FOUR MAIN PHASES OF ENGINEERING LAW

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Introduction

Prior to the official introduction of this thesis, allow the writer to humbly entreat of the Gods for an endowment, as to wisdom, courage and an unfaltering ambition to contribute materially to the engineering profession, a contribution, really worthy of such a profession. It is not the purpose of this thesis to present a complete and unerring treatise of my subject; nor is it the purpose of this thesis to achieve unprecedented success in a literary sense, such is not my fate.

Before any piece of literature can be condemned as a failure or applauded as a success, it is essential to familiarize oneself with the degree of expectation or magnitude of the purpose, sought by the author. My purpose is simple and may superficially be questioned as to whether such an intention warrants the time and effort bestowed upon it.

I wish to build, no, not literally as in an engineering sense, but figuratively as in a didactical sense. If I could add just one little increment to the store of knowledge of my fellow engineers, if I could aid in sculpturing just one minute impression in their monument of fame, if I could accomplish this, I would feel as if my efforts have not been in vain. Let not the reader misinterpret me, for to pretend the forthcoming treatise is information not to be found elsewhere would be to defeat my purpose and be an utter falsehood. This thesis is just a brief collection or it may be nomenclated a recapitulation of various phases of law, which in my estimation, are vital to our profession. Perhaps I am overly optimistic as to the value of this thesis, if so, criticise not too harshly, for the world is suffering from the lack of such optimism, ..but if in a two hour period a colleague of mine can in-

telligently understand the problems of the legal profession and in many respects their intimacy or association with ours, I will be tempted to call it a success. It is true, literally speaking, a man cannot be both a lawyer and an engineer; it is posssible, however, to attain credentials to that effect, but in the final analysis a man can either build, in a material sense, or plead their causes; he cannot do both.

It is granted, however, a man can both build and supervise and it is this supervision, and the world has suffered from its deficiency, that a knowledge of law will more fully enable an engineer to successfully execute. The realization of this association is imperative, for in reality the engineering profession owes the world an obligation. Its machines of necessity, of convenience and of war have created and brought to the fore, the complex problems of modern life. Their task is not complete with the design, with the technical problems, but the engineer must go on to supervise and to regulate the prodigies of his mind not to the dereliction, but to the aggrandizement of posterity.

If the history and evolution of various phases of law are briefly discussed it would be expedient to justify their purpose. It is only to enhance the reader with a greater background and thereby aid in permanently retaining the current material in his mind.

EMINENT DOMAIN

Eminent Domain is the power inherent in a sovereign state, of taking or of authorizing the taking, of any property within its jurisdiction for the public good.

The origin of the power of eminent domain is lost in obscurity, since before the title of the individual property owner as against the state was recognized and protected by law, the right to take land for public use was merged in the general power of the government over all persons and property within its jurisdiction. Under Roman law the rights of citizens were regarded with such respect that it is extremely doubtful if the taking of their property was authorized by law, and yet the aqueducts and straight military roads seem to indicate the existance of some form of compulsory power. With the downfall of the Roman Empire, all traces of the power of eminent domain disappeared for centuries, because under the feudal system all land was held under a tenure which recognized the ultimate ownership of the sovereign and would not involve the appropriation of property for the construction of a public improvement in its modern sense.

Prior to the year 1544 little was done in England to indemnify an individual for the confiscation of a portion of his property for public use or benefit, especially if the benefit was in the form of a national defense such as the building of better roads to hasten the transportation of troops and supplies or the constructing and enlarging of wharves to facilitate larger and a greater number of ships. In the year 1544 the city of London was granted power by Parliament to enter upon and appropriate private property for the purpose of supplying the city with water, and the provisions of just compensation determined by appraisers appointed by the Chancellor. In the year 1765 Blackstone said, referring to the absolute right of private property inherent in every Englishman and to the provisions of the Magna

Charta that no freeman should be divested of his freehold but by the judgment of his peers or the law of the land, "So great, moreover, is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community"; but Blackstone goes on to say, "the law permits the legislative body and the legislative body alone to interpose and compel the individual to acquiece. But how does it interpose and compel? By giving him full indemnification for the injury therefore sustained."

In France before the revolution the power of eminent domain in its modern sense was not recognized; property was appropriated for public use without any compensation. In the year 1789, the Declaration of Rights and a little later the Code Napoleon, provided that no one could be deprived of his property unless public necessity plainly demanded it, and then only upon the condition of a just and previous indemnity.

The primary objective for the exercise of eminent domain in a nation, state or community is the establishment of roads. When the American colonies were first settled, the situation in respect to roads was just the reverse of what it was in England; there were no roads; the land was wholly unsettled and unimproved and not allotted to private ownership; therefore the power of condemnation was unnecessary. A route could always be found without any trespassing of private property, and even if in a few cases it was necessary, with thousands of miles of unoccupied available land, land had no substantial value per square foot; thus it was possible without serious objection to acquire the necessary property without compensation.

As the colonies were further settled, various colonies were influenced to a considerable degree by the English practice of inquest by jury; the writ

of ad quod damnum (to have damages estimated before construction begins by the party promoting the construction) was used and continued to be used until long after the revolution. The Code Napoleon continued in force in the state of Louisiana after its acquisition by the United States, and undoubtedly this has had an important effect upon the constitutional law of eminent domain in this country.

Next to the construction of roads, the most important purpose for the exercise of eminent domain in the colonial period was the erection and maintenance of mills. There were two distinct differences among the colonies with respect to the rights of mill owners.

In the New England states such as Massachusetts, Delaware and Rhode Island, there were statutes to the effect that a mill owner had to own both sides of a stream before he could legally construct a dam, and whatever damages caused upon riparian land were treated merely as a regulation of conflicting rights of the different riparian owners in the stream. If a riparian owner was damaged, he had to apply to the court for the issue of a warrant for injury, and to make an appraisal of his yearly damage.

In the southern colonies such as, Maryland, Virginia and North Carolina the statutes authorized a person owning a mill site on one side of a stream not merely to flood the land of the upper riparian proprietor, but to take by eminent domain an acre of land on the opposite side for the abutment of his dam. The southern statutes required the suing out of a writ of ad quod damnum by the mill owner, and thereby making the institution of proceedings to the owners of the land one of a respondant (same as a defendant in a court of law).

In short, the history of eminent domain in the American colonies seems to sustain the doctrine that the power of eminent domain as untrammelled by

constitutional limitations extends to the taking of any property within the jurisdiction of the state for the public good, subject only to the moral obligation of making compensation.

After the revolution when our colonies broke from their mother country, and the Articles of Confederation were agreed upon, each state of the confederation was sovereign with the exception of a few powers delegated to the federal government. The power of eminent domain was still endowed in the state as it had been before the revolution in the colonies. The new states on being admitted to the union came in with all the sovereign powers of the old one.

The downfall of the Articles of Confederation was followed by the present Constitution of the United States which specifically delegates to the federal government in the Fifth Amendment the power of eminent domain. The latter part of this amendment which was ratified in the year 1789, as part of the Bill of Rights, reads as follows, "an individual shall not be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation". The Constitution of the United States at ratification did not specifically state the position of the individual states in regard to the power of eminent domain, but the state constitutions themselves in the majority of instances specifically stated their limitations with regard to property. After the Civil War the Fourteenth Amendment to the Constitution of the United States was ratified which restricted the state to the extent that no state shall make or enforce a law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive a person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws.

Prior to the year 1831 the condemnation of property by the state and federal governments has been construction by these same parties (with one exception such as previously mentioned, when a few states permitted the private owner of a mill certain powers on the banks of a stream). The improvements have been without a doubt a public benefit, if not a private convenience as in the case of the draining of swamps and marshes and the introduction of water supply systems; then as a public convenience as in the case of the construction of roads and canals, of wharves and basins which brought about general prosperity due to the increase in trade and commerce.

Prior to this time there had not been any firm stand of the courts on the granting of the power of eminent domain to a private corporation.

In the year 1831 there arose litigation between Beekman and the Saratoga and Schenectady Railroad Company. Beekman secured a temporary injunction to restrain the Saratoga and Schenectady Railroad from crossing his farm, and the issue was now whether this injunction should be permanent. The railroad failed to negotiate a purchase of the desired right of way; so it resorted to eminent domain. The land was appraised and the money equal to the appraisal was deposited in a bank. Beekman claimed he had full title to his property and the legislative act granting the right of eminent domain to a private corporation was unconstitutional. The railroad replied that the legislature had this power; since all the land was originally owned by the sovereign, it had the right to "retake" through proper legal procedure. This includes compensation.

The chancellor held that the legislature had the right to retake the property with just compensation, if it could be proven that a public interest required that it should be taken. This is regardless of the fact that the benefits to the public are effected through the medium of a private corporation.

It is upon this principle that the legislatures of certain states allowed the condemnation of the lands of individuals for mill sites. It is objected that a railroad differs from other public improvements, particularly from roads and canals, because the public cannot use their own vehicles, and the railroad is unlimited as to the toll they can charge. But if a railroad will enable one to travel from one place to another without the expense of a horse and carriage, he derives greater benefit from the improvement. If a farmer can transport to market his produce by railroad at half the price which it would cost him to carry it by his own horse and wagon, it is indeed a benefit. If an individual is so unreasonable as to refuse to permit a railroad to go through his lands, the legislature may lawfully appropriate a portion of his property for this public benefit or may authorize an individual or a corporation to appropriate it upon just compensation to the owner for the damages sustained.

Injunction denied.

From the year 1831, after the court upheld that the power of eminent domain should be given to a railroad, to this day, it has been interpreted that such private corporations as public utilities and trolley car companies should be placed in the same category as the railroad. This interpretation was indeed an expedient policy, for it is this contribution to private corporations that we can acclaim our vast network of both our transportation and communication lines, and our vast underground network of lighting and heating conduits. One reason this United States of America is the greatest country in the world today is without a doubt due to the concessions granted by our courts to private initiative. Did the courts discriminate against small property owners? No, the courts only granted the power of eminent

domain to that private initiative whose growth or germination had an incite to a public good.

In the past fourty years there has been increased litigation confronting our courts which varies somewhat from the disputes evolved from the usual routine requests, for the granting of the power of condemnation. It will not be possible for the writer to generally summarize or characterize this additive divergence from the routine other than the citing of particular situations and the point of law which decided this particular dispute, one way or the other. The citation of these cases should prove exceedingly interesting because it should enable one to understand our current problems and policies regarding eminent domain with greater clarity.

Clark v. Nash

198 U.S. 361; 49 L. Ed. 1085; 25 S. Ct. 676, 4 Am. Cas. 1171 (1905)

Lee L. Clark had an irrigation ditch, 18 inches wide by 12 inches deep, which brought water to his farm, all located in the arid portions of the State of Utah. E. J. Nash had riparian rights in the same creek, and sought to widen Clark's ditch by 12 inches and offered to pay his share of the operating expenses of the new ditch. Nash showed that owing to the topography of Fort Canyon Creek, it was impracticable to build a second ditch to Nash's farm.

The Utah court allowed Nash to condemn the property of Clark, and widen

the ditch to a capacity which will enable sufficient water to flow to the lands of both Nash and Clark.

Clark appeals to the Supreme Court of the United States.

Justice Peckham contends that the condemning of property to enlarge a ditch across the land of the plaintiff, (Clark) for the purpose of conveying water to the land of the defendant, (Nash) is not a public good or benefit. Therefore according to law it cannot be legally done.

It is charged that there is a law among Utah state statutes which permits a man to condemn the property of another, and to dig a ditch across the property, and convey a proportion of the available water equivalent to his riparian rights. This statute is unconstitutional in reality, but in the state of Utah, and states of similar circumstances, where irrigation is the difference between valuable land and worthless land (this is true of mining as well as farming), it would be necessary to enact such a statute in order to make as much of the land humanly habitable as possible. We therefore contend that the statute is valid, and that the lower court ruling in favor of Nash is also affirmed.

Justice Peckham goes on to say that it is not the desire of the supreme court to be understood that because of this decision, it approves of the broad proposition that private property may be taken in all cases where the taking may promote public interest and tend to develope the natural resources of the state.

Francis Jones and Co. v. Venable
120 Ga. 1; 47 S.E. 549; 1 Ann. Cas. 135 (1904)

Francis Jones and company brought an action to condemn land of W. H. Venable for a private railroad to bring out granite from the Rock Chapel Mountain Quarry to the Georgia railroad. The company admitted that it would be a private railroad, but claimed a right of eminent domain under Georgia laws; because of the necessity to take this particular route. Venable secured an injunction in the lower court to restrain the company in its condemnation, and the company now appeals.

Justice Fish contended that the question is whether a person or corporation actually engaged in the business of quarrying granite or other stone, and who needs, for the successful prosecution of such a business, a right of way for a private railroad across the lands of others, may in case of necessity acquire a right under condemnation proceedings.

The lower court granted the injunction contending that the law which permitted a private person or corporation to condemn the land of another for the building of a private railroad for the hauling of granite from a quarry was unconstitutional.

The law was interpreted as such; therefore the injunction is justly granted. But the lower court has errored, in that the constitution of the state provides: In case of necessity, private ways may be granted upon just compensation being first paid by the applicant. The constitution does not explain private ways and the power of condemnation through necessity is therefore the only limitation which must be determined by the court. If the railroad is necessary and in this case it is, the decision is reversed; thereby lifting the injunction.

New York City Housing Authority v. Muller

270 N.Y. 333; 1 N.E. (2d) 153; 105 A.L.R. 905 (1936)

The New York Housing Authority was proceeding on a large scale housing project in New York City and was exercising its right of eminent domain to acquire title to certain property. The defendant (Muller) questioned the right of the plaintiff alleging in part that the state statute was unconstitutional since the apartment would not be for such public use as is required by the legitimate exercise of the right of eminent domain.

Justice Crouch contended that as the purpose of this housing program was to build large apartment buildings to alleviate the huge slum area prevalent in New York City, and as the slum area was unquestionably a breeding place of disease, juvenile delinquency, crime and immorality, and which not only takes its toll upon the denizens of it but affects every citizen throughout the city, state and nation, it is indeed measured by the public health, welfare and safety. The right of eminent domain in this instance is exorcised through public benefit and public use and within the law. Judgement for the New York City Housing Authority.

Pittsburgh and West Virginia Gas Company v. Cutright

83 W. Va. 42; 97 S. E. 686 (1919)

The Pittsburgh and West Virginia Gas Company attempted to condemn a pipe line right of way over the land of M. R. Cutright, through the right of eminent domain. The pipe line was designed to serve a few customers, but also to take the gas through a gasoline plant. It was admitted that service to customers

was a proper public use to support the right of eminent domain. The company maintains that the private use, if it is such, is merely incidental to the public use. From the judgement for cutright the gas company now appeals.

Justice Miller: The sole and only question here presented is whether the particular strip of land, sought to be taken, is for a public use or only for the private use of the petitioner. It is admitted that the purpose for which gas is gathered at a compressor station is to pump it on to the gasoline plant. It is also admitted that having reached the gasoline plant water and other liquid substances are removed. The removal of these substances is imperative; to convey to the public the purest quality of gas; to alleviate clogging and gas leakage which would from time to time cause interruptions in service, and to decrease the cost of maintenance and increase the life of the pipe line. It therefore constitutes a public benefit, which is incidental to a private use, to condemn property to lay a pipe line between the compressor house and the gasoline plant.

Decision reversed and with order to proceed with condemnation.

James v. Dravo Contracting Company

302 U.S. 134; 82 L.Ed. 155; 58 S. Ct. 208; 114 A.L.R. 318 (1937)

The Dravo Contracting Company built certain dams for the United States on the Kanawha River in West Virginia and E. K. James, a state tax commissioner, levied a tax of $135,761.51, as 2 percent of the gross sum received by the company from the United States. The tax was attacked as being in effect a levy on the operations of the federal government by a state, which incidentally raised

the question of the federal right to take property by eminent domain for federal purposes. Dravo secured an injunction restraining James from collecting the tax, and James appeals.

Justice Hughes contends that the issue is not the legality of the power of condemnation, of state property, by the federal government. The issue as to the validity of this power by virtue of the sovereignty of the federal government has been determined by previous cases such as the Kohl v. United States and many others.

The contention that a transfer of legislative jurisdiction carries with it, not only the benefits but also the obligations, is true, but one should not neglect the fact that just as the states reserve jurisdiction for local purposes, such as in counties and municipalities; so should the United States reserve jurisdiction for purposes within the state, especially as governmental activities are being expanded and larger and larger areas acquired.

Judgement is affirmed.

Shedd v. Northern Indiana Public Service Co.

206 Ind. 35; 188 N.E. 322; 90 A.L.R. 1020 (1934)

The Northern Indiana Public Service Company brought an action to condemn certain lands of Charles B. Shedd by the right of eminent domain. Shedd set up the defense that the transmission line right of way in question would serve customers in Illinois, and was therefore not a public purpose in Indiana. The company replied, that the requirement of public use was met when some customers in Indiana were served, and that the use did not have to be exclusively within the state of Indiana. From the judgement for the com-

pany, Shedd now appeals.

Justice Hughes: It has been presented that the state of Indiana has no power of eminent domain for uses constituting interstate commerce over which the United States alone has sovereign right of control and regulation. This proposition as it stands is correct, but when viewed further a different situation is presented. If the state possesses the power of eminent domain for uses over which it has sovereign rights of control and regulation, does the mere fact that an electric power plant, such as the one in question, transports and sells its output to other states affect the power of eminent domain of that state? It does not.

As stated in the appellant's brief the evidence shows that one of the proposed uses of the land sought is to provide for transmission lines for the transmission and sale across the state line to the commonwealth Edison company and the Public Service company, this electricity to be generated by the appellee company at its proposed station at Michigan City, Indiana.

The answer to the foregoing question is stated in the rule of law given in the case of the Columbus Waterworks company v. Long, wherein the court said:

It is clear that the right of eminent domain should not be denied where public uses are to be subserved in the state granting condemnation, because in connection therewith, public use in another state may be likewise promoted. A state should not refuse to exercise its right because the inhabitants of a neighboring state may incidentally partake of the fruits of its exercise. Such refusal would violate the principles of just public policy and the neighborly comity which should exist between states.

The case of Washington Water Power company v. Waters also confirms this rule of law.

The question in this case is: Is the use a public use within this state

and does it serve the interests of the state? The question must be answered in the affirmitive, for the fact that the state of Indiana is in such proximity with the state of Illinois, that benefits to the state of Illinois will indirectly promote benefits to the state of Indiana.

The special findings of facts and the evidence in this case show that the use for which the property is taken is a public one, and the fact that the people of another state may also be benefitted will not defeat the right to condemn.

Judgment affirmed.

Panhandle Eastern Pipe Line Company v. State Highway Commission

294 U.S. 613; 55 S. Ct. 563 (1935)

A statute of the state of Kansas gave the State Highway Commission authority to order bridge abutments, wires and pipe lines moved to other locations. After the Panhandle had put in its 24 inch high-pressure pipe line, the highway department relocated a trunk road, thereby crossing the pipe in question. It ordered the pipe line altered, the company refused, and finally the commission got a mandamus from the Supreme Court of Kansas directing the Panhandle to move its line at its own expense ($5000). The Panhandle now appeals to the Supreme Court of the United States, charging that the state statute is unconstitutional if applied to this case. The Panhandle says this is taking property without due process of law and it also said it would be willing to move its pipe line when it was given the $5000. The commission says it has the right and the authority to order such a change. The

commission further contends that this is similar to railroad cases, where police power could always be used for public safety. The Panhandle replies that this case comes under the field of eminent domain with just compensation as guaranteed under the Fourteenth Amendment of the U. S. Constitution.

Justice McReynolds: We cannot accept the view that under the Federal Constitution, the appellant's transmission lines are upon the same footing as railroads, for a railroad crossing represents a hazard while a twenty-four inch high pressure pipe buried beneath the ground is not a constant hazard to vehicular travel. When the railroads obtained permission to occupy certian property, it did so with the understanding that it was subject to reasonable legislation to prevent danger. This would apply to the appellant, but hazard was not disclosed as being the cause for the alteration of the pipe line.

