The principal case does not fall within cases designated type one, *supra*, since the stool in the aisle is not a defect to be anticipated and guarded against by a customer as would water on the floor on a rainy day or the slippery conditions of waxed floors. The cases in type two and three, *supra*, are very similar as far as fact situations are concerned, and the case under consideration could conceivably be placed into either classification. Since it is extremely difficult, in many instances, for the plaintiff to obtain evidence as to how long a defect has existed or as to the defendant's actual knowledge of its existence, some courts might take a liberal view as to the requirement of such specific evidence. If the plaintiff is to be required to offer positive evidence to show that the defendant placed the stool in the aisle or that it had been there an unreasonable length of time, it is impossible for her to make out a case, because she cannot show such a state of facts. DORIS MESSER

PRIVILEGE — LAWYER AND CLIENT — INSURER AND INSURED — DISCOVERY.

In March 1932, one Meyer Plost was injured by an automobile driven by Joseph Scharff. Two years later he died and an action for wrongful death was instituted by his widow. The action was against the Avondale Motor Car Company. The plaintiff's petition alleged that the driver of the fatal car, Scharff, was an employee and agent of the company at the time of the accident. The Defendant denied the agency and also any responsibility for the injuries or death suffered by Meyer Plost.

Later the plaintiff caused subpoenas *duces tecum* to be issued upon George L. Ten Eyck, the vice-president and general manager of the Avondale Motor Car Company, demanding the production of a casualty report made by the said company or by any of its officers or employees, or by Joseph Scharff to any insurance or indemnity Company, or to any agent or attorney of any insurance or indemnity company concerning the casualty.

A similar subpoena *duces tecum* was served on Gordon Bennett, secretary of the A. R. Witham Insurance Agency demanding the same report. It appeared that insurance was written by the Lumbermen's Mutual Casualty Company, through the above agency, insuring the Avondale Motor Car Company against liability for damages caused by negligent acts of its salesmen.

George Ten Eyck and Gordon Bennett refused to produce the casualty report and testified that it was no longer in their possession but

was in the possession of Richard Remke, attorney representing the Avondale Motor Car Company and the Lumbermen's Insurance Company, and on the further ground that it constituted a privileged communication. The Trial court held their report not privileged and sentenced the two for contempt. The Court of Appeals affirmed the Trial court's decision. The Supreme Court held that the report constituted a privileged communication as between lawyer and client and purged Ten Eyck and Bennett of contempt. *In re Keimann*, 132 Ohio St. 187.

In this case the Supreme Court of Ohio has affirmed its stand taken in the case of *Ex-Parte Schoepf*, 74 Ohio St. 1, 77 N.E. 276 (1906) where it was held that a report of an accident made by the motorman of the defendant traction company and sent by him to the company to be turned over to their claim agent from whence it got into the hands of the company's lawyer was within the lawyer-client privilege. This view was followed in *Atlantic Coast Line Ry. Co.* v. *Williams* 21 Ga. App. 753, 94 S.E. 584 (1917). The Schoepf case was annotated in 6 L.R.A. (N. 5) 325 and was then said to be against the great weight of authority.

The English rule is that such a report is not privileged. *Woolley* v. *N. London Ry.* 38 L.J., C.P. 317 (1869); *Parr* v. *L. C. & D. Ry.*, 24 L.T. 558 (1881); *Fenner* v. *L. & S. E. Ry.*, 41 L.J., O.B. 313 (1872). In the case of *Cook* v. *North Metropolitan Tramway Co.* 54 J.P. 262 (1862) the court held that a document is not protected from inspection on the ground that it was made for the purpose, in the event of litigation, of being laid before the defendant's solicitor to be used by him for the purposes of the defense to any action, if any action should be brought. If, however, a report is procurred at the instigation of counsel after action has been brought, it seems clear that such a report is privileged. *Goldstone* v. *Williams Deacon and Company*, 68 L.J. Ch. 24 (1889).

