EMPLOYER’S LIABILITY

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The subject upon which I shall undertake to speak, is that of employer’s liability. By this is meant in this connection, the employer’s liability to his employees and not to third persons, and his liability to the employee, not for wages, but to make compensation for injuries received by the employee in the employer’s service. It is a subject which just now is receiving a great deal of attention in many quarters, and much is being said about it, often, as it seems to me, wisely, and often unwisely. It seems, therefore, that it is worth while to try to state the situation as it is, in order that we may more clearly see what the remedy may be. What I shall have to say will be largely confined to the purely legal aspects of the question, since it is only with reference to those that I have any claim at all to speak.

There can be no doubt at all that with the progress of civilization, and the development of industry, radical changes in the conditions under which industrial occupations are carried on, have been brought about. The time when the employer worked with his men; when his employees were few in number, and were made up of a few journeymen and apprentices, most of whom lived with him and formed part of his family, is apparently gone never to return. The introduction of the factory system, the development of railroads and mines, the expansion of machinery, the enormous use of steam and electricity, have not only worked great changes in the conditions of labor, but have made it vastly more complicated and dangerous.

Not only has the physical danger been increased, but the great growth of the labor-saving machine has tended strongly to break up many of the old trades, and to turn men into mere machine tenders instead of mechanics. The natural consequence of this has been to make men more and more dependent upon the machine-operated industries, and thereby to diminish their independence and power of initiative.

Not only has the physical danger been increased, but con-

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stant work in factories and similar places has tended to develop diseases peculiar to particular trades and industries, and the so-called "occupational disease" has become a well-recognized institution.

The result of all these causes has been that we have reached a situation when the carrying on of our great industrial occupations causes a great number of deaths and disabling accidents every year, and leads to the breaking down of the health of a large number of workers.

This situation is not by any means confined to the working classes. The increased strain and stress of modern life affects us all, and disease and death take their toll from every rank; but for the time being we may confine our attention to the effect upon the so-called working classes.

There can be no doubt that the burden of industrial injuries and occupational diseases falls heavily upon those who directly and indirectly are affected by them, and many persons are looking for means by which this burden may be lightened, or spread in whole or in part upon other shoulders.

It is urged that some method ought to be devised by which the worker who becomes the victim of industrial disease or accident shall be entitled to claim compensation from somebody, and the person who seems to stand nearest to the case and to be able to make such compensation is the employer, and it is therefore urged that he should be made liable for them.

In dealing with this question it may be desirable to begin with a statement of the general rules of law already existing and designed to furnish protection to the employee, and to follow this with a consideration of the matters which are thought to make the existing law deficient for the purpose. Stated affirmatively, it will be seen that the law places upon the master a number of duties designed to protect the servant against injury. Thus the law requires of the master the exercise of ordinary care in furnishing and keeping in repair a reasonably safe place to work; in supplying and keeping in repair reasonably safe tools, machinery and appliances; in employing and retaining reasonably competent servants; and in making and enforcing reasonable rules and regulations for the conduct of the business. Where the servant is young and inexperienced the law requires of the master that he shall inform the servant of and warn him against the dangers of the business known to the master and not obvious to the servant.
These duties of the master are in many cases enforced with much strictness; and no one can read the cases which are constantly arising without being impressed with the fact that there is a growing tendency to enlarge and emphasize these duties of the master. Wherever the master fails to perform his duties in any of these respects, he is deemed in law to be negligent, and is responsible for the injury to the servant which directly and proximately results from such failure. If the master confides the conduct of his business to a general manager or superintendent, the master is responsible if such manager or superintendent fails to perform the master's duties. These duties of care for the servant's protection are generally said to be non-delegable or non-assignable, and if the master does attempt to assign or delegate them, he remains liable for the non-performance of them even though he has exercised all due care in the selection of the servants or agents to whom they were so assigned or delegated.

Notwithstanding the general rules thus referred to, it is contended that there are other principles of the law which make the security of the employee less complete than it seems to be; and it is to these that I wish chiefly to direct my attention.

