

# Workmen's Compensation Act--Incidental Occupation

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being.”<sup>27</sup> Chief Justice Marshall concluded “that general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them.”<sup>28</sup> The decision in the case under consideration constitutes legislation by the judiciary. “It is the function of the Court to construe the statute and not to defeat it as construed.”<sup>29</sup> “It is the duty of all courts of justice,” said Lord Chief Justice Wilmot, “to keep their eye steadily upon the interest of the public, even in the administration of committative justice; and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give it no countenance or assistance in *foro civili*.”<sup>30</sup> As the decision now stands, the purpose of the statute is lost. Is it to be assumed that any man may now make a livelihood illegally? Can he take his chance in winning and if successful retain his gains, and in losing bring an action and recover the money he has lost? This undoubtedly will stimulate gambling to the *n*th degree, for under the law of the recent decision the bookmaker is unable even to offset his losses.

It should not have been necessary to plead the illegality of this contract which plainly appears on its face. If the plaintiff's action is to be sustained, the defendant should have been allowed to offset his losses against the plaintiff's. A disposition even more harmonious with the intention of the Legislature would have been for the Court to have, of its own motion, stepped in and denied the right to any relief thereunder without reference to the state of the pleadings, since it is apparent that the wager is antagonistic to the interests of the public.<sup>31</sup>

JOSEPH D. REZNICK.

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#### WORKMEN'S COMPENSATION ACT—INCIDENTAL OCCUPATION.

The Workmen's Compensation Law,<sup>1</sup> in its far-reaching paternalism, has opened a field of statutory law in which liberal construc-

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<sup>27</sup> *United States v. Palmer*, 3 Wheat. 610 (U. S. 1820) (Chief Justice Marshall in construing an act of Congress of April 30, 1790, §8 [1 Stat. 113] relating to robbery on the high seas).

<sup>28</sup> *Ibid.*

<sup>29</sup> *United States v. Palmer*, *supra* note 27; *Sorrell v. United States*, 287 U. S. 435, 449, 450, 53 Sup. Ct. 210, 215 (1932).

<sup>30</sup> *Law v. Peers*, *Wilmot's Notes*, 364, 378; approved in *Veasey v. Allen*, 173 N. Y. 359, 368, 66 N. E. 103 (1903).

<sup>31</sup> *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539 (1880); *Raferts v. Criss*, 266 Fed. 296 (C. C. A. 2d, 1920); *Drake v. Lawer*, 93 App. Div. 86, 88, 86 N. Y. Supp. 986, *aff'd*, 182 N. Y. 533, 75 N. E. 1135 (4th Dept. 1905); *Drake v. Siebald*, 81 Hun 178, 183 (N. Y. 1884).

<sup>1</sup> Laws of 1913, c. 816; Amended and Re-enacted, Laws of 1914, c. 41; Consolidated Laws, c. 67.

tion of the statutory provisions by the courts, as regards the rights and interests of employees, is practiced. Particularly significant, in view of the antecedent common law principles of master and servant, is the construction which the courts give to the phrase, "arising out of and in the course of the employment."<sup>2</sup> In this connection, the questions of fact and law pertaining to the determination of the incidental or non-incidental character of work, occupations, conditions and occurrences arising out of an employee's going to or coming from the place of employment lead into a path beset with legal thorns. In the recent case of *Schwimmer v. Kammerman & Kaminsky*,<sup>3</sup> the Court of Appeals has dealt with a phase of this problem in a manner that serves as an excellent point of departure in analyzing the law of New York concerning the status of employer and employee as affected by the latter's travels to and from the place of employment.

The facts in this case show that the employee deviated from the accustomed route from his home to the place of work to purchase, at the direction of the employer, materials for the repair of a machine at which he worked. In so doing, and while resuming his travels to the establishment of his employer, the employee was injured. In reversing the decision of the Appellate Division, the Court of Appeals, enunciating the law through Justice Lehman, held that the employee's injury arose out of and in the course of the employment and was therefore compensable. The critique of this decision not only affords an elucidation of the law as it is, but also happily reveals the state of the law as it should be.

The essence of the problem has its common law roots in the master and servant relation as laid down in English cases. It is unnecessary for the present purpose to search out a case more venerable than *Joel v. Morison*,<sup>4</sup> decided in 1834 by Baron Parke, in which the learned jurist established the memorable distinction between a mere "detour" on the part of a servant engaged upon his master's business and a "frolic" of the servant. In the latter event, the servant is engaged upon business which is purely his own and relieves the master of liability for his negligent acts. *Joel v. Morison*<sup>5</sup> and *Sleath v. Wilson*<sup>6</sup> are the leading English cases in the law of master and servant on mere deviations of the servant; *Mitchell v. Crassweller*<sup>7</sup> and *Storey v. Ashton*<sup>8</sup> are the leading cases on "Frolics" or total abandonment of the master's business.

