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Constitutional Status of Workmen's Compensation

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CONSTITUTIONAL STATUS OF WORKMEN'S COMPENSATION[1]

By Ernst Freund.[2]

I.

If at the beginning of the year 1911 the constitutional status of workmen's compensation was one of uncertainty, at the end of the year it could hardly be characterized otherwise than as one of confusion.

On March 24, 1911, the Court of Appeals of New York declared the carefully framed and conservative compensation act of that state unconstitutional, and by an unanimous decision condemned the very principle of the legislation, not as intrinsically objectionable, but as contrary to the positive limitations embodied in the guaranty of due process.[3] The Supreme Court of the state of Washington, on the other hand, on September 27, 1911, in sustaining a compulsory insurance law, strongly endorsed a theory of the police power which would also support compulsory compensation, and the decision must therefore, be regarded as opposed to that of New York.[4] The principle of compulsory insurance was likewise sustained by a decision of the Supreme Court of Montana, although the act of that state was declared invalid as arbitrarily discriminating between employer and employee, giving the latter an election between his common law right of action and the compensation under the act, while the employer is required to pay the insurance assessment at all events.[4½] So-called elective laws (of which more later on) were upheld by an opinion of the justices of the Supreme Court of Massachusetts,[5] and by decision of the Supreme Court of Wisconsin.[6] These two courts carefully abstained from committing themselves with regard to the problem of compulsory compensation, but the language used by the court of Wisconsin is unmistakably friendly to it. Under the influence of the New York decision, the compensa-

1. An address delivered before the American Association for Labor Legislation in Washington, December 28, 1911.

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3. *Ives v. South Buffalo R. R. Co.*, 201 N. Y. 271, 94 N. E. 435.

4. *State v. Clausen*, — Wash. —, 117 Pac. 1101.

4½. *Cunningham v. Northwestern Improvement Co.*, — Mont. —, 119 Pac. 554, November 21, 1911.

5. *Opinion of Justices*, — Mass. —, 96 N. E. 308, July 24, 1911.

6. *Borgreis v. The Falk Company*, — Wis. —, 133 N. W. 209, Nov. 14, 1911.

tion laws of California, Illinois, Kansas, New Hampshire, New Jersey and Ohio [6½] (the latter an insurance law) were likewise made elective.

The federal commission on employers' liability and workmen's compensation, however, has prepared a bill framed upon the principle of compulsory compensation which the New York Court of Appeals rejected. The action of the federal commission in repudiating the conclusion reached in New York is significant, and it is merely another evidence of the fact which must have impressed itself upon all observers, namely, that the New York decision is not generally accepted as finally settling the question. The expressions of dissent and criticism have been numerous and strong, and since the New York decision is not binding in other states, or on the federal courts, it is well to restate the reasons upon which is based the hope that the decision will, in course of time, yield to views which are sounder legally, as well as socially more satisfactory. In criticizing the decision of the Court of Appeals of New York, it must be borne in mind that the New York law was limited to the trade risks of hazardous industries. Somewhat different considerations are presented by compensation laws not so limited, by compensation laws operating through insurance, and by optional or elective compensation laws.

II.

The main arguments against the soundness of the law laid down in the Ives case are, that the analogies of principles previously sustained logically demand a different conclusion, and that the view taken of the guaranty of due process is unduly narrow.

1. The validity of the liability created by the law of New York is supported by the analogy of other statutes which have been sustained. The analogies most strongly relied upon before the Court of Appeals of New York as supporting the validity of the law were: first, the liability of railroad companies for damage done by fire caused by sparks escaping from locomotives; second, the liability of railroad companies for injuries to passengers under the law of Nebraska; and, third, the liability to injured seamen under the maritime law. The liability of railroad companies for fire had been sustained by the Supreme Court of the United States as a liability imposed irrespective of fault.[7] The New York Court of Appeals

6½. The Ohio law has likewise been sustained since the above was written.