The subject is a very complicated one, and it is obviously impossible within the space of time which can be allowed it here to undertake to deal with all aspects of it, and I shall therefore devote my time almost exclusively to three phases, which are usually most called in question, namely, to the so-called fellow-servant doctrine, the doctrine of the assumption of risk and the doctrine of contributory negligence.

I shall take up first the so-called fellow-servant doctrine, which, stated in its most general form, is that the master is not responsible to a servant for injuries caused to that servant by the negligence of a fellow servant. It is true that it does not prevail in this broadest form in Illinois, but I shall deal with it first in its general form.

The fellow-servant rule as it generally prevails is a defense very frequently made in actions by employees against employers for injuries incurred in the service, and it undoubtedly operates to prevent recovery in a great number of cases. By reason of this fact it has been often criticized or condemned, and many harsh things are said by laymen concerning the rule itself and the courts which enforce it to the disadvantage of the injured employee. It is often declared to be a totally unwarranted excep-
tion to the general rule, and courts are often condemned for de-
priving employees of what it is declared would otherwise be their
natural and proper right of recovery. The employer, it is said, is
liable to some persons for the negligence of his employee, why
should he not be liable to all persons? It is undoubtedly true that
we are in this age so familiar with the notion that an employer
or master is responsible in many cases for the acts of his em-
ployee or servant that we perhaps naturally come to regard that
as the ordinary and usual rule, and the assertion that it does not
apply for the protection of every person as an endeavor to estab-
lish the exceptional. It may be worth while, therefore, to spend
a few moments in endeavoring to determine the origin of the rule
that a master is responsible in any case for the misconduct of his
servant.

Starting at the beginning, therefore, we may ask ourselves
why should one person ever be responsible for the wrong conduct
of another? The dictates of natural justice would seem to lead
to the conclusion that every man should answer for his own mis-
conduct and that no one should be punished for the misconduct
of others. If, indeed, the person sought to be held can be found
to be morally responsible for the misconduct of the other, as where
he has directed or caused or participated in the act, no difficulty
will be found in justifying a rule which would make him legally
responsible. But in the great majority of the cases involving the
question with which we are now concerned, not only has there
been no direction or participation on the part of the master or
employer, but he has usually taken every precaution to prevent the
causing of the injury. The master is ordinarily in these cases en-
tirely innocent morally of the injury committed by his servant.
The servant is the guilty party, and is legally liable for his miscon-
duct. If, then, it is suggested that we should hold the master
liable, we are confronted by this problem: Why should the inno-
cent be punished for the misconduct of the guilty? Why should
a master, who is personally free from fault, be held responsible
to pay damages for the misconduct of his servant? If we will
stop to think about this question for a moment, and lay aside our
preconceived notions of what ought to be based upon what is, we
shall find that this question is not an easy one to answer. It is
true that now for many years our law has held an innocent master
responsible in many cases to third persons for injuries caused to
them by the negligence or misconduct of his servant. Many
efforts have been made to account for the existence of such a rule, but so far as I am aware no entirely satisfactory answer has ever been assigned for it. It seems upon the face of it to be unfair and unjust, and its application often involves consequences upon an innocent master which seem little short of cruel. When applied to a wealthy employer or to a great corporation its hardships do not seem so obvious, but when applied to a small farmer or a small tradesman who by many years of labor and self-denial has accumulated a little property, and who finds himself confronted with a claim for damages of ten or twenty or thirty thousand dollars because, in spite of his precautions, his careless servant has driven his team against another person and killed or maimed him, the hardship of the rule so far as the master is concerned is more apparent.

Courts in many cases have been impressed with the hardship of the rule, and judges who have felt compelled by the law to apply it against the master, have often expressed that feeling in their opinions. Thus the Supreme Court of Louisiana in one case said:

"We never apply this rule without a sense of the hardship on the master."

"To visit a man with heavy damages for the negligence of a servant, when he is able to show that he exercised all possible care and precaution in the selection of him," said Justice Sharswood in Pennsylvania, "is apt to strike the common mind as unjust."

And the Supreme Court of New York has said:

"The rule itself does not spring directly from principles of natural justice and equity." "The dictates of natural justice, disconnected with principles of expediency, would indicate that every individual should be responsible for his own wrong and that no person should be punished for the wrong of another."

