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INSURANCE FEATURES OF WORKMEN'S COMPENSATION LAWS†

ARTHUR LENHOFF

V. EFFECT OF ABSOLUTE LIABILITY OF INSURER TO CLAIMANT UPON THE INSURER-EMPLOYER RELATIONSHIP

A. Breach by Employer of Term of the Policy*

The foregoing analysis pointed to the independence of the worker's insurance status as the element which controls all branches of social insurance. Now, it remains to be seen whether the employer-insurer relationship is affected by that working principle. The cases in point present various situations reducible to three types. The first two hinge upon the employer's breach of a policy provision such as the notification clause and they differ only in that in the one type, the employer is the plaintiff, and in the other, the defendant. *Wisconsin Michigan Power Co. v. General Casualty & Surety Co.*¹²⁰ is representative of the first type. There, the employer, after having paid an award for which both he and the defendant had been held liable, brought action against the insurance company. The defense set up was the non-compliance of the employer with the notice provision. The Michigan Supreme Court dismissed the action. One can approve of the result only by disregarding the fact that whatever the effect of the plaintiff's payment upon the discharge of the compensation obligation,¹²¹ the plaintiff's right to be indemnified¹²² still requires an examination of the character of the notice

†This is the second of two installments under this heading. The first part of Professor Lenhoff's article appeared in (1943) 29 CORNELL L. Q. 176.

Acknowledgment is here made of certain printing errors appearing in the first part of the article:

In 29 CORNELL L. Q. at 180, note 23, line 3, substitute "24" for "23" between the words "note" and "*infra*"; and in line 4 of the same note substitute "section" for "action" between "see" and "V".

In note 113 of 29 CORNELL L. Q. at 201, the first word of line 2 should be "last" instead of "second"; also in line 2 of the same note substitute "second" for "first" between the words "the" and "calendar".

*The NEW YORK WORKMEN'S COMPENSATION LAW will hereafter be cited as W. C. L. 120252 Mich. 331, 233 N. W. 333 (1930).

¹²¹Since in New York the employer does not incur any statutory obligation to the employees by taking out insurance with the state fund, this (first) situation can arise only with an insurance company as insurer. See note 21 *supra*.

¹²²See text *supra* at note 23; *Lumbermen's Mutual Cas. Co. v. Bissell*, 220 Mich. 352, 363, 190 N. W. 283, 288 (1922). Cf. Note (1935) 83 U. OF PA. L. REV. 280. (The case noted is not in point.)

For the relationship of the liability of the insurer to the insured tortfeasor, a relationship analogous to the liability of the insurance carrier to the employer, see Langmaid, *Some Recent Subrogation Problems in the Law of Suretyship and Insurance* (1934) 47 HARV. L. REV. 976, 1002.

provision. This question will presently be discussed.¹²³

Another Michigan case, *Fidelity and Casualty Co. of N. Y. v. Vantaggi*¹²⁴ presents the second type. The insurance company, having satisfied an award, sued the employer for reimbursement because the employer had failed to notify it of the occurrence of the accident. While the court below dismissed the action on a highly technical ground, the highest court remanded the case. Although the emphasis was on the significance of the breach of the notice provision, the decision is not commendable because of its dubious construction of that provision. From the start the court recognized the difference between the compensation insurer's obligation to the employee and that of a surety, considering the insurance company no less a principal obligor than the employer. The court correctly argued that the rules concerning the right to restitution for payments made in satisfaction of debts owed primarily by a person other than the payor cannot apply to the insurer's action against the insured.¹²⁵ In dealing with this question, one has to keep in mind that it is one thing to hold the indemnitor liable to the indemnitee and an entirely different thing to reverse the underlying concept and hold the indemnitee liable to the indemnitor. As the court pointed out, one may search the compensation policy in vain to find the least suggestion of a promise by the employer, the indemnitee, to indemnify his insurer, the indemnitor. The court made an opening for the plaintiff by reading into the notice provision of the insurance policy an obligation, the breach of which would bring about a claim for damages,¹²⁶ and required it to show the extent of damages it had suffered by the defendant's failure to give him notice of the accident.

It is not so much the result as the rationale which provokes criticism. One wonders at the court's attempt to place the notice provision in the obligation category. According to the standard compensation insurance policy, that provision along with many other clauses, falls within the class of conditions.¹²⁷ That an insurance policy must be interpreted so as to

¹²³*Gise v. Fidelity Cas. Co. of N. Y.*, 188 Cal. 429, 206 Pac. 624 (1922) (the employer was denied recovery against his insurance carrier on all counts). See text *infra* at note 131.

¹²⁴300 Mich. 528, 2 N. W. (2d) 490 (1942).

¹²⁵Thus the court qualified the rule of *Lumbermen's Mut. Cas. Co. v. Bissell*, 220 Mich. 352, 190 N. W. 283 (1922). There, likewise, upon a complaint of the insurer who had paid the award, the employer was held liable to refund to him that amount for failure of notice, without any discussion concerning the materiality of the "breach in the contract" for the award.

¹²⁶*Fidelity and Cas. Co. of N. Y. v. Vantaggi*, 300 Mich. 528, 533, 2 N. W. (2d) 490, 494 (1942).

¹²⁷In the instant case, the notice provision constitutes a subdivision *F* of the policy. This coincides with *F* of the standard policy. It is included under the "conditions." See HOBBS, *WORKMEN'S COMPENSATION INSURANCE* (1939) 664.

resolve any doubt in favor of the insured and against the insurer is a rule of construction not open to any objection. Aside from the parlance of the policy, the conditional character of the notice provision has been generally accepted as a doctrine of insurance law,¹²⁸ and is in accordance with the common-law view of the distinction between words of condition and words of promise.¹²⁹ Finally, since it is the function of the industrial board to find the facts which show the occurrence of an industrial accident, the failure of the employer to make them known to his insurer is immaterial to the risk.¹³⁰

Where a breach of a condition or warranty affects that risk, quite a different question is raised. A California case, *Gise v. Fidelity & Casualty Co. of N. Y.*,¹³¹ sheds light upon a problem of this type. In an action brought against his insurer, the employer attempted to recover the expenditures incurred in defending a compensation claim of his fifteen-year-old employee who was badly hurt while operating a meat-grinding machine. This employment violated the labor statute as well as the employer's promise to his insurer as to nonemployment of juvenile workers. An award was made against both employer and insurer because the local compensation statute covers lawfully and unlawfully employed workers alike.¹³² The insurer, who had refused the employer's request for intervention in the compensation proceedings, counterclaimed the amount of the award which he had been obliged to pay.¹³³ While the lower court denied relief to each of the parties, the appellate court upon appeal and crossappeal affirmed the dismissal of the complaint but allowed the counterclaim. The argument advanced in the decision goes to the forfeiture of the indemnity insurance for breach of the promissory warranty. That the view taken by the court is open to question is apparent from the fact that the defendant company paid the award *qua*

¹²⁸VANCE, INSURANCE (2d ed. 1930) 915: ". . . (the notice) provision must be complied with under penalty of releasing the insurer from liability." See also RESTATEMENT, CONTRACTS (1936) § 260, comment *b*.

¹²⁹For the exceptional circumstances under which words of condition might be construed as words of promise, see *Hale et al. v. Finch*, 104 U. S. 261, 266 (1881).

¹³⁰See N. Y. INS. LAW (McKinney, Supp. 1942) § 150 (2). The New York law would probably be held to preclude a judgment against the employer, for that section is also applicable to compensation insurance. *Id.* at § 167 (4). Under this statute, the difference between "obligation" (warranty) and "condition" has lost its force, since the effect of a breach of warranty is no less dependent than a breach of condition upon its materiality to the risk of loss, damage, or injury. There is no case in point in New York. In *Standard Accident Ins. Co. v. Carlson*, 271 Mich. 199, 259 N. W. 887 (1935), the court without discussing other objections dismissed the complaint of the insurer upon the doctrine of waiver.

¹³¹188 Cal. 429, 206 Pac. 624 (1922).

¹³²CAL. LABOR CODE (Deering, 1937) § 3351.

¹³³*Fidelity & Cas. Co. v. Industrial Acc. Com.*, 185 Cal. 797, 178 Pac. 896 (1919).

compensation insurer. In contradistinction to a mere liability insurer, the former paying the awarded amount discharges his own obligation as against the claimant, for the statute couples the obligation assumed against the latter indissolubly with his acceptance of the employer's offer. And what is more, that obligation imposed by statutory command must be integrated into the policy issued to the employer. The contingency upon the happening of which the insurer's duty to compensate is conditioned being identical with respect to the employer and the employee, the payment of the award by the insurer carries with it the performance of his contractual as well as his statutory duty. The question whether the nonperformance of a precedent condition would have entitled the insurance company to refuse any payment has become moot.¹³⁴ Legalistic as the solution may appear, much is to be said for its practical effect, for it bars a flare-up of a compensation case which was decided and settled between two of the parties to it, namely the insurance company and the insured, about petty inadvertences neither harming the former nor profiting the latter. Where, however, as in the instant case, the employer's omissions amount to delinquencies which affect the risk, the insurer may recover in an action for deceit even though a recovery in quasi contract must be gainsaid.¹³⁵ The California case presents such a situation because the false declarations of the employer about the age of his employees induced the insurance company to accept his offer.

There is no public interest in sparing an employer from liability for damage to the insurer caused by deliberate or reckless misconduct which increases the risk assumed.¹³⁶ The Connecticut act, taking cognizance of this fact, vitiates the policy as between the parties to the contract if the employer's misstatements materially affect the risk assumed, although the insurance carrier is under an unconditional duty to the employees.¹³⁷ Such

¹³⁴RESTATEMENT, CONTRACTS (1936) § 250, comment *c*.