With respect to the constitutionality of the Kansas statute, it cannot be questioned that police power is necessary to regulate various traffic problems, but there must be an implied limitation to the police power of this act, for beyond a certain extent, there must be an exercise of eminent domain and compensation to sustain the act. We are in danger of forgetting, that a strong public desire to improve the public condition, is not enough to warrant achieving the desire, by a short cut, than the constitutional way of paying for the change. It is the governmental power of self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury.

Decision for the Panhandle.

State ex rel. Chelan Electric Co. v. Supreme Court

142 Wash. 270; 253 P. 115; 58 A.L.R. 779 (1927)

A lower court refused to proceed with condemnation proceedings, because the petitioner, the Chelan Electric company, planned to sell part of its electricity to private manufacturers. The company brings the present appeal to have the case reviewed, claiming that their general business, including the electricity for industrial purposes, meets the requirements of public use.

Justice Asken: The use for all the purposes mentioned has heretofore by our decisions been declared to be a public use. Although our decisions have not been construed as applying to various domestic appliances such as heating, cooking, washing machines, ironers and other electrical devices, it cannot be doubted that such uses are public.

The balance of generated power will be applied to uses which we have heretofore held to be private such as mining and manufacturing. A few manufacturing purposes are: refrigeration in stores, cafes and butcher shops; repair and sewing machines in shoe repairing shops and in dressmaking and tailoring shops; clippers and vibrators used by barbers, sterilizers and X-ray machines used by medics and dentists; there are innumerable electrical appliances in all walks of life, a few were mentioned just to illustrate.

It is therefore a just contention that due to the changed conditions of society, generated power for the foregoing mentioned purposes are a public use and benefit. We hereby overrule whatever prior decisions which seemingly present the viewpoint that water power is not devoted to public use when applied to mining and manufacturing purposes.

Judgment reversed and direction to proceed with condemnation.

There is little doubt that the power of eminent domain has evolved from a strict interpretation to that of a liberal one, as the need for such an interpretation was evident. An example of this liberalism is evidenced by the decision of the New York Supreme Court granting the power of condemnation to the New York Housing Authority. The ever increasing social legislation enacted in the past ten years is approved by the courts if its enactment is indubitably a benefit. (Let this not be construed to mean such legislation as the National Recovery Act, N.R.A., which was categorically experimental.) With the New York Housing Authority case in mind it would be pertinent to predict a further extension of power being granted to the sovereign under eminent domain.

During the past fifteen years due to the mechanical age with its increase of leisure time and automotive conveniences, more and more of our people are beginning to travel. The near future will bring about an even greater percentage, and this will necessitate vast chains of overnight lodgings, bathing facilities and various provisions for exercising a fair degree of culinary art. To provide for these tourists at sites of greatest beauty and health, it will be necessary to condemn land to attain these particular sites. The government will then supervise the construction and regulate the management so as to prevent any unsanitary and immoral conditions. The rates charged by the managers of the tourist camps will also be regulated by the government.

The foregoing prediction is purely a personal one and should be discounted accordingly. Although it is logical to conceive, if the tourist rate is to continue to increase, provisions will have to be made for the solution of this problem.

WORKMEN'S COMPENSATION

During the early period of industrial activity an employee was compensated by an employer only through litigation under the common law rules of negligence. It was much the same as our present day claims for injury to Smith's automobile. Smith must show that Brown was negligent and that Smith himself was free from negligence. There was probably no greater probability of recovery in the old industrial accidents than in the present day automobile accidents.

A summary of what would have to be proved is as follows:

If the employee was himself negligent and thereby contributed to the occurrence of the injury, such contributory negligence on his part, precluded a recovery of damage from his employer for such injury. This rule was founded upon the theory that each employee should exercise all reasonable care for his own protection, and should not recover for damages resulting from his own neglect of his personal duty of care.

He had to prove the employer did not use reasonable care for the safety of his employees while they were engaged in the performance of his work. This included all reasonable means and precautions to prevent injury, this means, to the extent that any reasonable, prudent man would supply if he himself were exposed to the dangers of the servant's position.

The theory of common law negligence did not cause hardship in our early history, for at this time all our manufacturing units were in the home. Industry was simple, free from danger; severe personal injury was a rarity. It was not thoroughly unreasonable that an employee should assume those risks.

These risks gradually expanded to where the skilled workman brought within his household the workmen under him, but as the latter were men from the small community itself, known to one another, all their individual

characteristics were a matter of common knowledge and not especially detrimental. But with the invention of the steam engine, and the "Industrial Revolution", which gave rise to the factory system and its mechanical hazards, there was a dire need for a change in policy.

The protection provided to employees waned as the need for it grew, for the courts added the limitations that they would presume the contract between the employer and the employee contemplated and designed to mean that the employee would assume the responsibility of any special or unusual risk, where he either knew of its presence or it was his duty in the course of his employment to find out. The ordinary risks which were incidental to his employment, and which he could avoid with ordinary care on his part, were perils he could guard against as effectively as could the master. These were perils of the service and were provided for in the rate of wage.

If the negligence theory could be proven an employee in a personal injury suit would be entitled to damages to the following extent:

Medical and other expenses necessitated by the injury.

Financial losses arising from inability to work or earn money due to disability.

Payment for physical pain and mental suffering resulting from the injury.

In case of death from a negligently inflicted injury, originally the surviving dependents had no right of recovery. The right of action was regarded as being personal to the employee and died with him. Finally a right of action was given to certain members of the family of the deceased. If a wife sued, the basis of her damage was the pecuniary loss sustained by her, due to the withdrawal of her husband's support and society. If suit

was brought by surviving children, pecuniary loss was involved in the withdrawal of support, comfort and care.

There were many objections to the theory because assessment of damages was left to the injured which resulted in a wide divergence of values. Trivial injuries frequently resulted in excessive judgment, while severe injuries were often greatly undervalued. The whims, passions, emotions, prejudices and temperamental peculiarities of individual jurymen and women were a potential source of erratic verdicts over which there was little or no control. The temperamental instability of the collective judgment of any group, as casually selected as are our juries, is the chief ground of objection to the jury system. Only too often emotions and not reason control the verdict.

When it was realized that the old law of negligence was no longer equitable a new period began. Attempts were made to remedy the defects of the common law legislative enactments. Employers' Liability laws were enacted modifying or abrogating certain doctrines of the common law which was felt to be inapplicable to modern conditions. This new legislation made the employer legally liable for any injury occurring as the result of neglect, default or wrongful act of any agent or officer of such employer, supervisor to the employee injured. (Such as superintendants and various grades of foremen.) However the fundamental concept of liability based upon negligence of the parties involved was still adhered to. It was difficult for an injured employee to recover any compensation. Litigation was expensive to both employer and employee. A just employer was fearful of assisting his injured workmen for fear of admitting liability for the injury. Court costs and lawyer's fees generally absorbed the benefit of the employee's verdict

if he received one. Unscrupulous attorneys took advantage of the necessities of the injured workmen to drive hard bargains with them, and in turn sought to negotiate extortionate settlements with employers. Deserving injured employees often recovered little or nothing and employers were frequently compelled to pay large judgments for trivial injuries. After a period of experimentation, it was generally conceded that Employers' Liability legislation had only served to accentuate the defects of a thoroughly unwise and unjust system of indemnification. The demand was then for an entirely new philosophy.

The philosophy of workmen's compensation was first developed in Germany, as a result of political agitation. Bismarck urged the adoption of some legislation to offset the appeal of the new socialistic doctrines with the result that in 1881 the first of a series of laws was passed, culminating in 1884 in the first accident insurance law.

After Germany's initial effort, other European countries undertook legislative reform in their own efforts to adjust social problems brought about by the advent of the "Industrial Revolution". In 1880 England passed its first Employers' Liabilities act, which abrogated, but not entirely, the common law defences of the employer. Their first compensation legislation of 1897 was amended by an act of 1906 which was further changed in 1911. Austria adopted the principle in 1887, followed by Norway in 1894. Even autocratic Russia had its compensation act.

In the United States the compensation laws differs from that of most others due to the fact that in this country there are numerous semi-independent governmental units such as the forty-eight states and the federal government. In Europe, however, the laws were adopted by centralized national government.

The Federal government introduced the idea into the United States. As early as 1882 employees in the Life Saving Service, suffering service injuries or diseases, were granted certain benefits. In the year 1900 employees in the Federal railroad mail service injured while on duty were allowed full salary for one year, and one half salary for the succeeding year. In the year 1908, a more general law for Federal employees was passed which remained unchanged in its rather limited scope for it was limited to employees engaged in interstate commerce until 1916. In that year a law applicable to all civil employees of the United States brought greater benefits. In 1919 this was enlarged to include employees of the government of the District of Columbia.

The Federal Employee Liabilities Act of 1908 gave definite rights to employees of common carriers engaged in interstate commerce by rail. In 1920 seamen were given benefits of the Act of 1908. The Federal Longshoreman's Act of 1927 was made to apply to the District of Columbia in 1928.

Maryland was the first state to provide for scheduled benefits without suit and proof of negligence under a cooperative insurance law of 1902. This was of strict application and was declared unconstitutional two years later. From year to year vaious states in the Union adopted compensation laws until up to the present time there are but four exceptions, Arkansas, Florida, Mississippi and South Carolina.

The philosophy of workman's compensation adopted by the major part of the civilized world completely outlawed the question of negligence.

The compensation acts were founded upon the cardinal principle that the risk of injury and the financial burden resulting therefrom should be borne by industry as a whole rather than fall solely upon the employee involved. The employer assumes this expense as a part of his cost of production and

protects himself against this hazard by insurance, the cost of which is cared for as are taxes, fire losses, depreciation of or accident to machinery and other industrial equipment. It is in effect, a special tax, and a part of the operating expense just as truly as is the cost of repairing broken machinery. It is argued that industry should pay for broken arms and cracked skulls, even as it pays for broken gears and cracked flywheels. It is all a part of the expense of operating the plant.

After years of litigation by employer and employee many employers were quite favorable to the enactment of various compensation laws. The acts provided for a definite schedule of awards for various types of injuries, such as for incapacity to work resulting from injury. Our own Michigan compensation laws state that the employer shall pay or cause to be paid as hereinafter provided, to the injured employee a weekly compensation equal to sixty-six and two thirds percent of the difference between his average weekly wages before the injury, and the average weekly wages which he is able to earn thereafter, but not more than eighteen dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks from the date of injury. There is also tabulated in detail the compensation entitled the employee if through injury, he loses a thumb or any other part of his body; for instance, for a thumb, he is entitled to sixty-six and two thirds percent of the average weekly wage during sixty weeks. Just as a machine has the price of all its parts listed, if the reader will pardon my comparison, the price of every part of our body is tabulated.

Many states are extending their statutes to include silicosis, hernia and metal poisoning.

The typical compensation act affects all employers and employees engaged in enterprises or businesses declared by the statute to be hazardous. These individuals are automatically under the act whether they wish to be or not, without any partiality or discrimination shown to the state, county, town, township, incorporated village or schooldistrict and municipal corporation.

The hazardous enterprises are namely these:

1. All construction, including repair, remodeling, removing, demolition and electrical work.

2. Carriage by land or water and loading or unloading in connection therewith, including the distribution of any commodity by horse drawn or motor driven vehicle where the employer employs more than three employees in the business.

3. All warehouse operation.

4. Mining, surface mining or quarrying.

5. All enterprises where explosives, molten metals, injurious gases or vapors, or corrosive acids, are manufactured, used, generated, stored, or conveyed.

6. All enterprises wherein machinery is used, now or hereafter subject to statutory regulations.

The statutes are usually administered by a state industrial board or commission. (In Michigan, a State Administrative Board.)

When the accident occurs the employee must report to the board, and the employee must make an informal claim within a specified number of months. The awards may be financed through company funds, by state insurance risks paid by the company, or through private insurance companies. The rate of

insurance is determined by accident experience in various occupations. It is usually computed as a ratio of the pay roll. The company accounts are audited at the end of the year, to determine the actual pay roll, and adjustments are then made in the premium paid. The rate varies as the danger of the job. For instance, for clerical work the rate may be as low as nine cents per $100 of payroll and salvage work may have a rate as high as $34.14 per $100 of payroll.

The problems of the administrative board or commissioners are these: it is no easy task in administration to keep workmen's compensation acts from being overloaded by heaping cases which in fact belong to unemployment or disease on their docket. Although there has been alleviation due to the adoption of unemployment insurance by many states.

There are various employers who complain of the expense of workmen's compensation. Theoretically they have no just cause for complaint as this expense is passed on to the consuming public, and it is absorbed by the business itself. This fact may alone have its beneficial results because they will use greater precautions for the prevention of accidents.

On the part of many employers, there has not been the understanding of the magnitude of this problem, due to the fact that they have purchased insurance and they feel that the safety is solely for the carriers. However a good or bad reaction will reflect itself in insurance rates.

In considering any legislation providing improvements of our compensation laws or any other laws, if the reader will permit me to generalize, one can place additional obligations upon industry only when there is an ability to meet them. Industry incurs certain obligations under the compensation laws. Its meeting these obligations is as essential as is its incurring them.

As society's representative, it is the duty of the commission to see that the rights of both employee and employer are protected; to see that each injured workman receives every dollar its act provides, but no more; and that payments are made promptly with a minimum of expense and litigation.

To more fully inform the reader, as to the policy of our courts in the matter of workmen's compensation laws, a diversified series of judicial decisions folows:

Richardson v. Crescent Forwarding and Transportation Company

135 So. 688, 17 La. App. 428 (1931)

Monroe Richardson was employed by the defendant as a laborer in loading and unloading trucks. He was injured while doing his work. The company had not elected to come within the state act, but the commission treated the work as extra hazardous, thus justifying the award made. The defendant appealed, alleging that truck loading is not listed in the law as extra hazardous.

Justice Higgens: The counsel for the defendant claims that the point of truck driving, as hazardous, could not be employed because Richardson was not a truck driver. This is true but his duties brought him into frequent contact with trucks and upon many occasions required that he ride them. In this way it was necessary for him to work in or about them, and whether or not he himself operated a machine is of no great importance.

We agree with the counsel for defense, that the mere fact, that certain phases of the general work conducted by the master, are hazardous, does not

result in bringing all employees under protection. For instance, stenographers, office boys and bookkeepers are not protected if injured, except through redress under article 2315 of the civil code. But, where certain phases of work are hazardous and are within the contemplation of the compensation statutes, all employees engaged therein, or necessarily brought into direct contact therewith, are afforded the protection which the compensation statutes were designed to furnish. The award of the commission is affirmed.

Lazarus v. Scherer

174 N.E. 293 (1931)

Murray Scherer, a pump repair man, was engaged by H. Lazarus to repair equipment for the Maumee Oil Company. Lazurus is the owner of the oil company. Scherer's torch caused an explosion during the work, and the Industrial Board of Indiana granted compensation. Appeal is brought alleging that Scherer's relationship was that of independent contractor, and not employee.

Justice Neal: As heretofore stated, the appelle, when the work was finished, rendered a statement to the appellant charging one dollar an hour for his services. While the mode of payment is not a decisive test in determining the relationship between appellee and appellant, yet it must be considered.

The fact that the appellant could discharge the appellee at any time, and the appellee could have ceased work when he chose, thus the power of discharge on the one hand and the right to cease work on the other,

establishes the fact that the appellee is an employee. The appellee is not an independent contractor.

The award granted is affirmed.

Security Union Insurance Company v. Mcleod

36 S.W. (2d) 449 (1931)

A. M. Mcleod was one of the truck drivers employed by J. L. Menefee to deliver gravel, under a paving contract with Whitham and Company. Mcleod was injured and sought recovery under workman's compensation.

Justice Ryan: The process of loading the gravel onto trucks was as follows: Whitham and Company owned and operated a crane which lifted the gravel into a chute; the trucks were backed under and filled from the chute. This process was under the control of an employee of the Whitham and Company. As a truck was loaded and after a signal "to pull out" was given, the truck driver left the pit with his load and brought it to the place of delivery, where the truck was unloaded. In unloading, the truck driver, on a signal from an employee of Whitham and Company would back in and "dump the load".

Whitham and Company exercised no other control over the trucks or their drivers than as detailed above, in the loading at the pit and the unloading at the place of delivery.

On delivery of the gravel, Whitham and Company gave the driver a slip or ticket which showed the number of yards hauled on that load, which was turned over to Menefee, who twice a month presented such slips or tickets to Whitham and Company and was paid for the hauling, at the rate of 75 cents

per cubic yard, based on such slips or tickets.

Under Whitham and Company's agreement with Menefee, they had no right to employ or discharge the men driving the trucks, nor to repair the trucks nor control his men; they never carried these men on their payrolls or paid them, neither were the men ever reported to the insurance company as employees of Whitham and Company, nor was any premium paid on them.

We have reached the conclusion that there was not a master and servant relationship between the Whitham and Company and Mcleod. Maleod was an employee of Menefee, and had no right to gain compensation from the insurance company of Whitham and Company.

Judgment for the insurance company.

Foyle v. Commonwealth of Pennsylvania

101 Pa. Super. Ct. 412 (1931)

Martin E. Foyle, an assistant superintendent of schools of Schuylkill county, was killed in the course of his employment. The Workmen's Compensation Board awarded compensation to widow and minor children, but upon appeal to the court of common pleas the award of the board was reversed. The claimants, Foyles, now appeal. The whole issue is whether Martin E. Foyle was an employee within the provision of the state statute requiring the relationship of "employer-employee".

Justice Gawthorp: From the statutory provisions above recited, it seems clear that an assistant county superintendent is not an employee of the commonwealth. His office is created by the legislature, his minimum

salary is fixed by law, he takes and subscribes to an oath, receives a commission and cannot be removed in any method other than that provided by the statutes. It follows that the provisions of the Workmen's Compensation Act do not apply to him.

The judgment of the court below is affirmed.

Milwaukee Toy Company v. Industrial Commission

234 N.W. 748 (1931)

Justice Fowler: Bayer as general manager of Milwaukee Toy Company was injured and attempted to gain the consent of the Industrial Commission for compensation. Bayer's time was consumed to a large extent with work such as would ordinarily be done by employees plainly within the act. (This was because the plant is so small.) The term general manager is ambiguous because it may indicate an executive position or a person performing ordinary duties of an employee.

In the case of Miller's Mutual Casualty Company v. Hoover the court said: the underlying reason for excluding the officers and directors of a corporation as such from provisions of the act is apparent. The officers and directors of a corporation do not come within the ordinary accepted meaning of the terms 'workmen' and 'employees', for whose benefit the legislation is primarily enacted. Their duties towards the corporation and its business are those of managing and directing heads, and as a rule do not perform ordinary tasks, nor are subject to ordinary risks. As a general rule, they are not affected by a temporary disability caused by injury.

Yet with the occupation of an official position with a corporation, does not in any way exclude them from coming under the Compensation Acts if there was a substantial reason for including them.

Judgment to Milwaukee Toy Company (Bayer) affirmed.

Todd Dry Docks v. Marshal

49 F (2d) 621 (1931)

Edward Pittson was a pipe fitter in the employ of the Todd Dry Docks Incorporated, and was sent into steerage quarters of the steamship "President Madison" to do certain repair work while the ship was temporarily in dry dock. The ship had very recently experienced an epidemic of cerebrospinal meningitis with a resulting long list of deaths among its passengers. Pittson died of the disease within a week after entering the ship and his widow placed a claim under the Longshoremen's and Harbor Worker's Compensation Act receiving an award. The Todd Dry Docks, Incorporated, appealed contending that the affliction did not constitute an "accidental injury or death".

Justice Neterer: The findings of the Deputy Commissioner appear to be fully sustained by rational and natural inferences from conceded facts, and are conclusive upon the courts.

The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection arising naturally out of such employment.

The deceased employee died from an infectious disease that arose

naturally out of his employment. The deceased came to his death through the pollution of the atmosphere by the infected persons who had worked on steerage.

