INDEX

NOTICE OF APPEAL.

Filed April 2, 1930.

New Jersey Supreme Court

ESSEX CIRCUIT.

ROSE O'BANNER, *Plaintiff,* *vs.* EDWARD PENDLEBURY, *Defendant.*	*Action at Law.* *Notice of Appeal.*

To Raymond H. Cohen, Esq., 60 Park Place, Newark, N. J., attorney for plaintiff:

SIR:

TAKE NOTICE that the defendant, Edward Pendlebury, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Dated March 29, 1930.

Respectfully,

HARLEY, COX & WALBURG,
Attorneys of Defendant.

Due service acknowledged this 31st day of March, 1930.

RAYMOND H. COHEN,
Attorney of Plaintiff.

GROUNDS OF APPEAL.

Filed April 8, 1930.

New Jersey Court of Errors and Appeals

ROSE O'BANNER, *Plaintiff-Respondent,* *vs.* EDWARD PENDLEBURY, *Defendant-Appellant.*	*Action at Law.* *Grounds of Appeal.*

The defendant states the following grounds of appeal:

1. The trial judge erroneously refused to direct a verdict in favor of the defendant when thereunto moved, whereas said motion should have been granted on one or more of the following grounds urged in support thereof:

(a) The statute under which the plaintiff alleges her cause of action is unconstitutional in that it contravenes and is repugnant to the Fourteenth Amendment, Section 1, of the Constitution of the United States on the ground that it attempts to take the property of the defendant without due process of law.

(b) The statute under which the plaintiff alleges her cause of action is unconstitutional in that it contravenes and is repugnant to the Fourteenth Amendment, Section 1, of the Constitution of the United States on the ground that it denies the defendant the equal protection of the laws and is class legislation.

(c) The statute under which the plaintiff alleges her cause of action is unconstitutional in

that it contravenes and is repugnant to Article 4, Section 7, of the Constitution of the State of New Jersey, because that section of the statute under which the plaintiff alleges a cause of action is not embraced in the title of said statute and that the said statute embraces more than one object.

2. The trial judge erroneously entered a judgment in favor of the plaintiff, whereas judgment should have been entered in favor of the defendant.

3. The trial judge erroneously entered a judgment in favor of the plaintiff for three thousand three hundred ten dollars ($3,310).

HARLEY COX & WALBURG,
Attorneys for Defendant-Appellant.

Due service acknowledged this 7th day of April, 1930.

RAYMOND H. COHEN,
Attorney of Plaintiff.

SUMMONS.

THE STATE OF NEW JERSEY, *ss.*

(SEAL)

To EDWARD PENDLEBURY: You are summoned to answer the annexed complaint of Rose O'Banner, in an action at law in the New Jersey Supreme Court, And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton this 22nd day of November, 1929.

FRED L. BLOODGOOD,
Clerk.

RAYMOND H. COHEN,
Attorney.

COMPLAINT.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

ROSE O'BANNER, *Plaintiff,* vs. EDWARD PENDLEBURY, *Defendant.*	*Action at Law.* *Complaint.*

Plaintiff, residing in the City of Newark, County of Essex, State of New Jersey, complains of defendant herein and says that:

1. On or about the 30th day of March, 1929, and for some time prior thereto the defendant was a general contractor in charge of work being performed at the Gunnell Oval at Kearny, N. J.

2. That as such general contractor he sub-contracted for a part of the work to one John Graves.

3. On the date aforesaid, the plaintiff's intestate, David O'Banner, her husband, was an employee of the said sub-contractor, John Graves, and was working on the said job at Gunnell Oval.

4. On the date aforesaid the plaintiff's intestate, David O'Banner, met with an accident arising out of and in the course of his employment for the said sub-contractor from which accident he died on April 5, 1929.

5. That by virtue of the Statute of 1911, Chapter 95 (and amendments) commonly known

as the "Workmen's Compensation Act," the plaintiff duly filed a formal petition for compensation benefits against John Graves, sub-contractor, and petition was contested and after a hearing the Deputy Commissioner of Compensation on July 26, 1929, signed a determination and order awarding plaintiff a judgment in the sum of three thousand three hundred ten ($3,310) dollars against John Graves, the sub-contractor. A true copy of said determination and order is attached hereto and made a part hereof, and that said determination and order was docketed as a judgment in the Hudson County Court of Common Pleas Minute Book 26 on page 466 and that execution was issued thereof by the Sheriff of the County of Hudson and same was returned not satisfied.

6. On the date aforesaid, the said sub-contractor John Graves failed to carry insurance for the protection of his employees or their dependents as prescribed by statute made and provided and entitled, "An act concerning the compulsory insurance of compensation payments arising under Section 2 of the act entitled," etc. (P. L. 1917, Chapter 178, p. 522); and by reason of the failure of the said John Graves to so insure himself, the plaintiff was and is unable to collect this judgment obtained in the compensation court.

7. By virtue of the statute aforesaid, to wit, Act of 1917, Chapter 178, as amended by the Laws of 1924, Chapter 128, page 244, which last-named statute *inter alia* reads:

> "Any contractor placing work with a sub-contractor, shall, in the event of the sub-contractor's failing to carry compensation in-

surance as required by his act becomes liable for any compensation which may be due an employee or the dependents of a deceased employee of said sub-contractor'';

the defendant herein becomes secondarily liable to the plaintiff to pay the aforesaid judgment by reason of the failure of the sub-contractor, John Graves, to carry compensation insurance.

8. The plaintiff's decedent comes within the protection of the Workmen's Compensation Act above referred to under the second section thereof.

9. The plaintiff has made repeated demands upon the defendant to pay her the compensation which is due by virtue of the judgment obtained in the compensation court because the sub-contractor, John Graves, failed to carry insurance as required by law but the said defendant has at all times wholly neglected and refused so to do and has not done so up to the present time.

10. By reason of the defendant's refusal and neglect to pay the judgment, in accordance with the terms thereof, the whole amount is now due and owing together with additional attorney's fee.

11. Plaintiff demands damages in the sum of three thousand three hundred ten ($3,310.00) dollars with interest from July 22, 1929, a reasonable attorney's fee and costs of suit to be taxed.

RAYMOND H. COHEN,
Attorney for Plaintiff.

November 21, 1929.

DETERMINATION AND RULE FOR JUDGMENT.

NEW JERSEY DEPARTMENT OF LABOR.

WORKMEN'S COMPENSATION BUREAU.

ROSE O'BANNER, *Petitioner,*	*On Claim Petition #10580.*
vs.	
JOHN GRAVES, *Respondent.*	*Determination and Rule for Judgment.*

A formal petition for compensation having been filed in the above-stated cause, to which an answer was filed by the respondent, the case came on to be heard in due course before this bureau at Newark, on July 22, 1929.

The case involved the death of petitioner's intestate, David O'Banner, on April 5, 1929. The petition alleged that the decedent, David O'Banner, husband of the petitioner, Rose O'Banner, was injured on March 30, 1929, during the course and scope of his employment as a laborer of John Graves, respondent, of 10 Wilkinson Terrace, Kearny, N. J., while working on the Gunnel Oval, Kearny, N. J., whereby he was driving a team of horses to which was attached a leveler, and as the ground of the Gunnel Oval was being leveled the said leveler struck a stone and then struck the decedent over the leg, throwing him to the ground. He was taken to an emergency hospital in Kearny, N. J., for treatment, and removed to his home the same day, and a few days later he was taken to the Kenney Memo-

rial Hospital, Newark, N. J., where lockjaw set in, causing his death on April 5, 1929.

It is not disputed by the respondent that the decedent was employed by the said respondent, John Graves, of 10 Wilkinson Terrace, Kearny, N. J., who acted as a sub-contractor for Edward Pendlebury of 26 Franklin Place, Arlington, New Jersey, who was the general contractor on the job on said Gunnel Oval, Kearny, N. J., and that the decedent was injured during the course and scope of his employment, and died as a result of said injury.

The respondent also did not dispute the relationship of husband and wife. The only question left for me to decide, was the dependency of the petitioner in this case.

The testimony clearly showed that the petitioner and the decedent decided to separate, and were living apart for over a year. The petitioner resided at 159 Warren street, Newark, N. J., and the decedent resided at 115 Wickliffe street, Newark, N. J. The testimony indicates that the decedent came to visit the petitioner almost every week, while they were separated, and would bring her monies for her support, and would also pay for some of her necessities, such as groceries, coal and clothing. It also appears that at the times he could not find her home he would leave monies for her support with either a friend, or her niece, sister or nephew. It also appears that the petitioner, Rose O'Banner, worked intermittently.

