ings have been taken by the council of the village of Ottoville relative to authorizing and providing payment for the improvement to such additional width of the portion of the road within the village. Section 1193-2 G. C. specifies in detail, and in proper order as to time, the several steps necessary. Such proceedings of council should have been completed prior to the passage by the county commissioners of the resolution approving the surveys, plans, profiles, cross-sections, estimates and specifications for such improvement, whereas the transcript discloses that the first step taken by the village council relative to improving said road to such additional width was the resolution of council, passed by it on December 27, 1920. This being a resolution which involved the expenditure of money, it should have been passed only after being fully and distinctly read upon three different days or under suspension of such rule authorized by a three-fourths vote of all members elected to council. This resolution should also be published and being subject to the provisions of the referendum act, could not go into effect until thirty days after its passage. The transcript shows that this resolution was passed by a yea and nay vote and without suspension of the rules at its first reading, and since it was not passed until December 27, 1920, of necessity the requirements relative to its publication and to meet the requirements of the referendum act have not been complied with. The resolution of the county commissioners approving the surveys, plans, profiles, cross-sections, estimates and specifications for such improvement was adopted on December 28, 1920, one day after the passage of the resolution of council.

(2) The bond resolution of the county commissioners indicates (and I am informed by Mr. Moenter, county auditor of Putnam county, that such is the fact) that the county commissioners have included in the amount of the bond issue under consideration the estimated cost and expense of the two feet of additional width of improvement within the village of Ottoville authorized by its council. The amount of the cost and expense of this additional width of improvement should be paid to the county treasurer by the village (section 1193-2) prior to the construction of the improvement, and the county commissioners are without authority to issue bonds of the county to raise funds for that purpose.

For the reasons stated, I am of the opinion that said bonds are not valid and binding obligations of Putnam county and advise the industrial commission not to accept the same.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1769.

WORKMEN'S COMPENSATION ACT—DOCK EMPLOYES ARE IN MARITIME SERVICE AND SAID ACT IS NOT APPLICABLE TO THOSE SO ENGAGED—INDUSTRIAL COMMISSION WITHOUT AUTHORITY TO DISBURSE STATE INSURANCE FUND TO EMPLOYES INJURED IN MARITIME SERVICE—DISCUSSION OF WAIVER OF CERTAIN RIGHTS BY EMPLOYE IN MARITIME WORK WHERE COMPENSATION OBTAINED FROM STATE INSURANCE FUND.

1. *The work performed by employes of dock companies in unloading ore from lake vessels by machinery, or in loading coal on such vessels, or in loading coal on lighters thence to such vessels, or in loading coal on to tugs for vessel fuel,*

is maritime in its nature, and the provisions of the Workmen's Compensation Law do not apply to those so engaged.

2. The Industrial Commission of Ohio is without authority to disburse any part of the state insurance fund in cases where an injury is received by an employe while in a maritime service.

3. Where an employe, injured while engaged in what is in reality maritime work, has, with full knowledge of all the facts, freely and voluntarily made application for and received compensation from the state insurance fund, his right to thereafter sue his employer in a court of admiralty or at common law, has been waived.

COLUMBUS, OHIO, December 31, 1920.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have requested my opinion as to whether or not workmen employed by dock owners and whose duties are substantially as follows are within the provisions of the Ohio workmen's compensation law.

These men are engaged in two distinct acts; one a so-called "ore unloading operation" and the other a so-called "coal loading operation." In the former they unload by means of machinery ore-carrying vessels from the Lake Superior region, transfer some ore from the holds of such vessels directly into cars for shipment to intrastate and interstate points, and other ore from the holds to storage spaces adjacent to the docks from which it is later loaded into cars for shipment to intrastate and interstate points. The cars are delivered under the unloading machines and taken therefrom by railroad employes. In the unloading operation some of such employes go aboard the vessel and work in the hold; others remain on the dock. The machinery used is erected on the dock and about stock piles which are adjacent thereto.

"The coal loading operation" consists in unloading intrastate and interstate carloads of coal into vessels for trans-shipment up the great lakes, usually to points in the Lake Superior region. These cars are placed on a hump by the railroad company and from there they are lowered by such employes by gravity to the unloading machines. The machines lift the entire car and dump the contents through chutes into the vessels. Nearly all the work done by the employes of the dock company in this operation is performed on the dock.