As this statute appears broader than some state statutes, it does appear under the findings and evidence that the award is within the "accidental injury" phase, as well. No doubt, if the body of the deceased had been penetrated by the shots from the accidental discharge of a shotgun on the steerage, from the effects of which he lingered and died of blood poisoning, an award could be sustained. By the same token, the discharge of infectious germs by coughing and sneezing on the steerage some of which penetrated the mucous membrane of the employee, resulting in his speedy death. In the one case the shot penetrated the muscles of the body, and in the other the germ penetrated the mucous membrane.

The award is approved.

Rosichan v. Hoose

177 N.E. 843; 40 Ohio App. 25 (1931)

Mary Hoose brought action before the Industrial Commission, on a claim under the Workmen's Compensation Act, for the death of her husband. He was a warehouse employee of Rosichan and handled baled paper. At the time of the accident he was standing eight feet from the floor; he suddenly fell, the fall resulting in his death. The commission denied recovery, and an appeal was made to the court of common pleas, where extensive testimony was received concerning the real cause of his death. Some doctors held it was

the fall, some heart trouble, while some considered it to be a combination of the two. The court of common pleas granted an award to the widow, and Rosichan brings the present appeal.

Justice Allread: The lower court found that the decedent died as a result of a fracture of the skull with cerebral hemorrhage. Prior to the accident the decedent has had some heart trouble, but the court did not find any credible evidence that the fall was occasioned by heart trouble. The decedent's work often required that he stand on bales of paper with his feet eight feet above the floor, and the work done by the decedent on the morning of the accident was of such a nature as to be a possible contributing factor in causing a failure of his heart action, if heart failure was the cause of his death.

Taking these lower court findings as a whole we cannot escape the view that the death must have resulted from the employment.

Judgment affirmed.

Union Oil Company v. Industrial Accident Commission

295 P 513 (1931)

Captain Albert Pelle was employed by the Union Oil Company, his duties consisted of delivering oil to customers in the San Francisco Bay area. At the time of the accident Pelle was on the wharf, attempting to step onto his barge when he fell into the water and was drowned. The state commission allowed compensation to the widow, and the oil company appeals alleging in part that the accident did not "arise out of and in the course of" the em-

ployment. The appeal stated in particular that Pelle was merely going to his cabin to sleep for the night.

By the court. With respect to the finding that the deceased met his death in the course of his employment, we are satisfied that the conclusion reached by the commission should be upheld. The record shows that Captain Pelle was not required to remain on board the barge that night by reason of the rules of his employer. It was permissible for him to go to his home in Oakland, and he might have stayed there and met the barge at a point on its itinerary. On the other hand, if he desired to take charge of the barge at 6 A.M. when it was scheduled to leave, it would not be possible for him to go home for the transportation service would not get him back to the wharf until 6:30 A.M. It was largely discretionary with the captain as to whether he would take the barge out or not, but his discretion was exercised in the best interests of his employer.

It is well settled that, if an employee is required to live or board on the premises of his employer either by the terms of his contract of employment or the necessities of the work, an injury received while on the premises may be compensable, though the employee is not at work at the time of the injury. In this case, the definite compulsion to be on board was not a direct order, but it was none the less a compulsion when it arose out of a required exercise of discretion by the employee himself.

The award is therefore affirmed.

Lovallo v. American Brass Company

153 A. 783, 112 Conn. 635 (1931)

The deceased, Donato Lovallo, was employed in the scrap metal department of the American Brass Company. At the time of his injury he was working overtime. The company allowed thirty minutes for supper on company time, and Lovallo was lighting his pipe after supper when his oily clothing caught fire and he was fatally burned. The compensation commissioner and the lower court both denied compensation to the widow, whence she now brings her present appeal.

Justice Haines: We are satisfied that the injury must be held to have arisen in the course of the employment. The deceased was working overtime for the convenience and benefit of the respondent; the half hour for lunch during which he was injured was part of that overtime for which he was receiving compensation. He was clearly within the period of his employment.

The act of the deceased in starting to smoke after his lunch was not merely for his own satisfaction or benefit. The respondent certainly permitted the act for a purpose partly its own, namely, to keep the workmen in good spirits for the performance of the duties of their employment. Even when an employer has no direct interest in the employee's permitted act of smoking, it has frequently been held in other jurisdictions that it is a reasonable act common to men generally, ministering to the comfort and good spirits of the workman, so that the employer has an incidental interest in it.

Reversed and remanded. Judgment for Lovallo.

Wilhelm v. Angell, Wilhelm and Shreve

234 N.W. 433, 252 Mich. 648 (1931)

Eugene B. Wilhelm was employed by the firm of Angell, Wilhelm and Shreve as a construction superintendent on a new school in Brighton, Michigan. In connection with his work he attended a meeting of the board of education on July 5, driving out from his home in Detroit. After the meeting, he started home and when half way there was hit by a train and killed. The widow sought compensation from the Department of Labor and Industry on the grounds that her husband was in the scope of his employment. The department denied recovery under the workmen's compensation act, and the widow now appeals.

Justice North: If in the discharge of his duties an employee is required to travel upon the highway or to use any other means of transportation, and while so doing in the performance of a service to his employer he suffers an accidental injury caused by his so traveling, he is entitled to compensation. When engaged in this type of work he should be protected regardless whether he was journeying to his next place of service or returning to his business headquarters or to his place of residence. He should be protected similarly to that of a salesman.

While it would be difficult to frame a definite test applicable to all cases, the character of the service rendered by the employee is of prime importance in determining whether the accident arose out of and in the course of his employment. In this case the essential causative relation between injury and employment is established. Mr. Wilhelm's work compelled him to be upon the highways. His injury can be traced to this risk or hazard to which he as an employee was exposed in a special degree by reason of his employment.

We order the commission to award the proper compensation in accordance herewith.

Costley v. Nevada Industrial Insurance Commission
296 P. 1011 (1931)

W. E. Costley secured employment with a mining company, and took his camping equipment up into the mountains, to the site of his work. He planned to erect his tent that night and be ready to commence work the next morning. While cutting stakes to tie down his tent he accidentally cut his foot, losing one toe and permanently injuring another. This injury was so serious that he could not follow his line of work. The mining company denied responsibility, alleging that Costley had not actually started work in the mine. Costley replied that putting up his own tent was really a part of the whole terms of his employment and urged compensation on these grounds. The Nevada Industrial Insurance Company refused to order an award, and Costley brought action against the commission for $792. The lower court granted this award, and the commission now appeals.

Justice Sanders: The question to be decided is whether the relation of employer and employee began before the occurrence? In other words, "Did the accident arise out of and in the course of the employment?"

The attorney general argues that to constitute an employee as defined by law, a person must be in the service of the employer under contract of hire and that Costley at the time of the accident being engaged in the performance of an act independent of the relation of master and servant is not compensable. This argument is not persuasive.

At the time of the accident Costley was not engaged in voluntarily doing something outside of his employment. Neither can it be said that his injury was caused by a fortuitous circumstance unconnected with the employment. Under these circumstances we can see no ground upon which to hold

that the accident in question did not arise out of and in the course of employment.

Judgment affirmed.

Sylcox v. National Lead Company

38 S.W. (2d) 497 (1931)

Roy Sylcox was employed by the National Lead Company, which concern operated a mine where Sylcox worked. The lead company owned and operated a bus to take the workmen from their homes to the mine. On the night of the accident Sylcox was getting off the moving bus and received injuries. Sylcox brought his action in court, before a jury, and received a judgment for $3000. The company appealed, alleging the case should be brought under the workman's compensation statutes.

Justice Bennick: Now in this case the plaintiff did not happen to be riding home from work on the single occasion through the courtesy of his employer, but the furnishing of transportation was a regular service, contemplated by the contract of employment, which the plaintiff was permitted, as a matter of fact, to use. Having been provided for in the contract, it was incidental to, and therefore a part of, the employment. Consequently, when injured, he was at the place where his services demanded him to be, and such being true, the accident was within the exclusive preview of the compensation act.

Decision of the lower court reversed.

Morris v. Dexter Manufacturing Company

40 S. W. (2d) 750 (1931)

Benjamin Morris froze his finger during his employment for the Dexter Manufacturing Company, with the result that amputation was necessary. The commission denied compensation, and Morris appealed to a circuit court, which granted compensation. The Dexter Manufacturing Company then brought this present appeal from the judgment in the circuit court.

Justice Cox: There is a great diversity of holding, among the several states of the union, on the question of whether frost bites or freezing comes under the provisions of the statutes of the several states. The question has not been passed upon in this state.

In the present case, the claimant loaded spokes onto a truck in a shed, then pushed them to a car which stood in the open and unloaded them into the car. In this case there were other workmen assisting the plaintiff and doing the same kind of work that he was doing and none of them were frozen. If the claimant was exposed to weather of greater severity than the other workmen, the freezing may have been incidental to and in the course of his employment; therefore he is entitled to compensation under compensation acts.

But as the employee was subjected to identical conditions, the judgment will be reversed.

Stacey Brothers' Gas Construction Company v. Massey

175 N.E. 368 (1931)

Justice Curtis: The full Industrial Board, on the 7th of November,

1930, made an award to appellee, Oral Massey, against appellant Stacey Brothers' Gas Construction Company under the provisions of the Indiana Workmen's Compensation Act, for injuries alleged to have been received by the appellee while working for the appellant. The facts are: On June 3, 1930, appellee was in the employ of the appellant and on that day he received second degree burns on his feet while placing hot rivets for the appellant in a metal floor, upon which he stood, which was also exposed to the hot rays of the sun. From the award made, the appellant appeals to this court saying the award of the Industrial Board was contrary to law. The appellant alleged the appellee's disability was not a personal injury by accident.

The only question presented is whether or not the injury complained of by the appellee and for which the award was made was caused "by accident arising out of and in the course of employment" and within the meaning of the Workmen's Compensation Act.

The evidence shows that the appellee was a boiler maker by trade, and had been for 26 years, and that he was doing the work required of him by the appellant, and was driving hot rivets into metal sheets exposed to the hot sun and heated also by the rivets. He was standing upon these sheets and about 4:20 P. M. he noticed his feet stinging whereupon he descended from the sheets and found his feet were blistered. He had done similar work before without injury.

Was this a mishap or event not expected or designed? In our opinion it clearly was. It follows, therefore, that the injury complained of and for which the award was made was caused by accident arising out of and in the course of employment.

Award affirmed.

Correia v. McCormick

154 Atl. 276 (1931)

Justice Rathbun: McCormick was engaged in building roads. Correia was employed as laborer and also as an under boss. His duties were to spread sand and gravel and to direct truck drivers where to dump their loads. If the loads were dumped as directed, it was his duty to punch the cards presented by the drivers. Correia's instructions were to send truck drivers who failed to follow instructions to the boss and not to punch their tickets. At the time of the injury Correia, while engaged in this work for McCormick, became involved in an argument with a truck driver. The truck driver having refused to follow instructions, Correia refused to punch his ticket and directed the truck driver to go to the boss. While Correia was proceeding in the direction of the boss, the truck driver delivered a blow with his fist knocking Correia down and then struck him twice with a shovel. One of the blows with the shovel so injured a nerve in Correia's left arm as to paralyze several of his fingers. The truck driver was not a servant of McCormick, but was an employee of a subcontractor.

The direct cause of Correia's injury was his strict adherence to duty. He merely complied with the orders of his superior. There is no evidence that at the time he received the injury he stepped aside from his employment to engage in a private quarrel. Had Correia punched the ticket giving the truck driver credit for a load dumped in violation of orders, there would have been no assault and no injury.

We find as a matter of law that the injury arose out of and in the course of Correia's employment and was compensable.

Judgment for Correia.

Industrial Commission of Ohio v. Hampton

176 N.E. 74, 123 Ohio St. 500 (1931)

William Hampton was in charge of the material warehouse of his employer, and was loading supplies onto a truck when the Sandusky cyclone struck. The storm blew down the building and tipped sacks of cement on top of him, causing his fatal injuries. After a denial of a claim for compensation the widow brought the present appeal, alleging that the death was not due to an act of God and negligent storing of company supplies.

Chief Justice Marshall: If the employment of Hampton had been in out of door servide and he had braved the elements, but had been directly injured or killed by the violent tornado by being picked up and thrown against a tree or building, his situation would not be any different from others in the community and his injury would not be due to any hazard of the employment. The injury to Hampton was not caused by the direct force of the wind upon his person. His injury and death were caused by the collapse of the building and the falling of the materials upon him, thereby crushing out his life. That the collapse of the building was caused by an act of God does not preclude a recovery but only brings the case within the range of the rule that there may be compensation when the industry combines with the elements in producing the injury. We are of the opinion that the industry did nombine with the elements in producing the hazard resulting in the injury.

Judgment for Hampton.

Goslin-Birmingham Manufacturing Company v. Gantt

131 So. 905 (1930)

Mr. G. R. Gantt received a bruise in his left side during the course of employment. This occurred on June 7, 1929, and he died of spticaemia or blood poisoning on the following August 5. Mrs. Gantt received a compensation award for the death of her husband under the Workmen's Compensation Act, but the employer, Goslin-Birmingham Manufacturing Company, now appeals.

Justice Brown: We quote from Dr. Beddow: You may have these germs floating around in the blood waiting for a chance to localize; yet I could not say whether the man was already suffering from an infection and received a bruise, or whether the infection followed the bruise, for I saw the man after it all occurred. If a man was yellow and anemic and had the streptococcus germ, a blow would be liable to stir the germ.

In either case therefore, the injury produced blood poison and thus produced the workman's death.

Judgment affirmed.

McDonough v. National Hospital Association

294 P. 351; 134 Or. 451 (1930)

Patrick McDonough had his leg and foot injured while in his regular employment with the Flora Logging Company and was treated by Dr. Sabin for the National Hospital Association. In the present case, it is alleged that Dr. Sabin set the leg, but neglected the foot to the asserted damage of

$50,000 to McDonough. From a decision for the defendent on this $50,000 claim, McDonough now appeals. The State Industrial Accident Commission had previously awarded and McDonough accepted, $1,395.20 as payment under the statute for the injury plus recovery for the negligent medical service.

Justice Rand: The Legislature intended that the Workmen's Compensation Act should be required to award compensation to an injured workman coming within the terms of the act, not only for the original injury, but also for any subsequent injury he may sustain due to the malpractice or negligence of the physician while being treated for the injury first sustained, but that, once having received and accepted compensation for the combined injuries, he cannot maintain an action against the physician for malpractice. If this action could be maintained it would result in two recoveries for the same damage.

Judgment affirmed.

Haynes Drilling Company v. Pratt

293 P. 1100; 146 Okla. 159 (1930)

Justice Clark: This is an original action filed in this court to review a judgment and award of the State Industrial Commission, made and entered on the 7th day of July, 1930, wherein the State Industrial Commission awarded to the respondent, J. N. Pratt, compensation at the rate of $18 per week for a period of one hundred weeks for the loss of the right eye, less $400 previously paid as compensation, and also an award and order that petitioners pay all medical expenses incurred by claimant as the result of

said injury.

It is contended by the petitioners that prior to the accident, the claimant had a cataract on the right eye that obstructed vision. Therefore claimant did not suffer a total loss of vision, through the injury, and therefore the injury is not within the meaning of the workman's compensation law.

Dr. Todd testified that it was probable that the cataract could have been removed without loss of injury. He has removed several with good results.

We contend that the temporary loss of vision of the eye would not prevent the respondent from recovering for the loss of an eye.

The judgment and award of the Industrial Commission is affirmed.

Panther Creek Mines v. Industrial Commission

173 N.E. 818; 342 Ill. 68 (1930)

Justice Farmer: The award was made by the Industrial Commission to the claimant whereby he received compensation, according to law, for the loss of his left eye. As the claimant had previously lost the vision of his right eye, he is permanently disabled. The employer therefore contends, he should receive compensation from the certain funds set aside by the compensation act for permanently disabled employees.

We are of the opinion the award made complies with the provisions of the statute, and the judgment of the circuit court will therefore be affirmed.

Outboard Motor Company v. Industrial Commission

239 N.W. 141 (1931)

An award was made by the Wisconsin Industrial Commission for the disability of Arthur Ringer, an employee of the Outboard Motor Company, based upon inhaling silica dust as a grinder. The employee worked at his trade for nine successive employers during the period 1904 to 1930, working for the Outboard Motor Company from April 9, 1930, to June 4, 1930. He actually put in 260 working hours for this last employer, which is half time, being sick the rest of the time. In fact, evidence showed that he was partially disabled, off and on, during these twenty-six years which he worked as a grinder. The company appeals from the award of the commission.

Justice Fritz: In September, 1929, the applicant had tuberculosis superimposed on pneumoconiosis. That combination did not disable him either while employed at the Nash Motor Company from September to October, 1929, or possibly even before that employment. At all events, that combination disabled him from working at the Evinrude Company during the winter of 1929 to 1930. He never recovered from that combination of tuberculosis and pneumoconiosis. Before entering the employment of the Outboard Motor Company in April, 1930, his condition, as the commission found, "had already approximated total incapacity, intermittently and regardless of his last employment had reached a stage where a protracted period of total disability was imminent." His breakdown while working for the Outboard Motor Company was not due to any new outset of the disease but was merely a recurrence. Consequently, the last employer, the Outboard Motor Company is not liable for compensation.

Judgment reversed, and caused remanded, with instructions to vacate the award and to remand the record under section 102.24, to the Industrial Com-

mission for futher hearings or proceedings.

Geneva-Pearl Oil and Gas Comapny v. Hickman

296 P. 954 (1931)

Theodore G. Hickman was a pumpman, employed by the Geneva-Pearl Oil and Gas Company and by the Rockland Oil and Gas Company. The two firms were entirely independent, Hickman working part time for each, which together constituted a full-time job for him. He was injured while working on the Geneva property, and now seeks to have his compensation based on his full wages. The Geneva Company, however, claims that the measure of his wages should be merely $50 per month they paid him. The State Industrial Commission of Oklahoma made an award based upon his full wages from the two companies and the companies appeal.

Justice Hefner: The first five paragraphs of section 7289 provide for various methods of determining a fair "average annual earnings" or "average weekly wages". It cannot be said Hickman's average wage as a pumper was $50 per month, because that is not true. One company paid him $50 and another $90 per month. His average wages therefore must necessarily mean the average total amount he received from both companies.

The insurance carrier cannot complain because the law relating thereto becomes a part of his contract. Again, if the employee worked one-third of his time for each of three employees, it is fair to them, because they each take the risk for one-third of his time and no more.

The petition to annul is denied.

Award of commission is affirmed.

Consolidated Lead and Zinc Company v. State Industrial Commission

295 P. 210 (1931)

William Hatfield, a pumpman in the employ of the Consolidated Lead and Zinc Company, sprained a knee during his regular work and was paid partial incapacity compensation for several months. He wore an iron brace, but that was ineffective. The company sought to have him operated upon, but he refused. The company then stopped payments and petitioned the State Industrial Commission to have the case closed, which was denied. Whence this present appeal, relying on the rule that refusal to undergo a simple, certain, and reasonably safe operation is such a wilful act of the injured as to prevent further compensation.

Justice Cullison: In the McNamara v. Metropolitan Street Railroad Company and the Henly v. Oklahoma Union Railroad Company cases the court of Missouri said:

We do not think the plaintiff should be criticized and punished on account of his failure to undergo a surgical operation. He should be accorded the right to choose between suffering from the disease all his life or taking the risk ofan unsuccessful outcome of a serious surgical operation. Certainly, defendent, whose negligence produced the unfortunate condition, is in no position to compel the plaintiff to risk his life again in order that the damages may be lessened. To give heed to such contention would be to carry to an absurd extreme the rule shich requires a person damaged by a wrong of another to do all that reasonably may be done to minimize his damages.

Dr. De Arman, the only physician in this case to take the witness stand, testified that it was highly probable that an operation on claimant's knee would eventually give claimant a 100 percent function of the use of said

knee, yet the doctor would not go so far as to state that claimant would get a 100 percent result without complications resulting from the operation.

Under the state of the record, we are of the opinion that the employer has failed to show the operation would be safe and simple and without risk. The order and award of the State Industrial Commission is hereby affirmed.