Many courts in this country have also followed a rule at variance with the Schoepf case. Thus in the *Virginia Carolina Chemical Company* v. *Knight* 106 Va. 674, 56 S.E. 725 (1907) a report that was made by the superintendent of the defendant company immediately after the accident was held not to be a privileged communication. This report was prepared on paper headed "Immediate Report of Accident" and was sent directly to the attorneys of the Travelers' Insurance Company in which company the defendant had a policy of indemnity. The document was prepared before any action had been brought or threatened. In *Carlton* v. *The Western and Atlantic Railroad Com-*

pany 81 Ga. 531, 7 S.E. 623 (1888) a conductor of the company under standing rules of the company, made a written report of the accident concerning the plaintiff's injuries and the surrounding circumstances. The court in this case did not require the defendant to produce the document but the holding was based on the fact that the plaintiff had erroneously proceeded. He had not made an oath as to the materiality of the document or even whether the defendant had it in his possession. The court said, "Had the requirements of the statute been complied with, we see no reason why the paper should not have been produced. We do not understand such a report to be a privileged communication." *In Lacoss et. al.* v. *Town* of *Lebanon et al.*, 78 N.H. 413, 101 Atl. 364 (1917) the defendant made a sketch and photograph of the scene of the accident after the injury to the plaintiff. He contended that they were made to enable him to defend against any suit that might be brought as a result thereof. The court held that these documents, instead of being communications from client to attorney, were made to perpetuate the evidence of the accident. The court then said that the client cannot escape his duty of discovering material by handing it to his attorney.

Many Canadian courts have taken a similar stand on the problem and have made even more emphatic statements against holding such documents to be privileged. Thus in the case of *Savage* v. *The Canadian Pacific Railway* 16 Man, L.R. 381 (1906) the court held, in a case involving facts similar to the Schoepf case, that if the documents had been prepared solely for or under the instructions of the defendant company's attorney and had been prepared especially for litigation and in contemplation thereof then they would have been privileged. However, the court then held that where the documents were prepared partly for the above purposes and partly for other purposes they were not privileged. This same result was reached in *Swaisland* v. *Grand Trunk Railway Company* 5 D.L.R. 750, 30 W.N. 960 (1912). *Grain Claims Bureau Ltd.* v.*Cain Surety Company* (1927) 4 D.L.R. 297, *Smith* v. *C. N. R.* 2 D. L. R. (1926; 72 *Betts* v. *Grand Trunk Railway Company* 120 P. R. 86 (1887).

In the principal case, the report was made by the defendant motor car company to its insurance company. The report was made in accordance with the provisions in the insurance policy. Was the report privileged while in the hands of the insurance company, and if so, upon what grounds? The insurance company has agreed to pretect the motor car company from liability. It needs the fullest information in order to determine its liability and to protect itself from fraudulent claims. In

many cases the problem would be submitted to a lawyer and some payments would be made only after litigation. Yet it seems difficult to say that the report is made under the benefit of the lawyer-client privilege when the writer of the report may not know even the name of the lawyer.

If the report is not privileged in the hands of the insurance company, does it become privileged upon being turned over to a lawyer? Numerous cases hold that a document which could be reached in the hands of a client does not become privileged by being turned over to a lawyer. *Edison Electric Light Company* v. *United States Electric Lighting Company* 44 F. 294 (1890); *Allen* v. *Hartford Life Insurance Company et al.* 72 Conn. 693; 45 Atl. 955 (1900); *Andrews* v. the *Ohio and Mississippi Railroad Company,* 14 Ind. 169 (1860); *In re Cunnion's* Will 201 N. Y. 123, 94 N.E. 648; Am. Cas. 1912 Atl. 834 (1911); *Jones et. al.* v. *Reilly et al.* 174 N.Y. 97; 66 N.E. 649 (1903); *Pearson* v. *Yoder et al.* 134 Pac. 421, 39 Okla. 105, 48 L.R.A. (N.S.) 334 (1913). The court points out that a document would be privileged if it came into existence as a communication by a client to his attorney. This is supported in 5 Wigmore on Evidence (2nd Ed.), 67 Section 2318. There has been a line of reasoning advanced in Ohio that the communication, to be privileged, must be of such a character that it would not have been made except for the relation of attorney-client. *Smart* v. *Master and Wardens of N. C. Lodge* 60 Ohio C. C. (N.S.) 15, 17 Ohio C.D. 273; affirmed without opinion in 73 Ohio St. 387 (1905). In the English case of *Collins* vs. *The London General Omnibus Company* 63 L.J. (Q.B.) 428 (1893) involving facts similar to the principal case with the additional factor that the injured party had written a complaint to the defendant company before the report of the, in that case, conductor was obtained, the court held that such a report was privileged. The decision was placed upon the ground that the document had been made for the purpose of obtaining the advice of the defendant's solicitor with reference to an anticipated action which might reasonably be apprehended. So also, in the case of *The Birmingham and Midland Motor O. Company* v. *London and N. W. Railway Company* 3 K.B. 850 (1913) the court stated that it was not necessary that the information was obtained "solely" or "merely" or "primarily" for the solicitor in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated. The same result was reached in the later case of *The Hopper* No. 13, 94 L.J.P. 45 (1925). These cases are supported by the Canadian case of *United Motor Company* v. *Regina* 8 W.W.R. 185.