New York cases of significance are *Cosgrove v. Ogden*,<sup>9</sup> in

<sup>2</sup> WORKMEN'S COMPENSATION LAW, art. 2, §10, Laws of 1922, c. 615.

<sup>3</sup> 262 N. Y. 104, 186 N. E. 409 (1933), *rev'g*, 236 App. Div. 766, 258 N. Y. Supp. 1012 (3rd Dept. 1933).

<sup>4</sup> 6 Carr. & P. 501 (1834).

<sup>5</sup> *Ibid.*

<sup>6</sup> 9 Carr. & P. 607.

<sup>7</sup> 13 C. B. 237.

<sup>8</sup> L. R. 4 Q. B. 476.

<sup>9</sup> 49 N. Y. 255, 10 Am. Rep. 361 (1872).

which the master is held liable for the servant's acts while engaged upon the master's business despite the servant's performance of the work in a forbidden manner; *Quinn v. Power*<sup>10</sup> holds the master liable for the servant's negligence while the latter is engaged upon the master's business; a deviation of the servant, when combining his own with his master's purpose, does not constitute an abandonment of the master's service is the holding in *Jones v. Weigand*,<sup>11</sup> and hence the liability of the master for the servant's negligent acts survives. The same theory applies in *Riley v. Standard Oil Co. of N. Y.*<sup>12</sup> But, let the servant abandon the purpose of his master and embark upon a frolic of his own and we find the master relieved of liability for the negligent acts of the derelict from duty; it was so held in *Reilly v. Connable*<sup>13</sup> and in the Massachusetts case, *McCarthy v. Timmins*.<sup>14</sup>

With this approach in mind, it may be indicated that the English Workmen's Compensation Act<sup>15</sup> is the fount from which the phrase, "arising out of and in the course of the employment" flowed to be incorporated in the New York statute. The strict construction of the phrase in that day as found in *Sheldon v. Needham*<sup>16</sup> illustrates common law harshness in antithesis to the liberal and benign construction of paternalistic statutes as illuminated by the opinion of Justice Cardozo in *Grieb v. Hammerle*.<sup>17</sup> In the English case, Lord Justice Eady said:

"I think the law is well established that, if an accident happens to a person who is being employed in the course of her employment, the accident may properly be said to arise out of the employment."

Invoking this logic, the learned Lord Justice denied compensation to a charwoman who had been sent by her employer to deposit a letter in a post-box some hundred yards distant from the place of employment, and who, in carrying out the commission, slipped upon a banana skin in the street and broke her leg. The court held that the injury sustained did not arise out of and in the course of employment.

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<sup>10</sup> 87 N. Y. 535, 41 Am. Rep. 392 (1882).

<sup>11</sup> 134 App. Div. 644, 119 N. Y. Supp. 441 (2d Dept. 1909).

<sup>12</sup> 231 N. Y. 301, 132 N. E. 197 (1921), where Justice Andrews said: "No formula can be stated that will enable us to solve the problem whether at a particular moment a particular servant is engaged in his master's business. We recognize that the precise facts before the court will vary the result. We realize that differences of degree may produce unlike effects. But, whatever the facts, the answer depends upon a consideration of what the servant was doing, and why, when, where and how he was doing it."

<sup>13</sup> 214 N. Y. 586, 108 N. E. 853 (1916).

<sup>14</sup> 178 Mass. 378, 59 N. E. 1038 (1901).

<sup>15</sup> 6 Edw. VII, c. 58, §1, subd. 1 (1906).

<sup>16</sup> 7 B. W. C. C. 471.

<sup>17</sup> 222 N. Y. 382, 118 N. E. 805 (1918).

*The Matter of Grieb v. Hammerle*<sup>18</sup> concerns a cigar packer who, after regular working hours, and while engaged in delivering cigars at the request of his employer, sustained accidental injury and died. In affirming the award of compensation, Justice Cardozo said:

"If the service was incidental to the employer's business and was rendered at the employer's request, it would be part of the employment within the meaning of this statute; any other ruling would discourage helpful loyalty." And further: "*Pro hac vice*, by force of custom or request, the employment is enlarged." Also: "A service does not cease to be part of an employment because it is occasional or trivial."