You refer to another instance in which a dock company receives coal at its dock in freight cars shipped from intrastate and interstate points. These cars are unloaded through the trestle at the dock by the railroad company, although the dock company's employes unload some cars by hand. The coal is then loaded by the latter on a lighter from which it is loaded into vessels for fuel. This lighter is not self-propelling. The employes of the dock company also load some coal by wheel barrow from the docks onto tugs for vessel fuel.

Your inquiries are: Would the service performed by the employes of the dock company as described be classed as maritime? If so, are they within the provisions of the workmen's compensation law? If such law is not applicable because the service rendered by these employes is of a maritime nature, would the fact that one of them had as a claimant received compensation from the state insurance fund be any defense to the employer in a suit brought in admiralty or at common law?

It is now settled by two decisions of the United States supreme court that the provisions of the workmen's compensation laws of the various states can not be made applicable to injuries sustained by workmen engaged in maritime service. The first of these cases was *Southern Pacific Co.* vs. *Jensen,* 244 U. S., 205, L. R. A. (n. s.) 1918C, 451. There, Jensen, a deceased workman, had been an employe of the Southern Pacific Co., a corporation of the state of Kentucky, where it had its

principal office. It had another office in New York City, was a common carrier by railroad and owned and operated a steamship plying between the ports of New York and Galveston, Texas. On August 15, 1914, while this vessel was discharging a cargo at New York in the navigable waters of United States, Jensen was operating a small electric freight truck, driving it into the steamship, where it was loaded, and driving it out of the vessel upon a gangway connecting the latter with a pier, and thence upon the pier where the lumber was unloaded. While he was making one of his trips out with a loaded truck his head struck a timber in the ship and his neck was broken. An award of compensation was made to his dependents under the provisions of the workmen's compensation law of New York, which was opposed by the company upon the ground of want of jurisdiction. The New York courts held that the compensation act applied to the employment in question and was not obnoxious to the Federal constitution. The supreme court of the United States, by a majority of one, reversed the judgment below. Attention was called to Article III, section 2, of the constitution of United States, extending the judicial power "to all cases of admiralty and maritime jurisdiction." By section 9 of the judiciary act of 1789 congress has conferred upon the United States district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction; * * * saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

Justice McReynolds, speaking for the majority of the court, said:

> "The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maratime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith are matters clearly within the admiralty jurisdiction."

And further that:

> "The remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction, * * *. And finally this remedy is not consistent with the policy of congress to encourage investments in ships manifested in the acts of 1851, etc."

After the decision in the Southern Pacific case, section 9 of the judiciary act was amended so as to include in the saving clause this language:

> "And to claimants the rights and remedies under the workmen's compensation law of any state."

Thereafter one William M. Stewart, while assisting in unrigging a derrick on a barge belonging to the Knickerbocker Ice Co., an employment conceded to be of a maritime nature, lost his life and an award was made in favor of his dependents by the industrial commission in the state of New York. Its validity was sustained by the New York courts and the case went to the supreme court of the United States. There was again a judgment of reversal, the court holding (four justices dissenting) that the attempt of congress to save the remedies given by the workmen's compensation law in the various states from the grant of the admiralty and maritime jurisdiction to the district courts was unconstitutional. Justice McReynolds again writing the majority opinion said:

"And, so construed, we think the enactment is beyond the power of congress. Its power to legislate concerning the rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the constitution, as above indicated. The definite object of the grant was to commit direct control of the Federal government; to relieve maritime commerce from unnecesary burdens and disadvantage incident to discordant legislation; and to establish, so far as is practicable, harmonious and uniform rules applicable throughout every part of the Union."

The interpretation of the Federal constitution, of course, raises a Federal question and the decisions above referred to are therefore conclusive upon all courts.

We must now determine whether or not the employes referred to in the statement above are engaged in maritime pursuits, for if they are, under the doctrine of the Jensen case and of the Stewart case, the remedies of the compensation acts are not available in cases of injury to them.

In *Insurance Co.* vs. *Dunham,* 11 Wall., 1, the supreme court of the United States said, after declaring that the locus or territory of maritime jurisdiction extends not only to the main sea, but to all of the navigable waters of the United States or bordering on the same, whether land-locked or open, salt or fresh, tide or no tide,

"It has been equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making locality the test) is entirely inadmissible, and that the true criterion is the nature and subject matter of the contract as to whether it was a maritime contract having reference to maritime service or maritime transactions."