7. *St. L. & S. F. R. Co. v. Mathews*, 165 U. S. 1.

gives a number of reasons why this analogy should not be accepted as controlling. It urges that the constitution of Missouri (the case having arisen under a statute of that state) contains a clause to the effect that the exercise of the police power shall never be abridged or so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals or the general well-being of the state. Will anyone seriously deny that the same principle, whether expressed or not, must exist in every state, or contend that it can be relied upon to modify the guaranty of due process? Must not the principle of due process always and everywhere be interpreted in subordination to the principle thus expressed in the constitution of Missouri? The Court of Appeals further quotes from a federal court to the effect that

"the right to use the agencies of fire and steam in the movement of trains is derived from the legislation of the state and it certainly cannot be denied that it is for the state to determine what safeguards must be used to prevent the escape of fire and to define the extent of the liability of fires resulting from the operation of trains by means of steam locomotives."

Why, it must be asked, is this proposition not applicable quite as well to the protection of employees as it is to the protection of adjoining landowners? The Court of Appeals leaves us without answer. And finally the Court of Appeals says:

"These statutes are designed to protect the rights of those who have no contractual relations to the corporations which inflict the injury. In such a case, when both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company which employs the instruments and creates the peril for its own profit, rather than upon the owners of the property, who have no control over or interest in these instruments."

Why cannot the legislature give force to the same considerations in favor of the employee? Surely the whole trend of modern social thought is opposed to the distinction made by the New York court. The Court of Appeals also rejects the analogy of the Nebraska law, sustained by the federal supreme court, which made railroad companies absolutely liable for injuries to passengers, excepting injuries due to the violation of some express rule of the company actually brought to the notice of the passenger. This principle of liability is almost identical with the one of the New York act. The New York court says that the point decided in that case was that this rule of liability was a part of the very statute under which the corporation took its charter. It is true that the Supreme Court, in the closing paragraph of the opinion, states that this is sufficient to sustain the statute, but it is also true that the much greater portion of the opinion is devoted to a justification of the rule upon principle,

and unless the Supreme Court repudiates the arguments used in this case it would seem to stand committed to the principle of absolute liability, at least for railroad companies.[8]

2. The liability of the New York act was further analogous to the liability of the ship for the expense of caring for and curing a mariner who is injured in the service of the ship, a principle recognized by the maritime law of all nations, including England and America. The Court of Appeals speaks of peculiar rights and privileges, wisely and benevolently built up by the maritime law for the protection of the seamen, which are not cognizable in the common law. As a matter of fact, these rights are cognizable in the common law, for a common law court, as well as a court of admiralty, will enforce these principles.[9] Furthermore, this liability was neither confined to exceptional circumstances of an injury happening during a sea voyage, nor to an injury due to the perils of the sea, for it was enforced in favor of an engineer working on the ship while in port, exactly as any other engineer might be working at the same kind of occupation on shore.[10] It is true that the liability of the ship extended only to the expense of the care of the disabled seaman, who was not entitled to indemnity for permanent loss of earning capacity. But is it possible that the principle of due process is consistent with indemnification up to a certain point, while it forbids an indemnity calculated upon a more liberal basis? The essential point is that the expense arising out of an injury for which the ship owner is in nowise to blame and which may even be due to the fault and negligence of the injured seaman, is charged against the ship, thus clearly recognizing a liability without fault. Whether that liability is restricted to the expense of curing or is extended to the care of the permanently disabled person, after his actual sickness is over, cannot be the difference between due process and lack of due process. The Court of Appeals says that the maritime law is exceptional in its character. It should, however, be borne in mind that in the older law the occupation of the mariner was the one occupation conspicuous for hazards, at a time when great mechanical forces were not ordinarily employed in industries.

3. The liability of the employer irrespective of his fault is finally analogous to the general principle of the liability of the master for the acts of his servant. It is not always recognized that

8. *C. R. I. & P. R. Co. v. Zernecke,* 183 U. S. 582.

9. See *Scarff v. Metcalf,* 107 N. Y. 211, and *Holt v. Cummings,* 102 Pa. 212.

10. *Holt v. Cummings,* 102 Pa. St. 212.