With that inimitable nimbleness of legal wit which characterizes the learned Justice, he seizes upon the Connecticut cases of *Hartz v. Hartford Faience Co.*<sup>19</sup> and *Larke v. John Hancock M. L. Ins. Co.*<sup>20</sup> to support his theme; and, moreover, illustrates the change in the English law as given in *Sheldon v. Needham*,<sup>21</sup> by quoting from *McDonald v. Owners of the Steamship Banana*,<sup>22</sup> in which it is said, *obiter dictum*, "If I send my domestic servant in the evening with a letter to a friend, and he is knocked down by a motor omnibus on his way to or from my friend's house, there will be liability under the English Statute." Justice Cardozo entertains a similar view and cites *Dennis v. White & Co.*<sup>23</sup> wherein the House of Lords, approving the dictum, "reviewing all the precedents, and sweeping aside many fine-spun distinctions, makes it clear that the dictum was sound and just."

The bridge between the decision in *Grieb v. Hammerle* and that in *Schwimmer v. Kammerman & Kaminsky* is of simple construction but reveals on close examination a legal lattice-work of most delicate, intricate and interesting character.

The conclusion is obvious that the courts must give force to the statutory provision that the employer's liability must flow from the employee's "disability or death from injury arising out of and in the course of the employment."<sup>24</sup> This fundamental construction is upheld by numerous decisions in this jurisdiction and in others whose statutes read the same.<sup>25</sup> Of similar import is the conclu-

<sup>18</sup> *Ibid.*

<sup>19</sup> 90 Conn. 539, 97 Atl. 1020 (1916).

<sup>20</sup> 90 Conn. 303, 97 Atl. 320 (1916); see also *Lane v. Lusty*, 3 K. B. 230 (1915); *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368 (1916).

<sup>21</sup> *Supra* note 16.

<sup>22</sup> 2 K. B. 926, 929 (1908).

<sup>23</sup> 1917 A. C. 479.

<sup>24</sup> *Supra* note 2.

<sup>25</sup> *Leonbruno v. Champlain Silk Mills*, 229 N. Y. 470, 128 N. E. 711 (1920); *Schultz v. Champion Welding & Mfg. Co.*, 230 N. Y. 309, 130 N. E. 304 (1921); *Morris & Co. v. Industrial Commission*, 295 Ill. 49, 128 N. E. 727 (1920).

sion that the word *and* carries with it conjunctive force;<sup>26</sup> "arising out of" *and* "in the course of the employment" are concurrent conditions and are essential findings to justify an award. The oft-cited case of *Cudahy v. Parramore*<sup>27</sup> has limited application in New York courts because that case deals with a matter arising under the Workmen's Compensation Law of Utah,<sup>28</sup> in which the phrase, "arising out of *or* in the course of the employment" occurs; the word *or* naturally carries with it disjunctive force. In New York, both conditional elements must co-exist to justify an award.

The question then presents itself, "What constitutes 'disability or death from injury arising out of and in the course of the employment'?" In answering this query, jurists have been particularly exercised and vexed by the necessity of interpreting those situations growing out of the employee's perambulations to or from the place of employment.<sup>29</sup> The court in *Irwin-Neisler & Co. v. Industrial Commission*,<sup>30</sup> an Illinois decision, suggests a working definition of the statutory phrases under discussion and interprets the situations indicated in terms of legal propositions. "Arising out of," in connection with employment, is construed to refer to the origin or cause of the accident; "in the course of," in connection with employment, is construed to refer to the time, place and circumstances of the accident; an employer may be liable for an employee's injuries sustained outside the place of employment where the employee's duties take him away; an employee going to or from the place of employment may or may not be in the line of employment, and this issue is largely a question of fact.

The common law finding that the status of master and servant subsists and persists while the servant is engaged upon the master's purpose has been previously emphasized. The holdings under the Workmen's Compensation Law are essentially in agreement with this principle; but the principle is applied with an elastic yard-stick that produces widely varying results. The court in *Newman v. Newman*<sup>31</sup> cites with approval the harsh rule of the early English cases and denies compensation to the driver of a meat-delivery wagon who was injured while making a delivery on foot. In *Gleisner v. Gross &*

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<sup>26</sup> *Heitz v. Ruppert*, 218 N. Y. 148, 112 N. E. 750 (1916); *McMahon v. Mack*, 220 App. Div. 375, 222 N. Y. Supp. 79 (3rd Dept. 1927); *Harris v. Henry Cheney Hammer Corp.*, 221 App. Div. 199, 223 N. Y. Supp. 738 (3rd Dept. 1927).

<sup>27</sup> 263 U. S. 418, 43 Sup. Ct. 94 (1923).

<sup>28</sup> Compiled Laws of Utah, 1917, §3113; *Amended*, Laws of Utah, 1919, c. 63.

