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Workmen's Compensation—Assemblyman Not an Employee

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Allocation Between Employers Of Compensation Award

One of the problems recurring in cases of injury to a workman while in the joint and concurrent employment of two employers is how to charge the Workmen's Compensation award against them—in proportion to the respective wage scales or in proportion to the degree of engagement of the employee in the service of each employer at the time of the accident.

In *Hunt v. Regent Development Corporation,*[6] the Court held that, although the facts demonstrated that the employee, a night watchman guarding the premises of two companies and receiving thirty dollars a week from one and fifty dollars a week from the other, was at no time disengaged from performing the duties owed to either employer, the liability must be apportioned to the wages paid. This decision follows the rule announced in *Stevens v. Hull Grummond & Co.,*[7] where an equal division of liability would have had the anomalous result of making one employer pay more in compensation than he had been paying in wages.

A dissenting opinion of Judge Desmond holds that the case of *Stevens v. Hull Grummond & Co.* is not applicable, because an equal division in that case would have violated the express command of the Workmen's Compensation Law that compensation could not exceed two-thirds of the wages paid.[8] Since, in the instant case, no such situation was present, Judge Desmond felt that the equal division ordered by the board and affirmed by the Appellate Division[9] should not be disturbed, such apportionments being properly left to the board where no rule of law is violated as a result.[10]

It would seem that there is room for an elaboration of the statutory definition of such responsibilities, especially in view of the fact that the Workmen's Compensation Law is not lacking in detailed specification in other areas, as for example in establishing the awards to be made for particular types of injury.

Assemblyman Not An Employee

The question of whether a New York State Assemblyman is covered by the Workmen's Compensation Law was presented by the case of *Toomey v. New*

6. 3 N.Y.2d 133, 164 N.Y.S.2d 694 (1957).
7. 274 N.Y. 227, 8 N.E.2d 498 (1937).
8. N.Y. WORKMEN'S COMPENSATION LAW §15.
9. Hunt v. Regent Development Corporation, 1 A.D.2d 862, 148 N.Y.S.2d 794 (*mem.*, 3rd Dep't 1956).
10. N.Y. WORKMEN'S COMPENSATION LAW §20 provides:
> The board shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of the chapter.

York State Legislature.[11] The Court decided (5-2) that he is not. The only existing opinion on the question, before the *Toomey* case arose, was rendered by the state Attorney-General whose opinion was favorable to a finding of coverage.[12]

With respect to coverage of state employees, originally the legislature enumerated those employments considered hazardous enough to merit compensation coverage.[13] By an amendment in 1924, however, the classification became "Any employment by the state, ..."[14] In the instant case, the majority decided that a broad construction of the language was not intended and should not be made. The decision rests on two grounds. The first, since under the original classification the legislature made no mention whatsoever of assemblymen or other elective officials, it must be concluded that the legislature did not intend to include these officials when it dispensed with express classification and substituted the broader language quoted above. The second reason given by the majority was that the concept of a public official is repugnant to that of an employee. The majority reasoning leaves room for doubt.

While it is established that express classification necessarily excludes those employments or occupations not mentioned,[15] it does not seem to follow that the unmentioned employments remain barred after classification is made general. Certainly it is within the power of the legislature to abandon categorization entirely, and bring all employments within the scope of coverage. The second ground, that the concept of public official is repugnant to that of employee, is equally unconvincing. It was held in *People ex rel. Kelly v. Common Council,*[16] that the office of congressman is a public employment. The holding suggests that the concepts of "public official" and "employee" are not necessarily contradictory or repugnant.

These arguments aside, the rules of statutory construction seem to govern the situation. The language of section 3, group 16, of the statute, is ambiguous. It is not clear what class of occupations the legislature intended to cover. An

11. 2 N.Y.2d 446, 161 N.Y.S.2d 446 (1957).
12. See 1945 OPS. ATT'Y. GEN. 93, which provides in part:
> Where the State is the employer the Workmen's Compensation Law is applicable regardless of the nature of the employment. No distinction is made in respect to the applicability of the Workmen's Compensation Law between officers and other employees of the State.
13. N.Y. Sess. Laws 1922, c. 615.
14. N.Y. WORKMEN'S COMPENSATION LAW §3(16) provides:
> Any employment by the state, notwithstanding the definitions of the terms "employment," "employer" or "employee," in subdivisions three, four and five of section two of this chapter.
15. Maloney v. Levy & Gilliland Co., 176 App. Div. 470, 163 N.Y. Supp. 505 (1st Dep't 1917).
16. 77 N.Y. 503 (1879).

established rule of construction is that general words are to have a general operation.[17] It is also a rule, however, that the manifest intent of the legislature shall prevail over a literal interpretation of the words being construed.[18] Applying these rules to the *Toomey* case, it does not seem that the majority has shown any legislative intent that would afford ground for qualifying or restraining the literal meaning of the words used. The majority appeared alarmed by the seemingly radical results that might be reached under a broader interpretation of the section. However, the desirability or undesirability of the effects of legislation would seem to be purely a matter of legislative judgment, not to be substituted by that of the judiciary.[19]

MISCELLANEOUS

State Not Liable Under Jones Act For Injuries To Its Seamen

In *Maloney v. State*,[1] the plaintiff brought an action against the state in the Court of Claims for the death of her husband, an employee of the state. She alleged that since her husband was a seaman, such action was permitted by the Jones Act, a federal statute allowing seamen to recover from their employers for personal injuries.[2] She further alleged that section 8 of the Court of Claims Act waived the state's immunity and gave the Court of Claims the right to determine the state's liability in accordance with the same rules applicable to action against individuals or corporations in the Supreme Court of New York, which has jurisdiction over cases arising under the Jones Act.[3] However, all employees of the State of New York are covered by the Workmen's Compensation Law, which provides an exclusive remedy, thus precluding such employees from bringing an action at law against their employer.[4] Therefore, the instant case presented the question of whether these provisions were applicable to the plaintiff's action.

The Court of Appeals held that the state did not waive its immunity as to the Jones Act because section 8 of the Court of Claims Act specifically states

17. In Re DiBrizzi, 303 N.Y. 206, 214, 101 N.E.2d 464, 467 (1951).
18. City Bank Farmers' Trust Co. v. N.Y.C.R. Co., 253 N.Y. 49, 170 N.E. 489 (1930).
19. Lawrence Const. Corporation v. State, 293 N.Y. 634, 639, 59 N.E.2d 630, 632 (1944).

1. 207 Misc. 894, 141 N.Y.S.2d 207 (Ct. Cl. 1955); 2 A.D.2d 195, 154 N.Y.S.2d 132 (4th Dep't 1956); 3 N.Y.2d 356, 165 N.Y.S.2d 465 (1957).
2. 46 U.S.C.A. §688.
3. Wagner v. Panama Ry., 299 N.Y. 432, 87 N.E.2d 444 (1949); Lynort v. Great Lakes Transit Corp., 234 N.Y. 626, 138 N.E. 473 (1922).
4. N.Y. WORKMEN'S COMPENSATION LAW §11.