the principle *respondeat superior* is a principle of liability without fault. The civil law makes the matter liable only for lack of proper care in selection or supervision; the common law, in making him absolutely liable toward others than servants for the fault of a servant, departs from the strict and normal rule of justice based on moral fault and responsibility. The abrogation of the fellow-servant doctrine further extends this principle of expediency. Where the employer has used all possible care in selecting and supervising his servant, the negligence of the servant resulting in injury to another servant is, as far as that employer is concerned, as much an accident as any other accident resulting from imperfections in his machinery or plant which the employer can by no possible care avoid. There is therefore no controlling difference in constitutional principle between the abrogation of the fellow-servant doctrine and the liability of the employer for an accident which is due to a risk inherent to the trade. As Senator Sutherland, the chairman of the Federal Employers' Liability Commission, tersely puts it, in the one case the master is held responsible for the fault of the dangerous agent and in the other for the fault of the dangerous agency.[11] Conceding, as the Court of Appeals does, that the legislature may abrogate the defenses both of common employment and of ordinary contributory negligence, it is inconsistent to hold that the legislature cannot create the liability which was proposed to be created by the New York act.

4. The liability for trade risks and due process of law:

If we assume, for the sake of argument, that our law has had in the past no analogies to workmen's compensation, and that the new legislation embodies an entirely novel principle, that principle should not for that reason alone be repudiated as being contrary to due process. Three rules may well be laid down for the application of the guaranty of due process, by which the New York decision may be tested:

(1) In establishing new canons of justice, the legislature is neither bound by every historical limitation of the common law, nor is it free to advance so far beyond prevailing ideas as to make the law utopian or even socialistic or communistic; in other words, the law may be in its reasonableness, progressive; and it must be in its progressiveness, reasonable.

(2) The standard of reasonableness must be approved by the courts.

11. Briefs, p. 159.

(3) The standard of reasonableness should be the same for the state and the nation.

Applying these rules to the relation between employer and employe, it must be insisted that the law may go beyond the elemental grounds of liability—viz., consent and fault—and advance to a new basis, which may be properly designated as that of social solidarity. Of course, if the first portion of the argument here presented is sound, the basis is not new at all; but assuming it to be new, its recognition imposes itself upon our law by the force of prevailing industrial conditions. That social solidarity is not one to be conjured up at the will of the legislature, but must be founded in the nature of relations and in our social consciousness. To illustrate: The Court of Appeals asks whether my neighbor can be made to pay my debts? Certainly not; for the basis of social solidarity is lacking. Nor would there be such solidarity between landlord and tenant under modern conditions. Were the law to make the employer liable for the loss falling on an employe through disease contracted outside of the employment, it would probably have to be judged, not as a rule of liability, but as a radical legislative change of the relation of employment and of its economic terms. But where the employer is made liable to a partial compensation for losses due to the risks of a hazardous industry, which are either actually or humanly speaking, inevitable, the solidarity is obvious and undeniable, and had it been recognized by the unwritten law, its abrogation might well be condemned as arbitrary and unreasonable.

The imposition of such a liability does not simply alter the economic terms of the contract of employment. Such a view may to a certain extent be justified if the employer is required to indemnify in part his employe for the losses due to ordinary sickness, or old age, or unemployment. In the case of compensation laws, the loss for which indemnity is paid is the result of an undertaking carried on by the master for his own benefit. Those laws simply fix the consequences of conditions inherent in the transaction and practically beyond the control of either party. Viewed in this light, the compensation laws bear no analogy to those laws which have been condemned as interfering with the essentials of economic liberty whereby parties are free to agree upon the terms of buying and selling labor, assuming for the sake of argument that that liberty cannot be impaired.[12] The substitution of a compensation on a fixed basis for damages estimated from case to case is justifiable

12. *Lochner v. New York*, 198 U. S. 45; *Adair v. U. S.*, 208 U. S. 261.

because it means a practical approximation toward justice in preference to a theoretically perfect justice adapted to each individual case, which, in the practical administration of justice, has proved to be arbitrary, speculative and grossly unequal guesswork. It seems to have the sanction of the Supreme Court of the United States, in the decision supporting the front foot rule of special benefit assessments.[13]

When it is laid down as a second requirement of due process, that the standard of reasonableness must be approved by the courts, recognition is not merely given to the established operation of our constitutional law, but also to the principle that the standard of reasonableness must commend itself to the conservative sense of the community which the judiciary represents more faithfully than the legislature. While the test of judicial approval is not infallible, it is the most practicable which we have, and under our institutions a condition in which the judiciary is seriously out of harmony with the deliberate and sustained will of the community can only be temporary, and had much better be overcome by seeking to bring about a change in judicial opinion than by overturning it by popular verdict. Negatively expressed, this same requirement means that the definition and evolution of due process should be a matter of judicial interpretation, and not of popular decision by referendum from case to case.