¹³⁵As to the relief provided by this remedy, see 5 WILLISTON, CONTRACTS (Williston & Thompson, rev. ed., 1936) § 1525.

¹³⁶OHIO CONST. Art. II § 35 (allowing an additional award under the obligation of the employer to reimburse the state fund for the increased award in case of his failure to comply with specific requirements for the protection of life, safety and health). Section 4553 of the California Labor Code and workmen's compensation laws of other states provide for an increased compensation in case of serious or willful misconduct of the employer. Some foreign statutes go further than that. *E.g.*, Austria: GEWERBLICHES-SOZIALVERSICHERUNGSGESETZ (1938) § 74 (b); German: REICHSVERSICHERUNGSORDNUNG § 903 (4). See note 7 *supra*.

¹³⁷CONN. GEN. STAT. (1930) § 5286. It is well to note the difference between a provision of this kind and the catch-all clause found in the Arkansas W. C. A. of 1939. See Ark. Acts 1939, No. 319, § 38 (c), amended Ark. Acts 1941, No. 121: ". . . provided that as to any question of liability as between employer and insurer the terms of the insurance contract shall govern." Although on its face suggesting no reluctance to aid the insurance companies, that provision remains open to a construction which

a provision protects the compensation insurer from fraudulent inducements, as well as from any other material misrepresentations, whether made intentionally or unintentionally, or whether made prior to or in the course of the insurance contract. Whenever a reform of compensation statutes is under consideration, one will have to counterbalance the social and economic incidents of a change involving restitutionary remedies for the insurer against the increase of litigation inherent in the greater strength of his position. Where private insurance companies are in the field, it is apparent that reimbursements made by the employers would cater only to the companies' profits, for their premium policy would not be determined by their balance sheets because of the competitive situation. However, with the concentration of all compensation insurance in one state fund, the public at large would gain by an increase in the revenues for the fund, because the calculation of the premiums would then rest exclusively upon its financial status. Whether the lowering of premiums would cause the price of merchandise to decrease would depend upon the importance of a local price differential.

B. *Attempted Cancellation of the Policy*

So far, we have been speaking only of employers' failings and transgressions. However, not all the vicissitudes causing insurer losses beyond those actuarially assumed can be charged to the employer. In *Piscitello v. Boscarello*,¹³⁸ the employer had expressly refused to accept the policy tendered to him by an insurance company which had overhastily and without subsequent revocation sent notice of issuance of the policy to the board. It is not strange that the company was held liable to an injured employee of the offeree.¹³⁹ Yet by no stretch of the imagination would a recovery by the company be possible against the employer. This brings us to a discussion of the third type of cases which center around the problem of the continuation of the compensation insurer's obligation until his compliance with the statutory requirements for the termination of this obligation. The crucial point is illustrated by a certain group of cancellation cases. In each of them the decision turned upon the question whether despite a failure to file a notice of the termination of the insurance contract with the administrative

might prove to be a boomerang. By reading into the contract the assumption of an unqualified insurance obligation, the satisfaction of an award by the insurer might discharge the employer's obligations as if he had himself paid the award.

¹³⁸113 Conn. 128, 154 Atl. 168 (1931). (Unlike the New York statute, the Connecticut W. C. L. requires the insurance company to report to the authorities the issuance of any compensation policy.)

¹³⁹*Id.* at 130, 154 Atl. at 170: "The terms . . . are given a certain fixed significance by a conclusive presumption. . . ."

agency, the insurance company should be held released from liability because of the presence of other insurance covering the same risk or because of the fact that the termination of the relationship originated in an agreement¹⁴⁰ or in an act of the employer,¹⁴¹ but not in an act of the insurance company itself. In *Arner v. Manhattan Spring and Couch Co.*,¹⁴² three insurance companies had insured the compensation risk; when the employer agreed with one of the companies to have its policy cancelled, this company considered itself released from liability. However, the courts found against the company when an accident occurred after that cancellation, but before cancellation was communicated to the board. In the absence of such communication, the liability of a compensation insurer continues whether or not "new insurance is provided."¹⁴³ Quite recently the insurance companies succeeded in having the statute amended by inserting the words "provided, however, that if the employer has secured insurance with another insurance carrier which becomes effective prior to the expiration of the time stated in such notice, the cancellation shall be effective as of the date of such coverage."¹⁴⁴ This change is not a material deviation from the correct conception of the nature of compensation insurance.

Where, as in these cases, the employer had compensation insurance with a second or third insurance company, any attempt by the first insurer, who had failed to give notice to the board of the termination of the insurance relationship, to demand restitution from the employer would be doomed to failure. Just as the courts held it immaterial to the continuance of liability that other insurance was in effect, likewise they held it immaterial that the insurance contract had been terminated where notice of termination

¹⁴⁰W. C. A. § 54 (5). The phraseology of the statute, if taken literally, suggests that the requirement of public notification applies only to cancellation by the carrier, the statute speaking of the notice as if it had to be served also "on the employer." Yet from the beginning the courts have balked at so literal a construction. *Matter of Otterbein v. Babor & Comeau Co.*, 272 N. Y. 149, 5 N. E. (2d) 71, 107, A. L. R. 1510 (1936) [employer's acquiescence in insurer's request for cancellation of policy together with an assumption of the risk by another insurer is not sufficient, without notice to the commissioner, to relieve the first insurer of its liability.]

¹⁴¹*Passarelli v. Columbia Engineering & Contracting Co.*, 244 App. Div. 850, 279 N. Y. Supp. 713 (3d Dep't 1935), *rev'd*, 270 N. Y. 68, 200 N. E. 583 (1936) (since the Commissioner had not been notified of the cancellation, the employee's rights were unaffected although the policy was cancelled by the employer). *Accord*, *Matter of Tufel v. Lido Club Hotel, Inc.*, 228 App. Div. 870, 241 N. Y. Supp. 795 (3d Dep't 1930).

¹⁴²264 N. Y. 501, 191 N. E. 535 (1934). *Hargraves v. Shevlin Mfg. Co. and Zurich Gen. Acc. and Liab. Ins. Co.*, 179 App. Div. 477, 165 N. Y. Supp. 960 (3d Dep't 1917), *aff'd mem.* 222 N. Y. 646 (1918). Cancellation not communicated to Commissioner, although accepted by a receiver in bankruptcy was not binding on the claimant who was injured subsequent to the purported cancellation.

¹⁴³*Matter of Otterbein*, 272 N. Y. 149, 5 N. E. (2d) 71 (1936).

¹⁴⁴N. Y. Laws 1937, c. 559, *amending* § 54 (5) W. C. L.

had not been given to the board. Such was the case in *Hamburger v. Wolfe-Smith*,¹⁴⁵ a New York decision, and in *Md. Casualty v. Moss*,¹⁴⁶ a Michigan decision. Awards were made against the insurance carriers for accidents which occurred after the expiration of the insurance contracts but prior to notification of the expiration. In each case, the claim of the insurers against the erstwhile client was rejected. The theory of the Michigan court was that the duty assumed by the insurer cannot be equated to the promise of a surety,¹⁴⁷ for it is an integral part of the insurance assumed by the company.¹⁴⁸ In New York, where the insurance company had raised the question unsuccessfully in the compensation proceedings and had then taken an appeal to the appellate division, the board decision was upheld, primarily upon reasoning similar to that of the Michigan court and secondarily because the board lacked jurisdiction to direct an interparty recovery.¹⁴⁹ The decisions are in harmony with sound principles of quasi contract and equity. By writing compensation insurance the insurance company brings itself within the operation of the statute. It becomes an instrument of social insurance, and its obligations are then defined by the statute rather than by the law of contracts.¹⁵⁰ The boards administering the statute, if faced with the question whether an award should be made against an insurer rather than against the employer or against both, should give, as the Connecticut court properly pointed out,¹⁵¹ first consideration to the interests of the injured person or his dependents. When one approaches the question in the way suggested by the court, no room is left for a fixed order of priorities among the obligors. It is submitted, furthermore, that since, as we saw, the obligation of the employer to insure is a public obligation which is nondelegable, the objections to the insurers' attempt to claim indemnity from the employers gain even greater potency. By satisfying the award made against him, the insurer has not discharged the public obligation of the employer who failed to take out insurance.

¹⁴⁵205 App. Div. 739, 200 N. Y. Supp. 803 (3d Dep't 1923).

¹⁴⁶276 Mich. 219, 267 N. W. 819 (1936).

¹⁴⁷But cf. *U. S. Fidelity & Guarantee Co. v. Taylor*, 132 Md. 511, 104 Atl. 171 (1918). In this case, representative of the third type, an award was allowed for an injury suffered in a business activity which both parties to the insurance contract considered outside the coverage of the policy. Afterwards the insurance company was allowed a recovery as a surety from the employer.

¹⁴⁸276 Mich. 219, 229, 267 N. W. 819, 820 (1936).

¹⁴⁹205 App. Div. 739, 740, 200 N. Y. Supp. 803, 805 (3d Dep't 1923).

¹⁵⁰It is questionable whether the criticism of the *Moss* decision in the *Harvard Law Review* [Note (1937) 50 HARV. L. REV. 706] is correct. That the statute has no penalizing character is, of course, true; but that does not disprove the argument that the insurance company's liability has a basis of its own by having become an agency of the social insurance system.

¹⁵¹*Witchekowski v. The Falls Co.*, 105 Conn. 737, 136 Atl. 565 (1927).

