NINTH REVISION

REVISED STATUTES

OF THE

STATE OF MAINE

1954

FIRST ANNOTATED REVISION

Effective December 31, 1954

IN FIVE VOLUMES

VOLUME 1

THE MICHIE COMPANY
CHARLOTTESVILLE, VIRGINIA

Chapter 31.

Industrial Accidents.

Sections 1-47. The Workmen's Compensation Act.
Sections 48-56. The Employers' Liability Law.
Sections 57-71. The Occupational Disease Law.

The Workmen's Compensation Act.

Purpose of Workmen's Compensation Act.—The purpose of the Workmen's Compensation Act is to transfer the burdens resulting from industrial accidents from the individual to the industry, and finally distribute it upon society as a whole. Dinsmore's Case, 143 Me. 344, 62 A. (2d) 205.

The general purpose of this act undoubtedly is to transfer the burdens resulting from industrial accidents, regardless of who may be at fault, from the individual to the industry and finally distribute it upon society as a whole, by compelling the industry, in which the accident occurs, through the employer, to contribute to the support of those who were actually and lawfully dependent upon the deceased employee for their sustenance during his lifetime. Scott's Case, 117 Me. 436, 104 A. 794. See § 15, re compensation to dependents.

The compensation act is intended primarily to provide employees injured in industrial accidents with compensation during periods of total and partial incapacity limited in terms of both time and money. Simpson's Case, 144 Me. 162, 66 A. (2d) 417.

The main purpose of the act was the creation of a new and wider remedy for victims of industrial accidents and a new tribunal for the administration of such remedy. Nadeau v. Caribou Water, Light & Power Co., 118 Me. 325, 108 A. 190.

The object of the act, broadly stated, is to compensate a workman for his loss of capacity to earn, which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident. Thibeault's Case, 119 Me. 336, 111 A. 491.

The underlying object of the compensation act is to pay an injured workman for his loss of capacity to earn. Such payment is made primarily by the industry or occupation in which the employee was injured; ultimately it is borne by society. The act bespeaks liberality in interpretation (see § 30). Yet, its liberality goes no further, and never was intended to go further, than to provide for compensation for an actual or a legally presumed resulting loss of the ability to work. In this is its whole design. Fennessey's Case, 120 Me. 251, 113 A. 302.

It is an historical fact, of which courts will take judicial knowledge, that the primary purpose of workmen's compensation laws is to benefit employees. Bartley v. Couture, 143 Me. 69, 55 A. (2d) 438.

That the legislative intention underlying the compensation act was to benefit industrial employees and throw the burden of the injuries arising out of their employment on the industries of which they were a part does not admit of doubt. Bartley v. Couture, 143 Me. 69, 55 A. (2d) 438.

Act to be liberally construed.—The compensation act should receive a liberal construction so that its beneficent purpose may be reasonably accomplished. Riley v. Oxford Paper Co., 149 Me. 418, 103 A. (2d) 111.

The Workmen's Compensation Act arose out of conditions produced by modern industrial development and is based on the philosophy that industrial accidents are inevitable incidents of industry, and that the burden should be borne by industry rather than by the injured employee. Boyce's Case, 146 Me. 335, 81 A. (2d) 670.

Rights and obligations under the Compensation Act are contractual. Gauthier's Case, 120 Me. 73, 113 A. 28.

The act is optional or elective. Acceptance of its provisions creates a contractual relationship between employer and employee. Mutual acceptance by employer and employee of the provisions of the act adds a contract to the underlying contract of employment; the superadded contract having to do with the subject of the employer's responsibility for disabling or fatal personal injuries to the employee, should such befall the latter in the course of his employment. Berry v. M. F. Donovan & Sons, 120 Me. 457, 115 A. 250.

Act is elective.—The Maine Workmen's

Compensation Act is elective. No employer or employee is bound to submit to it without his assent, actively or passively manifested. Mailman's Case, 118 Me. 172, 106 A. 606; Gauthier's Case, 120 Me. 73, 113 A. 28.

And is binding only on those electing to be bound.—The compensation act deals exclusively with matters growing out of the relation of employer and employee. The provisions of the act are binding upon employers and employees electing to be bound by them, and upon none others. All except employers and employees are strangers to the act, and their usual lawful rights and remedies are unaffected by it. Ferren v. S. D. Warren Co., 124 Me. 32, 125 A. 392.

The compensation act is binding upon employers and employees electing to be bound, and upon none others. The act deprives no creditor of his right to resort to the courts for the establishment and collection of his claim. White's Case, 126 Me. 105, 136 A. 455.

Act designed for speedy and final settlement of employees' claims.—The design of the entire workmen's compensation act is the speedy, inexpensive and final settlement of the claims of injured employees. Its procedure shuns protracted and complicated litigation. Conners' Case, 121 Me. 37, 115 A. 520. See § 30, re powers of industrial accident commission as regards matters of procedure.

And should be administered with care and caution.—The compensation act should be administered with great care and caution, with judicial discretion and impartial purpose, striving only to discover the spirit and the letter of the law, and to apply them without fear or favor. White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841.

No one section of act exhausts rights and obligations.—The compensation act does not exhaust the subject of compensation for employees, and for dependents of employees, in a single section. Different sections create, define and measure different obligations. Comstock's Case, 129 Me. 467, 152 A. 618.

Act cited in Gifford v. Morey, 123 Me. 437, 123 A. 520; Millett v. Maine Central R. R., 128 Me. 314, 146 A. 903; Pendexter v. Simonds, 134 Me. 142, 183 A. 127.

Sec. 1. Title.—The first 47 sections of this chapter shall be known, and may be cited and referred to in proceedings and agreements thereunder, as "The Workmen's Compensation Act;" the phrase "this act," as used in said sections, refers thereto. (R. S. c. 26, § 1.)

Sec. 2. Definitions.—The following words and phrases as used in this act shall, unless a different meaning is plainly required by the context, have the following meaning:

I. Employer. "Employer" shall include corporations, partnerships, natural persons, the state, counties, water districts and all other quasi-municipal corporations of a similar nature, cities and also such towns as vote to accept the provisions of this act; and if the employer is insured, it also includes the insurer unless the contrary intent is apparent from the context or it is inconsistent with the purposes of this act.

Cross reference.—See note immediately preceding c. 23, § 42, re liability of municipality as employer to workman injured in construction of state aid highway.

Applied in Donahue v. Thorndike & Hix, 119 Me. 20, 109 A. 187.

II. Employee. "Employee" shall include every person in the service of another under any contract of hire, express or implied, oral or written, except:

A. Persons engaged in maritime employment, or in interstate or foreign commerce, who are within the exclusive jurisdiction of admiralty law or the laws of the United States;

B. Any person whose employment is not in the usual course of the business, profession, trade or occupation of his employer. Policemen and firemen shall be deemed employees within the meaning of this act. Employers who hire workmen within this state to work outside the state may agree with such workmen that the remedies under the provisions of this act shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment; and all contracts of hiring in

this state, unless otherwise specified, shall be presumed to include such agreement. Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable.

I. In General.
II. Loaned Employees.
III. Employees Subject to Admiralty Jurisdiction.
IV. Independent Contractors.

Cross Reference.

See c. 55, § 14, re special provisions as to military service.

I. IN GENERAL.

Whether a person is an employee within the meaning of this subsection is a question of law. Kirk v. Yarmouth Lime Co., 137 Me. 73, 15 A. (2d) 184.

And a petitioner in a compensation case has the burden of proving that he was an employee as defined by this subsection. Higgins v. Bates Street Shirt Co., 129 Me. 6, 149 A. 147.

Employment must be in usual course of business.—It is an indispensable condition to recovery under the act that the employment must come within the normal operations of the usual and ordinary business of the employer. Eddy v. Bangor Furniture Co., 134 Me. 168, 183 A. 413.

Although an employee may be in the employment of the insured, he is not entitled to compensation under the act if, at the time of his injury, he is not engaged in the usual course of the trade, business or occupation of the employer. Eddy v. Bangor Furniture Co., 134 Me. 168, 183 A. 413.

And person employed must be "in the service of another."—Whatever the position occupied by the person employed, he must, to come within the provisions of this subsection, be "in the service of another." Clark's Case, 124 Me. 47, 126 A. 18.

But "employee" has broader meaning than "servant."—The term "employee", as used in the compensation act, may be said to have a broader and more liberal meaning than the word "servant," as that term has been generally understood, in that, by this subsection, it was intended to include all those in the service of another, whether engaged in the performance of manual labor, or in positions of management and trust, and whether being paid wages or a salary, so long as they remained under the ultimate control of the employer. Clark's Case, 124 Me. 47, 126 A. 18.

And may include president of corporation.—A president of a corporation is not precluded from becoming an employee within the meaning of this subsection. A corporation may hire its president to perform services for it under circumstances which will make him an employee. Higgins v. Bates Street Shirt Co., 129 Me. 6, 149 A. 147.

But not when performing executive duties only.—When the president of a corporation acts only as such, performing the regular executive duties pertaining to his office, he is not an employee within the meaning of this subsection. Higgins v. Bates Street Shirt Co., 129 Me. 6, 149 A. 147.

Policemen are employees whether appointed by elected officials or officials appointed by governor and council.—Under this subsection, policemen are employees of the city or town whose authorization is restricted within the limits of such city or town, whether appointed by elected local officials of such city or town, or appointed by officers appointed by the governor and council by virtue of a legislative act creating a commission. Moriarty's Case, 126 Me. 358, 138 A. 555.

And "employee" includes minor illegally employed.—A minor employee illegally employed comes within the definition of "employee" as found in this subsection. Thus, the provisions of the act are applicable to minor employees for whom a work permit is necessary, notwithstanding the failure to secure such a permit. Bartley v. Couture, 143 Me. 69, 55 A. (2d) 438.

Employee sent to foreign country.—In the case of an employee residing in Maine and employed by the joint superintendent of two corporations, one a foreign corporation owning the stock in the other, a Maine corporation, but within the limits of Maine, though the employee was at once sent to the foreign country to do work and remained there until his injury and death, there is a presumption that it was not the intention of the parties to violate a law of the foreign country prohibiting employment to outsiders, and a finding by the commission awarding compensation on the ground that the contract was between the employee and the Maine corporation was warranted. Saunders' Case, 126 Me. 144, 136 A. 722.

Former provisions of subsection.—For a consideration of former provisions of this subsection concerning the state and municipal employees, see Bowden's Case, 123 Me. 359, 123 A. 166; Pennell v. Portland, 124 Me. 14, 125 A. 143.

For a consideration of a former provision of this section excepting persons whose employment was "casual" from the definition of "employee," see Mitchell's Case, 121 Me. 455, 118 A. 287; Charles v. Harriman, 121 Me. 484, 118 A. 417; Pooler's Case, 122 Me. 11, 118 A. 590.

For application of the compensation law when persons engaged "as masters of or seamen on vessels in interstate or foreign commerce" were excepted from the definition of "employee," see Berry v. M. F. Donovan & Sons, 120 Me. 457, 115 A. 250; Westman's Case, 118 Me. 133, 106 A. 532.

Quoted in part in Smith v. Heine Safety Boiler Co., 119 Me. 552, 112 A. 516.

Cited in Nadeau v. Caribou Water, Light & Power Co., 118 Me. 325, 108 A. 190; Oxford Paper Co. v. Thayer, 122 Me. 201, 119 A. 390; Garbouska's Case, 124 Me. 404, 130 A. 180.

II. LOANED EMPLOYEES.

Employee may be transferred to service of another.—The servant of a general employer may, with respect to a particular work, be transferred, with his own consent or acquiescence, to the service of another so that he becomes the servant of the special employer. Torsey's Case, 130 Me. 65, 153 A. 807.

And consent to transfer may be inferred.—Consent or acquiescence in the change of employment may be inferred from the servant's acceptance of or obedience to orders given by the special employer or his representatives. Torsey's Case, 130 Me. 65, 153 A. 807.

Control governs status of loaned employee.—In cases where one lends his servant to another for a particular employment, in determining whether the servant is an employee of his original master or of the person to whom he has been furnished, the test is whether, in the particular service in which he is engaged or requested to perform, he continues liable to the direction and control of his original master or becomes subject to that of the party to whom he is lent or hired. If men are under the exclusive control of a special employer in the performance of work which is a part of his business, they may be, for the time being, his employees, although they remain general servants of their regular employer. Torsey's Case, 130 Me. 65, 153 A. 807.

The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another. As a general proposition, when one lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the one to whom he is loaned, although he remains the general servant of his regular employer. But the mere fact that the work in which the servant is engaged is superintended by the agent of someone other than the master does not relieve the master of responsibility. The test is whether in the particular service which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired. Gagnon's Case, 128 Me. 155, 146 A. 82.

Where an employee performs services for a third party by direction of his employer, if the relation of employer and employee continues to exist between them during the performance of such services, the employer is liable under the compensation act for injuries sustained by the employee while performing the task so assigned to him, although he may be under the control of the third party as to the details of the work. Gagnon's Case, 128 Me. 155, 146 A. 82.

III. EMPLOYEES SUBJECT TO ADMIRALTY JURISDICTION.

Accident treated as tort in determining between state and admiralty jurisdiction.—While an award under the workmen's compensation law is not made on the theory that a tort has been committed, but that the statute giving the industrial accident commission power to make an award is read into and becomes a part of the contract of employment, it is nevertheless true that, in order to determine whether admiralty or state jurisdiction controls the form of procedure, the accident from which the injury proceeds is treated in the nature of a tort. Lermond's Case, 122 Me. 319, 119 A. 864.

When injured employee within admiralty jurisdiction.—The wrong and injury complained of must have been committed wholly upon the high seas and navigable waters, or, at least, the substance and consummation of the same must have taken place upon those waters to be within the admiralty jurisdiction. Lermond's Case, 122 Me. 319, 119 A. 864.

The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel but upon its having been committed upon the high seas, or other navigable waters. Lermond's Case, 122 Me. 319, 119 A. 864.

An accident to an employee on a steamship caused by the slipping of a ladder down which he was going from the deck to the wharf, resulting in injury by striking either the wharf or a bumper log maintained in front of the wharf, to prevent impact, or both, is within the jurisdiction of the state court, and admiralty does not take jurisdiction. Lermond's Case, 122 Me. 319, 119 A. 864.

IV. INDEPENDENT CONTRACTORS.

Independent contractor is not employee.—An independent contractor is not an employee within the meaning of this subsection. Kirk v. Yarmouth Lime Co., 137 Me. 73, 15 A. (2d) 184.

One who is not an employee, but an independent contractor for the work, is not within the scope of compensation acts. Clark's Case, 124 Me. 47, 126 A. 18.

Generally no presumption as to relationship.—As a general proposition, no presumption exists that an employee is either a servant or an independent contractor, and the burden is upon the party having the affirmative of the issue to show the relation to be such as to entitle him to recovery. Dobson's Case, 124 Me. 305, 128 A. 401.

And relationship determined on facts of each case.—In determining whether a person is an employee or an independent contractor, as each new case arises, it must be disposed of by looking to and reasoning from the particular facts which it presents. Dobson's Case, 124 Me. 305, 128 A. 401.

No hard and fast rule can be made as to when one undertaking to do work for another is an independent contractor or an employee within the meaning of the Workmen's Compensation Act, but each case must be determined on its own facts. Murray's Case, 130 Me. 181, 154 A. 352.

But person presumed to be employee under certain circumstances.—In an action against an employer for injuries, a presumption arises that a person working on the defendant's premises and performing work for the benefit of the defendant was a mere servant; and if the defendant seeks to avoid liability on the ground that such person was an independent contractor, the burden is on him to show the fact. Murray's Case, 130 Me. 181, 154 A. 352.

Burden of proof where facts as to relationship are evenly balanced. — Where the facts presented with respect to the relation of an employer and employee are as consistent with the relation of agency as with that of independent contractor, one asserting the existence of the latter relation has the burden of proof. Murray's Case, 130 Me. 181, 154 A. 352.

Control is test as to whether person is employee or independent contractor.—As a usual thing, the principal consideration in determining whether a person is an employee, as distinguished from an independent contractor, is the authoritative right of the employer to control, not simply the result of the work, but the means and methods and manner by which the result is to be attained. If the employer has authority to direct what shall be done, and when and how it shall be done, and to discharge him disobeying such authority and direction, and if the employer would be liable to third persons for misconduct of the worker, the other party to the relationship is an employee. Clark's Case, 124 Me. 47, 126 A. 18.

The determination of the question of whether a person is a servant or an independent contractor depends upon who had the right to direct and control the work. Mitchell's Case, 121 Me. 455, 118 A. 287.

The right to control the work, control not only of the result of the work, but also of the means and manner of the performance thereof, reserved to or possible of exercise in the employer, establishes and maintains the relation of master and servant, and negatives that of proprietor and independent contractor. Dobson's Case, 124 Me. 305, 128 A. 401.

If subject to the control of the person for whom the work is done, and as to what should be done and how, the employee is a servant and not an independent contractor. Dobson's Case, 124 Me. 305, 128 A. 401.

An independent contractor is one who is independent of his employer in the doing of his work, and may work when and how he prefers. A servant is one who is employed by another and is subject to the control of his employer. Dobson's Case, 124 Me. 305, 128 A. 401.

One who engages in work under the direction, control, and with the cooperation and assistance of another, is not, with respect to that party, an independent contractor. Breen's Case, 130 Me. 64, 153 A. 561.

And mode of payment is not decisive.—In determining whether the relation is that of master and servant or that of proprietor and independent contractor, the mode of payment is not the decisive test; the test lies in the question whether the contract reserves to the proprietor the power of control over the employee. Dobson's Case, 124 Me. 305, 128 A. 401.

Whether payment is to be by the piece or the job or the hour or the day is indicative but not decisive of whether a person is an employee or independent contractor. What is controlling is whether the employer retained authority to direct and control the work, or had given it to the other. Clark's Case, 124 Me. 47, 126 A. 18.

Nor is right to discharge.—The right to discharge is not the decisive test in determining if a person is an employee or an independent contractor. The test is whether the employee is in fact independent or subject to the control of the person for whom the work is done, as to what should be done and how it should be done. Dobson's Case, 124 Me. 305, 128 A. 401.

III. Assenting employer. "Assenting employer" shall include all private employers who have complied with the provisions of section 6 and to whom a certificate authorized by said section has been issued, but only so long as such certificate remains in force. It shall also include all towns voting to accept the provisions of the act. This act shall be compulsory as to the state, counties, cities, water districts and all other quasi-municipal corporations of a similar nature; but the provisions of said section 6 shall not apply thereto or to assenting towns.

Quoted in part in Smith v. Heine Safety Boiler Co., 119 Me. 552, 112 A. 516.

Cited in Palmer v. Sumner, 133 Me. 337, 177 A. 711.

IV. Commission; commissioner. "Commission" shall mean the industrial accident commission created by the provisions of section 29; except that as to hearings on petitions authorized by sections 9, 13, 28 and 40, and also as to proceedings under the provisions of section 23, it shall mean any two or more members thereof designated from time to time by the chairman, one of whom shall at all times be a legal member; and except further, that in any such case by agreement of the parties the authority of the commission may be exercised by a single commissioner. "Commissioner" shall mean any member of the commission appointed under the provisions of section 29.

V. Industrial accident insurance policy. "Industrial Accident Insurance Policy" shall mean a policy in such form as the insurance commissioner approves, issued by any stock or mutual casualty insurance company or association that may now or hereafter be authorized to do business in this state, which in substance and effect guarantees the payment of the compensation, medical benefits and expenses of burial herein provided for, in such installment, at such time or times, and to such person or persons and upon such conditions as in this act provided. Whenever a copy of a policy is filed as herein provided, such copy certified by the insurance commissioner shall be admissible as evidence in any legal proceeding wherein the original would be admissible.

See c. 22, § 75, sub-§ 1, par. G, re financial responsibility law.

VI. Insurance company. "Insurance Company" shall mean any casualty insurance company or association authorized to do business in this state which may issue policies conforming to the provisions of the preceding subsection. Whenever in this act relating to procedure the words "insurance company" are used they shall apply only to cases in which the employer has elected to file such policy, instead of furnishing satisfactory proof of his ability to pay compensation and benefits hereinafter provided direct to his employees.

VII. Representatives. "Representatives" shall include executors and administrators.

VIII. Dependents. "Dependents" shall mean members of an employee's family or next of kin who are wholly or partly dependent upon the earnings

of the employee for support at the time of the accident. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

A. A wife upon a husband with whom she lives, or from whom she is living apart for a justifiable cause or because he has deserted her, or upon whom she is actually dependent in any way at the time of the accident.

B. A husband upon a wife with whom he lives, or upon whom he is actually dependent in any way at the time of the accident.

C. A child or children, including adopted and stepchildren, under the age of 18 years, or over said age but physically or mentally incapacitated from earning, upon the parent with whom he is or they are living, or upon whom he is or they are actually dependent in any way at the time of the accident to said parent, there being no surviving dependent parent. "Child" shall also include any posthumous child whose mother is not living and dependent. In case there is more than one child dependent, the compensation shall be divided equally among them.

In all other cases questions of total or partial dependency shall be determined in accordance with the fact, as the fact may have been at the time of the accident. If there is more than 1 person wholly dependent, the compensation shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof during the period in which compensation is paid to persons wholly dependent. If there is no one wholly dependent and more than 1 person partly dependent, the compensation shall be divided among them according to the relative extent of their dependency. If a dependent is an alien residing outside of the United States or of the Dominion of Canada, the compensation paid to any such dependent shall be ½ that hereinafter provided in case of the death of an employee.

I. In General.
II. Determination of Dependency.
A. In General.
B. Of Wife and Children of Employee.
1. In General.
2. Of Wife of Employee.
3. Of Children of Employee.

I. IN GENERAL.

Two classes of dependents under this subsection.—There are two classes of dependents who may receive compensation under the terms of the act—first, those who are, as a matter of law, conclusively presumed to be dependent; second, those who are, as a matter of fact, dependent. Brochu's Case, 129 Me. 391, 152 A. 535.

"Family" defined.—While as used in wills and expressing relationship the word "family" has a broader meaning, a common definition of the word in acts granting benefits to members of a "family" is "a collective body of persons who live in one house under a head or manager who has a legal or moral duty to support the members thereof." Scott's Case, 117 Me. 436, 104 A. 794.

The father and mother of a deceased employee come within the statutory definition of dependents but in the class where the degree of dependency is to be determined "as the fact may have been at the time of the accident." Chapman v. Hector C. Cyr Co., 135 Me. 416, 198 A. 736.

Paragraph A applied in Patrick v. J. B. Ham Co., 119 Me. 510, 111 A. 912; Moriarty's Case, 126 Me. 358, 138 A. 555; Perkins v. Kavanaugh, 135 Me. 344, 196 A. 645.

II. DETERMINATION OF DEPENDENCY.

A. In General.

Dependency is a mixed question of fact and law. It always is determinable "as the fact may have been at the time of the accident." Williams' Case, 122 Me. 477, 120 A. 620.

But the extent of dependency is a question of fact. Williams' Case, 122 Me. 477, 120 A. 620.

Dependency exists when contributions relied on for reasonable support.—The compensation act should be construed liberally (see § 30), and dependency is held

to exist whenever it appears that the contributions were relied upon by the claimant for his or her reasonable means of support, and suitable to his or her station in life. Dumond's Case, 125 Me. 313, 133 A. 736.

To confine the inquiry to the question whether the family of the deceased workman could have supported life without any contributions from him, or whether such contributions were absolutely necessary, in order that the family might be reasonably maintained is not a fair test of dependency; but rather the inquiry should include the question whether the contributions from the workman were looked to, depended and relied on in whole, or in part, by the family for means of reasonable support. Dumond's Case, 125 Me. 313, 133 A. 736.

The test of dependency is not whether the family could support life without the contributions of the deceased, but whether they in fact reasonably depended upon him in some degree for their means of living according to their position in life. Dumond's Case, 125 Me. 313, 133 A. 736.

And dependency not restricted to bare necessities of life.—Dependency, within the meaning of the act, does not require that one be actually and solely dependent upon the earnings of some one for the bare necessities of life. Dumond's Case, 125 Me. 313, 133 A. 736.

But reception of assistance does not create dependency.—Mere reception of assistance does not of itself create dependency. The test is, were the contributions necessary and were they relied upon by the claimant for his means of living, his station in life being considered. Henry's Case, 124 Me. 104, 126 A. 286.

The mere receiving of assistance does not of itself make the recipient a dependent. Granting that there were contributions, the yet further test for dependency is, had the accepting one necessity therefor in his life station, and were they counted on by him for his means of livelihood. Weliska's Case, 125 Me. 147, 131 A. 860.

Under this subsection, dependency does not follow from mere contributions by the injured workman. Dumond's Case, 125 Me. 313, 133 A. 736.

The term "dependent" as used in the Workmen's Compensation Act has a well-known and accepted meaning. The mere reception of assistance in the form of contributions or otherwise does not of itself create dependency. The controlling test is: was the assistance relied upon by the claimant for his or her reasonable means of support and suitable to his or her position in life? Drouin v. Ellis C. Snodgrass Co., 138 Me. 145, 23 A. (2d) 631, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

And dependency must exist in fact.—In the absence of a conclusive presumption in the claimant's favor, even though she was one of the deceased's next of kin, or even if, within the meaning of this subsection, was a member of his family, she has no standing in a compensation case, if she was not dependent upon him in fact. Scott's Case, 117 Me. 436, 104 A. 794.

No one, not belonging to the enumerated classes of persons conclusively presumed to be dependent, is entitled to be regarded as a dependent or partial dependent whose financial resources at his command or within his power to command by the exercise of such efforts on his part as he reasonably ought to exert in view of the existing conditions, are sufficient to sustain himself and family in a manner befitting his class and position in life without being supplemented by the outside assistance which has been received or some measure of it. As it is no purpose of the law to give aid and comfort to slackers in respect of their obligations as members of society, so it is that a claim of dependency will meet defeat if it appears that the claimant, by the expenditure of such efforts as, under all circumstances, ought fairly and reasonably to be expected of him, is of ability to be self and family supporting according to the proper measure of such support. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719.

At the time of the accident.—Under the language of this subsection, except in the cases specifically defined, "dependency" is predicated upon the question of whether the claimants are wholly or partly dependent on the earnings of the employee for support at the time of the accident. The time of the accident, therefore, becomes an important limitation. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719.

In determining dependency, it becomes immaterial how much or how little the deceased may have contributed to the claimant in the past. It matters not how dependent the claimant may have been in the past, for this subsection, upon which his entire right wholly depends, requires him to sustain the burden of proof that he was dependent for support at the time of the accident. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719.

A ruling that "the question of depend-

ency rests on the amount the deceased contributed to his father during the past year or two years, and therefore his own earning capacity would have to do with, and his condition during the past year," is clearly wrong. It ignores this section with reference to the distinction to be made between the facts necessary to establish the dependency at the time of the accident, in the first instance, and the facts necessary for fixing the amount of compensation to be paid, after a state of dependency has been found. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719.

This section repeats in every specification, whether in the case of a wife, husband or child, that dependency shall be determined in accordance with the fact, as the fact may have been "at the time of the accident," and, hence, admits no interpretation of its clear declaration that dependency is based upon the status of the claimant at the time of the accident to the person upon whose death his claim is based. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719.

And subsequent changes not considered.—The fact of dependency depends upon the situation which existed at the time of the accident. Subsequent changes in condition are not to be taken into consideration. Brochu's Case, 129 Me. 391, 152 A. 535.

Status of claimant considered in determining dependency.—In determining the question of dependency, the status of the claimant in society and his reasonable needs and expectations should be considered. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719.

And amount contributed and actually used for support must be shown.—It will be noted by reading this subsection, that the dependents are those who are "dependent upon the earnings of the employee." Therefore, it must be shown, not what part of the earnings were paid to the claimant, but what part was actually used by the claimant for actual and lawful support. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719.

Contribution for business venture not one for support.—Under this subsection, a contribution by a son to a father to save an investment in a business venture, whether applied on account of principal or interest of a mortgage loan, may not be regarded as contribution for support. Dumond's Case, 125 Me. 313, 133 A. 736.

But failure in business may result in dependency.—While contributions to sustain a failing business venture are not contributions for support within the meaning of this subsection, a failure in business may produce conditions that will result in partial or even entire dependency on one's children for support. Dumond's Case, 125 Me. 313, 133 A. 736.

B. Of Wife and Children of Employee.

1. In General.

Presumption of dependency construed as rule of law.—The conclusive presumption established in paragraphs A, B and C of this subsection may be construed to be merely a rule of law declaring a particular fact to be true under particular circumstances. Albee's Case, 128 Me. 126, 145 A. 742.

"Actually dependent" defined.—The term "actually dependent," as used in paragraphs A, B and C, means "dependent in fact." Drouin v. Ellis C. Snodgrass Co., 138 Me. 145, 23 A. (2d) 631, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

2. Of Wife of Employee.

Marriage may be inferred from facts.—In compensation cases, the proof of marriage, as of other issues, is either by direct evidence establishing the fact, or by evidence of collateral facts and circumstances, from which its existence may be inferred. Smith v. Heine Safety Boiler Co., 119 Me. 552, 112 A. 516.

And is presumed from cohabitation.—In compensation cases, cohabitation, as husband and wife, is evidence from which the law presumes lawful marriage. Smith v. Heine Safety Boiler Co., 119 Me. 552, 112 A. 516.

A marriage may be inferred from long cohabitation as man and wife, and other usually attending circumstances, unless such cohabitation appears to have been illicit in its origin. Smith v. Heine Safety Boiler Co., 119 Me. 552, 112 A. 516.

What constitutes justifiable cause within meaning of paragraph A.—Justifiable cause which will excuse a wife for living apart from her husband ordinarily involves, on the part of the husband with respect to the wife and to her knowledge, conduct inconsistent with the marital relation; not necessarily misconduct or ill treatment of such a character as might entitle her to a divorce from the bonds of matrimony, but such, for instance, as could be made, without turning on the same length of time, the foundation for a judicial separation. Albee's Case, 128 Me. 126, 145 A. 742.

A wife does not live apart from her husband for justifiable cause, within the mean-

ing of paragraph A, if he is not recreant to marital duty. Albee's Case, 128 Me. 126, 145 A. 742.

What constitutes desertion. — Under paragraph A of this subsection, though the cause need not be utter, and may become complete sooner than under the divorce statute, yet desertion still means wilful, wrongful and continued separation with intention to desert, without consent. Albee's Case, 128 Me. 126, 145 A. 742. See c. 166, § 55 and note thereto, re what constitutes desertion as a ground for divorce.

An absence assented to does not constitute desertion. Albee's Case, 128 Me. 126, 145 A. 742.

A separation begun by a husband, his wife acquiescing or consenting, does not amount to desertion until some withdrawal of the acquiescence or consent, or the occurrence of some act, or the making of a declaration indicative of a change in attitude. Albee's Case, 128 Me. 126, 145 A. 742.

Desertion not inferred from living apart. —Desertion cannot be inferred from the mere fact that the parties do not live together. Albee's Case, 128 Me. 126, 145 A. 742.

Presumption of dependency of deserted wife is conclusive.—Where there are no other facts in the case than the marriage of the claimant and the deceased and the latter's desertion, the presumption of the deserted wife's dependency cannot be overcome by evidence, but is conclusive. The fact of whether she was or not actually a member of his family or dependent upon him for support is immaterial. Scott's Case, 117 Me. 436, 104 A. 794.

And not dependent on her efforts to restore marriage.—A wife whose husband has deserted her comes within the class described in this section as living apart from her husband for a justifiable cause or because he has deserted her, and, hence, is conclusively presumed to be a dependent, notwithstanding a failure on her part to take steps to restore the marriage. Martin v. Biddeford, 138 Me. 26, 20 A. (2d) 715.

But subsequent misconduct may deprive her of presumption.—A deserted wife's act of adultery, after the desertion, takes her out of the class conclusively presumed to be dependent and places her in the class that requires proof. The word "desertion" as used in connection with paragraph A of this subsection, has its usual meaning when used in connection with marital relations. Desertion as a ground for divorce must continue up to the time of filing the libel, and involves not only the wilful abandonment without just cause, or the consent of the other party, but also the continued refusal to return without justification. If the deserted party at any time furnishes just cause for the one deserting refusing to return, or by his or her acts consents to the separation, desertion as a wilful and unjustifiable abandonment of one party by the other and as a ground of divorce ceases. Scott's Case, 117 Me. 436, 104 A. 794.

3. Of Children of Employee.

Children conclusively presumed dependent if within paragraph C.—Children of a deceased employee are conclusively presumed to be wholly dependent upon him for support if within the provisions of paragraph C. Drouin v. Ellis C. Snodgrass Co., 138 Me. 145, 23 A. (2d) 631, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

When no dependent parent survives a deceased employee, if a child, as defined, is living with the parent, the presumption of total dependency prevails. So, too, if a child is living apart from the parent and the state of the child when the employee met with his accident is that of actual dependency in any way. A child brought within this provision is presumed to be wholly dependent. Drouin v. Ellis C. Snodgrass Co., 138 Me. 145, 23 A. (2d) 631.

If a child is living apart from the parent and the state of the child when the employed parent met with his accident is that of actual dependency in any way, the child is presumed to be wholly dependent. Drouin v. Ellis C. Snodgrass Co., 138 Me. 145, 23 A. (2d) 631.

When no dependent parent is surviving a deceased employee, conclusive presumption is that the dependency of the dead man's less than eighteen year old legitimate child is entire, providing the state of the child when the parent died, and notwithstanding they were living apart from one another, was that of reliance upon him for subsistence. Weliska's Case, 125 Me. 147, 131 A. 860.

But presumption does not arise unless child living with father or actually dependent upon him.—A minor child who was neither living with her father at the time of the accident nor actually dependent upon him at that time is not conclusively presumed to be dependent. Brocliu's Case, 129 Me. 391, 152 A. 535.

And relationship of parent and child

alone not sufficient to justify compensation.—Under the compensation law, the legal obligation of a parent to support his minor child does not in itself establish dependency entitling the claimant to compensation. Dependency, as known to the compensation laws, is something different from the right to have support or the duty of a parent to render it. In the absence of express statutory authority therefor, a finding of dependency cannot rest on proof alone of the relation of parent and child, but there must be some evidence of a reasonable probability and expectation that the obligation of the parent will be fulfilled and thereby have some real as well as mere theoretical value. Drouin v. Ellis C. Snodgrass Co., 138 Me. 145, 23 A. (2d) 631, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

And burden on child living apart from parent to show actual dependency.—In a compensation case wherein a minor child, living apart from his deceased parent, seeks compensation for his parent's death, the burden of proving actual dependency in any way upon the parent at the time of his accident rests upon the claimant. And this burden is not sustained by evidence which merely shows that the deceased employee had made small annual contributions in the form of gifts in or near the holiday season to his child and for a time had defrayed his expenses in a convent. Drouin v. Ellis C. Snodgrass Co., 138 Me. 145, 23 A. (2d) 631, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

Marriage of daughter prior to father's death no bar to compensation.—If a minor daughter was dependent upon her deceased father at the time of his injury, the marriage of the daughter prior to the death of her father does not bar her right to compensation. Brochu's Case, 129 Me. 391, 152 A. 535.