It further appears that the injury sustained by the decedent at first was not thought to be very serious, but within a few days lockjaw set in, and he died as a result of same. Abundant

testimony was introduced to indicate the petitioner's dependence upon her husband for support, and further that he supplied the necessities of life.

The respondent introduced no other witness but himself, who testified that he did not see the petitioner until after the death of the decedent. That he informed her that her husband died at the Kenney Memorial Hospital, Newark, N. J. He further stated that when he noticed the decedent in such great pain and in such a serious condition, after the lockjaw had set in, and while he was practically on dying he asked the decedent if he had any request to notify his wife, relative to his condition, and he stated that he was informed by the decedent that he had no such request.

On the other hand, the testimony of the respondent was refuted by that of Roney Smith, a nephew of the decedent, who testified that he called on the decedent as was his custom, at his boarding house at 115 Wickliffe street, Newark, N. J., on the evening of the day of the accident and found that he had met with an accident and stated that his injuries did not appear to be anything to be alarmed over. He stated he was requested at that time, by the decedent, to notify his wife, the petitioner, about his accident. He waited until the following evening and told the petitioner about the accident, and that the injury in his opinion was not serious, and she did not think at that time that his injuries were of any real consequence, having obtained work in the interim, she could not see him the following few days, and as the testimony appears, lockjaw set in, and he later died on April 5, 1929. It further appears that the respondent

notified the petitioner on April 5, 1929, when it was already too late, it appearing that the decedent died on that day.

It is also rather significant, however, in this case, that the petitioner paid the funeral expenses for her husband, expending in the neighborhood of $400.00 or $450.00 for same, and arranged for his burial in the South.

I am accordingly of the opinion that the petitioner should prevail in this case and find that she was not only his legal wife at the time of the accident, but never relinquished any claim upon him for support, and I also find that he provided her with support and the necessities of life.

I further find that the decedent earned wages in the amount of $27.00 per week, and that the only dependent is the petitioner, Rose O'Banner.

It Is Therefore Found and Determined that the petitioner's intestate, David O'Banner, died on April 5, 1929, as a result of an injury sustained on March 30, 1929, which injury arose out of and during the course and scope of his employment, and that the petitioner's dependency is as above stated, and that counsel fee be allowed to the petitioner's attorney, Raymond H. Cohen, in the sum of $500.00 the sum of $300.00 to be paid by the respondent, and the sum of $200.00 to be paid by the petitioner. Funeral expenses are allowed in the sum of $150.00. Subpoena fees and expenses for serving said subpoenaes be allowed in the sum of $20.00, and petitioner's one-half of stenographic fee in the sum of $5.00,

It Is Therefore, on this 26th day of July, 1929, Ordered that judgment final be entered in

favor of the petitioner and against the respondent as follows:

Funeral expenses	$150.00
Costs including stenographer's fee	25.00
Counsel fee to Raymond H. Cohen	300.00

Dependents as follows:

Rose O'Banner, widow, 300 weeks, based upon 35% of $27.00 per week, from March 30, 1929, to January 3, 1935, the rate being $9.45 per week	$2835.00

It is further ORDERED that all expenses, counsel fee and weekly payments from March 30, 1929, to the date of the signing of this order, shall be due and owing upon the signing of this order, and subsequent payments to be made weekly as hereinbefore set forth; and it is further

ORDERED: That judgment final be entered in favor of the petitioner and against the respondent for the sum of $2,985.00, together with costs of $325.00.

HARRY J. GOAS,
Deputy Commissioner.

ANSWER.

Filed December 23, 1929.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

ROSE O'BANNER, *Plaintiff,* vs. EDWARD PENDLEBURY, *Defendant.*	*Action at Law.* *Answer.*

The defendant, Edward Pendlebury, residing in the Town of Kearny, County of Hudson and State of New Jersey, answering the complaint of the plaintiff, says that:

FIRST DEFENSE.

1. He admits that on or about March 30, 1929, and for some time prior thereto, he was a general contractor and was performing certain work at Gunnel Oval, in the Town of Kearny, County of Hudson and State of New Jersey.

2. He admits that at certain times, he subcontracted work to one John Graves.

3. He has no knowledge or information sufficient to form a belief as to the allegations of paragraph three.

4. He has no knowledge or information sufficient to form a belief as to the allegations of paragraph four.

Answer.

5. He has no knowledge or information sufficient to form a belief as to the allegations of paragraph five.

6. He has no knowledge or information sufficient to form a belief as to the allegations of paragraph six.

7. He denies that by virtue of the statute referred to in paragraph seven, he is liable in any way or manner, to the plaintiff herein for any judgment which she may have recovered against the said John Graves.

8. He has no knowledge or information sufficient to form a belief as to the allegations of paragraph eight.

9. He denies paragraph nine and avers and alleges that he is not indebted to the plaintiff for any sums of money, in any manner or respect.

10. He denies paragraph ten.

11. He avers and alleges that he is not indebted to the plaintiff for any sum or sums of money.

SECOND DEFENSE.

The statute under which the plaintiff alleges a cause of action in her complaint against this defendant, is unconstitutional in that it contravenes and is repugnant to the Fourteenth Amendment, Section One, of the Constitution of the United States, for the reason that it attempts to take the property of this defendant without due process of law.

Answer.

THIRD DEFENSE.

The defendant herein was not a party to the proceeding brought in the New Jersey Department of Labor, Workmen's Compensation Bureau, by the plaintiff and against the said John Graves, nor did he have any notice of said hearing, nor was he called as a witness, nor did he have an opportunity to appear or defend in said cause. The statute under which the plaintiff alleges a cause of action against this defendant is unconstitutional in that it attempts to take the defendant's property without due process of law.

FOURTH DEFENSE.

The statute under which the plaintiff alleges a cause of action against this defendant is unconstitutional in that it contravenes and is repugnant to the Fourteenth Amendment, Section One, of the Constitution of the United States, for the reason that it denies this defendant the equal protection of the laws, and is class legislation.

FIFTH DEFENSE.

The statute under which the plaintiff alleges a cause of action against this defendant is unconstitutional in that it contravenes and is repugnant to Article Four, Section Seven, of the Constitution of the State of New Jersey, because that section of the statute under which the plaintiff alleges a cause of action is not embraced in the title of the aforesaid statute, and that the said statute embraces more than one object.

SIXTH DEFENSE.

This Court has no jurisdiction over the subject matter set forth in the plaintiff's complaint.

Answer.

OBJECTION IN POINT OF LAW.

The defendant herein, at or before the trial of the within cause, will move to strike out the complaint on the ground that it fails to set up a good and legal cause of action, for the following reasons:

1. This Court has no jurisdiction over the subject matter set forth in the plaintiff's complaint.

2. The statute under which the plaintiff alleges a cause of action is unconstitutional in that it attempts to take the property of the defendant without due process of law, and is repugnant to and contravenes Section One of the Fourteenth Amendment of the Constitution of the United States.

3. The statute under which the plaintiff alleges a cause of action is unconstitutional in that it denies the defendant the equal protection of the laws and is class legislation, and contravenes and is repugnant to Section One of the Fourteenth Amendment of the Constitution of the United States.

4. The statute under which the plaintiff alleges a cause of action is unconstitutional in that it contravenes and is repugnant to Article Four, Section Seven, of the Constitution of the State of New Jersey, because that section of the statute under which the plaintiff alleges a cause of action, is not embraced in the title of the aforesaid statute, and the said statute embraces more than one object.

HARLEY, COX & WALBURG,
Attorneys for Defendant.

REPLY.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

ROSE O'BANNER,
Plaintiff,
vs.
EDWARD PENDLEBURY,
Defendant.

Reply.

Plaintiff replying to the answer filed by the defendant joins issue thereon and says that the Act of 1924, referred to is not unconstitutional for any of the reasons set forth in the second, third, fourth and fifth defenses.

RAYMOND H. COHEN,
Attorney for Plaintiff.

January 13, 1930.

STIPULATION OF FACTS.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

ROSE O'BANNER,
Plaintiff,
vs.
EDWARD PENDLEBURY,
Defendant.

Stipulation of Facts.

The parties, by their attorneys, hereto hereby agree to stipulate that the following facts are the true facts in the case and agree to present them to the Court for argument and hereby waive trial by jury:

1. During the month of February, 1929, the defendant entered into a contract with the Town of Kearny, a municipal corporation in the County of Hudson and State of New Jersey, to perform certain excavating work at one of its playgrounds known as Gunnell Oval, located in that town. The work was begun on this job approximately March 1, 1929, and prior to beginning the work, the defendant engaged one John Graves as sub-contractor to assist in the work under the contract. The said Graves supplied the wagons, teams and drivers, all under his control. Graves was paid $10 a day for the use of each wagon, team and driver.