And this also follows from the third proposition that the standard of reasonableness must be the same for state and nation; for a state referendum cannot affect the Fourteenth Amendment, and a national referendum is impracticable.

It is at this point that issue must be taken most emphatically with the Court of Appeals of New York. In referring to the demand for a change in the law, it says:

"We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment; but we think it is an appeal which must be made to the people and not to the courts."

Apparently, the court places upon the due process clause of the state constitution a construction by which it is made to embody the limitations of a historical state policy not identical with, but narrower than, the limitations imposed by the national constitution, with the result that state due process becomes a purely conventional principle, which time may show to be inadequate to satisfy the demands of a more perfect justice and which is therefore susceptible of improvement to be brought about by constitutional amendment.

13. *Parsons v. District of Columbia*, 170 U. S. 45.

The method of a specific constitutional amendment to sanction workmen's compensation encounters the difficulty of finding a proper formula of grant of power; either it is sufficiently wide to cover future needs and developments, in which case the submission to popular vote must reckon with the natural apprehension of the voter that his favorable vote may be construed as giving sanction to projects which he does not for the present approve, or the formula is adapted to the particular exigency, in which case doubt is thrown at once upon all legislation not coming within its terms. The dilemma is inevitable, and demonstrates that this method of dealing with the difficulty will fundamentally alter the theory of our state constitutions, transforming them from charters of limitations into miscellaneous collections of enabling acts. Whatever, therefore, may be thought expedient in view of the particular exigencies of the New York situation, as a general principle the method of adopting a narrow construction of due process and then allowing it to be overridden by constitutional amendment cannot be commended as either desirable or as right in principle.

If it were possible to use the power over corporations to enact a compensation law applicable to businesses conducted under corporate organization, this might furnish a solution of the problem with which the people of New York are confronted; for not only are nearly all, if not all, the industries affected by the New York law under corporate control, but the discrimination between corporate and individual employers as regards liability toward employees ought, in the absence of an adverse decision by the Supreme Court of the United States, to have a good chance of being sustained by the courts, but the suggestion made by Chief Judge Cullen in his concurring opinion, that a compensation law might be confined to corporations to be created hereafter, or that revocable charters of existing corporations might be revoked and reorganization be permitted only upon condition of accepting the law, is impracticable.

III.

Elective or optional laws. Outside of the state of New York the constitutional difficulty was sought to be met in another way. The New York decision having been the first one to come from a court of last resort upon this phase of constitutional law, and having been rendered by an unanimous court and one of the highest standing in the country, it was felt in other states where compensation bills were pending at the time, that it would be unwise to press

measures based upon the principle thus rejected, and all these states, except Washington, made their laws at least nominally optional or elective.

The experience of Massachusetts, where a law of 1907, allowing the substitution by agreement of a compensation scheme for common law rights and liabilities, had remained a dead letter, made it likely that a purely optional measure would be of little practical effect. The new laws seek to avoid failure in this respect by encouraging election in various ways. So they all establish presumptions in favor of election, to be overcome only by express notices of dissent or non-acceptance, generally for both employers and employes, but in California and under the insurance systems only for employes. If the law goes no further than creating presumptions, there can, perhaps, be no objection, constitutional or otherwise. A simple presumption, however, was considered inadequate. A further pressure was sought to be exercised upon the employer by taking from him the well-known common law defenses of assumption of risk and fault of fellow servant (in Wisconsin, only where there are at least four employes), and either abrogating or in various ways qualifying the absolute bar of contributory negligence. The power of the legislature to abrogate these defenses is generally conceded, and where, as in California and New Jersey, the abrogation is unqualified, the motives of the legislature are beyond judicial control. However, in order to exercise a similar pressure upon the employee, the abrogation is generally qualified by providing that, whereas if the employer shall elect not to accept the provisions of the law, he shall lose the defenses, he retains them if, after he has accepted, the employee, refusing to concur, sues at common law. This double-edged coercion is found in Illinois, Kansas, Massachusetts, New Hampshire, Ohio and Wisconsin.