An appeal to equity can meet with no more success than a recourse to quasi-contractual principles. To give notice to the administrative authorities of the termination of his relationship with the employer lies completely within the power of the insurer. Obviously the Michigan court was correct in emphasizing the absence of equities in favor of the insurer;¹⁵² the New York court was likewise correct in imposing upon the insurance company the duty of notifying the board of the termination of its contract no matter which of the parties initiated that termination.¹⁵³

VI. ESTOPPEL, WAIVER, MISREPRESENTATION, AND REFORMATION— EQUITY POWER OF THE BOARD

A. *Extension of Coverage by Agreement of the Parties*

As is apparent from the foregoing sections, there is a sharp dividing line between compensation insurance and private insurance. The pragmatic approach to the problem dealt with in this article demands an inquiry into the function of the institution; hence we turn to the question of the latitude of the parties in regulating that function. In the field of private insurance, the parties' conduct and words, particularly if evinced in the insurance policy, have been given a binding effect. Where, for example, the insurance company has invited expenditures of premiums by the other party for insurance against a certain class of occurrences, its subsequent allegation of the noninsurability of such events can hardly be a good defense. Let us see whether this holds true of compensation insurance.

In *Dann v. Town of Veteran*, the insurance company had, at the request of the town, the insured, annexed to the compensation policy a statement in which the parties agreed that one Dann, the highway superintendent, was an "employee."¹⁵⁴ When the highway superintendent was injured, the board disallowed the claim upon the ground that the superintendent was a public

¹⁵²276 Mich. 219, 230, 267 N. W. 819, 820 (1936).

¹⁵³Otterbein v. Babor & Comeau Co., 272 N. Y. 149, 154, 5 N. E. (2d) 71, 73, cited *supra* note 140.

¹⁵⁴254 App. Div. 462, 5 N. Y. S. (2d) 997 (3d Dep't 1938), *aff'd*, 278 N. Y. 461, 17 N. E. (2d) 130 (1938), *rearg. den.*, 279 N. Y. 760, 18 N. E. (2d) 697 (1939). It is noteworthy that although the Appellate Division reversed the Board decision, it did so through reasoning contrary to that propounded later by the Court of Appeals, for the Appellate Division found for the claimant by placing officers of public corporations on the same footing as those of private corporations. W. C. L. § 54 (6). However, in analogous cases the Appellate Division (Third Department) later on refused to base its decisions on an estoppel and took pains to show coverage of the claimant under § 54 (6). *Matter of Brigham v. Allegheny County*, 263 App. Div. 458, 33 N. Y. S. (2d) 479 (3d Dep't 1942) (sheriff); *Van Buren v. Town of Richmondville*, 257 App. Div. 1089, 14 N. Y. S. (2d) 697 (3d Dep't 1937) (town superintendent of highways).

officer, not an employee, and that the limitations upon the coverage were not open to an extension by agreement of the parties. The Court of Appeals reversed. Surprisingly enough, New York's highest court adopted the estoppel doctrine as its *ratio decidendi*.¹⁵⁵ One may ask whether the court would have reached the same result if, as in many other states, the insurance relationship had arisen directly out of the statute. It is respectfully submitted that where coverage in compensation insurance is concerned the organization of the carrier is immaterial. Where a monopolistic state fund was the insurer, it was found in an analogous case¹⁵⁶ that the theory of estoppel could not be applied to persons whose relationship to the principals does not constitute an employer-employee relationship protected by the statute. For similar reasons, courts in jurisdictions in which compensation insurance rests upon a contract, as in New York, came to the same conclusion and rejected the estoppel doctrine.¹⁵⁷

Thus, the denial of coverage regardless of the parties' expressed intention conforms with the tendency to repudiate the estoppel concept in the sphere of social insurance through strict definitions of both the legislative purpose

¹⁵⁵Said the court: "Having . . . expressly covered the claimant . . . , in consideration of a premium agreed to be paid therefor, it [the company] cannot after an accident be relieved of liability upon the ground that as to him the policy is void because in fact he was not an employee." *Matter of Dann v. Town of Veteran*, 278 N. Y. 461, 463, 17 N. E. (2d) 130 (1938).

¹⁵⁶*Butler v. Ind. Comm. of Arizona*, 57 Ariz. 119, 111 P. (2d) 628 (1941). The Commission had, on audit made of the payrolls of the city of Tucson, contested the exemption of the salary paid to the city manager from the computation for the compensation insurance premiums, whereupon the city paid not only the premiums for all the subsequent periods, but also made payments retroactive to the time of his appointment. When, upon a fatal accident, his widow claimed compensation, the Commission's defense of non-coverage, because his salary had been in excess of the maximum allowed by statute, was upheld. *Accord*, *Intermountain Speedway v. Ind. Comm.*, 101 Utah 573, 126 P. (2d) 22 (1942) (state fund, having accepted premiums, not estopped from challenging claimant's status as an employee).

¹⁵⁷*Employers' Liability Assur. Corp. v. Ind. Acc. Comm.*, 187 Cal. 615, 203 Pac. 95 (1922) (no estoppel of the insurance company from defense of non-coverage although the policy expressly included Williams and the premiums were fully paid, where defense rested upon his having been a partner, not an employee); *City Council of Augusta v. Reynolds*, 50 Ga. App. 482, 178 S. E. 485 (1935) (no estoppel by a first award and its payment from a denial of coverage in the subsequent proceeding for an additional award, claimant being a public officer, a fireman); *Parker v. Travelers Ins. Co.*, 174 Ga. 525, 163 S. E. 159 (1931) (no estoppel by reason of issuance of and payment of premiums on a policy which included claimant's position and salary, from contesting liability to him as a public officer, namely a policeman); *Soars v. Soars-Lovelace Inc.*, 346 Mo. 710, 142 S. W. (2d) 866 (1940) (widow's claim denied because of her husband's having been president of the corporation with a salary in excess of earnings covered by the Act); *Southern Surety v. Inabnit*, 119 Tex. 67, 24 S. W. (2d) 375 (1930) (insurer held not estopped from denying liability as to claimant, a receiver, regardless of his simultaneously having done a great deal of manual work on the oil lease).

and the limited jurisdiction of the administrative agencies.¹⁵⁸ As a matter of fact, constitutions and statutes have restricted the duty to compensate, without any fault-test, to the employer-employee relationship. Can private parties by their transactions go beyond the will of legislatures and extend the coverage of compensation policies, an extension the costs of which would have to be passed on through the medium of prices to the public? And is it not self-evident that the jurisdiction of administrative tribunals, creatures of legislation, cannot be extended by acts or omissions of private persons beyond the limits set by statute?¹⁵⁹ How much the social objective sought by compensation insurance law would be perverted to the absurd with consequent danger to the whole system, if premium payment and acceptance prevented the officials from looking into the existence of an employment relationship, may be seen from the operation of old-age insurance. The recent statute's generous treatment of older people with a very few quarters of coverage must needs put the bureau on its guard. Otherwise, "the number of those lucky people who are getting many times as much in [yearly] benefits as they have altogether contributed in taxes" would tremendously increase.¹⁶⁰ Is the mere existence of a wage record and an account number to foreclose the examination of the actual status of the person for whom or for whose dependents an application for benefits has been filed? It is undisputed that not even a decision rendered on the question of the existence of an employment relationship by one administrative tribunal precludes another tribunal set up in a companion field of public insurance from an examination of that question.¹⁶¹

¹⁵⁸*Southern Surety v. Inabnit*, 119 Tex. 67, 71, 24 S. W. (2d) 375, 377, cited *supra* note 157.

¹⁵⁹*Id.* See note 157 *supra*.

¹⁶⁰The quotation is taken from the illuminating article of Professor Edwin Witte, *The Approaching Crisis in Old Age Security* (1940) 30 AM. LAB. LEGIS. REV. 115, 119. *Walker v. Altmeier*, 46 F. Supp. 790 (E. D. N. Y. 1942) is a good example. There claimant, an employee of a law firm, having contributed from the time the Act came into effect (January 1, 1937), attained the age of 65 on October 4, 1938, only 21 months later; nevertheless the contributions which had been paid allowed him a monthly benefit of \$24.03 for the rest of his life. Incidentally, claimant continued practicing law, but now as an independent practitioner.

¹⁶¹No estoppel arises from the finding of the Commissioner of Internal Revenue to the effect that certain soliciting agents of the company are not subject to the tax for old age insurance; the unemployment insurance board might regard them as employees nevertheless. *Northwestern Mut. Life Ins. v. Tone*, 125 Conn. 183, 4 A. (2d) 640 (1939). *Metcovich v. Anglim*, 134 F. (2d) 834 (C. C. A. 9th, 1942) presents the converse situation. A court decision concerning a person's status for unemployment insurance was held not controlling as for old age insurance. A detailed discussion of the problems resulting from conflicting rulings in the same branch of social insurance by the two federal administrative branches involved, the Treasury and Social Security Board, is beyond the scope of this article; for this question, see Seitz, *Some Aspects of Coverage of the Social Security Act: What Is Employment?* (1941) 16 IND. L. J. 468, 473.