2. Prior to engaging Graves as sub-contractor, the defendant inquired of him regarding his coverage for workmen's compensation insurance, and the defendant was informed by the said

Graves that he carried workmen's compensation insurance covering his employees. The defendant was not notified by the said Graves, at any time, that he did not carry workmen's compensation insurance. At the time of the accident referred to in the complaint, the said John Graves did not carry workmen's compensation insurance covering his employees.

3. That David O'Banner, deceased, was employed by John Graves and that he came within the provisions of the Workmen's Compensation Act, as there was no agreement otherwise.

4. The defendant, Edward Pendlebury, was not served with process in the action brought in the Workmen's Compensation Bureau by the plaintiff, Rose O'Banner, and against the said John Graves, nor was he a party thereto, nor did he have notice of said proceeding, nor did he appear, nor was he called as a witness, nor did he have any opportunity to appear and defend in their action.

5. Attached to the pleadings is a true copy of the determination and order herein, in the Workmen's Compensation Bureau.

6. The said determination and order was docketed in the Hudson County Court of Common Pleas and execution issued thereon, returned not satisfied, against John Graves.

RAYMOND H. COHEN,
By J. C. PAUL, of Counsel,
Attorney for Plaintiff.

HARLEY, COX & WALBURG,
Attorneys for Defendant.

POSTEA.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

ROSE O'BANNER, *Plaintiff,*	*Action at Law.*	
vs.		
EDWARD PENDLEBURY, *Defendant.*	*Postea.*	

This case was tried before Judge Worrall F. Mountain to whom it had been referred without a jury on an agreed stipulation of facts.

The defendant moved for a direction of verdict on the following grounds:

1. That the statute under which the plaintiff alleges her cause of action is unconstitutional in that it contravenes and is repugnant to the Fourteenth Amendment, Section 1, of the Constitution of the United States on the ground that it attempts to take the property of the defendant without due process of law.

2. That the statute under which the plaintiff alleges her cause of action is unconstitutional in that it contravenes and is repugnant to the Fourteenth Amendment, Section 1, of the Constitution of the United States on the ground that it denies the defendant the equal protection of the laws and is class legislation.

3. That the statute under which the plaintiff alleges her cause of action is unconstitutional in that it contravenes and is repugnant to Article 4,

Postea.

Section 7, of the Constitution of the State of New Jersey, because that section of the statute under which the plaintiff alleges a cause of action is not embraced in the title of said statute and that the said statute embraces more than one object.

The motion was denied and an exception was entered on behalf of the defendant.

The Court made the following finding of facts:

1. During the month of February, 1929, the defendant entered into a contract with the Town of Kearny, a municipal corporation in the County of Hudson and State of New Jersey, to perform certain excavating work at one of its playgrounds known as Gunnell Oval, located in that town. The work was begun on this job approximately March 1, 1929, and prior to beginning the work, the defendant engaged one John Graves as sub-contractor to assist in the work under the contract. The said Graves supplied the wagons, teams and drivers, all under his control. Graves was paid $10.00 a day for the use of each wagon, team and driver.

2. Prior to engaging Graves as sub-contractor, the defendant inquired of him regarding his coverage for workmen's compensation insurance, and the defendant was informed by the said Graves that he carried workmen's compensation insurance covering his employees. The defendant was not notified by the said Graves, at any time, that he did not carry workmen's compensation insurance. At the time of the accident referred to in the complaint, the said John Graves did not carry workmen's compensation insurance covering his employees.

Postea.

3. That David O'Banner, deceased, was employed by John Graves and that he came within the provisions of the Workmen's Compensation Act, as there was no agreement otherwise.

4. The defendant, Edward Pendelbury, was not served with process in the action brought in the Workmen's Compensation Bureau by the plaintiff, Rose O'Banner, and against the said John Graves, nor was he a party thereto, nor did he have notice of said proceeding, nor did he appear, nor was he called as a witness, nor did he have any opportunity to appear and defend in their action.

5. Attached to the pleadings is a true copy of the determination and order herein, in the Workmen's Compensation Bureau.

6. The said determination and order was docketed in the Hudson County Court of Common Pleas and execution issued thereon, returned not satisfied, against John Graves.

After consideration of the briefs filed by counsel, I find that the law of the case is controlled by decision in Corbett *v.* Starrett Bros., reported in 143 Atlantic Reporter, page 352, which construes, Chapter 128 of the Pamphlet Laws of 1924. This adjudication was made by the Court of Errors and Appeals and by virtue of it that section of Chapter 128 which is pertinent to the instant action requires the general contractor to be the guarantor of the obligation of the subcontractor, to comply with the Insurance Act.

I further find that the Statute on which the within suit is based is constitutional.

Postea.

The defendant has prayed an exception to the findings of the Court which has been allowed and an exception granted.

In accordance with the views above, I find that the plaintiff Rose O'Banner is entitled to recover against the defendant Edward Pendlebury, in the sum of three thousand three hundred ten ($3,-310.00) dollars and judgment may be entered accordingly.

(Signed) WORRALL F. MOUNTAIN,
Circuit Court Judge.

March 12, 1930.

ORDER FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

ROSE O'BANNER, *Plaintiff,* *vs.* EDWARD PENDLEBURY (or Pendelbury), *Defendant.*	*Action at Law.* *On Postea.*

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of three thousand three hundred and ten dollars, besides costs to be taxed nisi.

Entered March 26, 1930.

On motion of

RAYMOND H. COHEN,
Attorney.

Damages $3,310.00.

Costs.....

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JUDGMENT.

NEW JERSEY SUPREME COURT.

ROSE O'BANNER, *Plaintiff,* *vs.* EDWARD PENDLEBURY (or Pendelbury), *Defendant.*	*Action at Law.* *On Postea.*

Raymond H. Cohen, attorney.

Judgment entered this twenty-sixth day of March, A. D. nineteen hundred and thirty in favor of plaintiff and against the defendant for the sum of three thousand three hundred and ten dollars and costs.

WM. S. GUMMERE,
C. J.

$3,310.00.

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LAWS OF 1917, CHAPTER 178 AS AMENDED

An Act concerning the compulsory insurance of compensation payments arising under section two of the Act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and

compensation thereunder," approved April fourth, one thousand nine hundred and eleven. (L. 1917, c. 178, p. 522.)

5. An employer who shall fail to provide the protection prescribed in this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished for a first offense by a fine of not more than five hundred dollars, and for a subsequent offense by a fine of not more than five hundred dollars, or by imprisonment for not more than thirty days, or by both, such fine and imprisonment. Any contractor placing work with a sub-contractor, shall, in the event of the sub-contractor's failing to carry workmen's compensation insurance as required by this act, become liable for any compensation which may be due an employee or the dependents of a deceased employee of said sub-contractor. Such contractor shall then have a right of action against such sub-contractor for reimbursement. The county prosecutor of the county in which the violation occurred shall proceed at the request of the Workmen's Compensation Bureau, or the Department of Banking and Insurance against the person, partnership or corporation guilty of the violation. All fines collected under the terms of this clause shall be paid to the State Treasurer and credited on the records of the State Comptroller to the account of the Rehabilitation Commission for Physically Handicapped Persons, to be used in carrying out the purposes of the act creating the above named commission, approved April tenth, one thousand nine hundred and nineteen. (L. 1917, c. 178, p. 524, as amended L. 1921, c. 272, p. 803, L. 1924, c. 128, p. 245.)

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ROSE O'BANNER,
Plaintiff-Respondent,

vs.

EDWARD PENDLEBURY,
Defendant-Appellant.

Action at Law.

BRIEF IN BEHALF OF PLAINTIFF-RESPONDENT.

Facts.

The plaintiff sues defendant to recover on an award entered in the sum of $3,310.00 which award has been duly docketed in the Hudson County Court of Common Pleas.

The plaintiff is the wife of David O'Banner and that the said David O'Banner was employed by John Graves. John Graves was a sub-contractor doing work on premises in Kearny, New Jersey, and as such employed the plaintiff's decedent. The defendant herein was a general contractor and the plaintiff's decedent lost his life in the course of his employment for which petitioner filed a petition under the Workmen's Compensation Bureau and an award entered thereon in her behalf.

The present suit is between decedent's widow against the general contractor based upon the act of 1924, p. 244 (N. J.).

ARGUMENT.

We shall discuss the grounds of appeal in the order in which they appear in the State of Case, p. 2.

(a) The Statute under which the plaintiff alleges her cause of action is unconstitutional in that it contravenes and is repugnant to the Fourteenth Amendment, Section 1, of the Constitution of the United States on the ground that it attempts to take the property of the defendant without due process of law.

