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Interpretation of the Word "Accidental" in section 26 of the Workmen's Compensation Act

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to discriminate against interstate commerce." It would be a perversion of the purpose of the commerce clause to apply the clause so as to compel the states, in levying taxes, to discriminate against intrastate commerce and thus subsidize interstate commerce at the expense of intrastate commerce. The function of the commerce clause is to prevent the states from discriminating against interstate commerce, not to compel the states to discriminate in favor of it.

As the Supreme Court said with reference to a state tax on the net income received from both interstate commerce and intrastate commerce, so we may say with reference to a state tax levied alike on all commerce, interstate and intrastate, in oil and gas produced within the state: "Such a tax... is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

—T. P. H.

INTERPRETATION OF THE WORD "ACCIDENTAL" IN SECTION 26 OF THE WORKMEN'S COMPENSATION ACT.—Section 26 of Chapter 15P of the West Virginia Code provides as follows:

"All employers subject to this act, the state of West Virginia excepted, who shall not have elected to pay into the workmen's compensation fund the premiums provided by this act, or having so elected, shall be in default in the payment of the same, or not having otherwise complied fully with the provisions of section twenty-four of this act, shall be liable to their employees (within the meaning of this act) for damages suffered by reason of accidental personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employees, and also to the personal

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12 See Powell, op. cit., 32 Harv. L. Rev. 902, 917. See also 26 Harv. L. Rev. 388, 390.
14 United States Glue Co. v. Oak Creek, supra, at p. 329. Italics ours.
representatives of such employees where death results from such accidental personal injuries, and in any action by any such employee or personal representative thereof such defendant shall not avail himself of the following common law defenses: The defense of the fellow-servant rule; the defense of the assumption of risk; or the defense of contributory negligence; and further shall not avail himself of any defense that the negligence in question was that of some one whose duties are prescribed by statute.\footnote{1}

The italicized word "accidental" was inserted by an amendment in 1919. The question is what effect shall be given to that word. There are several possible interpretations, no one of which is entirely satisfactory.

"Accidental" may mean either unintentional though negligent\footnote{2} or unintentional and non-negligent.\footnote{3} If it means the former to whom is it referable? There are two solutions. First, it may mean an unintentional, negligently self-inflicted injury by the employee. The object of such a definition would be to prevent recovery by the employee for such injuries. There are decisive objections to this explanation. First, recovery under such circumstances has been expressly forbidden by another section\footnote{4} of the act itself. Second, before the amendment it had been stated by the Supreme Court that the section as it then read would not support an action where the employee wilfully inflicted injury upon himself.\footnote{5} In view of these objections the only purpose in inserting the word "accidental" would be, because of an incredible excess of caution, to make trebly clear that which was already doubly so. Third, and most conclusive, if the injury were self-inflicted it could not be

\footnote{1} ACTS OF W. VA., REG. & EXTRAORD. SESS., 1919, 479.
\footnote{2} See Blue Wing v. Buckner, 51 Ky. 246, 250 (1851); Ullman v. Chicago & N. W. R. Co., 112 Wis. 150, 88 N. W. 41 (1901); McCarty v. New York & E. R. Co., 30 Pa. St. 247, 251 (1858); Grutchfield v. Richmond & D. R. Co., 16 N. C. 320, 322 (1877); Payne v. Fraternal Accident Assn. of Am., 119 Ia. 342, 93 N. W. 361, 362 (1905). WEBSTER'S NEW INTERNATIONAL DICTIONARY defines "accidental" as "that which happens without design." Such a definition does not, of course, exclude negligent injuries. See also, BOUVIER, LAW DICTIONARY, 3 ed., 101.
\footnote{4} W. Va. Code, c. 15P, § 28, reads as follows: "Notwithstanding anything herein contained, no employee or dependent of any employee shall be entitled to receive any sum from the workmen's compensation fund, or to direct compensation from any employer making the election and receiving permission mentioned in section fifty-four hereof, or otherwise under the provisions of this act, on account of any personal injury to or death of any employee caused by a self-inflicted injury, the wilful misconduct, or disobedience to such rules and regulations as may be adopted by the employer and approved by the commissioner. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . ...
“caused by the wrongful act, neglect or default of the employer,” etc.