<sup>29</sup> *McNally v. Diamond Mills Paper Co.*, 178 App. Div. 342, 164 N. Y. Supp. 793 (3rd Dept. 1917); *Tillbury v. McCarthy & Townsend*, 179 App. Div. 593, 166 N. Y. Supp. 878 (3rd Dept. 1917); *Geller v. Republic Novelty Works*, 180 App. Div. 762, 168 N. Y. Supp. 263 (3rd Dept. 1917).

<sup>30</sup> 346 Ill. 89, 178 N. E. 357 (1931); see also *U. S. Fuel Co. v. Industrial Commission*, 310 Ill. 85, 141 N. E. 401 (1923).

<sup>31</sup> 169 App. Div. 745, 155 N. Y. Supp. 665 (3rd Dept. 1915), *aff'd*, 218 N. Y. 325, 113 N. E. 332 (1916).

*Herbener*,<sup>32</sup> the statute is construed in the light of the factual conditions under two main groups: "if an employee's duties are exclusively or predominantly within an enumerated employment and he is injured while doing work fairly within the scope of the ordinary and customary fulfillment of such duties, he has a rightful claim even though the particular act he was doing when the mishap befell him would not, of and by itself, ordinarily come within the wording of the statute"; "if an employee's duties are not exclusively or predominantly within the category of enumerated employments," and he is incidentally employed, "the right to remuneration must hinge upon a finding that he sustained injury while actually and momentarily doing work named in the statute." That time and well-considered decisions have changed the manner and content of construction will be presently apparent. The courts have arrived at a broader view of what is, and what is not, an employee engaged upon his employer's purpose or business. The artificiality of the earlier English and American cases with their "fine-spun distinctions" has made way for a rational realism.

The decision in *Schwimmer v. Kammerman & Kaminsky* is logically and properly approached by reviewing the holdings relative to the various issues of law and fact raised by that case. Decisions dealing with the conditions incidental to an employee's noon or meal hour are numerous and diverse in result; these cases are allied to and influenced by the opinions dealing with an employee's coming to or from employment in general. Thus, in *Harris v. Henry Cheney Hammer Co.*,<sup>33</sup> a night watchman, killed at a grade crossing while going to work, while sustaining injury arising out of employment, was not in the course of the employment; the claim for compensation was denied on that ground. A laborer who failed to report on time to be conveyed to work in a train provided by the employer, and who walked on the tracks and was killed, was not injured in the course of the employment.<sup>34</sup> But, where a trolley car conductor, reporting after regular hours at his place of employment pursuant to rigid rules, was injured on the way to the office from his home, it was held that the injury arose out of and in the course of the employment.<sup>35</sup> An employee, en route to a greenhouse where he had the duty of tending the heating unit, was struck by an automo-

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<sup>32</sup> 170 App. Div. 37, 155 N. Y. Supp. 946 (3rd Dept. 1915).

<sup>33</sup> *Supra* note 26.

<sup>34</sup> *Supra* note 26.

<sup>35</sup> *Wilbur v. Fonda, Johnstown & Gloversville R. R. Co.*, 208 App. Div. 249, 203 N. Y. Supp. 336 (3rd Dept. 1924); see also *Lynch v. City of N. Y.*, 242 N. Y. 115, 151 N. E. 149 (1926); *Broderick v. Colon & Co.*, 255 N. Y. 609, 175 N. E. 334 (1931); *Pierson v. Interborough R. T. Co.*, 184 App. Div. 678, 172 N. Y. Supp. 492 (1st Dept. 1918), *aff'd*, 227 N. Y. 666, 126 N. E. 920 (1920); *Kowalek v. N. Y. Consolidated R. R. Co.*, 229 N. Y. 489, 128 N. E. 888 (1920); *Tallon v. Interborough R. T. Co.*, 232 N. Y. 410, 134 N. E. 327 (1922); *Lampert v. Siemens*, 235 N. Y. 310, 139 N. E. 278 (1923).

bile; the injury arose out of and in the course of the employment.<sup>36</sup> Of similar tenor are the decisions in *MacDonald v. Grand Battery & Ignition Service*,<sup>37</sup> *Clow v. Keith's Fordham Theatre*,<sup>38</sup> *McCarthy v. Walsh Construction Co.*,<sup>39</sup> *Morey v. Allendale School*,<sup>40</sup> and others.