Compensation to child upon death of employee's widow.—Paragraph C of this subsection defines "dependents" when used alone or with the further words "of the employee." And compliance with this paragraph is not necessary in order for a child of a deceased employee to be awarded compensation upon the death of the employee's widow under § 15. DeMeritt's Case, 128 Me. 299, 147 A. 210.

Liability of father to support child should be considered.—In a compensation case brought by the child of a deceased employee, the commission should consider the legal liability of the deceased employee to support his minor child and the probability that he would fulfill this obligation, and a failure to do so is error. Drouin v. Ellis C. Snodgrass Co., 138 Me. 145, 23 A. (2d) 631, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

Illegitimate children not presumed dependent. — Illegitimate children do not come within the class defined in paragraph C of this subsection and are not conclusively presumed to be dependents of a deceased parent, notwithstanding the rule of liberal construction expressly enjoined upon those interpreting the compensation act (see § 30). The application of the familiar rule of construction, "expressio unius est exclusio alterius," is proper in this instance. Scott's Case, 117 Me. 436, 104 A. 794.

But are entitled to benefits of act if members of deceased employee's family.—Illegitimate children of a deceased employee who were members of his family at the time of his death and wholly dependent upon him in fact would be entitled to the benefits of the act. Scott's Case, 117 Me. 436, 104 A. 794.

When the father recognizes illegitimate children as his own, the law regards it as his duty to support them, and having assumed that obligation and maintained them in his household, they became members of his family and dependents within the meaning of paragraph C of this subsection. Scott's Case, 117 Me. 436, 104 A. 794.

Even when employee living in adultery.—There being a natural and moral duty on the part of the father to support his illegitimate children, even though at the time he was living in adultery with the mother, and had a wife living apart, the father and the illegitimate children constitute a household or family and the illegitimate children are dependents in case of the father's death under the Workmen's Compensation Act. Scott's Case, 117 Me. 436, 104 A. 794.

IX. Average weekly wages.

A. "Average weekly wages, earnings or salary" of an injured employee shall be taken as the amount which he was receiving at the time of the accident for the hours and days constituting a regular full working week in the employment or occupation in which he was engaged when injured, provided such employment or occupation had continued on the part of the em-

ployer for at least 200 full working days during the year immediately preceding said accident; except that in the case of piece workers and other employees whose wages during said year have generally varied from week to week, such wages shall be averaged in accordance with the method provided under paragraph B following.

The object sought by this paragraph of the compensation act is the ascertainment of the earning capacity of the workman as shown by his constant employment in the past, in order that the remuneration after shall have relation to the remuneration before the injury. Hight v. York Mfg. Co., 116 Me. 81, 100 A. 9.

This paragraph affords the most satisfactory method of determining the employee's actual average wages, earning or salary. Thibeault's Case, 119 Me. 336, 111 A. 491.

This paragraph and paragraphs B and C describe three methods of computation. These methods are not to be applied in the alternative as a matter of choice, but are to be applied in the order stated, to the facts as they exist in the particular case, upon the principle of resorting to the best evidence obtainable in determining the employee's average wage. Thibeault's Case, 119 Me. 336, 111 A. 491.

Paragraph not applicable for employment less than 200 days.—The law does not permit the use of a claimant's actual wage schedule for a period less than 200 days under this paragraph. Thibeault's Case, 119 Me. 336, 111 A. 491.

The method of determining "average weekly wage" prescribed by this paragraph cannot be adopted if the employee had not worked in the employment for 200 days during the year immediately preceding the injury. Scott's Case, 121 Me. 446, 118 A. 236.

Tips considered in computing average weekly wage.—Tips, sanctioned by the employer, though not direct wages or earnings, should be taken into consideration in making an award for injury or death. Gross' Case, 132 Me. 59, 166 A. 55.

In computing average weekly wage or earnings, tips received by a waitress from patrons of the restaurant, may properly be added to the compensation paid her by the employer. Gross' Case, 132 Me. 59, 166 A. 55.

But bonus or overtime wages not considered.—Employment during the ordinary working hours is the employment considered, when earnings are a factor in determining compensation, because it is the normal wage that fixes earning capacity, rather than the combination of normal wage and bonus that makes up pay for extraordinary services, for overtime and for Sunday work. Juan's Case, 125 Me. 361, 134 A. 161.

Former provisions of paragraph.—For a consideration of this paragraph when the average weekly wage was determined by multiplying the average daily wage by 300 and dividing by 52, see Hight v. York Mfg. Co., 116 Me. 81, 100 A. 9.

Cited in Juan's Case, 124 Me. 123, 126 A. 571.

B. In case such employment or occupation had not so continued for said 200 full working days, the "average weekly wages, earnings or salary" shall be determined by dividing the entire amount of wages or salary earned therein by the injured employee during said immediately preceding year, by the total number of weeks, any part of which the employee worked, during the same period; provided, however, that the week in which employment began, if it began during the year immediately preceding the accident, and the week in which the accident occurred, together with the amounts earned in said weeks, shall not be considered in computations under this paragraph if their inclusion would reduce said "average weekly wages, earnings or salary."

Full wage schedule should be presented when this paragraph applied.—In all cases where compensation under this paragraph or paragraph C may be resorted to, a full wage schedule of the injured employee for the whole period of his employment should be presented. Thibeault's Case, 119 Me. 336, 111 A. 491.

Stated in Juan's Case, 124 Me. 123, 126 A. 571.

C. In cases where the foregoing methods of arriving at the "average weekly wages, earnings or salary" of the injured employee cannot reasonably and fairly be applied, said "average weekly wages" shall be taken at such sum as, having regard to the previous wages, earnings or salary of the injured

employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or a neighboring locality, shall reasonably represent the weekly earning capacity of the injured employee at the time of the accident in the employment in which he was working at such time.

The language of this paragraph indicates at least two minor degrees of availability; the wages of a substituted employee working in the same employment are a more satisfactory standard than those of one working in a similar employment; and so the wages of one working in the same place are a more satisfactory standard than those of one working in a neighboring place. Thibeault's Case, 119 Me. 336, 111 A. 491.

Method of this paragraph and that of A and B distinguished.—The distinctions between the method of wage determination under this paragraph and under paragraphs A and B are clearly marked. In A and B the average weekly wages, earnings or salary are determined with mathematical exactness. The facts are all present from which such accurate reckoning can be made. But in many cases, where those factors are lacking, some other method needed to be devised in order to fairly compensate injured workmen. The average weekly wage could not be computed in fact from actual earnings, and therefore an arbitrary method had to be found, and the method prescribed by this paragraph is that arbitrary and, in a sense, artificial method. In A and B the average weekly wage is positively ascertained from given data. In this paragraph such wage is taken or assumed on an entirely different basis. In A and B the basis of the average weekly wage is actual earnings; in this paragraph the basis is the weekly earning capacity in the same employment at the time of the accident. Such earning capacity, in this paragraph, is substituted for actual earnings under A and B, and is made to arbitrarily stand for and represent the average weekly wage called for by the act as the basis of recompense. It is average weekly wage in name, but not necessarily in fact. Scott's Case, 121 Me. 446, 118 A. 236.

Commission determines earning capacity under this paragraph. — This paragraph calls attention to certain possible factors but leaves the determination as to earning capacity to the sound judgment of the industrial accident commission. Those factors are the previous wages of the injured employee in the same employment, but not for any stated period; the previous wages of other employees in the same or most similar employment in the same or a neighboring locality, but again not for any specified time; and, of course, the commission should have regard for the actual wages of the employee at the time of his injury. From all these the commission is to fix a sum which shall "reasonably represent the weekly earning capacity at the time of the accident" in this employment. This calls for the exercise of judgment and discretion upon proven facts. Scott's Case, 121 Me. 446, 118 A. 236.

Wage schedule of more than one fellow employee should be presented.—Where a wage schedule of a fellow employee is relied upon, wage schedules of more than one such fellow employee should be produced if available; comparison may then be made by the commission in the presence of the parties and witnesses, and a better understanding of the incidents of the employment be obtained. Thibeault's Case, 119 Me. 336, 111 A. 491.

Stated in Juan's Case, 124 Me. 123, 126 A. 571.

D. Where the employee is employed regularly during the ordinary working hours in any week concurrently by 2 or more employers, for 1 of whom he works at one time and for another he works at another time, his "average weekly wages" shall be computed as if the wages, earnings or salary received by him from all such employers were wages, earnings or salary earned in the employment of the employer for whom he was working at the time of the accident.

Former provisions of paragraph.—For consideration of this paragraph prior to inclusion of the words "in any week" in the second line, and when the paragraph was included as a part of paragraph A, see Juan's Case, 124 Me. 123, 126 A. 571.

Stated in Juan's Case, 125 Me. 361, 134 A. 161.

E. Where the employer has been accustomed to pay to the employee a sum to cover any special expense incurred by said employee by the nature of

his employment, the sum so paid shall not be reckoned as part of the employee's wages, earnings or salary.

F. The fact that an employee has suffered a previous injury or received compensation therefor shall not preclude compensation for a later injury or for death; but in determining the compensation for such later injury or death, his "average weekly wages" shall be such sum as will reasonably represent his weekly earning capacity at the time of such later injury in the employment in which he was working at such time, and shall be arrived at according to and subject to the limitations of the previous provisions of this section. (R. S. c. 26, § 2.)

Subsection IX applied in Scott's Case, 117 Me. 436, 104 A. 794.

Subsection IX cited in Dulac v. Federal Mutual Liability Ins. Co., 120 Me. 324, 114 A. 293.

Sec. 3. Employers lose common law defenses.—In an action to recover damages for personal injuries sustained by an employee by accident arising out of and in the course of his employment, or for death resulting from such injuries, it shall not be a defense to an employer, except as hereinafter specified:

I. That the employee was negligent;

II. That the injury was caused by the negligence of a fellow employee;

III. That the employee has assumed the risk of the injury. (R. S. c. 26, § 3.)

Cross references.—See § 4, re nonapplicability of § 3 to certain actions; § 5, re nonapplicability of § 3 to assenting employers.

When section applicable.—It is only in actions to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, that certain defenses are excluded by this section. Charles v. Harriman, 121 Me. 484, 118 A. 417.

Section deprives employer of defenses to common-law action.—Any employee of an employer subject to the compensation act, who has not become an assenting employer under it, may recover for injuries sustained in the course of his employment in an action at common law, and under this section, neither contributory negligence nor the negligence of a fellow-servant or assumption of risk, shall be available to the employer as a defense to his action. Bartley v. Couture, 143 Me. 69, 55 A. (2d) 438. See Amundsen v. Thompson, 130 Me. 520, 156 A. 927; Poirier v. Venus Shoe Mfg. Co., 136 Me. 100, 3 A. (2d) 116.

An alternative benefit is found in the provision of this section, freeing employees prosecuting actions at common law for injuries sustained in the course of their employment from defenses which, prior to the act, had relieved employers from liability in cases almost without number. That benefit accrues to them under it. Bartley v. Couture, 143 Me. 69, 55 A. (2d) 438.

This section absolves the employee of the large employer from the consequences of his contributory negligence. Nadeau v. Caribou Water, Light & Power Co., 118 Me. 325, 108 A. 190.

But creates no statutory right of recovery.—This section only deprives the non-assenting employer of certain named defenses and besides doing this does not establish a statutory right of recovery based only on the fact that the employee sustained injuries by accident arising out of and in the course of his employment. Palmer v. Sumner, 133 Me. 337, 177 A. 711.

The action mentioned in this section means that which has existence at common law, so if one having a common-law right of action pursues it against a non-assenting employer, the employer cannot defend on the grounds of contributory negligence, negligence of a fellow-employee or assumption of risk of injury by the employee. Such an employee, although benefited by the taking away of the defenses enumerated, must still prove negligence upon the part of employer, and, proceeding at common-law, prove his common-law right of recovery. The statute purports only to rid the non-assenting employer of certain named defenses and it was not the intention of the legislature, in addition to taking away those defenses, to establish a statutory right of recovery based only on the fact that the employee sustained injuries by accident arising out

of and in the course of his employment. Palmer v. Sumner, 133 Me. 337, 177 A. 711.

This section in its effect is negative, not positive; destructive, not constructive. Its only effect is to abolish certain defenses, not to create a new right of action where there was none at common law. Palmer v. Sumner, 133 Me. 337, 177 A. 711.

And employer's negligence must be alleged and proved.—A non-assenting employer under the Workmen's Compensation Act is denied the privilege of the defenses of contributory negligence of the plaintiff, negligence of a fellow servant, or assumption of risk. On the other hand, since negligence is the basis of all actions for injuries suffered by employees, the plaintiff must allege and prove that his injury was in whole, or in part, caused by the negligence of his employer or of some person for whose care the employer is legally responsible, which, in the case of so-called large employers, includes negligence of fellow servants. Pelletier v. Central Maine Power Co., 124 Me. 193, 126 A. 836.

And plaintiff must allege necessary facts to bring case within this section.—The defense of assumed risk is not available to employers who have in their employment more than five employees. This being true, the plaintiffs, if they desired to bring their case in the class of cases in which such defense is denied should have alleged the necessary facts. Nadeau v. Caribou Water, Light & Power Co., 118 Me. 325, 108 A. 190.

Allegation of employee's due care may be omitted if facts show this section applicable.—In cases where the suit is against a large employer (more than five employees) the injured employee may omit the allegation of due care on his own part. In such case, however, the declaration must show that the defendant belongs to the class of employers to which this section applies, to wit, large employers. The plaintiff should allege and prove that he is an employee of the defendant in a specified occupation and that the defendant employs more than five workmen or operatives regularly in the same business in which the plaintiff is employed. Nadeau v. Caribou Water, Light & Power Co., 118 Me. 325, 108 A. 190; Nicholas v. Folsom, 119 Me. 176, 110 A. 68.

In a common-law action by an employee against his employer, the plaintiff must allege and prove either that he was himself in the exercise of due care, or that the defendant belongs to a class of employers in actions against whom the plaintiff's care is not material, i.e. regular employers of more than five workmen or operatives. Nicholas v. Folsom, 119 Me. 176, 110 A. 68.

But allegations of due care and that defendant subject to act properly included in one declaration.—Separate counts in a single declaration alleging (1) that plaintiff was in the exercise of due care when his injury was suffered, and (2) that defendant at the time was subject to the Workmen's Compensation Act may properly be included in one declaration. Bubar v. Bernardo, 139 Me. 82, 27 A. (2d) 593.

Section does not change common law as to liability of town for acts of agents.—Towns, which are merely subdivisions of the state, are not in general liable for the defaults of negligence of their agents and servants in the performance of municipal or public duties which they perform as agents of the state, unless the liability is created by statute. And this section neither expressly nor impliedly changes the common law, whereby a town is not liable for negligence of its agents and servants in the performance of public duties, performed as agents and servants of the state. Palmer v. Sumner, 133 Me. 337, 177 A. 711.

Applied in Foley v. Hines, 119 Me. 425, 111 A. 715; Hoskins v. Bangor & Aroostook R. R., 135 Me. 285, 195 A. 363.

Stated in Berry v. M. F. Donovan & Sons, 120 Me. 457, 115 A. 250; Oxford Paper Co. v. Thayer, 122 Me. 201, 119 A. 390; Hatch v. Portland Terminal Co., 125 Me. 96, 131 A. 5; Loring v. Maine Central R. R., 129 Me. 369, 152 A. 527.

Cited in Moore v. Isenman, 127 Me. 370, 143 A. 462.

Sec. 4. Section 3 not applicable to certain actions; 5 or less employees; farming; domestic service; logging.—The provisions of section 3 shall not apply to employers who employ 5 or less workmen or operatives regularly in the same business. Said provisions shall not apply to actions to recover damages for the injuries aforesaid, or for death resulting from such injuries, sustained by employees engaged in domestic service or in agriculture; or in the operations of cutting, hauling, rafting or driving logs, including work incidental thereto. Any such logging operations, however, incidental to any business conducted by

an assenting employer shall be presumed to be covered by his assent to the act as to such business unless expressly excluded in such assent. (R. S. c. 26, § 4.)

The language of this section goes no further than the exclusion of certain employments from the effect of § 3. It does not exclude the laborers mentioned from the benefit of the act if their employers see fit to include them. In other words, the scope of the entire act, whose purpose is the benefit of employees, is restricted by § 2, subsection II, defining the term "employee" and creating certain exceptions. The employees mentioned in this section are not among the exceptions, therefore, so far as that subsection is concerned, they are left within the act. Oxford Paper Co. v. Thayer, 122 Me. 201, 119 A. 390.

Section divides employers into two classes.—This section, in effect, divides non-assenting employers into two classes; those who employ five or less workmen or operatives regularly in the same business, and who may be called small employers, and those who employ more than five workmen or operatives regularly in the same business, and who may be called large employers. Nadeau v. Caribou Water, Light & Power Co., 118 Me. 325, 108 A. 190.

By this section, employers are legislatively divided into two classes, small employers and large employers. A small employer is one having five or less workmen in the same industry or business, or, when he has different businesses, five or less workmen in a business single in kind, regularly. Moore v. Isenman, 127 Me. 370, 143 A. 462.

What is meant by employment in logging and lumbering operations has not been defined by the legislature, but it has by implication pointed out that the expression includes the work of cutting, hauling, rafting, and driving logs. Gagnon's Case, 125 Me. 16, 130 A. 355.

Employers of loggers and lumberers and drivers may come within the compensation act if thy so elect. Gagnon's Case, 125 Me. 16, 130 A. 355.

But employer not compelled to accept act as to logging and driving.—It is optional with employers of loggers and drivers to avail themselves of the act or not as they see fit. If they do avail themselves of it, then their employees enjoy its benefits. If they do not avail themselves of it, and suit is brought against them for personal injuries, the ordinary defenses of contributory negligence, negligence of a fellow servant, and assumption of risk are still open to the employer. The employer of loggers and drivers therefore is not forced into accepting the act, and for this reason he may except this class if he desires to do so when he accepts the act as to his general manufacturing business. It can make no difference whether the employer of loggers and drivers is carrying on that business along or in connection with a general lumber or pulp and paper manufacturing business; he is not compelled to accept the act as to the logging and driving. Oxford Paper Co. v. Thayer, 122 Me. 201, 119 A. 390; Cormier's Case, 124 Me. 237, 127 A. 434.

And he may assent to sawmill operation without assenting to logging.—An employer may become an assenting employer as to his sawmill without assenting as to his logging operation. Or he may become an assenting employer as to both operations. It is only necessary for him to make his meaning clear in simple English language. White's Case, 124 Me. 343, 128 A. 739.

"Log" defined.—Although a long timber is cut into six-foot lengths before it is sawed into stock for boxes, each piece is properly termed a "log" within the meaning of this section. A log is defined as "especially, a cut of timber of any size or length suitable for sawing into lumber." Cormier's Case, 124 Me. 237, 127 A. 434.

Employment held within operation of act.—An employee who, at the time of the injury, was engaged in loading logs at a landing onto cars, owned and operated by the employer in conveying the logs from the landing to his sawmill to be manufactured, the employer having nothing to do with the cutting and hauling of the logs to the landing, is engaged in an employment within the operation of the act, where the employer's assent covered "manufacturing lumber" and his policy included "logging railroad-operation." Gagnon's Case, 125 Me. 16, 130 A. 355.

History of section.—See Oxford Paper Co. v. Thayer, 122 Me. 201, 119 A. 390.

Applied in Blacker v. Oxford Paper Co., 127 Me. 228, 142 A. 776; LeBlanc v. Sturgis, 128 Me. 374, 147 A. 701.

Cited in Michaud's Case, 121 Me. 537, 118 A. 425; Pooler's Case, 122 Me. 11, 118 A. 590; Hoskins v. Bangor & Aroostook R. R., 135 Me. 285, 195 A. 363.

Sec. 5. Section 3 not applicable to assenting employers; such employers exempt from other suits.—The provisions of section 3 shall also not apply to actions to recover damages for the injuries aforesaid, or for death resulting from such injuries, sustained by employees of an employer who has assented to become subject to the provisions of this act. If an employer at the time of so assenting is engaged in two or more independent businesses, he shall be held to come under the provisions of the act only as to the business or businesses specified in his assent. Assenting employers, except as hereinafter provided by section 7, shall be exempt from suits because of such injuries either at common law or under the provisions of section 9 of chapter 165, or under the provisions of sections 48 to 55, inclusive, of this chapter. (R. S. c. 26, § 5.)

This section absolves the employer from the common-law consequences of his negligence. Nadeau v. Caribou Water, Light & Power Co., 118 Me. 325, 108 A. 190.

But employer must plead and prove exemption.—To avail himself of the exemption from suit provided for by this section, an assenting employer must plead and prove it. Nadeau v. Caribou Water, Light & Power Co., 118 Me. 325, 108 A. 190.

The immunity of assenting employers as guaranteed by this section is only from actions by "employees". The remedy of those persons excepted from the definition of "employee" by § 2, subsection II, is by common-law action, except as the common law has been modified by statutes other than the Workmen's Compensation Act. Nadeau v. Caribou Water, Light & Power Co., 118 Me. 325, 108 A. 190.

Employer's right to designate which business subject to act.—This section gives an employer who is carrying on two or more distinct kinds of businesses the right to choose in which he will come under the Workmen's Compensation Act and in which he will not. If, for instance, an employer is engaged in the manufacture of boots and shoes and also is carrying on the manufacture of cotton goods, two clearly distinct kinds of businesses, he can elect which business he desires to place under the act in case he does not desire both. Oxford Paper Co. v. Thayer, 122 Me. 201, 119 A. 390.

Where an employer files an assent to the compensation act as to a part only of his employees upon the ground that the work in which they are engaged is a separate business and files an insurance policy as to such employees, which assent and policy is approved by the industrial accident commission, the employer cannot be held to be an assenting employer except as to the employees engaged in the work covered by the assent, nor the insurance carrier be held beyond the terms of its contract of indemnity. Hutchinson's Case, 123 Me. 250, 122 A. 626.

Under this section, an employer engaged in more than one kind of business, may become an assenting employer as to all or any. In assenting he must specify the business or businesses concerning which he desires to come under the provisions of the law. White's Case, 124 Me. 343, 128 A. 739.

It is settled that, if an employer is carrying on two clearly distinct kinds of businesses, and he does not desire to place both under the act, he can elect which business he desires so to place. Paradis Case, 127 Me. 252, 142 A. 863.

Employer's assent construed most strongly against him.—Technical language is not required in an employer's assent. But the meaning should be made reasonably clear. The language is that of the employer and being ambiguous must be taken most strongly against him. White's Case, 124 Me. 343, 128 A. 739.

Effect of commission's approval of erroneous division of employees.—If a division of employees is permitted by the industrial accident commission that is not warranted under the act, it does not follow that all employees must of necessity be included under the assent or are covered by a policy of insurance that is expressly limited to only a part. Hutchinson's Case, 126 Me. 102, 136 A. 353.

Employment held within terms of assent.—Where the written acceptance of the employer specifies and describes his business as "Lumber and those incidental," at "Portage, Maine, and vicinity," and the employee is injured while hauling logs for the sawmill of employer, though thirty miles distant therefrom, the injury is compensable. Durand's Case, 124 Me. 59, 126 A. 164.

Applied in Fournier's Case, 120 Me. 191, 113 A. 27; Pooler's Case, 122 Me. 11, 118 A. 590.

Sec. 6. Insurance; self-insurers; benefit system; notices.—

I. Employer may become assenting employer by filing written assent

and insurance policy. Any private employer desiring to become an assenting employer as herein provided shall file with the commission at its office in Augusta his written assent in such form as the commission approves, and may also file a copy of an industrial accident insurance policy in form approved by the insurance commissioner, said policy if found correct in all respects to be stamped with his approval. Such written assent shall continue in force during the life of said original policy or during the life of any subsequent policy or policies in renewal thereof and dating from the expiration of any immediately preceding policy, provided a copy of such renewal policy, or a binder pending the issuance thereof, is filed not more than 10 days following such expiration. Such binder shall be in form approved by the insurance commissioner. In case there shall be an interim of more than 10 days aforesaid between copies of such policies or binders on file with the commission, then a new assent must be filed with the policy terminating such interim. (1949, c. 352)

Cross reference.—See § 2, sub-§ V, re industrial accident insurance policy.

Applied in Fournier's Case, 120 Me. 191, 113 A. 27.

Cited in White's Case, 126 Me. 105, 136 A. 455.

II. Insurance policies and rates to be approved by insurance commissioner. Every insurance company issuing industrial accident insurance policies covering the payment of compensation and benefits provided for in this act shall file with the insurance commissioner a copy of the form of such policies and no such policy shall be issued until he has approved said form. It shall also file its classification of risks and premium rates relating thereto, and any subsequent proposed classification thereof, none of which shall take effect until the insurance commissioner has approved the same as adequate for the risks to which they respectively apply. He may require the filing of specific rates for workmen's compensation insurance including classifications of risks, experience or any other rating information from insurance companies authorized to transact such insurance in Maine, and may make or cause to be made such investigations as may be deemed necessary to satisfy himself that such rates are correct and proper before giving his approval and permitting such rates to be promulgated for the use of said companies. The insurance commissioner may at any time withdraw his approval of any classification of risks or premium rates relating thereto and approve a revised classification thereof.

See § 2, sub-§ V, re industrial accident insurance policy.

III. Assenting employer may become self-insurer by filing securities. Any private employer desiring to become an assenting employer as self-insurer may, in lieu of filing an insurance policy as above provided, furnish satisfactory proof to the commission of his solvency and financial ability to pay the compensation and benefits herein provided, and also deposit cash, satisfactory securities or a surety bond, in such sum as the commission may determine; such bond to run to the treasurer of state and his successor in office, and to be conditional upon the faithful performance of all the provisions of this act relating to the payment of compensation and benefits to any injured employee. In case of cash being deposited it shall be placed at interest by the treasurer of state, and the accumulation of interest on said cash or securities so deposited shall be paid to the employer depositing the same. Provided, however, that the commission may at any time in its discretion deny to an assenting employer the right to continue in the exercise of the option granted by this subsection.

Stated in Berry v. M. F. Donovan & Sons, 120 Me. 457, 115 A. 250; Gross's Case, 132 Me. 59, 166 A. 55.

IV. Certificate to assenting employer. Upon the filing of such assent and complying with the provisions of subsection I or III of this section, the commission shall issue to such employer a certificate stating that said employer has conformed to the provisions of this act, and setting forth the date on which the policy filed under subsection I expires. The certificate thus issued shall remain in full force until the date of expiration of such policy or renewal thereof; or until the employer shall notify the commission that he withdraws his assent or has canceled such policy; or until a certificate issued to a self-insuring employer under the provisions of subsection III is withdrawn by the commission, or such employer files an industrial accident insurance policy in place of the securities so deposited by him.

Cross reference.—See § 2, sub-§ V, re industrial accident insurance policy.

What entitles employer to certificate.—It is the assent of the employer, accompanied by an insurance policy in proper form, which entitles the employer to a certificate that he has conformed to the provisions of the law. Paradis Case, 127 Me. 252, 142 A. 863.

Duty of commission to issue certificate.—The assent and policy being in proper form, it is the duty of the commission to issue the required certificate under this subsection. Oxford Paper Co. v. Thayer, 122 Me. 201, 119 A. 390.

Applied in Hutchinson's Case, 126 Me. 102, 136 A. 353.

Cited in Dulac v. Dumbarton Woolen Mills, 120 Me. 31, 112 A. 710; Hutchinson's Case, 123 Me. 250, 122 A. 626.

V. Approval of benefit system in use January 1, 1915. Subject to the approval of the commission, any employer may continue with his employees in lieu of the compensation, benefits and insurance provided by this act the system thereof which was used by such employer on the 1st day of January, 1915. No such substitute system, however, shall be approved unless it confers benefits upon injured employees at least equivalent to the benefits provided by this act, nor if it requires contributions from the employees, unless it confers benefits in addition to those provided under the provisions of this act at least commensurate with such contributions. Such substitute system may be terminated by the commission on reasonable notice and hearing to the interested parties if it shall appear that the same is not fairly administered, or if its operation shall disclose latent defects threatening its solvency, or if for any substantial reason it fails to accomplish the purposes of this act. An employer who is authorized to substitute a plan under the provisions of this section shall give his employees notice thereof in a form to be prescribed by the commission, and a statement of the plan approved shall be filed with the commission.

VI. Notices of assent to be kept posted. A notice in such form as the commission approves, stating that the employer has conformed to the provisions of this act, together with such further matters as the commission determines, shall be posted by the employer and kept posted by him at some place in each of his mills, factories or places of business, conspicuous and accessible to his employees. For willful failure to post such notices, the employer shall be liable to a forfeiture of $10 for each day of such willful neglect, to be enforced by the commission in an action of debt in the name of the state. (R. S. c. 26, § 6. 1949, c. 352.)

Sec. 7. Employee of assenting employer waives right of common law action unless expressly claimed.—An employee of an employer, who shall have assented to become subject to the provisions of this act as provided in the preceding section, shall be held to have waived his right of action at common law to recover damages for the injuries aforesaid sustained by him, also under the statutes specified in section 5, if he shall not have given his employer at the time of his contract of hire notice in writing that he claimed such right, and within 10 days thereafter have filed a copy thereof with the commission; or, if the contract of hire was made before the employer so elected, if the employee within 10 days after knowledge by him of such assent shall not have given said

notice and filed a copy thereof with the commission as above provided. Such waiver of common law and statutory rights shall continue in force for the term of 1 year, and thereafter without further act on his part for successive terms of 1 year each, unless the employee shall at least 60 days prior to the expiration of such first or any succeeding year, give his employer notice of claim of such rights and file a copy thereof with the commission as aforesaid.

A minor working at an age legally permitted under the laws of this state shall be deemed sui juris for the purpose of this act, and no other person shall have any cause of action or right to compensation for an injury to such minor employee except as expressly provided herein; but if said minor shall have a parent living or a guardian, such parent or guardian, as the case may be, may give the notice and file a copy thereof as provided in this section, and such notice shall bind the minor in the same manner that adult employees are bound under the provisions hereof. In case no such notice is given, such minor shall be held to have waived his right of action at common law or under the statutes above referred to, to recover damages for such injuries sustained by him.

Any employee, or the parent or guardian of any minor employee, who has given said notice to the employer that he claimed his right of action at common law or under the statutes aforesaid, may waive such claim by a subsequent notice in writing which shall take effect 5 days after the delivery thereof to the employer or his agent. Copy of such notice shall be sent forthwith by the employer to the commission. (R. S. c. 26, § 7.)

An employee may elect to claim his common-law rights, giving due and seasonable notice of such election. Nadeau v. Caribou Water, Light & Power Co., 118 Me. 325, 108 A. 190.

But non-action places him under act.—Non-action, that is to say, a failure to give notice of a desire to be left outside the provisions of the act, impliedly places the employee of an assenting employer there. Berry v. M. F. Donovan & Sons, 120 Me. 457, 115 A. 250.

Waiver not applicable to common-law right against third persons.—See note to § 25.

Stated in Bartley v. Couture, 143 Me. 69, 55 A. (2d) 438.

Cited in Dulac v. Dumbarton Woolen Mills, 120 Me. 31, 112 A. 710; Denaco v. Blanche, 148 Me. 120, 90 A. (2d) 707.

Sec. 8. Employee under act, injured by accident, entitled to compensation.—If an employee who has not given notice of his claim of common law or statutory rights of action, or who has given such notice and has waived the same, as provided in the preceding section, receives a personal injury by accident arising out of and in the course of his employment, he shall be paid compensation and furnished medical and other services, as hereinafter provided, by the employer who shall have assented to become subject to the provisions of this act. (R. S. c. 26, § 8.)

I. In General.
II. Injury by Accident.
III. Arising Out of and in the Course of the Employment.
  A. In General.
  B. Place of Accident.
  C. Injuries Received While Going to or Returning from Place of Employment.
IV. Evidence and Burden of Proof.

I. IN GENERAL.

Section liberally construed.—This section provides for compensation to an employee who receives a personal injury by accident arising out of and in the course of his employment. In such cases a liberal construction of the law is intended by the legislature. Ferris' Case, 123 Me. 193, 122 A. 410. See § 30.

A personal injury by accident arising out of and in the course of the claimant's occupation is compensable. Brodin's Case, 124 Me. 162, 126 A. 829.

An assenting employer under the act, is liable to any employee for compensation and benefits applicable to injuries suffered by him, arising out of and in the course of his employment. Denaco v. Blanche, 148 Me. 120, 90 A. (2d) 707.

But the relation of employer and em-

ployee must have existed between the parties when the employee was injured. Clark's Case, 124 Me. 47, 126 A. 18.

The right to compensation is purely a statutory right. The statute prescribes the terms and conditions upon which it may be claimed and upon which it may be awarded. The statute is based solely upon the theory, that, regardless of age, sex, ignorance or intelligence, any person whose injury comes within the terms of the statute shall be compensated, and any person whose injury does not come within the terms of the statute shall not be compensated. Saucier's Case, 122 Me. 325, 119 A. 860.

Under the act, the theory of common-law negligence, as the basis of liability, is discarded and a right to compensation is given for injuries incident to the employment. The compensation law substitutes in place of an action which requires proof of the employer's negligence with common-law defenses, the right to compensation based on the fact of employment. This obviates uncertainties, delay, expense and possible hardship. It transfers the expense and uncertainty from the worker to the industry, and tends to improve relations between employers and employees by avoiding troublesome litigation. Boyce's Case, 146 Me. 335, 81 A. (2d) 670.

In a compensation case, the indispensable inquiry is not one of fault or negligence, but is that of a relationship between the employment and the injury for which compensation is sought. Washburn's Case, 123 Me. 402, 123 A. 180.

And contributory negligence on the part of the employee does not necessarily bar his right to compensation and it is held that even if an employee, while acting in the scope of his employment, performs his duties recklessly and knowingly exposes himself to danger, unless the injury can be said to have been inflicted by willful intention, the manner in which he does his work may be deemed to be a risk incidental to the employment and the injury received compensable. Bennett's Case, 140 Me. 49, 33 A. (2d) 799.