It is most undisguised in the act of Kansas, in which section 46 provides for actions to recover damages brought by an employee entitled to come within the provisions of the act against an employer who might come, but has elected not to come within its provisions, that the three defenses (assumption of risk, fault of fellow servant, contributory negligence as absolute bar) shall not be available to the defendant employer; while under section 47, in an action to recover damages brought by an employee who would be entitled to come within the provisions of the act, against an employer who has elected to come within its provisions, the employer (unless he

or a managing agent was wilfully or grossly negligent) shall retain these defenses unimpaired.

Wisconsin accomplishes the same result by first abrogating two of the three defenses and then providing that any employer who has elected to pay compensation shall not be subject to the provisions of the abrogating section; for this likewise visits the failure to elect with the penalty of the more unfavorable position in the common law action, since the workman who insists upon suing for damages instead of electing compensation obviously remains subject to the defenses. The act in terms speaks only of the relief to the employer from a new burdensome provision, and leaves it to be inferred that the benefit to the employe which results from the burden laid on the employer is taken from him, if he does not elect to take compensation. Massachusetts even goes to the length of depriving employees who sue at law of the benefits of the earlier employers' liability acts of that state,[14] acts which were intended to remedy a condition of the law grossly unjust to the employee.

If this novel method of forcing acceptance of a so-called optional measure is analyzed, it will appear to amount to this: that the legislature proposes to have justice administered to two parties to the same relation upon different terms, offering to each conditions unfavorable to him and giving him the chance of redeeming himself by declaring his willingness to accept the new method of relief. Either the legislature has the power to compel compensation—can it then exercise this compulsion in the roundabout way of denying justice except upon terms not applied to all alike?—or it has no such power; can it then do by indirection what it cannot do directly? This serious question goes to the very root of the laws of Illinois, Kansas, Massachusetts, New Hampshire, Ohio and Wisconsin. In New Hampshire the difficulty is aggravated by the fact that the employer, before he can elect to come under the act, must establish his solvency by filing a bond conditioned upon the discharge of his liabilities.

With the single exception of New Jersey, all the states also treat employer and employe unequally in the matter of exercising the option. In Kansas and Ohio the employe can escape the operation of the act only by leaving the employment; the same is true in New Hampshire, where the law is silent as to his right of election; while in California, Illinois, Massachusetts and Wisconsin the workman may refuse compensation once, but having once accepted remains

14. Last codified in 1909.

bound, whereas the employer is at liberty to withdraw every year. The acts apparently assume that it is superfluous to safeguard the rights of the employee since the employer can in any event force acceptance of his terms by dismissing the recalcitrant employe. Thus, there seems to be a discrimination against the employee in the matter of election, which adds to the other difficulties of the elective scheme.

It is believed that either under specific clauses under our constitutions guaranteeing to each person the right to have his remedy in court freely and without purchase, or under the general principle of the equal protection of the law, justice must be administered upon equal terms to all irrespective of collateral considerations and not with a view to driving people into a legislative policy which it is feared may be unconstitutional.

The Supreme Court of Wisconsin attempts to dispose of this difficulty as follows:

"But it is said that there is no proper classification here, and hence that the law is fatally discriminating in its character. The two defenses are preserved intact to employers who elect to come under the law, and taken away from those who do not so elect. The rules governing classification are familiar and are, in brief, as follows: it must be based on substantial distinctions which make real differences; it must be germane to the purposes of the law; it must not be limited to existing conditions only, and must apply equally to each number of the class. It seems to us that this classification fully meets these requirements; certainly there will be very real differences between the situation of the employer who elects to come under the law and the employer who does not. If the consenting employer only employs workmen who also elect to come under the law, he can never be mulcted in heavy damages and will know whenever an employe is injured, practically just what must be paid for the injury; surely this is a different situation from the situation of the man who is liable to be brought into court by an injured employe at any time and obliged to defend common law actions upon heavy claims, unliquidated in their character, the outcome of which actions none can foretell. On the other hand if, as seems quite likely, the greater part of the consenting employer's workmen consent, but some do not, and these latter are still retained in the employment, the same considerations will apply, with somewhat less force. On the one hand there is a class of consenting employers employing wholly or largely consenting workmen, and having definite and fixed obligations to their workmen in case of injury; on the other hand is a class of non-consenting employers, who have no such fixed obligations in case of injury to their workmen, but choose to meet every such workman in court and fight out the question of liability. There seems a very robust difference between these two classes. But after all, there is another distinction which seems perhaps more satisfactory: the consenting employer has done his share, and it must be considered a considerable share, in rendering successful the legislative attempt to meet and solve a difficult social and economic problem. Even if it be true (which, as before stated, is not decided) that he may not be compelled under our constitutions, state and national, to assist in the solution of this problem, still does not his voluntary act in giving that assistance constitute a substantial distinction, making a real difference of situation between him and the employer who refuses his aid, a difference which justifies a difference in treatment?"[15]