Here, again, we observe the same concept operating as was noted in the preceding section, but in a different phase. There we saw protection given even in the absence of all the ordinary elements of a contractual relationship. Here, however, despite the presence of all indicia of the parties' intention to establish coverage, protection is denied. Conceivably, all social insurance at present depends upon the existence of an employment relationship. Since the great majority of judicial decisions and administrative decrees in compensation law as well as in old-age and unemployment insurance¹⁶² have advanced the theory of a contractual basis as the essential of that relationship, a caveat must be entered. The bulk of the decisions shows that in addition to the wide realm of undisputed employment relationships, there is a penumbral area where the bright features of such relationships fade away, not abruptly but in infinitesimal gradations. Their perceptibility depends upon the presence or absence of many factors. Some weight may be given to the fact that the payments made to a certain person, were classified as salary and were included in the payrolls upon which the premiums for the compensation insurer were calculated. Together with other facts, it might warrant a finding that the individual concerned is to be considered an employee.¹⁶³ Thus, a question of fact is presented to the board as it would be to the jury in a judicial proceeding.¹⁶⁴

Here, as in other fields, unfortunate confusion has resulted from the resort of the courts to the use of the panacean word, estoppel. Opinions are couched in terms of estoppel where the factual requisites for coverage are present, while estoppel in the proper sense points to a state of things in which those requisites are absent but the effect of coverage is asserted.¹⁶⁵ Thus, when

¹⁶²W. C. L. § 2 (9) and § 3 (1) (Group 18): "... under contract of hire . . ."; N. Y. LABOR L. (McKinney, Supp. 1942) § 502 (1): "Employment . . . means any employment under any contract of hire . . ."; Social Security Act of 1939, 53 Stat. 1365 (1939), 42 U. S. C. § 409 (b) (1940): "... under a contract of service . . ." Likewise, in absence of such references, the word "employment" was construed as implying a contractual element. *Taylor v. Brainard*, 37 N. E. (2d) 714 (1941); *Comments* (1914) 27 YALE L. J. 113, (1915) YALE L. J. 611. *But see* *Anderson v. Miller Scrap Iron*, 169 Wisc. 106, 170 N. W. 275, 277 (1919), which seems to hold that coverage by compensation insurance is achieved by the appearance of an employment relationship irrespective of the existence of a valid contract. Discussion of this question is beyond the scope of this article.

¹⁶³See cases cited *infra* note 164.

¹⁶⁴*Hyman v. Carolina Veneer & Lumber Co.*, 194 S. C. 67, 9 S. E. (2d) 27 (1940) (a social security card showing plaintiff to be an employee of another company does not rebut evidence that he was defendant's employee). *Accord*, *Tennessee Valley Appliances, Inc. v. Rowden*, 24 Tenn. App. 487, 146 S. W. (2d) 845 (1940) (question for the jury whether tortfeasor was an employee of the defendant corporation upon whose report and payments he had received a social security card).

¹⁶⁵Of course, the jurisdiction being statutory, it is within the means of the legislature to extend the coverage by sustaining the plea of estoppel. Thus, under the influence

the appellate division in *Kennedy v. Kennedy Mfg. Co.* found against the insurance company, it resorted to the doctrine of estoppel although the facts clearly indicated the existence of an employment relationship.¹⁶⁶ This was pointed out by California's highest court in its comment on the decision.¹⁶⁷ There are certainly cases which seem to be based upon a waiver of the defense of noncoverage. However, upon closer scrutiny, one finds that these cases involve border-line situations in which the way the parties dealt with each other after the occurrence of the accident could, along with other facts, constitute sufficient evidence to justify an award.¹⁶⁸

That estoppel is not the true basis of these decisions can be seen from the test applied to them by the Court of Appeals where the presence or absence of an employment relationship constitutes the preliminary question. Cases under unemployment laws supply the best examples.¹⁶⁹ When, quite recently, the appellate division, reversing a board decision, treated the existence of an employment relationship as a question of law, the Court of Appeals reversed. It held that once the administrative agency had found the existence of an employment relationship, the courts could not review this finding, the question of employment being a matter of fact.¹⁷⁰ At about the same time, the Supreme Court of the United States took pains to state that the

of the *Parker* case, 174 Ga. 525, 163 S. E. 159 (1931), cited *supra* note 157, Georgia changed her (non-compulsory) W. C. L. so as to deny insurer under certain circumstances the defense of lack of coverage. That meant that the law raised uncovered employees to a par with covered employees "as if [they] were subject to the Act." Ga. Laws 1933, p. 184; GA. CODE ANN. (Park, Skillman & Strozier, 1937) tit. 114 § 607. However, this fictitious extension has never been construed as covering non-employees. ¹⁶⁶177 App. Div. 56, 163 N. Y. Supp. 944 (3d Dep't 1917).

¹⁶⁷In *Employers' Liab. Assur. Corp. v. Ind. Acc. Comm.*, 187 Cal. 615, 619, 203 Pac. 95, 97 (1922), cited *supra* note 157, the court said: "This ruling [on estoppel], however, was not necessary to the decision of that case since it clearly appeared that irrespective of the terms of the policy the applicant was, upon the facts, an employee of the corporation."

¹⁶⁸*Treuhaile v. Quaker Oats Co.*, 228 Iowa 711, 292 N. W. 799 (1940) (claimant while operating the defendant company's grain elevator suffered an injury and the company recognized his employee's status involving compensation payments. Not more than one year later, after his return to work, the claimant applied for reopening of the case and for compensation for permanent disability, and the company then contested his status. The Commissioner, however, found him to be an employee, which finding the court upheld).

¹⁶⁹*Matter of Morton*, 284 N. Y. 167, 30 N. E. (2d) 469 (1940) (vendor-vendee or employer-employee relationship was in question).

¹⁷⁰*Matter of Electrolux Corp.*, 288 N. Y. 440, 43 N. E. (2d) 480 (1942), *rev'g* 262 App. Div. 642, 30 N. Y. S. (2d) 972 (3d Dep't 1941) (salesman). Note that as late as 1941 the Appellate Division was upheld when it reversed the appeal board. *Miller v. Aluminum Cooking*, 283 N. Y. 577, 27 N. E. (2d) 439 (1941). *But cf. In re Apfel*, 265 App. Div. 899, 37 N. Y. S. (2d) 867 (3d Dep't 1942), in which the court said: "The only issue presented is whether as a matter of law these claimants [insurance agents] were employees. . . . The evidence sustains the finding of the board that [they] were."

conclusions drawn from the facts by the administrative authorities with respect to the existence or the special character of an employment relationship must be given "presumptive weight."¹⁷¹ Viewed in the light of these decisions, the *Dann* case can no longer be regarded as an authority.

Yet, not only the relationship involved in a case, but also the nature of the contingency for which compensation is claimed has to satisfy the statutory requirement. Where a substantial departure from factory rules, as, for instance, from a prohibition against the manipulation of a cutting machine by juvenile workers, takes the accident out of the statute, acts of the insurer manifesting his intention to compensate for that accident cannot be given any effect.¹⁷² This is one of many instances which exemplify the importance of the problem. Thus, the administrative referee may exercise his own judgment as to whether the job of the employee who suffered the injury belonged to a covered class, even though his employer answered that question in the affirmative. Some courts, although reaching a sound result, still obscure their reasoning by interspersing expressions suggesting that the misleading conduct of one of the parties is relevant. The confusion is primarily due to the historical reason that in New York (and other states of the competitive pattern) the insurance companies which had been active in liability insurance became the carriers in the new field. Since courts traditionally look to previous cases, their resort to liability cases was a matter of course. They are to be commended for the skill with which they plotted out their interpretation of the new legal concepts. As the years go by, emphasis in the opinions is shifting from estoppel to an examination of the facts to determine the existence of an employment relationship, a covered employment, or a covered accident, as the case may be. Just as the nature of the relationship as such was not disputed in the *Kennedy* case,¹⁷³ neither was the industrial nature of the accident disputed in *Harding v. Industrial Commission*.¹⁷⁴ There, claimant had suffered his injuries while hauling hay from a farm owned by his

¹⁷¹*Davis v. Dept. of Labor of Wash.*, 317 U. S. 249, 63 Sup. Ct. 225 (1942) (state court decision that the employment fell beyond the state act reversed, upon the strength of the state statute and the absence of a federal administrative decision that the employment fell within the federal jurisdiction, the question of the maritime or non-maritime character of the employment being doubtful); see also *Parker v. Motor Boat Sales*, 314 U. S. 244, 62 Sup. Ct. 221 (1941).

¹⁷²In undisputed absence of the insignia of coverage, the fact that payments were made to the claimant during his temporary disability must be held immaterial. *Radtke v. Ind. Comm.*, 174 Wisc. 212, 133 N. W. 168 (1921).

¹⁷³See notes 166, 167 *supra*.

¹⁷⁴83 Utah, 376, 28 P. (2d) 182 (1934) (the state fund, the insurer here, fully apprised of the facts, had paid compensation for five years, not disputing the claim in any way until claimant thereafter demanded their continuation after the expiration of the original period of compensation).

employer, who was running a brick and tile business which was covered by state compensation insurance. Hence, the decision turned upon the question of whether claimant's work was agricultural or industrial. As the facts showed that the hauling of the hay was incidental to the manufacture of brick and tile where horses were being used, it was held that his service was a part of that business.¹⁷⁵ The decision suggests, furthermore, the proposition that the utterances as well as the conduct of the parties might establish admissions of relevant facts and so have some bearing upon the outcome of the proceedings.

B. *Waiver and Estoppel*

There still remains room for the utilization of waiver and estoppel. As noted previously, the choice of the insurance carrier with whom, and the definition of the location for which, insurance is to be carried still rests in the hands of the parties. These are the matters in which waiver and estoppel play their part. What the parties to the contract may accomplish by words written into the insurance-policy may also be inferred from their acts and attitude. Much will depend upon the approach which boards and courts take to the interpretation of the particular facts. In some cases they will give full credit to the spoken words. So, in *Neubeck v. Doscher* it was held that the insurance company was not estopped from setting up the defense of lack of coverage of the place involved, although the employer had reason to believe that the other locality was insured.¹⁷⁶

In general, it is easier to find illustrations to the contrary. When, prior to an accident, the insurance company accepted the unpaid premium without any reference to the cancellation which had been previously attempted, the court ruled that the employer was justified in his belief that his insurance had been reinstated.¹⁷⁷ One can see from *Barone v. Aetna*¹⁷⁸ how far such

¹⁷⁵*Id.* at 385, 28 P. (2d) at 186.