However, an employee engaged upon his own purpose in returning home, while receiving free transportation on a conveyance supplied by the employer, has no rightful claim if injured, since the injury does not arise out of nor in the course of the employment;<sup>41</sup> the New York courts seem to lean toward Baron Parke's view that the employee is engaged upon a frolic of his own. Further, one who did not leave his place of employment with reasonable despatch, and was injured there, could not claim that such injury arose out of and in the course of the employment.<sup>42</sup>

Among the "lunch hour decisions" occur conflicting and irreconcilable cases. In *McInerney v. Buffalo & Susquehanna R. R. Co.*<sup>43</sup> an award was denied to one who left the employer's premises to go home for dinner and was injured on the way. Similarly, injuries sustained in the street on the way from the place of employment to a restaurant do not arise out of nor in the course of the employment.<sup>44</sup> In *Scanlon v. Herald Co.*<sup>45</sup> an employee was injured while returning to work after a meal at home; during the time spent at home, cognizant of the fact that unfinished duties would be rewarded with dismissal, he had done some work in the interests of the employer, but which the latter had not expressly commanded; it was held that the employee was not in the course of the employment at the time of the accident.<sup>46</sup>

Where an employee was injured while sitting in the doorway of a factory, eating his lunch under circumstances spelling out an invitation to do so on the part of the employer, the injury was held to arise out of and in the course of the employment.<sup>47</sup> An employer who tacitly assents to the use of a part of his establishment as a lunch room and provides opportunity for a recreation room is liable for injuries to an employee sustained during the use of such apart-

<sup>36</sup> *Jessup v. Wrigley*, 224 App. Div. 800, 230 N. Y. Supp. 854 (3rd Dept. 1928), *aff'd*, 250 N. Y. 563, 166 N. E. 325 (1929).

<sup>37</sup> 228 App. Div. 869, 242 N. Y. Supp. 838 (3rd Dept. 1930).

<sup>38</sup> 247 N. Y. 583, 161 N. E. 191 (1928).

<sup>39</sup> 254 N. Y. 608, 173 N. E. 887 (1930).

<sup>40</sup> 227 App. Div. 676, 236 N. Y. Supp. 854 (3rd Dept. 1930).

<sup>41</sup> *Kowalek v. N. Y. Consolidated R. R.*, *supra* note 35.

<sup>42</sup> *Adams v. Uvalde Asphalt Paving Co.*, 205 App. Div. 784, 200 N. Y. Supp. 886 (3rd Dept. 1923).

<sup>43</sup> 225 N. Y. 130, 121 N. E. 806 (1919).

<sup>44</sup> *Clark v. Voorhees*, 231 N. Y. 14, 131 N. E. 553 (1921).

<sup>45</sup> 201 App. Div. 173, 194 N. Y. Supp. 663 (3rd Dept. 1922).

<sup>46</sup> *Ibid.* Judge Kiley dissented; and in the light of *Grieb v. Hammerle* (*supra* note 17) and *Schwimmer v. Kammerman & Kaminsky* (*supra* note 3), it would appear that the dissenting opinion on that occasion would be the prevailing opinion today.

<sup>47</sup> *Domres v. Syracuse Safe Co.*, 240 N. Y. 611, 148 N. E. 727 (1925).



ments.<sup>48</sup> So, also, an employer who permitted employees to warm bottles of tea in the boiler room in preparation for lunch, although the particular employee was injured while thus engaged during regular working hours, is liable for such injuries.<sup>49</sup> Other cases in point might be cited in considerable number.

The courts have, in general, been more liberal in granting awards to "outside workers"; perhaps an appreciation of the additional hazards encountered by such employees and a prejudice against the stuffiness of courtrooms has operated to produce this result. However, awards have been granted to a helper on a truck who had not partaken of food for many hours and who, in crossing the street to purchase cakes at a bakery, was injured;<sup>50</sup> to a chauffeur who made a detour of seventeen city blocks from his usual route to procure lunch at home and was injured while traveling;<sup>51</sup> to a chauffeur who was sent to lunch by his employer as upon an errand;<sup>52</sup> to a salesman who was going to have lunch and concurrently interview prospective customers, and was injured by a fall in the restaurant.<sup>53</sup> Awards were denied to a chauffeur who made a detour of one mile to drive home and tell his wife that he would be home late;<sup>54</sup> and to an elevated guard who combined the undertakings of free transportation, a visit to his dentist and a visit to the company's office to collect wages, and was injured while on his way.<sup>55</sup>

The law concerning traveling salesmen is significant in its bearing on the movements of employees when separated from the establishment of the employer. *Harby v. Maxwell Bros.*<sup>56</sup> holds that a traveling salesman may recover an award for injuries sustained while on the way from his home to take a train for the express purpose of visiting customers of the employer. Indeed, if it can be shown that the salesman was embarked upon his employer's purpose in securing customers or trade, even though the element of travel is colored to some extent by the salesman's personal business, a line of cases holds that injuries sustained under such circumstances arise

<sup>48</sup> *Donlon v. Kips Bay Brewing & Malting Co.*, 189 App. Div. 415, 179 N. Y. Supp. 724 (3rd Dept. 1919).

