

Master and Servant - Workmen's Compensation - Arising out of and in the Course of Employment

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retroactive in application to policies written previous to that date. *Pawlowski v. Eskofski*, 209 Wis. 189, 244 N.W. 611 (1932); *Baker v. Tormey*, 209 Wis. 627, 245 N.W. 652 (1932). Legislation permitting direct joinder of the insurer has been held to invalidate no action clauses in many jurisdictions. *Globe Indemnity Company v. Martin*, 214 Ala. 646, 108 So. 761 (1926); *Ruiz v. Clancey*, 182 La. 935, 162 So. 734 (1935); *Lunt v. Aetna Life Insurance Company*, 261 Mass. 469, 159 N.E. 461 (1927); *Stacey v. Fidelity and C. Co.*, 114 Ohio State 633, 151 N.E. 718 (1926). The case at issue must be distinguished from *Sheehan v. Lewis*, 218 Wis. 588, 260 N.W. 633 (1935), where the no action clause was held unenforceable, the policy being written by a Massachusetts insurance company protecting a Wisconsin corporation. The court said that the statute shall govern and render the conflicting provisions inoperative. The interpretation of a personal contract is referable to the place where it was made. *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N.W. 1042 (1910); *McKnelley v. Brotherhood of American Yeomen*, 160 Wis. 514, 152 N.W. 169 (1915). An insurance policy made in and to be performed in Wisconsin by non-residents is to be governed in its validity and effect by the laws of Wisconsin. *North Western Mutual Insurance Co. v. Adams*, 155 Wis. 335, 144 N.W. 1108 (1914). The provisions or laws of the state where the contract is made will be recognized in other jurisdictions unless against the statutes, powers, rights, or the well settled public policy of the other jurisdiction. *Missouri State Life Insurance Co. v. Lovelace*, 1 Ga. App. 446, 58 S.E. 93 (1907). It was held in *Clarey v. Union Central Life Insurance Co.*, 143 Ky. 540, 136 S.W. 1014, 26 L.R.A. (N.S.) 763, (1911) that a no action clause as to the period within which to bring a suit would be recognized in another state though contrary to its public policy.

The no action clause in a liability insurance policy secures a valuable right, *Pawlowski v. Eskofski*, *supra*. To disregard the provision is to place upon the insurer a greater obligation than that contracted for, and results in an impairment of the contract between the parties, contrary to Section 10, Article I of the United States Constitution, and Article I, Section 12 of the Constitution of Wisconsin. One of the tests that a contract has been impaired is that its value has by legislation been diminished. *Planters Bank v. Sharp*, 6 Howard (U.S.) 301, 12 L.ed. 447 (1848); *Bank of Minden v. Clement*, 256 U.S. 126, 41 Sup. Ct. 408, 65 L.ed. 857 (1920). If the effect of impairment is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. *Pawlowski v. Eskofski*, *supra*. In the case at issue, the court determined that, as the no action clause would be valid in Illinois, the insurer is entitled to the rights thereunder, and to permit joinder of the insurer would be unconstitutional as an impairment of a contract. In a case directly in point and with identical facts, *Riding v. Travelers Insurance Company*, 48 R.I. 483, 138 Atl. 186 (1927), the court held that the insurer's obligation under the policy was not variable or dependent upon the jurisdiction in which the insured drove his car.

JOHN T. MCCARRIER.

MASTER AND SERVANT—WORKMEN'S COMPENSATION—ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.—The claimant is the widow of the deceased. She made claim for compensation under the Workmen's Compensation Act against the deceased's employer. The deceased was killed while he was returning from a week-end trip at his lake home. He was on his way to assume his duties as salesman for the defendant company. The claimant contended, and proof sustained her claim, that deceased frequently made stops on return trips to deliver batteries and car accessories to his employer's customers. She failed to substan-

tiate her allegations that the deceased had delivered two batteries that were in his car and which he was expecting to deliver on the particular return trip in question. The accident occurred before the deceased had reached the point on his trip where he would turn off to cover his scheduled route. The Industrial Commission awarded compensation to the widow. On appeal to the circuit court judgment was entered dismissing the claim. On appeal to the supreme court, *held*, judgment affirmed. This death was not compensable as growing out of and incidental to the deceased's employment. *Automotive Parts and Grinding Co. v. Industrial Commission* (Wis. 1936) 264 N.W. 492.