¹⁷⁶204 App. Div. 617, 199 N. Y. Supp. 203 (3d Dep't 1923) (the dissenting opinion pointed to estoppel); *accord*, *Ocean Acc. & Guaranty Corp. v. Ind. Acc. Comm.*, 179 Cal. 432, 176 Pac. 273 (1918). *But cf.* *Skoczlois v. Vinocour*, 221 N. Y. 276, 116 N. E. 1004 (1917) (long after the cancellation was lodged with the Commissioner, the employer, three days after an accident, paid nearly all of the premiums which were past due at the time of the cancellation. Thereupon, the company, reminding him of the cancellation, asked for the balance. So the company's conduct could not give rise to an honest claim on the part of the defaulter.)

¹⁷⁷*Vollpe v. Petti*, 256 N. Y., 570, 177 N. E. 144 (1931) (the element which distinguishes this case from the *Skoczlois* case, 221 N. Y. 276, 116 N. E. 1004 (1917), cited *supra* note 176, lies in the acceptance of overdue premiums by the insurer prior to the accident); *accord*, *Rossi v. Ciampi*, 264 N. Y. 499, 199 N. E. 534 (1934).

¹⁷⁸*Barone v. Aetna*, 260 N. Y. 410, 183 N. E. 900 (1933). Similarly, it was held that collection of premiums for a policy in which the time of its effectiveness was fixed at 12 m., when an accident occurred half an hour before, estopped the insurer

an interpretation may be carried in the protection of the insured. There, the policy required the employer, whose business was such as to take him from one locality to another, to notify the company's agent in writing of changes of location in order to receive an indorsement for the policy. When the employer was stricken by illness and failed to give a written notification, it was held that the provision was waived because the agent's housekeeper not only accepted the oral notice given by the contractor's wife, but also promised to make a new indorsement. One might say that wherever the parties can exercise freedom of contract, they are allowed by law to alter the terms of the contract by either words or conduct. Whether such words or conduct constitute a waiver is to be determined by the board. That the solution reached sometimes appears to be arbitrary may not always be the fault of the tribunal. Of course, the board cannot extend the statute of limitations.¹⁷⁹ And where the insurance company failed to plead cancellation of the policy, this failure did not mislead the other party; it was the employer's own carelessness that lulled him to sleep.¹⁸⁰

C. Equity Jurisdiction of the Administrative Board

We need not expatiate further on that subject. At this point, something must also be said about the power of the board to grant equitable relief. Primarily, this query arises when reformation of the insurance policy is attempted by the administrative agency. As in other jurisdictions,¹⁸¹ the New York courts at first frowned upon the idea of an increase of administrative power.¹⁸² The battle ended with the board empowered to determine

from any equitable defense, for the employer could assume from previous talks with insurer's agent that his business was already covered. *Orto v. Poggioni*, 245 App. Div. 782, 281 N. Y. Supp. 16 (3d Dep't 1935), *aff'd*, 271 N. Y. 551, 2 N. E. (2d) 690 (1936).

¹⁷⁹*Matter of Degaglio v. Bradley Contracting Co.*, 184 App. Div. 243, 171 N. Y. Supp. 679 (3d Dep't 1918) (employer's promise to give claimant an easy job after he recovered held no more estoppel than were his payments made after the expiration of the limitation period).

¹⁸⁰*Matter of Levine v. Comet Painting & Decor. Co.*, 284 N. Y. 359, 31 N. E. (2d) 193 (1940) (W. C. L. §§ 23, 123 and *Rules of the Industrial Board* 14 (1) authorized Board to take new evidence in reviewing the case). See also *Marshall v. Pletz*, 317 U. S. 383, 63 Sup. Ct. 284 (1942).

¹⁸¹For example: Maryland, Missouri, Oklahoma, Utah, and Wisconsin. See note 63 *supra* and note 185 *infra*.

¹⁸²*Allied Mutual's Liab. Ins. v. Interstate Cork, et al.*, 134 Misc. 504, 235 N. Y. Supp. 541 (Sup. Ct. 1929) (denial of motion of defendant-employer to dismiss the reformation action in which the insurer asked to have the date of the effectiveness of the policy changed to a date subsequent to the accident). In *Soolos v. Marsh*, 195 App. Div. 674, 186 N. Y. Supp. 689 (3d Dep't 1921), the court mistakenly cites *Matter of Litts v. Risley Lumber Co.*, 224 N. Y. 321, 120 N. E. 730 (1918), as an authority for the proposition that the board has no equity power. In fact, the latter case grounded the denial of an award entirely upon the facts which established an independent-contractor relationship.

the entire controversy in the administrative action. This holding is not only sound but also in conformity with the public policy that has led the great majority of the legislatures in this country to entrust the adjudication of compensation claims to administrative officials rather than to the courts. To relegate the parties to successive proceedings, first, in court for trial of the preliminary issue of the terms of the contract, and then before the board for the determination of the award, would allow the very delay which workmen's compensation laws were designed to prevent. In order to make that interpretation which is both socially desirable and coincident with the purpose of the statute, it is not necessary to depart from the ordinary meaning of the statutory language. Even taken literally, the wording of the act seems to be elastic enough to support that construction, for it authorized the board "to determine *all* questions in relation to the payment of claims presented to it for compensation."¹⁸³

The new rule, announced and framed in *Royal Indemnity Co. v. Heller*,¹⁸⁴ has since then been followed in numerous cases.¹⁸⁵ It has been argued that

¹⁸³W. C. L. § 20 (2) [italics added]. *Skoczlois v. Vinocour*, 221 N. Y. 276, 116 N. E. 1004 (1917), *supra* note 176. It is clear that the question of extension to the board of equity jurisdiction with respect to preliminary issues must be separated from that concerning its indisputable power to pass judgment upon ultimate facts, such as causality of the accident or its industrial nature. *Matter of Shearer v. Niagara Falls Power Co.*, 242 N. Y. 70, 150 N. E. 604 (1926).

¹⁸⁴256 N. Y. 322, 176 N. E. 322 (1931); Note (1931) 31 COL. L. REV. 1205 (insurer's defense before the board that the accident occurred prior to the day of the commencement of the coverage while the date mentioned in the policy was allegedly due to a clerical error, was rejected; thereupon the insurer, pending his appeal in that proceeding, started an equity action to have the policy reformed. The dismissal of this action was affirmed upon the ground that the adjudication of that matter was within the board's jurisdiction). Although, literally taken, "no question of reformation arose" (*see Barone v. Aetna*, 260 N. Y. 410, 414, 183 N. E. 900, 901 (1933)), the *Royal Indemnity* case has been properly considered a landmark for the exercise of equitable powers by the board; *accord*, *Matter of Haskell v. Hitchcock*, 262 App. Div. 309, 28 N. Y. S. (2d) 945 (3d Dep't 1941) (held that the board should have corrected the policy so that it show the name of the contractor as the insured employer).

¹⁸⁵*See, e.g., McMahon v. Gretzula*, 238 App. Div. 877, 262 N. Y. Supp. 793 (3d Dep't 1933), and 242 App. Div. 742, 274 N. Y. Supp. 993 (3d Dep't 1934), *aff'd*, 267 N. Y. 573, 196 N. E. 586 (1935). For a history of the case, see 267 N. Y. 473, 196 N. E. 586 (1935). *See Matter of Gelbin v. Metro Goldwyn Mayer*, 261 App. Div. 196, 24 N. Y. S. (2d) 909 (3d Dep't 1941).

California follows New York. *Bankers Indem. Ins. Co. v. Ind. Acc. Comm.*, 4 Cal. (2d) 89, 47 P. (2d) 719 (1935); *Gen. Acc. & Life Assur. v. Ind. Acc. Comm.*, 196 Cal. 179, 237 Pac. 35 (1925). Kansas is also in line with New York. *See note 188 infra.*

Wisconsin goes the other way, holding that the board does not have power to reform. *Kelley v. Minneapolis, St. P. & S.S. M. Ry.*, 206 Wisc. 568, 240 N. W. 141 (1932). In Note (1931) 31 COL. L. REV. 1205, n. 4, Wisconsin cases are cited as instances of the opposite proposition. However, these cases do not deal with the problem at all; they only pass upon the insurance agent's authority to renew a policy and upon the interpretation of the scope of the insured business. *Maryland Cas. Co. v. Ind. Comm.*, 198 Wis. 202, 223 N. W. 444 (1929); *Northwestern Cas. & Surety v. Doud*, 197 Wis.

possession of the power to dispose of equitable defenses and to grant equitable relief means that the exercise of that power is not within the discretion of the board. Whenever the facts warrant its use, the exercise of the power can be insisted upon, for the board's unwillingness cannot affect its jurisdiction.¹⁸⁶ In one case the point in issue was whether a certain person whose insurance was optional under the law was in fact insured. The insurance company's defense was that the parties did not intend to contract for his coverage, although the policy on its face indicated that he was included. Upon appeal, it was held that the board had improperly rejected the defense.¹⁸⁷ Conversely, where but for the wording of the policy, everything else evinced the intention to insure a certain business enterprise, the denial of an award was reversed.¹⁸⁸ From the jurisdictional point of view, it seems to be obvious that the decision of the board on questions of this kind, once it has become final, is no longer open to collateral attack.¹⁸⁹ By the same token, once the board has disposed of a claim, a new action concerning any matter embraced in that decision either expressly or impliedly, such as the question of a reformation of the insurance policy, must run against the defense of *res judicata*.¹⁹⁰

There is one question which suggests itself because of the ease with which an administrative board, unhampered by rigid rules of evidence, may be satisfied of the need for a reformation of the insurance policy. Can he in whose interest it is to leave the policy as it stands, forestall such an administrative reformation?¹⁹¹ In *Barone v. Aetna Life* the Court of Appeals

237, 221 N. W. 766 (1928).

Missouri and Utah follow Wisconsin. *Kelly v. Howard*, 233 Mo. App. 474, 123 S. W. (2d) 584 (1938); *Continental Cas. Co. v. Ind. Comm.*, 61 Utah 16, 210 Pac. 127 (1922) (insurer's action for reformation).