Thus in the principal case, a letter by an officer of the Motor Car Company to his lawyer would be clearly within the privilege. But this report was made to an insurance company. The court points out that the communication was not made in the ordinary course of the business of the Motor Car Company. This is true, but it seems far short of being equivalent to a document that came into existence as a communication by a client to his attorney. It would seem that a document which is not privileged in the hands of a client should not become so upon being turned over to the attorney. Such an extension of the lawyer-client privilege would seem to be unwarranted.

It may well be asked, "Just how is this report material to the plaintiff's case?" The cause of action is for a negligent injury and death. It is not based on a writing. If the report contained any admission of liability and was not otherwise privileged, the plaintiff, if he could obtain possession, could offer it in evidence. Otherwise, it would not seem to be admissible. It has been held that reports made to the general manager by the superintendents and conductors, several days after the accident, were not admissible against the company as res gestae or admissions. *Carroll* v. *The East Tennessee, Virginia and Georgia Railway Company* 82 Ga. 452, 10 S.E. 163 (1889); *Cully* v. *N. Pacific Railway Company* 35 Wash. 241, 99 Pac. 202 (1904). The Sections of the Ohio General Code dealing with discovery are very broad. Ohio G.C. Sec. 11552 states that: "Either party, or his attorney, in writing, may demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper, or document in his possession, or under his control, containing evidence relating to the merits of the action or defense, specifying the book, paper, or document with sufficient particularity to enable the other party to distinguish it. . . ." Thus a party to an action is enabled to obtain documents that are in the possession of the adverse party but which documents are necessary to prepare proper pleadings or to make other necessary preparations for trial. Copies of instruments on which an action or defense is founded may be secured. Obviously the doctrine has many beneficial effects. In many complicated transactions one party is justly aided by an investigation of records in the possession of the other.

But is it to the advantage of the public to permit the plaintiff to obtain a report of an accident made by the defense to his casualty company? Such insurance should be encouraged and a settlement of claims without resort to litigation should also be encouraged. It would seem that there is no encouragement to either if the plaintiff may inspect such reports in the hope of finding damaging admissions.

It would seem that there are public policy arguments which should privilege such reports from inspection and production. It is not so easy to accomplish this purpose in the face of Ohio G. C. Sec. 11552. It might be done by limiting the effect of that section. Thus in the *Ex parte Schoepf* case (supra) the court said, "The efforts of the plaintiff appear to us to be directed toward a 'fishing' for the nature of the defense and persons by whom it is to be established, rather than to obtain competent and necessary evidence to sustain the plaintiff's petition." In the principal case the court reaches the same result by an extension of the lawyer-client privilege. If this view is to be followed, it would seem that the report should be privileged while it is in the hands of the insurance company as well as in the hands of the attorney. While this may seem to enlarge the privilege of lawyer and client, it seems less objectionable than a doctrine that a document which could be subpoenaed while in the hands of a client may find sanctuary in the hands of an attorney.

PHILIP J. WOLF

LABOR LAW

LEGAL ASPECTS OF THE SIT-DOWN STRIKE.

The latest weapon in the ceaseless conflict between capital and labor is the sit-down strike. It is a swift moving effective technique that has served labor well in recent months. The success of the General Motor's strike is an indication that it will be utilized more and more by organized labor.

It is recognized by this writer that the legal aspect of the sit-down strike situation is a comparatively unimportant portion of the whole problem. The economic and social ramifications of such a class struggle are interwoven into the controversy to such a degree that accepted legal theory has been relegated to a position of secondary importance. Granting that this be true, the legal questions involved are still of sufficient significance to warrant a synopsis of the subject. In view of the recent development of this technique there is little case law to guide the courts. Thus a review of the general law relative to strikes is necessary.

In Ohio the right to strike has been upheld in numerous decisions: *Parker* v. *Bricklayers' Union*, 10 Ohio Dec. Rep. 458, 21 Wkly. L. Bull. 223 (1889); *Brown Mfg. Co.* v. *Union*, 12 Ohio Dec. (N.P.) 753 (1902); *The La France Electrical Construction and Supply Co.* v. *International Brotherhood of Electrical Workers, Local 8, et al.*, 108 Ohio St. 61, 140 N.E. 897 (1923).