<sup>49</sup> *Etherton v. Johnstown Knitting Mills Co.*, 184 App. Div. 820, 172 N. Y. Supp. 724 (3rd Dept. 1918).

<sup>50</sup> *Sztorc v. James H. Stansbury*, 189 App. Div. 388, 179 N. Y. Supp. 586 (3rd Dept. 1919).

<sup>51</sup> *Baum v. Schweitzer*, 124 Misc. 516 (1925).

<sup>52</sup> *Bryan v. Bunis*, 208 App. Div. 389, 203 N. Y. Supp. 634 (3rd Dept. 1924).

<sup>53</sup> *Lavanha v. Kimball & Son*, 187 App. Div. 962, 174 N. Y. Supp. 909 (3rd Dept. 1919).

<sup>54</sup> *Perlmutter v. Byrne*, 193 App. Div. 769, 182 N. Y. Supp. 945 (3rd Dept. 1920).

<sup>55</sup> *Pierson v. Interborough R. T. Co.*, 102 Misc. 130, 168 N. Y. Supp. 425 (1917), *aff'd*, 184 App. Div. 678, 172 N. Y. Supp. 492 (1st Dept. 1919), *aff'd*, 227 N. Y. 666, 126 N. E. 920 (1920).

<sup>56</sup> 203 App. Div. 525, 196 N. Y. Supp. 729 (3rd Dept. 1922), *aff'd*, 235 N. Y. 504, 139 N. E. 711 (1923).

out of and in the course of the employment.<sup>57</sup> However, a traveling salesman who was overcome by gas at a hotel and died as a consequence had no rightful claim;<sup>58</sup> it would appear that the essence of salesmanship is motility; when this element is absent, the traveler is no longer a salesman engaged upon his employer's business.

An attenuated distinction arises in the case of employees in other fields, however. In *Clark v. Voorhees*<sup>59</sup> the Court points out that when an employee (other than a salesman) is injured on the way to the place where he is to render service, such injury does not arise out of and in the course of the employment. A subjective rather than an objective standard, in the Harvard sense, seems to distinguish these holdings from the "traveling salesman decisions."

Extraordinary latitude in construing the statutory provision is evinced by the courts under some circumstances; these liberal awards are inexplicable on the view that the injuries arose out of and in the course of the employment except in a remote sense. The theory on which they rest seems to be that the employer's general purpose is best served by a paternal attitude toward the employed. In Justice Cardozo's words: "Any other ruling would discourage helpful loyalty."<sup>60</sup> Thus, awards may be mentioned for injuries sustained as a result of seeking shelter from a storm;<sup>61</sup> while answering calls of nature;<sup>62</sup> while playing ball on an employee's team;<sup>63</sup> while dancing at a dinner given by the employer;<sup>64</sup> while cranking an automobile at the employer's residence on a Sunday.<sup>65</sup> It is difficult, if at all possible, to reconcile these holdings with those in *Scanlon v. Herald Co.*,<sup>66</sup> *Clark v. Voorhees*,<sup>67</sup> *Carroll v. Verway*,<sup>68</sup> and others.

This brings us in proximity to the circumstances and facts encountered in *Schwimmer v. Kammerman & Kaminsky*. Justice Car-

<sup>57</sup> *Hospers v. Hungerford-Smith Co.*, 194 App. Div. 945, 184 N. Y. Supp. 927 (3rd Dept. 1920), *aff'd*, 230 N. Y. 616, 130 N. E. 916 (1921); *Habbershaw v. Shepard Co.*, 197 App. Div. 910, 187 N. Y. Supp. 937 (3rd Dept. 1921); *Fuld v. Solomon Co.*, 197 App. Div. 911, 187 N. Y. Supp. 935 (3rd Dept. 1921); *Goater v. D'Olier*, 198 App. Div. 959, 189 N. Y. Supp. 944 (3rd Dept. 1921); *Roberts v. J. F. Newcomb & Co.*, 201 App. Div. 759, 195 N. Y. Supp. 405 (1922).

<sup>58</sup> *Kass v. Hirschberg, Schutz & Co.*, 191 App. Div. 300, 181 N. Y. Supp. 35 (3rd Dept. 1920).

<sup>59</sup> *Supra* note 44.

<sup>60</sup> *Supra* note 17.

<sup>61</sup> *Moore v. Lehigh Valley R. R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620 (3rd Dept. 1915).