Whatever an employee's intelligence, indiscretion or purpose, if the accident arose out of and in the course of her employment, she is entitled to compensation. If it did not, whatever her intelligence, indiscretion or motive, she is not entitled to it. Saucier's Case, 122 Me. 325, 119 A. 860.

The question of negligence does not in any form, arise under this section. It was the purpose of the section to compensate for negligence that is not wilful. Therefore, the question of whether the injured employee was doing what she did through indiscretion of youth is entirely immaterial. Saucier's Case, 122 Me. 325, 119 A. 860.

Section not applicable to every accident. This section cannot be legitimately construed in the light of providing that every accident that may happen to the employee, even while he is on the premises of his employer, shall be of its essence. Each case is to be decided upon the particular facts. And there must not be too clamorous insistence in pressing any claim beyond safe limits. Washburn's Case, 123 Me. 402, 123 A. 180.

There must be some causal connection between the conditions under which the employee worked, and the injury which he received. Webber's Case, 121 Me. 410, 117 A. 513; Washburn's Case, 123 Me. 402, 123 A. 180; Boyce's Case, 146 Me. 335, 81 A. (2d) 670.

In a common-law action, the causal connection considered is between the wrong and the injury and in cases arising under the Workmen's Compensation Act, it is between the employment and the injury. The principal involved, however, is essentially the same. Petersen's Case, 138 Me. 289, 25 A. (2d) 240.

An injury resulting from an accident which had no connection with the employment is not compensable. Saucier's Case, 122 Me. 325, 119 A. 860.

Injury must be traceable to employment.—An injury which cannot fairly be traced to the employment as a contributing, proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment is not compensable. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. Gooch's Case, 128 Me. 86, 145 A. 737; Washburn's Case, 123 Me. 402, 123 A. 180; Willette's Case, 135 Me. 254, 194 A. 540. See Ferreri's Case, 126 Me. 381, 138 A. 561; Hawkins v. Portland Gas Light Co., 141 Me. 288, 43 A. (2d) 718.

The rational mind must be able to trace the resultant injury to a proximate cause set in motion by the employment, and not by some other agency, or there can be no recovery. Hawkins v. Portland Gas Light Co., 141 Me. 288, 43 A. (2d) 718.

An injury is not compensable if it cannot fairly be traced to the employment or conditions connected therewith as a contributing proximate cause. Weymouth v.

Burnham & Morrill Co., 136 Me. 42, 1 A. (2d) 343, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

An injury is not compensable if the causative danger was not peculiar to the work and did not come out of the employment, but was a hazard to which the deceased would have been equally exposed apart from it. Weymouth v. Burnham & Morrill Co., 136 Me. 42, 1 A. (2d) 343, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

An injury which did not originate in causal or incidental connection with the employment and was not a peril of that employment, nor related to it, nor which the nature of the employment attracted or invited and which did not have association with the work as it was required to be performed is not compensable. Washburn's Case, 123 Me. 402, 123 A. 180.

And a natural incident to the work. — To be compensable, an injury must not only have been received while the employee was doing the work for which he was employed, but, in addition thereto, such injury must also be a natural incident to the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence, and directly connected with the work. Gooch's Case, 128 Me. 86, 145 A. 737.

Right to compensation vests when accident happens.—Upon the happening of an accident, the contractual right of the employee to have compensation vests, and the obligation to pay it becomes definite. White's Case, 126 Me. 105, 136 A. 455.

And such right not affected by subsequent legislation.—Upon the happening of an industrial accident the right to receive compensation becomes vested, and the obligation to pay it fixed. To change such vested rights and fixed obligations by statute would clearly be to impair the obligation of contracts. The procedure may be changed if a substantially equivalent remedy remains; but contractual rights that have become vested remain unaffected by the repeal of an old, or the enactment of a new statute. Gauthier's Case, 120 Me. 73, 113 A. 28.

Under the Workmen's Compensation Act, when an industrial accident occurs to an employee, the rights and obligations of the parties become vested and fixed, and such rights and obligations cannot be either destroyed or enlarged by subsequent legislation. This principle is based upon the plain mandates of both the State and Federal constitutions. Shink's Case, 120 Me. 80, 113 A. 32.

Only an assenting employer, or the insurance carrier of such employer, is obligated to pay compensation under this section. Paradis Case, 127 Me. 252, 142 A. 863.

And injury not compensable in absence of employer's assent.—In order for one to recover compensation under the compensation act, it must appear that the employer assented to it, as well as that the injury arose out of and in the course of his employment. Unless there be such assent, the commission has no jurisdiction. Eddy v. Bangor Furniture Co., 134 Me. 168, 183 A. 413.

Even though an injury arose out of and in the course of the employment, the employee is not entitled to recover compensation without showing that his employer assented under the compensation act for the work in which he received his injury. Eddy v. Bangor Furniture Co., 134 Me. 168, 183 A. 413.

And assent not to be extended. — The assent of the employer is not to be extended beyond what in the usual course of the specified business is necessary, incident or appurtenant thereto. Paradis Case, 127 Me. 252, 142 A. 863; Eddy v. Bangor Furniture Co., 134 Me. 168, 183 A. 413.

The assent, as supplemented by the approved insurance policy and certified by constituted public authority (§ 6) may be said to define, with reference to the particular business or industry, the method of accident compensation on which the minds of employer and employee met. Paradis Case, 127 Me. 252, 142 A. 863.

Applied in Hull's Case, 125 Me. 135, 131 A. 391.

Quoted in part in Simpson's Case, 141 Me. 162, 66 A. (2d) 417.

II. INJURY BY ACCIDENT.

Injury must be by accident. — Even though an employee's injury arose out of and in the course of the employment, if it is not an accident within the purview of the act, there can be no recovery. Westman's Case, 118 Me. 133, 106 A. 532.

"Injury by accident" given broad interpretation.—"Injury by accident," as used in this section, is to be given a broad interpretation in harmony with the spirit of liberality in which the compensation act was conceived (see § 30), so as to make it applicable to injuries to workmen which are unexpected and unintentional and which thus come within the meaning of the term "accidents" as it is popularly un-

derstood. Brodin's Case, 124 Me. 162, 126 A. 829.

"Accident" defined. — "Accident" has been defined, in cases under the compensation act, as an unusual, undesigned, unexpected and sudden event resulting in injury. Dillingham's Case, 127 Me. 245, 142 A. 865.

An accident is a befalling; an event that takes place without one's forethought or expectation; an undesigned, sudden, and unexpected event. Its synonyms include mishap, mischance, misfortune, disaster, calamity, catastrophe. Patrick v. J. B. Ham Co., 119 Me. 510, 111 A. 912; Brodin's Case, 124 Me. 162, 126 A. 829.

The words "accident" and "accidental," in the compensation act, were used in their popular and ordinary meaning, as happening by chance, unexpectedly taking place, not according to the usual course of things. Westman's Case, 118 Me. 133, 106 A. 532.

To satisfy the words of this section, the occurrence must be one in which there is personal injury by something arising in a manner unexpected and unforeseen, from a risk reasonably incidental to the employment. Westman's Case, 118 Me. 133, 106 A. 532.

If, in the act which precedes the injury, something unforeseen, unexpected and unusual occurs which produces the injury, then the injury has resulted through accidental means. Westman's Case, 118 Me. 133, 106 A. 532.

An occurrence to be accidental must be unusual, undesigned, unexpected, sudden. Brown's Case, 123 Me. 424, 123 A. 421; Brodin's Case, 124 Me. 162, 126 A. 829; Taylor's Case, 127 Me. 207, 142 A. 730.

The expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed. Brodin's Case, 124 Me. 162, 126 A. 829.

By the term "injury" is meant not only an injury the means or cause of which is an accident, but an injury which is itself an accident. Brown's Case, 123 Me. 424, 123 A. 421.

Thus, an internal injury that is itself sudden, unusual and unexpected is nonetheless accidental because its external cause is a part of the victim's ordinary work. Brown's Case, 123 Me. 424, 123 A. 421.

While the word "accident" is commonly predicated of occurrences external to the body, and such external accidents may or may not cause bodily injuries, yet an internal injury that is itself sudden, unusual and unexpected is nonetheless accidental because its external cause is a part of the victim's ordinary work. Taylor's Case, 127 Me. 207, 142 A. 730.

If a laborer performing his usual task, in his wonted way, by reason of strain, causes the rupture of a subordinate blood vessel which produces a sudden dilatation of the heart, the occurrence is accidental within the meaning of this section. Brown's Case, 123 Me. 424, 123 A. 421.

A strain or exertion of a laborer while at his work, which caused a cerebral hemorrhage, or acute dilatation of the heart is an accident arising out of and in the course of employment. Taylor's Case, 127 Me. 207, 142 A. 730.

Aggravation of pre-existing disorder is compensable.—An employee is entitled to compensation if a pre-existing condition was aggravated or accelerated by the injuries received in the course of and arising out of her employment. Healey's Case, 124 Me. 54, 126 A. 21. See Orff's Case, 122 Me. 114, 119 A. 67, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

If a disorder existing before the accident had been so aggravated or accelerated by an industrial accident as to produce incapacity, the employee is entitled to compensation. Comer's Case, 130 Me. 373, 156 A. 516.

While causal connection between the accident and disability must be shown, the accident need not be proved to be the sole, or even the primary cause of disablement. It is sufficient to sustain a finding for the injured employee if the accident hastened a deep seated disorder, or so influenced the progress of an existing disease as to cause disablement, or caused an acceleration or aggravation of a pre-existing disease. Swett's Case, 125 Me. 389, 134 A. 200; Martriciano v. Profenno, 127 Me. 549, 143 A. 270.

Evidence that an existing disorder reaches the point of disablement during employment does not prove accidental or other injury arising out of such employment. It is sufficient, however, if by weakening resistance or otherwise an accident so influences the progress of an existing disease as to cause death or disablement. Mailman's Case, 118 Me. 172, 106 A. 606.

As is aggravation through malpractice. —Aggravation through malpractice of an employee's injury is to be taken as a part of the original injury and included in the compensation to which the employee is entitled. Mitchell v. Peaslee, 143 Me. 372, 63 A. (2d) 302.

An employee sustained a right inguinal hernia as result of an accident. While operating to reduce this hernia under a local anaesthetic the doctor suggested to the injured man the advisability of removing his appendix, which had appeared through the abdominal incision. With the employee's consent the appendix was removed, the employee subsequently dying. The commissioner in his finding stated: "It is impossible to say whether death would have resulted had the appendix not been removed." The removal of the appendix was an incident of the hernia operation. The deceased had the right to rely on the statement of the doctor furnished by his employer that the removal of the appendix was a proper and usual procedure under such circumstances. Even though such practice may have been unwarranted and a contributing cause of death, the accident would still be regarded as the proximate cause of death and the employer would be liable. Gauvin's Case, 132 Me. 145, 167 A. 860.

Disability traceable to a nervous condition caused by an industrial accident, or to a mental state accelerated or aggravated by one, is compensable. Baker's Case, 143 Me. 103, 55 A. (2d) 780.

Mental disability, if a sequence as the effect of injury received in the course of the employment and arising out of it, is compensable. Reynold's Case, 128 Me. 73, 145 A. 455.

Disability caused by, and following a few hours after chafing may be properly found to be accidental. McDougal's Case, 127 Me. 491, 144 A. 446.

Incapacity due from a skin infection caused by entry of a germ through an abrasion on a hand, which abrasion was itself suffered in the course of employment, is compensatory. The exact time of receiving abrasion is unimportant, if evidence shows causal connection between abrasion and infection received in course of employment. Bearor's Case, 135 Me. 225, 193 A. 923.

An injury need not have a traumatic origin in order to entitle the injured employee to compensation. Brodin's Case, 124 Me. 162, 126 A. 829.

The supreme judicial court has never declared as a positive and general rule that a fatal disease, not occupational, nor one pre-existing and aggravated by exposure, strain or other impelling circumstances, is non-compensable, unless preceded by and growing out of a traumatic injury. Brodin's Case, 124 Me. 162, 126 A. 829.

Nor need the injury be produced by violence. It suffices in that regard, whatever the accident may have been, if it produced a lesion or change in any part of the system which injuriously affects any bodily activity or capability. Brodin's Case, 124 Me. 162, 126 A. 829.

The phraseology of this section is broad enough to include all non-occupational diseases although not preceded by traumatic causes provided it is clearly shown that the disease arose out of and in the course of the employment and was unusual, undesigned, unexpected and sudden. Brodin's Case, 124 Me. 162, 126 A. 829.

The accidental character of the injury is not removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease which was immediately the cause of death. Brodin's Case, 124 Me. 162, 126 A. 829.

But disease, to be compensable, must be interpreted both as an "injury" and an "accident." Dillingham's Case, 127 Me. 245, 142 A. 865.

And cases of occupational disease cannot be said to have arisen from accidental causes, since they lack the element of sudden or unexpected event. Dillingham's Case, 127 Me. 245, 142 A. 865.

Cases of occupational or industrial poisoning cannot be regarded as accidents, within the meaning of this section which provides for money payments to workmen for injuries caused by accident arising out of and in the course of their employment. Dillingham's Case, 127 Me. 245, 142 A. 865.

The Workmen's Compensation Act provides no compensation for disabilities resulting from occupational disease. Spence v. Bath Iron Works Corp., 140 Me. 287, 37 A. (2d) 174. See §§ 57-71, re Occupational Disease Law.

Injuries resulting in the course of employment from assaults to gratify feelings of resentment or enmity are not compensable. Gray's Case, 123 Me. 86, 121 A. 556.

Pneumonia held not result of accident. —Pneumonia suffered by a fireman whose clothes had been wet while fighting a fire, which developed within four days after the fire, is not a result of an accident arising out of and in the course of his employment, under this section. Ferris' Case, 123 Me. 193, 122 A. 410.

III. ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

A. In General.

Accident must have arisen out of and in the course of employment.—A personal injury to be compensable under the com-

pensation act must be by accident arising out of and in the course of the employment. Bennett's Case, 140 Me. 49, 33 A. (2d) 799.

Disability caused by personal injury by accident arising out of and in the course of his employment is a statutory prerequisite for the payment of compensation to an injured employee. Dillingham's Case, 127 Me. 245, 142 A. 865.

In compensation proceeding, the first problem for the commissioner to solve is whether or not, under the law, there has occurred an accident arising out of and in the course of the employment. Burridge's Case, 128 Me. 407, 148 A. 35.

In order to receive compensation under the law, the injury must have been received by accident "arising out of and in the course of his employment." Chapman v. Hector J. Cyr Co., 135 Me. 416, 198 A. 736. See Butler's Case, 128 Me. 47, 145 A. 394; Wheeler's Case, 131 Me. 91, 159 A. 331; Veilleux's Case, 130 Me. 523, 157 A. 926.

The accident must have arisen "out of the employment" and "in the course of the employment" to entitle the employee to compensation. Sullivan's Case, 128 Me. 353, 147 A. 431.

Where an accident by which an employee received his injury neither arose in the course of nor out of his employment, he is not entitled to compensation. Johnson v. State Highway Comm., 125 Me. 443, 134 A. 564.

To be compensable under this section, the accident must have arisen out of and in the course of the employment. In other words, it must have been due to a risk to which the deceased was exposed while employed, and because employed by the defendant. There are two distinct elements of proof, namely, risk while employed, and risk because employed. Dulac v. Dumbarton Woolen Mills, 120 Me. 31, 112 A. 710; Mailman's Case, 118 Me. 172, 106 A. 606; White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841; Saucier's Case, 122 Me. 325, 119 A. 860; Gray's Case, 123 Me. 86, 121 A. 556; Taylor's Case, 126 Me. 450, 139 A. 478; Sullivan's Case, 128 Me. 353, 147 A. 431; Weymouth v. Burnham & Morrill Co., 136 Me. 42, 1 A. (2d) 343, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473; Hawkins v. Portland Gas Light Co., 141 Me. 288, 43 A. (2d) 718; Boyce's Case, 146 Me. 335, 81 A. (2d) 670.

The term arising out of and in the course of the employment has purpose. That purpose is to create a uniform rule of causation on the plane of which the law shall be administered for the equal good of all within its provisions, and the administration of the statute thereby saved from being plunged into the abyss of misrule. Washburn's Case, 123 Me. 402, 123 A. 180.

The expressions "arising out of" and "in the course of" in this section are not synonymous. Westman's Case, 118 Me. 133, 106 A. 532.

And compensation awarded only where both elements present. — Under this section, providing for compensating workmen for accidental injuries arising both out of and in the course of their employments, an injury which occurs while but one of these conjunctive elements is present, is not to be recompensed. Gray's Case, 123 Me. 86, 121 A. 556.

In a compensation case, the first question is whether the employee received an injury arising out of and in the course of his employment, within the meaning of this section. In order that compensation may be due, the injury must both arise out of and also be received in the course of the employment. Neither alone is enough. Willette's Case, 135 Me. 254, 194 A. 540.

This section permits recovery only in cases of accident arising out of and in the course of the employment and all cases of whatever nature must be reduced to these terms. One is just as essential a condition of the right to compensation as the other. Fournier's Case, 120 Me. 236, 113 A. 270.

Even if there is an accident which occurred in the course of the employment, if it did not arise out of the employment, there can be no recovery; and even though there is an accident which arose out of the employment, if it did not arise in the course of the employment, there can be no recovery. Westman's Case, 118 Me. 133, 106 A. 532; White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841.

When an injury arose, not out of the employment as a contributing proximate cause, but only in the course of that employment, it is not compensable. Gray's Case, 123 Me. 86, 121 A. 556.

Time of the accident alone does not settle the question of right to compensation. Place and circumstances are also essential elements. Taylor's Case, 126 Me. 450, 139 A. 478.

An accident which did not arise in the course of employment, although within the period of it, is not compensable. Fournier's Case, 120 Me. 236, 113 A. 270.

And an injury sustained outside the scope or sphere of the disabled workmen's

employment is not compensable. Gray's Case, 123 Me. 86, 121 A. 556.

If it is apparent to the rational mind that the employee was engaged in activities beyond the scope of his employment when he received the accidental injury, no consideration of emergency being involved, it is error of law upon the part of the commissioner to hold his employer subject to pay compensation for the injury suffered. Willette's Case, 135 Me. 254, 194 A. 540.

If the workman abandons his employment, even for a short time, and engages in play, or some occupation entirely foreign to his employment, he is not entitled to compensation for an accident by which he is injured while so doing. White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841.

Compensation is not recoverable where an employee is injured while doing something solely for his own benefit; where, although the injury arises from the risk of the occupation, it is received while the employee has turned aside from the employment for his own purpose. White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841.

An injury is not compensable if it was not something that happened as the natural and probable consequence of the employment, but was the result of the employee's own voluntary act, entirely independent of any duty he was required to perform, and done for the sole purpose of satisfying his curiosity. Saucier's Case, 122 Me. 325, 119 A. 860.

Section not changed by Occupational Disease Law.—The controls of this section restricting compensation for accidental injuries to those arising out of and in the course of employment are not changed by the Occupational Disease Law. (§§ 57-71). Dinsmore's Case, 143 Me. 344, 62 A. (2d) 205.

The words "arise out of the employment" refer to the origin or cause of the accident. Sullivan's Case, 128 Me. 353, 147 A. 431.

The words "arising out of" mean that there must be some causal relation between the conditions under which the employee worked and the injury which he received. Westman's Case, 118 Me. 133, 106 A. 532; Dulac v. Dumbarton Woolen Mills, 120 Me. 31, 112 A. 710; White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841; Gray's Case, 123 Me. 86, 121 A. 556; Beers' Case, 125 Me. 1, 130 A. 350; Fogg's Case, 125 Me. 168, 132 A. 129; Taylor's Case, 126 Me. 450, 139 A. 478; Gooch's Case, 128 Me. 86, 145 A. 737; Sullivan's Case, 128 Me. 353, 147 A. 431; Weymouth v. Burnham & Morrill Co., 136 Me. 42, 1 A. (2d) 343, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

An accident does not "arise out of" the employment, if there is no causal connection between the work and the injury received. White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841; Taylor's Case, 126 Me. 450, 139 A. 478.

If the injury is sustained by reason of some cause having no relation to the employment it does not arise out of the employment. Gooch's Case, 128 Me. 86, 145 A. 737.

If the injury can be seen to have followed as a natural incident of the work, and to have been contemplated, by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment. But an injury which cannot fairly be traced to the employment as a contributing, proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment does not arise out of the employment. Westman's Case, 118 Me. 133, 106 A. 532; Dulac v. Dumbarton Woolen Mills, 120 Me. 31, 112 A. 710; White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841; Washburn's Case, 123 Me. 402, 123 A. 180; Gooch's Case, 128 Me. 86, 145 A. 737; Willette's Case, 135 Me. 254, 194 A. 540; Martin v. Biddeford, 138 Me. 26, 20 A. (2d) 715; Weymouth v. Burnham & Morrill Co., 136 Me. 42, 1 A. (2d) 343, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473. See Westman's Case, 118 Me. 133, 106 A. 532.

Accidents arising out of the employment are those in which it is possible to trace the injury to the nature of the employee's work or to the risk to which the employer's business exposes the employee. White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841; Weymouth v. Burnham & Morrill Co., 136 Me. 42, 1 A. (2d) 343, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

Nothing can come "out of the employment" which has not, in some reasonable sense, its orgin, its source, its causa causans, in the employment. Westman's Case, 118 Me. 133, 106 A. 532; Weymouth v. Burnham & Morrill Co., 136 Me. 42, 1 A. (2d) 343, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

An injury is deemed to arise out of employment when there is apparent, on consideration of all the circumstances, the relation of cause and effect between the

conditions under which the work is required to be performed and the resulting injury. Gray's Case, 123 Me. 86, 121 A. 556; Willette's Case, 135 Me. 254, 194 A. 540.

Injuries arising from employment are such as are made likely by the character of the business or by the method under which it is carried on. Gray's Case, 123 Me. 86, 121 A. 556.

An injury arises out of the employment if it arises out of the nature, conditions, obligations, or incidents of the employment; in other words, out of the employment looked at in any of its aspects. Boyce's Case, 146 Me. 335, 81 A. (2d) 670.

And if an accident does not occur "in the course of," it cannot "arise out of" the employment. Sullivan's Case, 128 Me. 353, 147 A. 431; Wheeler's Case, 131 Me. 91, 159 A. 331; Bennett's Case, 140 Me. 49, 33 A. (2d) 799; Chapman v. Hector C. Cyr Co., 135 Me. 416, 198 A. 736.

If it is determined that an accident did not happen in the course of the employment, it is inevitable that the commissioner should find that it did not arise out of the employment. Hinckley's Case, 136 Me. 403, 11 A. (2d) 485.

In order for the accident to arise out of the employment, the employment must have been the proximate cause of the accident. Westman's Case, 118 Me. 133, 106 A. 532; Dulac v. Dumbarton Woolen Mills, 120 Me. 31, 112 A. 710; White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841; Saucier's Case, 122 Me. 325, 119 A. 860; Healey's Case, 124 Me. 145, 126 A. 735; Weymouth v. Burnham & Morrill Co., 136 Me. 42, 1 A. (2d) 343, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

Where the employment was not the proximate cause of the accident, the resulting injury is not compensable. Healey's Case, 124 Me. 145, 126 A. 735.

To rise out of the employment an injury must have been due to a risk of the employment. Wheeler's Case, 131 Me. 91, 159 A. 331; Weymouth v. Burnham & Morrill Co., 136 Me. 42, 1 A. (2d) 343, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473; Bennett's Case, 140 Me. 49, 33 A. (2d) 799; Hawkins v. Portland Gas Light Co., 141 Me. 288, 43 A. (2d) 718; Boyce's Case, 146 Me. 335, 81 A. (2d) 670; Riley v. Oxford Paper Co., 149 Me. 418, 103 A. (2d) 111.

Accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment. Westman's Case, 118 Me. 133, 106 A. 532; Gray's Case, 123 Me. 86, 121 A. 556; Gooch's Case, 128 Me. 86, 145 A. 737.

An injury arises out of the employment when, after the event, it must appear to have had its origin in a risk connected with the employment, and to have swept along from that source as a rational consequence. Gray's Case, 123 Me. 86, 121 A. 556.

The words "in course of" refer to time, place and circumstances, under which the accident takes place. Westman's Case, 118 Me. 133, 106 A. 532; Fournier's Case, 120 Me. 236, 113 A. 270; Fogg's Case, 125 Me. 168, 132 A. 129; Paulauski's Case, 126 Me. 32, 135 A. 824; Taylor's Case, 126 Me. 450, 139 A. 478; Sullivan's Case, 128 Me. 353, 147 A. 431.

An injury is received in the course of the employment when it comes while the workman is doing the duty which he is employed to perform. Westman's Case, 118 Me. 133, 106 A. 532; Dulac v. Dumbarton Woolen Mills, 120 Me. 31, 112 A. 710; White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841; Webber's Case, 121 Me. 410, 117 A. 513; Wheeler's Case, 131 Me. 91, 159 A. 331; King's Case, 133 Me. 59, 173 A. 553; Willette's Case, 135 Me. 254, 194 A. 540; Martin v. Biddeford, 138 Me. 26, 20 A. (2d) 715; Bennett's Case, 140 Me. 49, 33 A. (2d) 799.

An employee is said to have received injuries in the course of his employment where he was doing, at the time, at a place, and of a nature, the duties which his employment reasonably called him to perform. Charles v. Harriman, 121 Me. 484, 118 A. 417.

An injury whch is the result of the employee's own voluntary act done only out of curiosity, entirely independent of any duty required to be performed or incidental thereto, is not in the course of the employment and therefore does not arise out of the employment and is not compensable. Sullivan's Case, 128 Me. 353, 147 A. 431.

An accident arises in the course of the employment when it occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto. Fournier's Case, 120 Me. 236, 113 A. 270; Westman's Case, 118 Me. 133, 106 A. 532; Charles v. Harriman, 121 Me. 484, 118 A. 417; Sulli-

van's Case, 128 Me. 353, 147 A. 431. See Boyce's Case, 146 Me. 335, 81 A. (2d) 670.

An accident arises in the course of the employment if it occurs, as to time, place and circumstances, during employment, or in the course of activities incidental thereto, at a place where the workman may properly be found, and under circumstances that negative the idea of voluntary self infliction or any statutory bar. Butler's Case, 128 Me. 47, 145 A. 394.

If an employee is "doing his regular work," at the time of his accidental injury, it would seem impossible to avoid the conclusion that he was injured "in the course of his employment." Beers' Case, 125 Me. 1, 130 A. 350.

The course of employment covers the period between the workman entering his employer's premises and his leaving them within a reasonable time after his day's work is done. Butler's Case, 128 Me. 47, 145 A. 394.

The course of an employee's employment does not begin and end with the actual work he was employed to do, but covers the period between his entering his employer's premises a reasonable time before beginning his actual work and his leaving the premises within a reasonable time after his day's work is done and during the usual lunch hour, he being in any place where he may reasonably be in connection with his duties or entering or leaving the premises by any way he may reasonably select. Roberts' Case, 124 Me. 129, 126 A. 573.

Injury sustained while quenching thirst held to have arisen out of employment.—The fact that the accident involved in a compensation case occurred while the employee was engaged in quenching his thirst, rather than in the actual performance of some duty which he owed the employer under his employment is not a matter of controlling importance, as it is recognized that such acts as are necessary to the life, comfort and convenience of the workman while at work, though personal to himself, and not technically acts of service, are incidental to the service; and an accident occurring in the performance of such acts is deemed to have arisen out of the employment. Brodin's Case, 124 Me. 162, 126 A. 829.

Injury from independent act of fellow employee does not arise out of employment.—An injury resulting from the independent act of another employee, disconnected from the performance of any duty of the employment, does not, in legislative meaning, arise out of the employment. Petersen's Case, 138 Me. 289, 25 A. (2d) 240.

Nor does injury resulting from horseplay.—Injuries sustained in the course of employment, by reason of horseplay, practical joking, fooling or skylarking, done independently of or disconnected from the performance of any duty of the employment, do not, in legislative meaning, arise out of the employment. Washburn's Case, 123 Me. 402, 123 A. 180.

Where an injury was the result of horseplay or fooling by a fellow employee in which incident the petitioner was innocent of any blame, under such circumstances, the injury did not arise out of the employment. Petersen's Case, 138 Me. 289, 25 A. (2d) 240.

Unless such horseplay should have been foreseen by employer.—An injury to an employee arises out of the employment, even though resulting from horseplay by a fellow employee, if such horseplay should have been foreseen by an employer, due to the fact that the employer knew of similar horseplay in the past. In such cases it becomes a natural incident of the work. Petersen's Case, 138 Me. 289, 25 A. (2d) 240.

When injury from assult arises out of employment. — It is true that an injury resulting from an assault occurring wilfully or sportively is not a compensable accident within the meaning of the Workmen's Compensation Act. It is also equally true that when an employer knows of the occurrence of such assaults in the past and fails to prevent their recurrence, so that a subsequent injury, resulting therefrom, may be said to have followed in a given case as a natural incident of the work and to have been such that it would have been contemplated by a reasonable person, then it may be said to have arisen not only in the "course of" but also "out of" the employment and to be compensable under this section. Petersen's Case, 138 Me. 289, 25 A. (2d) 240.

Idiopathic fall induced by nature of employment is compensable.—When an idiopathic fall is itself caused or induced by the nature of employment, it is compensable. A common example is the fainting spell or dizziness attributable to overexertion in employment. Riley v. Oxford Paper Co., 149 Me. 418, 103 A. (2d) 111.

As are injuries from such fall when contributed to by special risk of employment.—When an employee is suddenly overtaken by an internal weakness, illness, or seizure which induces a fall, such a fall is usually referred to as an idiopathic fall. The peculiar aspect of such falls is that their

originating cause is a physical condition personal to the victim and unrelated to the situation in which he happens to be or the external conditions of his employment. Injuries from such falls have, however, been held compensable whenever some special and appreciable risk or hazard of the employment has become a contributing factor. Riley v. Oxford Paper Co., 149 Me. 418, 103 A. (2d) 111.

Such as where height constitutes special risk.—When an employee suffers an idiopathic fall in the course of his employment from a height above the level floor, compensation has quite uniformly been allowed, at least where the height is sufficient to constitute an appreciable risk or hazard of employment. Riley v. Oxford Paper Co., 149 Me. 418, 103 A. (2d) 111.

Or objects against which employee falls constitutes such risk. — Compensation has usually been allowed for the results of idiopathic falls against objects which are present as part of the conditions of employment and which present some appreciable risk or hazard of employment. Examples of such objects are plant machinery, motor boxes, sawhorses, tables, posts and the like. Riley v. Oxford Paper Co., 149 Me. 418, 103 A. (2d) 111.

But an idiopathic fall to the level floor, not from a height, not onto or against an object, not caused or induced by the nature of the work or any condition of the floor, is not compensable under this section. Riley v. Oxford Paper Co., 149 Me. 418, 103 A. (2d) 111.

Thus injuries resulting from a fall from and to a hard level floor caused exclusively by some internal weakness or seizure personal to the employee are not compensable. Riley v. Oxford Paper Co., 149 Me. 418, 103 A. (2d) 111.

B. Place of Accident.

The fact that the employee was upon the premises of the employer when the accident occurred can have no bearing upon the question of the latter's liability, unless the accident arose out of or in the course of the employment. White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841.

It is not sufficient to sustain an award that the employment occasioned the presence of the employee where the injury occurred. Gooch's Case, 128 Me. 86, 145 A. 737; Riley v. Oxford Paper Co., 149 Me. 418, 103 A. (2d) 111.

Injury must be in place where employment took employee.—If the injury results to employee from the doing of something which the employment neither required nor expected, or in a place where his employment did not take him, it cannot be said to arise out of the employment. Saucier's Case, 122 Me. 325, 119 A. 860; Healey's Case, 124 Me. 145, 126 A. 735; Bennett's Case, 140 Me. 49, 33 A. (2d) 799.

Where an employee engaged in the construction of a highway was injured on the travelled portion of the highway it was held that when the work had reached a point where the travelled portion of the highway was completed, the road opened for public travel and there was no longer necessity for employees to go upon it in the performance of the duty which they owed to their employer, that portion of the highway ceased to be included in the premises of the employer, even if it might be assumed to have been properly so included prior to that time, and the injury was not compensable. Ferreri's Case, 126 Me. 381, 138 A. 561.

And in place where he may reasonably be in performance of his duties.—The accident to be compensable must occur within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties, or engaged in doing something incidental thereto. He should not be in a place forbidden by the employer, or in a clearly unsafe place, when the employer has provided a safe one. Boyce's Case, 146 Me. 335, 81 A. (2d) 670.

If the employee is in a place where he is prohibited from being by positive orders of his employer by reason of the danger, or has taken a certain course in going from one place to another which he is prohibited from taking by his employer for the same reason, notwithstanding it is within the period of his employment and his purpose in going to the other place is to perform some of his duties he is engaged to perform, he cannot be said, while in the forbidden place or while going by the forbidden route or means, to be acting in the course of his employment, within the meaning of the compensation act, because he is not in a place where he reasonably may be in the performance of any of his duties. If, however, he is in the place where his duties are intended to be performed and where, of course, he reasonably may be, and is engaged in the performance of them and only violates some rule relating to his conduct while in such performance, he is still acting in the course of his employment even though he performs them recklessly and knowingly exposes himself to

danger in violation of orders and, unless the injury can be said to have been inflicted by "wilful intention" (§ 18), may recover compensation. Fournier's Case, 120 Me. 236, 113 A. 270.

Accident on public way.—An accident occurring upon a public way, when the employee is prosecuting no duty incumbent upon him by reason of his employment, is not compensable because not arising out of his employment, and not occurring in the course of his employment. Paulauskis' Case, 126 Me. 32, 135 A. 824; Taylor's Case, 126 Me. 450, 139 A. 478.

Where the employment requires the employee to travel on the highway, and accident causes injury to the latter when he is using the highway in pursance of his employment, or in doing some act incidental to his employment, with the knowledge and approval of his employer, such injury is compensable. Kimball's Case, 132 Me. 193, 168 A. 871. See Rawson's Case, 126 Me. 563, 140 A. 365.

Injury in employer's housing area. — Where the injury occurs in an area devoted by the employer to the housing of employees, in which they are privileged but not required to live, it does not arise in the course of the employment as those words are used in this section. Wheeler's Case, 131 Me. 91, 159 A. 331.

C. Injuries Received While Going to or Returning from Place of Employment.

Ordinarily, accidents occurring on the public highway when an employee is going to work or returning therefrom are not compensable under this section. Dinsmore's Case, 143 Me. 344, 62 A. (2d) 205.

An injury suffered while an employee is on his way to work, and before he reaches the premises where the work is to be performed, is not received in the course of his employment. Wheeler's Case, 131 Me. 91, 159 A. 331; Chapman v. Hector J. Cyr Co., 135 Me. 416, 198 A. 736.

