sent from the country only briefly had made an *entry* upon their return.[21]

In arriving at its decision in *Rosenberg*, the Court looked to congressional intent.[22] It pointed to the fact that in codifying the definition of *entry* in the 1952 Act, Congress was ameliorating the harsh results visited upon resident aliens by the rule of *Volpe v. Smith*[23] and that the bill gave due recognition to judicial precedents.[24] The Court concluded that to effectuate congressional purpose, *intent* would have to be construed as meaning an intent "to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence."[25] Factors relevant to the determination of this intent are the length of time the alien is absent, the purpose of the visit, and a need of the alien to procure travel documents.[26]

While the Court's interpretation of congressional intent is rather tenuous,[27] the end result seems only fair. The insignificance of a brief trip to Mexico or Canada bears little relation to the punitive consequence of subsequent excludability.

John V. Stroud

WORKMEN'S COMPENSATION — WIDOW IS ENTITLED TO DEATH BENEFITS. DECEASED HUSBAND, RECIPIENT OF A FOOTBALL SCHOLARSHIP, IS AN EMPLOYEE OF HIS COLLEGE WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION ACT. *Van Horn v. Industrial Accident Commission* (Cal. App. 1963).

Van Horn, an outstanding athlete while in high school, was recruited by California State Polytechnic Institute for its football team. In accordance with the promises made to him by the school coach, he was paid $50 at the beginning of each academic quarter, and another sum to defray his rental expenses during the football season. In addition, he was paid an hourly wage to line the football field;

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21 United States *ex rel.* Valenti v. Karnuth, 1 F. Supp. 370 (D.C. N.Y. 1932); Annello *ex rel.* Annello v. Ward, 8 F. Supp. 797 (D.C. Mass. 1934).
22 374 U.S. at 457.
23 289 U.S. 422 (1933).
24 Rosenburg, 374 U.S. at 457.
25 *Id.* at 462.
26 *Ibid.*
27 Previous legislation, by making administrative orders of deportation and exclusion final, reflected a consistent congressional desire to limit judicial participation in immigration matters, 3 DAVIS, *Administrative Law Treatise* § 23.08, See also, Note, 71 YALE L.J. 760 (1962).

this activity was the only work, in the usual sense of the word, that he performed for the College.

Van Horn and some of his teammates were killed in the crash of a plane which had been chartered by the school to return the team from an out-of-state football game. His widow applied for death benefits under the California Workmen's Compensation Act. The application was denied by the Industrial Accident Commission on the ground that decedent was not an employee of the college within the meaning of the Act. Reversed, on appeal; he was an employee. *Van Horn v. Industrial Accident Commission,* 219 A.C.A. 523, 33 Cal. Rptr. 169 (1963).

Workmen's compensation legislation is designed to alleviate for employees and their dependents the financial distress which would otherwise result from injuries and/or deaths or other causes occurring in the course of employment. By this legislation, the employer's liability is no longer based on fault, nor are the common-law defenses to negligence generally applicable. The intent of such legislation is to shift the economic burden from the employee to the industry, and ultimately to the consumer.[1] The right to this extended compensation is statutory.[2]

In California, the right to compensation depends upon the existence of a contract of employment[3] and an injury arising out of and in the course of employment.[4] The question as to whether a student who is a recipient of an athletic scholarship qualifies for compensation benefits can arise in two situations: first, where there is a contract between the student and the school whereby the student is employed to engage in a particular sport; and second, where the student is employed to perform certain work (in the usual sense) for the school, with continued employment being conditional upon his playing in a particular sport.