<sup>62</sup> *Krawczyk v. MacNamara*, 187 App. Div. 911, 173 N. Y. Supp. 912 (3rd Dept. 1919).

<sup>63</sup> *Grannis v. Grebe Co.*, 228 App. Div. 740, 238 N. Y. Supp. 843 (3rd Dept. 1930).

<sup>64</sup> *Kenney v. Lord & Taylor*, 254 N. Y. 532, 173 N. E. 853 (1930).

<sup>65</sup> *MacDonald v. Grand Battery & Ignition Co.*, 254 N. Y. 605, 173 N. E. 886 (1930).

<sup>66</sup> *Supra* note 45.

<sup>67</sup> *Supra* note 44.

<sup>68</sup> 254 N. Y. 598, 173 N. E. 882 (1930).

dozo, in *Marks v. Gray*,<sup>69</sup> has set forth certain definite principles affecting the interpretation of an employee's travels to and from the place of employment. If the work in which the employee is engaged creates the necessity for transportation or travel, an injury sustained as a result thereof arises out of and in the course of the employment; and this is so although the employee is concurrently serving some purpose of his own. If, on the other hand, the work has no part in creating the necessity for travel, an injury sustained as a result thereof does not arise out of and in the course of the employment; the test seems to be whether the employee is traveling primarily on his employer's business or is bent upon personal, frolicsome roving.

Incidental employment at the express or implied direction of the employer may justify an award for injuries sustained while thus engaged. The British Workmen's Compensation Court has so held in *Lowry v. Sheffield Coal Co., Ltd.*,<sup>70</sup> *Molloy v. S. Wales Anthracite Colliery Co.*,<sup>71</sup> and *Riley v. W. Holland & Sons, Ltd.*<sup>72</sup> The American courts recognize a wide variety of incidental occupations, and accidental injuries arising therefrom are held to be compensable.<sup>73</sup> The principle involved is broadly expressed in *Younger v. Motor Cab Transp. Co.*<sup>74</sup> in which the holding was that when some advantage accrues to the employer, no matter how trivial, from the injured employee's conduct, his act is not strictly personal in nature; total abandonment of the employer's purpose must be shown or else an injury sustained by the employee *may* be said to arise out of and in the course of the employment. So also in a Federal case,<sup>75</sup> it was said that where the deceased was regularly employed, classified and paid as a longshoreman, compensation should not be denied because, at the time of his death, he was temporarily performing service not ordinarily performed by longshoremen. But these broad views are usually tempered by the moderating conditions set forth in a Connecticut case;<sup>76</sup> "in the course of the employment" embraces the use of the highway by an employee when doing something *with the employer's knowledge and approval*. Concerning knowledge on the employer's part, it would seem that this knowledge need not be the result of an express direction, but may arise through circumstances which would render him chargeable with knowledge; the latter would constitute a mixed issue of law and fact. It is to be noted that *DeNoyer v. Cavanagh*<sup>77</sup> holds that a general employer is liable for

<sup>69</sup> 251 N. Y. 90, 167 N. E. 181 (1929).

<sup>70</sup> 1 B. W. C. C. 3.

<sup>71</sup> 4 B. W. C. C. 65.

<sup>72</sup> 4 B. W. C. C. 155.

<sup>73</sup> NEW YORK STATE WORKMEN'S COMPENSATION LAW (Annotated), prepared by Division of Statistics & Information, 1931, pp. 20-28.

<sup>74</sup> 260 N. Y. 396, 183 N. E. 863 (1933).

<sup>75</sup> *Southern Pacific Co. v. Locke*, 1 F. Supp. 992 (1932).

<sup>76</sup> *Boulanger v. First National Stores*, 155 Conn. 665, 163 Atl. 261 (1932).

<sup>77</sup> 221 N. Y. 273, 116 N. E. 992 (1917).

the injuries of an employee, even though at the time of the employment forming the proximate cause of the injury the employee was engaged in a special service under the direction of another. In *Dale v. Saunders Bros.*<sup>78</sup> the rule was restated that payment of wages is not the sole test of the status of employer and employee.

Arriving at the marrow of this discussion in a manner *festina lente*, two important cases require statement. Thus, in *Gibson v. New Crown Market*<sup>79</sup> an employee was injured en route from his home to the market where he was employed, after having taken an order for meat on the way at the direction of his employer; the directions concerned both the method of travel and the manner of obtaining the order; the injury arose out of and in the course of the employment. This result is to be contrasted with the decision in *Newman v. Newman*<sup>80</sup> and *Scanlon v. Herald Co.*<sup>81</sup>

*Bila v. Bloomingdale*<sup>82</sup> holds that a chauffeur has a rightful claim to compensation for injuries sustained while engaged upon the employer's business, *subsequent* to a deviation from the usual route of travel undertaken for purely personal reasons on the employee's part but with the knowledge and consent of the employer. The court points out that no zone law applies to such cases deciding at what exact point in space the employee leaves his personal business and re-enters upon that of the employer. Consent of the employer clearly relieves the employee of the burden of explaining away his interpolated frolic.