We cannot adopt this view of the act of 1924 (*supra*) as it is only an amendment to section 5 of the act of 1917, p. 522, which last named act is known as "Workmen's Compensation Insurance Act" and is amendatory to the original compensation act of 1911 (*supra*) as expressed in the title.

Section 5 of the act of 1924 only prescribes a remedy in the nature of a penalty against the general contractor for his negligence in failing to see that his sub-contractor carries compensation insurance. The act only specifies that the general contractor becomes secondarily liable in the event that the sub-contractor carries no insurance. The act of 1924 (*supra*) was very carefully construed by our Court of Errors and Appeals in the case of*Corbett* v. *Starrett Bros.*, reported in 143 Atl. Reporter, p. 352 (not officially reported) and it was there held:

> "Section 5 of the Compulsory Insurance Act, as amended by Chapter 128 of the Laws of 1924, was never intended to create the relation of employer and employee between a general contractor and a person employed by a sub-contractor, but requires the general contractor to see to it that a sub-contractor insures his liability, to pay the compensa-

tion as provided by statute; otherwise, the general contractor becomes liable to pay it."

"A sub-contractor is liable in the first instance, and the general contractor is only secondarily liable, in the event that the sub-contractor ignores the statute.

"The purpose of the amendment was to protect the employee of the sub-contractor, and not to impair any of his common-law rights, nor in any way relieve the general contractor from responding for damages caused by his own negligence."

It is obvious from the foregoing case that the defendant could not be made a party to the original Workmen's Compensation action, for that Court only takes cognizance of cases wherein the petitioner and the respondent are in the relationship of employee and employer and the Corbett case (*supra*) expressedly holds that such relationship does not exist between the employee of a sub-contractor and the general contractor.

In consideration of this ground of appeal we find it necessary to discuss "due process." It must be borne in mind that the defendant in this case was served with a summons and complaint and appears by counsel but contends that he had no opportunity to be heard in the judgment entered against Graves in the compensation bureau. That argument is only good in so far as Graves is concerned as we already pointed out this defendant had no standing in the Workmen's Compensation Bureau by virtue of the decision of the Court of Errors and Appeals in the Corbett case, but that in the instant case he was properly served with papers. In the case of *Owens* v. *Battenfield* reported in 33 Federal Reporter (2) p. 753 it was held. " 'Due process' clause requires opportunity to be heard, but does not control form of procedure."

And further in the case of *Hallinger* v. *Davis,* reported in 146 U. S. p. 314. On p. 320 the Court said

> "due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State."

Further on p. 321 the Court said:

> "the 14th amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversion in this respect may exist in (2) states separated only by an imaginary line. Each State prescribes its own modes of judicial proceedings."

In the case of *U. S.* v. *Cruikshank,* 92 U. S. p. 542, Court said:

> "the duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States and it still remains there."

It will be seen from the foregoing that the defendant in the instant case by being properly served with papers and appearing by counsel is governed by the laws of the State of New Jersey, as provided for in our judicial proceedings and that the Corbett case controls in so far as proceeding against the defendant in the first instance is concerned.

Counsel in their brief quotes the case of "Postal Telegraph Cable Company"; and it will be seen upon a reading of that case that it refers to a former decision, but we are concerned in this case with a statute.

The Postal Telegraph case above referred to is forcibly commented on by our opponents as the law of this case but the facts in that case are far different than the facts in the instant

case. The defendant in the instant case is controlled by the statute of 1924 and it was impossible under our settled law to make him a party to the action in the compensation bureau.

Further in the brief of our opponents they quote the case of *Windsor* v. *McVeigh* as sustaining their principle but by reading the entire case we find that the defendant in that case was cited to appear and when he appeared he was not allowed to be heard and that his property was confiscated and for this reason the Court reversed the decision of the lower court. The next case cited by our opponent is *Galpin* v. *Page,* which is answered the same as that in the preceding case.

In the Hubbard case cited by our opponent it appears that the pleadings were amended at the trial and there was no summons served but in the case at bar there was a proper service of summons and complaint, and an appearance by the counsel in behalf of the defendant.

SECOND POINT.

(b) The Statute under which the plaintiff alleges her cause of action is unconstitutional in that it contravenes and is repugnant to the Fourteenth Amendment, Section 1, of the Constitution of the United States on the ground that it denies the defendant the equal protection of the laws and is class legislation.

We fail to see how this point can be consistently raised when a reading of section 5 of the act specifically states that it applies to *"any employer"* and that certainly is inclusive of every class of employer and does not alone contemplate general contractors. In the case of

Duncan v. *Missouri,* reported in 152 U. S. page 377, it was held:

> "Due process of law, and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individuals to an arbitrary exercise of the powers of government."

Further; in the case of *Dukish* v. *Blair,* reported in 3 Federal Reporter (2) page 302:

> "due process of law in each particular case means such exercise of government power as settled maxims of law permit and sanction, and under such safeguards for protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs."

We cannot agree with our opponent's brief wherein it states that the 1924 act is not an amendment or supplement to the employers' liability act for the 1924 act specifically refers to the Compensation Insurance Act which is a supplement to the Workmen's Compensation Act and therefore the 1924 act must be considered and read as a part of the original Workmen's Compensation Act of 1911.

The case of *Rockingham County Light and Power Company* v. *Philbrick,* reported in 79 New Hampshire, page 279, holds "a statute to be objectionable as 'class legislation' must deny some privileges which it permits others of the same class to enjoy."

POINT C.

(c) The Statute under which the plaintiff alleges her cause of action is unconstitutional in that it contravenes and is repugnant to Article 4, Section 7, of the Constitution of the State of New Jersey, because that section of the statute under which the plaintiff alleges a cause of action is not embraced in the title of said statute and that the said statute embraces more than one object.

The act of 1924 (*supra*) only refers to section 5 of the act of 1917 (*supra*) and the last-named act is amendatory of the original compensation act of 1911 which act has on several occasions been held constitutional such as in the case of *Sexton* v. *Newark District Telegraph,* reported in 84 New Jersey Law, page 85.

The doctrine set forth in the *Sexton* case was re-stated in the recent case of *Doyne* v. *Stollerman,* reported in 3 New Jersey Misc. Reports, page 1171, and which case holds as follows:

> "Title to Act Feb. 28th, 1918. (P. L. p. 429), stating that act prescribes liability of employer for injuries to employee, establishing elective schedule for compensation and regulating procedure, is not in violation of constitutional requirement that legislation embrace but one object to be expressed in title, since such title is but supplementary to title to original act of April 4, 1911 (P. L., p. 134) whose constitutionality has been established and is amply restrictive, and body of act covers only matters incidental to object in title and designed to carry it into effect."

The title to the act of 1917 is set forth on page 25, State of Case, and we feel that the last-quoted case above is dispositive of Point "C."

We have examined similar provisions of the various compensation acts of the various states

of the union and find that most of the states are adopting similar legislation for the reason that general contractors were evading their responsibility to their workmen by sub-contracting their work and thereby escaping responsibility to the workmen on the theory that the relation of master and servant did not apply to them.

In Oklahoma the case of *Tahoma Smokeless Coal Company* v. *State Industrial Commission,* reported in 274 Pac. Reporter, page 16, it was held:

> "Under the Act of 1923, Chapter 61, the owner of a coal mine lease is secondarily liable for personal injuries to an employee of an independent contractor who is mining coal for said company, where such contractor fails to carry insurance protecting his employees against injury while working in said mine."

In Pennsylvania the statutes provide that an injured employee can go back through the various lines of sub-contractors and general contractors and hold one or all of them for any of his injuries thus accomplishing the same purpose which is accomplished in the New Jersey Statute.

This situation is expressed in Pennsylvania in the case of *Byrne* v. *Henry A. Hitner's Sons Company, et als.,* reported in 290 Penna. 225.

The Pennsylvania Act provides that where the sub-contractor carries insurance, the general contractor is not obligated in any way to any injured employees of the sub-contractor.

In the case of *State* v. *New Jersey Indemnity Insurance Company,* reported in 95 New Jersey Law, page 308, it was held:

> "that the enforcement of the penalty for the violation of the insurance laws of the State

> of New Jersey did not violate the 14th Amendment of the United States Constitution. The purpose and effect of this amendment has been declared to be to protect 'against hostile legislation of the States the privileges and immunities of the citizens of the United States, as distinguished from the privileges and immunities of the citizens of the State.' ''

The above case quotes with approval the Slaughter House Cases reported in 83 United States, 36.

We shall argue Points 2 and 3 under one head.