Injuries received by an employee in going to and from his work on a public street or in a public conveyance, unless his means of conveyance is furnished by his employer, are not received in the course of his employment. Roberts' Case, 124 Me. 129, 126 A. 573; Kinslow's Case, 126 Me. 157, 136 A. 724; Littlefield's Case, 126 Me. 159, 136 A. 724. See Ferreri's Case, 126 Me. 381, 138 A. 561.

But there are exceptions to this general rule that an injury resulting from an accident in a public street is not compensable even though the injured person is on his way to or from his work. Rawson's Case, 126 Me. 563, 140 A. 365.

Such as where transportation furnished by employer.—An injury suffered in the course of transportation furnished by an employer as an incident of employment is sustained in the course thereof. Bartley v. Couture, 143 Me. 69, 55 A. (2d) 438, holding that the principal of res ipsa loquitur is applicable where employees are being transported by an employer as an incident of their employment, and injuries are suffered as a result of employer's agent driving a motor vehicle off the highway.

Transportation or the means of transportation to and from work may be furnished by the employer as an incident of the contract of employment, in which case, an injury sustained in the course of such transportation, is sustained in the course of the employment. Chapman v. Hector C. Cyr Co., 135 Me. 416, 198 A. 736. See Rawson's Case, 126 Me. 563, 140 A. 365.

When transportation is furnished by the employer, and the employee is injured while being transported, there is a causal relationship between the employment and the accident causing injury, and the accident, under these circumstances, arises out of the employment. Chapman v. Hector J. Cyr Co., 135 Me. 416, 198 A. 736.

Where transportation is furnished by an employer as an incident of the employment, an injury suffered by the employee while going or coming in the vehicle furnished by the employer and under his control, arises out of and is within the course of the employment. Littlefield's Case, 126 Me. 159, 136 A. 724.

When an injury occurs before the beginning or after the termination of the work there are two general rules applicable to the question as to whether it arises out of and in the course of the employment. The first is, that the employee while on his way to work is not in the course of his employment. The second is, that when a workman is employed to work at a certain place, and as a part of his contract of employment there is an agreement that his employer shall furnish him free transportation to and from his work, the period of service continues during the time of transportation, and if an injury occurs during the course of transportation it is held to have arisen out of and in the course of the employment. Littlefield's Case, 126 Me. 159, 136 A. 724.

And where fireman is subject to emergency calls.—A permanent member of a municipal fire department who sleeps at the station house, is on duty the entire twenty-four hours in each day, has a limited period in each day in which to go

to his home for meals, and is subject to duty upon an alarm of fire while at his meals, if accidentally injured while alighting from a street car on his way home to a meal, may properly be found to have suffered an injury arising out of and in the course of his employment. Fogg's Case, 125 Me. 168, 132 A. 129. See Rawson's Case, 126 Me. 563, 140 A. 365.

Injury to employee returning from lunch with employer's mail held not compensable. — An employee, whose duty it was to get his employer's mail at the Post Office during his noon hour, carry same to his own home, telephone the contents of important letters and then eat lunch and return to his work at the regular hour in the afternoon, incidentally bringing the mail to the office when he returns, suffers no compensable injury by reason of slipping on the sidewalk and fracturing his hip, while thus returning to his place of employment, as such an injury cannot be said to have occurred in the course of his employment. While thus in the street, the employee was in no different position than that of any employee going to and from his home and his place of work, and was subject to no greater or different risk than that of any other pedestrian. The injury cannot be said to have occurred in the course of his employment. Rawson's Case, 126 Me. 563, 140 A. 365.

Accident on premises of employer is compensable. — When an accident occurs to an employee, conducting himself properly, upon the premises of the employer, while coming to or departing from his work, such accident falls within the provisions of this section, as it is absolutely necessary that an employee must come and go in order to engage in an employment at all. Consequently, an accident, happening to him under such conditions both arises out of and in the course of his employment. White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841.

In determining the compensability of an injury received while the employee is on his way to or from work it is not so much whether the employer owns or controls the place where the injury occurs, but rather whether it happens within the premises or on the approaches to the premises, where the work is to be performed. Wheeler's Case, 131 Me. 91, 159 A. 331.

As is accident on way maintained by employer as means of ingress and egress. —An injury suffered by an employee on his way to or from work, while entering or leaving the premises of his employer on a way maintained by the employer to provide ingress to or egress from the premises, or which the employer has a right to use for such purpose, is received in the course of the employment and if arising out of the employment, is compensable. Wheeler's Case, 131 Me. 91, 159 A. 331.

Where the only access from an employer's premises to the nearest public street is over the land of another, by a private way, which the employer had obtained the right to use in connection with its plant as a means of ingress and egress for such as might have business with it, and its employees in going to and from their work, and the employer, so far as was necessary for its uses, kept the way in repair, an injury to an employee sustained as he was leaving the plant of the employer in his automobile over this private way, was received in the course of his employment. Roberts' Case, 124 Me. 129, 126 A. 573.

IV. EVIDENCE AND BURDEN OF PROOF.

Claimant must establish right to compensation. — The burden rests upon the claimant to prove the facts necessary to establish the right to compensation. Hawkins v. Portland Gas Light Co., 141 Me. 288, 43 A. (2d) 718.

The petitioner in a compensation case must prove all the necessary elements of his case. Taylor's Case, 126 Me. 450, 139 A. 478.

He has burden of proving injury by accident arising out of and in the course of employment.—It is well settled law that the person petitioning for relief under a workmen's compensation act has the burden of proving the essential facts necessary to establish a case. Hence, he must adduce evidence to show that the injury was the result of accident arising out of and in the course of the employment, within the requirement of this section. Butts' Case, 125 Me. 245, 132 A. 698. See Westman's Case, 118 Me. 133, 106 A. 532; Dulac v. Dumbarton Woolen Mills, 120 Me. 31, 112 A. 710; White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841; Marchavich's Case, 123 Me. 495, 124 A. 209; Johnson v. State Highway Comm., 125 Me. 443, 134 A. 564; Paulauskis' Case, 126 Me. 32, 135 A. 824; Taylor's Case, 126 Me. 450, 139 A. 478; McNiff v. Old Orchard Beach, 138 Me. 335, 25 A. (2d) 493, overruled on another point, 140 Me. 121, 34 A. (2d) 473.

And must prove connection between accident and disability.—The burden of establishing causal connection between an industrial accident and a petitioner's in-

capacity is on the petitioner. Baker's Case, 143 Me. 103, 55 A. (2d) 780.

And service within scope of employment.—It is incumbent upon an injured employee to prove that the accident befell him while serving within the scope of his employment. Farwell's Case, 128 Me. 303, 147 A. 215.

And within acceptance of employer. — It is incumbent upon the employee to prove that the injury received was within the scope of the acceptance of the employer. If he does not come within the terms of the assent, he may not recover compensation. Eddy v. Bangor Furniture Co., 134 Me. 168, 183 A. 413.

Employer's burden when facts show accident during employment. — If, in a compensation case, facts are proved the natural and reasonable inference from which is that the accident happened while the employee was engaged in his employment, it falls on the employer, if he disputes the claim, to prove that the contrary was the case. Mailman's Case, 118 Me. 172, 106 A. 606.

Compensation not awarded upon possibility.—Compensation cannot be awarded upon the possibility, or upon evenly balanced chances, that the occurrence was an accident. McNiff v. Old Orchard Beach, 138 Me. 335, 25 A. (2d) 493, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

An award in a compensation case cannot rest merely upon imagination or possibility, or upon a choice equally compatible with an accident and with no accident. However, it is not necessary that facts be proven to any higher degree than that necessary under the settled rule of finality (except in cases of fraud) of decisions of fact. Ferris' Case, 132 Me. 31, 165 A. 160, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

The claimant in a compensation case must go further than simply to show a state of facts which is as equally consistent with no right to compensation as it is with such right. Surmise, conjecture, guess or speculation are not sufficient to sustain the burden and justify a finding in behalf of the claimant. Taylor's Case, 126 Me. 450, 139 A. 478.

But finding may be based on reasonable inferences.—The finding that an accident is compensable may be supported by inferences, provided those inferences are reasonable, and not based merely upon surmise, conjecture, guess or speculation. Marchavich's Case, 123 Me. 495, 124 A. 209. See note to § 37.

Presumption when cause of fall unknown. —Where the cause of a fall is entirely unknown, but the fall occurs in the course of employment, most courts allow compensation. The theory of compensability seems to rest on a strong inference amounting to a presumption that the injury would not have occurred except for some condition, risk, or hazard of the employment, and therefore arose out of the employment. It falls upon the employer to rebut the inference and explain the fall. Riley v. Oxford Paper Co., 149 Me. 418, 103 A. (2d) 111.

Evidence sufficient to show injury by accident. — See Wallace's Case, 123 Me. 517, 124 A. 241.

Evidence sufficient to show injury arising out of employment.—See Pennell v. Portland, 124 Me. 14, 125 A. 143; Martin v. Biddeford, 138 Me. 26, 20 A. (2d) 715.

Evidence sufficient to show injury in course of employment. — See Dobson's Case, 124 Me. 305, 128 A. 401; Moriarty's Case, 126 Me. 358, 138 A. 555; Martin v. Biddeford, 138 Me. 26, 20 A. (2d) 715.

Sec. 9. Employee entitled to limited medical services; selection of own physician; cost.—During the first 30 days after an injury aforesaid the employee shall be entitled to reasonable and proper medical, surgical and hospital services, nursing, medicines and mechanical surgical aids when they are needed. The amount of such services and aids shall not exceed $100 unless a longer period or a greater sum is allowed by the commission, which in its discretion it may allow when the nature of the injury or the process of recovery requires it.

Upon knowledge or notice of such injury the employer shall promptly furnish to the employee the services and aids aforesaid. In case, however, the employer fails to furnish any of said services or aids, or in case of emergency or other justifiable cause, the employee may procure said services or aids and the commission may order the employer to pay for the same provided that they were necessary and adequate, and the charges therefor are reasonable. In every case where any of said services or aids are procured by the employee, it shall be his duty to see that the employer is given prompt notice thereof. The commission in its discretion may also require the employer to furnish to the injured employee,

but not more than once each for an injury aforesaid, artificial limbs, eyes and teeth made necessary by such injury. In case artificial limbs, eyes and teeth, in use by an employee at the time of the accident as substitutes for natural parts of the body, are themselves injured or destroyed, they shall be repaired or replaced by the employer.

Whenever there is any disagreement as to the proper costs of the services or aids aforesaid, or as to the apportionment thereof among the parties, any interested person may file a petition with the commission for the determination thereof. (R. S. c. 26, § 9.)

Cross reference.—See note to § 28, re liability of employer for payments under this section after lump sum payment to employee.

Purpose of section.—The evident purpose of this section was to allow for the first 30 days after the injury, as compensation to the injured employee, his medical expenses to the end that the latter might not, for reason of economy, delay seeking medical advice, even though the injury might be slight and not immediately incapacitating. McKenna's Case, 117 Me. 179, 103 A. 69.

Period limited to 30 days after injury.—The industrial accident commission exceeds its powers in making a rule that services under this section shall be furnished during the 30 days succeeding the date of incapacity arising from the injury. The plain language of this section restricts the period to "the first 30 days after an injury." McKenna's Case, 117 Me. 179, 103 A. 69.

Commission may enlarge period and amount.—This section authorizes the industrial accident commission to enlarge the thirty day period therein mentioned when, in its discretion, the nature of the injury or the process of recovery require it, even though the services are rendered during the last sickness of the injured employee. Merrill's Case, 126 Me. 215, 137 A. 72.

But disagreement is prerequisite to jurisdiction.—Respecting medical aid, whenever an employer and an employee are disagreeing on a longer period or a greater sum, the power to hear and determine the controversy is in the industrial accident commission. Which is but another way of saying that disagreement between them who have or claim an interest in proceedings instituted by an employee adversely to an employer, or conversely, to settle a medical-aid difference, is prerequisite to jurisdiction within the meaning of the compensation law. White's Case, 126 Me. 105, 136 A. 455.

And act provides no remedy to employer against insurer to determine enlargement.—On occasion, the accident commission can fix a longer period or a greater sum, for medical and related attention. But the compensation act does not provide to an assenting employer a remedy against his insurance carrier, to determine whether there shall be an increased time or amount. White's Case, 126 Me. 105, 136 A. 455.

Employer bound to furnish medical aid.—Under this section, the employer, without contract except as implied from his status as an assenting employer, is bound to furnish, or pay for, medical aid to an extent determinable by the industrial accident commission. Ferren v. S. D. Warren Co., 124 Me. 32, 125 A. 392; White's Case, 126 Me. 105, 136 A. 455.

Whether employee lives or dies.—This section demands furnishing of and payment for the things therein named without regard to whether the patient lives or dies, or furnished in a case which proves to be a "last sickness" case. Merrill's Case, 126 Me. 215, 137 A. 72.

And his obligation is exclusively enforceable by petition to commission.—The implied obligation of the employer under this section is enforceable exclusively through petition to and decree of the industrial accident commission. Ferren v. S. D. Warren Co., 124 Me. 32, 125 A. 392. See White's Case, 126 Me. 105, 136 A. 455.

But section does not affect right to contract for payment of medical bills.—Despite the provisions of this section, the employer may bind himself by express contract to pay medical bills. Such contract is enforceable through the common-law courts. No commission decree is necessary to give binding force to such a contract. And, unless the contract expressly so provides, such decree cannot limit the extent of the obligation. Ferren v. S. D. Warren Co., 124 Me. 32, 125 A. 392.

Services must be necessary and adequate and charges reasonable.—Under this section, if the evidence supports the commission's finding that "the petitioning employee failed to sustain the burden of proving that the services rendered were

made necessary by reason of the nature of the injury or process of recovery, that the services there rendered were adequate, and that the charges therefor were reasonable," there was no abuse of discretion on the part of the commission in disallowing the items in question. Lussier v. South Portland Shipbuilding Corp., 141 Me. 265, 43 A. (2d) 299.

Expenditures for services under this section are incidental to compensation.—The services and aids contemplated by this section of the act are incidental to the compensation payable to him under subsequent sections, except so far as they are available before the beginning of the period during which such compensation is payable. Simpson's Case, 144 Me. 162, 66 A. (2d) 417.

And not a part thereof.—The expenditures of an employer for services and aids furnished an employee in accordance with the provisions of this section do not constitute a part of the compensation payable to him under § 11. Simpson's Case, 144 Me. 162, 66 A. (2d) 417.

But services not available after time employee entitled to compensation.—The services and aid to which an employee is entitled under this section are available to him before and during the time compensation is payable to him but not thereafter. Simpson's Case, 144 Me. 162, 66 A. (2d) 417.

At the expiration of the maximum period, during which an injured employee is entitled to have compensation paid to him, or upon the payment, or accrual, of the maximum amount so payable, the authority of the commission in connection with the services and aids to which this section is applicable terminates, except so far as it may be called upon to determine allowances for services and aids furnished during the compensation period. Simpson's Cases, 144 Me. 162, 66 A. (2d) 417.

History of section.—See Merrill's Case, 126 Me. 215, 137 A. 72; Simpson's Case, 144 Me. 162, 66 A. (2d) 417.

Applied in Butt's Case, 125 Me. 245, 132 A. 698.

Stated in part in Melcher's Case, 125 Me. 426, 134 A. 542.

Sec. 10. Waiting period; when compensation payable.—No compensation for incapacity to work shall be payable for the first 7 days of incapacity; provided, however, that in case incapacity continues for more than 28 days, compensation shall be allowed from the date of incapacity. (R. S. c. 26, § 10. 1949, c. 380, § 1.)

Stated in Simpson's Case, 144 Me. 162, 66 A. (2d) 417.

Cited in Hustus' Case, 123 Me. 428, 123 A. 514.

Sec. 11. Compensation for total incapacity.—While the incapacity for work resulting from the injury is total, the employer shall pay the injured employee a weekly compensation equal to 2/3 his average weekly wages, earnings or salary, but not more than $27 nor less than $15 a week; and in no case shall the period covered by such compensation be greater than 500 weeks from the date of the accident, nor the amount more than $10,500. In the following cases it shall, for the purposes of this act, be conclusively presumed that the injury resulted in permanent total incapacity: the total and irrevocable loss of sight in both eyes, the loss of both hands at or above the wrist, the loss of both feet at or above the ankle, the loss of 1 hand and 1 foot, an injury to the spine resulting in permanent and complete paralysis of the arms or legs and an injury to the skull resulting in incurable imbecility or insanity. (R. S. c. 26, § 11. 1949, c. 380, § 2. 1953, c. 357, § 1.)

"Incapacity for work" defined.—The phrase "incapacity for work," as used in this section and §§ 12 and 13, has come to have a well settled meaning. It includes according to nearly all authorities not merely want of physical ability to work but lack of opportunity to work, due neither to claimant's own fault subsequent to the accident, nor to illness not connected with the accident, nor to general business depression. This statement is not equivalent to holding that the employer has the burden of providing the claimant with remunerative employment; but it recognizes as proper for consideration evidence or lack of evidence of a condition by which the employee's incapacity, "his loss of capacity to earn," may be affected. In considering the element of lack of remunerative employment, the qualification that such lack of opportunity to work is not due to general business depression,

is important; if the qualification is disregarded, the employer will be held to guarantee employment regardless of the condition of industry in a given locality. Milton's Case, 122 Me. 437, 120 A. 533.

Section applicable only to total disability.—This section applies to total disability and contemplates a period of not more than five hundred weeks. It applies to nothing else. Phillips' Case, 123 Me. 501, 124 A. 211.

It is for the total incapacity for work, the loss of earning power, for which this section provides compensation. Connelly's Case, 122 Me. 289, 119 A. 664.

Total disability does not depend upon the inability of the injured to perform the same kind of labor he was performing when injured, but his inability by reason of his injury to obtain any kind of work he can do. Connelly's Case, 122 Me. 289, 119 A. 664.

Pre-existing condition no bar to right to compensation for total incapacity.—An injured employee is entitled to compensation for total incapacity even though the injury would ordinarily cause only partial disability where the injury was coupled with a pre-existing malady, and where the employee could still earn the same wages received at the time of the accident notwithstanding the disease, except for the accident. Gagnon's Case, 144 Me. 131, 65 A. (2d) 6.

The language of the last sentence of this section is most significant as distinguishing sharply between loss and loss of use and as specifying the one or the other according as the one or the other is intended. Thus, the first clause does not say the loss of both eyes, which would mean removal, but the total and irrevocable loss of sight in both eyes, which is but another expression for total loss of use. The loss of the eye is one thing, the loss of sight which means the loss of the use of the eye is another. The second clause provides for the loss of both feet at or above the ankle. This admits of no other construction than an amputation at or above a certain point. So of the next clause "the loss of one hand at or above the wrist;" while the last clause "an injury to the spine resulting in permanent and complete paralysis of the legs or arms" again recognizes the loss of use as distinguished from actual loss. Merchant's Case, 118 Me. 96, 106 A. 117. See note to § 13.

Payments under this section do not affect periods of presumed incapacity under § 13.—See note to § 13.

History of section. — See Simpson's Case, 144 Me. 162, 66 A. (2d) 417.

Services under § 9 not part of compensation under this section.—See note to § 9.

Payments under this section not allowed as credit on amount payable to dependents under § 15.—See note to § 15.

Former provision of section. — For a consideration of this section when it contained provisions concerning the right of dependents to succeed to the right of compensation upon the death of the employee, see Nickerson's Case, 125 Me. 285, 133 A. 161; Estabrook v. Steward Read Co., 129 Me. 178, 151 A. 141; Comstock's Case, 129 Me. 467, 152 A. 618.

Applied in Simmon's Case, 117 Me. 175, 103 A. 68.

Cited in Clark's Case, 120 Me. 133, 113 A. 51; Morin's Case, 122 Me. 338, 120 A. 44; Walker's Case, 122 Me. 387, 120 A. 59; St. Pierre's Case, 142 Me. 145, 48 A. (2d) 635.

Sec. 12. Compensation for partial incapacity.—While the incapacity for work resulting from the injury is partial, the employer shall pay the injured employee a weekly compensation equal to 2/3 the difference, due to said injury, between his average weekly wages, earnings or salary before the accident and the weekly wages, earnings or salary which he is able to earn thereafter, but not more than $27 a week; and in no case shall the period covered by such compensation be greater than 300 weeks from the date of the accident. (R. S. c. 26, § 12. 1949, c. 380, § 3. 1953, c. 357, § 2.)

Purpose of section.—The intent of this section is to secure to the workman a percentage of the wages which he has lost through incapacity caused by accidental injury. It measures the loss by the difference between his earnings before and what he is able to earn after the accident. Ray's Case, 122 Me. 108, 119 A. 191.

It is partial "incapacity for work," the loss of earning power, for which this section provides compensation. Connelly's Case, 122 Me. 289, 119 A. 664.

Compensation based on difference between earnings before injury and ability to earn thereafter.—The requirement of this section is that an employer pay compensation to an injured employee during partial incapacity in an amount represent-

ing a percentage of the difference between his earnings before injury and what he is able to earn thereafter. St. Pierre's Case, 142 Me. 145, 48 A. (2d) 635; Shoemaker's Case, 142 Me. 321, 51 A. (2d) 484.

This section provides a yardstick for measuring the amount of compensation when the incapacity of the employee is partial. That yardstick requires factual finding of the difference between the earnings of the employee before an injury and his ability to earn thereafter. St. Pierre's Case, 142 Me. 145, 48 A. (2d) 635.

An award for partial disability depends upon the claimant's earning capacity. Foley v. Dana Warp Mills, 122 Me. 563, 119 A. 805.

And commission must determine employee's earning ability.—It is the duty of the commission, the trier of facts in compensation cases, to determine the actual earning ability of the employee. St. Pierre's Case, 142 Me. 145, 48 A. (2d) 635; Shoemaker's Case, 142 Me. 321, 51 A. (2d) 484.

Which is not limited to employment engaged in prior to injury.—The workman's wage loss resulting from partial incapacity is not measured solely by the yardstick of his former employment. Compensation is awarded not for incapacity to do the same kind of work as before, but for incapacity to earn in his crippled physical condition. The inquiry is whether, as a matter of fact, he can perform any kind of available work and thereby earn wages. This need not be in the same kind of employment in which he was engaged at the time of the injury. Beaulieu's Case, 132 Me. 410, 171 A. 696. See Milton's Case, 122 Me. 437, 120 A. 533.

Partial disability is defined by this section as being the difference between what he was earning, his weekly wages, before the injury and the weekly wages "which he is able to earn thereafter." It does not limit it to the same kind of employment in which he was engaged at the time of the injury. Connelly's Case, 122 Me. 289, 119 A. 664.

"Incapacity for work" includes lack of opportunity to work.—The phrase "incapacity for work" as used in this section has come to have a well-settled meaning. It includes not merely want of physical ability to work but lack of opportunity to work. Ray's Case, 122 Me. 108, 119 A. 191. See note to § 11.

"Incapacity for work" means loss of earning power as a workman in consequence of the injury whether the loss manifests itself in inability to perform such work as may be obtainable or inability to secure work to do. Ray's Case, 122 Me. 108, 119 A. 191.

That "incapacity to work" means inability to get work because of the injury, as well as inability to perform the work because of the injury, seems to be fairly established. Ray's Case, 122 Me. 108, 119 A. 191.

"Incapacity for work" may mean physical inability to do work so as to earn wages, or it may mean inability to earn wages by reason of inability to get employment. Ray's Case, 122 Me. 108, 119 A. 191.

Not due to employee's own fault or general business depression. — Compensation under this section is awarded for loss of capacity to earn, and this includes lack of opportunity to work not due to the employee's own fault, or to general business depression. Milton's Case, 122 Me. 437, 120 A. 533.

In measuring the compensation of an employee for partial incapacity, the loss or reduction in wages that he is able to earn after the accident, which is occasioned by general business depression, must be considered. In so far as the wages which he is able to earn now are reduced by that element, the loss must be borne by him, not the employer. It is not a loss due to the injury. Beaulieu's Case, 132 Me. 410, 171 A. 696.

Only incapacity existing within 300 weeks is compensable under this section. Ripley's Case, 126 Me. 173, 137 A. 54.

But the 300 week period prescribed by this section is not a limitation of the time for filing petitions. Ripley's Case, 126 Me. 173, 137 A. 54. See § 33, re limitation for filing petitions.

Applied in Cacciagiano's Case, 124 Me. 422, 130 A. 275.

Cited in Merchant's Case, 118 Me. 96, 106 A. 117; Clark's Case, 120 Me. 133, 113 A. 51; Morin's Case, 122 Me. 338, 120 A. 44; Walker's Case, 122 Me. 387, 120 A. 59; Hustus' Case, 123 Me. 428, 123 A. 514; Comstock's Case, 129 Me. 467, 152 A. 618.

Sec. 13. Compensation for specified injuries; permanent impairment.—In cases of injuries included in the following schedule the incapacity in each such case shall be deemed to be total for the period specified; and after such specified period, if there be a total or partial incapacity for work resulting

from the injury, the employee shall receive compensation while such total or partial incapacity continues under the provisions of sections 11 and 12 respectively. The specific periods during which compensation for presumed total incapacity is to be paid because of the injuries hereinafter specified shall be as follows:

For the loss of a thumb, 50 weeks.

For the loss of the 1st finger, commonly called the index finger, 30 weeks.

For the loss of the 2nd finger, commonly called the middle finger, 25 weeks.

For the loss of the 3rd finger, commonly called the ring finger, 18 weeks.

For the loss of the 4th finger, commonly called the little finger, 15 weeks.

The loss of the 1st phalanx of the thumb or of any finger shall be considered to be equal to the loss of ½ of said thumb or finger, and the compensation therefor shall be ½ the amount above specified. The loss of more than 1 phalanx shall be considered as the loss of the entire thumb or finger. Provided, however, that in no case shall the amount received for the loss of a thumb and more than 1 finger of the same hand exceed the amount specified in this schedule for the loss of a hand.

For the loss of the great toe, 25 weeks.

For the loss of one of the toes other than the great toe, 10 weeks.

The loss of the 1st phalanx of any toe shall be considered to be equal to the loss of ½ of said toe, and the compensation therefor shall be ½ the amount above specified. The loss of more than 1 phalanx shall be considered as the loss of the entire toe.

For the loss of a hand, 125 weeks.

For the loss of an arm, or any part thereof above the wrist, 150 weeks.

For the loss of a foot, 125 weeks.

For the loss of a leg, or any part thereof above the ankle, 150 weeks.

For the loss of an eye, or the reduction of the sight of an eye, with glasses, to 1/10 of the normal vision, 100 weeks.

For the total and permanent loss of hearing in one ear, 50 weeks.

For the total and permanent loss of hearing in both ears, 100 weeks.

In all other cases of injury to the above-mentioned members or eyes where the usefulness of any physical function thereof is permanently impaired, the specific compensable periods for presumed total incapacity on account thereof shall bear such relation to the periods above specified as the percentage of permanent impairment due to the injury to such members or eyes shall bear to the total loss thereof; and the commission upon petition therefor by either party shall determine such percentage. (R. S. c. 26, § 13. 1949, c. 405. 1953, c. 362, § 1.)

The legislature did not give this section retroactive effect. Phillips' Case, 123 Me. 501, 124 A. 211.

The law establishes the basis upon which compensation shall be computed (§§ 11, 12) and the duration of the period of presumed total disability is fixed by this section. Morin's Case, 122 Me. 338, 120 A. 44.

"Loss" means severance.—In this section, the word "loss" is used in the same sense as in § 11, and as there, is equivalent to severance or amputation. Merchant's Case, 118 Me. 96, 106 A. 117; Clark's Case, 120 Me. 133, 113 A. 51. See note to § 11.

Here, as in § 11, the idea of severance is apparent from the several clauses concerning the loss of an arm or any part above the wrist, for the loss of a leg or any part above the ankle, etc. And the distinction is again clearly made when it is specified that "for the loss of an eye, or the reduction of the sight of an eye," etc. Were there no difference between loss and loss of use, there was no need of this careful phrasing. Throughout these sections when loss of use without removal or severance is contemplated, it is so stated in unambiguous words and when "loss" is used it means loss in the ordinary acceptation of the term, that is, the physical loss of a member. Merchant's Case, 118 Me. 96, 106 A. 117.

Unless a workmen's compensation act provides that when a member is so impaired as to be permanently incapable of use compensation shall be awarded as for

the "loss" thereof, "loss" of a member is construed to mean loss by severance only. Merchant's Case, 118 Me. 96, 106 A. 117.

And "loss of a foot" means the entire foot.—The statutory words "the loss of a foot," means the loss of an entire foot and not a fractional part thereof. McLean's Case, 119 Me. 322, 111 A. 383; Clark's Case, 120 Me. 133, 113 A. 51.

Compensation awarded without reference to earning capacity.—Compensation under this section is awarded without reference to existing earning capacity. Walker's Case, 122 Me. 387, 120 A. 59.

And is not based on presumption that lost member was normal.—The compensation provided for in this section is not necessarily based on the presumption that the injured workman previously had a normal arm, leg, hand or eye. If he had an arm, leg, hand or eye capable of performing the ordinary functions of such members, even though its normal efficiency was impaired, and, as a result of an injury, the arm, leg or hand is severed, or the sight of an eye is reduced to or below one-tenth of the normal vision, he would be entitled to compensation for total incapacity for the specified period fixed in the section. Borello's Case, 125 Me. 395, 134 A. 374.

Periods specified begin from date of amputation.—The periods specified in this section for the loss of a member begin to run from the date of the amputation. Phillips' Case, 123 Me. 501, 124 A. 211.

And are not affected by payments under § 11.—The specified periods under this section are not affected by any period for which compensation is paid under § 11. Phillips' Case, 123 Me. 501, 124 A. 211.

Where an employee receives compensation for injury to a member under § 11, and the member is subsequently amputated, this section begins where § 11 leaves off. Section 11, covering total disability, plus this section, covering loss of members, presents a natural and reasonable interpretation of the two sections, when construed together, is in accord with the intention of the legislature, is consistent with every other provision of the act and gives the employee no more than just compensation, as the result of his injuries. Phillips' Case, 123 Me. 501, 124 A. 211.

Last paragraph applicable to loss of use.—The last paragraph of this section provides for cases of loss or impairment of use of a member where the member itself is not lost. Clark's Case, 120 Me. 133, 113 A. 51.

It is evident that the last paragraph was intended to enlarge the scope of the law and to provide compensation for permanent impairment of the usefulness of a member, or of any physical function thereof, named in the schedule, where previously compensation for loss of the member to the extent specified could alone be had. That the provision is confined to the members named in the schedule is clear, because the injuries named in the schedule are the basis for determining the extent of incapacity. Clark's Case, 120 Me. 133, 113 A. 51.

Formerly, the last paragraph of this section began with the words "In all cases in this class." It was held, that the paragraph was not limited to cases wherein there was an amputation. See Clark's Case, 120 Me. 133, 113 A. 51.

Extent of impairment determined by commission in proceeding under last clause.—In a proceeding upon a petition under the last clause of this section, the extent of impairment rests for determination in the sound judgment of the industrial accident commission upon consideration of the evidence. Michaud's Case, 122 Me. 276, 119 A. 627.

Petition under this section should conform to § 32.—A petition under the last clause of this section should conform to the requirements of § 32. Michaud's Case, 122 Me. 276, 119 A. 627.

Award for specified period no bar to award for subsequent disability.—The making of a decree awarding specific compensation for presumed total disability does not bar an award of compensation for subsequent actual disability. Recurring or continuing disability following a period of presumed total disability are adequately provided for by this section. Walker's Case, 122 Me. 387, 120 A. 59.

Under this section, compensation for either "total or partial incapacity for work" can be secured after the expiration of the specified period, if the facts warrant it. Lemelin's Case, 123 Me. 478, 124 A. 204.

A petition for further compensation for partial incapacity for work, after the expiration of the specific period for which a claimant has been awarded and paid compensation for presumed total incapacity, is expressly authorized by this section. Crabtree's Case, 123 Me. 554, 121 A. 678.

And agreement for compensation no bar to petition under this section.—An approved agreement under § 32 providing specific compensation for a period of presumed total disability does not bar or interfere with a petition for compensation

for actual disability after such specified period. Walker's Case, 122 Me. 387, 120 A. 59.

And no time limit for filing petition after specified period has ended.—When an agreement for compensation for a compensable injury resulting in presumed total disability for a specified period, has been seasonably filed and approved in accordance with the provisions of § 32, the case is before the commission, and there is no time limit for filing a petition for compensation for total or partial incapacity for work resulting from the injury specified, continuing after the period specified. The legislature apparently considered that a time limit is unnecessary in view of the interest of the claimant to promptly make application for compensation after the specified period of total disability has expired. Morin's Case, 122 Me. 338, 120 A. 44.

The statutes fix no limitation within which a petition for incapacity for labor beyond the specified period under this section should be filed. Such is not a petition for review under § 38, nor an original petition under § 32, filed in the absence of an agreement of the parties, and the limitation of § 33 is not applicable. Lemelin's Case, 123 Me. 478, 124 A. 204.

An agreement having once been filed or a decree made, the limitations contained in § 33 do not apply to petitions to determine the incapacity following a specific agreement under this section. Ryan's Case, 123 Me. 527, 124 A. 322.

If the injury is the same.—An agreement or decree covering a specified injury resulting from an accident cannot be held to remove the limitations of § 33 as to any other injury received from the same accident, but not covered by the prior agreement or decree, except in cases where the injury described in the petition, though differing from that described in the prior agreement or decree, is a result thereof, as in cases of amputations. Ryan's Case, 123 Me. 527, 124 A. 322.

"Incapacity for work" defined.—See notes to §§ 11, 12.

Applied in Maxwell's Case, 119 Me. 504, 111 A. 849; Foster's Case, 123 Me. 27, 121 A. 89; Martin's Case, 125 Me. 221, 132 A. 520; Baker's Case, 143 Me. 103, 55 A. (2d) 780.

Quoted in part in Estabrook v. Steward Read Co., 129 Me. 178, 151 A. 141; Comstock's Case, 129 Me. 467, 152 A. 618.

Cited in Lemelin's Case, 121 Me. 72, 115 A. 551; Graney's Case, 123 Me. 571, 124 A. 204; Nickerson's Case, 125 Me. 285, 133 A. 161; Ripley's Case, 126 Me. 173, 137 A. 54.