Pacific Indemnity Company v. Industrial Accident Commission

5 P. (2d) 1 (1931)

John Driscoll, a teamster, had his wooden leg smashed when his horses got out of control. He was engaged in his regular employment at the time of the accident, and is protected under the usual clauses of the California Workman's Compensation Act. Since he had no money to purchase anew leg, he was out of work from May 9 to October 1, when the state board awarded him $383. 44 for the time lost and $19.45 per week until the Public Indemnity Company should purchase a new limb for him. The company brings the present action against the commission to have the award annulled.

Justice Preston: It is plain the Workmen's Compensation Act was enacted for the sole purpose of compensating workmen for injury or disability incurred; not for injury sustained by their personal property. That a man's artificial leg is his personal property and not a part of his natural living body cannot be disputed. If, under the present act, power were conceded to compensate workmen for injuries or loss of property , the jurisdiction of the commission would be enlarged to an unwarranted extent. If an employee could recover for injury to an artificial limb, what would prevent the extention of this right

to include other property injuries such as; eye glasses, false teeth, crutches, tools or clothing, any of which might prevent the continuation of employment, pending replacement.

The Workman's Compensation Act of this state does have a phrase as follows "Including injuries to artificial members", but this is beyond the power of the Legislature and thereby unconstitutional. (The unconstitutionality of this phrase does not affect the validity of the remaining portions of this act.) The commission exceeded its judicial power as limited by the constitution, and its award in favor of said respondent must be, and it is, hereby annulled.

Chicago, Wilmington and Franklin Coal Company v. Indiana Commission

177 N.E. 731; 345 Ill. 78 (1931)

Chief Justice Stone: The parents of Raymond Hannebique, deceased, were awarded compensation for partial dependency by reason of the death of Raymond due to an accident arising out of and in the course of his employment with the Chicago, Wilmington and Franklin Coal Company. The circuit court of Franklin county set aside the award and annulled the record of the Industrial Commission.

Raymond Hannebique was twenty-two years of age, unmarried and lived with his parents and a younger brother. He gave his wages to his parents and between his wages and that earned by his brother and a father in ill-health they managed to get along. The total family earnings were about $4000 a year and they did not save anything from those earnings.

Due to the father being in ill-health and having his son working with him which made it possible for the father to hold his job, the father and mother were partially dependent on their deceased son.

Judgment of court reversed and award of Industrial Commission is confirmed.

Kennedy v. Keller

37 S.W. (2d) 452 (1931)

Chief Justice Sutton: The deceased has children of a tender age, but the custody of the children were awarded to the mother by a divorce degree. The mother married again and her second husband completely supported her and the children.

Because the deceased did not contribute to the support of his children does not alleviate his legal responsibility for their support. If, after having been abandoned by their father, they had been supported by some charitable stranger or neighbor or some charitable institution or by the state, would the courts hold that the children were therefore not dependent upon their father for their support, and not entitled, upon his death, to the death benefits provided by the statute? We cannot bring ourselves to believe that the Legislature so intended.

Judgment for the children affirmed.

Veith v. Patterson

34 S.W. (2d) 717; 236 Ky. 845 (1931)

William Patterson was killed while in the course of his employment with John A. Veith. The daughter, Jennie May Patterson, was denied compensation by the State Workmen's Compensation Board, and she took the case to the circuit court, securing a judgment. The employer, John A. Veith, then brought the present appeal on the grounds that William Patterson had no legal duty to support his daughter, Jennie May, while she was confined to the reform school; and that therefore there were no grounds for compensation.

Justice Clay: At the time of the accident, Jennie May Patterson had been confined in the reform school for more than six months and during that period she had neither lived with, nor been supported by, her father, nor was she living with, or being supported by him at the time of the accident. In the circumstances she was not a dependent within the meaning of the act.

There is no provision in the statute to meet a case like this, but we can find support in those jurisdictions where actual dependency at the time of the accident is a prerequisite to compensation. It is generally held that claimants who are being cared for in the workhouse, reformatory, or asylum are not dependent within the meaning of the Compensation Acts.

Judgment reversed and cause remanded.

Victory Sparkler and Specialty Company v. Gilbert

153 A. 275 (1931)

Mr. and Mrs. William James Gilbert adopted a five year old boy, John Fortner. The husband, William, died in 1922 leaving his wife, Mary Elizabeth, claimant, and the adopted son John. On May 31, 1929, John was killed in an accident arising out of his employment. He was twenty years old at the time and supported his mother, Mary Elizabeth Gilbert. The State Industrial Accident Commission of Maryland refused compensation, because of the adoption feature, but the lower court reversed the decision of the commission and the company brings the present appeal.

Justice Pattison: It will be seen that relations existing between an illegitimate child and its parent or between a stepchild and its step-parent are vastly different from relations existing between an adopted child and its adopting parents. In the case of the illegitimate child, there is no liability of the putative father for the maintenance and support of the child, other than the enforced liability arising from the bastardy laws of the state. In the case of a stepchild, the step-parent has no liability at all. In the case of the adopted child, the adopting parents assume the obligation to maintain, support, and educate him to the same extent as if he were their own offspring.

In the case before us, the adopting mother assumed the obligation to support, maintain, and educate the adopted son and in return she is entitled to his services to the same extent as a natural mother. She carried the burden for years and after her means were greatly reduced, the adopted son reached the age where his services meant much and it was then he contributed to her support to the time of his death.

We do not believe it was the intention of the Legislature to exclude an adopting mother from compensation, and to include a natural mother where the right did exist.

Judgment affirmed.

Bartling v. General Electric Company
247 NYS. 799; 231 App. Div. 369 (1931)

By the court. An award was made because of an injury to Henry Houshalter, which resulted in permanent loss of the use of 75 percent of his right hand. The award was made to his widow for the reason that he died prior to the making of any award from causes other than the injury. The appellant made the payments to the widow as they became due, but she died before all payments became due. Besides the widow, the deceased employee left no dependents. After the death of the widow, the board made an award to the executor and executrix of the estate of the widow for the amount of the payments which had not accrued at the time of the death of the widow.

The sole point raised for the appellant is that the award to the estate of the widow is unauthorized by any provision of the Workmen's Compensation Law and is invalid.

The law does provide that upon the death of the deceased from causes other than the injury, the dependents are entitled to the compensation due him. The law does not authorize that compensation due the deceased or his dependent, should be part of the estate of the executor.

Award reversed, and claim of the estate dismissed, with costs against the State Industrial Board.

Proper v. Polley Brothers

253 N.Y.S. 530 (1931)

The New York Industrial Board granted an award to the widow and minor children of Lewis A. Proper for accidental death while said Lewis was working temporarily in New York. Polley Brothers appeal, alleging recovery should not be in New York, but in Pennsylvania, if anywhere.

Justice Hindman: The claimant's deceased husband, Lewis A. Proper, was employed as a tool dresser by the Polley Brothers, a Pennsylvania partnership engaged in the business of drilling oil wells. The business was carried on chiefly in Pennsylvania, but they also did some drilling in other states. The employees resided in Pennsylvania, and, when the employers took a job out of state, they picked from these regular employees the men most capable of doing the job, who afterward returned to their regular employment in Pennsylvania. The work of these employees out of state was purely temporary as an incident of their general employment. They resided and were hired in Pennsylvania by a Pennsylvanian employer.

That was the case of Proper, the deceased employee. He had been working for the Polley Brothers one year and working all that time in Pennsylvania except for the nine or ten days that he worked in New York state just prior to his death. His employers intended that he should return to his regular occupation in Pennsylvania when the New York job was finished.

The Pennsylvania Workmen's Compensation Act provides that the act shall apply to "accidents occurring to Pennsylvania employees whose duties require them to go temporarily beyond the territorial limits of the commonwealth, not over 90 days, when such employees are performing services for employers whose place of business is within the commonwealth."

The claimant is apparently entitled to compensation under the Pennsylvania Act. We think that the award should be reversed and the claim dismissed.

Award reversed, and claim dismissed.

Interstate Power Company v. Industrial Commission

234 N.W. 889 (Wisconsin) (1931)

Vernon Oehler, was a resident of Iowa and worked in that state for the Interstate Power Company. The company was incorporated in Wisconsin, where it had its main offices. Oehler was sent into Wisconsin to do a temporary job and while there was accidentally electrocuted. The Industrial Commission of Wisconsin allowed compensation, and the power company appealed, alleging it was an Iowa case since the employee was a resident of Iowa, hired in Iowa and only temporarily in Wisconsin.

Justice Wickhem: The workmen's compensation act as enacted in this state does not state the status of the deceased. In the Blatz case it is stated that the status is created when service is performed within the state under a contract of hire, without regard to the question of where the contract was made. In the Wandersee case it is stated that until an employee performs service for another in the state of Wisconsin, he is not an employee.

The Blatz case also stated when residents of the state of Wisconsin contract for services to be performed out of state, a constructive status under the Wisconsin compensation act is created. We think the constructive status simply means that, constructively, the services are being performed in Wisconsin.

Affirmed.

CONTRACTS

The idea of contractual obligation has not always existed in English jurisprudence. The development of the doctrines underlying the subject of contracts is interwoven with the history of procedure. Only recently has historical research indicated the progress of the steps in thought from the early law to the modern conception of contracts.

It is surprising that, in spite of the numerous foreign influences which were at work in the field of contract, the common law of England was little influenced by them. The Church very early took a strong view of the sanctity of contractual relationships, insisting that in conscience the obligation of a contract was completely independent of writings, forms and ceremonies, and tried as far as she could to translate this moral theory into terms of law. Then there was the mercantile courts which were endeavoring to enforce the practice of the best merchants and to express that practice in terms acceptable to either or both of the two conflicting schools of legal experts whose approval was necessary. In England both of these forces were at work. Glanville, one of their experts of the times, knew just enough of the Roman classification of contracts to be able to describe, and then misapply, it, while Brocton endeavored to express common law in Romanesque language. This is why the English law of contract is neither Roman nor canonic.

In the final analysis the common law courts developed a law of contracts as best they could out of the stubborn materials of the forms of action, and so, after many years of uncertainty and long conflicts with technical and procedural difficulties which by this time were inherent in the common law system, they finally arrived at a systematic law of contract.

The common law of the United States has as its bases the common law of England in its form as it existed at the time of the revolution, and has

developed it along the lines which seemed most in accord with justice and reason.

A contract is an agreement between two parties, resulting in an obligation or legal tie, by reason of which one party is entitled to have certain stipulated acts performed or forborne by the other.

A contract is also said to be an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others. According to the etymology of the word, from contraho, a contract is a drawing together of the minds of the parties until they meet in agreement.

There are two sorts of agreements or obligations, the delictual and the contractual. A delictual obligation arises from the violation of a pre-existing right. It does not depend for its creation upon any desire of or attempt by the parties concerned to create it, but it arises by virtue of one's place as an individual of society. Thus, A owes B a duty not to assault him. B enjoys this right from which a new right may arise if the first is violated. This new right will entitle him to damages. The right of B is said to be a right in rem, that is, against the world at large. Such rights are to be found in the law of torts.

As students of engineering law we are primarily interested in contractual obligations. A contractual obligation arises between the parties by means of their acts. They do not depend on any rights that the parties have had. Thus, when A and B enter into a contract, new rights and duties are created by A and B which did not previously exist. This right is one in personam, that is, against determinate persons.

There are four things necessary to make a contract.

1. The offer and acceptance, called the agreement. This offer and ac-

ceptance is the assent given by each party to the other with reference to the subject matter. The parties must be of the same mind and intention concerning the matter agreed upon.

2. The form or the consideration. The form is that which the law requires to give the agreement legal recognition. For if a deed is not under seal, the courts will not enforce it. If a contract is not under seal, it must have a consideration. A consideration means a forbearance, or a detriment, or a giving up of something one is not bound to relinguish. Thus, to make a promise one is not bound to make is a consideration for another promise. Furthermore to enforce a promise, it may be compulsory to have it in writing.

3. The parties must consist of two or more persons, for no one can make a contract with himself.

4. The subject matter of the contract or agreement must be possible to perform and it must be within the statutory restrictions of the state. It may be as varied as the necessities of human life.

Suppose A promises to enter B's service for one year, and B promises to pay A $1000 for his work. The agreement consists of the meeting of the minds of A and B as to the terms of the contract. The consideration consists of the services to be rendered.

There are three classifications of contracts with respect to form.

1. Formal contracts. These obligations are dependent for their validity upon their form, and may be divided into contracts of record and contracts of seal. An example of a contract of record is a judgment of a court or a recognizance. These are not true contracts, however, for the obligations are imposed by law, and not by the agreement of the parties.

A contract under seal, also called a specialty, is a written promise or

obligation which derives its validity, at common law, from its form alone, the presence of the seal.

Thus where A executes an instrument by which he agrees to work for B for a year, and the work "Seal" appears after his signature, the contract is a specialty.

2. Quasi-formal. Quasi-formal contracts are those which are partly dependent on form and partly on consideration. They are more commonly included under the term simple contracts. An example is a bill of exchange.

3. Simple contracts. All other contracts are simple contracts, whether they be oral or in writing. Other terms applied to this class are informal contracts, and verbal contracts.

Thus where A orally agrees to sell B his horse for $100, the contract is simple. Similarly, if he agrees in writing to sell the horse, it is a simple contract, provided there is no seal.

Contracts are further divided into two classes depending upon how fully the terms of the contract are stated.

1. Express contracts. Express contracts are contracts whereby the terms and the promises are fully known to each of the parties. Where A agrees to sell B a horse for $100, and B agrees to buy the horse for that sum, the terms of the contract are fully expressed.

2. Implied contract. An implied contract arises where the parties have not so fully stated the terms, but have actually made a contract. In such cases the terms of the contract are determined by the conduct of the parties and the inferences properly deducible from the attending circumstances. In short, the parties are actually contracting but not expressly and fully. This idea is important because it distinguishes such implied contracts from another class, sometimes called implied contracts, but in modern jurisprudence

termed a quasi-contract.

If A works for B, under such circumstances that no reasonable man would conclude that A meant to work; without compensation, B is liable to A for the fair value of such services. Although nothing was mentioned as to the amount of the salary, from B's conduct it is implied that as a matter of fact he expected to pay A. This is an example implied in fact. There is a contract, but its express terms are incomplete and other terms must be implied from the fact that B employed A.

If A in making change, by mistake gives B ten dollars instead of five dollars, it is clearly unjust that B retain the extra five dollars. There is, however, no contract between A and B, either express or implied, for the return of the money. Neither from the circumstances nor in any other way can any sort of contract be found. But the law steps in and imposes an obligation on B to return the money, for he is unjustly enriched at the expense of A. This doctrine of unjust enrichment is the fundamental basis of the subject of quasi-contracts, and illustrates the difference between a contract implied in fact.

A general distinction between express and implied contracts is in the mode of proff. An express contract is proved by the evidence of the words used or writing executed. In implied contracts the intention of the parties is determined by proving the facts and circumstances, surrounding them. But when a contract is established in either of these ways, it is of the same effect and validity, and the consequences of a breach of the contract are the same. There can be no implied contract where there is an express contract between the parties in reference to the same subject matter, and where the provisions of the express contract would supersede those of the other.

In either an express or implied contract, a contract can either be

bilateral and unilateral. A bilateral contract is one where there are reciprocal promises, so that there is something to be done or forborne on both sides. Such a contract consists of mutual executory promises. Thus where A promises to sell B his horse for $100, and B promises to purchase the horse for that figure, there is a bilateral contract.

A unilateral contract is one in which there is a promise on one side only. Thus where the consideration is executed on one side and executory on the other, the contract is unilateral. B promises to pay A a dollar if he will deliver a package to B. There is no obligation upon A to deliver the package but if A delivers the package to B, he obtains the promise of B to pay the dollar. The contract is executed as to A and executory as to B. Examples of unilateral contracts are promissory notes.

R. F. Conway v. City of Chicago

274 Ill. 369; 113 N.E. 703 (1916)

R. F. Conway Company had a contract for paving Lincoln Avenue for the City of Chicago. The specification required the street railway company would pave the center 16 feet and the Conway contract would complete the job. The paving consisted of a six inch concrete base with a one inch sand filler on top. Treated wood blocks were to rest on top of the filler. There was a guarantee clause in the contract which stated that the City of Chicago would retain five percent of the total contract price, to insure repairs found necessary in the five year period. The pavement settled. The Conway Company declared that the City of Chicago could not use the five percent re-

tention fund to repair the street, because the failure was caused by heavy streetcars traveling on light tracks causing excessive vibrations and this was a contingency not included in the contract obligation. The City of Chicago claimed Conway was liable irrespective of the cause of failure. From a judgment to the City of Chicago, Conway appeals.

Justice Dunn: It would be justifiable that the appellant should stand the loss of the five percent retention fund, if the appellant's work could be shown or proven to cause the failure. The mere mention of "proper construction of said improvement" would hardly seem to guarantee to cover the sufficiency of plans and specifications over which the contract had no control. We are of the opinion that to fairly construe or interpret the contract, the contractor did not guarantee against all defects arising during the five years but only defects arising on account of the character and quality of the materials and workmanship.

Judgment reversed.

Sloss-Sheffield Steel and Iron Company v. Payne

186 Ala. 341; 64 S. 617 (1914)

J. D. Payne contracted with the Sloss-Sheffield Steel and Iron Company that he "should go upon the land of the steel company and open what is commonly known as the Ida ore and Big Seam ore, and quarry therefrom and furnish to the steel company all of the outcrop of said Ida ore and six feet of Big Seam ore thereof, at a rate of from one to ten cars a day, for which the steel company guaranteed to pay Payne 60 cents a ton, for said ore". The

steel company ordered Payne to stop after four months work. Payne sought damages for a breach of contract, and from a judgment for Payne the steel company now appeals.

Justice Mclellan: After consulting various authorities for the definition of the term "outcrop", we have come to tha conclusion that although it has distinct meaning in mining law, its service to define contractual rights and obligation is negligible. It is too indefinite.

The subject matter of a contract is an essential element. A valid contract must describe the subject thereof with definiteness and certainty. It cannot leave the designation of the subject matter at large and yet bind the parties. The term outcrop being uncertain, indefinite as charged, the entirely dependent terms could add nothing to the certainty prerequisite.

The fact that under said contract the plaintiff delivered and was paid for many tons of the ore cannot avail to avert the uncertainty of the contract in respect to the term outcrop. The acceptance by the defendent of ore extracted from the outcrop manifestly did not import into the uncertain term "outcrop", of the contract, the degree of certainty essential to make it valid and binding.

Reversed and remanded.

Salisbury v. Credit Service

199 A. 674 (Delaware) (1937)

Credit Service, Inc. was a loan association which loaned out small sums to people in Baltimore. It also received investments, through issue of gold

debenture bonds. A circular which the company issued promised that the company would maintain a market at par for those bonds which were held for a year. M.C. Salisbury purchased such a bond, held it for a year, and then tried unsuccessfully, to sell it back to the company at par less two percent brokerage fee. Salisbury brings action on the grounds that the circular was an offer to maintain the market price of the bond for repurchase, if the reader would buy a bond. It was an offer and it was accepted, therefore it is a contract.

Justice Harrington: It is elementary law that in order to constitute a contract there must be an offer made by one person to another and an acceptance of that offer by the person to whom it was made. Whether in writing or otherwise, a mere statement of a person's willingness to enter into negotiations with another person is in no sense an offer, and cannot be accepted so as to form a binding contract.

In this case, it cannot be denied that the circular was issued by the defendant company to its selling agents to aid them in the sale of the bonds. The language of the customer market clause, if in any sense promissory in its nature, was, therefore, a part of the contract of sale. As the plaintiffs acted upon this guarantee the defendant is bound by them.

Judgment for the plaintiff, Salisbury.