¹⁸⁶*In re Gleasner's Estate*, 245 App. Div. 343, 282 N. Y. Supp. 158 (3d Dep't 1935).

¹⁸⁷*Ibid.*, *aff'd sub nom.* *Comm'r v. Gleasner*, 269 N. Y. 590, 199 N. E. 686 (1935). Because the policy did not contain an exclusion of the coverage of the company president who was killed in an industrial accident, the company was held by the board for the payments to special funds according to W. C. A. § 15 (8), the widow having disclaimed any right under the Act. The courts, however, held the board was obliged to "reform."

¹⁸⁸See also *Emp. Liab. Assoc. Corp. v. Matlock*, 151 Kan. 293, 98 P. (2d) 456 (1940) (equity action by insurer against employer and workman for cancellation or reformation of the policy, dismissed because subject was within the jurisdiction of the board); *Walker v. Kansas Gasoline Co.*, 130 Kan. 576, 287 Pac. 235 (1930) (board has power to set aside the release).

¹⁸⁹*Royal Indem. Co. v. Heller*, 256 N. Y. 322, 176 N. E. 410 (1931), *aff'g* 231 App. Div. 812, 246 N. Y. Supp. 885 (3d Dep't 1930).

¹⁹⁰The court held that even an erroneous determination by the board as to the question of its power to reform a policy must be conclusive and a subsequent equity action for reformation dismissed. *Id.* at 327, 176 N. E. at 411.

¹⁹¹*Allied Mutual's Life Ins. v. Interstate Cork Co.*, 134 Misc. 504, 235 N. Y. Supp. 541 (Sup. Ct. 1929) (action of insurer). For the requirements of such reformation, see *Lewitt v. Jewelers Safety Fund Soc.*, 249 N. Y. 217, 164 N. E. 29 (1928) (burglary insurance policy reformed by adding a location inadvertently left out in the renewal policy).

allowed the employer to pursue his civil action for reformation of the policy before the courts.¹⁹² The opinion laid down two principles. First, it fully sustained the jurisdiction of the board over equitable defenses to the same extent as over legal defenses. Hence, if the adverse party had pleaded the pendency of the board proceeding, the court action would not have been entertained.¹⁹³ Second, the court emphatically contradicted the assertion of any exclusionary power of the board over equitable defenses and advanced the concept of a concurrent jurisdiction ruled by priority, so that the race will be to the swift.¹⁹⁴ It may be inferred from the holding that in New York, while administrative jurisdiction over all possible phases of a compensation litigation has been recognized, it has received a different construction from that given to analogous provisions governing other labor tribunals, for example, the national as well as the state labor board. The jurisdiction of the labor boards really ousts the courts of power in all matters within the jurisdiction of the boards, so that the lack of jurisdiction may be raised at any stage of a court action.¹⁹⁵ The New York doctrine illustrates the difficulty of finding a satisfactory solution of the problems inherent in jurisdictional competition. Moreover, where the compensation claimant does not participate in the court action, the *Barone* formula may become of little importance because the judgment would not be *res judicata* as to him in the administrative action. Should the board reach a result different from that of the equity court, the former judgment would have no effect upon the court deciding an appeal from the board, for, as noted in a previous passage, the scope of review does not embrace questions of fact.

In the light of the foregoing conclusions one understands why the referees hardly ever await the termination of a court action even if it has been com-

¹⁹²260 N. Y. 410, 183 N. E. 900 (1933) (for the facts, see text at note 178 *supra*. The employer, alleging insurance, brought action for reformation against the insurer, who failed to plead the pending board proceeding). Cf. *Royal Indem. Co. v. Heller*, 256 N. Y. 322, 176 N. E. 322 (1931), cited *supra* note 184.

¹⁹³260 N. Y. 410, 183 N. E. 900, 902 (1933).

¹⁹⁴It is generally recognized that in *in personam* actions brought upon the same cause of action before different tribunals of co-ordinate jurisdiction, each tribunal is free to proceed until a judgment or decree rendered by the one has become *res judicata* as to the other. *Chicago, R. I. & P. Ry. v. Schendel*, 270 U. S. 611, 46 Sup. Ct. 420 (1926). Usually, therefore, no injunction to enjoin the prosecution of the claim in the other tribunal will be granted. *Kline v. Burke Construction Co.*, 260 U. S. 226, 43 Sup. Ct. 79 (1922).

¹⁹⁵*United Electrical, Radio and Machine Workers v. Int. Broth. of Elect. Workers*, 115 F. (2d) 488 (C. C. A. 2d, 1940) (courts have no jurisdiction to grant injunctive relief asked by a trade union certified as a representative against a rival organization); see also *Myers v. Bethlehem Corp.*, 303 U. S. 41, 58 Sup. Ct. 459 (1938); *Newport News Co. v. Schauffer*, 303 U. S. 54, 58 Sup. Ct. 466 (1938); Note (1940) 54 HARV. L. REV. 513.

menced prior to the board proceeding. The fact that, as compared with the ever-mounting number of reformation cases decided by the board, no contrary court decision has been reported, seems to be significant. It can only mean that the carriers, well-advised and realistic as they are, no longer cherish any illusions about the prospects of getting a court decision before the completion of the compensation proceedings, which are noted for their expeditiousness.¹⁹⁶ In concluding this discussion it may be noted that, having regard for the difficulties engendered by the concurrent-jurisdiction rule, the Kansas courts have held in favor of the primary jurisdiction of the board.¹⁹⁷

In regard to the extent to which administrative agencies may go in the exercise of their equitable power, one need but look to the decisions of the reviewing court, for it is hard to find rulings more liberal and less doctrinaire than those of the Third Department of the Appellate Division.¹⁹⁸ Quite recently, the Third Department held that equity may relieve a claimant from the unjust results of the statutory bar against the commencement of a compensation action when the claimant has already received a judgment, and allowed an award to be rendered against the insurance carrier despite the existing judgment.¹⁹⁹ Since many states (but no longer New York)²⁰⁰ still adhere to the alternative-remedies rule, that decision calls for a few remarks. At common law it has been generally held that employment of one remedy eliminates recourse to the other remedies forever. Yet, as many cases demonstrate, equity may occasionally make an exception to this rule. Where no element of estoppel is involved or no real choice exists, the application of the rule becomes pointless.²⁰¹ Is this concept of finality of election, which is apparently embedded in the workmen's compensation law, not also subject

¹⁹⁶As a sequel to the judicial recognition of the board's power over equitable defenses, § 54a was added to the W. C. L. by N. Y. Laws 1935, c. 780. By that provision the Commissioner may require the employer, whenever the board has repudiated the insurer's defense of lack of coverage, to deposit or to secure the amount of the award, so that the carrier is relieved from any payment pending his appeal.

¹⁹⁷*Emp. Liab. Assoc. Corp. v. Matlock*, 151 Kan. 293, 98 P. (2d) 456 (1940), cited *supra* note 188.

¹⁹⁸All appeals taken from awards or other decisions of the Industrial Board in compensation cases and from decisions of the Appeal Board in unemployment insurance cases have been centralized in that department. W. C. L. § 23; N. Y. LAB. L. § 535.

¹⁹⁹*Matter of Gelbin v. Metro Goldwyn Mayer*, 261 App. Div. 196, 24 N. Y. S. (2d) 909 (3d Dep't 1941). The case arose many years prior to the amendment cited *infra* note 200. Since claimant was unable to collect from the third party the damages granted him by judgment, the third party having been involved in a reorganization proceeding, he commenced the compensation action.

²⁰⁰An amendment to W. C. L. § 29 (1) abolished the binding effect of a choice between a third party action and a compensation proceeding. N. Y. Laws 1937, c. 684.

²⁰¹*Cf.* cases cited in Note, *Election of Remedies* (1923) 36 HARV. L. REV. 593.

to qualifications analogous to those applied to the non-statutory cases?²⁰² At first thought, one might argue that when the judgment is obtained without any fraud having been committed by either party, the board has been deprived of jurisdiction over the matter.²⁰³ However, further consideration suggests that, since the relief from the fatal effects of the choice necessarily involves a different respondent, there is no danger of a double satisfaction, a relitigation, or an unnecessary vexation of the defendant, the very reasons which lie at the foundation of the binding-choice rule. And considering particularly the policy behind the compensation acts, it is a common-sense construction that when the judgment obtained against the third party remains hopelessly unsatisfied, the pursuit of the former remedy must be regarded as no more of a bar than the deliberation preceding the choice.

D. Misrepresentations by Employees

Notwithstanding the large stock of curatives, there still remain iniquitous situations for which compensation insurance, unlike private insurance, has no dose to administer. Thus, we turn our attention to misrepresentations by employees. Here again, the difference between what is void and what is voidable, a difference which we have already found to be fundamental in the insurance relationship between employees and carriers, grows in importance. If, for example, the employment contract were void because of the illegality of the occupation, then there would be no contract at all, and hence no coverage.²⁰⁴ The question whether a job which was obtained in violation of a penal statute or an industrial code is covered might depend upon the meaning and purpose of the prohibitive provisions. Of the cases bearing upon this subject, those concerning accidents to minors employed

²⁰²But see *U. S. v. Oregon Lumber Co.*, 260 U. S. 290, 43 Sup. Ct. 100 (1922) (after the equity action for rescission had failed because of the interposed plea of the statute of limitations, the law suit was dismissed because of the consummation of the choice). See Mr. Justice Brandeis, *dissenting, id.* at 302; *accord*, *Schenck v. State Line Tel. Co.*, 238 N. Y. 308, 144 N. E. 592 (1924) (equity suit brought after the discontinuance of the law suit which had not yet progressed to a judgment held maintainable).