The rule is thus laid down in *Hughes on Admiralty,* page 18:

"Rights arising out of contract are maritime when they relate to a ship as an instrument of commerce or navigation, intended to be used as such or to facilitate its use as such.

The test in contract cases is the nature of the transaction."

The same author says at page 22:

"If the principal contract is maritime, jurisdiction is not ousted by the fact that some incidental question growing out of it would not be maritime in case it stood alone.

On the other hand, preliminary contracts looking to a formal contract are not maritime, though the contract itself, when executed, may be so. For instance, a contract of charter party partly performed is maritime, but a preliminary agreement to make a contract of charter party is not maritime."

And the author also observes that the same transaction may be maritime in one case and not so in another. For instance, wharfage rendered to a ship while loading or unloading is a maritime contract, but wharfage to a ship laid up while waiting for the season to open is not. Watchmen on vessels while in port during voyages are considered as having maritime contracts, but those who have charge of such vessels while laid up have no such contracts.

In *Roberts* vs. *Bark Windemere,* 2 Fed. 722, it was held that the removal of

ballast from a foreign vessel while in port for the purpose of putting her in condition to receive cargo for an intended voyage was a maritime service.

In *The Canada,* 7 Fed. 119, Judge Deady said:

> "To my mind it is very plain that the services of a stevedore are maritime in their nature. A voyage can not be begun or ended without the stowing or discharge of cargo. To receive and deliver the cargo are as much a part of the undertaking of the ship as is its transportation from one port to another. Indeed, it is an essential part of such transportation. Freight is not due or earned until the cargo is, at least, placed on the wharf at the end of the ship's tackle. To say that the final delivery or discharge of the cargo is not a maritime service, because it is, or may be, partly performed on shore, is simply begging the question, as it is the nature of the service, and not the place where rendered, that determines its character in this respect."

The Senator, 21 Fed. 191, was a case in which the libelent made a contract with the master of a vessel to perform service as a stevedore to unload her cargo at the port of Cleveland. To enforce payment of his wages he proceeded in rem against the vessel.

The court said:

> "Stevedores are a class of laborers at the ports, whose business it is to load and unload vessels; and by long practice they become experts at the business. Like the occupation of a sailor, it requires practice as well as judgment to insure the faithful and profitable discharge of the duty. The safety of the vessel, as well as the cargo, depends very largely upon the manner in which it is loaded,—how the cargo is stored; whether secured so that one part of it does not injure another, or that storms do not break it loose, or shift and thereby damage it; and whether the vessel is trim or wellbalanced for navigation. The necessity for skilled labor has created the demand for this separate class of laborers, and induced men to adopt it as an occupation. They have, in the large expansion of the business of transportation upon our lakes and rivers, become a necessity in every port. The demand for such service can not be fulfilled by the common laborer; hence they have become so connected with navigation, to load as well as unload vessels, that they are regarded as a part of the maritime machinery for the commerce of the lakes. They perform an indispensable part of the transportation and delivery of a cargo,—to begin it and conclude it. If services intermediate are regarded as maritime, why not the commencing and closing service?"

A similar ruling as to stevedores was made in each of the following cases:

The Mattie May, 45 Fed. 899;
The Strathnairn, 190 Fed. 673;
The Allerton, 93 Fed. 219;
The Hattie M. Bain, 20 Fed. 389;
The Florez vs. The Scotia, 35 Fed. 916;
The Gilbert Knapp, 37 Fed. 209;
The Norwegian Steamship Co. vs. Washington, 57 Fed. 224.

And of course the Jensen case is also direct authority for the proposition that the service rendered by a workman in unloading a cargo is maritime.

The furnishing of fuel coal for a vessel is a maritime service.

Berwind vs. Schultz, 28 Fed. 110.

In an opinion rendered to your commission on July 14, 1917, my predecessor held on the authority of the Jensen case that the workmen's compensation law could not apply to maritime employments.

Applying the rules to be deduced from the authorities cited, I am of the opinion that the compensation act does not apply to the workmen referred to in the statement of facts who unload with machinery the ore from the vessels; to those who load the coal on the vessels; to those who load the coal from the trestle on the lighter, referred to in the special instance; to those who take charge of the coal on the lighter, place it on the vessels or to those who load coal by wheel barrow onto tugs for vessel fuel.