(2) The Trial Judge erroneously entered a judgment in favor of the plaintiff, whereas judgment should have been entered in favor of the defendant.

(3) The Trial Judge erroneously entered a judgment in favor of the plaintiff for three thousand, three hundred ten dollars ($3,310).

The points above were not raised by the appellant either in the objection in point of law or any of the defenses set forth in the answer to complaint nor were they raised in the Postea as filed, therefore the appellants have no right to raise the point at this time. However, since they have raised them we shall answer their arguments.

They argue that a formal order must be entered before we can collect the full amount due as set forth in the Postea. We consider that the Postea as signed by Judge Mountain is an order decreeing that the full amount become due and payable at once. Furthermore this proceeding is against the general contractor who is not in the relationship of master and servant to the plaintiffs' decedent as held in the "Corbett" case.

Counsel further argues that the judgment should be only for compensation and because it includes burial expenses and attorneys' fees they should not pay anything on account thereof. The case of *Henry Steers, Inc.* v. *Turner Construction Company,* reported in 104 New Jersey Law, page 189, construes "compensation" to include "medical payments" and further holds that the statute must be liberally construed to effectuate its purpose, and it would have been an idle gesture on the part of legislature to have specifically set forth in detail just every payment due under "compensation" which a petitioner is entitled to and surely the above case covers this argument completely.

Their next point of attack which also was not raised in the court below is that the judgment should have been docketed in the Essex County Court of Common Pleas, but in as much as the sub-contractor, John Graves and the general contractor, this defendant, both reside in Hudson County and the accident occurred in Hudson County, it seems logical that the place to docket the judgment was in Hudson County.

We consider these last two points trivial and wholly technical and simply an attempt to evade that which it is their clear duty to pay.

For these reasons we feel that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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JOSEPH C. PAUL,
Of Counsel and on the Brief.

New Jersey Court of Errors and Appeals.

ROSE O'BANNER, *Plaintiff-Respondent,* *vs.* EDWARD PENDLEBURY, *Defendant-Appellant.*	ACTION AT LAW.

BRIEF IN BEHALF OF DEFENDANT-APPELLANT.

I.

Statement of the Case

This appeal brings before this Court for review a judgment of the Supreme Court entered in the Essex Circuit in favor of the plaintiff-respondent (hereinafter referred to as the plaintiff) and against the defendant-appellant (hereinafter referred to as the defendant).

The plaintiff, for her cause of action against the defendant, alleged that on March 30th, 1929, the defendant was a general contractor in charge of work being performed at a public playground known as Gunnell Oval, at Kearny, Hudson County, New Jersey, and that as such general contractor he subcontracted for a part of the work to one John Graves; that on March 30th, 1929, the plaintiff's husband, David O'Banner, was an employee of the said subcontractor, John Graves, and

was working on the job at Gunnell Oval; that on that day, he met with an accident arising out of and in the course of his employment with the said subcontractor, John Graves, from which he died on April 5th, 1929; that the plaintiff, as the widow of David O'Banner, instituted an action in the New Jersey Department of Labor, Workmen's Compensation Bureau, against her husband's employer, John Graves, and recovered a compensation award totalling three thousand three hundred ten dollars ($3,310); that it subsequently appeared that the subcontractor, John Graves, failed to carry workmen's compensation insurance and that by virtue of the act of 1917, chapter 178, as amended by the laws of 1924, chapter 128, the general contractor, the defendant herein, became liable for any compensation due the plaintiff herein. The plaintiff further alleged that no payments had been made by the employer on the compensation award.

The defendant filed an answer denying any knowledge of the injury or proceedings in the Workmen's Compensation Bureau, and averring that he was not a party to the proceedings in the Workmen's Compensation Bureau, that he did not have an opportunity to be heard or appear and defend, and that he was not called as a witness therein. The defendant further set up the defense that the statute under which the plaintiff alleged her cause of action was unconstitutional in that it attempted to take the property of the defendant without due process of law, that it was class legislation, and that the section of the statute under which the plaintiff alleged her cause of action is not embraced in the title of the statute, and that the statute embraces more than one object.

The case was submitted to Judge Worrall F. Mountain at the Essex Circuit, on an agreed state-

ment of facts. After the submission of the agreed state of facts (p. 18 to p. 19), the ~~plaintiff~~ defendant moved for a direction of a verdict on the ground that the statute was unconstitutional (p. 20), the motion was denied and an exception was allowed. The court found in favor of the plaintiff, and on March 26th, 1930, judgment was entered in favor of the plaintiff for three thousand three hundred ten dollars ($3,310).

II.

Grounds of Appeal.

The grounds of appeal are as follows (p. 2):

1. The trial judge erroneously refused to direct a verdict in favor of the defendant when thereunto moved, whereas said motion should have been granted on one or more of the following grounds urged in support thereof:

(a) The statute under which the plaintiff alleges her cause of action is unconstitutional in that it contravenes and is repugnant to the Fourteenth Amendment, Section 1, of the Constitution of the United States on the ground that it attempts to take the property of the defendant without due process of law.

(b) The statute under which the plaintiff alleges her cause of action is unconstitutional in that it contravenes and is repugnant to the Fourteenth Amendment, Section 1, of the Constitution of the United States on the ground that it denies the defendant the equal protection of the laws and is class legislation.

(c) The statute under which the plaintiff alleges her cause of action is unconstitutional in that it contravenes and is repugnant to Article 4, Section 7, of the Constitution of the State of New

Jersey, because that section of the statute under which the plaintiff alleges a cause of action is not embraced in the title of said statute and that the said statute embraces more than one object.

2. The trial judge erroneously entered a judgment in favor of the plaintiff, whereas judgment should have been entered in favor of the defendant.

3. The trial judge erroneously entered a judgment in favor of the plaintiff for three thousand three hundred ten dollars ($3,310).

III.

Brief of the Argument.

(1)

The trial judge erroneously refused to direct a verdict in favor of the defendant.

(a)

The statute under which the plaintiff alleges her cause of action is unconstitutional in that it attempts to take the property of the defendant without due process of law.

It appears from the agreed statement of facts submitted to the trial court that during the month of February, 1929, the defendant entered into a contract with the Town of Kearny, a municipal corporation of the County of Hudson and State of New Jersey, to perform certain excavating work at one of its playgrounds known as Gunnell Oval, and located in that town. The work was begun on this job at about March 1st, 1929, and prior to the beginning of the work, the defendant engaged one John Graves as subcontractor to assist in the work

under contract. Graves supplied wagons, teams and horses, all under the control of Graves. He was paid $10 a day by the defendant for the use of each wagon, team and driver. Prior to engaging Graves as a subcontractor, the defendant inquired of him regarding his coverage for workmen's compensation insurance, and the defendant was informed by Graves that he carried workmen's compensation insurance covering his employees; and the defendant was not notified at any time by Graves that he failed to carry workmen's compensation insurance. It also appears that at the time of the accident referred to in the complaint, Graves failed to carry workmen's compensation insurance covering his employees. It was further agreed that in the proceeding brought in the Workmen's Compensation Bureau by the plaintiff and against John Graves, as employer of the decedent, that the defendant was not served with process and that he was not a party thereto, that he did not have notice of said proceeding, nor did he appear, nor was he called as a witness, nor did he have any opportunity to appear and defend in that action (pp. 18 to 19). Attached to the pleadings is a copy of the judgment of the Workmen's Compensation Bureau (pp. 8 to 12).

The plaintiff alleges a cause of action by virtue of chapter 178 of the laws of 1917 as amended by the laws of 1924, chapter 128. This statute is printed at pp. 25 to 26 of the State of Case. The section of the statute pertinent to the present case is as follows:

> "Any contractor placing work with a subcontractor, shall, in the event of the subcontractor's failing to carry workmen's compensation insurance as required by this act, become liable for any compensation which may be due an employee or the dependents of a deceased employee of said subcontractor."

The plaintiff contends that the judgment entered in the Workmen's Compensation Bureau in favor of the plaintiff and against the employer, John Graves, is absolutely binding upon the defendant in the present action, and that by virtue of the statute referred to, the defendant becomes liable to the plaintiff for any compensation which may be due.

It is well settled law that a person is not bound by a judgment to which he is not a party, has not had notice of and has not had an opportunity to appear and defend. It is undisputed that in this case the defendant was not a party in the Workmen's Compensation Bureau proceeding, that he had no notice of it, and that he did not have an opportunity to appear and defend.

It is elementary that the essential elements of "due process of law" are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case.

Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College Case,* 17 U. S. 518:

> "By the law of the land is most clearly intended the general law—a law which hears before it condemns, which proceeds upon inquiry, and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

In *Postal Telegraph Cable Company* v. *Newport,* 247 U. S. 464, a judgment was recovered by the City of Newport against the defendant telegraph company for alleged taxes due the city for a franchise right granted under a local ordinance, to erect poles and stretch wires in the city streets. The trial court entered judgment on the theory

that the rights of the parties under the ordinance had been adjudicated in a previous proceeding, holding that a judgment for the tax against another corporation which formerly owned the telegraph lines, was *res adjudicata* against the defendant, on the question of liability. This judgment was reversed by the United States Supreme Court, which said:

> "The doctrine of *res adjudicata* rests at bottom upon the ground that the party to be affected or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. *And as a state may not consistently with the fourteenth amendment enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.*"

In *Baldwin* v. *Hale,* 68 U. S. 223, the plaintiff sued on a note and the defendant set up the defense that he had secured a discharge of his debts in insolvency proceedings. The plaintiff, at the time of the insolvency proceedings, resided in another state, and therefore, did not prove his debt in the insolvency proceedings. The United States Supreme Court said:

> "The courts of one state would have no power to require citizens of other states to become parties to such proceedings in insolvency, under the principle that common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense. Parties

> whose rights are to be affected, are entitled to be heard, and in order that they enjoy that right, they must first be notified."

In *Coe* v. *Armour,* 237 U. S. 413, a statute of the State of Florida provided that where a judgment had been entered against a corporation and had been returned unsatisfied, execution could be issued directly against the stockholders. The Supreme Court of the United States held that the Florida statute was repugnant to the due process clause of the fourteenth amendment and in the course of its opinion, said:

> "Before the third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation, he is entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as to whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself."

In *Windsor* v. *McVeigh,* 93 U. S. 277, the Supreme Court, speaking of the due process clause of the constitution, had this to say:

> "The principle stated in this terse language lies at the foundation of all well ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights and is not entitled to respect in any other tribunal."

and in *Galpin* v. *Page,* 85 U. S. 350,

> "It is a rule as old as the law, and never more to be respected than now, that no one

> shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and could never be upheld where justice is justly administered."

In *Darmstatter* v. *Passaic,* 81 N. J. L. 162, Justice Minturn adopted the definition of due process of law as given by Webster in the *Dartmouth College* case.

In *Hubbard* v. *Montross Shingle Co.,* 79 N. J. L. 210, suit was brought against a corporation, and at the trial, over the objection of the defendants, the defendants' name was amended to read as a partnership naming the individuals. It was held that this was unconstitutional and that the judgment was taking the property of the defendants without due process of law. The court, in its opinion, said:

> "As was said by the United States Circuit Court in *Lavin* v. *Emigrant Industrial Savings Bank,* 18 Blatchf. 1: 'What is absolutely indispensable is, unless he (defendant) has consented to the act of deprivation, that he shall have notice of the proceeding either actual, or, in proper cases, constructive; that he shall have an opportunity to be heard in defense of his right or title. If the proceeding is wanting in these essentials, then by the principles of the common law, whatever force and effect the judgment may otherwise have, it cannot bind him; he is not and cannot be treated as a party to the judgment without a violation of what is regarded as a fundamental rule of natural justice.'
>
> A fortiori must this be so, when the judgment may result, as in this case, in an interference with the personal liberty of the de-

fendants. *D'Arcy* v. *Ketchum,* 11 How. (U. S.) 174; *Wilson* v. *Seligman,* 144 U. S. 41."

There are numerous other cases in the United States Supreme Court which reiterate the principle that a person's property may not be taken without an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case:

Selig v. *Hamilton,* 232 U. S. 383;
Ochoa v. *Hernandez,* 230 U. S. 139;
Washington v. *Fairchild,* 224 U. S. 510;
Converse v. *Hamilton,* 224 U. S. 243;
Twining v. *New Jersey,* 211 U. S. 78;
Hovey v. *Elliott,* 167 U. S. 409;
C. B. & I. v. *Chicago,* 166 U. S. 226;
Pennoyer v. *Neff,* 95 U. S. 714;
McVeigh v. *The United States,* 78 U. S. 259;
Burdick v. *The People,* 149 Ill. 600;
In re Lambert, 55 L. R. A. 856.

The trial judge did not file any opinion but stated in the postea that the law of the case is controlled by *Corbett* v. *Starrett Bros.,* 143 Atl. Rep. 352 (not officially rept.). In that case, the defendant contended, by virtue of section 5 of the statute referred to, that the employee of the subcontractor became the employee of the general contractor, and that the employee of the subcontractor could not maintain any action against the general contractor for injuries sustained through the negligence of the general contractor. This court, in construing that section of the statute, held that the subcontractor is liable in the first instance and the general contractor is secondarily liable in the event that the subcontractor ignored the statute;

that the statute only requires the general contractor to be the guarantor of the obligations of the subcontractor.

The suit at bar was tried on the theory that the defendant was bound to pay the judgment recovered in the Workmen's Compensation Bureau against the subcontractor, as it appeared that the subcontractor failed to carry insurance and had failed to pay the judgment. Even though the general contractor, under the statute, is a guarantor of the obligations of the subcontractor, still he certainly should have an opportunity to defend on the merits of the employee's or dependent's claim and not be bound by a judgment of a tribunal in which he had not appeared and a proceeding of which he had no notice.

It was held in *DeGreiff* v. *Wilson,* 30 N. J. Eq. 435, by Chancellor Runyon, that a judgment recovered against a principal alone is evidence of the fact of its recovery only and not of a fact which it was necessary to find in order to recover said judgment. He stated at page 437:

> "The judgment is not evidence of the indebtedness against the defendants. Although there is a conflict of authority on the subject, it seems to be the better opinion that, except in cases where, upon the fair construction of the contract, the surety may have undertaken to be responsible for the result of a suit, or where he is made privy to defend it, a judgment against the principal alone is, as a general rule, evidence of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover said judgment. *Brandt on Suretyship,* par. 524."

Under the theory propounded by the plaintiff, the defendant becomes liable even though he has a good defense against the action of the petitioner in the Workmen's Compensation Bureau. It may

be that the accident did not occur in the course of the employment with the subcontractor and yet, if the subcontractor does not appear and permits a judgment to go by default against him, under the plaintiff's theory the general contractor would be absolutely liable although he had no knowledge of the proceeding in the Workmen's Compensation Bureau. The employee and the subcontractor could permit a judgment by fraud to be entered against the subcontractor and allow it to lie dormant for a long period of time in the Workmen's Compensation Bureau and then the petitioner could institute a suit at law against the general contractor who would have no defense to the suit.

The fact that the Legislature has attempted to create a new right for the plaintiff does not remove it from the inhibition provided by the constitution. *Davidson* v. *New Orleans,* 96 U. S. 97; *King* v. *Hatfield,* 130 Fed. 564. In the latter case, the court said:

> "It follows that a law which, by its own inherent force, extinguishes rights or property, or compels their extinction without any legal proceedings whatever, comes directly in conflict with the constitution."

The attempted action of the Legislature and the procedure followed in this case clearly deprives the defendant of due process of law. He becomes absolutely liable to a third person with whom he has no contractual relationship and with whom he is not in privity, by virtue of a judgment obtained by that third person against his employer, without notice or knowledge to this defendant. To say the least, it must be conceded under the decisions of the United States Supreme Court, in construing the due process clause, that a defendant must have

an opportunity to be heard on the merits of the cause of action before he can be bound by the judgment. This statute attempts to make the general contractor absolutely liable for the default of the subcontractor and yet affords him no opportunity to set up a just and legal defense.

We respectfully submit that the statute on which the plaintiff relies is unconstitutional and is an attempt to take this defendant's property without due process of law.

(b)

The statute is unconstitutional in that it is class legislation and deprives the defendant of the equal protection of the laws.

An examination of the title of the statute under which the plaintiff is proceeding will show that it is not an amendment or supplement to the Employer's Liability Act commonly known as the Workmen's Compensation Act, but that it is a separate and distinct statute concerning the compulsory insurance of compensation payments arising under section two of the Employer's Liability Act, or Workmen's Compensation Act. The Employer's Liability Act is divided into two sections. An employer and employee may, by their election, come under either section one or section two of the act. The plaintiff's decedent in this case and his employer, the subcontractor, had elected to work under section two which relates to the workmen's compensation section of the act. The statute under which the plaintiff is proceeding concerns only the compulsory insurance of compensation payments, arising under section two of the Employer's Liability Act. It has no reference or connection in any way with section one of the Employer's Liability Act. It is evident, therefore, that the statute does not operate directly on

all general contractors or all subcontractors, but affects only those subcontractors and general contractors who have elected to come under section two of the Employer's Liability Act. If a subcontractor and his employee decide to elect to come under section one of the Employer's Liability Act, the statute under which the plaintiff sues would not be operative as far as they were concerned or as far as the general contractor was concerned. We submit that the statute is repugnant to the fourteenth amendment of the constitution of the United States in that it is class legislation operating only on a particular class; that is, that class of contractors, employers and employees, who elect to come under section two of the Employer's Liability Act.