15. *Borgnis v. The Falk Company*, — Wis. —, 133 N. W. 209, 217.

This argument certainly does not carry conviction, if the legislative attempt to meet and solve a difficult social and economic problem involves an unconstitutional burden; for shorn of all verbiage it amounts to saying that a person may be penalized for standing upon his constitutional rights. As was recently said by the Supreme Court of Ohio:

"We are not disposed to question, at least for our present purpose we will not, that a citizen may waive a constitutional right, but we do deny that he can be compelled to waive his right, or that he can be arbitrarily subjected to an option to stand upon one right under penalty of losing another."[16]

If, on the other hand, the legislative policy is such that under the constitution it would be possible to carry it out directly, the objection remains that the method chosen for indirect coercion involves an unprecedented bartering of the terms of administering justice. And this objection remains, even though the method should be declared, as in Wisconsin it has been declared, to be constitutional. It is conceded to be a piece of legislative trickery; it must confuse the common sense of right and wrong, and it makes a mischievous precedent, which in time to come will give trouble to those who invented it. Why should not the legislature indirectly force arbitration regarding wages by juggling the rights and remedies relating to the various incidents of strikes, depriving as far as it can be done, non-consenting employers of their right to injunction, and making picketing on the part of non-consenting employees a penal offense? The classification would be that sanctioned by the Supreme Court of Wisconsin.

It is a further undesirable consequence of this system of so-called election, that under the plea of voluntary acceptance, the burden imposed upon the employer may be carried far beyond what would be regarded as constitutionally safe in case of direct legislation. Thus it happened that the courts of Wisconsin and Massachusetts considered themselves absolved from the duty of passing upon the merits of accident liability not confined to the trade risks of a hazardous indutsry. On the theory of election there is no reason why the legislature should not leave the final adjudication of compensation claims to a political board.

It will also be interesting to watch how the problem of necessary amendments will be handled in case of laws which rest in theory upon voluntary adoption.

16. *Byers v. Meridian Printing Company*, 95 N. E. 917, 919.

IV.

It remains to say something upon the constitutional aspects of workmen's compensation that have not been covered by the foregoing observations.

And, first, as to liability for accidents arising out of and in course of the employment in any industry, though not specially hazardous, or not due to such hazard.

The arguments advanced in favor of the liability which the New York act proposes to create, lose some of their convincing force if the restriction to hazardous industries and to risks inherent in the trade is abandoned. In giving the benefit of compensation to all employees and extending it to injuries that have nothing to do with the nature of the particular employment, the law practically makes every contract of employment a partnership in the ordinary risks of any occupation, and not only those risks which are inevitable, but also those which are due to the carelessness of the employe. That is to say, the employer is made to share the risks of the employe, not *vice versa.* Where the employer operates on a large scale, it is the expediency rather than the justice of the principle of liability which impresses the mind; where the employer has only very few employees, and is not greatly superior to them in the social or economic scale, it is rather the injustice which is obvious. The exemption of domestic servants and farm employees seems to be based upon the recognition of the injustice of such a liability, but in reality emphasizes it by discriminating against other small employers and raises a question under the equal protection clause of the federal constitution.[17] The English compensation act is free from this discrimination.

The strongest argument in favor of the constitutionality of a liability not based upon special hazards is that it is after all no more objectionable than the rule of *respondeat superior* applied in the same way, which yet has never been challenged, or than the abrogation *in toto* of the fellow servant doctrine, or of the doctrine of assumption of risk or of contributory negligence, without regard to the nature of the employment, which seems to be conceded to be valid.