Toledo Computing Scales Company v. Stephens Brothers

96 Ark. 606; 132 S.W. 926 (1910)

Stephens signed an order for a set of scales and mailed the order on

December 9 to the Toledo Computing Scales Company at Toledo, Ohio. That night he telegraphed Toledo countermanding the order, and followed the wire with a similar letter. The company said that they accepted the order on December 15 and the company's order clerk testified that he did not receive the cancellation until December 16. The company proceeded to fill the order anyhow, and sent the scales to Sulphur Springs, Arkansas, where they were accidentally destroyed in a railroad fire. The shipment was f. o. b. Toledo. If the negotiations amounted to a contract, it could not be revoked and Stephens would have to pay Toledo, and then possibly get some redress from the railroad. On the other hand, if the order by Stephens is merely an offer to purchase, it could be revoked any time before acceptance, and Toledo should seek its loss from the railroad. From the judgment for Stephens Toledo appeals.

Justice Hart: The order in question shows on its face that it was merely a proposal to purchase, and that it was not a contract of purchase or sale. It is so treated by the head of the appellant's order department, for throughout his testimony he speaks of it as an order, and specifically names the date of its acceptance. With these statements in mind it cannot be denied that Stephens had the right to revoke his order anytime before acceptance.

The head of the appellant's order department claims he received the telegram of revocation the day after the acceptance. He denies receiving a letter countermanding the order. The appellee also claims they telephoned the agent to countermand the order.

The head of the appellant's order department fails to mention he was the only one of the appellant's employees who received communications addressed to it. In view of these facts and his interest in the result, it cannot be said the findings of the lower court were arbitrary.

The judgment will therefore be affirmed.

Haskell and Barker Car Company v. Allegheny Forging Company

47 Ind. A. 392; 91 N.E. 975 (1910)

Haskell and Barker Car Company ordered 36 winding chains from the Allegheny Forging Company in accordance with the correspondence between the two companies. Only a part of the chains were delivered. The Allegheny company then sought collection of the unpaid bill, and the Haskell company replied that the default on the full delivery was a breach of contract with resulting damages. Haskell put in a counterclaim for the amount of the damages due to delay in time and higher cost in completion of the purchase in the open market. The legal controversy is whether there was a contract through a proper offer and acceptance of an order for 36 chains or whether there was not a contract for any amount, but with the Allegheny company at liberty to collect merely for the reasonable value of whatever chains were delivered. From a judgment for Allegheny, Haskell now appeals, alleging a full contract as a support for his counterclaim for damages.

Justice Watson: The counterclaim charges the acceptance of the order by the appellee and that only a portion of the chains ordered were forwarded to the appellant, and that by reason of the failure of the appellee to comply with its part of the contract, the defendant was compelled to go into the open market and purchase the chains which the appellee failed to deliver, and had to pay the sum of $84 in excess to the amount the appellee had agreed to furnish them. There was also a $100 claim for the delay in securing these additional chains.

The shipping of a portion of the chains by the appellee undoubtedly indicates the offer was accepted and therefore the contract was completed and binding.

Judgment reversed, with leave to both parties to amend the pleadings if they so desire.

United States v. P. J. Carlin Construction Company

224 Fed. 859; 138 C.C.A. 449 (1915)

The United States advertised for bids for certain construction work at Fort Madison, San Francisco, California. The Carlin Construction Company submitted two proposals. Bid "A" was a lump sum bid of $1,178,000 while bid "B" was an alternate proposal of doing the work on a plan devised by Carlin. The United States considered the low bids of Carlin, reserving to itself the right to determine whether the work should be on the basis of plan "A" or plan "B". Considerable negotiations followed as to the details of the proposed plan "B", Carlin meanwhile being somewhat slow in completing these plans. Sixty days after opening of bids, the government accepted plan "A", and the construction company refused to sign the contract. The United States then instituted an action for resulting damages, and from an adverse judgment brought the present appeal.

Justice Rogers: It is necessary, therefore, to determine whether the government duly accepted the offer submitted by the construction company. If the offer was never properly accepted, the government cannot maintain this action.

At the time the government invited bids it provided the bidder should do either of two things, put up $10,000 in cash or give a bond by a responsible surety company that the bidder would execute the contract. The construction company elected to give a bond. That bond executed by the Illinois Surety Company guaranteed that if the Construction Company's bid was accepted "within 60 days from the date of the opening of the proposals" the Construction Company would within 10 days after notice of acceptance enter into contract. This bond the government accepted, but after the bids were received the government notified the Construction Company that they

could have a period of six months to determine whether the work would be done according to plan "A" or "B". Therefore there was not a true acceptance to the offer.

Judgment affirmed.

Glenn v. S. Birch and Sons Construction Company

52 Mont. 414; 158 P. 834 (1916)

The S. Birch and Sons Construction Company paved certain streets in Great Falls, Montana, and received $200,000 in Great Falls six percent paving bonds. The company next desired to market these bonds and recover its money out of the job. Considerable correspondance was had with Fred Glenn and Company brokers in municipal bonds. There are three important wires in these negotiations.

October 8, 1913

Fred Glenn:
We will hold Great Falls' warrants for your acceptance until October eleventh. After that date will hold them subject to other parties.

S. Birch and Sons

October 8, 1913

S. Birch and Sons:
Our people have confirmed purchase of both districts of Great Falls, Montana, paving warrants, subject legality, and etc. We are sending written contract which you will please sign. Concerning proceedings please obtain minutes every council action from start to finish. We are writing you fully. Please wire undersigned immediately confirming sale.

Fred Glenn

October 8, 1913

Fred Glenn:
We confirm sale of warrants subject to written contracts.

S. Birch and Sons

The written contract on arrival from Glenn had substituted "German American Trust Company" as a purchaser in place of Glenn. This was unsatisfactory to Birch, the whole deal was called off, and Birch sold the bonds elsewhere.

Glenn now sues Birch on a breach of contract, and Birch replies there never was a contract, since there was at no time an unconditional acceptance by either party of the counteroffer of the other party.

Chief Justice Brantly: In order to form a contract there must be an offer by one party and an unconditional acceptance of it by the other, in accordance with its terms.

There was an offer and it would have been accepted if the plaintiff had not introduced the third party. The offer was made to the Glenn Company and not to the German American Trust Company. There is no doubt that there was not a valid offer and acceptance. There was no contract.

The judgment is affirmed.

Wisconsin Steel Company v. Maryland Steel Company

203 Fed. 403; 121 C.C.A. 507 (1913)

The Maryland Steel Company brought a legal action for work done in the construction of a high-pressure engine for the Wisconsin Steel Company. There

had been some informal conversations between the parties, but the words could not be construed as constituting a binding contract, since there was not actual authority from proper company officials, nor were the terms of the contract sufficiently definite or certain. But it developed that as a result of their conversations the Wisconsin Company sent castings to the Maryland Company. The controversy then turns on the legal significance of the apparent act of sending the castings to the Maryland Company and that company working on the castings. From a judgment for the Maryland, the Wisconsin appeals.

Justice Baker: The Wisconsin Company was having two engines built by the Maryland Company and as a representative of each company was looking over the work being done on the engines in the Maryland plant, the representative of the Wisconsin company said he would send a third engine to be built. The representative of the Maryland Company said to do so.

As neither of these men had the authority to make a binding contract, there is no contract on that account. Although we do believe there is a contract due to the acts of the companies. The sending of the castings to the Maryland Company by the Wisconsin Company was an offer. The working on the castings by the Maryland Company was an acceptance.

Judgment affirmed.

Wheeler v. New Brunswick and C. Railroad Company

115 U.S. 29; 5 S. Ct. 1160; 29 L. Ed. 341 (1885)

James Murchie, vice president of the New Brunswick and C. Railroad Com-

pany, agreed to sell to E. S. Wheeler between 200 and 600 tons of second-hand rail at $30 per ton. Although it was not necessary, Murchie then referred the matter to his board of directors, who approved the sale but included a specification that a ton should be considered 2000 pounds. Murchie sent the minutes of the meeting of the board to Wheeler. Wheeler promptly replied that he considered that the contract was in full force and effect, and that the ton should be treated as 2,240 pounds as that was the custom of the trade in scrap iron. Several months passed before delivery date, but no further correspondence was had. Meanwhile the market price of $30 per ton dropped, and when the railroad attempted delivery, Wheeler refused; alleging in effect that there was no agreement on the number of pounds per ton and therefore there was no contract. From a judgment in the lower court in favor of the railroad, Wheeler now appeals.

Justice Miller: The original agreement is a valid contract because both Murchie and Wheeler had full authority to engage in such acts. The court also finds that each party at the time of the making of the contract understood that the word "tons" meant tons of 2240 pounds and there was no misunderstanding between said persons as to the true intent and meaning of the contract.

The contract was not annulled because of the minor disagreement which seemed to exist between the parties as to whether a net or gross ton was to be the unit of measurement. To nullify or set aside this contract, fairly made, requires the consent of both parties. There must be the same meeting of minds, the same agreement to modify or abandon it, as was necessary to make it. Wheeler and company are bound to accept and pay for the rails when tendered, unless they have some other good reason for not doing so.

Judgment affirmed.

W. G. Root Construction Company v. West Jersey and Seashore Railroad Company

85 N.J.L. 645; 90 A. 271 (1914)

Justice Trenchard: The plaintiff, a construction company, contracted with Atlantic City to build a sewer in certain streets. The contract provided that the construction company should, at its own expense, take care of and support railroad tracks and other structures in the streets. The performance of the work required that the sewer be built and extended under the tracks of the West Jersey and Seashore Railroad Company. This made necessary caring for and safe guarding the tracks and interlocking signal system of the railroad. In order to expedite the work, the construction company said to the railroad company in effect: We want to get under your tracks without delay in order to carry out promptly our contract with the city, and so will you, without delay, and at our expense, do the work of caring for the tracks, etc. which we contracted with the city to do at our expense.

The railroad company did the work promptly and rendered bills each month. The bills were paid with the exception of about $1300, and the construction company refused to pay this because there was no consideration for its contract to pay the railroad company for its work in caring for and safeguarding the railroad tracks and signal system. It was argued that railroad company was required by law to do this work, and hence the contract with the construction company was void for want of a consideration.

We believe there was sufficient consideration in the agreement for the work done by the railroad, since it was enabling the construction company to complete its contract with the city without delay and litigation which would surely have resulted if an attempt would have been made to compel the railroad company to do the work at its expense.

Our conclusion, therefore, is that the judgment in favor of the railroad company was right. It was not only legal, but it is equitable, because presumably, the construction company ahs received from Atlantic City money for which it had not performed any service.

Judgment affirmed.

Baumhoff v. Oklahoma City Electric and Gas and Power Company

14 Okl. 127; 77 P. 40 (1904)

The Oklahoma City Electric Company agreed to sell and George W. Baumhoff agreed to buy the utility in Oklahoma for $120,000. There was a condition that the city council should pass an ordinance, in effect changing the party in the franchise to conform to the sale. The ordinance was passed, but the Oklahoma City Electric Company refused to perform. From a decision in favor or the company, Baumhoff appealed.

Justice Gillette: The contention of the Oklahoma City Electric Company that the contract sued on is void for want of mutuality, cannot, we think, be sustained upon the authorities.

There may be said to be mutuality of contract where the agreement entered into between the parties is binding alike upon each touching its ultimate performance. Both parties are bound or neither is bound. In the contract under consideration the item to be sold is plainly stated. The amount to be paid is equally definite. The time in which conveyance was to be made was also fixed. It is true that the contract provided for the sale to take place after the passage of an ordinance; butthis condition in the contract does not, we think, render the contract void for the want of mutuality.

The provision in question, if not ultimately consummated, may defeat the sale provided in the contract; but it cannot be said that it is lacking in mutuality because it is manifest that both parties are mutually and equally affected by and concerned in this condition.

Judgment reversed.

Perry v. Pearson

135 Ill. 218; 25 N.E. 636 (1890)

Silas Q. Perry made a contract on November 24, 1884, for the sale of some $357,700 worth of stock in the Perry-Pearson Company, manufacturers of wood products. Six years later he brought the present action, alleging that in 1884 he was mentally incompetent and that the contract should be recinded. From an adverse judgment in the lower court, Perry now appeals.

Justice Macruder: It is said that Perry was incapable of making a sale of stock, by reason of the impairment of his mental faculties through illness and trouble. It is urged that the weakness of his mind at the time of sale made him an easy victim of imposition. Mental weakness which will justify a court of equity in setting aside a contract or a deed must be such as renders a party incapable of understanding and protecting his own interests.

The complaintant produced a large number of witnesses who testified as to his mental condition in the fall of 1884. They spoke of his being nervous, worried and excited. A few witnesses said he appeared to be broken down, worn out, and shattered in health. Several refered that his voice trembled, and there was sometimes a wild, dazed look in his eyes. At the time

the Perry-Pearson Company was largely in debt. Many of its obligations were about to mature.

The defendant produced a large number of witnesses, many of whom had known the complainant for years, who said he was a diffident and reticent man; that he had always had a sort of nervous hesitancy in his speech and a tremulousness in his voice, and a shaking of the hands. It was also proved that the plaintiff had performed many perfectly intelligent contracts at that time, even though he did appear to be nervous and worried.

We are satisfied that the plaintiff was capable at that time of transacting ordinary business and that he was only over taxed by his financial condition.

There is no mental incapacity. Judgment affirmed.

Hardy v. Worchomoka

(N.W. Terr.) 3 West L.R. 579 (1906)

Justice Newlands: The section of the steam boilers' ordinance referred to is as follows:

Anyone not holding a final or provisional certificate of qualification as an engineer or a permit under this ordinance who at any time operates any steam boiler or is in charge of any steam boiler while in operation, whether as owner or as engineer, shall be liable on summary conviction to a penalty of not less than $5 and not more than $50.

Before a certificate of qualification as an engineer can be obtained, the candidate must pass an examination as to his fitness to take charge of

a steam boiler and produce a certificate of good conductand sobriety. These provisions show that the intention of the ordinance is to allow only those persons who have the necessary qualifications to operate a steam boiler and to prohibit all others from doing so. The plaintiff was therefore prohibited from operating a steam boiler during the time he had no certificate and cannot recover wages for the work done by him in that capacity during that time.

The plaintiff will have judgment for costs on the lower scale.

Short v. Bullion-Beck and Champion Mining Company

20 Utah 20; 57 P. 750; 45 L.R.A. 603 (1899)

It was illegal to employ a workman in excess of eight hours per day, except in case of emergency. B. L. Short was instructed to work twelve hours a day during a period of four months, and now brings an action for $148.15 as wages for this overtime. From judgment in favor of his employer, Bullion-Beck Mining Company, Short now appeals.

Justice Miner: It appears to us that the consideration for the services rendered was illegal. In 6 Am. and Eng. Enc. Law (2d Ed.) p. 757, it is stated:

A contract founded upon a consideration which is illegal in whole or part is as between parties and their privies, void and of no effect, and a court of law or equity will not entertain a suit brought in relation to it, but will leave the parties as it finds them. If the agreement be executed the court will not rescind it. If it is executory, the court will not aid

its execution.

In the case of Wood v. Armstrong, 25 Am. Rep. 671, the court said: "It would be a strange anomaly if a contract made in violation of a statute and prohibited by a penalty, could be enforced in a court of the same country, whose laws are thus trampled upon and set at defiance."

We are of the opinion that as both parties are engaged in criminal enterprise, both are principals, and both guilty, and the plaintiff is not entitled to recover.

Judgment of the court is affirmed.

Reece Folding Machine Company v. Fenwick

140 Fed. 287; 72 C.C.A. 39; 2 L.R.A.N.S. 1094 (1905)

A. D. Fenwick was a successful inventor who had been in the employ of the Reece Folding Machine Company. He was discharged without cause in the spring of 1899. He had specialized in the invention of machinery for folding collars and cuffs, and had made a contract with the company that he would assign to it any of his past, present or future inventions in this narrow field of collar and cuff folding. The company brought an action to force Fenwick to assign an invention which he had previously completed, and also any he had invented since his discharge, as per contract. Fenwick replied that the contract was illegal and void, because it restricted his personal liberty. From a judgment for Fenwick, the Reece Folding Machine Company now appeals.

Justice Putnam: The defense is set up that such contracts for an indefinite period, covering inventions to be afterwards made, are against public policy. On the other hand, whether based on agreements for employment or on other valuable considerations such contracts have been extensively made. They are essential to the business of the contracting parties, and are not unjust. A person may purchase an invention, and pay therefor a very large sum, and proceed to use it. The inventor, according to practice not uncommon, may subsequently overlap that invention by improvements which, though small, may be enough, in these days of sharp competition, to build up a successful hostile business.

On being discharged Fenwick considered his relations with the complainant company terminated. Thereupon he opened a place of business and began inventing on his own behalf. Six months after he was discharged, Fenwick visited the principal office of the complainant corporation, and told the officers he had begun building a new folding and pasting machine. (The folding machine was of the type specifically related in his contract.) He wanted to enter an arrangement whereby they could exploit these machines.

They refused his offer. This refusal further substantiated Fenwick's belief that he was on his own behalf.

We also believe that conversation completely severed the relation between the two parties. An invention, prior to this time, which is specifically within the contract, can be exploited by the complainant, that is if Fenwick has not spent his time, efforts or money in developing and exploiting the same to any substantial extent.

Reversed and remanded for proceedings not inconsistant with this opinion.

Anchor Electric Company v. Hawkes

171 Mass. 101; 50 N.E. 509; 68 Am. S.R. 403; 41 L.R.A. 189 (1898)

The Anchor Electric Company was formed by a merger of several persons and corporations engaged in the electrical business. Part of the contract signed by H.C. Hawkes and others provided that for five years they would not individually compete in the electrical business with the Anchor Electric Company. The company brought an action in a lower court to injoin Hawkes from competing against the Anchor Company. Hawkes claimed the contract was illegal because it was a restraint of trade. From the decision for the plaintiff, Hawkes appeals.

Justice Knowlton: From very early times certain contracts in restraint of trade have been held void as against public policy. They are objectionable on two grounds: They tend to deprive the party restrained of the means of earning a livelihood, and they deprive the community of the benefit of his free and unrestricted efforts in a chosen field of activity.

The objection to an agreement which restrains trade has evolved to where such an agreement if reasonable is held valid. Many decisions in both England and the United States verify this.

In this case, inasmuch as the stipulation is only to refrain Hawkes for five years from doing business that would interfere with or compete with the proposed business of the Anchor Electric Company, it seems quite clear, under the authorities of Massachusetts, that the stipulation gives no further limitations than is reasonably necessary to protect the good will of the business sold by the defendant's corporation, and it should, therefore, be held valid, unless there is a distinction in the company between the two parties. Very likely the price paid by the plaintiff was larger because the good will was

deemed more valuable due to this restriction.

Judgment affirmed.

Winchester Electric Light Company v. Veal

145 Ind. 506; 41 N.E. 334 (1895)

George W. Veal, as a county treasurer, loaned certain county money to the Winchester Electric Light Company, receiving in return two mortgage notes. This procedure was illegal. Veal, as an individual, brought an action to recover on the notes. For a decision in favor of the defendant on the grounds that the contract of the mortgage was illegal, Veal appeals.

Chief Justice Howard: We contend as many other authorities in this and in other courts that in cases such as this before us, public policy requires that, notwithstanding the violation of the statute, the contract based upon this violation should nevertheless not be declared void. In the case of Lester v. Bank, the president of the bank had borrowed from its funds which is contrary to statute. Recovery under the contract was enforced, not to shield the officials who had violated the law, but for the protection of the stockholders, depositors, and other creditors of the bank. The faults or even crimes, of public officials, ought not to be allowed to interfere with the right of the people, through their several municipal and political organizations, to recover the moneys raised from them by taxation, and wrongfully converted or misapplied by such officials.

The judgment is reversed. (New trial granted, and privilege of Veal to have the county joined in the lawsuit with an issue of public policy and thus permit recovery on the notes.)

Rabinowitz v. Massachusetts Bonding and Insurance Company

197 A. 44; 119 N.J. Law 552 (1938)

B. McCormack was injured and taken to a hospital. The patient was confined in the hospital for nine months with an injured knee. The accident occurred within the Workmen's Compensation legislation, the Massachusetts Bond and Insurance Company being the insurer. Two months after admission the hospital wrote the insurance company regarding payments, and the reply acknowledged responsibility under certain conditions. The bill was never paid, however, and the plaintiff now seeks recovery on the basis of a quasi-contract for the value of the benefit conferred. It is conceded that there was no expressed contract between the hospital and the insurance company. The hospital has assigned its rights to the bill to Rabinowitz.