Sec. 14. Permanent total incapacity due partly to prior injury; second injury fund.—If an employee who has previously lost, or lost the use of, 1 hand, 1 arm, 1 foot, 1 leg or 1 eye, becomes permanently and totally incapacitated through the loss or loss of use of another member or organ, the employer shall be liable only for the compensation payable for such second injury. Provided, however, that in addition to such compensation and after the completion of the payments therefor, the employee shall be paid the remainder of the compensation that would be due for permanent total incapacity, out of a special fund known as the "second injury fund," and created for such purpose in the following manner:

In every case of the death of an employee under the provisions of this act where there is no person entitled to compensation, the employer shall pay to the industrial accident commission the sum of $300, to be deposited with the treasurer of state for the benefit of said fund, and the commission shall direct the distribution thereof. (R. S. c. 26, § 14.)

Purpose of section.—The purpose of this section is not only to relieve the employer from liability for incapacity occasioned by the first injury or diseased condition as the case may be, but to minimize the chance that wage earners may be denied employment because of a physical handicap. Gagnon's Case, 144 Me. 131, 65 A. (2d) 6.

This section applies only to the specific injuries enumerated. Gagnon's Case, 144 Me. 131, 65 A. (2d) 6.

Sec. 15. Compensation for death of employee; how apportioned.—If death results from the injury, the employer shall pay the dependents of the employee, wholly dependent upon his earnings for support at the time of his accident, a weekly payment equal to 2/3 his average weekly wages, earnings or salary, but not more than $27 nor less than $15 a week, from the date of death for

a period ending 300 weeks from the date of the accident, and in no case to exceed $8,000. Provided, however, that if the dependent of the employee to whom compensation shall be payable upon his death is the widow of such employee, upon her death or remarriage compensation to her shall cease; and the compensation to which she would have been entitled thereafter but for such death or remarriage shall be paid to the child or children, if any, of the deceased employee, including adopted and stepchildren, under the age of 18 years, or over said age but physically or mentally incapacitated from earning, who are dependent upon the widow at the time of her death or remarriage. If the dependent is the widower, upon his death the remainder of the compensation which would otherwise have been payable to him shall be payable to the children above specified, if any, who at the time thereof are dependent upon him. In case there is more than 1 child thus dependent, the compensation shall be divided equally among them. Provided further, that except in the case of dependents who are physically or mentally incapacitated from earning, compensation payable to any dependent child under the age of 18 years shall cease upon such child's reaching the age of 18 years or upon marriage.

If the employee leaves dependents only partly dependent upon his earnings for support at the time of his accident, the employer shall pay such dependents for the said period of 300 weeks, a weekly compensation equal to the same proportion of the weekly payments herein provided for the benefit of persons wholly dependent as the total amount contributed by the employee to such partial dependents for their support during the year prior to his accident bears to the earnings of the employee during said period. (R. S. c. 26, § 15. 1949, c. 380, § 4. 1951, c. 95. 1953, c. 364, § 1.)

Purpose of section.—The intent of this section was not to burden the industries of the state, but to transfer the burdens resulting from industrial accidents, regardless of who may be at fault, from the individual to the industry and finally distribute it upon society as a whole, by compelling the industry, in which the accident occurs, through the employer, to contribute to the support of those who are actually and lawfully dependent upon the deceased for their sustenance during his lifetime. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719. See note preceding § 1.

One of the beneficent purposes of the compensation act is to secure to an employee's dependents a portion of the return that his earning capacity would have procured for them from the industry in the service of which the workman lost his life. Juan's Case, 125 Me. 361, 134 A. 161.

This section defines the rights of dependents of employees, where death results from injury. Comstock's Case, 129 Me. 467, 152 A. 618.

From the language of the last paragraph of this section, it will be seen that the ratio of the computation, therein prescribed, is predicted upon the premise of "the benefit of persons wholly dependent." Accordingly, "wholly dependent" must first be defined and then the degree established in case of partial dependency. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719.

Dependency prerequisite to compensation under this section.—Excepting the cases enumerated in § 2, paragraph VIII, where "dependency" is defined as conclusive, a state of dependency must first be found as a condition precedent to holding the employer liable for the payment of any sum, whatever, for the support of a claimant. If there is no dependency, there is no support contemplated by this section. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719.

The claimant, according to the spirit and purpose of this section, must show that he was actually and lawfully dependent or partially dependent, as the case may be, and unable to support his family, without assistance at the time of the injury of the person upon whose earnings he relies. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719.

The purpose of the distribution authorized by this section was to aid those actually and lawfully dependent and not for the purpose of enabling a claimant to live in a manner inconsistent with his position in life, his method of living and his earnings. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719.

Dependency is a condition precedent to award of compensation. Henry's Case, 124 Me. 104, 126 A. 286; Weliska's Case, 125 Me. 147, 131 A. 860.

It was not intended under the compen-

sation act to compel contributions by an employer to one to whom an injured employee had been furnishing financial assistance to further some business enterprise merely because the person so assisted was dependent on such assistance to save himself from financial loss. Only in so far as the claimant is able to show that he was relying on such assistance at the time of the injury as reasonably necessary for the support of himself and those dependent upon him in a manner suited to their station in life can the employer and the industry be compelled to contribute. Dumond's Case, 125 Me. 313, 133 A. 736.

But child need not prove dependency on employee when widow dies.—When compensation has been awarded a widow under this section, upon her death it is not necessary that a child claiming the compensation prove that he was a dependent of the employee at the time of his injury. DeMeritt's Case, 128 Me. 299, 147 A. 210.

Under this section, upon the death of the employee's widow, a child's dependency and right to compensation is not governed by § 2, paragraph VIII. He would be entitled to compensation not as a dependent of the employee but as his child dependent at the death of his widow upon his widow. DeMeritt's Case, 128 Me. 299, 147 A. 210.

Compensation to employee prior to death no bar to dependent's claim.—Compensation paid to an injured employee to the date of his death limits the time during which compensation may be recovered by his dependents but is not a bar to recovery. Clark's Case, 125 Me. 408, 134 A. 450.

And amount paid employee under § 11 not credited to employer's liability under this section.—The clause in this section limiting the amount payable to dependents was not intended as a limitation upon the employer's liability for injury and for injury and death, should death follow injury after compensation has been paid to the injured employee. A credit for the amount paid to the injured employee under § 11 is not allowed upon the employer's liability to dependents under this section. Nickerson's Case, 125 Me. 285, 133 A. 161.

The rights of an employee totally incapacitated for work are fixed by § 11, which applies to such injuries and nothing else. The rights of dependents of an employee who dies as the result of an injury are fixed by this section. In these sections the limitations of the periods during which compensation is to be paid, and of the aggregate amounts of compensation are different, thus clearly indicating that they are intended to apply only to proceedings under the sections in which they are respectively found. Nickerson's Case, 125 Me. 285, 133 A. 161.

The compensation to the employee is distinct from that to the dependent. An allowance of payments made to the employee cannot be made against the compensation to the dependent, and vice versa. Nickerson's Case, 125 Me. 285, 133 A. 161.

The compensation expressly given the dependent by this section should not be permitted to be diminished by crediting sums paid the employee in his lifetime. Nickerson's Case, 125 Me. 285, 133 A. 161.

Amount paid dependents measured by wages of deceased without regard to benefits received by him.—Where the claimant is wholly dependent upon the deceased it is of no consequence whether he contributed all his wages or only a fraction of them to the dependent, and it is of no consequence whether the deceased did or did not receive any benefit from the dependent. The sum to be paid is measured by the wages of the deceased not by the injury done to the dependent. The amount to be paid in case the dependent was partly dependent only is to be a portion of that paid in case of those wholly dependent and the amount is to be determined on the same basis, that is to say, it is to be measured not by the injury done the dependent but by that proportion of the average weekly wages of the deceased which the amount of the wages contributed by him to the dependents bore to the amount of his annual earnings without regard to the benefits, if any, received by the deceased from the dependents. Heughan's Case, 129 Me. 1, 149 A. 151.

In determining the amount "contributed to dependents," no deduction of the cost of the deceased employee's board, while living at his parents and paying no board, should be made. Heughan's Case, 129 Me. 1, 149 A. 151.

Death must have resulted from injury.—The statutory ground upon which a dependent may recover is proof that the decedent died as a direct result of the injury sustained. Dulac v. Proctor & Bowie Co., 120 Me. 324, 114 A. 293.

An award of compensation under this section is erroneous where there was no causal relation between the injury and the

death of the plaintiff's decedent. Dulac v. Proctor & Bowie Co., 120 Me. 324, 114 A. 293.

If the death can be traced directly to the accident, and as a result of the injuries there received, it brings the case, regardless of other facts, within the purview of this section. Ballou's Case, 121 Me. 282, 116 A. 591.

And within 300 weeks from date of accident.—In a compensation case under this section, the proof must show, in order to establish compensable status for a dependent, not alone death of the employee from injury, but death within three hundred weeks from the date of the accident. Comstock's Case, 129 Me. 467, 152 A. 618.

Death from pre-existing disease aggravated by accident is death from injury.—Even where a workman dies from a pre-existing disease, if the disease is aggravated or accelerated under certain circumstances which can be said to be accidental, his death results from injury by accident. Acceleration or aggravation of a pre-existing disease is an injury caused by accident. Patrick v. J. B. Ham Co., 119 Me. 510, 111 A. 912. See note to § 8.

If, by weakening resistance, or otherwise, a compensable injury so influences the progress of an existing disease as to cause death, the proof in that regard need not establish more. Ferris' Case, 132 Me. 31, 165 A. 160, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

Death need not be shown to have resulted from a sole source. Death resulting from the concurrence of an accident and a disease has been held to be compensable. Ferris' Case, 132 Me. 31, 165 A. 160.

If the employee, but for the injury, would not have died at the time at which, and in the way in which, he did die, then, within the meaning of the compensation act, the unfortunate occurrence, though it merely hastened a deep-seated disorder to destiny, must be held to have resulted in an injury causing death. Lachance's Case, 121 Me. 506, 118 A. 370; Comer's Case, 130 Me. 373, 156 A. 516.

Where an employee affected with disease receives a personal injury under such circumstances that the act in question would entitle him to compensation had there been no disease involved, and such disease is materially hastened to a final culmination in death by the injury, there may be an award, if it is shown that such injury was the result of accident. In such cases, the court will not undertake to measure the degree of disability due respectively to the disease, and to the accident, but the consequence of the disease will be attributed solely to the accident. Dulac v. Proctor & Bowie Co., 120 Me. 324, 114 A. 293.

The court will not differentiate between a direct cause and a contributing cause, where a pathological predisposition to infirmity or disease was aggravated or brought into activity resulting in death by reason of the contributing injury. Dulac v. Proctor & Bowie Co., 120 Me. 324, 114 A. 293.

Claimant must establish right to compensation.—The burden of proof rests upon the claimant under this section to prove the facts necessary to establish a right to compensation. Dulac v. Proctor & Bowie Co., 120 Me. 324, 114 A. 293.

In a proceeding for compensation for the death of an employee, the burden is upon the petitioner to prove his case. Kelley's Case, 123 Me. 261, 122 A. 580.

By a preponderance of evidence.—The dependent must go further than simply to show a state of facts which is equally consistent with no right to compensation as it is with such right. Mailman's Case, 118 Me. 172, 106 A. 606; Dulac v. Proctor & Bowie, 120 Me. 324, 114 A. 293.

He can no more prevail if factors necessary to support the claim are left to surmise, conjecture, guess or speculation, than can a plaintiff in the ordinary action in tort or contract. A sure foundation must be laid by a preponderance of evidence in support of the claim before the dependent can succeed. Dulac v. Proctor & Bowie, 120 Me. 324, 114 A. 293.

And must show death by accident arising out of and in course of employment.—To sustain a decree awarding compensation to a dependent, it must appear that there was produced at the trial of facts competent legal evidence that the deceased died or was disabled as the result of an accident arising out of and in the course of his employment by the defendant. Mailman's Case, 118 Me. 172, 106 A. 606. See note to § 38.

But proof need not be direct and claimant entitled to presumptions.—In attempting to prove accidental death it is not necessary to negative every other possibility of death except that by accidental means. Nor must the proof be necessarily direct and positive; it may be by circumstances. Moreover there are legal presumptions which may be properly considered. "In human experience it is the common desire and effort to preserve life, rather than de-

stroy it, and hence the law, where a person is found dead, imputes to the circumstances the prima facie significance that death was caused by accident rather than suicide, and that presumption persists in its legal force to negative the fact of suicide until overcome by evidence." Westman's Case, 118 Me. 133, 106 A. 532.

When the employee dies at his post of duty a presumption may reasonably be entertained that he was then performing his duty and engaged in the work for which he was employed, from which a causal relation between his employment and the accident may be inferred. Mailman's Case, 118 Me. 172, 106 A. 606.

Evidence sufficient to show death from accidental injury. — See Mailman's Case, 118 Me. 172, 106 A. 606; Patrick v. J. B. Ham Co., 119 Me. 510, 111 A. 912; Larrabee's Case, 120 Me. 242, 113 A. 268; Jacque's Case, 121 Me. 353, 117 A. 306; Lachance's Case, 121 Me. 506, 118 A. 370.

Evidence insufficient to show death from accidental injury.—See Dulac v. Federal Mutual Liability Ins. Co., 120 Me. 324, 114 A. 293.

History of section. — See Nickerson's Case, 125 Me. 285, 133 A. 161.

Applied in Hight v. York Mfg. Co., 116 Me. 81, 100 A. 9; Smith v. Heine Safety Boiler Co., 119 Me. 552, 112 A. 516; Martin's Case, 125 Me. 49, 130 A. 857; Hull's Case, 125 Me. 135, 131 A. 391; White's Case, 126 Me. 105, 136 A. 455; Tuttle's Case, 126 Me. 349, 138 A. 559; Chapman v. Hector J. Cyr Co., 135 Me. 416, 198 A. 736.

Quoted in part in Brochu's Case, 129 Me. 391, 152 A. 535.

Stated in Drouin v. Ellis C. Snodgrass Co., 138 Me. 145, 23 A. (2d) 631, overruled in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

Cited in Estabrook v. Steward Reed Co., 129 Me. 178, 151 A. 141.

Sec. 16. Burial expenses.—If the employee dies as a result of the injury, the employer shall pay, in addition to any compensation and medical benefits provided for in this act, the reasonable expenses of burial, not to exceed $350. (R. S. c. 26, § 16. 1953, c. 395, § 1.)

Former provisions of section.—For a consideration of this section when it contained provisions for payment of expenses of last illness and burial where the employee died without dependents, see Merrill's Case, 126 Me. 215, 137 A. 72.

Applied in Martin v. Biddeford, 138 Me. 26, 20 A. (2d) 715.

Cited in Simpson's Case, 144 Me. 162, 66 A. (2d) 417.

Sec. 17. Compensation unpaid at death.—If the employee shall die before having received the entire amount of compensation to which he is entitled under the provisions of this act, the compensation payable to him before his death shall be paid to his dependents, if any; otherwise to his executor or administrator. No compensation is payable for presumed total incapacity for any period following the death of an employee. (R. S. c. 26, § 17.)

Sec. 18. Injury or death due to willful intention or intoxication.—No compensation or other benefits shall be allowed for the injury or death of an employee where it is proved that such was occasioned by his willful intention to bring about the injury or death of himself or of another, or that the same resulted from his intoxication while on duty. This provision as to intoxication shall not apply, however, if the employer knew that the employee was intoxicated or that he was in the habit of becoming intoxicated while on duty. (R. S. c. 26, § 18.)

Intoxication is no defense in a compensation case where there is no evidence of the employee being at all intoxicated while about his work at the time of the accident. Martin v. Biddeford, 138 Me. 26, 20 A. (2d) 715.

Injury held not result of willful intent.—See Dulac v. Dumbarton Woolen Mills, 120 Me. 31, 112 A. 710.

Stated in Berry v. M. F. Donovan & Sons, 120 Me. 457, 115 A. 250.

Cited in Simpson's Case, 144 Me. 162, 66 A. (2d) 417.

Sec. 19. Compensation unaffected by employee's savings or insurance.—No savings or insurance of the injured employee independent of this act shall be taken into consideration in determining the compensation to be paid

hereunder, nor shall benefits derived from any source other than the employer be considered in fixing the compensation due. (R. S. c. 26, § 19.)

The meaning of this section is that if the employee has savings, or individual insurance, or advantage, or gain, independent of his contract of employment, the basis of computing the amount of compensation is not thereby affected. The section contemplates that compensation is to be paid for diminished capacity to earn wages. Gross' Case, 132 Me. 59, 166 A. 55.

Sec. 20. Notice of accident within 30 days.—No proceedings for compensation under the provisions of this act, except as hereinafter provided, shall be maintained unless a notice of the accident shall have been given within 30 days after the date thereof. Such notice shall include the time, place and cause of the accident, and the nature of the injury, together with the name and address of the person injured. It shall be given by the person injured or by a person in his behalf; or, in the event of his death, by his legal representatives, or by a dependent or by a person in behalf of either.

Such notice shall be given to the employer, or to one employer if there are more employers than one; or, if the employer is a corporation, to any official thereof; or to any employee designated by the employer as one to whom reports of accidents to employees should be made. It may also be given to the general superintendent or to the foreman in charge of the particular work being done by the employee at the time of the accident. (R. S. c. 26, § 20.)

If a workman knows that his disablement is due to an industrial accident he should, except when prevented by illness or other cause, speedily inform his employer. Bartlett's Case, 125 Me. 374, 134 A. 163.

Notice of the accident must be given within thirty days after the happening thereof. Bartlett's Case, 125 Me. 374, 134 A. 163.

And proof must show notice within requisite time.—In no case may an injured workman recover compensation, unless his proof shall show that he gave notice within the requisite time, except where the employer or his agent has knowledge of the injury. Lachance's Case, 121 Me. 506, 118 A. 370. See § 21 and note thereto.

Failure to give the notice required by this section, it not appearing that the employer or his agent had knowledge of the injury, bars one from being entitled to compensation. Butts' Case, 125 Me. 245, 132 A. 698.

Purpose of notice.—The purpose of notice to the employer is that he may have opportunity for the protection of his rights. Lachance's Case, 121 Me. 506, 118 A. 370.

The law intends that the fact of the accident shall be brought home to the knowledge of the employer by notice received or actual knowledge obtained, at a reasonably early date so that he may make such investigation as he desires while memory of the occurrence is yet fresh. Bartlett's Case, 125 Me. 374, 134 A. 163.

Whether section complied with is question of law.—The question whether the notice has been given to the employer within the time allowed by the legislature is one of law. Wardwell's Case, 121 Me. 216, 116 A. 447.

Former statutory provisions.—For consideration of a former provision of this section requiring that a claim for compensation be made within one year after the injury, see Smith v. Heine Safety Boiler Co., 119 Me. 552, 112 A. 516; Hustus' Case, 123 Me. 428, 123 A. 514. See now § 33, re limitation for filing petition.

Former statutory provisions (R. S. 1916, c. 50, § 18) specifically required the notice of injury to be written. See Lachance's Case, 121 Me. 506, 118 A. 370. Also, a former statute (R. S. 1916, c. 50, § 19) provided with great particularity how the written notice was to be served upon the various classes of employers. See Simmons' Case, 117 Me. 175, 103 A. 68.

Applied in Spiller's Case, 122 Me. 492, 120 A. 626; Crawford's Case, 127 Me. 374, 143 A. 464.

Stated in Fogg's Case, 125 Me. 524, 134 A. 626.

Cited in Brackett's Case, 126 Me. 365, 138 A. 557; Sheehan's Case, 128 Me. 177, 146 A. 258.

Sec. 21. Notice unnecessary if employer has knowledge; extension of period for notice.—A notice given under the provisions of the preceding section shall not be held invalid or insufficient by reason of any inaccuracy in stating any of the facts therein required for proper notice, unless it is shown

that it was the intention to mislead and that the employer was in fact misled thereby. Want of such notice shall not be a bar to proceedings under the provisions of this act if it be shown that the employer or his agent had knowledge of the accident. Any time during which the employee is unable by reason of physical or mental incapacity to give said notice, or fails to do so on account of mistake of fact, shall not be included in the 30-day period above specified. In case of the death of the employee within said period, there shall be allowed for giving said notice 3 months after such death. (R. S. c. 26, § 21.)

The thirty-day notice required by § 20 is rendered unnecessary by knowledge clearly brought home to the employer. Pennell v. Portland, 124 Me. 14, 125 A. 143.

An employer's contention that it had not received notice of the injury required by § 20 cannot be sustained where there was evidence to justify the commissioner's finding that the employer had sufficient knowledge of the injury. Bearor's Case, 135 Me. 225, 193 A. 923.

But knowledge must be had within 30 days.—Knowledge in lieu of notice is knowledge of the accident and must also be had within thirty days after its happening. Bartlett's Case, 125 Me. 374, 134 A. 163.

What constitutes knowledge.—The word "knowledge" is in this section employed in its ordinary sense. It does not necessarily mean first hand knowledge. It does not require proof that the employer witnessed the accident. In common usage the word knowledge comprehends specific information. On the other hand to have knowledge means more than to be put upon inquiry. Bartlett's Case, 125 Me. 374, 134 A. 163.

Knowledge by an employer of the fact that an employee is suffering from a strangulated hernia is not equivalent to knowledge that the hernia was caused by an accident arising out of and in the course of his employment. Bartlett's Case, 125 Me. 374, 134 A. 163.

For cases concerning oral notice as knowledge when the notice under § 20 was required to be in writing, see Simmons' Case, 117 Me. 175, 103 A. 68; Lachance's Case, 121 Me. 506, 118 A. 370; Sheehan's Case, 128 Me. 177, 146 A. 258.

Who is agent within meaning of this section.—To constitute a person an agent, in the sense in which the word is used in this section, such person should, for the time being, stand in the place of the employer, or such relationship should exist between him and the employer that the agent's knowledge of injury to an employee would in the ordinary course of business conduct be communicated to the principal. A superintendent or foreman is such an agent. But one who merely, at time, supervises a portion of the work of certain employees does not fall within the rule. Sheehan's Case, 128 Me. 177, 146 A. 258.

The term "agent" is used in this section in a broad sense. It includes superintendents and foremen, but it does not, however, include mere fellow servants. Sheehan's Case, 128 Me. 177, 146 A. 258.

As a usual rule, in industrial accident cases, foremen are included in the category of those whose knowledge is regarded as that of the principal. Lachance's Case, 121 Me. 506, 118 A. 370.

A room foreman in a mill is an agent through whom the employer may be charged with knowledge of an injury, where the claimant fails to give the notice required by § 20, and if there is evidence of such knowledge on which the decree can rest it will not be set aside. Marchavich's Case, 123 Me. 495, 124 A. 209.

Under the provision of this section declaring that want of notice shall not be a bar to proceedings under the act, if it is shown that the employer or his agent had knowledge of the injury, the agents acquiring such knowledge are not limited, in the case of corporations, to agents to whom, by virtue of § 20, notice of the injury may be given. Simmons' Case, 117 Me. 175, 103 A. 68.

Purpose of provision excusing delay in giving notice.—The legislature inserted the provision as to excuse for failure to comply with the strict thirty-day limit with a definite purpose, and that purpose was the protection of the legal rights of the parties in meritorious cases when the facts should warrant it. It employed comprehensive and elastic terms to accomplish that purpose, and to enable the court to grant relief from hardship or misfortune. Wardwell's Case, 121 Me. 216, 116 A. 447; Brackett's Case, 126 Me. 365, 138 A. 557.

Such provision is remedial and should be applied broadly and reasonably.—The third sentence of this section is a remedial provision and it is the duty of the court to apply it in a broad and reasonable way to the facts of each case that may call

for its consideration. Wardwell's Case, 121 Me. 216, 116 A. 447.

The industrial accident commission is a creature of the statute. No jurisdiction is conferred except as the statute confers it. When, however, the granted powers are discretionary within reasonable limits, as in this section, then the provision of § 30, that in interpreting the act a liberal construction shall be given with a view to carrying out its general purpose, applies with full force. Wardwell's Case, 121 Me. 216, 116 A. 447.

Finding as to excuse for delay in giving notice final.—In case of controverted facts which would tend to excuse a failure to notify within the thirty days required by § 20, it is the province of the commissioner to determine those facts like any other issue of fact before him and his finding is final provided there is some competent evidence to support it. Wardwell's Case, 121 Me. 216, 116 A. 447. See § 37 and note thereto.

When mistake of fact exists.—A mistake of fact within the meaning of this section takes place either when some fact which really exists is unknown or some fact is supposed to exist which really does not exist. Brackett's Case, 126 Me. 365, 138 A. 557; Crawford's Case, 127 Me. 374, 143 A. 464.

When an accident results in an injury which remains latent for more than thirty days, the only immediate and perceptible result of the accident being so trivial that the injured person does not regard it as of material consequence and is reasonably justified in reaching that conclusion, he may be excused, on the ground of mistake, within the meaning of the word as used in this section, for failure to give notice of the accident as required in § 20, provided that notice is given within a reasonable time [now 30 days] after the latent injury becomes apparent. Brackett's Case, 126 Me. 365, 138 A. 557; Crawford's Case, 127 Me. 374, 143 A. 464. For other cases holding that, under this section as it formerly read, where failure to give notice was excused, notice had to be given within a reasonable time after the cause of delay was removed, see Butts' Case, 125 Me. 245, 132 A. 698; Bartlett's Case, 125 Me. 374, 134 A. 163.

Applied in Spiller's Case, 122 Me. 492, 120 A. 626.

Stated in Butts' Case, 125 Me. 245, 132 A. 698; Fogg's Case, 125 Me. 524, 134 A. 626.

Sec. 22. Employee may be examined by employer's physician or impartial examiner; to accept proper medical treatment.—Every employee shall after an injury, at all reasonable times during the continuance of his disability if so requested by his employer, submit himself to an examination by a physician or surgeon authorized to practice as such under the laws of this state, to be selected and paid by the employer. The employee shall have the right to have a physician or surgeon selected and paid by himself present at such examination, of which right the employer shall give him notice when requesting such examination.

The commission or any commissioner may at any time after the injury appoint a competent and impartial physician or surgeon to act as medical examiner, the reasonable fees of whom shall be fixed and paid by the commission. Such medical examiner, after being furnished with such information in regard to the matter as may be deemed essential for the purpose, shall thereupon and as often as the commission or the said commissioner may direct, examine such injured employee in order to determine the nature, extent and probable duration of the injury or the percentage of permanent impairment. He shall file in the office of the commission a report of every such examination, and a copy thereof shall be sent to each of the interested parties, who upon request therefor shall be given the opportunity at a hearing, before decree is rendered, to question said impartial examiner as to any matter included in such report.

If any employee refuses or neglects to submit himself to any reasonable examination provided for in this act, or in any way obstructs any such examination, or if he declines proper medical or surgical treatment offered by the employer, upon petition of said employer such employee's rights to compensation shall be suspended, and his compensation during such period of suspension shall be forfeited. (R. S. c. 26, § 22.)

Sec. 23. Rights of minors or incompetents may be exercised by

guardian; appointment of trustee.—In case an injured employee is a minor or is mentally incompetent or, where death results from the injury, in case any of his dependents entitled to compensation are minors or mentally incompetent at the time when any right, privilege or election accrues to him or them under the provisions of this act, his parent, guardian or next friend, or some disinterested person designated by the commission may, in his behalf, claim and exercise such right, privilege or election, or file any petition or answer, and no limitation of time in this act provided shall run so long as such minor or incompetent has no parent living or guardian.

In case the commission shall have reasonable grounds for believing that compensation paid under the provisions of this act, either in weekly installments or in a lump sum, will be squandered or wasted by the injured employee or his dependents, the commission may designate in writing some disinterested person to act as trustee for the said injured employee or said dependents; and the said trustee shall file an account at least once a year with the commission showing the amounts of receipts and expenditures in behalf of said injured employee or said dependents. (R. S. c. 26, § 23.)

Cited in Garbouska's Case, 124 Me. 404, 130 A. 180.

Sec. 24. Waiver of rights to compensation not valid; claims not assignable.—No agreement by an employee, unless approved by the commission or by the commissioner of labor and industry, to waive his rights to compensation under the provisions of this act shall be valid. No claims for compensation under the provisions of this act shall be assignable, or subject to attachment or liable in any way for debt. (R. S. c. 26, § 24.)

Sec. 25. Employee injured by third party has election; employer paying compensation subrogated to employee's rights.—When any injury for which compensation or medical benefits are payable under the provisions of this act shall have been sustained under circumstances creating in some person other than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim such compensation and benefits or obtain damages from or proceed at law against such other person to recover damages. Any employer having paid such compensation or benefits or having become liable therefor under any decree or approved agreement shall be subrogated to the rights of the injured employee to recover against that person; provided if the employer shall recover from such other person damages in excess of the compensation and benefits so paid or for which he has thus become liable, then any such excess shall be paid to the injured employee less the employer's expenses and costs of action or collection. Settlement of such subrogation claims and the distribution of the proceeds therefrom must have the approval of the court wherein the subrogation suit is pending or to which it is returnable; or, if not in suit, of a single commissioner. When the court in which such subrogation suit is pending or to which it is returnable is in vacation, the judge of the court, or, if the suit is pending in or returnable to the superior court, any justice of the superior court, shall have the power to approve the settlement of such suit and the distribution of the proceeds therefrom. The beneficiary shall be entitled to reasonable notice and the opportunity to be present in person or by counsel at the approval proceedings.

The failure of the employer or compensation insurer in interest to pursue his remedy against the third party within 30 days after written demand by a compensation beneficiary shall entitle such beneficiary or his representatives to enforce liability in his own name, the accounting for the proceeds to be made on the basis above provided. (R. S. c. 26, § 25.)

Purpose of section.—The clear intent of this section is that the party paying compensation under the act, or whose liability therefor is fixed, shall succeed to the

rights of the injured employee to recover against the wrongdoer. Donahue v. Thorndike & Hix, 119 Me. 20, 109 A. 187.

There is no good reason why the action for the benefit of the employer may not be brought in the name of either the employer or the employee. The essential allegations as to defendant's liability must be the same in either case. In fact it seems a much more simple procedure to bring the action in the name of the injured employee for the benefit of the party in interest. Donahue v. Thorndike & Hix, 119 Me. 20, 109 A. 187. See Travelers Ins. Co. v. Foss, 124 Me. 399, 130 A. 210; Fournier v. Great Atlantic & Pacific Tea Co., 128 Me. 393, 148 A. 147.

The liability of the defendant is the same whether the action is for the benefit of the injured employee or the insurer. Donahue v. Thorndike & Hix, 119 Me. 20, 109 A. 187.

Subrogation defined. — Legal subrogation, as the legislature has made it in the class of cases covered in this section, is the placing of one person as near as possible in the position of another in respect to a debt or claim, and to its rights and remedies. Its office is to secure real and essential and consistent justice, in simplification of procedure, and without circuity of action, on equitable principles. There is distinction, more in the manner of bringing them to be than in virtual effect, between assigning and subrogating. An assignment rests on contract. Subrogation is an act of law. But the outcome, were a claim for injuries to the person assignable, would be much the same in substituting one person to another person's rights. In the one instance, the person would part with his claim; in the other, the law parts the claim for him. Travelers Ins. Co. v. Foss, 124 Me. 399, 130 A. 210.

Claim and award of compensation is basis for subrogation.—The basis upon which subrogation rests, in this statutory right of action, and a condition precedent to instituting suit thereon, is that compensation be claimed and awarded under the act. It is only when the injured employee claims compensation under the act, and the same is awarded, and the employer has paid the compensation or has become liable therefor, that the employer succeeds to the rights of the injured employee to recover damages against the other person. Creamer v. Lott, 124 Me. 118, 126 A. 488.

Proof that the employer did in fact pay compensation whether voluntarily or not, falls short of the necessary condition precedent under which this action may be maintained. Creamer v. Lott, 124 Me. 118, 126 A. 488.

Compensation to employee under act does not affect third party's liability.—The liability of a third party to pay damages in respect to the injury is not affected by the election of the injured employee to receive compensation under the act. Donahue v. Thorndike & Hix, 119 Me. 20, 109 A. 187.

Employee has no interest in action by employer against third party.—In a suit by an employer against a third party under this section, in a legal sense, the employee has no interest in the case. The law leaves it optional with him to have compensation from his employer, or to proceed by action against the third person. When he elects to take compensation, the doctrine of subrogation arises and he no longer has claim against the third person. Both the election and the doctrine relate back to when the injury was done. Travelers Ins. Co. v. Foss, 124 Me. 399, 130 A. 210.

Recovery not limited to amount paid by employer.—In proceeding against a third person, the employer is not limited in his recovery to the amount paid by him, but the section clearly permits the employer, by an action against such other person, to reimburse himself and, also, to recover for the injured employee a sum over and above the amount for which the employer was absolutely liable, if the evidence should permit such recovery. Donahue v. Thorndike & Hix, 119 Me. 20, 109 A. 187.

No assignment necessary for employer's right of action.—If the injured employee claims compensation under the act and the same is awarded, the employer having paid the compensation or become liable therefor, succeeds to the rights of the injured employee to recover damages against such other person. No assignment is required by the terms of the law; but the employer, upon paying the award or becoming liable therefor, is at once vested with the injured employee's right of action against the wrongdoer. Donahue v. Thorndike & Hix, 119 Me. 20, 109 A. 187.

Subrogation under this section is a matter of law. Without an assignment, the employer, upon paying or becoming liable for compensation awarded his employee for injuries received at the hands of a third person, is at once vested with the injured beneficiary's right of action against the wrongdoer. Fournier v. Great

Atlantic & Pacific Tea Co., 128 Me. 393, 148 A. 147.

Nonwaiver need not be alleged and proved by employer.—An action by the employer under his right of subrogation is the common-law action of the employee assigned by law to the employer. The issues of fact in such an action, as in a suit by the employee, pertain to the "tortious liability of the defendant" and allegations or proof of nonwaiver of the employer's right of subrogation are as unnecessary as like allegations and proof of waiver are in actions by the employee. Fournier v. Great Atlantic & Pacific Tea Co., 128 Me. 393, 148 A. 147.

Employee cannot receive double compensation.—The language of this section is clear and comprehensive. When any injury for which compensation is payable under this act shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee has the right, at his option, either to claim compensation under the act, or to obtain damages from or to proceed at law against such other person. The injured employee cannot receive directly both payment from the third party and compensation from his employer. If he receives payment from the third party, it would seem that such payment, if not set aside, would bar his claim for compensation under the act. Donahue v. Thorndike & Hix, 119 Me. 20, 109 A. 187.

But is entitled to amount over compensation recovered by employer.—This section enables an injured employee suffering damage through the tort of a third person not only to receive the compensation allowed by law from his employer but also to obtain from the tort-feasor such additional damages as he would be entitled to had he elected to first bring suit at common law. This, in view of the required accountings by the employer and employee, is not an allowance of double indemnity. And immunity of the tort-feasor for his wrongdoing is prevented. Mitchell v. Peaslee, 143 Me. 372, 63 A. (2d) 302.