The situation involving employment of a student to engage in a particular sport is similar to that of a professional athlete. In *Metropolitan Casualty Ins. Co. of New York v. Huhn,*[5] a professional baseball player was found to be an "employee" within the mean-

1 99 C.J.S. *Workmen's Compensation* 5(*a*) (1958).
2 Argonaut Mining Co. v. Industrial Accident Commission, 104 Cal. App. 2d 27, 230 P. 2d 637 (1951).
3 McBurney v. Industrial Accident Commission, 220 Cal. 124, 30 P. 2d 414 (1934).
4 CAL. LABOR CODE § 3600. See also, Winter v. Industrial Accident Commission, 129 Cal. App. 2d 174, 276 P. 2d 689, 691 (1955), where the court stated, "Basically, the coverage formula of the Workmen's Compensation Law inheres in the clause 'arising out of and in the course of employment', language which was taken bodily from the preceding early English law and which has been generally adopted in the American States."
5 165 Ga. 667, 142 S.E. 121 (1928).

ing of the Georgia compensation act. In that case an injury on the playing field was found to squarely meet the requirements: a contract of employment, and injury arising in the performance of the contract. On the other hand, some states have specifically excluded professional athletes from their compensation acts. In Florida,[6] for example, service performed by a professional athelete is expressly excluded from the definition of the term "employment," and in Massachusetts[7] a professional athlete is excluded from workmen's compensation benefits if his contract of employment provides for the payment of wages during the period of his disability from injury suffered in the course of such employment.

In considering whether an athletic scholarship is a contract of employment to play a particular sport, the question arises: Is the offer of remuneration by the college a gratuitous promise conditioned upon engaging in a particular sport for the school, or is it bargained—for consideration which gives rise to a contract of employment? The problem can be illuminated considerably by comparing it with Professor Williston's celebrated example of the benevolent man saying to a tramp, "If you go around the corner to the clothing shop, there you may purchase an overcoat on my credit."[8] Williston points out that no reasonable person would understand that the short walk was requested as consideration for the promise. "An aid, though not a conclusive test in determining which interpretation of the promise is more reasonable, is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration."[9]

In this light, a distinction emerges between athletic and academic scholarships. An academic scholarship results in little direct economic benefit to the college. The primary beneficial effects of the scholarship—motivation to achieve and maintain a certain level of academic achievement, and financial assistance in obtaining a college education—all directly benefit the promisee-student, not the promisor-school. There are admittedly benefits accruing to the school, but they are much more nebulous. On this basis the academic scholarship can be described as a gratuitous promise conditioned upon the fulfillment of certain requirements. In the case of an athletic scholarship, on the other hand, more direct economic benefits accrue to the college. The football games in which the student participates provide revenue that usually substantially supports the school's total athletic program. Another factor, more difficult to measure from an economic

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6 FLA. STATS. § 440.02(1)(c)(4) (1961).
7 MASS. ANN. LAWS, ch. 152, § 1(4) (1957).
8 WILLISTON, CONTRACTS § 112 at 445 (3rd ed. 1957).
9 *Ibid.*

standpoint but no less real, is the value of the publicity the team receives, which can be of significant benefit to the school. Therefore, provided there is present an element of bargain and exchange, under the "benefit to promisor" test the athlete's participation in the games would constitute bargained-for consideration for the promise of compensation on the part of the school, and the employer-employee relationship would arise. It is not necessary that the compensation be in the form of wages or pecuniary assistance. Courts have held that tuition,[10] exchange of services,[11] and other forms of non-pecuniary compensation are sufficient.

In the *Van Horn* case, the contract of employment to play football is analogous to that normally found in professional athletics. The negotiations between the decedent and his coach for financial assistance took place in the Spring of 1958. It was not until 1960 that he performed any work in the usual sense for the college. The original agreement provided only for the playing of football and was in effect at the time of his death. He was killed, in transportation furnished by the school, while returning from a game in which he had participated. Therefore, there is little question as to his death arising during the course of his employment. The court viewed the contractual aspects of the *Van Horn* case as follows: "After a careful review of the evidence, we are of the opinion that the finding of the commission that there was no contract of employment is not supported by the evidence. The record reveals that petitioners established a prima facie case for benefits upon the presentation of evidence showing the alleged contract of employment. The coach, with whom it was shown that decedent made the alleged contract, testified at length; yet nowhere in his testimony is there a denial by him that he made a contract with decedent."[12] Applying the rule that, where there is an absence of conflicting evidence, "any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee,"[13] the court found that an employer-employee relationship existed.

