the legislative department - a power which can never be reposed or exercised by the judiciary."

"The power to fix rates and classifications is without doubt conferred upon the Court of Visitation by the terms of the law under consideration - - - The statute under consideration is skillfully

constructed to confer legislative power upon the Court of Visitation to fix rates, - - - This tribunal possesses the extraordinary power of proclaiming - - - schedules which are made conclusive in the future; and any future controversy which might arise between the shipper and the railroad company has thus been prejudged and determined. Here is found a combination of the legislative and judicial functions".

"We think, that by the several provisions of the statute under consideration, legislative, judicial and administrative powers are so inextricably interwoven and bound up together as to render their separation impossible. - - - We must hold therefore that said Court of Visitation is wholly without that authority and jurisdiction which the legislature appears to have intended to confer upon it - - - The peremptory writ of mandamus will be denied".

This opinion was concurred in by Mr. Justice Johnson with no opinion given. Mr. Chief Justice Doster dissented on the ground that such powers as the Court of Visitation had were permissible on the authority of many cases. An instance of commingling of powers was quoted from section 12 of the Act of Congress, 1804, creating the Territory of Louisiana, and commenting on this Mr. Justice Doster said: "The judges were not only authorized to assist in the making of the laws but were authorized judicially to administer them when made - - - Nor is the lodgment of dual and even tripartite governmental powers in a single tribunal lacking in illustration among the decided cases. Indeed the decisions in which it has been allowed are almost as numerous as those which declare the general theory of distributive powers." The dissenting opinion was that for these reasons the statute should not

have been annulled.

The Court of Visitation case helps to define the field of regulation of industry. This decision above, had some bearing upon the formation of the Kansas Public Utilities Commission, the Industrial Welfare Commission, and the Court of Industrial Relations. Many of the arguments against the last-named, were used against the Court of Visitation, viz., commingling of functions.

In the State v. Howat cases this argument was answered by the Supreme Court: "The opinion in that case, (State v. Johnson) was written while the principles controlling the place in government of administrative boards was in the process of development. It is possible that language may have been there used which might require some modification before its acceptance as having universal application. But the vital grounds upon which the statute there considered, was held void, do not exist here. The present law bears internal evidence of having been drowned with a view to avoiding the features of the Court of Visitation Act, upon which the decision cited was based. The function of a tribunal of the general character of the Court of Industrial Relations has become so fully recognized that we do not regard it as necessary to undertake a review of the subject at this time." (See 107 Kan. 451).

This seems to be consistent with other decisions in the matter of regulation, and the development of present public acceptance of the powers and prerogatives of such bodies as the Interstate Commerce Commission, and the Public Utilities Commissions of the several states.

It is also in keeping with the opinion of the Kansas Supreme

Court in the case of Telephone Association v. Telephone Company, 107 Kan. 169. On page 174 of this decision it was said: "That case (Larrabee v. Railway Co., 74 Kan. 808), was decided many years ago, when public utilities regulation in this state was confined to railroads. A tribunal with the jurisdiction and powers of the Court of Industrial Relations was beyond the range of legislative vision, and all remedies were regarded as unusual and out of the ordinary course, which did not follow closely the paths of law and equity - - - It is now clearly perceived that what is most needed in the field of business intercourse is expert administrative adjustment and not court adjudication. Advancing step by step according to that principle, the legislature superseded the board of railroad commissioners with the public utilities commission, gave it authority to regulate public utilities generally, and then superseded the public utilities commission with the Court of Industrial Relations and gave it greatly amplified powers. The policy has become the settled policy of the state.

As has been seen the "greatly amplified" powers of the Court of Industrial Relations were condemned only in that they were misdirected. The word "Court" did not alter the constitutionality of this body but probably hindered its influence. It was merely a public service commission misnamed a court. The Court of Visitation however was fundamentally a court, and the other functions were added. It is very probable that the Court of Visitation would have been declared invalid even in the present day.

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