The other solution is that it refers to the employer. That would exclude an interpretation that he should be liable, under the provision of this section, for intentional injuries, but would make him answerable for his unintentional but negligent acts. A reason for such a signification would be found in the following lines of reasoning. Section 28 provides that an employee shall have, in addition to the rights given him by the act, a remedy in tort against an employer, under the statute, who has intentionally injured him. Section 26 is concerned with the employee’s rights against an employer not under the act. When the statute was first enacted, there was the possibility that the court, taking an exceedingly narrow and backward view of Section 26, might interpret it as merely declaratory of the common law. The effect of such an interpretation would be to read in the word “intentional” before “injuries”. The addition of the word “accidental” in the sense suggested, would exclude such a construction. This would not mean that an employer not under the act who intentionally injures his employee would escape liability. The act nowhere abolishes the common-law tort action by an injured employee against an employer not under the act. It only deprives such an employer, under certain circumstances, (i. e., under the construction contended for, where he was negligent) of the common-law defences specified. In the case of intentional injuries the employer never had these defences, therefore there was no need to abolish them by statute.

This construction, though possible, is improbable. Eight years ago there might have been some justification for a fear that the courts might hold the provision which abolished common-law defences to a tort action in derogation of the common law and therefore to be strictly construed and allowed to change it only so far as the words necessarily required. When the amendment in question was made, however, there was no real foundation for such an apprehension. In 1919 it would have taken the most reactionary of courts to hold such acts other than remedial and therefore to be construed liberally in the light of their purpose. But the answer

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is even more decisive. The West Virginia Supreme Court had emphatically announced, before the amendment in question was made, that Section 26 covered negligent injuries caused by the employer, etc.\textsuperscript{7}

The other meaning attributable to "accidental," that it covers non-negligent as well as unintentional injuries, involves some niceties in interpretation of the other words of the section. First, such a definition logically would exclude liability for negligent acts of employers. It would be very difficult to believe such construction is proper. To avoid it, it may be argued that the particular qualification might be construed as additional rather than exclusive because the restricted interpretation would be opposed to the general purpose of the act.\textsuperscript{8}

If it is taken as exclusive, a difficulty as to the signification to be given to "wrongful" arises. The ordinary meaning of the word is, without doubt, tortious.\textsuperscript{9} Torts are composed, not only of negligent and wilful acts which cause injury, but also of non-negligently inflicted injuries based upon the postulate that "in civilized society men must be able to assume that others who maintain things likely to get out of hand or to escape and do damage, will restrain them or keep them within their proper bounds."\textsuperscript{10} The word "accidental" necessarily must limit the word "wrongful"; and it would restrict it to the latter category of torts,—the non-negligent ones. It would not follow, however, that Section 26 abolished the common-law defenses only as to non-negligently inflicted injuries. Such a limited operation may be avoided by a careful adherence to the exact words of the statute. After stating (according to the interpretation just worked out) that employers not under the act shall be liable to their employees for non-negligent personal injuries caused non-negligently by the employer, etc., the section goes on as follows: "and in any action (not any such action) by any such employee (referring generally to employees of employers not under the act) or personal representa-


\textsuperscript{8} See BLACK, INTERPRETATION OF LAWS, 146; 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., § 491.

\textsuperscript{9} See WEBSTER'S NEW INTERNATIONAL DICTIONARY, tit., Tortious; 3 BOUVIER, LAW DICTIONARY, 3 ed., 3500; BLACK'S LAW DICTIONARY, 2 ed., 1235.

\textsuperscript{10} POUND, OUTLINE OF A COURSE ON THE HISTORY AND SYSTEM OF THE COMMON LAW, 47.
tive thereof such defendant (meaning the employers generally who have not accepted the terms of the act and not just the particular one who caused an injury by his non-negligent act etc.) shall not avail himself of the following common law defenses:"
The italics and parenthetical explanations are mine. The net result of this admittedly finely drawn and careful interpretation is to make employers liable for non-negligent, tortious injuries for which they would be liable anyway, without the introduction of the word "accidental", if the full meaning of the word "wrongful" is given to it—i.e., as covering non-negligent torts. Further, it is to be noted that, in order to ascribe to the word "accidental" the meaning of non-negligent, it is necessary to give to the word "wrongful" just that full definition.