Notwithstanding such criticisms, however, the rule itself is abundantly established.

As has already been pointed out, many efforts have been made to account for it, but, as is said by Sir Frederick Pollock in his treatise on the law of Torts:

"No reason for the rule, at any rate no satisfactory one, is commonly given in our books."

Mr. Justice Holmes, in his book on the Common Law, attempts to account for it upon historical reasons, and Professor

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6 Barb. 238.
8th ed., p. 77.
Wigmore has made an elaborate study of its historical development; but if it had no other foundation than an historical one, it probably should not, and would not, long survive. It is sometimes said that, as the master is the one who put the original force in motion, he is the one who should answer for the consequences; but this seems to put the employment of an agent or servant upon the same perilous footing as the keeping of wild beasts or the employment of unusually dangerous forces. It is sometimes said that the master is the one who is to get the benefit of the service and therefore he should take the burdens. But it is not true in the ordinary case that the master is the only one who receives the benefit. Being employed may be just as great a benefit to the servant as the employment of him may be to his master. From the standpoint of society at large the activities of the master and the activities of the servant may be equally beneficial. There is, however, an element of truth in the position so far as the mere outsider is concerned. He is not directly benefited by the employment in the ordinary case. It is sometimes said that, granting that the master is entirely innocent, the third person injured is innocent also, and that as between two equally innocent parties the loss ought to fall upon the master because he is the one who first employed the servant and by whose act therefore the injury has been made possible. This course of reasoning, however, is not entirely satisfactory because there is no such general principle as that referred to, and if we concede that both parties are equally innocent we simply are adopting an arbitrary principle for fastening the responsibility upon one of them. It is sometimes said that the purpose of the rule is to secure greater care and diligence on the part of the master in the selection of his servants and control of his business, but if this be true, the rule does not accomplish its purpose because even if the master has exercised the utmost care in both respects he is nevertheless held liable. It is sometimes said that the master should be held because employers are, as a class, more apt to be pecuniarily responsible than employees, and therefore for the protection of third persons the remedy should be given against the employer. This argument, however, is one which must obviously be confined to very narrow limits because there can be no tenable theory that the obligations of one man may be shifted to another simply because the latter

7 Harv. Law Rev. 315, 383.
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is more able financially to bear them. It is sometimes said that
inasmuch as the master has given general commands to the serv-
ant to perform the service, it must be implied that he has com-
manded the act in question. This, however, is a mere fiction, and
in many cases we would have the absurdity of a command implied
in the face of unquestionable proof that the act was expressly
forbidden.

The most potent reason to my mind for holding the master
responsible is to some extent a composite of these various reasons.
So far as the third person is concerned, who is not connected
with the master's business, who is not participating in it, and
who derives no direct benefit from its carrying on, it may well be
that considerations of expediency, rather than those of natural
justice, should permit the third person a remedy against the chief
and responsible head of the enterprise, even though he be person-
ally free from fault, and leave the latter to obtain reimbursement
by the methods which the law gives him against the servant by
whose negligence the master was thus made responsible. Prac-
tically, however, this remedy of the master is not likely to prove
very efficacious.

Whatever may be thought about the reasons for this rule, two
or three things are certain and significant. First, that the rule
making the master liable does not depend upon foundations of
natural justice, but is defended upon considerations of expediency.
Second, that in all the cases which arose during the time the rule
was taking shape, the person injured was a third person; and
thirdly, that of the various considerations of expediency urged in
its support, the most important and significant contemplate that
the person seeking a recovery is an outsider, in no way partici-
pating in or connected with the enterprise.

It is also true that the rule that the master should be liable,
or as it is more shortly put, the rule of respondeat superior, is
not a statement of a universal principle at all, but is in itself an
exception to a more general rule and is based merely upon con-
siderations of expediency. As is well stated by Mr. Beven in his
work on Negligence:

“There is no general rule making one man liable for the negligence
of another. The rule of law is the other way. Culpa tenet suos auctores
tantum. To this law there has long been an exception established—that
the master must answer for the act of his servant when strangers are in-
jured thereby.”