In action by an employer against a third person under this section, each of several injured employees is entitled to such part of the award made to him as represents the excess over the employer's payments, expenses and costs of action or collection. Denaco v. Blanche, 148 Me. 120, 90 A. (2d) 707.

The act assures the employees of assenting employers moderate recoveries from their employers by the waiver of their rights of action at common law against those employers and such waiver does not involve any benefit to third persons responsible for injuries to them. The waiver is declared in § 7, and full recognition of their right to supplement the compensation and benefits they receive by full recovery from negligent third persons is carried in this section. Denaco v. Blanche, 148 Me. 120, 90 A. (2d) 707.

Action under this section same as ordinary action for negligence.—Regardless of the subrogation element of an action under this section, the same issues are involved as in an ordinary action of tort for negligence between parties who do not sustain the relation of employer and employee to each other. Cullicut v. Burrill, 120 Me. 419, 115 A. 172.

Purpose of second paragraph.—The inability of the injured person to obtain full damages, and the immunity of the tort-feasor, are among the evils which the legislature intended to remedy by the amendment of 1921, embodying the second paragraph of this section. Foster v. Congress Square Hotel Co., 128 Me. 50, 145 A. 400.

Second paragraph liberally construed.—The second paragraph of this section is remedial and, like other acts of that nature, is to be so construed as most effectually to meet the beneficial end in view and to prevent a failure of the remedy. The liberal construction rule imposed by the legislature (§ 30), with a view to carrying out the general purpose of the compensation act, applies to this section. Foster v. Congress Square Hotel Co., 128 Me. 50, 145 A. 400.

The employer or insurance carrier has the full thirty days after demand in which to institute the action. Foster v. Congress Square Hotel Co., 128 Me. 50, 145 A. 400.

The employer's right of action by subrogation, once vested by this section, continues until and unless the employer fails to pursue its remedy for thirty days after demand by the compensation beneficiary. Fournier v. Great Atlantic & Pacific Tea Co., 128 Me. 393, 148 A. 147.

And only employer or insurer can institute suit during such 30 days.—During the thirty day period after demand to bring suit, no one but the employer or insurer can institute the action against the tort-feasor which the common law gave the employee the right to institute. Foster v. Congress Square Hotel Co., 128 Me. 50, 145 A. 400.

Unless waiver is shown.—If waiver by

the employer or insurer is shown the injured person may bring suit before the expiration of thirty days after the written demand provided for by this section. Foster v. Congress Square Hotel Co., 128 Me. 50, 145 A. 400.

The provision for subrogation in the compensation act was made for the benefit of the employer and the insurance carrier and may be waived by them. A statutory, or even a constitutional, provision made for one's benefit, is not so sacred that he may not waive it. Foster v. Congress Square Hotel Co., 128 Me. 50, 145 A. 400.

Compensation under act does not ipso facto bar common-law action by employee. —By choosing to apply for and accepting compensation under the Workmen's Compensation Act, the injured person does not, ipso facto, lose his right to bring a common-law action against a tort-feasor, who is other than the employer. Foster v. Congress Square Hotel Co., 128 Me. 50, 145 A. 400.

The second paragraph of this section, granting an employee the right to bring a common-law action, even though compensation has been awarded and received, when the employer fails to pursue the subrogated right, after written demand to do so, clearly shows that the legislature did not intend that the employee should lose his right of common-law action against the tort-feasor, but the right to institute such suit is suspended during the period specified in the section and revived if the employer fails to act in accordance with the demand. Foster v. Congress Square Hotel Co., 128 Me. 50, 145 A. 400.

Under this section, an employee injured under circumstances creating in some person other than his employer a legal liability to pay damages in respect thereto does not, by claiming and accepting compensation from his employer, lose his right to bring a common-law action against such other person, but his right to enforce liability in his own name is suspended until the employer, vested by subrogation with the injured beneficiary's right of action, fails to pursue its remedy for thirty days after written demand or waives that right. Mitchell v. Peaslee, 143 Me. 372, 63 A. (2d) 302.

After 30 day period only employee can institute action. — Failure to bring suit within the thirty day period is deemed an express waiver of the employer's right of action and the employee is then reinvested with his original right of action and alone can pursue it. Fournier v. Great Atlantic & Pacific Tea Co., 128 Me. 393, 148 A. 147; Mitchell v. Peaslee, 143 Me. 372, 63 A. (2d) 302.

Declaration in action by employee.—The right of the injured employee to bring a common-law action does not require the declaration to allege that the plaintiff has exercised his option and has been awarded compensation, nor that the employer or insurance company failed to pursue its remedy against the tort-feasor within thirty days after written demand by the plaintiff so to do. Foster v. Congress Square Hotel Co., 128 Me. 50, 145 A. 400.

Waiver of the subrogated right of the employer need not be alleged or proved in an action by the employee. Nonwaiver is a matter of defense with the burden upon the defendant to prove it. Fournier v. Great Atlantic & Pacific Tea Co., 128 Me. 393, 148 A. 147.

Right of action for malpractice governed by this section.—The right of action of an employee against his physician for malpractice which aggravates an injury for which he has claimed and accepted compensation is within the purview of and governed by the provisions of this section. Mitchell v. Peaslee, 143 Me. 372, 63 A. (2d) 302.

An injured employee's right to recover against a physician for malpractice is vested in his employer and, in the absence of written demand as provided in this section, an action by the employee in his own name cannot be maintained. Mitchell v. Peaslee, 143 Me. 372, 63 A. (2d) 302.

Applied in Hoyt v. Northern Maine Fair Ass'n, 121 Me. 461, 118 A. 290; Waldo & Penobscot Tel. Co. v. Central Maine Power Co., 131 Me. 158, 159 A. 723; Shaw v. Piel, 139 Me. 57, 27 A. (2d) 137; Daigle v. Pelletier, 139 Me. 382, 31 A. (2d) 345.

Cited in Simpson's Case, 144 Me. 162, 66 A. (2d) 417.

Sec. 26. Claims under act have preference over unsecured debts.— A claim for compensation under the provisions of this act, and any decree or approved agreement therefor, shall be entitled to a preference over the unsecured debts of the employer to the same amount as the wages of labor are preferred by the laws of this state; but nothing herein shall be construed as impairing any lien which the employee may have acquired. (R. S. c. 26, § 26.)

Sec. 27. Compensation to nonresidents. — If an employee receiving

weekly payments under the provisions of this act shall cease to reside in the state, or if his residence at the time of the accident is in another state, the commission upon application of either party may, in its discretion, having regard to the welfare of the employee and the convenience of the employer, authorize such payments to be made monthly or quarterly instead of weekly. (R. S. c. 26, § 27.)

Sec. 28. Commutation of payments to lump sum.—In any case where compensation is being paid or is claimed on account of an injury or death, either the employer, or the employee or his dependents, may petition the commission for an order commuting all payments on account of such injury or death that may become due in the future, to a lump sum. Such petition may be granted where it is shown to the satisfaction of the commission that the payment of a lump sum in lieu of future weekly payments, or as an agreed compromise settlement of a disputed claim, will be for the best interests of the person or persons receiving or claiming such compensation, or that the continuance of weekly payments will, as compared with a lump sum payment, entail undue expense or hardship upon the employer liable therefor, or that the person entitled to compensation has removed or is about to remove from the United States. Where such commutation is ordered, the commission shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments capitalized at their present value upon the basis of interest calculated at 5% per year with annual rests.

Upon payment of any lump sum approved by the commission, the employer shall be discharged from all further liability on account of said injury or death and be entitled to a duly executed release; upon filing which, or other due proof of payment, the liability of such employer under any agreement, award or decree shall be discharged of record, and the employee accepting the lump sum settlement as aforesaid shall receive no further compensation or other benefits on account of said injury or death under the provisions of this act. (R. S. c. 26, § 28.)

Payment under this section is full settlement for all compensation.—The payment of a lump sum under this section is in full settlement for all compensation, general and specific, under the act. Both parties are bound by it. Melcher's Case, 125 Me. 426, 134 A. 542.

Including medical services and aids. — The services of a physician or surgeon and medical and surgical aids are "compensation" within the meaning of this section, and the employer making a lump sum payment is discharged from liability for such services. Melcher's Case, 125 Me. 426, 134 A. 542.

The services, restoratives and aids required by § 9 to be supplied are "compensation," within the meaning of this section and, after payment to the employee under a lump sum settlement order, regularly arrived at, the injured workman can no longer, as of right, demand of the employer any contribution of any sort. Melcher's Case, 125 Me. 426, 134 A. 542.

And compensation for malpractice. — It is well settled at common law that in an action for negligence causing bodily injury the negligence or lack of skill of a physician or surgeon, selected with reasonable care, which aggravates or increases the injury is regarded as a consequence reasonably to be anticipated and a part of the injury for which the original wrongdoer is liable. This principle is applied in workmen's compensation cases where an injury to an employee is aggravated by the negligent or unskillful treatment of a properly chosen physician or surgeon and if the chain of causation remains unbroken the resulting disability or death is compensable and an award of compensation includes the original injury and its ultimate results through malpractice. A lump sum settlement of such an employee's claim for compensation, made and accepted in accordance with provisions of this section is within this rule. Payment of the lump sum, approved by the industrial accident commission, is in full settlement of all compensation to which the employee is or may be entitled under the act. Mitchell v. Peaslee, 143 Me. 372, 63 A. (2d) 302.

Cited in Simpson's Case, 144 Me. 162, 66 A. (2d) 417.

Sec. 29. Industrial accident commission; appointment; tenure; duties; salary; clerk; seal.—The industrial accident commission, as heretofore established, shall consist of 5 members, three of whom shall be men learned

in the law and members in good standing of the bar of this state. They shall be appointed by the governor, with the advice and consent of the council. One of the commissioners, to be designated as chairman, shall be appointed for the term of 5 years, and the other commissioners for the term of 4 years each; the title of the members which was heretofore "associate legal member" shall be "commissioner." The commissioner of labor and industry and the commissioner of insurance shall be members ex officio.

The commissioners so appointed shall hold office for the terms aforesaid, unless removed as herein provided, and until their successors are appointed and qualified. They shall all have the same authority and powers; but their respective duties shall be determined by the chairman. They shall be sworn, and for inefficiency, willful neglect of duty or for malfeasance in office may, after notice and hearing, be removed by the governor and council. In case of a vacancy occurring through death, resignation or removal, the governor shall appoint a successor for the whole term of the member whose place he takes, subject to removal as aforesaid. In case the office of chairman becomes vacant, the senior commissioner shall act as chairman until the governor makes an appointment to fill such vacancy.

The chairman shall receive a salary of $7,000 per year, and the other commissioners a salary of $6,500 each per year. The commissioner of labor and industry, in addition to his salary as such, shall receive for his services as a member of the commission $1,000 per year. The members of the commission shall also receive their actual, necessary, cash expenses while away from their office on official business of the commission.

The commission shall appoint a clerk and a reporter and such clerical assistance as may be necessary, subject to the provisions of the personnel law.

The commission shall have a seal bearing the words "Industrial Accident Commission of Maine." It shall have its office and keep its records in the state house in Augusta, but may hold sessions at any place within the state. (R. S. c. 26, § 29. 1945, c. 144. 1951, c. 412, § 9.)

Right of party to demand use of reporter.—See note to § 37.

Cited in Girsuard's Case, 145 Me. 62, 71 A. (2d) 682.

Sec. 30. Authority of commission; forms and procedure.—The commission shall have general supervision over the administration of this act, and shall have powers to make rules and regulations not inconsistent with this act or other laws of the state for the purpose of carrying out the provisions hereof. It may prescribe forms and make suitable orders as to procedure adapted to secure a speedy, efficient and inexpensive disposition of all proceedings hereunder. In interpreting this act it shall construe it liberally and with a view to carrying out its general purpose. The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act. It may also provide blank forms of reports, agreements, petitions and other forms required. (R. S. c. 26, § 30.)

Act given broad interpretation. — The Workmen's Compensation Act is a remedial statute and should be given a broad interpretation for the purpose of carrying out its manifest purpose. Simmons' Case, 117 Me. 175, 103 A. 68; Martriciano v. Profenno, 127 Me. 549, 143 A. 270.

And liberal construction.—It is a well recognized rule of construction of acts of this kind, and expressly enjoined upon those whose duty it is to administer this act, that it shall be construed liberally with a view to carrying out its general purpose, and not strictly as other statutes in derogation of common-law rights usually are. Scott's Case, 117 Me. 436, 104 A. 794.

The compensation act is entitled to a humane and liberal construction. Brodin's Case, 124 Me. 162, 126 A. 829.

The Workmen's Compensation Act is to be liberally construed so that its beneficent purpose may be reasonably accomplished. Nickerson's Case, 125 Me. 285, 133 A. 161.

In applying the general principles of law governing the relations of master and servant to cases involving workmen's compensation, it should be kept in mind that

by explicit legislative mandate the provisions of the act are to be liberally construed. Murray's Case, 130 Me. 181, 154 A. 352.

The compensation act is to be construed liberally and with a view to carrying out its general purpose. This section directs the industrial accident commission to so interpret the act and the supreme judicial court has adopted the same principle of interpretation. Donahue v. Thorndike & Hix, 119 Me. 20, 109 A. 187.

In favor of employee.—In dealing with the Workmen's Compensation Act, its provisions must be liberally construed in favor of the workman and those dependent upon him. Kirk v. Yarmouth Lime Co., 137 Me. 73, 15 A. (2d) 184.

But its provisions cannot be extended beyond reasonable import. — Though the legislature has declared for liberal interpretation and construction of the act, its express provisions cannot be extended beyond their reasonable import. Comstock's Case, 129 Me. 467, 152 A. 618.

The compensation act should receive a liberal construction so that its beneficent purpose may be reasonably accomplished. Its provisions, however, cannot be justly or legally extended to the degree of making the employer an insurer of his workmen against all misfortunes, however received, while they happen to be upon his premises. Such was not the intent of this section. White v. Eastern Mfg. Co., 120 Me. 62, 112 A. 841.

A liberal construction of the act does not require the court to strain plain and unequivocal language. Maxwell's Case, 119 Me. 504, 111 A. 849.

The function of the commission, and of the court in a case brought to it by appeal from a decision of the commission, is to construe the act without either adding to or subtracting from its language. The mandate of this section for liberal construction of the provisions of the act provides no warrant for administrative or judicial creation of rights or liabilities under the guise of construction. The measure of liability is for legislative and not judicial determination. Simpson's Case, 144 Me. 162, 66 A. (2d) 417.

What constitutes a "speedy, efficient and inexpensive procedure" under this section is a question of fact addressed to the discretion of the commission. It should be only upon the conclusion that this discretion has been abused, that the court should be called upon to exercise its power of review. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719; Marchavich's Case, 123 Me. 495, 124 A. 209.

The power of the commission to make rules is limited to such as are not inconsistent with the Workmen's Compensation Act. McKenna's Case, 117 Me. 179, 103 A. 69. See note to § 9, re rule violative of that section.

Forms for petitions must comply with § 32.—Even though the commission may, under this section, provide blank forms for petitioners, it cannot dispense with the plain requirements of § 32 as regards the contents of the petition. Maxwell's Case, 119 Me. 504, 111 A. 849.

If forms of petitions are provided under this section, they should conform to the requirements of § 32, lest they become a pitfall for the inexperienced. Michaud's Case, 122 Me. 276, 119 A. 627.

Applied in Wardwell's Case, 121 Me. 216, 116 A. 447; Ballou's Case, 121 Me. 282, 116 A. 591; Hustus' Case, 123 Me. 428, 123 A. 514; Estabrook v. Steward Read Co., 129 Me. 178, 151 A. 141.

Stated in Boyce's Case, 146 Me. 335, 81 A. (2d) 670.

Cited in Dinsmore's Case, 143 Me. 344, 62 A. (2d) 205.

Sec. 31. Investigators; subpoenas; depositions.—

I. Investigators. Any commissioner may, when the interests of any of the parties or when the administration of the provisions of this act demand, appoint a person to make a full investigation of the circumstances surrounding any industrial accident or any matter connected therewith, and report the same without delay to the office of the commission.

II. Subpoenas. Any commissioner may administer oaths and issue subpoenas for witnesses and subpoenas duces tecum to compel the production of books, papers and photographs relating to any questions in dispute before the commission or to any matters involved in a hearing. Witness fees in all proceedings under the provisions of this act shall be the same as for witnesses before the superior court.

III. Depositions. Depositions taken for the causes and in the manner hereinafter mentioned may be used in all hearings under the provisions of this act.

Any commissioner may issue commissions to take depositions to any United States consul or vice consul, any judge of any court of record in the United States or any foreign country, or to any notary public or justice of the peace in this state for any of the following causes:

A. When the deponent resides out of, or is absent from, the state.

B. When the deponent is bound to sea, or is about to go out of the state.

C. When the deponent is so aged, infirm or sick as to be unable to attend at the place of hearing.

Such deposition shall be taken by written interrogatories to be filed with the said commissioner, and the adverse party shall have 10 days after written notice of such filing to him or his attorney, in which to file cross-interrogatories thereto; and if cross-interrogatories are not so filed within 10 days after such notice, the right of cross-examination shall be considered waived.

The deponent shall be duly sworn; and after his answers have been written out, the deposition shall be signed and sworn to by the deponent before the commissioner authorized to take it, and shall by him be sealed up and sent to the industrial accident commission at Augusta. (R. S. c. 26, § 31.)

Cited in Gauthier's Case, 120 Me. 73, 113 A. 28.

Sec. 32. Approval of agreement as to compensation; petition for award.—If following an injury the employer and the employee reach an agreement in regard to compensation under the provisions of this act, a memorandum of such agreement signed by the parties shall be filed in the office of the commission. If the commissioner of labor and industry finds that such agreement is in conformity with the provisions of the act, he shall approve the same. In case he shall find that such agreement is not in conformity therewith and shall refuse to approve the same, or if the employer and the employee fail to reach an agreement in regard to compensation, either employee or employer, and when death has resulted from the injury and the dependents of the deceased employee entitled to compensation are, or the apportionment thereof among them is, in dispute, any person in interest may file in the office of the commission a petition for award of compensation, setting forth the names and residences of the parties, the facts relating to the employment at the time of the accident, the time, place and cause of the accident, the knowledge of the employer or notice of the occurrence thereof, the character and extent of the injury and the claims of the petitioner with reference thereto; together with such other facts as may be necessary and proper for the determination of the rights of the petitioner relative to said claims. (R. S. c. 26, § 32.)

Editor's note. — The cases cited under this section as authority for the proposition that an approved agreement has the force of a judgment were decided when it was specifically provided by statute (R. S. 1916, c. 50, § 35) that such would be its effect. While this statute no longer exists, it is provided by § 41 that the decree which the justice of the superior court is required to render (see note to § 41) in accordance with the approved agreement does have the effect of a decree rendered in a suit in equity. It is felt that these cases are still of value in light of the provisions of § 41.

An approved agreement has the force of a judgment of a court. Lemelin's Case, 121 Me. 72, 115 A. 551; Newell's Case, 121 Me. 504, 118 A. 373; Walker's Case, 122 Me. 387, 120 A. 59; Foster's Case, 123 Me. 27, 121 A. 89; Lemelin's Case, 123 Me. 478, 124 A. 204; Crowley's Case, 130 Me. 1, 153 A. 184.

On being officially approved, a compensation agreement under this section becomes as effective as a judicial judgment. Healey's Case, 124 Me. 54, 126 A. 21.

And precludes further compensation if broad enough. — An officially approved agreement under which the employee has already received compensation and which has the binding force of a judgment, precludes the employee from receiving any additional compensation unless such agreement is first modified in accordance with the provisions of § 38, if the agreement is

broad enough to cover all the compensation to which he is entitled under the act. Maxwell's Case, 119 Me. 504, 111 A. 849.

The agreement for compensation for an injury is final and binding. Neither the commission nor the court has authority to add any further obligation to the contract which the parties have made and the commission approved. No further specific compensation for the injury can be compelled to be paid. Collins' Case, 123 Me. 74, 121 A. 554.

The commission is not authorized to award further specific compensation for the same injury covered in an approved agreement. Collins' Case, 123 Me. 74, 121 A. 554.

When an employee has received compensation under an approved agreement, a second compensation cannot be permitted. Foster's Case, 123 Me. 27, 121 A. 89.

Contracts free from fraud must be respected and enforced as made. This is true of ordinary contracts. With greater reason is it true of compensation agreements which are made by the parties, officially approved and have the force of judgments. Collins' Case, 123 Me. 74, 121 A. 554.

Agreements are final and binding to the extent of the facts agreed upon and the conditions covered by them as a basis for the compensation to be paid. Collins' Case, 123 Me. 74, 121 A. 554; Crowley's Case, 130 Me. 1, 153 A. 184.

While an approved agreement unlimited as to time and providing for the maximum compensation for total incapacity caused by an accidental injury remains in force, res adjudicata is a good defense to an original petition asking compensation for the same injury. But if the defense of res adjudicata is not pleaded it is waived. Ripley's Case, 126 Me. 173, 137 A. 54.

But is binding only as to conditions covered.—Agreements under this section do not bind the employee except as to the conditions covered by them as a basis for the compensation agreed upon. Maxwell's Case, 119 Me. 504, 111 A. 849.

An agreement under this section, officially approved, although having the force of a judgment, is binding only to the extent of the facts agreed upon. Morin's Case, 122 Me. 338, 120 A. 44; Foster's Case, 123 Me. 27, 121 A. 89.

An agreement under this section, duly approved, as to compensation for an injury, is, in effect, a judgment as to the injury or injuries it purports to cover, and such matters are res adjudicata. But additional compensation may be awarded for an injury not covered by such an agreement on a petition filed within the limitation period specified in § 33. Spencer's Case, 123 Me. 46, 121 A. 236.

And is no bar to petition for disability after specified period.—See note to § 13.

Parties have wide latitude in making agreements subject to approval. They may, of course, make agreements contemplating a part only of the injuries suffered, leaving a part for further agreement or decree. Collins' Case, 123 Me. 74, 121 A. 554.

Absent approved agreement, redress is by petition.—Under this section and subject to official approval and record, an employer and injured employee may agree upon the compensation. If there be no approved agreement redress is by petition. Garbouska's Case, 124 Me. 404, 130 A. 180.

When an agreement has been seasonably filed, although not approved, an original petition is the appropriate remedy and no time is fixed for its filing. Morin's Case, 122 Me. 338, 120 A. 44.

The Workmen's Compensation Act unmistakably aims at a prompt adjustment of claims by a procedure as simple and direct as possible. The first step under this section is by agreement, if possible. If such agreement is made and not approved, or if the parties fail to reach an agreement, either employer or employee may file a petition, giving in detail certain required facts. Morin's Case, 122 Me. 338, 120 A. 44.

But original petition not appropriate when approved agreement in force. — When an agreement is made, approved and in force respecting a given injury no original petition is necessary or appropriate. Ripley's Case, 126 Me. 173, 137 A. 54.

If an agreement is officially approved no original petition is necessary or appropriate. The remedy, if any is needed by reason of changed conditions or otherwise, must be by application for review under § 38. If refused approval, or if unapproved, an original petition is obviously the appropriate remedy. Gauthier's Case, 120 Me. 73, 113 A. 28.

And petition must set forth unapproved agreement or failure to agree.—A petition under this section must set forth, either an agreement which has not received the approval of the commissioner or a failure to reach an agreement in regard to compensation. One of these is a prerequisite to filing an original petition under the section. Morin's Case, 122 Me. 338, 120 A. 44.

Petition should comply with requirements of this section.—The defendant is entitled to have the provisions of this section as regards the contents of the petition complied with in order that he may be prepared to meet the claim. Technical or formal language should not be required, but in substance the nature of the petitioner's claim should be set out in his petition. Maxwell's Case, 119 Me. 504, 111 A. 849.

The petition should give the defendant, howsoever informally, the information within the contemplation of this section. Gauthier's Case, 120 Me. 73, 113 A. 28.

See note to § 13, re necessity for petition under that section to comply with this section; note to § 30, re necessity for forms issued by commission to comply with this section.

Defect in petition should be pointed out by answer or motion.—If a petition is defective, the opposing party, by answer, or by motion if the defect is apparent upon the face of the papers, should call attention seasonably to the defect, that it might be remedied by amendment. Michaud's Case, 122 Me. 276, 119 A. 627.

And defect will not be cause for reversal absent harmful error.—But where the requirements of this section as regards the contents of the petition have not been complied with, if the case was fully heard by the commission and defendants asked no further time or opportunity for investigation or for the production of further evidence, and it does not appear that the petitioner acted contumaciously, or that the defendants were misled or prejudiced by any fault or omission in the petition, the court should not, for this reason alone, reverse the decree on appeal. Gauthier's Case, 120 Me. 73, 113 A. 28.

Applied in Orff's Case, 122 Me. 114, 119 A. 67, overruled in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473; Phillips' Case, 123 Me. 501, 124 A. 211; Ryan's Case, 123 Me. 527, 124 A. 322; Juan's Case, 124 Me. 123, 126 A. 571; White's Case, 126 Me. 105, 136 A. 455; Hamel's Case, 126 Me. 401, 138 A. 866.

Cited in Martin's Case, 125 Me. 221, 132 A. 520; St. Pierre's Case, 142 Me. 145, 48 A. (2d) 635.

Sec. 33. Time limitations for filing petitions.—An employee's claim for compensation under the provisions of this act shall be barred unless an agreement or a petition as provided in the preceding section shall be filed within 1 year after the date of the accident; provided, however, that any time during which the employee is unable by reason of physical or mental incapacity to file said petition shall not be included in the period aforesaid. In case of the death of the employee, there shall be allowed for filing said petition 1 year after such death. No petition of any kind, however, may be filed more than 10 years following an accident. (R. S. c. 26, § 33.)

This section relates to original petitions which, under § 32, may be filed by either employee or employer. Gauthier's Case, 120 Me. 73, 113 A. 28.

Limitation not applicable to petition for incapacity beyond specified period. — See note to § 13.

Each limitation period for the beginning of proceeding is jurisdictional. Garbouska Case, 124 Me. 404, 130 A. 180.

And the filing of an agreement or petition is action essential to the allowance of compensation. It is mandatory that the one or the other should be placed on record sufficiently early. Garbouska Case, 124 Me. 404, 130 A. 180; Wallace v. Booth Fisheries Corp., 135 Me. 336, 196 A. 406.

A petition, filed within the time limited by law, is prerequisite to an employee's right to recover compensation for accidental injury, except that, "any time during which the employee is unable by reason of physical or mental incapacity to file said petition shall not be included in the period aforesaid." Thibodeau's Case, 135 Me. 312, 196 A. 87.

An employee, in full possession of his mental faculties, is not excused from compliance with this section on the ground of mental incapacity simply because he was led to believe "he would be better." Wallace v. Booth Fisheries Corp., 135 Me. 336, 196 A. 406.

Extension of limitation not applicable to petition by dependent.—The physical incapacity spoken of in this section is personal to the employee; incapacity in the sense of bodily disability. The words of the section are plain, positive and inexorable and the extension of time for disability does not apply to petitions by dependents in case of death of the employee. Garbouska Case, 124 Me. 404, 130 A. 180.

Filing of agreement or petition removes case from operation of this section.—The filing of an agreement or a petition, as provided in § 32, takes the case out of the operation of this section, and stops the

running of the one-year period. Morin's Case, 122 Me. 338, 120 A. 44.

The limitation to the filing of a petition does not apply if an agreement as provided in § 32 was filed within a year after the occurrence of the injury. Ripley's Case, 126 Me. 173, 137 A. 54.

When a petition is filed after one year it is not barred by the limitation of this section, if the injury described is identical with or resultant of an injury specified in an approved agreement filed within a year. Ripley's Case, 126 Me. 173, 137 A. 54.

Where an agreement has been filed and approved, within one year after the occurrence of the injury, the limitation fixed in this section is met, the case is before the commission, and there is no time limit for later filing a petition for determination of the degree of present disability. Milton's Case, 122 Me. 437, 120 A. 533.

Unless compensation sought for different injury. — Where an agreement has been made and approved in accordance with § 32, if compensation is sought for another injury, an agreement or petition must be filed within a year, otherwise it is barred. But respecting the same injury, no original petition to the industrial accident commission is contemplated. Ripley's Case, 126 Me. 173, 137 A. 54.

Limitation must be pleaded in answer. —See note to § 35.

Applied in Lemelin's Case, 121 Me. 72, 115 A. 551; Ryan's Case, 123 Me. 527, 124 A. 322.

Quoted in part in Simpson's Case, 144 Me. 162, 66 A. (2d) 417.

Cited in McCollor's Case, 122 Me. 136, 119 A. 194; Milton's Case, 122 Me. 437, 120 A. 533; Spencer's Case, 123 Me. 46, 121 A. 236; Lemelin's Case, 123 Me. 478, 124 A. 204; Guthrie v. Mowry, 134 Me. 256, 184 A. 895.

Sec. 34. Notice on petitions.—Within 4 days after the filing of the petition for award aforesaid, a copy thereof attested by the clerk of the commission shall be mailed to the other parties named in the petition, or notice be given in such other manner as the commission may determine. (R. S. c. 26, § 34.)

Stated in Morin's Case, 122 Me. 338, 120 A. 44.

Sec. 35. Filing of answers.—Within 10 days after notice of the filing of such petition all the other parties interested in opposition shall file an answer thereto and furnish a copy thereof for the petitioner; which answer shall state specifically the contentions of the opponents with reference to the claim as disclosed by the petition. The commission or any commissioner may grant further time for filing answer, and allow amendments to said petition or answer at any stage of the proceedings. If any party opposing such petition does not file an answer within the time limited, the hearing shall proceed upon the petition. (R. S. c. 26, § 35.)

No dispute exists in absence of answer. —If no answer is filed, no facts will appear to be actually in dispute, although the petitioner may apprehend, and so state in his petition, that a dispute exists. Morin's Case, 122 Me. 338, 120 A. 44; Brodin's Case, 124 Me. 162, 126 A. 829.

And allegations of petition taken as admitted.—Under this section, the filing of an answer should be insisted on. And where no answer is filed, the commission, in proceeding upon the petition, may treat the allegations of fact which are well pleaded in the petition as admitted, and may make such award as the facts so admitted will support, after analogy of procedure upon bills in equity taken pro confesso for want of appearance as answer. Michaud's Case, 122 Me. 276, 119 A. 627; Morin's Case, 122 Me. 338, 120 A. 44; Brodin's Case, 124 Me. 162, 126 A. 829.

Failure to comply with this section requiring that an answer be filed leaves the petition, analogously to the procedure in equity, to be taken as confessed on the well pleaded facts. Ross' Case, 124 Me. 107, 126 A. 484.

In the absence of an answer disputing material facts when properly alleged in or disclosed by the petition, such facts are treated as admitted. Clark's Case, 125 Me. 408, 134 A. 450; DeMeritt's Case, 128 Me. 299, 147 A. 210.

A defense to a petition which is not pleaded is waived. Ripley's Case, 126 Me. 173, 137 A. 54.

A point not set up by the defendants in their answer should not be open to them on appeal. Mitchell's Case, 121 Me. 455, 118 A. 287.

And claim that employee barred by limitation of § 33 must be stated in answer.—The defense that the employee was barred by the limitation of § 33 is not

available to an employer, where the answer filed by the employer does not state this claim. McCollor's Case, 122 Me. 136, 119 A. 194.

If the opponents of the petition wish to interpose the bar of a statute limitation, they should so do by answer before hearing, that the issue may be apparent, or lose the benefit of such defense, as in procedure in actions at law, requiring that the statute of limitations shall be specially pleaded. Morin's Case, 122 Me. 338, 120 A. 44; Comer's Case, 130 Me. 373, 156 A. 516.

An employer, having failed to file an answer, cannot avail himself of the limitations of § 33 first interposed as a defense upon appeal before the law court. Morin's Case, 122 Me. 338, 120 A. 44.

But the direction for answering contained in this section may be waived by the petitioner. Ross' Case, 124 Me. 107, 126 A. 484.

Power to grant additional time to file answer discretionary.—The power of a commissioner to grant additional time to file answers is discretionary and denial of such further time is not subject to review by the court, unless abuse of discretion is shown. Clark's Case, 125 Me. 408, 134 A. 450.

Applied in House's Case, 122 Me. 566, 120 A. 183.

Sec. 36. Time and place of hearing.—The whole matter shall then be referred to a single commissioner, who shall fix a time for hearing upon at least a 5 days' notice given to all the parties. All hearings shall be held in the town where the accident occurred unless it is deemed advisable that any hearing be held in some other place, in which case the commission may in its discretion reimburse the claimant for his actual traveling expenses incurred in attending the hearing; any sum of money paid for such expenses to be charged to the appropriation of the commission. (R. S. c. 26, § 36.)

Hearing in county other than that wherein accident occurred does not affect appellate jurisdiction.—See note to § 41.

Quoted in part in Morin's Case, 122 Me. 338, 120 A. 44.

Stated in Girouard's Case, 145 Me. 62, 71 A. (2d) 682.

Cited in Maguire's Case, 120 Me. 398, 115 A. 176.

Sec. 37. Hearing; decision.—If from the petition and answer there appear to be facts in dispute, the commissioner shall then hear such witnesses as may be presented, or by agreement the claims of both parties as to such facts may be presented by affidavits. If the facts are not in dispute, the parties may file with the commission an agreed statement of facts for a ruling upon the law applicable thereto. From the evidence or statements thus furnished the commissioner shall in a summary manner decide the merits of the controversy. His decision, findings of fact and rulings of law, and any other matters pertinent to the questions so raised shall be filed in the office of the commission, and a copy thereof attested by the clerk of the commission mailed forthwith to all parties interested. His decision, in the absence of fraud, upon all questions of fact shall be final. (R. S. c. 26, § 37.)

Section constitutional.—This section is not violative of the constitution in respect to the method by it provided for the exclusive determination of issues of fact. Mailman's Case, 118 Me. 172, 106 A. 606.

The industrial accident commission is not a court of general nor even of limited common-law jurisdiction, but an administrative tribunal specially created by the legislature to administer the Workmen's Compensation Act with the aid of the supreme judicial court. As such administrative arm of the legislature it possesses only such jurisdiction, powers and authority as are conferred upon it by express legislative grant or such as arise therefrom by implication as necessary and incidental to the full and complete exercise of the powers granted. Conners' Case, 121 Me. 37, 115 A. 520.

The provisions of this section are mandatory. Girouard's Case, 145 Me. 62, 71 A. (2d) 682.