Justice Wells: It is a well established rule of law when a person, with the expectation of remuneration, confers benefits of service or property upon another, under such circumstances that it would be unjust and inequitable for the persons receiving the benefits to retain them without compensation therefor, the law will raise a quasi-contractual obligation to support a recovery for the value of such benefits conferred.

It can also be said that a company which is under a legal duty to provide the person with medical or surgical attendance, the physician is in the position of one who dutifully intervenes in the company's affairs and performs its obligation. But if the company owes no such duty to the person injured, there is no satisfactory basis upon which it can be held responsible to the physician.

In this case the insurance company clearly indicated a responsibility, through its policy, to pay for proper medical services rendered to the employee.

Furthermore, the letters indicated a recognition of the services being rendered by the hospital and an authorization to continue the same until recovery was effected. The hospital "dutifully intervened in" the affairs of the insurance company and conferred a benefit for which it is entitled to a reasonable remuneration.

Pacific Timber Company v. Iowa Windmill and Pump Company

135 Iowa 308; 112 N.W. 771 (1907)

The Iowa Windmill and Pump Company purchased a carload of lumber from the Pacific Timber Company, the lumber being in specified size and at specified prices for the respective sizes. The consignee accepted part of the lumber, rejecting the balance as below standard quality. It is admitted that if this contract is a "severable" one, the consignee could accept part and reject part. On the other hand, if the contract is an "entire" contract, acceptance of part constitutes acceptance of the entire.

The Pacific Timber Company brought an action for one full car of lumber, and the Iowa Company replies that the acceptance of part does not carry any liability for the rejected part. From judgment for the Iowa Company, the Pacific Timber Company appeals.

Justice Sherwin: This suit was brought to recover the contract price for the entire car. The only question to determine is whether the contract between the parties was entire or separable. As a general rule a contract is entire when by its terms, nature and purpose, it contemplates and intends that each and all its parts are interdependent. On the other hand, a sever-

able contract is one in its nature and purpose susceptible to division and apportionment. The question whether a given contract is entire or severable is largely one of intention, and the intention is determined from the language the parties have used and the subject matter of the agreement.

It is very difficult to lay down a rule which will apply to all cases, and consequently each case must depend very largely upon the terms of the contract involved. In this case we think it almost conclusive that the parties did not intend the contract in question to be severable. It is hardly conceivable that the plaintiff, living more than 2,000 miles away from the defendant's place of business, should contemplate the shipment of a carload of lumber, although consisting of pieces of different dimensions, with the understanding or intention that each piece of lumber so shipped should constitute the basis of an independent contract, so that the consignee should be at liberty to reject any part of the lumber so shipped and retain the balance; nor is there anything in the contract itself indicating that the defendant had any thought that it was to receive other than an entire car.

One test of this contract would be whether the plaintiff could maintain an action for the part of the car complying with the contract when the balance of the car did not comply. We are clearly of the opinion that such action could not be maintained under the terms of this contract. There are many decisions to support us, for in the case of Chicago v. Sexton an agreement to furnish ironwork for a building to be erected was held to be an entire contract. Payment was to be fully made when the contract was completed.

Judgment reversed.

Clark v. Lehigh and Wilkes-Barre Coal Company

250 Pa. 304; 95 A. 462 (1915)

M. T. Clark owned four tracts of coal land, which he leased to the Lehigh and Wilkes-Barre Coal Company, on the basis of $5,000 per year and a royalty of 35 cents per ton of coal removed. The facts are not particularly clear, but it appears that one of the Clark tracts ran parallel and adjacent to some other property owned outright by the Lehigh Company. Along this property line, and presumably on Clark's property, was an old commissioner's road. The coal under this road was also leased and the royalty paid as on any other. After twenty years the Lehigh Company discovered that a commissioner's road is merely a surface easement, with a right to pass and repass, and that the adjacent or abutting owners own to the center of such a road. The Lehigh Company refused to pay any more royalties or rent money. Clark brought action for these moneys, and the Lehigh Company put in a counterclaim for $50,000 as overpaid rents and royalties. It is claimed that the original contract for leasing the coal is void because of a mistake of law. From a judgment for Clark, the Lehigh Company appeals.

Justice Mestrezat: It is not alleged that the Lehigh Company was induced to enter into the lease by any fraud, misrepresentation, concealment, or other inequitable conduct on the part of Clark. The contract may have been advantageous to the Lehigh Company but for the fact that it was the owner of a portion of this coal.

It is alleged that we are dealing with a mistake of law, pure and simple, unaided by any equitable consideration which should move a chancellor to grant relief. Under these circumstances, it is settled that equity will not relieve against a mistake of law. The rule is stated by Mr. Pomeroy (2 Pom. Eq. Jur. (3d Ed.) Par. 842) as follows:

The doctrine is settled that, in general, a mistake of law, pure and simple, is not ground for relief. Where a party with knowledge of all the material facts, and without any other special circumstances giving rise to an equity in his behalf, enters into a transaction affecting his interests, rights, and liabilities, under an ignorance or error with respect to the rules of law controlling the case, courts will not in general, relieve him from the consequences of his mistake.

As a reason for the rule, he says: If ignorance of the law were generally allowed to be pleaded, there could be no security in legal rights, no certainty in judicial investigations, no finality in litigations.

The judgment is affirmed.

Singer v. Grand Rapids Match Company

117 Ga. 86; 43 S.E. 755 (1903)

H. L. Singer brought action against the Grand Rapids Match Company on a contract for the purchase of matches by wholesale. A "mistake of fact" developed concerning the number of matches contained in cartons of various sizes; with the result that the buyer anticiparted receiving five times the quantity which the seller intended to deliver. Singer brought an action against the match company for a breach of contract, and the company replied that there was no contract because of a mistake in fact.

Justice Lamar: The plaintiff insists that they wrote to the defendants, inquiring as to whether they had not made a mistake in the quotations, and received a reply that the quotations were correct. The mistake was in the

make up or construction of the contract, because the quotations were correct. The defendant will not be penalized because of a misconstruction by the opposite party. A slip of the pen or tongue ought not to be treated as a deliberate contract, unless the other party has acted upon the contract and it would be unjurious to him to have it rescinded. This doesnot mean that the authorities intend to let parties out of hard bargains. When such contracts are made, the courts are called upon to enforce them.

The question in this case is, has a contract been made? Did the minds of the parties meet? Where there has been no fraud, deceit or mistake, where the terms are clear and unambiguous, neither party can escape liability by a mere statement that he made a mistake. If by reason of ambiguity in the terms of the contract, it appears that one of the parties has, without gross fault or neglect on his part, made a mistake; that this mistake was knownor ought to have been known by the other party; and the mistake can be relieved without injustice, the court will afford relief, either by refusing to degree specific performance, by cancellation or by refusing to give damages. There is no disposition in the law to let one "snap up" another or take advantage of his mistakes. In many instances, where one of the parties has made a mistake, neither a court of equity nor of law will refuse to enforce the contract. But where the mistake is open, where the opposite party knew or should have known, no contract was made. The minds of the parties have not met, and they will be left where the mistake places them.

The court did not err in granting non-suit.

School District Number 1 v. Dauchy

25 Conn. 530; 68 Am. D. 371 (1857)

Dauchy had nearly completed the construction of a school house when lightning started a fire and destroyed the structure. He refused to build a new school, and the School District Number 1 brought an action for breach of contract. From a judgment for Dauchy, School District Number 1 appealed.

Justice Ellsworth: The defendant insists that where the thing contracted to be done, becomes impossible by the act of God the contract is discharged. This is altogether a mistake. The act of God will excuse the not doing of a thing where the law created the duty, but never where it is created by the positive and absolute contract of the party. The reason of this distinction is obvious. The law never creates or imposes upon anyone a duty to perform what God forbids or what he renders impossible of performance, but it allows people to enter into contracts as they please, provided they do not violate the law.

Where a party by his own contract creates a duty or charge upon himself, he is bound to make good. He could have provided for this act of God in his contract; therefore if a party undertakes to repair, the circumstances of the premises being consumed by lightning, or thrown down by an inevitable flood of water, or an irresistible tornado, will not effect his discharge. In a case when the act of God renders performance absolutely impossible, the agreement shall be discharged; as if one covenants to serve another for seven years, and he dies before the expiration of the seven years. Even in the case of death, it would be better to say, that the termination of the contract was implied at the death of either party.

In the case of Mohk v. Cooper, where the freighter of a vessel covenanted to proceed to St. Petersburg and there take a full cargo, but was prevented by an embargo. Lord Mansfield and other judges held that no exception not contained in the contract itself, could be used as an excuse for its non-performance. In the case of Burret v. Dutton, the court says, "Ice being in the Thames rendered it impossible for movement on the river, but this is not an excuse for nonperformance of a contract to transport certain goods". In the case of Adams v. Nichols, the court held that where a person contracted to build a house on the land of another, and the house was before its completion destroyed by fire, without his fault, he was not thereby discharged from his obligation to fulfill his contract.

These and other authorities which might be cited, satisfy us that the law was not correctly laid down in the court below, and concurring as we do with the doctrine of those cases, we advise a new trial.

AGENCY

Primitive systems of law were ignorant of the law of agency. The parties to acts in law had to execute them in person. Although over a vast number of years a system of agency evolved, partially through the influence of the church and partially through the influence of the people. The people elected individuals to represent them in government and in court, why then could they not elect or appoint individuals to represent them in business.

There is little justification for discussing further the evolution and history of agency, for there were no dynamic changes; it came into existence slowly and without apparent notification.

Agency is a contract by which one person, with greater or less discretionary powers, undertakes to represent another in certain business relations.

An agent is one who acts for and on behalf of another person called the principal, in the same manner as the principal might himself act in the particular matter in which the authority is conferred. It is therefore a relationship founded upon contract; that is to say, the principal agrees to confer the authority upon the agent, and the agent agrees to carry out the authority so conferred.

The authority may be expressed or implied. If the contract is expressed, there is little occasion for uncertainty. The time, place, and manner of executing the authority, and the conditions and limitations imposed, are clearly defined. The extent of the express authority may be general or special. There can be little doubt of the limits of the agent's authority when the appointment is in writing and is unequivocal, but it is to be borne in mind, that express authority to an agent may be given orally as well as in writing. Persons dealing with an agent who has been given express authority are bound by the extent and limitations of the authority conferred. When third persons deal with an agent knowing his authority has been conferred in writing, they

are bound by the written instructions. The burden of the proof is on the third party dealing with the agent to show that the agent has acted within the scope of the authority conferred.

If the authority is applied it is very frequently left to be inferred or implied from the words and conduct of the principal or from the circumstances surrounding that particular case. Care must be exercised not to infer too much from the known facts, for in attempting to infer authority of an agent by reason of the words, conduct or actions of the principal, a reasonable and fair construction must be placed upon these facts and circumstances.

The courts will not permit a strained and unreasonable construction. It has been stated that the authority which is to be implied cannot exceed the natural and legitimate interpretation of the facts from which it is inferred. Implied authority cannot result from mere presumption or hazard or from matters of convenience. Certain implications are permissable even where the authority given to an agent is express, as, under an express authority, an agent has implied authority to do whatever is reasonable and necessary in the proper execution of his agency. An agent acting under express authority has implied authority to act according to known usages and customs.

As previously stated it is not necessary to have authority conferred in writing and under seal unless the agent is required to perform an act under seal. It is the doctrine that authority to execute an instrument under seal must be evidenced by an instrument of equal solemnity.

Perhaps it would be expedient to define a principal. A principal is the person for and on behalf of whom the agent acts; the person who confers the authority on the agent. The principal is the constituent; the agent, the representative. He who acts through another acts through himself. The principal, acting through the medium of the agent, is brought into contractual

relationships with other persons, with the same effect as if he made the contract directly. He acquires the same rights and is subject to the same responsibilities through the act of the agent as if he acted on his own behalf.

It is often said that every agent is a servant, but that every servant is not an agent. Agency is looked upon as a higher form of employment than service. A servant is usually not vested with authority to bring third parties into contractual relationship with the master and usually is not a factor causing a change of legal relationship between the master and third persons. It is only where the servant commits a breach of his obligations or injures some persom in the performance of his master's instructions that the master is put under obligations to other parties through the servant's acts. The servant, therefore, is one who is usually employed by the master to perform mechanical and fixed duties and is usually not vested with authority to perform, on behalf of his master, acts calling for the exercise of skill, judgment, or discretion, and generally speaking, is an employee of more restricted authority than the agent.

Agents are classified or grouped according to the extent of the authority conferred. There are general agents and special agents. A general agent is one who is empowered to transact all of the business of his principal of a particular kind, or one who is empowered to transact all of his principal's business in a particular place. A principal may have more than one general agent. He may have a general agent in Baltimore and one in New York, and in each place the agent represents the principal in the particular line of business delegated to him; or the principal may have a general agent to manage his real estate, and one to manage his manufacturing business.

A special agent is one who is authorized to act in a particular transaction. He cannot bind his principal in any other transaction than that in

which he is given authority. It is to be borne in mind that a special agent is just as much an agent as a general agent in the particular matter in which he is authorized to act. It will therefore by seen that it is the extent of the authority conferred which makes the agent either general or special.

Another classification of agents including those called universal agents. A universal agency is not of common occurrence and, generally speaking, where the term is used, it refers to an agency wherein a person is authorized to transact all of the business of a principal of every kind and nature.

It would be difficult in these days of almost unparalleled commercial activity to overestimate the importance of the place occupied by the law of agency in the great body of substantive law, and as a branch of contracts. So extensive have the active business operations everywhere come to be that no one would expect to find in any community any considerable number of business men who have sufficient time and capacity to attend to their affairs without the assistance of agents or servants. Indeed, it is not too much to say that the great bulk of the trade and commerce of the world is carried on through the instrumentality of agents; that is to say, persons acting under authority delegated to them by others, and not in their own right or on their own account. The magnitude of this importance becomes still more manifest when we include also the field covered by the law relating to the subject of torts, which we do in order to be as thorough as we should be in our consideration.

J. A. Fay and Egan Company v. Brown Machinery Company

(Mo. App.) 14 S.W. (2d), 491 (1929)

The J. A. Fay and Egan Company desired to sell $25,000 worth of supplies to the Missouri Car Company. The Fay and Egan Company made a contract with the Brown Machinery Company for their assistance as agents in this sale. They referred the Brown Company, as they had done many times, to their St. Louis representative, Mr. J. B. Temple. Temple agreed that Fay and Egan would pay Brown ten percent for closing the deal. When the deal was closed, Fay and Egan refused to pay the $2,500 commission, their claim being that Temple was only a salesman and had no authority to make such a promise to Brown. Brown relied upon a number of letters from Fay and Egan in which they spoke of Temple as their "representative". Brown held that a fundamental requisite of agency was representation. Therefore, since Brown and Egan used the word "representative", Brown relied on the apparent authority of Temple, who promised the ten percent commission to Brown.

It should be noted that Fay and Egan are the plaintiffs, who sued for $1,741.78 for machinery sold to Brown but not paid for. The Brown Company, as defendant, merely brought its claim of $2,500 as a counterclaim. In effect it says, Pay us $2,500 and we will pay you your $1,741.78.

Justice Haid: The plaintiff asserts that Mr. Temple was a salesman and could not bind the plaintiff in this contract. But the defendant disclosed several letters which referred to Mr. Temple as "our representative" and therefore the defendant had every reason to believe Mr. Temple was a representative. According to Webster's dictionary, a representative is defined as "One who represents another in a special capacity; an agent, deputy or substitute". A "salesman" on the other hand is defined as "One whose oc-

cupation is to sell goods or merchandise".

The plaintiff may not have given the power of agent to Mr. Temple, but it appears to accord with the definition of apparent authority commonly given in text books. Apparent authority is such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess. The conclusion of the defendant was justified.

This point (on $2,500 commission) must be ruled against the J. A. Fay and Egan Company.

Acme Gravel Company v. Bryant

295 P. 909; 111 Cal. App. 411 (1931)

The Acme Gravel Company brought an action for $2,153.28 for gravel furnished in the construction of an apartment hotel. The defendant, J. A. Bryant, replies that through the arrangement with the Acme salesman, Nugent, payments of 75 percent in cash plus 25 percent in preferred stock in the hotel corporation were agreed upon. Acme replies that Nugent never had that authority. From a judgment for plaintiff, defendant brings the present appeal.

Justice Lucas: Bryant produced one witness, namely, Robert F. Morris, engineer and second in charge who testified that one Nugent, salesman for Acme, solicited from him an order for the building materials in question and was told that to secure the order it would be necessary for Acme to take 25 percent of the value of the materials in stock.

William H. Ford, president and sole owner of the Acme corporation, testified that neither he nor anyone else in authority had ever authorized Nugent to negotiate a sale of materials for anything other than cash, and that he never accepted anything but cash for materials. The first time he had ever heard of Bryant's contention was after Bryant was pressed for payment. He further testified that Nugent had admitted to him that while something had been said about taking stock as part payment for the materials, there was no agreement to do so. Nugent did not appear as a witness at the trial, his whereabouts being unknown.

It is Bryant's contention that evidence is sufficient to justify the conclusion that Nugent did enter into an agreement to take part payment in corporate stock even if by so doing he violated positive instructions. The theory is advanced that one who employs another to make a sale becomes responsible for the methods which he adopts in so doing.

The court contends that the principal should be responsible when different acts and transactions of the agent which had been either permitted or acquiesced by his principal and which were sufficient to lead those with whom the agent was dealing to believe that he was clothed with ample power and authority. In other words, if a case of ostensible agency was clearly established.

"Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess."

"Ostensible authority is such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess."

In this case there is neither proof of actual authority nor of any act

or omission on the part of the Acme corporation, or any of its officers, sufficient to establish ostensible authority.

Judgment affirmed.

Springfield Engine and Thresher Company v. Kennedy

34 N.E. 856; 7 Ind. App. 502 (1893)

James B. Mitchner was the agent at Kokomo, Indiana, for the Springfield Engine and Thresher Company and as such sold John H. Kennedy a grain separator, payment partly in cash and partly by promissory notes, with a chattel mortgage against the machine as security for the notes. The contract of sale guaranteed the machine as security for the notes. The contract of sale guaranteed the machine, but required a written complaint of any defect which the company might be liable for. The agent made definite promises regarding the good working order of the machine and agreed to fix anything which was wrong. The machine was unsatisfactory; Kennedy refused to pay the notes due, and the company now brings this action on the notes to foreclose the chattel mortgage. Judgment for defendant in lower court. The company now appeals saying that Mitchner was a special agent and had no authority to make the warranties and promises which he had made as a means of closing a sale.

Justice Lotz: The appellant contends that the findings do not show that Mitchner was their general agent at any time, and therefore did not have the authority to waive the conditions in the contract of warranty. The terms "general agent" and "special agent" are relative. An agent may

have the power to act for his principal in all matters. He is then strictly a general agent. He may have the power to act for his principal in particular matters. He is then a special agent. Mitchner was authorized to make sales for the appellant's machinery in certain localities. His powers for that purpose were general, and with reference therto he was a general agent. The contract made in the first instance was not an unconditional contract for the sale of the machine. Kennedy had the right to return it if unsatisfactory. Mitchner as a general agent, when he received notice of the defects in said machinery, the notice to him was a notice to his principal. For it is a general rule "that notice to an agent of a corporation relating to any matter of which he has the management and control is notice to the corporation". Mitchner's subsequent acts and promises were in the line of perfecting the sale. We think he had the right to waive the written notice re-quired by the contract and of the other stipulations therein contained which were for the benefit of the appellant.

Judgment affirmed.

