

from the obligation to make repairs and the tenant knew of the defective condition of the premises which caused the injuries. Accord: *Goldberg v. Wunderlich*, 248 Ky. 798, 59 S.W. (2d) 1018 (1933) where the court held that a clause in the lease exempting the landlord from liability for failure to repair does not relieve him from liability to third persons.

In consonance with this view is that of the court in *Barron v. Liedloff*, 95 Minn. 474, 104 N.W. 289 (1905) which placed the landlord's liability not on his contractual obligation to repair, but on his negligence. The contract to repair is a mere matter of inducement from which arises the landlord's duty to exercise care as to the condition of the leased premises.

Collison v. Curtner, 141 Ark. 122, 216 S.W. 1059 (1919) held that the landlord was liable for injuries to third persons, invited on the premises by the tenant. And in *Robinson v. Heil*, 128 Md. 645, 98 Atl. 195 (1916), the court held that the landlord's liability for injuries to a member of the tenant's family is practically the same as to the tenant himself.

In the cases quoted in this comment, the Ohio courts have made no effort to deal with the challenge of the minority view. The trends of the day are to place the burdens of responsibility upon the backs of the strong; not on the weak. Where the great traditions of the Law afford a logical and reasonable departure from the harsh interpretations of its principles, without doing violence to its logic and rules, it would seem that the courts are dutibound to do so. The minority view seems more in harmony with modern economic and social changes.

JOSEPH FREEDMAN

Master and Servant

WORKMAN'S COMPENSATION — LEGAL TRAUMA — RECOVERY FOR INJURIES NOT COMPENSABLE UNDER THE ACT — OCCUPATIONAL DISEASE

The plaintiff was a saleslady in a dress goods department of the Elder and Johnson Co. of Dayton, Ohio. The plaintiff's duties were to handle ready made dresses, some of which were dyed completely, and others partially. The plaintiff had been working for seven years, and the court assumed for the purpose of discussion that during this period particles of dye had come in contact with her eye at various times, finally causing chemical conjunctivitis. Compensation was refused because the disease sustained was not one listed under the Occupational Disease List

of Section 1465-68 of the Ohio General Code, 114 Ohio Laws 28 (1931). Furthermore, the plaintiff's condition was held not to be such an injury as was contemplated under the Ohio Workman's Compensation Act. The court said the injury must be one of physical character, or what is known in Ohio as legal trauma. *Industrial Commission v. Armacost*, 129 Ohio St. 176 (1935).

"Traumatic injury is a bodily wound or injury directly resulting from contact with an external, independent influence or cause." *The Great Atlantic and Pacific Tea Co. v. Sexton*, 242 Ky. 266, 46 S.W. (2d) 87 (1932). See *Industrial Commission v. Middleton*, 126 Ohio St. 212, 184 N.E. 835 (1933).

The court in the *Armacost case*, supra, by denying the claimant compensation, in effect denied her any possible recovery under Ohio law. This is due to the doctrine of *Mabley and Carew Co. v. Lee*, a minor, 129 Ohio St. 69, 193 N.E. 750 (1934). The employer is now relieved of common law liability to his employees for injuries arising from the employment, even though they are not compensable under the Act. The court there intimated, Judge Zimmerman dissenting, that when the people of Ohio voted for the amendment to Art. II, Sec. 35 of the Ohio Constitution, authorizing enactment of the Compensation Act, they did so with the intention of taking from the employee a common law right, regardless of whether the wrong might be compensated for under the ensuing Act or not. See Case Comment in Ohio BAR, Vol. 7, No. 51, p. 718 (March 18, 1935). In the *Lee* case, referred to, there was a statute limiting the hours of labor, the breach of which caused the plaintiff nervous and physical exhaustion, which was held not compensable, but which in the absence of a Compensation Act might have given rise to a common law action on the theory of violation of the statute as negligence per se. But the court's attitude was that this statute could not affect the interpretation of certain clauses in Art. II, Sec. 35 of the Constitution: "Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries or occupational disease . . .". The court has thus denied recovery at common law for injuries which are not compensable under the Act as well as for those which are.