Some reasons, however, exist for such an interpretation. There is the necessity of giving to the word "accidental" some meaning consistent with the rest of the section. A word deliberately added by amendment cannot be regarded as inserted without purpose. Yet, if possible, it should be given a meaning which will harmonize with other words in the section. Further the purpose of the whole act and of the particular section lends sanction to this view. The end sought by workmen's compensation acts is to place upon the industry in which a person is employed the cost of the injury received in the course of employment, intentionally self-inflicted hurts excepted. They are remedial statutes to be interpreted liberally to further that purpose. The object of the particular section under consideration is to aid the main purpose by compelling employers to come under the act. The construction suggested furthers both of these purposes.

"As early as in Bacon's Abridgment it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant; this rule has been repeated innumerable times.' Washington Market Co. v. Hoffman, 101 U. S. 112, 115 (1879). See also 2 Lewis' Sutherland, Statutory Construction, 2 ed., § 380; Preliminary Article on Statutes and Statutory Construction, 1 Fed. Stat. Ann., 2 ed., § 32.

11 See 2 Lewis' Sutherland, Statutory Construction, 2 ed., § 401; 1 Honnold, Workmen's Compensation, 20.
13 See 1 Honnold, Workmen's Compensation, § 6, and cases cited in note 35.
15 See Bradbury, Workmen's Compensation, § 20. This method of clubbing the employers to accept the act by the indirect method of limiting their defenses in tort actions against them was adopted to avoid the possibility that a compulsory statute might be held unconstitutional. Such a possibility is now exceedingly remote. See Wambaugh, "Workmen's Compensation Acts: Their Theory and Their Constitutionality," supra; 19 Mich. L. Rev. 751. See also a discussion of the decision upholding the Arizona Workmen's Compensation Act, 33 Harv. L. Rev. 96.
There is one more possible, though unlikely view. It is a sound rule of construction that wherever a statute is inartificially expressed and the context throws no clear light on its meaning the courts are required to look less at the letter or words of a statute than at the reason and spirit of the law. It should, in such a case, be interpreted functionally. In the purpose of the act there is some justification for a more radical construction which would make a sweeping change in the law. It is arguable that the word "accidental" was inserted to enable an employee to recover, in a tort action, from an employer, not under the act, for those injuries for which he would receive compensation had his employer elected to accept the provisions of the law. This would entail one of two things: either the striking out of the words "caused by . . . . . agents or employees", or the reading into the sentence, immediately after that clause, some such words as "or caused by anything else happening in the course of and arising out of the employment for which the employer would be liable if under the act." Such extensive interpretation would give full effect to the purpose of the statute. It would, however, be giving very far-reaching consequence to a very small change. While the whole policy of the act warrants such a result, it would seem better to reach it by explicit enactment than by doubtful interpretation. The legislature should act to clarify the passage.

Two recent West Virginia cases have been decided under Section 26. Both cases held that an employer not under the statute was liable only for negligent acts, etc., causing injury to the employee. In neither case, however, was the effect of the word
“accidental” discussed. One case arose in 1916, before the amendment, so the problem was not involved. It is not apparent when the facts in the other case occurred. Inasmuch as the court used the text of the act in the Code Supplement of 1918 they probably took place prior to the amendment. At any rate, it seems clear that the court never had the point before it. The question is, therefore, still an open one upon which it is desirable that the legislature express itself clearly.

—G. E. O.

**NUSTIEL CORPORATION A PLEA IN BAR.—** At common law, comprehensively speaking, all defensive matter is pleaded either (1) in bar of the action or (2) in abatement or suspension of the action. Since in West Virginia the “parol” will no longer “demur” on account of infancy, the members of the profession ordinarily speak only of pleas in bar and pleas in abatement, using the latter term to cover pleas to the jurisdiction. It is usual to state that defensive matter which bars the very right of action, and therefore all possible actions in which the right might be asserted, should be pleaded in bar; and that matter which, ignoring the right, merely abates the particular action to which the plea is filed should be pleaded in abatement. So far, very well. But a moment of reflection brings the realization that a right of action may be considered as barred with reference to any one of three different elements which are always inherent in every right of action: (1) the right itself; (2) the party entitled to assert the right; (3) the party against whom it may be asserted. In other words, it is possible to classify pleas in bar as (1) those going to the subject matter of the action, and (2) those going to the person. Whether it is appropriate to do so is another question. On the other hand, a typical plea in abatement undertakes to interpose a bar with reference to neither the subject matter nor the person, but merely undertakes to stop the action. Courts are agreed that matter extinguishing the right in so far as it reposes in the subject matter of the action should be pleaded in bar. Likewise, it is conceded that matter which will not prevent

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