In the light of the preceding digest, it becomes obvious that the opinion in *Schwimmer v. Kammerman & Kaminsky* represents a summation of principles derivable from well-considered cases. The employee on leaving the factory for his home, as an indoor worker severing temporal and physical continuity with his general duties, was engaged upon personal travels. Following his steps toward his abode, no liability of the employer for possible injuries can be established. Nor would such liability attach during the employee's domiciliary visit; his gastronomic feats and other domestic activities that might strike his fancy would constitute purely personal business. But as the employee sets forth from his home on the return trip to the factory, the curtain rises on the first act of a legal drama. He has embarked upon a special commission, at the express direction of his employer. Under the rule of *Gibson v. New Crown Market*<sup>83</sup> that outside workers, including messengers, are subject to special consideration in the matter of assuming the risks and hazards of the public highway, the status of the employee has altered significantly. The special mission on which he has embarked constitutes him a messen-

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<sup>78</sup> 218 N. Y. 59, 112 N. E. 571 (1916).

<sup>79</sup> 208 App. Div. 267, 203 N. Y. Supp. 355 (3rd Dept. 1924).

<sup>80</sup> *Supra* note 31.

<sup>81</sup> *Supra* note 45.

<sup>82</sup> 184 App. Div. 65, 171 N. Y. Supp. 434 (3rd Dept. 1918).

<sup>83</sup> *Supra* note 79.

ger *pro tempore*, and the Workmen's Compensation Law, like an invisible sprite hovers over him ready to drop an award into his lap on the slightest provocation. The deviation from his accustomed route and the purchase of the necessary materials for the repair of the machine at which he works consummates the liability of the employer. This liability subsists and persists as the messenger-extraordinary wends his way toward the establishment of his employer. The rule is derived from *Joel v. Morison*,<sup>84</sup> *Sleath v. Wilson*,<sup>85</sup> *Quinn v. Power*,<sup>86</sup> *Jones v. Weigand*,<sup>87</sup> *Riley v. Standard Oil Co. of N. Y.*,<sup>88</sup> *Grieb v. Hammerle*,<sup>89</sup> *Gibson v. New Crown Market*,<sup>90</sup> *Bila v. Bloomingdale*,<sup>91</sup> *Irwin-Neisler & Co. v. Industrial Commission*,<sup>92</sup> *McDonald v. Owners of the Steamship Banana*,<sup>93</sup> *Dennis v. White & Co.*,<sup>94</sup> and others.

Under these provocative circumstances fate interposes and provides an accidental injury for the faithful employee delivering his purchased materials; should the employer invoke the proposition that a special, gratuitous occupation exists, the rule of *Grieb v. Hammerle*,<sup>95</sup> *Younger v. Motor Cab Transp. Co.*,<sup>96</sup> *DeNoyer v. Cavanaugh*,<sup>97</sup> and *Dale v. Saunders Bros.*<sup>98</sup> applies. Justice Lehman makes the point that delivery of the purchased articles was a condition precedent to the termination of the special mission.

Hence, since the injuries were sustained by the employee before he arrived at the factory of his employer, they arose out of and in the course of the employment and as such were compensable. The decision is sound, just and realistic; it carries with it the force of substantial compliance with the statute in a practical manner, and the emphasis of legal principles flowing from a rational, historic source as found in the well-considered cases under the common law and the Workmen's Compensation Law.

EMIL F. KOCH.

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<sup>84</sup> *Supra* note 4.  
<sup>85</sup> *Supra* note 6.  
<sup>86</sup> *Supra* note 10.  
<sup>87</sup> *Supra* note 11.  
<sup>88</sup> *Supra* note 12.  
<sup>89</sup> *Supra* note 17.  
<sup>90</sup> *Supra* note 83.  
<sup>91</sup> *Supra* note 82.  
<sup>92</sup> *Supra* note 30.  
<sup>93</sup> *Supra* note 22.  
<sup>94</sup> *Supra* note 23.  
<sup>95</sup> *Supra* note 17.  
<sup>96</sup> *Supra* note 74.  
<sup>97</sup> *Supra* note 77.  
<sup>98</sup> *Supra* note 78.