If it be conceded that the Constitution absolves the employer of all common law liability, should not the court be more liberal and allow recovery for an injury that has heretofore gone uncompensated? The Ohio doctrine is that "it is the tear that is compensable and not the wear." *Industrial Commission v. Bartholome*, 128 Ohio St. 13, 190 N.E. 193 (1934). So the problem is: when should be attribute an injury to wear, and when to tear?

Death from heart attack caused by breathing dust laden air has been held compensable. *Carrol v. Industrial Commission*, 69 Colo. 473, 195 Pac. 1097, 19 A.L.R. 107 (1920); "injury" within the Workman's Compensation Act is sufficiently established by evidence tending to show the tangible impact in his employment, of particles of granite upon the lungs of a granite cutter, *In Re Sullivan*, 265 Mass. 497, 164 N.E. 457, 62 A.L.R. 1458 (1929); blindness due to vapor of wood alcohol used by a sign writer has been held compensable, *Fidelity and C. Co. v. Industrial Commission*, 177 Cal. 614, 171 Pac. 429, L.R.A. 1918 F, 856 (1918). In a case similar to the principal one, a New York court has held that ordinarily the lodgment of dirt, or any other foreign substance, in the eye is an "accident," *Guyon v. Standard Wall Paper Co.*, 209 App. Div. 708, 205 N.Y.S. 280 (1924). A California Appellate court has given compensation to an employee for infection of the nose and mouth while engaged in the work of grinding and sacking wheat and barley, by inhaling dust caused by this work. *Hartford Acc. and Indemnity Insurance Co. v. Industrial Commission*, 32 Cal. App. 481, 163 Pac. 225 (1917). Typhoid fever caused by negligent contamination of drinking water is an "injury" under the Workman's Compensation Act. *Vennen v. New Dills Lumber Co.*, 155 Wis. 126, 154 N.W. 640 (1915). Compensation has been allowed for pneumonia as an "injury" caused by inhalation of gas. *Thomson v. Ashington Coal Co.*, 17 Times L.R. 345 (1901). The weight of authority is that disease contracted as a direct result of unusual circumstances connected with work is to be considered an "injury" caused by accident. L.R.A. 1916A, 290.

On the other hand other courts have held that inhalation of dust and silica and other dust injuries to the eyes or the respiratory organs are not compensable if the injury results after a period of time. *Williams v. Guest, Kenn & Mittelfords*, 1 K.B. 497 (1926); *Donnelly v. Minneapolis Mfg. Co.*, 161 Minn. 240, 210 N.W. 305 (1924). Inhalation of dust has been held a disease and not an injury, and the same court stated that recovery for the injury or disease is not confined to compensation under the Workman's Compensation Act. *Smith v. International High Speed Steel Co.*, 98 N.J. Law 574, 120A. 188 (1923).

It may be gathered from the foregoing illustrations that the question of whether or not an injury is compensable depends upon the time it takes for the injured person to feel the effects of the injury. In many of the other jurisdictions having a Compensation Act, if an injury is not compensable, then the injured employee may still resort to his common law recovery against his employer. *Jellico Coal Co. v. Adkins*, 197 Ky.

684, 247 S.W. 972 (1923); *Trout v. Wickware Spencer Steel Corp.*, 195 N.Y.S. 528 (1922); *Dowing v. Oxweld Acetyline Co.*, 112 N.J. Law 25, 169 A. 709 (1933). But in Ohio, if the employee does not sustain a compensable injury under the Act, then he can have no recovery at all. According to the Ohio court's interpretation of Article II, Section 35, of the Ohio Constitution, an employee gives up all his common law right to recovery for torts against his employer, and therefore the complying employer is freed of all common law liability to his employees even though injured while in the scope of employment. In view of such an interpretation as this, the court might well be more liberal in its construction of the word "injury" and thus allow compensation in cases where now the employee is altogether without relief.