And issues must be determined as provided in this section. — Not only are the provisions of this section mandatory, but they are jurisdictional. If an answer to a petition raises issues of fact the commissioner has no authority to hear and determine those issues except in one of the three methods set forth in the statute: (1) upon the testimony of witnesses, (2) by agreement upon affidavits presenting the claims of both parties, or (3) upon an

agreed statement of facts filed with the commission by parties for a ruling upon the law applicable thereto. Girouard's Case, 145 Me. 62, 71 A. (2d) 682.

The right to decide facts is invested exclusively in the commissioner, and his province may not be invaded by an arbitrary unauthorized court order that certain testimony must be accepted as involving both persuasion and decision. Weliska's Case, 125 Me. 147, 131 A. 860; Baker's Case, 143 Me. 103, 55 A. (2d) 780.

In cases under the Workmen's Compensation Act it is not the province of the law court to ascertain and determine facts. Guthrie v. Mowry, 134 Me. 256, 184 A. 895.

Even where it may be said that there is room for doubt as to the finding of the industrial accident commission in a compensation case yet, in the absence of fraud, the court should ever bear in mind the decisive force of the tribunal which, by this section is declared to be the ultimate judge of the weight and effect of the testimony. Martriciano v. Profenno, 127 Me. 549, 143 A. 270.

But in arriving at his conclusions, he must be guided by legal principles. Failing in this he commits error of law and it is the function of the court to correct such error. For this purpose the court will examine the evidence set forth in the record. Robitaille's Case, 140 Me. 121, 34 A. (2d) 473; Fisher's Case, 140 Me. 156, 34 A. (2d) 621.

Commissioner's finding final absent fraud. — A decision by the commissioner upon a question of fact, in the absence of fraud, is final. Ferris' Case, 123 Me. 193, 122 A. 410; Brodin's Case, 124 Me. 162, 126 A. 829; Butts' Case, 125 Me. 245, 132 A. 698; Strout's Case, 126 Me. 579, 140 A. 377; Taylor's Case, 127 Me. 207, 142 A. 730; Farwell's Case, 127 Me. 249, 142 A. 862; Farwell's Case, 128 Me. 303, 147 A. 215; Lynch v. Jutras, 136 Me. 18, 1 A. (2d) 221; Weymouth v. Burnham & Morrill Co., 136 Me. 42, 1 A. (2d) 343, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473; Robitaille's Case, 140 Me. 121, 34 A. (2d) 473; Fisher's Case, 140 Me. 156, 34 A. (2d) 621; Hawkins v. Portland Gas Light Co., 141 Me. 288, 43 A. (2d) 718.

In causes arising under the Workmen's Compensation Act, the commissioner is, by this section, made the trier of facts and its decrees are, in the absence of fraud, final. Mailman's Case, 118 Me. 172, 106 A. 606.

Under the explicit language of this section, fraud and fraud only can be invoked to defeat a commission's finding of facts. Mailman's Case, 118 Me. 172, 106 A. 606.

Whether for or against the petitioner.— It was formerly held that the rule of finality prescribed by this section for findings of fact by the commissioner applied only when the finding was in favor of the petitioner, and that, if the decree was against the petitioner, the findings of fact were open to review. See Orff's Case, 122 Me. 114, 119 A. 67; Ferris' Case, 132 Me. 31, 165 A. 160; Weymouth v. Burnham & Morrill Co., 136 Me. 42, 1 A. (2d) 343; Drouin v. Ellis C. Snodgrass Co., 138 Me. 145, 23 A. (2d) 631; McNiff v. Old Orchard Beach, 138 Me. 335, 25 A. (2d) 493. However, the cases so holding were overruled on this point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473, the court there holding that the commissioner is made the trier of facts and his findings thereof, whether for or against the claimant, are final. See Fisher's Case, 140 Me. 156, 34 A. (2d) 621; Albert's Case, 142 Me. 33, 45 A. (2d) 660.

And a finding of fact by the commission must stand if there is any competent evidence to support it. Jacque's Case, 121 Me. 353, 117 A. 306. See Orff's Case, 122 Me. 114, 119 A. 67, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473; Henry's Case, 124 Me. 104, 126 A. 286; Bartlett's Case, 125 Me. 374, 134 A. 163; Fogg's Case, 125 Me. 524, 134 A. 626; Syde's Case, 127 Me. 214, 142 A. 777; Albee's Case, 128 Me. 126, 145 A. 742; Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

The court has no authority to review the industrial accident commission's finding of fact in the absence of fraud and provided that for such finding there be any legal evidence. Ballou's Case, 121 Me. 282, 116 A. 591.

Facts found by the commission, if they have any competent evidence on which to rest, though it be slight, provided the inferences therefrom be such as a reasonable person might draw, must, according to this section, be accepted by the court on an appeal from a decree based on the findings. Martin's Case, 125 Me. 49, 130 A. 857.

The finding by the commissioner shall not be disturbed if any competent substantive evidence, or reasonable inferences therefrom, warrants it. Gagnon's Case, 125 Me. 16, 130 A. 355.

An award must stand if based upon some competent evidence, drawing reason-

able inferences from proven facts. Michaud's Case, 122 Me. 276, 119 A. 627.

Findings of fact supported by evidence are closed. Whether the evidence was slim or ample is not the question. Competent evidence was essential. But it is not for a reviewing court to say if the evidence was strong enough to justify the findings. Williams' Case, 122 Me. 477, 120 A. 620.

Where the record contains admissible and substantial evidence upon which a finding of fact may be grounded, it is not to be set aside. Lemelin's Case, 123 Me. 478, 124 A. 204.

The decision of the commissioner will not be reversed, when there is some competent evidence to support it, even though slender; where a state of facts is shown more consistent with the commissioner's finding than with any other theory; and where the finding is supported by inferences which are not unnatural, and not irrational. Adams' Case, 124 Me. 295, 128 A. 191.

Under this section, when there is any reasonable evidence which supports the finding of the commissioner, such finding is not subject to review. Burridge's Case, 128 Me. 407, 148 A. 35.

But court not bound by commissioner's reasoning.—While the court must accept the commissioner's findings of fact, if based on any competent evidence, it is not bound by his reasoning. Shaw's Case, 126 Me. 572, 140 A. 370. See Mailman's Case, 118 Me. 172, 106 A. 606; Spiller's Case, 122 Me. 492, 120 A. 626; Adams' Case, 124 Me. 295, 128 A. 191; Hull's Case, 125 Me. 135, 131 A. 391.

Compensation not awarded on speculation, surmise, etc.—To support an award of compensation, there must be some competent evidence. It may be slender. It must be evidence, however, and not speculation, surmise, or conjecture. Dulac v. Proctor & Bowie Co., 120 Me. 324, 114 A. 293; Butts' Case, 125 Me. 245, 132 A. 698; Strout's Case, 126 Me. 579, 140 A. 377; Taylor's Case, 127 Me. 207, 142 A. 730.

If a decree for compensation is founded upon speculation, surmise or conjecture it cannot stand. Strout's Case, 126 Me. 579, 140 A. 377.

Findings must be based on evidence.—This section requires that the merits of the controversy be decided "from the evidence thus furnished." Gauthier's Case, 120 Me. 73, 113 A. 28.

The industrial accident commission while primarily an administrative body exercises certain judicial functions. In the exercise of these functions it acts judicially. While it determines finally the trustworthiness and weight of testimony its findings must be based on evidence. This would be true even if there were no express statutory mandate. Gauthier's Case, 120 Me. 73, 113 A. 28; Paulauskis' Case, 126 Me. 32, 135 A. 824.

A commissioner's decree must be based upon evidence. If such a decree is founded upon speculation, surmise or conjecture it cannot stand. This is true where evidence of primary facts is wanting. Swett's Case, 125 Me. 389, 134 A. 200.

The finding at the trial of facts must be based upon some competent evidence, otherwise the finding is an error of the law. Johnson v. State Highway Comm., 125 Me. 443, 134 A. 564; Paulauskis' Case, 126 Me. 32, 135 A. 824.

Presented at the hearing.—It may be entirely proper for the commissioner with the consent, or, unless waived, in the presence of the parties, to view the locus of the accident, not for the purpose of obtaining information or evidence on which to base his award, but for the purpose of better understanding the evidence presented to him at the hearing, as in case of views by a jury. But this section prohibits his obtaining information to be used as evidence in this manner. It expressly provides that his decision is to be based on evidence presented at the hearing before him. Hutchinson's Case, 123 Me. 250, 122 A. 626; Marchavich's Case, 123 Me. 495, 124 A. 209.

Under circumstances affording opportunity for refutation.—The commissioner's final findings must be grounded upon evidence presented under such circumstances as to afford full opportunity for comment, explanation and refutation. Gauthier's Case, 120 Me. 73, 113 A. 28; Hutchinson's Case, 123 Me. 250, 122 A. 626; Marchavich's Case, 123 Me. 495, 124 A. 209.

And finding not supported by evidence should be set aside.—In spite of the force of this section that the finding of the commissioner shall be final in the absence of fraud, if there was no adequate evidence for the finding, as a matter of law it should be set aside. Dulac v. Dumbarton Woolen Mills, 120 Me. 31, 112 A. 710.

When the court holds that the findings of the commissioner must be set aside because unsupported by evidence, it is not deciding facts. It is asserting the fundamental legal proposition that a trier of

facts acting in a quasi judicial capacity must not render decisions without evidence. But it would be a usurpation for the court to say to the tribunal having by statute the exclusive right to decide facts that it must accept certain testimony as conclusive. Orff's Case, 122 Me. 114, 119 A. 67, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

Upon a finding by the commissioner, in favor or against the moving party, if it is apparent that the commissioner has disregarded evidence which has probative force in favor of the party against whom the decision has been rendered, the decision will be set aside. Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

A finding of fact without evidence, is reversible error. Ferris' Case, 123 Me. 193, 122 A. 410.

It is when the commissioner decides facts without evidence, or upon illegal or inadmissible evidence, that an error of law is committed which the court is required to correct. Adams' Case, 124 Me. 295, 128 A. 191; Weymouth v. Burnham & Morrill Co., 136 Me. 42, 1 A. (2d) 343, overruled in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

As should finding based on incompetent evidence.—If the finding is founded in whole or in part upon incompetent or illegal evidence error has been committed and the finding will not be sustained. Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

If there was sufficient competent evidence introduced before the commissioner to warrant his findings as a matter of law, such findings must stand, even though inadmissible testimony was received, unless it appears that his findings were in any part based on such incompetent testimony. Larrabee's Case, 120 Me. 242, 113 A. 268.

But commissioner may draw reasonable inferences.—The commissioner, in the determination of questions of fact, is permitted to draw such inferences from the evidence and all the circumstances as a reasonable man would draw. Westman's Case, 118 Me. 133, 106 A. 532; Marchavich's Case, 123 Me. 495, 124 A. 209; Adams' Case, 124 Me. 295, 124 A. 191; Cacciagiano's Case, 124 Me. 422, 130 A. 275; Butts' Case, 125 Me. 245, 132 A. 698.

In determining questions of fact, the commissioner may draw all reasonable inferences from the evidence and circumstances. Martriciano v. Profenno, 127 Me. 549, 143 A. 270.

If the commissioner's inference is a rational and natural inference from the proved facts, the decree must stand even though a different inference might with equal logic and reason be drawn by some other tribunal. Kelley's Case, 123 Me. 261, 122 A. 580.

When the facts attendant upon the accident are assembled and stated, inferences, as distinguished from mere conjecture, surmise or probability, may be drawn by the commissioner; but a finding by him cannot stand unless the facts thus found are such as to entitle him reasonably to infer his conclusion from them. Paulauskis' Case, 126 Me 32, 135 A. 824.

From known facts and from all the circumstances, the commissioner may draw rational and natural inferences. Farwell's Case, 128 Me. 303, 147 A. 215.

Weight and credibility of evidence determined by commissioner.—It is the duty of the commissioner to weigh the testimony and to pass upon the credibility of the same. In the absence of fraud, such findings by the commissioner are final. Spiller's Case, 122 Me. 492, 120 A. 626.

The court will review the commissioner's reasoning but will not, in the absence of fraud, review his findings as to the credibility and weight of testimony. Mailman's Case, 118 Me. 172, 106 A. 606; Spiller's Case, 122 Me. 492, 120 A. 626; Adams' Case, 124 Me. 295, 128 A. 191.

If the case must be proved wholly or in part circumstantially, and there is a dispute as to what the circumstances are, the determination of such dispute by the commissioner is final. It is for the trier of facts who sees and hears witnesses to weigh their testimony and without appeal to determine their trustworthiness. Mailman's Case, 118 Me. 172, 106 A. 606; Patrick v. J. B. Ham Co., 119 Me. 510, 111 A. 912; Wallace's Case, 123 Me. 517, 124 A. 241; Hull's Case, 125 Me. 135, 131 A. 391.

The law does not require that the commissioner shall be controlled by the express language of the petitioner or his witnesses, or even of the physician who testified in the case. It is his privilege and province to pass upon the credibility of the testimony and consider it in connection with the circumstances and probabilities tending to prove or disprove the testimony. Foley v. Dana Warp Mills, 122 Me. 563, 119 A. 805.

The decree of the commission is analogous to a finding of a judge who, by consent, determines facts, or an award by a referee agreed upon by the parties. That such a finding or award cannot be impeached by showing errors of judgment,

however gross, as to the weight and credibility of testimony, is settled. Patrick v. J. B. Ham Co., 119 Me. 510, 111 A. 912.

The trier of facts is not bound to accept certain testimony as conclusive. Its weight and credibility are for him. Henry's Case, 124 Me. 104, 126 A. 286.

The credibleness and significance of the evidence were for the trier of fact. Ross' Case, 124 Me. 107, 126 A. 484.

In compensation cases, where no fraud appears, the volume of the evidence, or how it might be esteemed elsewhere, is not examinable. The test is simply whether some competent evidence supports the finding. Ross' Case, 124 Me. 107, 126 A. 484.

The credibility of the evidence under this section is absolutely within the judgment and decision of the commissioner. Ballou's Case, 121 Me. 282, 116 A. 591.

And nature and extent of disability is question of fact.—The nature and extent of the claimant's disability is a question of fact upon which the finding of the commissioner is final, if there is any evidence upon which it can be based. Foley v. Dana Warp Mills, 122 Me. 563, 119 A. 805.

As is question of employment within provisions of act.—Whether or not an employee at the time of his injury was engaged in an employment within the operation of the compensation act, is a question of fact to be determined by the commissioner, and if any rational view of the evidence supports it, the decision is beyond review on appeal. Gagnon's Case, 125 Me. 16, 130 A. 355.

Whether employment arose out of and in course of employment.—The finality of findings of fact by the industrial accident commission applies to the usual phases of the issue as to whether an accident arose out of and in the course of employment. Martin v. Biddeford, 138 Me. 26, 20 A. (2d) 715.

Whether claimant has sustained burden of proof.—It is the right and duty of the commissioner under this section to find the facts, and if he has considered all the competent evidence and there is competent evidence on which to base the decision, the decision is final. It is also final if the commissioner decides there is a lack of probative evidence. Whether a claimant has sustained the burden of proof is the problem of the commissioner. It is a question of fact which cannot be disturbed by the appellate court. Houle v. Tondreau Bros. Co., 148 Me. 189, 91 A. (2d) 481.

The question of the weight of evidence and whether the burden of proof is sustained is solely for the commissioner. Shaw's Case, 126 Me. 572, 140 A. 370.

And question of dependency.—In an action for compensation for the death of an employee, a finding that the claimant did not prove her dependency affected the merit of the controversy and was for the commissioner to decide under this section. Perkins v. Kavanaugh, 135 Me. 344, 196 A. 645.

Burden of proof on claimant to establish right to compensation.—The burden of proof rests upon the claimant to prove the facts necessary to establish a right to compensation under the compensation act. The claimant must go further than simply to show a state of facts which is equally consistent with no right to compensation as it is with such right. Surmise, conjecture, guess or speculation are not sufficient to sustain the burden and justify a finding in behalf of the claimant. But on the other hand if the evidence upon the questions involved is slender but is sufficient to satisfy a reasonable man, a case has been made out in favor of the claimant. Westman's Case, 118 Me. 133, 106 A. 532.

In a hearing before the commissioner, the plaintiff has the burden of proof. Mailman's Case, 118 Me. 172, 106 A. 606; Baker's Case, 143 Me. 103, 55 A. (2d) 780.

At a hearing before the industrial accident commission the petitioning employee is the moving party and upon him is the burden to prove the allegations in his petition and all elements necessary to support his claims for compensation, such as the employment, the accident arising out of and in the course of the employment, the resulting injury, and the causal connection between the condition which he alleges disabled him and the alleged accident. Surmise, conjecture, guess, or speculation are not sufficient. Houle v. Tondreau Bros. Co., 148 Me. 189, 91 A. (2d) 481.

But proof need not be by preponderance of evidence.—The industrial accident commission, as an administrative or quasi-judicial tribunal, occupies a plane where, by legislative provision, the preponderance of evidence rule is without application. If the petitioner's evidence, with its logical inferences, is, on the fundamental issue of causal relation between compensable injury and death, reasonably convincing, the requisite degree of proof is attained, notwithstanding that opposing evidence is of even greater weight. Ferris' Case, 132 Me. 31, 165 A. 160, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

Use of reporter at hearings.—There being no statute making the use of a reporter mandatory in proceedings before the commission, such use may be waived by the parties. If neither of the parties requests the use of a reporter, in hearings before the commission or commissioners, the use of the reporter is waived. Even if waived by the parties, it rests within the discretion of the commission or the commissioners before whom the case is heard whether or not a reporter will be used. Girouard's Case, 145 Me. 62, 71 A. (2d) 682.

Although there is no statute which requires the use of a reporter in proceedings before the commission, from the provisions of § 29, which provides that the commission shall appoint a reporter, and from the fact that a report of the evidence may be necessary to perfect an appeal (see note to § 41), in cases heard upon the testimony of witnesses before the commission, either party may as a matter of right demand that the reporter be used and that he make a record of the proceedings. Refusal or neglect to accede to such demand would constitute error in law on the part of the commission or commissioner before whom the case was heard, and on exceptions the decree would be set aside and cause remanded under appropriate order to the commission for a hearing de novo in one of the statutory methods. Girouard's Case, 145 Me. 62, 71 A. (2d) 682.

Applied in Healey's Case, 124 Me. 54, 126 A. 21; Moriarty's Case, 126 Me. 358, 138 A. 555; Eddy v. Bangor Furniture Co., 134 Me. 168, 183 A. 413.

Quoted in part in Morin's Case, 122 Me. 338, 120 A. 44.

Stated in part in MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719; Berry v. M. F. Donovan & Sons, 120 Me. 457, 115 A. 250.

Cited in Clark's Case, 124 Me. 47, 126 A. 18; Ferris' Case, 132 Me. 31, 165 A. 160, overruled in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

Sec. 38. Petition for review of incapacity; for further compensation.—While compensation is being paid under any agreement, award or decree, the incapacity of the injured employee due to the injury may from time to time be reviewed by a single commissioner upon the petition of either party upon the grounds that such incapacity has subsequently increased, diminished or ended. Upon such review the commissioner may increase, diminish or discontinue such compensation in accordance with the facts, as the justice of the case may require. If after compensation has been discontinued, by decree or approved settlement receipt as provided by section 44, additional compensation is claimed by an employee for further period of incapacity, he may file with the commission a petition for further compensation setting forth his claim therefor; hearing upon which shall be held by a single commissioner. The provisions of the 4 preceding sections as to procedure shall apply to the petitions authorized by this section and by section 22; and said provisions shall also apply to the petitions authorized by sections 9, 13, 28 and 40, except that such petitions shall be heard by the commission as therein provided. (R. S. c. 26, § 38.)

Review available only in case of agreement or decree.—This section applies only to reviews in cases wherein agreements have been approved or decrees fixing compensation entered. Gauthier's Case, 120 Me. 73, 113 A. 28.

A petition which contains no reference whatever to any agreement, award, findings or decree, of which review is asked upon the ground that the incapacity of the injured employee has subsequently ended, increased or diminished, is not a petition under this section. Morin's Case, 122 Me. 338, 120 A. 44.

Section provides only remedy where approved agreement in force.—If, subsequent to an approved agreement for compensation, by reason of changed conditions or otherwise, a remedy is essential, it must be had by an application for a review under this section. An original petition is inappropriate. Newell's Case, 121 Me. 504, 118 A. 373. See note to § 32.

Law of case on review.—Where the right to compensation has been established between the parties by an agreement officially approved under § 32, whether established correctly on general principles or not, so long as the facts on which the awarding of compensation was predicated continue to be facts in the case, so long does that which was established continue to be the law of the case. Healey's Case, 124 Me. 54, 126 A. 21.

Extent of incapacity is only question open on review under this section.—Upon

the application of either party there may be a review in reference to whether the incapacity of the injured employee has ended, increased or diminished subsequent to the agreement, award, findings or decree. Whether there still be incapacity, or, if yet, whether subsequently to the agreement, the award, the findings or the decree, it has increased or diminished, are the only propositions open on the review. If incapacity is ended compensation may be discontinued. Or compensation may be increased or diminished, as the facts may show. Zooma's Case, 123 Me. 36, 121 A. 232.

The matters, important in primary determination, of whether the one person was the employee of the other; whether that other was an assenting employer; whether the employee sustained an industrial hurt under circumstances entitling him to compensation, i. e., the right of the employee to receive compensation, and the time from which the compensation must be paid, and the related details respecting all that was done and transpired, to the application for review, are of unquestionable finality and cannot be reviewed under this section. Zooma's Case, 123 Me. 36, 121 A. 232.

On a petition for review of incapacity under this section, the question open is whether such incapacity, if it continues, has subsequently increased or diminished, or has it ended. Crowley's Case, 130 Me. 1, 153 A. 184.

Section does not authorize review on grounds of newly discovered evidence.—This section is expressly limited to cases where by the original decree a compensatory award has been made, and where the petitioner asks to have such award increased, diminished or ended because of conditions that have arisen since its making. Therefore, it has no application to a case wherein a review is sought on the grounds of newly discovered evidence. Conners' Case, 121 Me. 37, 115 A. 520.

The legislature did not intend that the original determination as to liability should be overturned by any subsequent evidence. Conners' Case, 121 Me. 37, 115 A. 520.

The commission has no authority, statutory or inherent, to grant a rehearing on the merits of a case because of newly discovered evidence, and this rule is not changed by the third sentence in this section. Comer's Case, 131 Me. 386, 163 A. 269.

Or modification of findings because of error.—The principle that, when a hearing has been had on the merits and a decree either awarding or denying compensation has been entered, the commission is without power to reopen the case and modify its finding because of error, is not modified by the third sentence of this section. Devoe's Case, 131 Me. 452, 163 A. 789.

Employee must submit to reasonable medical treatment.—In a petition under this section to end compensation payments, it was held that a man cannot continue to receive compensation and at the same time refuse to submit to proper medical or surgical treatment such as an ordinarily reasonable man would submit to in like circumstances. See Beaulieu's Case, 124 Me. 83, 126 A. 376.

Burden of proof on petitioner.—The burden of proof rests upon the petitioner to prove that the employee's incapacity, so far as it was caused by the accident, has increased, diminished or ended. Orff's Case, 122 Me. 114, 119 A. 67, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

A petitioner under this section has the burden of proof. Healey's Case, 124 Me. 54, 126 A. 21.

Where the employee's rights have already been established and it is sought to review them, the burden must rest upon the moving party to establish the grounds upon which his petition is based. Connelly's Case, 122 Me. 289, 119 A. 664.

In a proceeding on a petition filed by an insurer under this section, the burden of proof is on the insurer to show that the employee's incapacity has diminished. Milton's Case, 122 Me. 437, 120 A. 533.

While the rule is well established that in the first instance the burden of establishing his right to compensation rests on the injured employee (see notes to §§ 8 and 37), and it would continue to rest upon him so long as the question of his right to compensation is held open on the original petition, or in case he petitions for review upon the ground of increased disability, there is no reason, when the employer or insurance carrier petitions for review under this section, for reversing the ordinary rule that the burden rests on the moving party to establish the grounds upon which he seeks relief. Connelly's Case, 122 Me. 289, 119 A. 664.

When a petitioner for review of an agreement awarding compensation for total disability has shown an ability to do such work as is ordinarily available in the community in which the injured employee resides, he has sustained the burden upon him as the moving party, and it then be-

comes the burden of the employee to meet this by showing he has used reasonable efforts to obtain such work and failed by reason of his injury. If he fails to use reasonable efforts to find work such as he could perform or insists that he could not perform it, if available, no burden rests upon the petitioner to offer him work or to prove that some particular kind of work is available which he could perform. Connelly's Case, 122 Me. 289, 119 A. 664.

And disability presumed to continue until burden sustained.—Where a petition for review is filed under this section by an employer claiming the disability covered in an agreement with his employee has ended, the disability is presumed to continue until the employer sustains the burden of showing that it has ended or diminished. Shaw's Case, 126 Me. 572, 140 A. 370.

What constitutes increased incapacity.—Greater physical disability due to the accident is "increased incapacity" and so, if traceable to the accidental injury, is the necessity of accepting less remunerative employment. Ray's Case, 122 Me. 108, 119 A. 191.

Loss of wages due to the workman's fault subsequent to the accident or to his illness not connected with the accident does not entitle him to greater compensation under this section. The same is of course true of loss occasioned by general business depression. Ray's Case, 122 Me. 108, 119 A. 191.

Purpose of third sentence of section.—The intent of the third sentence of this section is to permit the making by the parties of a settlement discontinuing compensation, or the entry of a decree to the same effect without thereby foreclosing the right of the employee to recover further compensation if he suffers a recurrence of trouble due to the injury, or if it is discovered that compensatory injury exists, which at the time the final decree was entered, was unknown to the parties and therefore not considered by the commission. Such purpose is in accord with the liberal aim of the compensation act, which seeks on the broadest principles to provide a just recompense for those injured in industrial accidents. Devoe's Case, 131 Me. 452, 163 A. 789; Lynch v. Jutras, 136 Me. 18, 1 A. (2d) 221.

The third sentence of this section does not authorize review proceedings. They are provided for in the first two sentences of the section. Comer's Case, 131 Me. 386, 163 A. 269.

But does authorize petition for injuries unknown at time compensation discontinued.—In a compensation case, only that decided as to the known injury is res adjudicata. The unknown injuries cannot be said to have been "considered by the commission." For such, an award for further compensation may be had, provided, as stated in this section, the petition be brought "after compensation has been discontinued by decree or approved settlement receipt." Lynch v. Jutras, 136 Me. 18, 1 A. (2d) 221.

Where neither the injured employee nor the commission was aware of the injuries which cause a continuation of the employee's disability, on their discovery, the commission is authorized to award additional compensation. Devoe's Case, 131 Me. 452, 163 A. 789.

Where an employee is in fact injured in some way other than that known to him and is awarded compensation simply for the known injury, a decree for such will not conclude him in a later petition for further compensation on account of a previously unknown compensatory injury, even though he should have known of it. Lynch v. Jutras, 136 Me. 18, 1 A. (2d) 221.

The provision of the third sentence of this section may properly be invoked in cases where disability appears to have ended and the case finally closed, if the injured employee suffers a recurrence of his former troubles traceable to the original injury, or in cases where it is discovered that compensatory injury exists which, at the time final decree was entered, was unknown and therefore was not considered by the commission. Comer's Case, 131 Me. 386, 163 A. 269.

While compensation is being paid, under either an agreement or an award, a review of incapacity is available on the petition of either an employee or an employer, and such a review may be had on the petition of an employee after compensation has been discontinued by decree or approved settlement receipt. St. Pierre's Case, 142 Me. 145, 48 A. (2d) 635.

It is the duty of the industrial accident commission to determine the actual earning ability of the employee (see note to § 12), and a decree suspending payments without finding that incapacity had ended, and requiring an attempted demonstration of the employee's earning capacity, is erroneous for improperly placing the burden on the employee to make an attempted demonstration of her earning capacity. Shoemaker's Case, 142 Me. 321, 51 A. (2d) 484.

And availability of work and employee's efforts to secure it should be considered.—In determining whether the employee is possessed of any capacity to earn, based upon whether he can perform any kind of available work, the fact of whether the work which he can perform is such as is ordinarily available in the community where he lives and whether he has made reasonable efforts to obtain it and failed by reason of his injury should be considered. Connelly's Case, 122 Me. 289, 119 A. 664.

Former provisions of section.—For a consideration of a former provision of this section prohibiting the commissioner from ordering a "change of the status existing prior to the application for review," see Fennessey's Case, 120 Me. 251, 113 A. 302.

For application of former limitation period contained in this section, see Lemelin's Case, 121 Me. 72, 115 A. 551.

This section formerly provided that the review was to be had "before the expiration of the period for which compensation has been fixed by such agreement or decree." For cases holding that, under this provision, a review under this section was not available unless the period of compensation was definitely fixed by the agreement or decree, see Wallace's Case, 123 Me. 517, 124 A. 241; Milton's Case, 122 Me. 437, 120 A. 533; Beaulieu's Case, 124 Me. 83, 126 A. 376; Hamel's Case, 126 Me. 401, 138 A. 866.

Cited in Maxwell's Case, 119 Me. 504, 111 A. 849; Foster's Case, 123 Me. 27, 121 A. 89; Lemelin's Case, 123 Me. 478, 124 A. 204.

Sec. 39. Petition or agreement superseded by subsequent approved agreement.—If after any petition, except for lump sum settlement under the provisions of section 28, has been filed the parties themselves reach an agreement as to payment of compensation, the memorandum of which is approved by the commissioner of labor and industry, or as to payment of medical benefits under the provisions of section 9, the pending petition shall thereupon be dismissed by the commission. The weekly rate of compensation payable for actual incapacity under any decree or approved agreement may be modified at any time by an approved agreement between the parties as to any subsequent period of incapacity. (R. S. c. 26, § 39.)

Sec. 40. Agreement through mistake of fact or fraud.—Upon the petition of either party at any time the commission may annul any agreement which has been approved by the commissioner of labor and industry provided it finds that such agreement was entered into through mistake of fact by said petitioner or through fraud; and provided further, that except in the case of fraud upon his part, an employee shall not be barred by any time limit from filing a proper petition to have the matters covered by such agreement determined in accordance with the provisions of this act as though the agreement aforesaid had not been approved. (R. S. c. 26, § 40.)

Sec. 41. Decision or approved agreement as basis for court decree; appeal.—Any party in interest may present copies, certified by the clerk of the commission, of any order or decision of the commission or of any commissioner, or of any memorandum of agreement approved by the commissioner of labor and industry, together with all papers in connection therewith, to the clerk of courts for the county in which the accident occurred; or if the accident occurred without the state, to the clerk of courts for the county of Kennebec; whereupon any justice of the superior court shall render a pro forma decree in accordance therewith and cause all interested parties to be notified. Such decree shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in a suit in equity duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact found by said commission or by any commissioner, or where the decree is based upon a memorandum of agreement approved by the commissioner of labor and industry.

Upon any appeal therefrom the proceedings shall be the same as in appeals in equity procedure and the law court may, after consideration, reverse or modify any decree so made by a justice based upon an erroneous ruling or finding of

law. There shall be no appeal, however, from a decree based upon any order or decision of the commission or of any commissioner unless said order or decision has been certified and presented to the court within 20 days after notice of the filing thereof by the commission or by any commissioner; and unless appeal has been taken from such pro forma decree within 10 days after such certified order or decision has been so presented. In cases where after appeal aforesaid by an employer the original order or decision rendered by the commission or by any commissioner is affirmed, there shall be added to any amounts payable under said order or decision, the payment of which is delayed by such appeal, interest to the date of payment. In all cases of appeal the law court may order a reasonable allowance to be paid to the employee by the employer for expenses incurred in the proceedings of the appeal including the record, not however to include expenses incurred in other proceedings in the case. (R. S. c. 26, § 41.)

Purpose of section.—The general purpose of this section was to facilitate finality of decision in respect to whether an injured workman was, or not, within the protection of the compensation law. Middleton's Case, 136 Me. 108, 3 A. (2d) 434.

The industrial accident commission may not enforce its orders and decisions by process emanating from itself. By this section, the legislature has indicated, as enforcing machinery, the entry, as a matter of form, by any justice of the superior court, of a decree which shall conform to the conclusion of the commission. Middleton's Case, 136 Me. 108, 3 A. (2d) 434.

General jurisdiction is not given to the law court by this section. The court sitting in equity does not have general jurisdiction over appeals in compensation cases. It has only such jurisdiction, restricted as to place and procedure, as this section specifies. The decree of the sitting justice affirming the finding of the commission is a mere ministerial act. He hears and considers no testimony, and no arguments. He makes no decision but perfunctorily signs a decree in order to give progress to the appeal and place it in a channel for final determination by the law court. Nor does the law court possess in such appeals such powers as it possesses in ordinary equity appeals. It must accept the findings of the commission on disputed questions of fact as binding. In short, the appeal merely takes on the same procedure as is followed in equity cases, but it does not become thereby a cause in equity. It retains its original essence. Maguire's Case, 120 Me. 398, 115 A. 176.

This section and § 38 provide only proceedings available subsequent to original decree.—Two proceedings subsequent to the original decree are authorized by the act—the one on appeal in matters of law under this section, and the other in modification of damages because of subsequent facts and conditions under § 38. The authorization of these two impliedly excludes all other according to the general rule for the interpretation of statutes. Conners' Case, 121 Me. 37, 115 A. 520.

Duties of justice of superior court under this section are not judicial.—The duties of the justice are in their nature ministerial rather than judicial. He does not pass upon the rights of the parties, but signs a decree in conformity with the decision of the commission. Hight v. York Mfg. Co., 116 Me. 81, 100 A. 9; Maguire's Case, 120 Me. 398, 115 A. 176.

This section prescribes that the justice of the superior court, sitting as in chancery, shall render a decree in accordance with the finding of the commissioner and notify all parties. This decree is merely perfunctory. The justice rendering it, passes neither upon the facts nor the law. The effect of the decree and all proceedings in relation to it, are to be the same as though rendered in a suit in equity, duly heard and determined by the court, except there shall be no appeal upon the questions of fact found by the commission, nor if the decree is based upon a memorandum of agreement officially approved. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719.

Section precludes new trial on ground of newly discovered evidence.—This section provides that the decree of the justice "shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in a suit in equity duly heard and determined by said court, except there shall be no appeal therefrom upon questions of fact found by said commission." Proceedings in equity know no such machinery as a motion for new trial on the ground of newly discovered evidence. Such motion is cognizable only in actions at law. Conners' Case, 121 Me. 37, 115 A. 520.