Kruse v. Revelson

155 N.E. 137; 115 Oh. St. 594; 55 A.L.R. 289 (1927)

Frank Kruse constructed a certain part of a building for Isadore Revelson who previously had let the general contract to the Golden Building Company. The present action is for labor and material furnished in construction. The owner, Isadore Revelson, alleges that he made a contract with Golden for the building, and Frank Kruse is a mere subcontractor and

should therefore get his money from Golden. Kruse replies that the contract was for cost plus $300; that Revelson often paid the subcontractors on the job directly; that such things indicate a mere agency; that Revelson is the principal and that Golden is the agent; and that Revelson is liable for Golden's actions in hiring Kruse. The lower court decided for Revelson and Kruse now appeals.

Justice Robinson: The legal question is, Do the above facts create the relationship between Revelson and the Golden Building Company of principal and agent, or do they create the relationship of owner and independent contractor?

The contract between Revelson and the Golden Building Company, whereby the Golden Building Company for a money consideration, the amount of a part of which was definitely fixed, and the basis for the ascertainment of the balance of which was likewise definitely fixed, agreed to produce a certain result, namely, the completion of a building, without retention by Revelson of the power to impose his will upon the Golden Building Company in the manner of accomplishing the result. Such a contract does not create the relationship of principal and agent. We are unable to see any distinction between this contract and the contract between Kruse and Golden Building Company. The relationship is the same.

The fact that some of the payments for labor and material were made by Revelson direct to the subcontractors, upon the order of the principal contractor, does not distinguish the contract from the character of contracts that pay to the principal contractor upon estimates.

Judgment affirmed.

Thomle v. Soundview Pulp Company

42 P. (2d) 19; 181 Wash. 1 (1935)

Kristine Thomle and others sought action to prohibit the consolidation of certain logging and mill properties. Thomle and others had formed a syndicate for the purchase of timber interests, had deposited money in the syndicate for which they received "units" indicative of their shares of interest, and finally appointed a manager of the syndicate with very extensive and broad authorities. Thomle contends that the agent had no authority to exchange the "units" for "shares" in a new corporation. The controversy turns on the effect of the express terms creating the agency.

Justice Steinbert: Viewing the syndicate arrangement as an agreement rather than as a juridical entity, we have this situation: The syndicate members, including the respondents, entered into a contract with each other, as well as with the syndicate manager, by the terms of which specified sums of money were pooled to be invested by the manager, with the hope and espectation of ultimate profit. The parties deliberately adopted a plan or arrangement which they considered the best means for effectuating their intention and object. The manager was given broad and almost unlimited powers, with the added provision that such powers were to be accorded the most liberal construction. The manager was to have entire control of the business and affairs of the syndicate, with the unqualified authority to enter into any and all agreements, deemed by it expedient to carry out its terms. The only limitation placed on the syndicate manager was the exercise of good faith and the absence of willful misconduct. These powers were sweeping in their significance and effect, but each of the syndicate members entered into the agreement fully apprised of its legal consequences. Each had the right to

refrain from entering into the agreement, but he also had the right, if he did enter into it, to expect and demand that all the others would likewise be bound.

There is little doubt the authority of the manager was sufficient to concede to him the power of agent for the syndicate members. This authority was fully and unambiguously declared in the agreement.

Not only must we view whether the manager had proper authority for his act, but also whether the discretion of the manager was soundly exorcised. We contend that an anomalous situation would be presented if 4,185 units, represented 746 individuals, content and malcontent, were put in charge of an industry having the proportions of the one here involved. Every practical and logical standpoint, necessitated the metamorphosis of syndicate units into stock certificates. We hold that the syndicate manager had the authority to make the exchange and that his discretion wassoundly and properly exorcised in making the transfer.

Rucks-Brandt Construction Company v. Price

23 P. (2d) 690; 165 Okl. 178 (1933)

C. C. Silver, a mason foreman of the Rucks-Brandt Construction Company, was injured in the course of his employment, filed a claim with the State Industrial Commission, and received an award for 500 weeks. The Southern Surety Company, the insurer of the Construction Company, became bankrupt. Silver then sought a court order to force the Rucks-Brandt Construction Company to pay the weekly compensation for the period remaining in the 500 week

award. Meanwhile the construction company brought the present action against the Sheriff, Charles Price, and C. C. Silver to restrain them by an injunction from proceedings, alleging that the commission award was not binding on the construction company, since they had received no notice of hearing of the case before the State Industrial Commission. Price and Silver reply that the construction company had by contract delegated the Southern Surety Company as its agent to appear before the commission and had shown such definite intent by the contract of insurance,

Justice Swindall: The trial court found that no notice had been served upon the plaintiff, but found the attorneys for the Southern Surety Company appeared and represented the plaintiff. They were authorized to do so by the terms of the plaintiff's policy with the company.

One of the articles in the law among other things provides:

To defend in the name and on behalf of this employer, any suits or other proceedings which may at any time be instituted against him on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor, although such suits, other proceedings, allegations or demands are wholly groundless, false or fraudulent.

It is contended by the plaintiff that the clause "to defend in the name and on behalf of this employer, any suits or other proceedings which may at any time be instituted against him on account of such injuries" constitutes an obligation and not an authority, and did not authorize the insurer, through its attorneys, to enter plaintiff's appearance in the proceedings and defend its behalf so as to bind it personally by the award. But under the agency laws an obligation is defined as a "duty" and authority as "the lawful delegation of power by one person to another". It is thus evident that an obligation may contain an authority. The provision of the plaintiff's policy

placed the insurer under a duty to proceed to a settlement "upon notice of such injuries" and to defend, "in the name and on behalf of his employer", proceedings, "instituted against him on account of such injuries". The authority granted might have been withdrawn at any time, such as between a principal and agent. So we hold, that in the present case the Southern Surety Company was authorized to bind the plaintiff and under its duty to conduct the matter to a final adjustment. We also hold that Southern Surety Company was authorized to enter plaintiff's appearance and act in its behalf so as to bind it personally under the clause of the policy.

Judgment affirmed.

Henry Cowell L. and C. Company v. Santa Cruz County National Bank

255 P. 881; 82 Cal. App. 519 (1927)

A. S. T. Johnson was an agent of the Henry Cowell Lime and Cement Company, and managed their business in Santa Cruz, California. He sent out bills, received checks, which he deposited, and drew checks on the company account. Johnson now appears short in his accounts, and the Cement Company contends that Johnson had no authority to draw money from this account and so the bank wrongfully paid on Johnson's signature. The amount involved is $1,007.44. From judgment for defendant, plaintiff now appeals.

Justice Tyler: The plaintiff demands of the defendant a repayment of these checks that their agent wrongfully indorsed and cashed. The defendants refuse.

The main issue raised is whether Johnson had ostensible authority to in-

dorse and cash the checks. It is claimed by the plaintiff that the agent did not. It may be stated that ostensible authority is defined to be such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess. Ordinarily an agent authorized to receive checks in payment for his principal may not have authority to indorse and collect the same. On the other hand he may have the apparent authority, and a bank cashing the check would not be compelled to pay again.

In order to establish the fact that Johnson had the authority by implication, the defendant called many witnesses. It appeared therefrom that Johnson was employed for many years by the plaintiff corporation and that his duties were not confined, as alleged in the complaint, to those of mere bookkeeper, but rather as a manager of plaintiff's extensive business, and that his acts as such were sufficient to warrant those dealings with him in believing that he possessed authority to do the very acts in question.

We therefore conclude that Johnson had the authority and when one of two innocent persons must suffer, the loss should be borne by him whose act made the loss possible.

Judgment affirmed.

Bredel v. Parker-Russell Mining and Manufacturing Company

(App.) 21 S.W. (2d), 932 (1929)

Fred Bredel, a gas engineer is suing for $2000 as compensation for services in designing certain gas ovens for an installation in Kalamazoo, Michigan. He relies on a contract of employment with Mr. Leigh Wickham, vice president of the Parker-Russell Mining and Manufacturing Company. The evi-

dence indicated that Wickham had authority to hire such a designer, but the company contends that Wickham had no authority to promise the $2000 compensation. The controversy then turns on whether the authority to hire carried with it the implied power to fix the compensation. In other words, was it necessary to tell Bredel how much he would be paid in order to hire him. From a decision in the lower court in favor of the plaintiff, defendant now appeals.

Justice Bennick: Generally speaking, the rule of agency is that every express delegation of power carries with it the power to do all those things which are reasonably necessary and proper to carry into effect the main power conferred. Whether an incidental power is a necessary one is a jury question when the conclusion to be drawn from the facts and circumstances of the case are not obvious one way or another.

It may be reasonably argued that the unrestricted and unlimited power conferred upon Wickham to employ the plaintiff carried along with it the power to bargain for the compensation to be paid. This is a jury question. But there is more to the case than a mere presumption, for the evidence shows that the plaintiff was sent to Wickham by the president, with the assurance that whatever Wickham did would be all right with him.

Therefore we think there was ample evidence of Wickham's power to bind his principal. Judgment affirmed.

Texas Building Company v. Drs. Albert and Edgar

57 Tex. Civ. App. 638; 123 S.W. 716 (1910)

Justice Rice: In the case at bar there is no question made as to the reasonableness of the charge of these physicians; but the only point of con-

tention on the part of the appellant seems to be that Barnes, its foreman, did not have the authority to bind the company to pay for the services of said physicians. The facts disclosed that Keasler was a poor man, unable to buy the necessary services of these physicians, of which he was in urgent need. The main office of the superintendant was in a distant city. Prompt action was necessary in order to save the life of the injured man. Barnes, the foreman, was on the ground in charge of the crew, with full authority to employ and discharge them and to do all other necessary things for conducting the said business. He urged the physicians to do all in their power for Keasler, suggesting they procure a specialist, if in their judgment it became necessary to do so. One of the physicians, knowing both Barnes and Keasler were employees of the building company and that Barnes was foreman, relied upon the conduct of the foreman as supposing that the company would pay therefor.

We believe that Barnes, its only representative at the time, was authorized to do whatever was necessary to alleviate the sufferings of Keasler, and it seems, from what was said and done by him, that the physicians reasonably believed that he had the authority to employ them and bind the company to pay their services. We are inclined to believe that whenever a company employing laborers sends them out under the supervision and control of the foreman, he not only had the implied authority and power to do all things that are incidental to the work at hand, but all things that might be necessary for the master's interests.

The principal of justice and the dictates of humanity, in our judgment, as well as the law, imposed upon the company under the circumstances the duty to furnish the wounded man medical aid.

Judgment affirmed.

B. and W. Engineering Company v. Beam

137 P. 624; 23 Cal. App. 164 (1914)

The B. and W. Engineering Company, the plaintiff, agreed to clear up a lot for I. W. Beam. After the work was done, E. D. Crowley, the representative of the plaintiff, accepted $1,070 as payment in full for services. It was a complicated transaction, and the figure was a compromise between Crowley and Beam. The B. and W. Engineering Company received andused the $1,070; but several years later brought the present action, denying there ever was an "accord and satisfaction" or compromise since Crowley had no authority to act. From a judgment for the defendant, plaintiff appeals.

Justice Lennon: The contention of the plaintiff that Crowley was merely a foreman of the work and was not expressly authorized nor ostensibly empowered by virtue of his employment, to accept less than the full sum in dispute.

This contention is answered by the record before us, which shows inequivocally that it was an admitted fact that he was an acknowledged and authorized business manager. The question as to whether Crowley therefore had the authority to change the claim in the controversy need no be discussed for the acceptance and retainment of the money paid to Crowley is an expression that it was a full settlement of the disputed claim. This acceptance is without doubt tantamount to an express ratification of the compromise made by Crowley.

Judgment affirmed.

Froug, Smulian and Company v. Outcault Advertising Company

168 S.W. 1075; 114 Ark. 9 (1914)

Gavin, an agent for Froug, Smulian and Company, contracted with the Outcault Advertising Company for an advertising campaign. The Froug Company used only part of the cuts, but Outcault billed for the entire amount. Gavin had apparently told his superiors that they would have to pay only for what they used. Froug Company claims that the transaction is void, since Gavin did no have authority to make the contract. The advertising company replies that, even though unauthorized, the contract was ratified by the use of some of the cuts; and ratification of a part of an act of agency ratifies the whole. From a judgment for plaintiff, Froug, Smulian and Company appeal.

Justice Smith: The principal, of course, is not bound by the authorized act of his agent, who acts without the apparent scope of his authority. But he may ratify his agent's unauthorized act, and when he does so he becomes completely bound as if he had conferred upon his agent the authority to do the act, in question. This is an elementary principal of the law of agency. Ordinarily, the principal is not held to have ratified, the acts of his agent if he is ignorant of his agent's action, but such lack of knowledge cannot always afford immunity from liability, and does not do so at all if, with knowledge that an unauthorized contract has been made in his name, but without information as to its details, he permits its performance and enjoys its benefits.

The appellants knew a contract had been entered into in their name and was being performed by appellee. A letter was introduced in evidence addressed by appellee to appellants, thanking them for their partonage. In this letter there was a notice that some kind of an order or contract had been made.

Upon being advised their employee had executed a contract in their name, without authority, appellants had the right to repudiate it, but they could not ratify it in part and repudiate it in part.

Appellants say Gavin misinformed them as to the terms of the contract. Even if this is true, the appellee was in no way responsible for the fact.

Judgment affirmed.

Lion Oil Company v. Sinclair Refining Company

252 Ill. App. 92 (1929)

A feud existed between the Lion Oil Company and the Sinclair Refining Company for control of certain retail gasoline filling stations in Chicago. The records indicated that the Sinclair Company's salesmen told certain Lion staion operators that the Lion Oil Company was on the verge of bankruptcy. There was testimony that money had been offered and even paid to Lion operators to change over to Sinclair gasoline. The Lion Oil Company contended that slanderous statements were made by salesmen of the Sinclair Company, and that that company was liable for the torts or wrongs committed. The lower court granted a verdict of $100,000 to the Lion Company, and the Sinclair Company appealed.

Justice Wilson: There is ample evidence in the record in support of the proposition that the slanderous statements of the agents received the full support of the Sinclair Company and their acts, in circulating untrue words, were ratified by their employer.

It is urged, on behalf of the Sinclair Company on this appeal, that,

under law they should not be held responsible for unauthorized utterances of one of its salesmen and cites cases in support of this contention. The rule in this state appears to be that a principal is liable to third persons for a tort which he has expressly authorized or directed his agent to commit. He is also liable for a tort committed by his agent afterward ratified and affirmed by himself. It appears to be the rule also in this state that the principal is liable for the tort of an agent committed within the scope of his employment.

As has already been stated, the fact that this course of slanderous statements was followed by the payment of money by the Sinclair Corporation to the customers of the plaintiff, certainly indicates a confirmation and an affirmance of the acts of its agents in attempting to procure the business of the Lion Oil Company.

Judgment affirmed.

Mississippi Valley Construction Company v. Charles T. Abeles and Company

112 S.W. 894; 87 Ark. 374 (1908)

Mr. M. F. Bain was the agent of the Mississippi Valley Construction Company and had definite instructions to purchase lumber for a certain job from the Rock Creek Lumber Company. Bain disobeyed and purchased lumber from Charles T. Abeles and Company. Abeles looked upon Bain as an independent individual, and extended credit to Bain personally. However, when Abeles learned of the Mississippi Company as principal, he immediately elected to hold the principal. The principal now replies that the act was unauthorized

and Abeles' only recovery is against Bain. Judgment in lower court was for Abeles, the plaintiff, and the Mississippi Valley Company now appeals.

Justice Wood: While Bain purchased the material sued for in his own name, and without disclosing his principal, and while credit was extended to him as the supposed principal, it was nevertheless true that he was agent of appellant construction company, and was clothed with the authority to buy the material to be used in the construction of the building. The proof shows that the appellee did not know that Bain was the agent of the construction company when the credit was extended to him, and that as soon as the agency was discovered the appellee elected to proceed against the construction company. The doctrine is well settled that where a party deals with an agent without any disclosure of the agency, and without any knowledge thereof, he may elect to treat the after-discovered principal, and hold him alone responsible for the debt, providing the election is made within a reasonable time after the discovery. The agent Bain, under the proof was certainly clothed with the apparent authority to make the purchase from the appellee. This being true, the appellant construction company was liable notwithstanding any secret instructions to Bain to purchase material from another.

Judgment affirmed.

Elco Shoe Manufacturers v. Sisk

183 N.E. 191; 260 N.Y. 100 (1932)

John P. Murphy was a salesman under contract with the Elco Shoe Manufacturing Company, makers of high-grade ladies' shoes. The contract provided

that Murphy could sell other makes of shoes provided they were not competing. However, he took over the line of Chandler shoes and in a single year sold $104,000 worth, while the Elco sales fell off $150,000. Elco sued Murphy, bringing an action for breach of contract and general accounting, basing their suit on the disloyalty of Murphy. Murphy answered the charges by instituting a counterclaim for $32,212.70 for unpaid commissions and wrongful discharge. The lower court gave verdict for Murphy on the basis that two lines of shoes were not in the same price range, and were therefore not competing, under the contract. Elco appeals. Murphy has since died, and this appeal was brought against William E. Sisk as executor of the estate of Murphy.

Chief Justice Pond: If the Chandler shoes which Murphy sold were competing with the plaintiff's line within the fair intent and meaning of the contract, then Murphy's conduct in selling such shoes was a violation of his contract with the plaintiff as a matter of law. "What a contract means is a question of law."

The trial court defined competing shoes as "those so similar in price design, style, material, workmanship and other characteristics as may fairly leave ordinary and reasonable retail dealers in such doubt in making a choice between them as to permit the skill of a salesman to become a determining factor". We do not adopt this principle in this case. We contend that no man can serve two masters with equal fidelity when rival interests come into existence. Agents are bound at all times to exercise the utmost good will to principals. They must act in accordance with the highest and truest principals of morality. The question here is not so much a technical definition of the word "competition" as used by shoe dealers as it is a question of loyalty and fair dealings. An agent is not loyal when he offers for sale a choice between a ladies' high-class turned shoe and a cheaper

shoe resembling the former and offered to trade as such. The cheap article competes with the higher priced if the two superficially resemble one another in appearance. Whether Murphy pushed the Chandler shoe or not, he offered a fine high-priced shoe, and one not so expensive, but practically the same in appearance except to the trained observer. This seems to be real and active competition. He not only sold shoes which were almost in active competition with the Elco shoes, but in one instance at least he told the Chandler people how to disguise an Elco design so as to produce an imitation thereof and sold the product.

Reversed on the counterclaims and an accounting ordered.

Pine Bluff Iron Works v. Arkansas Foundry Company

54 S.W. (2d) 299; 186 Ark. 532 (1932)

The Pine Bluff Iron Works acted as agent for the Arkansas Foundry Company in furnishing certain steel for the construction of a store building. As the contractor paid the Pine Bluff Iron Works, they in turn paid the foundry. In the case in controversy, the Pine Bluff received a check from the contractor and deposited it to its own account. Then it drew a check of its own to the foundry, but the bank failed before the check returned from the clearing house. From judgment in favor of the Arkansas Foundry Company, the Pine Bluff Iron Works appeals. The controversy turns on the commingling of funds by an agent.

Justice Kirby: The appellant according to his own understanding was authorized to collect for the materials, and could not, of course, accept other

than the money in payment therefor. The undisputed testimony shows that he deposited the money received for the materials in his own bank to his own credit without anything to indicate that he received it on account of or for his principal, or anything to indicate that it was not his own money, and, having so deposited it, he became liable for the loss of it throught the bank failure. Of course, if he had deposited it to his principal's credit or in such a manner as to indicate that it was not to his own personal account, such would not have been the case.

Judgment affirmed.

Lukens Iron and Steel Company v. Hartmann-Greiling Company

172 N.W. 894; 169 Wis. 350 (1919)

A. M. Castle and Company were the western sales agents of the Lukens Iron and Steel Company. Hartmann-Greiling Company had a contract of $105,000 for the construction of a United States Dredge by April 4, 1916. There was a penalty for late delivery. Castle secured the steel contract for the Lukens Iron and Steel Company, but the steel was so late in delivery that the dredge was made late, and the United States put a $1000 penalty against Hartmann according to the contract. Hartmann brings an action to recover a $1000 as damages against the Lukens Iron and Steel Company for their late delivery and consequent penalty. The steel company admits that Castle was their agent, but says they never knew the steel had to be rushed. Hartmann replies that the agent, Castle, knew it was a time contract for the United States Government, under penalty of prompt completion, and that knowledge of the agent should have been transferred to the principal.