Whether the salesman, who mixes pleasure or private business with his sales occupation, can recover compensation under a Workmen's Compensation Act, if he is injured, or whether his estate can get compensation, if he is killed, depends upon facts and circumstances which the Commission must consider specially in each case. The formula traditionally applied by courts and commissions was first enunciated in the master-servant, third party liability cases. In *Joel v. Morison*, 6 C. & P. 501, 172 Eng. Rep. 1338 (1834), Baron Parke purported to distinguish between a mere "detour" on the part of the servant engaged upon the master's business, and a "frolic" of the servant. Compare *Thomas v. Lockwood Oil Co.*, 174 Wis. 486, 182 N.W. 841 (1921), where the servant, a truck driver, went out of his way on his return trip "to kill time," and where the court classified the trip as a "detour" and not a "frolic." The English Workmen's Compensation Act is the source of the phrase "arising out of and in the course of the employment," incorporated by the Wisconsin legislature into the local statutes in 1911. Wis. Laws (1911) c. 50; see Wis. STAT. (1935) 102.03. Courts cannot lay down a hard and fast rule of interpretation. The limits of the relationship of employer and employee, master and servant, are necessarily elastic. See Kock, *Workmen's Compensation Act and Incidental Occupation* (1933) 8 St. John's L. Rev. 107. In *Schmiedeke v. Four Wheel Auto Co.*, 192 Wis. 574, 213 N.W. 292 (1927) it was conceded that the trip was made in the interest of the employer although the deceased had carried on personal business while covering his route. It was a compensation case and the court decided that the accident had occurred within the course of employment and that the Industrial Commission should make the claimed award. In *Southern Casualty Co. v. Ehlers*, 14 S.W. (2d) 111 (Tex. Civ. App. 1929), where the statute contained a similar provision about scope of employment, the court held that the injury complained of had not occurred in the course of employment. The injured person was an automobile salesman. He had driven into town to interview prospective purchasers but he had also made arrangements to attend a social function in which he personally was interested. In *Harvey v. Bakers & Consumers Compressed Yeast Co.*, 244 App. Div. 838, 279 N.Y. Supp. 511 (1935) compensation was allowed for the deceased's death where it appeared that he had taken certain merchandise with him at night which he was preparing to deliver in the morning when he was killed on his return trip and while he was about to make deliveries. The New York court has tried to phrase a more precise test to be applied to these cases than the old formula about detour and frolic. See *Marks v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1929). So long as the job of the employee creates the necessity for travel, he is acting in the course of employment even though he makes use of the occasion to serve some purpose of his own. And the Wisconsin court in a compensation case has pointed out that, if the trip would not have been made had the private errand been cancelled, then the trip is not made in the course of employment and compensation can not be awarded to the injured person or to his dependents if the employee is killed. *Barrager v.*

Industrial Commission, 205 Wis. 550, 238 N.W. 368 (1931). In that case the deceased was permitted by his employer to make a special trip to bring his wife home from a vacation visit. Incidentally he was expecting to call upon some of his employer's customers. The court felt that the personal interest was the primary reason for the trip. In the principal case the court refers to the *Barrager* case as decisive in the case before it. See also *Githens v. Industrial Commission* (Wis. 1936), 265 N.W. 662, a compensation case, and *Fawcett v. Gallery* (Wis. 1936), 265 N.W. 667, a third party liability case.

THOMAS J. BERGEN.

MATERIALMEN'S LIENS—STATUTORY BONDS—STATUTORY CONSTRUCTION.—The plaintiff sold iron posts to the Badger Company. The latter shipped them to the principal contractor who had entered into a contract with the state to build a bridge. The principal contractor, unaware of plaintiff's claim, paid the Badger Company which company later went into receivership. Dividends from that proceeding not having been declared, the plaintiff brought this action against the principal contractor and his surety, obligors on a bond required by statute. The trial court ordered judgment for the plaintiff, concluding it to be the duty of the defendants to have ascertained the plaintiff's status. On appeal, *held*, judgment reversed; a principal contractor doing public work is not liable to a subcontractor of a subcontractor. Subsequent liberalizing of the lien law to include remote claimants did not extend the remedy afforded by the Public Works Act, *Gilson Bros. Co. v. Worden-Allen Co.*, (Wis. 1936) 265 N.W. 217.

Until amendment the mechanic's lien law expressly denied the right of a lien to a subcontractor of a subcontractor. See WIS. REV. STAT. (1878) § 3315. In this exclusion was seen a recognition that building construction would be hampered by permitting a multiplication of liens on the part of distant claimants. *Dalman v. Clasen*, 116 Wis. 113, 92 N.W. 566 (1902). The Public Works Act making mandatory a bond to insure compensation to materialmen and laborers participating in public contract projects was enacted in 1899 as a substitute for the lien accessible on private undertakings. See WIS. STAT. (1935) § 289.16. Its protection is available to "parties in interest." By judicial interpretation claimants have been restricted to the kind or nature of claims approved by the lien law. *Wisconsin Brick Co. v. Nat. Surety Co.*, 164 Wis. 585, 160 N.W. 1044 (1917). Most courts have declined, in the absence of express direction, to limit such statutes in conformity with the restrictions of lien laws, but construe them independently to fulfill an apparent legislative purpose to secure the payment of all persons contributing to public improvements however far removed from contractual relationship with the principal contractor. *Franzen v. Southern Surety Co.*, 33 Wyo. 15, 246 P. 30, 46 A.L.R. 496 (1926); *Trenton v. N. J. Brick & Supply Co.*, 112 N. J. Law 218, 171 At. 176 (1934); *Eagle Oil Co. v. Altman*, 129 Okla. 98, 263 Pac. 666 (1928). It is the minority view that courts should not extend the protection of the bond to remote claimants not expressly included by statute. *Miller v. Bonner*, 163 La. 333, 111 So. 776 (1926); *Faurote v. State*, 111 Ind. 73, 11 N.E. 476 (1887).

In the principal case the default did not occur because of the mismanagement or insolvency of the principal contractor. Timely notice would have warned him against payment to the defaulting subcontractor until the plaintiff's claim was secured. In *Berger Mfg. Co. v. Lloyd*, 209 Mo. 681, 108 S.W. 52 (1908), the subcontractor was denied recovery on the bond because it was not shown that he relied on the principal contractor for payment, but that he merely dealt in the ordinary course of business upon the immediate subcontractor's credit.