In *State* v. *Lindsay,* 94 N. J. L. 357, affirmed 96 N. J. L. 268, an action was brought under chapter 203 of the laws of 1918 which provided that upon the death, without dependents, of an employee as a result of an injury received in the course of his employment, the employer of said person should pay to the Commissioner of Labor the sum of $400. This statute was held unconstitutional on the ground that it was a tax and that it was class legislation. The court, in its opinion, said:

> "Such a tax has manifestly no relation to the police power; it is plainly not a property tax, and *when we consider that it is restricted not merely to employers generally who have in their employ, workmen with no dependents entitled to claim, but employers of that character who are within section 2 of the compensation act, we reach a tenuity of classification that seems to us to deprive the class of any logical validity and of all substantial basis. Southern Railway Co.* v. *Greene,* 216 U. S. 400 (p. 360)."

The same situation exists in the present statute. There is a tenuity of classification coinciding with that found in the statute referred to in *State* v. *Lindsay.*

The decision in *State* v. *Lindsay, supra,* is dispositive of our contention that the statute is unconstitutional and that it is repugnant to the fourteenth amendment of the constitution of the United States in that it constitutes class legislation.

(c)

The statute is unconstitutional because it embraces more than one object, and that section of the statute under which the plaintiff alleges her cause of action is not embraced in the title of the said statute.

The constitution of the State of New Jersey, in Article 4, Section 7, paragraph 4, provides:

> "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object and that shall be expressed in the title."

The title of the act under which the plaintiff is proceeding is as follows:

> "An Act concerning the compulsory insurance of compensation payments arising under section two of the act entitled 'An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder' approved April fourth, one thousand nine hundred and eleven (L. 1917, c. 178, p. 522)."

There is nothing in the title to put any third person on notice that new duties are imposed upon him, and there is nothing in the title to indicate that the relative rights of third persons who have no relationship under section two of the Workmen's Compensation Act are to be affected or changed. This statute creates new rights in favor of an employee of a subcontractor acting under section two of the Workmen's Compensation Act, and creates new duties on the part of a general contractor who has no privity or contractual relationship with the employee of the subcontractor.

It has been held in *Corbett* v. *Starrett Bros., supra,* that this statute does not create the relationship of employer and employee between the general contractor and the employee of the subcontractor.

The purpose of the constitutional provision to which we have referred is to prevent the very thing which has been done in this statute. In *Jordon* v. *Moore,* 82 N. J. L. 552, this court held that under article four, section seven, paragraph four of the constitution, the title of an act of the Legislature constitutes a limitation upon the enacting clauses and that any construction of the law that will give them a scope beyond the object embraced in the title is to be rejected.

In *George Jonas Glass Company* v. *Ross,* 69 N. J. L. 157, the Legislature amended the "District Court Act" and attempted to change the relative rights of landlords and tenants. The Supreme Court held that this was unconstitutional as the title of the act did not indicate a purpose to declare or change the relative rights of landlords and tenants.

In *Griffith* v. *Trenton,* 76 N. J. L. 23, the Supreme Court held that in whatever sense a title of an act would naturally and generally be taken is ordi-

narily the meaning that should, in a constitutional sense, be held to be embraced in it. See *Robbins* v. *Lanning,* 93 N. J. Eq. 262.

Certainly, a general contractor reading the title of this statute would not naturally or generally expect to find therein new duties and obligations imposed upon him in favor of an employee of a third person, nor could the employee of a subcontractor, in reading the title of the act, be expected to find therein that there were new rights created in his favor and against a third person with whom he had no contractual relationship and with whom he was not in privity. The title of the act concerns only compulsory insurance of compensation payments arising under section two of the Workmen's Compensation Act, and to say that it embraces the changing of relative rights of third persons not concerned between themselves with section two of the Workmen's Compensation Act, would be to read something into the title which the Legislature failed to include.

The statute should, therefore, be held unconstitutional because it violates the constitution of the State of New Jersey in that the statute embraces more than one object and that portion of the statute upon which the plaintiff relies is not expressed in the title of the said statute.

(2)

The court erred in finding in favor of the plaintiff for three thousand three hundred ten dollars ($3,310.00). (Under this head will be argued grounds of appeal 2 and 3).

The trial court, in its postea, found that the plaintiff was entitled to recover of the defendant the sum of three thousand three hundred ten dollars ($3,310). It appears from a copy of the judgment of the Workmen's Compensation Bureau

that the plaintiff, as petitioner in that court, was awarded a judgment of three hundred (300) weeks' compensation at the rate of nine dollars and forty-five cents ($9.45) a week which, if fully paid, would amount to two thousand eight hundred thirty-five dollars ($2,835.). It further appears from the judgment entered that the weekly compensation payments from March 30, 1929, to July 26, 1929, the day of the entering of the judgment, were ordered due.

The Workmen's Compensation Act, chapter 95 of the Laws of 1911, as amended by chapter 49 of the Laws of 1923, provides for distribution of compensation in the case of death, as follows:

> "The compensation shall be paid during three hundred weeks; *provided,* that if at the expiration of three hundred weeks there shall be one or more dependents under sixteen years of age, compensation shall be continued for such dependents until they reach sixteen years of age, at the schedule provided under clauses (a), (b), (c), (d), (e), and (f), of paragraph twelve."

The intent of the compensation act was to provide weekly payments for a certain definite time in the case of dependency in a death action. The Supreme Court, on proper application to it, may order that the entire amount of compensation shall become due immediately. *Chapter 199, Laws of 1915; Heldrich* v. *American Incubator Manufacturing Company,* 104 N. J. L. 492; *Cohen* v. *Slavin,* 126 Atl. Rep. 432 (Not officially reported).

In this case, however, there was no order entered by the plaintiff making the entire amount of compensation due. The statute under which the plaintiff is proceeding states that a general contractor shall "*become liable for any compensation*

payment which may be due an employee or the dependents of the deceased employee of said subcontractor" so that in any event, the only compensation which could have been due at the time the postea was signed was from April 5, 1929, the date of death of plaintiff's husband. The compensation due from April 5, 1929 to March 12, 1930 (date of signing postea) amounts to 48 5/7 weeks at nine dollars and forty-five cents ($9.45) a week or four hundred sixty dollars and thirty-five cents ($460.35).

It also appears from the judgment of the Workmen's Compensation Bureau that included in that judgment were items for funeral expenses, $150; stenographer's fee, $25; and counsel fee to the petitioner's attorney, $300; all of which charges were included in the judgment entered in the Supreme Court. The statute under which the plaintiff alleges her cause of action makes no such provision, but on the contrary, very clearly states that the general contractor shall be liable for any compensation which may be due the dependents of a deceased employee of the subcontractor. Certainly, these charges are not compensation due to the plaintiff. The plaintiff, at the most, would be entitled to recover only the compensation due; namely, four hundred sixty dollars and thirty-five cents ($460.35). *Holzapfel* v. *Hoboken Manufacturers Railroad Co.,* 92 N. J. L. 193.

The fact that the judgment of the Workmen's Compensation Bureau was filed in the Common Pleas Court of Hudson County, does not alter the situation. Chapter 149, Laws of 1918, as amended by chapter 229 of the Laws of 1921, provides:

> "A copy of the judgment of the commissioner, deputy commissioner or referee, if such judgment results in an award to the petitioner, shall, as soon as practicable after the

> same is rendered, be filed in the office of the clerk of the county in which the hearing was held, and when so filed, shall have the same effect and may be collected and docketed in the same manner as judgments rendered in causes tried in the Court of Common Pleas."

It appears from the judgment of the Workmen's Compensation Bureau that the hearing in that court was held at Newark, and therefore, the judgment should have been docketed in the Common Pleas Court of Essex County. However, it is imperative for the plaintiff to obtain a court order making the entire amount of compensation due immediately, before she can collect it in a lump sum.

We respectfully submit that the trial court erred in finding in favor of the plaintiff and against the defendant in view of the constitutional grounds heretofore urged, and on the further ground that there was no logical basis or any evidence in the case upon which the trial court could enter a judgment against the defendant for three thousand three hundred ten dollars ($3,310).

IV.