The principal case might have come under the Act had the court found the injury to be a physical one. It is an old adage that "little strokes fell great oaks." Thus, if an immediate injury were caused by each particle of dye, the injury would have fulfilled the requirements of legal trauma. Where it takes many particles of dye to cause the injury over a period of time, the injury not being anticipated in the ordinary course of employment, the court in the principal case denied recovery. Their rationalization was that trauma caused by a microscopic foreign substance in contact with the eye during an uncertain period of time is not such as will be compensable. It would seem, however, that the injury should have been held compensable, and that the court should not have differentiated between legal and medical trauma. Regardless of what adjective is used the injury is still one of trauma.

So long as the Ohio courts adhere to their present position there are only two ways out of this situation: amend Article II, Section 35 of the Ohio Constitution; or carry a similar case to the Supreme Court of the United States, on the constitutional issue of deprivation of a substantive right under the due process clause.

SEYMOUR A. TREITELMAN.

WORKMEN'S COMPENSATION — SCOPE OF EMPLOYMENT — HOME WORK AS A FACTOR

The decedent was being driven to work by her father in the latter's car to the Francis Willard Public School, where she was employed as a teacher. Her death was occasioned by the collision of an interurban car with the automobile in which she was riding. There was testimony that the preparation necessary for teacher's work could not be fully made during school hours and that the superintendent had knowledge that

she was working at home. On the morning in question the decedent had certain papers with her, the work of her pupils. She had graded these papers at home. The court held that her death under such conditions was not compensable from the workmen's compensation fund. *Industrial Commission v. Gintert*, 128 Ohio St. 129, 190 N.E. 400, 40 O.L.B. 524 and 213, 92 A.L.R. 1032 (1934).

As a general rule, in order that an injury may be held to arise out of and in the course of employment within the meaning of the workmen's compensation acts, it must have occurred on the employer's premises, and injuries sustained while going to and from work are not within the protection of the act. This rule is subject to certain exceptions. 83 A.L.R. 216.

A number of courts have enlarged the scope of employment in consideration of certain factors; requirements of employment, *Stoockley v. School Dist.*, 231 Mich. 523 (1925); requests of employer or superior, *Kyle v. Greene High School*, 208 Iowa 1037, 226 N.W. 71 (1929); lack of adequate facilities and time at place of employment, *English v. Industrial Commission*, 125 Ohio St. 494, 181 N.E. 901, 36 O.L.R. 422 (1932); custom and practice, *Scrivner v. Franklin School Dist.*, 50 Idaho 77, 293 P. 666 (1930); and knowledge and approval of employer, *Marshall v. United Rys. Co. of St. Louis*, (Mo. App.) 184 S.W. 159 (1915); *Thurston v. Kansas City Terminal Ry. Co.*, (Mo. App.) 168 S.W. 236 (1914); *Borley v. Ockenden*, 2 [1925] K.B. 325. See also *Celina, D., U., & C., Ry. Co. v. Ind. Com.*, 307 Ill. 142, 138 N.E. 289 (1923). Some courts have held that the basic principles of the Compensation Act, the wording of the constitution, and the statute with reference to injuries, act as a limitation and therefore exclude from compensation the risks which are similarly encountered by the public generally. The conception of "scope" is based upon the time and space element. *Gintert v. Ind. Com.*, supra; *Ind. Com. v. Baker*, 127 Ohio St. 345, 188 N.E. 560 (1933). Other courts hold that the proper test is to determine which of the two causes, the employer's purpose or the employee's personal purpose, was dominant in causing the employee to travel. *Barrager v. Ind. Com.*, 205 Wis. 550, 238 N.W. 368 (1931); *Marks v. Gray*, 251 N.Y. 90, 167 N.E. 181, 78 A.L.R. 684 (1929).

Scope of employment cannot be accurately defined. In its final analysis it is a question of fact which cannot be determined by the application of a rigid rule. The decision in the principal case seems contrary to the more liberal viewpoint in this respect.

R. HAROLD THOMAS.