Justice Kerwin: We are satisfied the evidence shows that A. M. Castle and Company were agents of plaintiff, and that plaintiff was bound by their acts and knowledge. A. M. Castle and Company knew the terms of the government contract, at least as early as August 17, 1915, and knew it was a penalty contract. Their knowledge was the knowledge of the plaintiff, hence plaintiff was chargeable with such damages as might fairly and reasonably be considered as arising from such a breach of contract.

Judgment affirmed.

Kaufman Metal Company v. Atlantic Refining Company

105 S.E. 373; 26 Ga. App. 100 (1920)

Chief Justice Broyles: The Atlantic Refining Company of Brunswick, Ga., gave to H. C. Willer Company, Jacksonville, Fla., an order for a one yard concrete mixer. The refining company on the request of the Willer Company sent A. J. Wright, one of its employees, to Jacksonville to inspect the mixer, which he did and, after the inspection he wrote across the order the following words: "Above inspected and accepted for Atlantic Refining Company. A. J. Wright, Traffic Manager". The machine was subsequently shipped to the refining company by the Kaufman Metal Company of Jacksonville, and the refining company refused it. The Kaufman company brought suit against the refining company for the agreed purchase price of the machine.

The undisputed evidence in the case showed that the machine inspected by Wright and shipped to the refining company was not a one yard mixer as ordered, but it either was a half or three-quarter yard mixer, and that the

the refining company wanted a one yard mixer only. It is also undisputed that Wright had no authority to accept the machine for his company but his authority was limited to inspection only and he inspected the machine as to its mechanical condition. He believed the mixer was of a capacity ordered, for he did not have the technical knowledge necessary to determine such a capacity.

We believe the refining company was legally justified in refusing to accept the machine.

Judgment affirmed.

Pope v. Wheatley

Tex. Civ. App. 54 S.W. (2d) 846 (1932)

I. N. Anderson was made general agent of C. R. Pope for the procuring of an oil lease and the drilling of a well. Owing to an error, the work was started on the property of S. H. Wheatley, with resulting damage to a field of grain. As a result of the controversy over the damage to the crops. Anderson and Wheatley submitted the matter to a board of three arbitrators, who awarded Wheatley $125. damages. Pope refused to pay, the lower court ordered payment, and the court of civil appeals of Texas also affirmed the award. Pope retitioned this latter court for a rehearing, alleging that Anderson had no authority to refer the matter to a board of arbitration, since the general agent cannot delegate such matters to arbitration without special authority from the principal.

Chief Justice Hickman: The only question of law presented for our de-

cision is: Under the foregoing findings, did I. N. Anderson, as agent of the appellant Pope, have the authority to bind Pope by his act in submitting the controverted matter to arbitration? The reference of a dispute to arbitration is an extraordinary method of settlement usually employed by an agent. It is not a method of settlement, usually employed by an agent, and the authority thus to settle a dispute is not one of the implied powers of a general agent. There are many decisions which verify this conclusion.

Our original opinion will be withdrawn, and this opinion on rehearing substituted, therefor. The judgment in favor of appellee against Anderson will not be disturbed, since no appeal was prosecuted therefrom.

Buick v. Standard Oil Company

230 N.Y.S. 192; 224 App. Div. 299 (1923)

Justice Whitmeyer: Plaintiff was shot in the leg and seriously injured on August 14, 1927, at about 3 a. m. by one Burton J. De Garmo at a gas filling station, belonging to the defendant, the Standard Oil Company. De Garmo conducted the station for the defendant and was watching it at the time. He claims that he thought that the plaintiff was trying to steal gasoline and that he shot, aiming at the ground, to frighten him away. Whether or not DeGarmo is liable for his act is the only question. De Garmo worked under a contract, in writing, which referred to him as "agent" and to the defendant as the "company". Under the contract, De Garmo was to sell on commission, to have the charge and custody of the property and the merchandise at the place, and was to take care of and be responsible for the same. Pro-

tection of the property was among his duties.

The nature of his act, then, is the question, whether it was within the general scope of his employment, while he was engaged in defendant's business, and was done with a view to the furtherance of the business, or was done solely to effect some purpose of his own, If the former, the defendant is liable whether the act was done negligently, or wantonly, or even willfully. If the latter, the defendant is not liable. Usually the question is one of fact. The gas station had been burglarized three times shortly before and articles had been taken and the pump had been broken. Although De Garmo had various merchandise in the station such as soft drinks, tobacco and smokers's supplies we do not believe he was watching the station primarily for his own interest. He was on the watch to prevent thieving and in so doing he was acting within the general scope of his employment and with the view of protecting the defendant's interest, and therefore does not alleviate the liability of the defendant because De Garmo's own interests were automatically protected. The question was one of fact for the jury and was resolved against the defendant.

The judgment should be affirmed.

Magnolia Petroleum Company v. Guffey

(Tex. Civ. App.) 59 S.W. (2d) 174 (1933)

Bob Lawson ran a gasoline station and this court treats him as an agent of the Magnolia Petroleum Company. When the defendant, Grady Guffey, came into the gasoline station to purchase gasoline and cash a check, Lawson drew a gun and held Guffey captive, because he alleged the check was no good, and because the peace officers were after Guffey. Finally Guffey was released

to get the check cashed. He returned immediately with the money, when Lawson again held him with a gun for over an hour. Guffey then brought an action in the lower court and received judgment of $4,625 as compensation from the principal, Magnolia Petroleum Company, for false imprisonment. The defendant now appeals, saying that Lawson was not within the scope of his employment, when he detained Guffey.

Justice Funderburk: The principal is liable "for all of the torts which his agent commits in the course of his employment". This rule has been upheld by many decisions. The decisions in this state have established the following proposition:

A principal is ordinarily liable for the willful tort of an agent acting within the general scope of his employment for the principal's benefit, regardless of the fact that the agent was actuated by personal malice and regardless of the fact that the agent disobeyed orders or instructions. Thus a principal, whether an individual or a corporation, is liable to the extent of actual damages for the willful tresspass of his agent committed in the course of his agency, even if done against the principal's orders. Again a principal may be liable for slanderous words spoken by a duly authorized agent in the scope of his duty. But liability in any case is dependent upon whether the agent was acting within the scope of his authority.

To contend that the principal is as a matter of law not liable for a false imprisonment and assault of an agent because he did not give his agent authority to falsely imprison or assault is analagous to contending the principal is not liable for the negligence of his agent because he did not give his agent authority to be negligent.

This case shall be remanded for a new trial on the grounds of whether Lawson acted in pursuance of his principal's business.

United States v. Pan-American Petroleum Company

55 F. (2d) 753 (1932)

During a transaction for leasing oil lands of the United States, charges were made that the agent of the United States, Mr. Fall, acted in conspiracy with the third-party purchaser of the oil leases to defraud the United States as principal. The present suit seeks to declare void all these oil leases. The lower court gave judgment for the defendant, Pan-American Petroleum Company; and the United States now appeals.

Justice Sawtelle: When Fall, the agent, accepted a "loan" from the Pan-American Company he became thereafter incapable of properly representing the United States of America in any dealings with his benefactor. Although the defrauded principal occasionally may be benefitted by certain transactions entered into in his name by the disloyal agent does not deprive the principal of his right to repudiate the bargain.

When the parties entered into the agreement they poisoned the spring of fair dealings between the government and the Pan-American Company. In the case of the United States v. Mammoth Oil Company , it was held:

If a governmental official, engaged in making contracts for the government, receives pecuniary favor from one with whom such contracts are made, a fraud is committed on the government, and it matters not that the government is subjected to no pecuniary loss, or that the contract might have been an advantageous one to it. The entire transaction is tainted with favoritism, collusion, and corruption, defeating the proper and lawful function of the government.

Reversed and judgment for the United States.

Porter Construction Company v. Berry; Duke et al

298 P. 179; 136 Or. 80 (1931)

J. P. Duke acted as agent for N. E. Berry in certain building construction in the city of Seattle. The Porter Construction Company was retained by Duke to do the excavation work. They had received $6,000 for part of the work, and now brought an action for an unpaid balance of $3,846.07. The case was brought against Duke. However, Duke is appealing from an adverse judgment in the lower court, alleging that he was a mere agent, that he had no financial interest in the project, and that he never guaranteed that Berry would pay his bills. Duke further charges that Porter Construction Company knew these facts.

Justice Rossman: Duke testified that he had no personal interest in either the property or the construction of the building, and that he made no engagements with the plaintiff in his individual capacity of any character. Berry and Duke were acquainted with one another, and during the times when Berry was absent Duke acted as his representative in supervising the excavation.

The question is whether the above testimony is capable of sustaining a judgment against Duke for the cost of making the excavation. According to the testimony of the plaintiff it cannot be doubted Duke was acting as agent, and as his capacity was well known to the plaintiff he is free form any liability.

Action against Duke dismissed.

J. Dwight Palmer v. The Marquette and Pacific Rolling Mill Company

32 Mich. 274 (1875)

Justice Cooley: The plaintiff sues the defendants for breach of contract whereby as he alleges he was employed by them as dock superintendent at their works at Marquette. The contract is alleged to have been made August 8, 1372 for one year from August 14, 1872. Plaintiff entered upon employment on the day last named, and was discharged January 1, 1873.

The plaintiff gave as testimony that the oral negotiations between H. A. Burt, the agent of the defendants and himself, were about employment at two thousand dollars a year, but Burt thought the sum too high. This was on the first day of August. On the seventh day of August Burt sent him the following telegram:

Chicago, Aug. 7,1872

To Dwight Palmer: You may come on at once at salary of two thousand conditional only upon satisfactory discharge of business.

H. A. Burt, Agent

It was this telegram with the previous negotiations, that the plaintiff relied upon to be a contract.

As he had counted upon the contract as not being performed within a year from the time it was made, it was necessary for the plaintiff to show the contract in writing. The only part of this contract which was in writing was the telegram, which embraced only the consideration. The other essentials of a contract were not contained in the telegram, for it cannot be determined by the telegram whether Burt had in mind to employ the plaintiff as a dock superintendent, watchman or any other employment. It is manifest that on these matters the telegram settles nothing.

Judgment affirmed.

Brown et al. v. Retsof Mining Company

111 N.Y.S. 594; 127 App. Div. 368 (1908)

Edward W. Brown was hired as agent for the Retsof Mining Company on the basis of the following letter from the Retsof Mining Company:

I desire to say that your relations as sales agents of the Retsof Mining Company will continue under the same conditions as outlined in your contract as long as you conduct the business in a manner satisfactory to the Retsof Mining Company. In view of this fact, I do not deem it at all necessary that any formal contract for a specified time be entered into.

The agent brought an action in the lower court alleging that he was unjustly discharged; but the Retsof could discharge at any time he chose, without obligation to explain or justify its actions. In the trial Brown went into extensive detail as to the fine service he had rendered. Retsof now appeals from judgment for Brown.

Justice Hooker: The nature of the employment which gave the defendant the absolute right to terminate the relationship between himself and agent was carefully investigated. The duties of the agent were many and diversified.

Yet regardless of the duties it is our contention that the language of the contract could not have been plainer. There was no limitation upon the term "satisfactory". It is not important to consider whether the defendant was actuated by some ulterior motive; it is immaterial whether the plaintiff, through a long series of years, had worked up a profitable business.

The plaintiff voluntarily entered into this contract, whose legal effect they sould have known. We therefore reverse the judgment and a new trial granted.

Barber-Greene Company v. Gould

109 So. 364; 215 Ala. 73 (1926)

Frank E. Gould, an agent of the Barber-Greene Company, brought an action for unpaid commissions on machinery sales. Two sales were involved. The sale to J. A. Burt carried a clause that the sale would be complete upon the approval of J. A. Burt. The sale to Crittenburg-Ozark Joint Project, on the other hand, was an outright and completed sale. The buyers in both cases have returned the machines as unsatisfactory, and Gould seeks recovery of commissions on the basis that he did the work in closing the sales and that the return of the machines was really the fault of Barber-Greene. From a judgment for the plaintiff, defendant appeals, still insisting that he should not pay commission on Burt's deal, as that sale was never closed.

Justice Somerville: In cases of this sort between principal and agent whereby the principal has discretion as to the acceptance of the agent's orders, it seems to be the law that the agent's commission will not accrue on rejected orders unless the principal has abused his discretion and acted in bad faith in their rejection. Although this principle is not applicable here.

Another principle, is that the terms of contracts of employment are frequently such that the agents right to commission for negotiating a sale does not accrue until and unless the purchaser pays the price, although the principal cannot deprive the agent of his right to compensation under such a contract by unreasonable means. It is also observed that as a rule the failure, refusal or inability, of either principal or third person, to carry out the contract does not defeat the agent's right to compensation.

Another principle which affects this case is that the principal is bound

to the agent as well as the purchaser by his warranties and if through a breach of the principal's warranties, the sale does not completely materialize, the agent is still justified in receiving compensation for his work. This principle is only effective when the contract is an unconditional sale.

The sale to Burt was not an unconditional sale and therefore the sales commission on that sale is denied.

The sale to Joint Project was an unconditional sale and therefore the sales commission on that sale is approved.

Gilbert Manufacturing Company v. Stroud and Company

287 F. 527 (1923)

Stroud and Company engaged the Gilbert Manufacturing Company as its exclusive sales agents in certain defined territory, with a provision that, Stroud should nevertheless get their regular commission. Gilbert is now making a counterclaim for commissions on repair parts which Stroud has sent into Gilbert's territory. The main suit dealt with Stroud's demand that certain machines be returned by Gilbert, and Gilbert is holding the machines until they receive commission on the repair parts. In the lower court there was a verdict for Stroud on all points, and Gilbert appeals.

Justice Stone: The commission contract and the sales contract were correlated. Each of them, by its terms, deals with graders and wagons and them alone. In neither contract is there any reference to parts of or repairs to graders and wagons.

Judgment affirmed.

Conclusion

In conclusion it is imperative to familiarize the reader with certain generalities, or perhaps they should be called intangibles, that have had and still do have, although in lesser degree, a marked effect upon the decisions handed down by our courts.

In early American history the state constitutions did not in terms, give to the courts the power of declaring acts of the legislature in violation of the restrictions of the bill of rights to be void, and it is conceivable that it was intended that these restrictions should operate merely as directions to the legislature, and that the legislature would be the sole judge of its compliance with the law. Although it was held within the next few years that the highest court of the state could declare any statute, in conflict with the express limitations of the bill of rights, unconstitutional, the three fundamental canons of constitutional government were adopted. The two most important ones will be discussed.

The first important canon was that every presumption by the courts should be made in favor of the validity of a statute. This was recognized by the courts at the outset and this power was exceptionally pleasing to the people, it made them feel that they were being protected against oppressive and discriminatory legislation; they were proud of it. A short time later because of the rise of problems of greater complexity the courts saw fit to take it upon themselves to declare statutes unconstitutional upon mere technicalities. Inevitable consequences followed. The treatment of statutes by this seemingly narrow and partisan stand point by the courts lead to a reaction of feeling among the people. A decision of a court declaring a statute unconstitutional has, instead of being received with general approval often

provoked public indignation, and aroused among superficial thinkers that the courts have exceeded their power, and in so doing are curtailing the power of the people themselves. Various remedies have been suggested, but as yet none adopted. The distrust and ill feeling which certain decisions upon matters of constitutional law have created, have seriously threatened the bulwark against governmental tyranny which only a short while ago was looked upon with almost religious veneration. In 1911 this feeling lead to the adoption of a constitution in California which would permit greater freedom of legislative enactment. One provision of this constitution if recognized in its strictest sense, a man could be deprived of his property without compensation and even hanged without a trial.

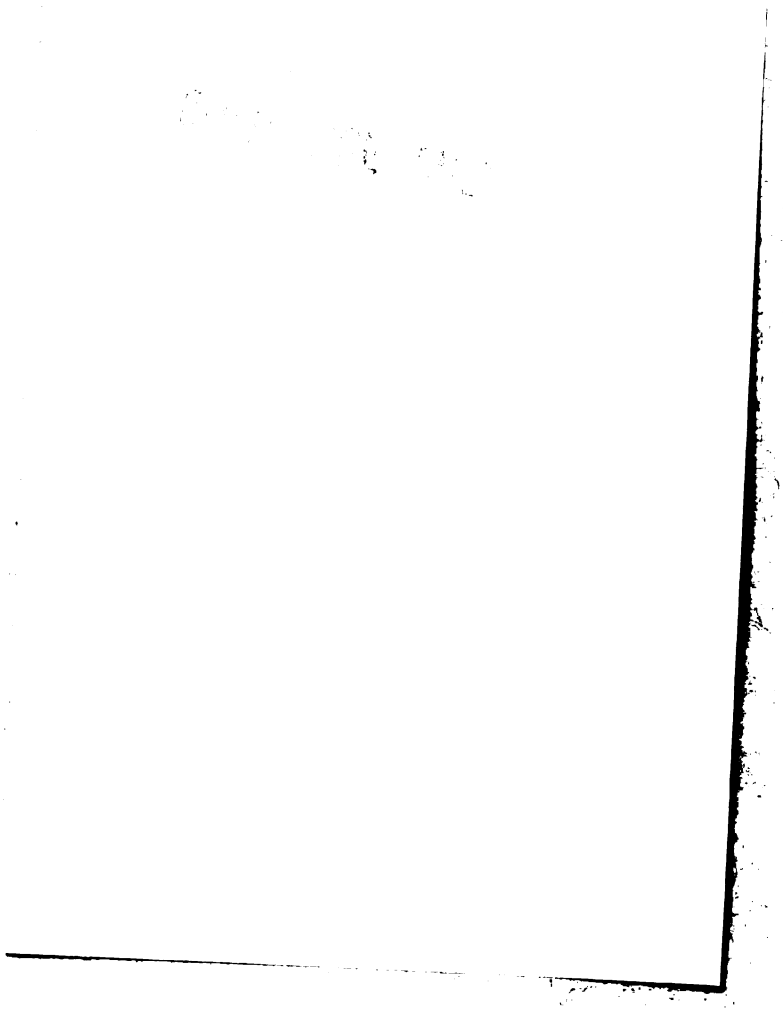
The writer feels that a purely personal belief as to the vigorous attitude of the courts to our legislative enactments, would not be inopportune. It has been said that our courts thrive on dogmas, in fact our own President Roosevelt mentioned the horse and buggy days innumerably in connection with the United States Supreme Court. President Roosevelt in attempting to eliminate conservative rulings and open the way for more social legislation, is packing the supreme court bench.

One only has to read the court decisions for proof of the falsehood of calling our tribunals dogmatic. The courts are invariably conservative of the times and they serve to restrict the passion of the times by cool judgment. Any of our present day courts would have been called liberal or radical twenty years ago. The courts are not called radical today, because the people always remain one step ahead of them or what seems even more logical, the tribunals of our land remain one step behind her people. It is of the utmost importance, that they refrain from immediately reflecting the opinions of the masses.

The second important canon which has an important effect upon the decisions rendered by our courts, is that the constitution should be interpreted and enforced by an independent judiciary, the members of which should hold office during good behavior and should be subject neither to reward nor punishment for their decisions.

As our state and federal judges were dependent upon popular vote of the people, they were extremely cautious in rendering a decision against a land owner in favor of the public, because the judge would incite in the land owner and his friends a desire for revenge, and the public would perhaps not even pay any attention to the case. If they did, it would only be to criticise him for lack of human qualities.

This flaw in our judicial system has been somewhat alleviated by the appointment of our federal judges for life and the election of judges, by a few states for a period of fourteen or twenty-one years. This will tend to permit the judiciary body to issue a decision independent of public opinion because of self preservation. Although it must not be disregarded that the vast majority of our state judges are elected by popular vote for periods of from four to seven years.

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