If the law applies to hazardous industries only, but is not con-

17. The Supreme Court of Massachusetts holds, in the opinion rendered by the justices on the compensation bill, that the discrimination is not fatal, so far as the abrogation of the common law defenses is concerned. The law of Wisconsin exempts all employers of less than four employees from the abrogation of the fellow servant doctrine.

fined to accidents due to trade risks, but extends to any accident arising out of or in the course of employment, the constitutional aspect is, in one respect, similar to that of a law applying to non-hazardous industries. Such is the law of Washington, and the bill proposed by the Federal Compensation Commission. The Supreme Court of Washington has left the question of validity, in view of possible discrimination against other employers in the state (a point which would not arise under a federal law, since the federal jurisdiction does not extend to non-hazardous industries), undetermined. It must, however, be borne in mind that the constitution does not require "a minute consideration of the distinction which may arise from accidental circumstances as to the persons and things coming within the general class provided for," and that "there cannot be an exact exclusion or inclusion of persons and things."[18] It is particularly important that some freedom should be conceded to the power of classification where the facility of administering a law is a controlling consideration, and it is clear that the elimination of the question of what constitutes a trade risk will remove a prolific source of litigation.[18½]

Compensation through insurance. The constitutional aspect of insurance is somewhat different from that of simple compensation. The difference may be stated by saying that in addition to dividing the loss resulting from industrial accident between employer and employee, insurance further distributes the share of the employer among all employers, or among all employers of the same class. Compulsory insurance may be looked upon either as an exercise of the police power, requiring a number of employers to join in a common plan for protecting their employees, or as an exercise of the taxing power, levying contributions from the members of a class for the purpose of relieving distress resulting from their occupation, and distributing those contributions among the sufferers.

If compulsory compensation is held valid, it may be well urged that compulsory insurance should be likewise held valid, upon the theory that the power to impose a duty carries with it the power to compel the adoption of appropriate and reasonable arrangements,

18. *L. & N. R. R. Co. v. Melton*, 218 U. S. 36.

18½. Much will depend upon the interpretation placed upon the words, "arising out of and in the course of the employment." The doubts regarding the justice of the liability, which have been suggested, will be practically removed, if the courts in applying the act require that the injury must be due to some risk peculiarly incident to the employment. Such seems to be the tendency of some recent English decisions. See *Amys v. Barton* [1912], 1 K. B. 40, where a driver of a threshing engine was stung by a wasp and died of blood poisoning; it was held that he was not entitled to compensation under the act.

which alone can ensure the prompt and regular discharge of the duty. It is perfectly well known that compensation without insurance would either be practically inoperative or work injustice, hardship or ruin in many individual cases. The whole matter of liability for accident—whether common law or statutory, whether based on fault or not—can never be satisfactorily dealt with on a purely individualistic basis, since the possible consequences of an act may be entirely disproportionate to the relation entered into by the parties or to any fault of theirs; the only adequate solution of the problem, as has been recognized in Germany, lies in the social principle of insurance.

Theoretically, insurance is less just to the employer than liability to compensation, since it makes him amenable to losses which he has been not only careful to avoid, but successful in avoiding; and a strong argument has been made against the practical operation of state insurance, as compared with the co-operative insurance of Germany.[19]

As a measure of taxation compulsory insurance encounters difficulties in many states from specific constitutional limitations upon the exercise of the taxing power. The Supreme Court of Washington was of the opinion that the tax of that state might be sustained as a license tax.

Considered as an exercise of the taxing power, compulsory insurance against the consequences of industrial accident may even be held to fall within the power of federal legislation.[20] In connection with a federal law, however, the question would arise at once: How could such a law protect the employer against common law action by the injured employe in the state courts? Not only is such a right of action entirely beyond the control of Congress, but under a number of state constitutions it is also beyond the power of the state legislature to abolish it. It is true that the payment of federal insurance might be made dependent upon the execution of a release of all rights of action under state law; but there would be nothing to prevent a state from declaring such a release to be inoperative and Congress would be powerless against such legislation. The mere possibility or probability of voluntary co-operation on the part of the states would not be a sufficient answer to the objections drawn from the inadequacy of federal power. There is no immediate prospect that this question will become practical.

19. See the brief of Mr. W. T. Sherman, submitted to the Federal Employers' Liability Commission, pp. 590-609.

20. See the brief of Mr. Miles M. Dawson in The Survey of August 5. 1911.