*Van Horn* was a case of first impression in California. The only other appellate decision in this country considering the precise ques-

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10 Stanford University v. Industrial Accident Commission, 8 Cal. Comp. Cases 74 (1943).
11 Gabel v. Industrial Accident Commission, 83 Cal. App. 122, 256 Pac. 564 (1927).
12 33 Cal. Rptr. at 172-173.
13 *Id.* at 172.

tion decided in *Van Horn,* i.e., whether the student was employed to play football, is *State Compensation Ins. Fund v. Industrial Accident Commission.*[14] In this case recovery under the Colorado act was sought by the widow of a student who had been fatally injured while playing in a football game for Fort Lewis A. & M. The decedent had enjoyed an atheltic scholarship known as "Grant-in-aid" which consisted of a waiver of tuition. He was also a part-time employee of the school, *but this part-time employment was not conditioned upon his playing football.* The Colorado Supreme Court dismissed the widow's claim. It was pointed out that the decedent was not hired to play football and that he would have retained his part-time employment whether he played or not. Furthermore, the court said: "It is significant that the college did not receive a direct *benefit* from the activities, since the college was not in the football business and received no benefit from this field of recreation."[15] (Emphasis added).

To hold that an organization receives no benefit from activities which are a source of actual revenue to it seems subject to criticism. Nevertheless, the case held no contract of employment to play football existed. It is interesting to note that this conclusion was reached despite the facts that the student-athlete received remuneration in the form of a waiver of tuition, that the college derived revenue from the games, and that the element of "bargain and exchange" was also present (the decedent had been working part-time at a gasoline station when the coach approached him with an offer to arrange other part-time employment *if* he would play football).

Another Colorado case dealing with a football injury, where the student was also otherwise employed to perform certain tasks around campus, is *University of Denver v. Nemeth.*[16] Here the student sustained a back injury while playing football. At the time of his injury he was receiving $50 monthly from the University for working about the tennis court. His meals were provided for a nominal fee, and his room was supplied in exchange for cleaning the furnace at the dormitory. This arrangement *was dependent upon his remaining on the football squad.* The Industrial Accident Commission held that the student was employed to play football and awarded compensation. This award was affirmed on appeal, the appellate court placing significance on the fact that the retention of benefits and jobs on the campus was dependent upon the student's remaining on the

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14 135 Colo. 570, 314 P. 2d 288 (1957).
15 314 P. 2d at 290.
16 127 Colo. 385, 257 P. 2d 423 (1953).

football squad. Therefore, playing football was an *incident* of the employment, and the injury arose out of and in the course of his employment.

Whether the school is receiving reasonable value for the remuneration it gives constitutes another criterion the court might use in deciding whether there is an employer-employee relationship. Thus, if it appears that the jobs assigned were shams (the value of the scholarship being disproportionate to the services rendered), it could be inferred that *participation in the sport* is the real purpose of the arrangement and *is* an incident of the employment.

To summarize, the courts in two situations have allowed recovery under workmen's compensation acts to the student-recipient of an athletic scholarship. *First,* where a contract of employment to play a sport can be established; and *second,* where there is employment to perform certain tasks, which employment is dependent upon the student playing the sport.

In *Van Horn* an employer-employee relationship was found to have arisen of which, very likely, the coach, student, and school were all unaware. This holding might result in athletic scholarships becoming an expensive proposition for colleges, considering the number of permanent injuries and deaths which result from contact sports. The Industrial Accident Commission remarked in its denial of the application for death benefits that "to hold that decedent was an employee would impose a heavy burden on institutions of learning and would discourage the granting of scholarships."[17] This may be true and could cause a reduction in scholarships, but it is the natural result of calling a spade a spade where one finds a hole in the ground.

Joe N. Turner

FELONY-MURDER — SURVIVING CO-FELONS ARE PUNISHABLE FOR FIRST DEGREE MURDER UNDER CALIFORNIA PENAL CODE SECTION 189 FOR THE KILLING OF A CONFEDERATE BY THE OWNER OF THE STORE WHICH THEY WERE ROBBING. *People v. Hand,* (San Diego July 22, 1963).

In the process of executing a planned robbery of a store, one of four robbers was killed by the owner. The store had been previously robbed and the owner was waiting for such a recurrence.

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17 33 Cal. Rtpr. at 174.