

# Workmen's Compensation--Scope of Employment (Johnson v. Smith, 263 N.Y. 10 (1933))

St. John's Law Review

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### Recommended Citation

St. John's Law Review (1934) "Workmen's Compensation--Scope of Employment (Johnson v. Smith, 263 N.Y. 10 (1933))," *St. John's Law Review*: Vol. 8 : No. 2 , Article 28.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol8/iss2/28>

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peculiar boast and excellence of the common law.<sup>10</sup> It adapts itself to varying changes in conditions<sup>11</sup> and modifies its own rules so as to serve the ends of justice.<sup>12</sup> No rule of the common law could survive the reason on which it was founded.<sup>13</sup> It needs no statute to change it but abrogates itself.<sup>14</sup>

M. E. W.

WORKMEN'S COMPENSATION—SCOPE OF EMPLOYMENT.—Plaintiff was employed to do "anything from clerical work to a coal heaver." On this occasion he was acting as a salesman soliciting business for his employer. When out of town he lunched at a restaurant in which the cook was a typhoid carrier. From the food there consumed he contracted the disease. He seeks compensation under the statute. *Held*, injury does not arise out of and in the course of employment. *Johnson v. Smith*, 263 N. Y. 10, 188 N. E. 140 (1933).

Undoubtedly the most significant of the provisions of The Workmen's Compensation Law<sup>1</sup> is the phrase "arising out of and in the course of employment."<sup>2</sup> "Arising out of," has been defined as referring to the origin or cause of the accident; "in the course of," is defined as referring to the time, place and circumstances of the accident.<sup>3</sup> An employer may be liable for the injuries sustained by the employee outside the place of employment especially where the duties of the employee are to be performed elsewhere<sup>4</sup> The

<sup>10</sup> *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111 (1884); *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383 (1898).

<sup>11</sup> *Seeley v. Peters*, 5 Gilman 130 (Ill. 1848); *Reno Smelting Works v. Stevenson*, 20 Nev. 269, 21 Pac. 317 (1889); *Hannot v. Sherwood*, 82 Va. 115 (1885).

<sup>12</sup> *Netelsen v. Stilz*, 184 Ind. 702, 111 N. E. 423 (1916).

<sup>13</sup> *People v. Randolph*, 2 Parker Cr. R. 174 (N. Y. 1855); *Beardsley v. City of Hartford*, 50 Conn. 529 (1883); *Ketelsen v. Stilz*, *supra* note 12.

<sup>14</sup> *Beardsley v. City of Hartford*, *supra* note 13; *Ketelsen v. Stilz*, *supra* note 12.

<sup>1</sup> Laws of 1913, c. 816, amended and re-enacted; Laws of 1914, c. 41; N. Y. CONS. LAWS, c. 67.

<sup>2</sup> N. Y. WORKMEN'S COMPENSATION LAW (1922) art. 2, subd. 4.

<sup>3</sup> *Irwin v. Neisler & Co. v. Industrial Commission*, 346 Ill. 89, 178 N. E. 357 (1931); see *U. S. Fuel Co. v. Industrial Commission*, 310 Ill. 85, 141 N. E. 401 (1923).

<sup>4</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); *Harby v. Maxwell Bros.*, 203 App. Div. 525, 196 N. Y. Supp. 729 (3rd Dept. 1922), *aff'd*, 235 N. Y. 504, 139 N. E. 711 (1923); *Habbershaw v. Shepard Co.*, 197 App. Div. 910, 187 N. Y. Supp. 935 (3rd Dept. 1921); *Field 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. Newcomb & Co.*, 201 App. Div. 759, 195 N. Y. Supp. 405 (1922).

employer may also be liable for the injuries sustained to the employees going to or from the place of employment, the facts in each case determining whether or not the injury has arisen in and out of the course of employment.<sup>5</sup> It has been with extraordinary elasticity that the courts have construed the statute under some circumstances.<sup>6</sup> In one case<sup>7</sup> it was held that the employer was liable for injuries to the employee, even though at the time of employment the employee was engaged in a special service under the direction of another. How much further the courts will go is uncertain. It is to be noted, however, that the case at bar falls in line and is consistent with "the lunch hour decisions." When the employee sustains injuries during the time he is out to lunch, having departed from the scope of his employment, he is not entitled to remuneration.<sup>8</sup> The rule is different, however, where the employee is always on duty and subject to call.<sup>9</sup> Where the employer has acquiesced in the employee's eating his lunch on the premises, spelling out an invitation to do so, the injury arises in and out of the course of employment.<sup>10</sup> Where an employee is engaged not only in a personal act of eating, but has entered the restaurant for the purpose of promoting the interest of his employer by interviewing a prospective customer, clearly it is within the scope of his employment.<sup>11</sup> Or, where the salesman is en route to interview a prospective customer, that is within the scope of his employment.<sup>12</sup> However, where a traveling salesman was overcome by gas at a hotel and died as a consequence, he had no rightful claim.<sup>13</sup> So it would seem that the test of a salesman's employment is mobility; when this element is absent he is no longer a salesman engaged in his employer's business.<sup>14</sup>

I. L. K.

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<sup>5</sup> *Clow v. Keith's Fordham Theatre*, 247 N. Y. 583, 161 N. E. 191 (1928); *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); *Macdonald v. Grand Battery & Ignition Service*, 228 App. Div. 869, 242 N. Y. Supp. 838 (3rd Dept. 1930); *Morey v. Allendale School*, 227 App. Div. 676, 236 N. Y. Supp. 854 (3rd Dept. 1930).

<sup>6</sup> *Denoyer v. Cavanagh*, 221 N. Y. 273, 116 N. E. 992 (1917).

<sup>7</sup> *Ibid.*

<sup>8</sup> *McInnerey v. Buffalo & Susquehanna R. R. Co.*, 225 N. Y. 130, 121 N. E. 806 (1919); *In re Clark v. Voorhees*, 231 N. Y. 14, 131 N. E. 553 (1921); *Scanlon v. Herald Co.*, 201 App. Div. 173, 194 N. Y. Supp. 663 (3rd Dept. 1922).

<sup>9</sup> *In re Crippen v. Press Co.*, 254 N. Y. 535, 173 N. E. 854 (1930).

<sup>10</sup> *Domres v. Syracuse Safe Co.*, 240 N. Y. 611, 148 N. E. 727 (1925).

<sup>11</sup> *In re Tannenbaum v. Perfect Tailoring Co.*, 243 N. Y. 557, 154 N. E. 612 (1927).

<sup>12</sup> *Harby v. Maxwell Bros.*, *supra* note 4.

<sup>13</sup> *Kass v. Hirshberg, Schultz & Co.*, 191 App. Div. 300, 181 N. Y. Supp. 35 (3rd Dept. 1920).

<sup>14</sup> (1933) 8 ST. JOHN'S L. REV. 107.