²⁰³In *Johnson v. Am. Hawaiian S. S. Co.*, 98 F. (2d) 847 (C. C. A. 9th, 1938), the point at issue concerned a choice made by claimant for compensation. Misled by his employer, claimant started this compensation action, yet he was not deemed to be barred from an action against the third party wrongdoer. Similarly, the acceptance of compensation benefits has not been held to exclude a common-law action for damages where the claimant was ignorant of his status, for instance, as a non-employee. *Smith v. Price Bros. Co.*, 131 F. (2d) 750 (C. C. A. 6th, 1942).

²⁰⁴*Swinura v. Horowitz*, 242 N. Y. 523, 152 N. E. 411 (1926) (employment for handling intoxicating liquor during the prohibition era); *Matter of Clarke v. Town of Russia*, 283 N. Y. 272, 28 N. E. (2d) 833 (1940) (illegal contract between municipality and one of its officers). In California, however, legality of employment is of no importance. CAL. LAB. CODE (Deering, 1937) § 3351. The Act extends coverage irrespective of whether the worker is "lawfully or unlawfully" employed.

in violation of a statute reveal an important aspect of the problem.

For the most part the courts have been reluctant to regard these employments as absolutely void. Even so, in the absence of a definite statutory mandate, the question of their coverage is far from being uniformly answered. In many states the compensation acts apply only to persons legally permitted to work, or the courts have made a rule to this effect.²⁰⁵ As a result, the profession has been forced to search for other remedies in order to indemnify the juvenile victims of an accident.²⁰⁶

Another view leaves it to the minor to choose between a claim for compensation or an action at common law based upon the wrong done by employing him contrary to statutory interdiction.²⁰⁷ That the separation of the question of the industrial risk from that of culpability, which is the basic concept of compensation law, was not allowed to stand in the way of that choice, can be seen from the earlier New York cases.²⁰⁸

However, in 1920 the trend of opinions changed completely, and the courts have followed the new course ever since.²⁰⁹ This new rule, which restricts the minor to his compensation claim, represents a third approach to that thorny problem.²¹⁰ As a deterrent a sanction was added providing, in case of transgression, for a double award against the employer alone, and not against his insurance carrier.²¹¹

²⁰⁵For an interesting survey of the varying views, see *Humphries v. Boxley Bros. Co.*, 146 Va. 91, 135 S. E. 890 (1926).

²⁰⁶A discussion of this special problem must be omitted here. May it suffice to point out that where a compensation act is of the elective type, a common-law action lies, according to some authorities, the minor being held unable to make a valid election. *Western Union v. Ausbrooks*, 148 Tenn. 615, 257 S. W. 858 (1924). Virginia holds to the contrary. *Humphries v. Boxley Bros. Co.*, 146 Va. 91, 135 S. E. 890 (1926), cited *supra* note 205.

²⁰⁷Under this view, the illegality was charged solely to the employer. *Watson v. Stagg*, 108 N. J. L. 444, 158 Atl. 820 (1932). For a collection of cases, see Notes (1921) 14 A. L. R. 18, (1924) 33 A. L. R. 337, (1927) 49 A. L. R. 1435, (1929) 60 A. L. R. 847, (1933) 83 A. L. R. 416.

²⁰⁸*Wolff v. Fulton*, 185 App. Div. 436, 173 N. Y. Supp. 75 (3d Dep't 1918) (minor may choose between common-law action and compensation claim); The case of *Ide v. Faul & Timmins*, 179 App. Div. 567, 166 N. Y. Supp. 858 (3d Dep't 1917) is not in point, for there the minor himself claimed under W. C. L.

²⁰⁹Espoused in *Boyle v. Cheney Piano Action Co.*, 193 App. Div. 408, 184 N. Y. Supp. 374 (3d Dep't 1920), the new holding was corroborated in *Noreen v. Vogel*, 231 N. Y. 317, 132 N. E. 102 (1921), *cf. Decker v. Pouvaillsmith Corp.*, 225 App. Div. 489, 233 N. Y. Supp. 407 (3d Dep't 1929), *rev'd on other grounds*, 252 N. Y. 1, 168 N. E. 442 (1929). Consequently the common-law actions of third persons, parents, for instance, have also been barred. *Noreen v. Vogel*, *supra*.

²¹⁰*Accord*, *Rasi v. Howard Mfg. Co.*, 109 Wash. 524, 187 Pac. 327 (1920); *Pierce's Case*, 267 Mass. 208, 166 N. E. 636 (1929).

²¹¹N. Y. Laws 1923, c. 572 (W. C. L. § 14a). The insurance carrier is not liable for the increased award. *Id.* § 14a (2). There is a difference between infants under 18 and over 18. See note 216 *infra*.

Reverting to our principal subject we find that claims for damages have never been defeated upon the ground of misrepresentations made by applicants for a job, such as false statements concerning their age, or former employment relationships.²¹² This must be even more true of compensation claims. The reasons for it revolve around the distinction between a void contract and a voidable contract. Misrepresentations of the stated type might motivate an employer to give an applicant the job; yet it is clear that they do not affect the nature of the transaction and its terms. Since there was a full agreement between the parties, there was a contract.²¹³ Reserving the question of mistakes concerning the identity of the applicant to later discussion, we may ask whether the stated misrepresentations should have any effect upon the compensation claim if, as we assume, the accident occurred prior to the termination of the actual employment. To state this question is to answer it, for as long as the employer did not avoid the contract of employment, the employment was being carried out, and compensation will be awarded.²¹⁴ The risks resulting in the injury were involved in the services rendered to the employer, not in the surreptitious manner in which he got his job.²¹⁵ But does not a causal connection between the misrepresentation and the accident lend support to a different view? Were not the minimum age limitations enacted because infants were more likely

²¹²Newkirk v. Los Angeles Junction Ry. Corp., 21 Cal. (2d) 308, 131 P. (2d) 535 (1942); Ganga v. Ford Motor Co., 250 Mich. 347, 230 N. W. 159 (1930); Hart v. N. Y. C. & H. Ry., 205 N. Y. 317, 98 N. E. 493 (1912); Kenny v. Union Ry., 166 App. Div. 497, 552 N. Y. Supp. 117 (3d Dep't 1915).

²¹³For the distinction between mistakes making the contract void and misrepresentations, see ANSON, CONTRACTS (Patterson's ed. 1939) §§ 212-214.

²¹⁴Kenny v. Union Ry., 166 App. Div. 497, 552 N. Y. Supp. 117 (3d Dep't 1915) (held, the fact that application violated N. Y. Penal Law § 939, by falsely stating that the applicant was never employed by a railroad company and by disguising his family status, made the contract voidable only; compensation awarded). Accord, Clifford Ide v. Faul, 179 App. Div. 567, 166 N. Y. Supp. 858 (3d Dep't 1917); Kocilowicz v. Tonawanda Corrugated Box Co., 252 App. Div. 716, 298 N. Y. Supp. 844 (3d Dep't 1937) (compensation granted for fatal accident of a minor employed in violation of Labor Law § 171, forbidding employment of minors longer than 48 hours a week, and in violation of Labor Law § 131, conditioning the employment upon the issuance of proper working papers by public school authorities). In those jurisdictions which exclude minors illegally employed from the operation of W. C. L., misrepresentations concerning their age might, if there is a causal connection between the misrepresentation and the injury, substantiate their contributory negligence and so defeat their actions. Acklin Stamping Co. v. Kutz, 98 Ohio St. 61, 120 N. E. 229 (1918).

²¹⁵Plick v. Toye Bros. Auto & Taxicab Co., 13 La. App. 525, 127 So. 59 (1930) (to the company's defense that the deceased was employed on his false representation that he was a white man, 21 years of age, and in possession of a city badge, the court's answer was that, first, even conceding that the deceased was guilty of fraud, the contract was not null and void, but only voidable at the option of the employer; and, second, that "he would still come under the compensation law because of his status as an employee at the time he was killed." *Id.* at 530, 127 So. at 63.

to have accidents than adults? On the other hand, the policy underlying workmen's compensation law insists on shifting the cost of all such injuries to the insurance carrier regardless of the employee's lack of care or his predisposition to accidents. Barring accidents due to his wilful intention, the employee's faults, although possibly or even probably traceable somewhat to his immaturity, are no defense to his compensation claim.²¹⁶

In contradistinction to private life, health, and accident insurance,²¹⁷ social insurance law does not deny benefits on account of false statements about facts, however material they may be to the risks inherent in the job. As just noted, the sound implications of this fundamental difference have been accepted in the treatment of the misrepresentation problem. In general,²¹⁸ social insurance law has set up no standards of fitness, health, or morals as a qualification for coverage.²¹⁹ Even if the employee spoke the truth about his tender age, poor health, former jobs, etc., and the employer nevertheless hired him, the obligation of the insurance carrier, be it a compensation insurance carrier, the Social Security Board, or a state fund, is not avoided. One cannot cite pertinent cases for the simple reason that the proposition is too obvious ever to have been contested. Thus, the right to compensation does not depend upon the claimant's statements about his age, training, health, former jobs, or police record, any more than do the rights of his wife or his children to survivor's benefits, which by social insurance law

²¹⁶W. C. L. § 10; *Matter of Braiter v. Addie Co.*, 256 App. Div. 882, 9 N. Y. S. (2d) 280 (3d Dep't 1939), *aff'd*, 282 N. Y. 326, 26 N. E. (2d) 277 (1940). See *Noreen v. Vogel*, 231 N. Y. 317, 322, 132 N. E. 102, 104 (1921), cited *supra* note 209. The question of the employer's personal liability for a double award presents a quite different issue. The employer may be tricked by the pretenses of the applicant concerning his full age, because of the applicant's appearance. Thus, pursuant to W. C. L., § 14a (3), if his statement were true, a certificate would neither be required nor obtainable, so it may be argued that no additional award should be imposed upon the employer. Michigan courts have so construed a similar provision. *Boschaw v. Newsberry*, 259 Mich. 333, 243 N. W. 46 (1932). In New York section 14a of W. C. L. has been construed not to subject the employer to the increased compensation simply because he failed to investigate the applicant's age, provided that the minor's employment in that job was not forbidden by the labor statute. *Matter of Tesar v. National Ventilating Co.*, 227 App. Div. 333, 237 N. Y. Supp. 488 (3d Dep't 1929).