It is respectfully submitted that the judgment below should be reversed.

May term, 1930.

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Of Counsel.

New Jersey Court of Errors and Appeals.

ROSE O'BANNER, *Plaintiff-Respondent,* *vs.* EDWARD PENDLEBURY, *Defendant-Appellant.*	ACTION AT LAW.

REPLY BRIEF OF APPELLANT.

In view of the importance of the questions involved in this issue, the appellant respectfully asks the indulgence of the court in considering this reply brief.

The respondent refers to two statutes in other jurisdictions, one in Oklahoma and the other in Pennsylvania, which she conceives to be similar to that of New Jersey.

The Oklahoma statute (P. L. 1923, Chap. 61), *which is part of the Workmen's Compensation Act, as distinguished from ours, which is a separate and distinct enactment,* provides as follows:

> "The person entitled to such compensation shall have the right to recover the same directly from his immediate employer, the independent contractor, or intermediate contractor, and *such claims may be presented against all such persons in one proceeding.* If it appears that the principal employer has failed to require a compliance with the Workmen's Compensation Act of this state, by his or their independent contractor, then such

employee may *also proceed in the same investigation or case against such principal employer.* If it shall be made to appear in such proceedings that the principal employer has failed to require a compliance with this act by his independent contractor then such principal employer shall be liable for all such injuries to employees of his independent contractor or the subcontractor of such independent contractor. If it appears in such proceeding that the principal employer is liable for compensation under the terms of this Act, and the subcontractors of the independent contractor and their sureties are also liable, then judgment or order shall be issued against all of such parties *and execution may be issued therefor, but such execution shall first be enforced against those found liable other than the principal employer, and will be enforced as against the principal employer only for the residue of such claim after exhausting the execution against others liable therefor* * * *."

It will be observed that this statute makes provision for proceeding in the same action against the owner or general contractor where it appears that a possibility of his liability exists. By being made a party to the proceeding such owner or contractor has an opportunity to contest the entire case on the merits and the possibility of foisting a judgment on him without an opportunity of being heard is precluded.

Our Act does not prescribe any form for the prosecution of the right granted to the employees of the sub-contractor, nor does it set forth any method of proceeding for its prosecution. It is not, as set forth in the original brief, part of the Workmen's Compensation Act and the respondent here apparently did not consider it so, since he, according to the record, did not join the appellant

as a party to the original proceeding in the Compensation Court.

The Pennsylvania statute referred to by the respondent is also part of the Compensation Act and vastly different from that of New Jersey. It provides as follows:

> "An employer who permits the entry upon the premises occupied by him or under his control of a laborer or an assistant hired by an employee or a contractor, for the performance upon such premises of a part of the employers regular business entrusted to such employee or contractor, shall be liable to such laborer or assistant *in the same manner and to the same* extent as to his own employee." (Pa. Sts. sec. 21986.)

Further:

> "After December 1st, 1915, an employer who permits the entry upon premises occupied by him or under his control, of a laborer or an assistant hired by an employee or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to that employee or contractor, shall be conclusively presumed to have agreed to pay to such laborer or assistant compensation in accordance with the provisions of article three, (which is the equivalent of section two of our Compensation Act) unless the employer shall post in a conspicuous place, upon the premises where the laborer's or assistant's work is done, a notice of his intention not to pay such compensation, and unless there be filed with the Bureau, within ten days thereafter and before any accident has occurred, a true copy of such notice, together with the proof of the posting of same, setting forth upon oath or affirmation the time, place and manner of such posting." (Pa. Sts. 21989.)

The above sections of the Workmen's Compensation Act make the general contractor the statu-

tory employer of the employee of the sub-contractor, when the employee is entitled to proceed against him and, of course, the same procedure with respect to the prosecution of the claim is followed, as in the ordinary compensation case. The general contractor is then party to the original proceedings.

Some of the thought expressed in the case of *Byrne* v. *Hitner's Sons Co.,* 290 Pa. 225, 138 A. 826, cited by the respondent is germane to the present issue:

> "It was not necessary under the Act, for the widow to be put to the inconvenience of filing three separate petitions with three separate counsel fees. All that is contemplated is that she file a petition setting forth the facts in her case, who employed her husband, the principal contractor, if known, and whatever facts may be necessary in connection with the employment and the injury. The parties named must appear; if it develops there are others who may be liable in addition to those named in her petition, the board may order the proceedings amended so that all parties may be brought on the record. All parties being present the board proceeds to determine who is responsible under the act as here interpreted.
> * * * * * * *
> The final order awarding definite compensation must determine all these matters as well as the financial responsibility of the sub-contractor and the insurer. After such order, if against the sub-contractor, the statutory employer is no longer bound and is released entirely from liability."

Incidentally, under this Pennsylvania act the employee of a sub-contractor who is entitled to proceed against the general contractor, loses his action at common law against such general contractor and is conclusively presumed to have ac-

cepted the provisions of the Compensation Act unless he shall have given notice to the general contractor in writing on entering upon such employer's premises. (Pa. Sts., Sec. 21989-90).

Under the New Jersey Act he still retains his cause of action at common law as evidenced by the *Starrett* case.

Our search has failed to reveal any case which deals with the constitutionality of either the Pennsylvania or the Oklahoma statute.

It will also be observed that under both the Pennsylvania and the Oklahoma acts, the employee's remedy is first exhausted against the primary employer and then against those liable under the acts. In Oklahoma this is determined by actual levy in execution and in Pennsylvania, the financial responsibility of the primary employer is apparently determined at the hearing on the claim petition (*Byrne* v. *Hitner, supra*).

In New Jersey the liability of the general contractor is made to depend merely upon the failure of the subcontractor to carry compensation insurance. There is no provision for exhausting the employee's remedy against the sub-contractor before proceeding against the general contractor. The general contractor is made liable irrespective of the financial capacity of the sub-contractor.

The *Starrett* case upon which the respondent relies for the principal support of her claim declares the relation created by the act to be that of guaranty. Assuming this to be so, we would characterize it as a guaranty of collection. Under normal conditions in such cases, we believe the guarantor to be entitled to notice of his principal's default. None is provided for by our act.

It is also our understanding that under the fundamental law controlling the relation of guarantor and creditor, the guarantor may set up against the creditor any claim or defense which

the principal debtor has against the creditor. Here the more appropriate term would be insurer rather than guarantor since the general contractor is absolutely concluded by the judgment against the sub-contractor, regardless of the method by which it was obtained.

The respondent's brief suggests a further argument against the constitutionality of the New Jersey Act. Its provisions are designed to benefit only one class of employees, namely, those of the subcontractor of the general contractor, to the exclusion of and discrimination against all other classes of employees. Why should they be favored by the law any more than employees of the general contractor, or those of a subcontractor of the subcontractor as far down as the work may be delegated? Suppose the general contractor carries no insurance and is financially irresponsible, why, under the same theory that the present act proceeds, shouldn't his employees have a cause of action against the owner who procured the services of the general contractor? Further, if a subcontractor of a subcontractor carries no insurance, why shouldn't his employees have a cause of action against the original subcontractor, or the general contractor or the owner? There doesn't seem to be any particular evil facing the employees of a subcontractor that isn't common to all classes of employees. Why segregate them from employees as a class and confer some special benefit upon them to the exclusion of all others?

When any person enters the employ of another, whether he be owner, general contractor, or subcontractor, etc., he accepts his employer and stands on that particular employer's ability to pay whatever money may become due him. Financial responsibility of the employer is a risk all employees must assume and if the legislature is to prescribe a remedy for use in a contingency, it

certainly seems unfair discrimination and improper classification to bestow the remedy on one particular class of employees alone.

Under the 1916 amendment to the Practice Act, it was not necessary for the appellant to raise any particular objection in the trial court, or take any particular exception, since the matter was heard without a jury by the court alone on stipulation of facts submitted by the parties.

The respondent says the question of the lagality of the amount of the judgment cannot be considered by this court since the appellant did not raise this objection to the trial court. In the case of *Smith* v. *Cruse,* 101 L. 82, Chancellor Walker, speaking for the Court of Errors and Appeals, said:

> "Now, the amendment to the Practice Act (P. L. 1916, 109) provides that when cases are submitted to the court to be heard without a jury, any error made by the court in giving final judgment shall be subject to change, modification or reversal, without the grounds of objection having been specifically submitted to the court. There is no requirement that the defeated party must have preferred a request for a finding of law or fact, or law and fact, and except to an adverse finding, in order to secure a review of the judgment, but appeal is given to him, as a matter of right although he did not submit the grounds of objection to the trial court."

It is, therefore, urged that the judgment should be modified in the event that it is sustained.

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