What is here said must be understood as limited to the status of those workmen only who are referred to in the statement of facts. I have not considered the applicability of the compensation act to those who assist in handling the coal before or at the time of its delivery to the dock company.

In the opinion of my predecessor referred to above, Opinions of the Attorney-General for 1917, Vol. II, p. 1219, it was said:

> "If the Ohio act were elective, then I think, as congress has not prohibited employer and employe from *contracting* as to liability, that if both actually and not by presumption agreed to comply with the act and be bound by its administration, then they would be held to their contract. But our act is compulsory and there is absolutely no provision for persons not bound by it electing to be so bound—except in the case of certain employes coming under the field of the federal employers' liability act, I am forced to hold that the ruling of the majority of the court in the Jensen case, must be construed as deciding that the Ohio act does not apply to maritime employments."

I agree with the statement quoted that a contract made by a workman in the maritime service to be bound by the provisions of the compensation law would be unenforceable. I do not believe the commission could safely disburse any part of the insurance fund to employes who are not within the provisions of the act although their employer might have paid his premium. I think that the making of such payment would be a use of the fund for which there would be no warrant in law.

The last question propounded is: Would the fact that a claimant who has been engaged in maritime service and received compensation from the state insurance fund be any defense to the employer in a suit brought in admiralty or at common law? It is not easy to see how this question would arise unless some of the employe's duties were of a maritime nature and some were not and for an injury received while performing the former he would make claim and receive compensation. Answering the question, however, I would say that if the employe, with full knowledge of all the facts and of his rights, accepted compensation from the fund he could not thereafter sue his employer. True it is held that the remedies afforded by employers' liability acts are cumulative and not exclusive of or in abrogation of, a right of action at common law.

Kleps vs. Bristol Mfg. Co., 12 L. R. A. (n. s.) 1038 (annotated).

And there is also authority for the proposition that one who settles with a party not liable is not estopped from thereafter suing the wrongdoer.

Wilson vs. Ewald, 113 N. Y. Supp. 687;
Shank vs. Koen, 10 N. P. (n. s.) 514, 519.

But section 1465-76 G. C. contains the following provision:

"Every employe, or his legal representative in case death results, who makes application for an award, or accepts compensation from an employer who elects, under section 22 of this act, directly to pay such compensation waives his right to exercise his option to institute proceedings in any court, except as provided in section 43 hereof. Every employe, or his legal representative in case death results, who exercises his option to institute proceedings in court, as provided in this section, waives his right to any award, or direct payment of compensation from his employer under section 22 hereof, as provided in this act."

The legislature of Ohio has no power to deprive a workman receiving an injury while in maritime service of his right to resort to the federal courts, but inasmuch as he could settle his claim against his employer without suit, it is my opinion that he could waive the right to sue by accepting from the commission a sum which he thought sufficient.

It is well established that a contract can not be made to oust the federal courts of jurisdiction and that where a party is bound by the so-called doctrine of election he must in reality have two alternative remedies between which to choose. But I can think of no reason why a workman could not by settling his case give up the right to sue in any court, federal or state, and while he may have had no remedy under the compensation law if he accepts an award, he has had his satisfaction whether such remedy was available or not. But the award must have been accepted in my opinion with full knowledge of his rights and freely and voluntarily. If he accepts it under such conditions in my judgment he has lost the right to sue his employer at common law or in a court of admiralty. But this question, as I suggested, is relatively unimportant because I do not think the commission would have the right to disburse the state fund to those who are not within the provisions of the compensation law.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1770.

APPROVAL, CONTRACT WITH RALPH EDGAR KINNEAR FOR CONSTRUCTION OF FISH HATCHERY AT ZOAR LOCK, LAWRENCE TOWNSHIP, TUSCARAWAS COUNTY, OHIO.

COLUMBUS, OHIO, December 31, 1920.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—Under date December 20, 1920, Mr. F. A. Farley, engineer of construction, submitted to me for examination a contract entered into between yourself and Ralph Edgar Kinnear, covering construction of a fish hatchery at Zoar Lock, Lawrence township, Tuscarawas county, Ohio, at a contract price of $15,-