And grants no power to reopen or rehear case on the merits.—Under this sec-

tion, no power of reopening or rehearing a case upon its merits, in which a decree has been entered, and of determining anew the liability or non-liability of the employer, is granted. That decree, in the absence of fraud, is declared to be final upon all questions of fact. Conners' Case, 121 Me. 37, 115 A. 520.

Appeals are, by the terms of this section, limited in scope to questions of law. Perkins v. Kavanaugh, 135 Me. 344, 196 A. 645.

In an appeal under this section questions of fact are not involved. It concerns itself simply with questions of law. Conners' Case, 121 Me. 37, 115 A. 520.

On appeals respecting the administration of the Workmen's Compensation Act, cognizance is taken of questions of law only. Ferris' Case, 132 Me. 31, 165 A. 160, overruled on another point in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473; Kilpinen's Case, 133 Me. 183, 175 A. 314; Eddy v. Bangor Furniture Co., 134 Me. 168, 183 A. 413.

Review of the commission's decree is limited to questions of law alone. Williams' Case, 122 Me. 477, 120 A. 620.

And reversal or modification must be based on error of law.—Upon appeal, the court may reverse or modify the decree from which appeal is taken, but such reversal or modification must be based upon an erroneous ruling or finding of law. Brodin's Case, 124 Me. 162, 126 A. 829.

The findings of fact by the industrial accident commission cannot be disturbed on appeal. Lothrop v. Brooklawn Co., 135 Me. 391, 197 A. 553.

Decisions of the commission, upon questions of fact, are not subject to review. Kilpinen's Case, 133 Me. 183, 175 A. 314; Eddy v. Bangor Furniture Co., 134 Me. 168, 183 A. 413.

For further cases concerning the finality of the commission's finding of fact, see note to § 37.

When supported by the evidence.—The industrial accident commission is the trier of the facts and its findings for or against the claimant are final, if there is any evidence on which to base it. When there is competent and probative evidence, the decision of the commission, if guided by legal principles, is not subject to review. Boyce's Case, 146 Me. 335, 81 A. (2d) 670. See Kelley's Case, 123 Me. 261, 122 A. 580.

A decision of the commissioner will not be reversed where the finding is supported by rational and natural inferences from proved facts. Eddy v. Bangor Furniture Co., 134 Me. 168, 183 A. 413.

The court has no authority to review the commission's finding of fact in the absence of fraud and provided such findings are supported by any legal evidence. Gray v. St. Croix Paper Co., 120 Me. 81, 113 A. 32.

Where the only question of law on appeal is whether or not there was any evidence before the commission upon which the decision can rest, the finding stands upon the same footing as the finding of a judge or the verdict of a jury, and it cannot be set aside if there is any evidence upon which it can rest. Simmons' Case, 117 Me. 175, 103 A. 68.

The commission's conclusion in matters of fact is not subject to review by the courts, unless palpably contrary to the undisputed evidence. Mailman's Case, 118 Me. 172, 106 A. 606.

It being provided by this section that there shall be no appeal from a decree entered in equity, in accordance with an order or decision of the industrial accident commission, from questions of fact found by the commission, the only question presented upon appeal as to such questions is whether or not there was any evidence to support the finding. Simmons' Case, 117 Me. 175, 103 A. 68.

Whether the finding of fact is supported by legal evidence is the limit of passing in review. Gagnon's Case, 125 Me. 16, 130 A. 355.

And appeal not sustained if facts consistent with finding.—If a state of facts is shown more consistent with the commissioner's finding than with any other theory and the finding is supported by rational and natural inferences from facts proved or admitted, an appeal cannot be sustained. Mailman's Case, 118 Me. 172, 106 A. 606; Patrick v. J. B. Ham Co., 119 Me. 510, 111 A. 912.

Court not to substitute its judgment for that of commission.—Where there is competent evidence of probative value in the record in support of the contentions of both parties, the commission has the right to adopt as the basis of its decision that which it regards true and proven by a fair preponderance of the testimony, and the court cannot substitute its judgment for that of the commission on such fact finding by the commission. Albert's Case, 142 Me. 33, 45 A. (2d) 660.

All questions of law subject to revision by law court.—While this section was intended by the legislature to submit the final decision of all questions of fact to the commission, it is nevertheless obvious, that it equally intended to leave all questions

of law, raised by the pleadings, subject to the revision of the law court, as it is therein provided, as follows: "Upon any appeal therefrom, the proceedings shall be the same as in appeals in equity procedure and the law court may, after consideration, reverse or modify any decree so made by a justice, based upon an erroneous ruling or finding of law." MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719.

An error which is one of law may be corrected on appeal. Gauthier's Case, 120 Me. 73, 113 A. 28.

An erroneous ruling by the commission, as a matter of law, is subject to appeal. Zooma's Case, 123 Me. 36, 121 A. 232.

A finding of the commission involving a conclusion of law is reviewable. Brackett's Case, 126 Me. 365, 138 A. 557.

A finding of law which is erroneous is reversible. Smith v. Heine Safety Boiler Co., 119 Me. 552, 112 A. 516.

And issues determined by the commission upon facts undisputed are questions of law open to review by the court. Pooler's Case, 122 Me. 11, 118 A. 590; Kirk v. Yarmouth Lime Co., 137 Me. 73, 15 A. (2d) 184.

Where the issue is one of law, the facts being undisputed, a finding is reviewable by the court. Fournier's Case, 120 Me. 191, 113 A. 27.

Findings of fact can be reviewed to determine if supported by evidence.—Notwithstanding there shall be no appeal upon questions of fact found by the commissioner and that his decision in the absence of fraud, upon all questions of fact shall be final, the finding of the commission upon questions of fact is reviewable upon the appeal to the law court, to the extent of ascertaining whether or not there is any palpable evidence upon which the decision can be sustained. MacDonald v. Pocahontas Coal & Fuel Co., 120 Me. 52, 112 A. 719.

Before an appeal should be sustained, it would be incumbent upon the claimant to show that the decision below was based upon an error of law. If such error of law were made to appear, it would be the function of the court to correct such, and for this purpose the court would examine the evidence set forth in the record. The court does not review the evidence with a purpose to discover whether the commission erred in its finding of facts. It is the trier of facts, and its holdings on questions of fact, when there is any evidence in support of the same, cannot be disturbed by the court. The court will not pass upon the sufficiency of the evidence, but it must be competent and have probative force. Albert's Case, 142 Me. 33, 45 A. (2d) 660.

And finding not so supported is error of law.—If supported by any legal evidence the finding of the commission must stand. If not it must be reversed inasmuch as a finding of a material fact without evidence is error of law. Kelley's Case, 123 Me. 261, 122 A. 580.

In the absence of competent evidence to sustain a finding of commission, the issue becomes one of law, and it is the duty of the court to set aside findings of commission. Gagnon's Case, 144 Me. 131, 65 A. (2d) 6.

A finding of fact by the commission not based on any evidence is an error of law which would compel the court to sustain an appeal. Albert's Case, 142 Me. 33, 45 A. (2d) 660.

Where the commissioner assigned as grounds for his decree conclusions that are unsupported by any competent testimony, or beliefs that are the result of pure speculation and conjecture, these assigned grounds constitute an error in law where they go to essential facts. Shaw's Case, 126 Me. 572, 140 A. 370.

Inferences may be weighed by court.—The inferences which the commissioner draws from proved or admitted circumstances must needs be weighed and tested by the court. Otherwise it cannot determine whether the decree is based on evidence or conjecture. Mailman's Case, 118 Me. 172, 106 A. 606.

Finding based on speculation not sustained.—The court must accept the findings of fact, if there is competent evidence, but it is not necessarily bound by the reasoning of the commission. A finding based on speculation or conjecture will not be sustained. Conclusions must be natural and rational. Boyce's Case, 146 Me. 335, 81 A. (2d) 670.

A finding based on speculation, surmise or conjecture will not be sustained. Syde's Case, 127 Me. 214, 142 A. 777.

Nor is one not guided by legal principles.—Notwithstanding the plain recitals of the compensation act that factual decisions of the industrial accident commission shall be final in the absence of fraud, and that no appeal will lie upon questions of fact, such decisions must be guided by legal principles, and will be set aside if based in any degree on the misapprehension of undoubted facts. Baker's Case, 143 Me. 103, 55 A. (2d) 780.

A ruling by a commissioner in an industrial accident case, based in part on

inadmissible testimony and in part on a misapprehension of an admitted fact is an error of law which the court is required to correct. Hinckley's Case, 136 Me. 403, 11 A. (2d) 485.

When it appears that the commissioner misunderstood or misstated the testimony in an important respect and upon that misunderstanding based his decision such determination may be reversed as legal error. Farwell's Case, 127 Me. 249, 142 A. 862.

Decree reviewable on appeal or on exceptions.—It is to be noted that this section provides with respect to the pro forma decree: "Such decree shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in a suit in equity duly heard and determined by said court, except that there shall be no appeal therefrom under questions of fact found by said commission or by any commissioner, or where the decree is based upon a memorandum of agreement approved by the commissioner of labor and industry." Such decrees, therefore, may like equity decrees, be brought before the supreme judicial court for review either by an appeal therefrom or on exceptions thereto. The procedure on such review will depend upon the method chosen to obtain the same and the statutory procedural requirements with respect to the method of review chosen must be strictly complied with. Girouard's Case, 145 Me. 62, 71 A. (2d) 682.

Report of evidence must be before the court on appeal.—The provision of this section that "upon any appeal therefrom the proceedings shall be the same as in appeals in equity procedure," is both mandatory and jurisdictional, and where it appears from the record that the case was heard before the commission on testimony of witnesses, and there was no report of such testimony nor any abstract thereof in the record, the appeal has not been perfected as required by c. 107, § 31, and it must be dismissed. Girouard's Case, 145 Me. 62, 71 A. (2d) 682.

This section requires that "upon any appeal therefrom the proceedings shall be the same as in appeals in equity procedure." Appeals in equity carry with them all the evidence, and it is the common practice to have the report of the evidence before the law court in compensation cases as in equity appeals. Gagnon's Case, 121 Me. 20, 115 A. 465.

In workmen's compensation cases, if the record on appeal does not contain a report of the evidence from the witnesses, or an abstract thereof, it should affirmatively appear in the record that it was heard before the commission in one of the alternative methods provided in § 37, and if so heard, the affidavits presented as therein prescribed, or the agreed statement of facts for a ruling upon the law applicable thereto as therein provided for, should form a part of the record presented to the court on appeal, for they would constitute the evidence under c. 107, § 31. Girouard's Case, 145 Me. 62, 71 A. (2d) 682.

But review may be had on exceptions without report of evidence.—The inability of a party aggrieved by a decree of the industrial accident commission or a commissioner to perfect an appeal because of inability to obtain a report of the evidence or an abstract thereof is not necessarily fatal to the obtaining of a review on questions of law. Chapter 107, § 26, provides that when the review is sought on exceptions to a decree, the exceptions need "be accompanied only by such parts of the case as are necessary to a clear understanding of the questions raised thereby." This statutory provision applies to exceptions to pro forma decrees in accordance with the decision of the industrial accident commission. If the case comes to the law court on exceptions to such a decree, it is only required that the exceptions be accompanied by such parts of the case as are necessary to a clear understanding of the questions raised by the exceptions. Although there may be exceptions where a report of all the evidence in the case would be necessary to a clear understanding of the questions raised thereby, yet in many cases the legal questions raised by the exceptions could be clearly understood without a report of all the evidence, and in such cases, the exceptions need not be accompanied by the same. Girouard's Case, 145 Me. 62, 71 A. (2d) 682.

No review of previous erroneous decree.—On an appeal by a claimant in a compensation case, no review may be made of a previous erroneous decree of the commission from which no appeal had been taken. Shoemaker's Case, 142 Me. 321, 51 A. (2d) 484.

Appeal must be perfected in county of accident.—Even where a hearing before the commission is had in a county other than that wherein the accident occurred, in accordance with the provisions of § 36, the provision of this section that an appeal be perfected in the county in which the accident occurred must be complied with. If perfected in another county, the court

has no jurisdiction. Maguire's Case, 120 Me. 398, 115 A. 176.

Case must not be sent up piecemeal.—Under § 37, the commissioner must decide the merits of the controversy. Under this section, proceedings to procure a review require a decree pro forma by a justice of the superior court, as though duly heard and determined by said court. Both requirements clearly provide that cases under this act must not be sent up piecemeal. Guthrie v. Mowry, 134 Me. 256, 184 A. 895.

Appeal held perfected within required time.—Where an employee filed certified copies of the decision of the industrial accident commission with the clerk of courts, when the superior court was in vacation, and awaited the coming in circuit of a justice, who then signed the decree, after which appeal was taken within ten days, the employer was not prejudiced. Middleton's Case, 136 Me. 108, 3 A. (2d) 434.

Implied authority of court to recommit to commission.—Authority to recommit to the commission is not expressly given by this section, but is, under some circumstances, necessarily implied. When a new or modified decree involves the weighing of conflicting testimony, it becomes necessary to remand the case to that tribunal upon which the statute casts the responsibility of weighing evidence, and of determining facts upon such evidence. Gauthier's Case, 120 Me. 73, 113 A. 28.

Applied in Scott's Case, 117 Me. 436, 104 A. 794; Westman's Case, 118 Me. 133, 106 A. 532; Maxwell's Case, 119 Me. 504, 111 A. 849; Fennessey's Case, 120 Me. 251, 113 A. 302; Berry v. M. F. Donovan & Sons, 120 Me. 457, 115 A. 250; Lemelin's Case, 121 Me. 72, 115 A. 551; Orff's Case, 122 Me. 114, 119 A. 67, overruled in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473; Hutchinson's Case, 123 Me. 250, 122 A. 626; Wallace's Case, 123 Me. 517, 124 A. 241; Gross' Case, 132 Me. 59, 166 A. 55; Riley v. Oxford Paper Co., 149 Me. 418, 103 A. (2d) 111.

Quoted in part in Robitaille's Case, 140 Me. 121, 34 A. (2d) 473.

Sec. 42. Enforcement of court decree; how modified. — Any pro forma decree rendered under the provisions of the preceding section shall be enforceable by the superior court by any suitable process including execution against the goods, chattels and real estate, and including proceedings for contempt for willful failure or neglect to obey the orders or decrees of the court, or in any other manner that decrees in equity may be enforced. Upon the presentation to it, however, of a certified copy of any subsequent order or decision of the commission or of any commissioner increasing, diminishing, terminating or commuting to a lump sum any payments of compensation on account of said injury, or of any agreement for modification of such compensation approved by the commissioner of labor and industry, the court shall revoke or modify any such pro forma decree based upon such prior order or decision of the commission or of any commissioner, or upon any agreement so approved, to conform to such subsequent order or decision or such approved agreement. (R. S. c. 26, § 42.)

The remedy for a party having a judgment under the compensation law is to present it to the superior court and obtain a "suitable process" to enforce it. Ripley's Case, 126 Me. 173, 137 A. 54.

Applied in Healey's Case, 124 Me. 54, 126 A. 21.

Sec. 43. Proceedings not to abate because of death.—No proceedings under the provisions of this act shall abate because of the death of the petitioner, but may be prosecuted by his legal representatives or by any person entitled to compensation by reason of said death under the provisions of this act. (R. S. c. 26, § 43.)

Sec. 44. Employers to file reports of accidents and settlement receipts.—Whenever any employee has reported to an employer under the act any injury by accident arising out of and in the course of his employment which has caused the employee to lose a day's work or has required the services of a physician, or whenever the employer has knowledge of any such injury by accident, every such employer shall within 7 days after said notice or knowledge make report thereof to the commission, with the average weekly wages or earnings of such employee, together with such other particulars as the commission may re-

quire; and shall also report whenever the injured employee shall resume his employment, and the amount of his wages or earnings at such time. Any employer who willfully neglects or refuses to make any report required by this section shall be subject to a penalty of not more than $100 for each such neglect or refusal, to be enforced by the commission in an action of debt in the name of the state. In the event the employer has sent the report to the insurance carrier for transmission by such insurance carrier to the commission, the insurance carrier willfully neglecting or refusing to transmit the report shall be liable for the said penalty.

Whenever any settlement is made with an injured employee, either by the employer or insurance company, for compensation covering any specified period under an approved agreement or a decree, or covering any period of incapacity, total or partial, that has ended, a duplicate copy of the settlement receipt or agreement signed by said employee showing the total amount of money paid to him for such period or periods shall be filed with the commission, but shall not be binding without its approval. (R. S. c. 26, § 44.)

Cross reference.—See c. 30, § 8, re reports of death, accidents, etc., to be made to commissioner of labor.

Duty of employer to report to commission.—Every employer under the compensation act, whose employee is accidently injured in and by reason of his employment, is under the duty of reporting to the industrial accident commission. Ross' Case, 124 Me. 107, 126 A. 484.

Report admissible in evidence in so far as it contains declarations againt interest of employer.—A report made in accordance with the provisions of this section, in so far and in so far only as it contained statements which were declarations against the interest of the employer, is admissible in evidence in a compensation case. The fact that the report was made and filed as an official document required by law cannot detract from its admissibility. Jacque's Case, 121 Me. 353, 117 A. 306.

A settlement receipt is not binding upon a compensation claimant unless approved by the commission. Lermond's Case, 122 Me. 319, 119 A. 864.

An attempted settlement which is unapproved, has no effect. Ripley's Case, 126 Me. 173, 137 A. 54.

Sec. 45. Insurance companies to furnish information.—Every insurance company insuring employers under the provisions of this act shall fill out any blanks and answer all questions submitted to it that may relate to policies, premiums, amount of compensation paid and such other information as the commission or the insurance commissioner may deem important, either for the proper administration of this act or for statistical purposes. Any insurance company which shall refuse to fill out such blanks or answer such questions shall be liable to a forfeiture of $10 for each day of such refusal, to be enforced by the commission in an action of debt in the name of the state. All moneys recovered under the provisions of this or the preceding section, or under the provisions of section 6, shall be paid into the state treasury and credited to the appropriation for the administration of this act. (R. S. c. 26, § 45.)

Sec. 46. Biennial report of commission.—The commission shall make a report to the governor and council for the biennial period ending December 31st of each even year, giving such statistical information as may be contained in its department in relation to the administration of this act, particularly with reference to the number of employees under the act, the number injured, the amount of compensation and other benefits paid and the cost of the same to the employers. (R. S. c. 26, § 46.)

Sec. 47. False statements.—If for the purpose of obtaining any benefit or payment under the provisions of this act, either for himself or for any other person, anyone willfully makes a false statement or representation he shall be guilty of a misdemeanor and liable to a fine of not exceeding $50, and shall forfeit all right which he may have to compensation under the provisions of this act. (R. S. c. 26, § 47.)

The Employers' Liability Law.

Law constitutional.—The employer's liability law is a valid exercise of the police power of the state, and it is therefore not repugnant to, or in conflict with, the Constitution of the United States or the Constitution of the State of Maine. Dirken v. Great Northern Paper Co., 110 Me. 374, 86 A. 320.

Sec. 48. Employers' liability defined.—If personal injury is caused to an employee, who, at the time of the injury, is in the exercise of due care, by reason of:

I. A defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied in consequence of, the negligence of the employer or of a person in his service who had been entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition;

II. The negligence of a person in the service of the employer who was entrusted with and was exercising superintendence and whose sole or principal duty was that of superintendence, or in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer;

III. The negligence of a person in the service of the employer who was in charge or control of a signal, switch, locomotive engine or train upon a railroad.

The employee or his legal representatives shall, subject to the provisions of the 8 following sections, have the same rights to compensation and of action against the employer as if he had not been an employee, nor in the service, nor engaged in the work of the employer.

A car which is in use by, or which is in possession of, a railroad corporation shall be considered as a part of the ways, works or machinery of the corporation which uses or has it in possession, within the meaning of subsection I of this section, whether it is owned by such corporation or by some other company or person. One or more cars which are in motion, whether attached to an engine or not, shall constitute a train within the meaning of subsection III of this section, and whoever, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive engine or train shall be deemed to be a person in charge or control of a signal, switch, locomotive engine or train within the meaning of said subsection. (R. S. c. 26, § 48.)

Stated in part in Dirken v. Great Northern Paper Co., 110 Me. 374, 86 A. 320.

Cited in Fournier v. York Mfg. Co., 108 Me. 357, 81 A. 82.

Sec. 49. Actions for damages for death in addition to those for injury.—If the injury described in the preceding section results in the death of the employee, and such death is not instantaneous or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal representatives of said employee may, in the action brought under the provisions of the preceding section, recover damages for the death in addition to those for the injury. (R. S. c. 26, § 49.)

Sec. 50. Actions for damages by widow or next of kin.—If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of section 48, an employee is instantly killed or dies without conscious suffering, his widow or, if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer. (R. S. c. 26, § 50.)

Sec. 51. Damages for death.—If, under the provisions of either of the 2 preceding sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable.

The amount of damages which may be awarded in an action under the provisions of section 48 for a personal injury to an employee, in which no damages for his death are awarded under the provisions of section 49, shall not exceed $4,000.

The amount of damages which may be awarded in such action, if damages for his death are awarded under the provisions of section 49, shall not exceed $5,000 for both the injury and the death, and shall be apportioned by the jury between the legal representatives of the employee and the persons who would have been entitled, under the provisions of section 50, to bring an action for his death if it had been instantaneous or without conscious suffering.

The amount of damages which may be awarded in an action brought under the provisions of section 50 shall not be less than $500, nor more than $5,000. (R. S. c. 26, § 51.)

Damages must be assessed in accordance with section.—By the express provisions of this section the damages recoverable for the death of a person "shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable. It is error to omit to instruct the jury that the damages are to be assessed in accordance with the rule expressly prescribed in the statute under which the action was brought, and to instruct them that the damages are to be assessed upon the principle of compensation to the plaintiff for the pecuniary loss resulting to her on account of the death of her husband. Pottle v. Liverpool & London & Globe Ins. Co., 109 Me. 584, 85 A. 1058.

Sec. 52. Notice of injury in writing within 60 days; action within 1 year.—No action for the recovery of damages for injury or death under the provisions of sections 48 to 51, inclusive, shall be maintained unless notice of the time, place and cause of the injury is given to the employer within 60 days and the action is commenced within 1 year after the accident which causes the injury or death. Such notice shall be in writing, signed by the person injured or by a person in his behalf; but if from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in this section, he may give it within 10 days after such incapacity has been removed, and if he dies without having given the notice and without having been for 10 days at any time after his injury of sufficient capacity to give it, his executor or administrator may give such notice within 60 days after his appointment. A notice given under the provisions of this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place or cause of the injury, if it is shown that there was no intention to mislead and that the employer was not in fact misled thereby.

If a notice given under the provisions of this section is claimed by the employer to be insufficient for any reason he shall so notify in writing the person giving it within 10 days, stating the insufficiency claimed to exist, and thereupon the person whose duty it is to give the notice may, within 30 days, give a new notice with the same effect as if originally given. (R. S. c. 26, § 52.)

Sec. 53. Liability of employer not barred by entering into contract with independent contractor.—If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such contractor or subcontractor, caused by any defect in the

condition of the ways, works, machinery or plant, if they are the property of the employer or are furnished by him and if such defect arose, or had not been discovered or remedied, through the negligence of the employer or of some person entrusted by him with the duty of seeing that they were in proper condition. (R. S. c. 26, § 53.)

Sec. 54. No right of action for damages, if employee knew of defect or negligence and failed to give notice.—An employee or his legal representatives shall not be entitled under the provisions of sections 48 to 51, inclusive, to any right of action for damages against his employer if such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or to some person superior to himself in the service of the employer who was entrusted with general superintendence. (R. S. c. 26, § 54.)

Sec. 55. Application of §§ 48-54.—The provisions of the 7 preceding sections shall not apply to injuries caused to domestic servants or farm laborers by fellow employees or to those engaged in cutting, hauling or driving logs. Nothing in said section shall be construed to abridge any common law rights or remedies which the employee may have against his employer, but a judgment recovered under the provisions of said sections or a settlement of any action commenced or claim made for death or injury, under the provisions thereof, shall be a bar to any claim made or action begun to recover for the same injury or the same death, under the provisions of the common law or under the provisions of any other statute. (R. S. c. 26, § 55.)

Section does not make unconstitutional classification.—See Dirken v. Great Northern Paper Co., 110 Me. 374, 86 A. 320.

What constitutes "driving logs."—The language of the exemption is explicit and unqualified. The meaning of the expression "driving logs" is clear and free from all uncertainty. It includes any actual log driving labor, regardless of whether the employer is the owner of the logs driven or not, and irrespective of the use he may intend to make of the logs after they have been driven. Gallant v. Great Northern Paper Co., 114 Me. 208, 95 A. 889.

Sec. 56. Special contracts.—No person shall, by a special contract with his employees, exempt himself or another person from liability which he may be under to them, for injuries suffered by them in his employment and resulting from the negligence of the employer or such other person, or of a person in his employ. (R. S. c. 26, § 56.)

The Occupational Disease Law.

Cross Reference.—See c. 25, § 88, re duty of physicians.

Sec. 57. Title.—Sections 57 to 71, inclusive, shall be known and may be referred to as "the occupational disease law"; the phrase "this law" as used in the said sections refers thereto. (1945, c. 338. 1953, c. 308, § 36.)

Cited in Dinsmore's Case, 143 Me. 344, 62 A. (2d) 205.

Sec. 58. Application.—Except as otherwise specifically provided herein, incapacity to work or death of an employee arising out of and in the course of the employment, and resulting from an occupational disease as hereinafter defined, shall be treated as the happening of a personal injury by accident arising out of and in the course of the employment, within the meaning of the Workmen's Compensation Act, and all the provisions of that act shall apply to such occupational diseases; provided, however, that this law shall apply only to cases in which the last exposure to an occupational disease in an occupation subject to

the hazards of such disease occurred in this state and subsequent to January 1, 1946. (1945, c. 338. 1953, c. 308, § 37.)

Sec. 59. Definition of "occupational disease". — Whenever used in this law, the term "occupational disease" shall be construed to mean only a disease set forth in section 69 which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and which arises out of and in the course of employment. (1945, c. 338.)

Sec. 60. False reports.—No compensation shall be payable for an occupational disease if the employee who was employed on January 1, 1946, or who, at the time of entering into the employment of the employer by whom the compensation would otherwise be payable, falsely represents himself in writing as not having previously been disabled, laid off or compensated in damages or otherwise, because of such disease. (1945, c. 338. 1953, c. 308, § 38.)

Sec. 61. Aggravation of occupational disease.—Where an occupational disease is aggravated by any other disease or infirmity, not itself compensable, or the death or incapacity from any other cause, not itself compensable is aggravated, prolonged, accelerated or in anywise contributed to by an occupational disease, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the incapacity or death as such occupational disease, as a causative factor, bears to all the causes of such incapacity or death, such reduction in compensation to be effected by reducing the number of weekly or monthly payments or the amounts of such payments, as under the circumstances of the particular case may be for the best interest of the claimant or claimants. (1945, c. 338.)

Sec. 62. Date from which compensation is computed; employer liable.—The date when an employee becomes incapacitated by an occupational disease from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease shall be taken as the date of the injury equivalent to the date of accident under the Workmen's Compensation Act. Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, on the risk when such employee was last so exposed under such employer, shall be liable therefor; the amount of the compensation shall be based upon the average wages of the employee when last so exposed under such employer, and notice of injury and claim for compensation, as hereinafter required, shall be given and made to such employer; provided, however, that the only employer and insurance carrier liable shall be the last employer in whose employment the employee was last injuriously exposed to the hazards of the disease during a period of 60 days or more, and the insurance carrier, if any, on the risk when the employee was last so exposed, under such employer. (1945, c. 338.)

Sec. 63. Notice of injury; filing of claim.—The provisions of sections 20 and 33 of the Workmen's Compensation Act with reference to giving notice, making claims and filing petitions shall apply to cases under this law except that in cases under this law the date of incapacity as defined in section 62 shall be taken as equivalent to the date of accident in said sections 20 and 33, and the notice under section 20 shall include the employee's name and address, the nature of the occupational disease, the date of incapacity, the name of the employer in whose employment the employee was last injuriously exposed for a period of 60 days to the hazards of the disease and the date when employment with such employer ceased. Provided, however, that after compensation payments for an occupational disease have been legally discontinued, claim for further compensation for such occupational disease not due to further exposure to an occupational

hazard tending to cause such disease, shall be barred if not made within 1 year after the last previous payment. (1945, c. 338.)

Sec. 64. Partial incapacity.—Compensation shall be payable for partial incapacity due to occupational diseases as provided in section 12 of the Workmen's Compensation Act. (1945, c. 338.)

Sec. 65. Compensation limits.—Compensation for partial or total incapacity or death from occupational disease shall be payable only in the following manner and amounts: if such incapacity or death occurs during the calendar month of January, 1946, total compensation shall not exceed $500. Thereafter the total compensation payable for such incapacity or death shall increase at the rate of $50 each calendar month. Such progressive increase in limits shall continue until the limits fixed in the Workmen's Compensation Act are reached. Compensation shall not be payable for incapacity by reason of occupational diseases unless such incapacity results within 1 year after the last injurious exposure to such disease in the employment, and shall not be payable for death, unless death follows continuous disability from such disease, commencing within the period above limited, for which compensation is payable, and results within 7 years after such last exposure. (1945, c. 338. 1953, c. 308, § 39.)

Sec. 66. Examination of employees.—An employer may request any of his employees, or any prospective employees, to be examined for the purpose of ascertaining if any of them are in any degree affected by an occupational disease or peculiarly susceptible thereto. Refusal to submit to such examination shall bar such employee or prospective employee from compensation or other benefits provided by this law resulting from exposure to the hazards of occupational disease subsequent to such refusal and while in the employ of such employer. (1945, c. 338.)

Sec. 67. Waiver.—Where an employee or prospective employee, though not actually incapacitated is found to be affected by an occupational disease, he may, subject to the approval of the industrial accident commission, be permitted to waive or limit in writing his compensation for any aggravation of his condition that may result from his continuing in his hazardous occupation. A waiver or limitation so permitted shall remain effective for any trade, occupation, process or employment, notwithstanding any change or changes in his employment or employer until the commission otherwise orders. The industrial accident commission shall make reasonable rules and regulations relative to the form, execution, filing or registration and public inspection of waivers or records thereof. (1945, c. 338.)

Sec. 68. Impartial medical advice.—On request of a party or on its own motion the commission may in occupational disease cases appoint one or more competent and impartial physicians, their reasonable fees and expenses to be fixed and paid by the commission. These appointees shall examine the employee and inspect the industrial conditions under which he has worked in order to determine the nature, extent and probable duration of his occupational disease, the likelihood of its origin in the industry and the date of incapacity. The provisions of section 22 of the Workmen's Compensation Act shall apply to the filing and subsequent proceedings on their report, and to examinations and treatments by the employer.

If claim is made for death from an occupational disease, an autopsy may be ordered by the commission under the supervision of such impartial appointees. All proceedings for or payments of compensation to any claimant refusing to permit such autopsy when ordered shall be and remain suspended upon and during the continuance of such refusal. (1945, c. 338.)

Sec. 69. Occupational diseases.—When arising out of and in the course of employment, compensation shall be payable for disabilities sustained or death incurred by an employee resulting from the following occupational diseases:

Column 1 Description of disease	Column 2 Description of process
1. Anthrax.	1. Handling of wool, hair, bristles, hides or skins.
2. Lead poisoning or its sequelae.	2. Any process involving the use of or direct contact with lead or its preparations or compounds.
3. Mercury poisoning or its sequelae.	3. Any process involving the use of or direct contact with mercury or its preparations or compounds.
4. Phosphorus poisoning or its sequelae.	4. Any process involving the use of or direct contact with phosphorus or its preparations or compounds.
5. Arsenic poisoning or its sequelae.	5. Any process involving the use of or direct contact with arsenic or its preparations or compounds.
6. Poisoning by benzol or nitro-, hydro-, hydroxy- and amido-derivatives of benzene (dinitrobenzol, anilin and others), or its sequelae.	6. Any process involving the use of or direct contact with benzol or nitro-, hydro-, hydroxy- or amido-derivatives of benzene or its preparations or compounds.
7. Poisoning by carbon bisulphide or its sequelae or any sulphide.	7. Any process involving the use of or direct contact with carbon bisulphide or its preparations or compounds or any sulphide.
8. Poisoning by nitrous fumes or its sequelae.	8. Any process in which nitrous fumes are evolved.
9. Poisoning by formaldehyde and its preparations.	9. Any process involving the use of or direct contact with formaldehyde and its preparations.
10. Chrome ulceration or its sequelae or chrome poisoning.	10. Any process involving the use of or direct contact with chromic acid or bichromate of ammonium, potassium or sodium, or their preparations.
11. Carbon monoxide poisoning.	11. Any process involving direct exposure to carbon monoxide in building sheds or enclosed places.
12. Poisoning by sulphuric, hydrochloric or hydrofluoric acid.	12. Any process involving the use of or direct contact with sulphuric, hydrochloric or hydrofluoric acids or their fumes.

Column 1	Column 2
13. Dermatitis (venenata).	13. Any process involving the use of or direct contact with acids, alkalies, acids or oil, or with brick, cement, lime, concrete or mortar capable of causing dermatitis (venenata), but exclusive of soaps and cleaning materials.
14. Silicosis or its sequelae.	14. Any process involving direct exposure to silicon dioxide particles.
15. Fluoride poisoning or its sequelae.	15. Any process involving direct exposure to fluorides.

(1945, c. 338. 1951, c. 261, § 1. 1953, c. 361, § 1.)

Sec. 70. Silicosis.—In the absence of conclusive evidence in favor of the claim, disability or death from silicosis shall be presumed not to be due to the nature of any occupation, unless during the 10 years immediately preceding the date of disability the employee has been exposed to the inhalation of silica dust over a period of not less than 5 years, 2 years of which shall have been in this state, under a contract of employment existing in this state; provided, however, that if the employee shall have been employed by the same employer during the whole of such 5-year period, his right to compensation against such employer shall not be affected by the fact that he had been employed during any part of such period outside of this state. No compensation shall be payable for partial incapacity due to silicosis. The compensation payable in any such case shall be limited to a period not to exceed the average life expectancy of a person of the age and sex of the deceased. In the event of disability from silicosis the employer shall provide reasonable medical treatment not to exceed $1,000 in amount. (1951, c. 261, § 2.)

Sec. 71. New occupational diseases not retroactive.—When any new occupational disease has been added to the list of compensable occupational diseases after January 1, 1946, the date the law making such addition first became effective shall be used in place of January 1, 1946, and said law, including sections 58, 60 and 65, shall apply thereto as of the date the law making such addition first became effective. (1951, c. 261, § 2. 1953, c. 308, § 40.)