²¹⁷N. Y. Ins. Law (McKinney, Supp. 1942) §§ 142 (3), 149 (4) (misrepresentations concerning previous medical treatment, consultation or observation in life, accident or health insurance).

²¹⁸The only two exceptions are W. C. L. § 43 (excluding compensation for an occupational disease because of false representations as to previous suffering from a disease of the kind in issue) and W. C. L. § 69 (similar provision as to dust diseases).

²¹⁹*Madden's Case*, 22 Mass. 487, 111 N. E. 379 (1916) (pre-existing weak heart condition held not to affect claim); *Matter of Connolly v. Samaritan Hospital*, 259 N. Y. 137, 181 N. E. 76 (1932) (pre-existent cardiac condition held immaterial to claim based upon a fall caused by that condition); *Cooke v. Cooke & Cole Silk Co.*, 19 N. J. Misc. 581, 21 A. (2d) 853 (1941) (coronary occlusion precipitated by normal work held to be covered).

accrue upon his death, depend upon such things. In either case the fact of employment is the thing which counts and not a supposition that a correct statement would have led the employer to reject the applicant.

From a strict, legal point of view, a serious problem is raised where the fraud concerns the *identity* of the employee, as distinguished from his age or health. Since in an employment contract the person of the contracting party is of the essence, a mistake of identity shows a lack of consent. Under such circumstances, no employment contract comes into existence. However, no case either in compensation law or in social insurance law is reported which raises the problem. There is one case which arose under the Employers' Liability Act. The evidence showed the applicant for the job had been originally rejected for physical reasons, filed an application under another name, and had a friend impersonate him at the physical examination upon the outcome of which the employment was contingent.²²⁰ The public interest in the safety of railroad operations might have given some support to the holding that the employment was void. Yet, is it not stretching the doctrine of *error in persona* to the breaking point to subsume the instant case under that category of error? These remarks suggest, also, that to rest the coverage upon the legal concept of an employment contract instead of the very fact of work being performed, is to narrow its objective.

VII. CONCLUSION

We have completed our investigation of how compensation insurance actually works. We saw that in general the practical results reached by the agencies and courts stood the test of correctness and soundness. It is true that they have not always been particularly scientific in the proper demarca-

²²⁰Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Rock, 279 U. S. 410, 49 Sup. Ct. 363 (1928) (action dismissed). See Notes (1929) 43 HARV. L. REV. 141, (1930) 28 MICH. L. REV. 357, (1930) 14 MINN. L. REV. 98, which indicate the dissatisfaction which the decision provoked by its emphasis upon the public policy of the statutes requiring common carriers to adopt safety measures for the protection of the public. None of the notes rationalize the result upon the basis of the non-existence of an employment relationship. In the *Rock* case, *supra*, the defendant company knew nothing of the plaintiff and never intended to deal with him. In *Maslin v. Columbian Nat'l Life Ins.*, 3 F. Supp. 368 (D. C. 1932) a life insurance policy procured by impersonation of another person in the physical examination was held not to be a contract. *Accord*, *Morgan Munitions Co. v. Studebaker Co.*, 226 N. Y. 94, 123 N. E. 146 (1919); *RESTATEMENT, CONTRACTS* (1936) § 475, ill. 5. This element of identification distinguishes the instant case from *Ganga v. Ford Motor Co.*, 250 Mich. 247, 230 N. W. 159 (1930). There claimant, a minor, aware of the fact that the company intended to employ its "former" employees, applied for a job under the name of his older brother who had been employed previously, and was hired. Only the name of the employee was mistaken; his physical appearance was not in doubt. See also Note (1930) 30 COL. L. REV. 1076.

tion of that field. However, this is not their fault. It is primarily the task of our science to scrutinize new legal relationships and to examine whether the scope of a rule operative in other relationships, apparently cognate to the new ones, might be extended to them. If not, a new classification will prove itself helpful in avoiding misconstructions and impractical solutions. When, about a generation ago, the first workmen's compensation acts made their appearance in this country, their fascination for a profession imbued with the 19th century tort doctrines rested upon the excision of the defenses of contributory negligence and assumption of risk from actions for industrial injuries. In this vein, an eminent law professor denied that the insurance feature was the most important point of compensation law, even in a country of the *ipso-jure* insurance pattern, and made a criticism touched with irony of the stress laid upon that feature by stating that it has "naturally been emphasized by laymen."²²¹ However, as has sometimes been the case with new juristic phenomena (for instance, with collective bargaining contracts), so, here, the layman's creative imagination seems to have outstripped that of lawyers always restrained by their so-called "natural" penchant for the past. It is probable that the aversion of the profession at that time to the study of statutory law contributed to the attitude of indifference toward the practice of the new subject.²²² Consequently, throughout the past age, the law students, who were to become the rank and file of the profession, having seen only a scanty treatment, if any, of a small portion of compensation law as an appendant to the law of torts, accepted the disclaimer as a foregone conclusion. There are a very few exceptions. On the whole, that reserved attitude inured to the benefit of non-lawyers who have not hesitated, of course, to preempt that field. It was one of the objectives of this paper to point to the abundance of purely legal questions inherent in the particular form of compensation insurance as a result of its connection with private insurance companies.

This is no attempt to summarize the analysis set forth on the foregoing pages. In view of the many points which had to be discussed, a summary would necessarily involve much duplication. Some suggestions derived from the general theme running through the particulars may perhaps help to round out the presentation. By way of contrast and by way of comparison, this study, on the one hand, drew a sharp distinction between compensation

²²¹Wambaugh, *Workmen's Compensation Acts: Their Theory and Their Constitutionality* (1912) 25 HARV. L. REV. 129, 131.

²²²For an admirable criticism of the indifference, "if not contempt," evinced by the profession to statutory law, see Pound, *Common Law and Legislation* (1908) 21 HARV. L. REV. 381.

insurance and (private) liability or accident insurance, and, on the other hand, suggested a definition of the concepts of compensation insurance in the light of social insurance law. Their sociological and economic affinity is obvious. To show that there is such affinity not only in their administration but also in their legal structure, and that occasionally the protections supplied by either of them overlap one another, is a lesson we have learned. This is more apparent when coverage for compensation insurance arises *ipso facto* with the employment, as in old age and survivor's insurance and unemployment insurance. The legislative acts occupying those fields can easily be regarded as being *in simili* if not *in pari materia*. Yet, even where compensation insurance covers the employment only after a transaction, we perceived that its incidents, so far as the coverage of the employee was concerned, were not different from those produced by the insurance laws of the self-acting pattern. Certainly, it is not until the employer insures the compensation risk that the legal structure of protection for the employee by the former type corresponds exactly with that of the automatic system. Thus, upon the writing of the insurance, the construction given the law brushes aside any respect for the contractual element. Whatever the contractual aspect of the insurance relationship could disclose to the contrary, the practice of the law renders the claims no less defense-proof than they are under the other system against objections based upon failings, if not breaches, in the employer-insurer relationship. Specifically, one cannot concede any particular difference between the two types in the eclipse of the powers of the doctrines of misrepresentation and fraud, waiver and estoppel, warranties and conditions, the most notable rulers in the realm of private insurance law.

Nevertheless, there still remains the possibility that by the termination of the contract with service of the notice upon the commissioner and after expiration of a certain period, the coverage is lost unless and until the employer has obtained another policy. This is one of the constitutional defects of the contractual system. On the other hand, one must realize that the existence of *ipso-jure* insurance by no means warrants the continuity of coverage during the period of employment. Where the number of employees, for instance, is determinative for insurance, the duration of coverage may end upon the employer's cutting down his staff below the minimum. Nothing short of placing all the wage earners under a compulsory insurance system geared to automatism could eliminate the last opportunity for the exercise of an employer's volition. For the present purposes, it is not necessary to expatiate on the difference between the scope left to the exercise of employers' volition in the present *ipso-jure* insurance and the scope left in the other

type. As we observed, the difference boils down to one in degree rather than in substance, so that it may sink into insignificance by increasing both administrative control over the employer's compliance with the legal obligation to continue carrying insurance, and the control over a fair adjustment of claims.²²³

As one views the notes and comments on the various problems of compensation law in the legal periodicals, one can hardly escape the impression that questions revolving around the concept of employment, the causal connection between employment and injury, the recovery against the common-law tortfeasor, and other topics related to the "statutory tort" read into the compensation acts, have stimulated discussion. However, there has been no attempt to create a new formulation of the insurance relationship between insurance carriers and employees and their dependents. Becoming aware of the striking differences between the old field of insurance law and the new field of compensation insurance, one may question the propriety of carrying over methods utilized in the old field, treated more or less as a matter of private law, into the new. There is need for both a critical examination of that ready-made approach and a search for a new method appropriate to the subject.

In the latter regard, the advent of old age, survivor's and unemployment insurance law in recent years has produced an analogue which, in planning for a unification of the administration of social insurance, will have to be taken into account. While differing in the kind of relief offered, the three branches of social insurance all aim at protection against the risk of the loss or the impairment of earning power, hazards inherent in the wage earner's position in an industrial society.

²²³See Section IV *supra*. By the Beveridge social security plan, workmen's compensation is to be unified in one system, with private insurance companies to be excluded. See Professor Laski's article, N. Y. Times, December 6, 1942, p. 18.