Or, as stated by Mr. Wood in his treatise on Master and Servant:

"The doctrine holding a master liable for the wrongful acts of his servant * * * is in direct antagonism with that broader doctrine, that every person shall be held to answer for his own wrongs; therefore it is regarded with much jealousy by the courts, and is circumscribed into as narrow limits as is consistent with the true interests of society."

This rule of law that the master was liable to strangers for the negligence of his servants had been settled for many generations before the question arose whether the master should also be liable to one servant for an injury which the latter sustained by reason of the negligence of a fellow servant. The question was first suggested in the famous English case of *Priestly v. Fowler,* decided in 1837. This case, however, did not squarely raise the question, but it came directly before an American court in 1841 in the case of *Murray v. South Carolina Ry. Co.* In the following year the question was again presented, this time to the Supreme Judicial Court of Massachusetts, in the case of *Farwell v. Boston & Worcester Railroad Corporation.* The action was by an engineer against the railroad company to recover damages for an injury caused to the engineer by the negligence of a switchman. No fault on the part of the company in the selection or retention of such switchman or in the general management of its business was suggested. The question was argued by distinguished counsel, and the opinion of the court was written by Chief Justice Shaw, who is everywhere conceded to have been one of the ablest judges which this country has ever produced. He examined the question with great thoroughness and his opinion has since been recognized both in England and America as the most authoritative exposition which has ever been made of the principles which control the determination of the question now considered. The question was obviously a new question, and it was significant that never before in the history of English law had it been seriously contended that such an action could be maintained. The question, as will be seen by a moment's consideration, was this: It had then become conceded law that the master was liable to strangers for injuries caused by the negligence of his servant. All the cases that had hitherto arisen had been cases

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*See. 277.
*3 M. & W. 1.
McMullen's Law 385.
*4 Metcalf 49.
in which the plaintiff was a stranger to the enterprise in the prosecution of which he received injury. The strongest reasons for the support of the rule making the master liable for his servant's negligence were based upon the fact that the person injured was a stranger. In the case now before the court the plaintiff was not a stranger. He was a servant of the company employed for wages and aiding in carrying on the general business of the company. He was familiar with the nature of the business when he accepted the employment, and he knew that other servants, such as this switchman, would necessarily be employed by the company in carrying on its operations. None of the reasons which had led to the establishment of the rule of liability so far as the third party was concerned applied to this plaintiff. His case was not within the reason of the rule; no such case had arisen before; no rule for such a case had been determined. What should be done with it? Those who condemn the Farwell case insist that what should have been done with it was to declare the master liable. The master is liable for the acts of his servants, they urge; the plaintiff here had been injured by the negligence of the defendant's servant; the rule is respondeat superior; let the superior respond, here. This reasoning, however, obviously begs the very question to be decided. As has been pointed out, there is no universal rule that the superior should respond. That rule is itself exceptional and grew out of conditions differing from those which were here presented. What Chief Justice Shaw and his associates (for all of the other Justices agreed with him) did was to declare that this was not a case concerning which any fixed rule of law was established, and since there was no established rule about it, the question whether the master should be held liable to the servant for the negligence of a fellow servant must depend upon the express or implied terms of the contract of employment, and upon such considerations of policy and expediency as should be thought applicable to the situation.

"The general rule," he said, "resulting from considerations as well of justice as of policy is that he who has engaged in the employment of another for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services and in legal contemplation the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as ef-
fectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others."

He also urged that considerations of policy led to the same conclusion.

"Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other."

It was urged that however potent these considerations of policy might be, they had no application except in cases where the various servants were actually so closely associated that one could in fact exercise some influence and control over the others, and that therefore the rule suggested ought not to apply where the several servants were not associated together or were engaged in different departments of the business. This distinction, however, was rejected, as not being founded upon practical considerations.

Furthermore, "the master is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of anyone but himself, and he is not liable in tort for the negligence of his servant because the person suffering does not stand toward him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied."

The doctrine of the Farwell case has been generally accepted, not only in the United States, but in England, and unless changed by statute the general rule of English and American law undoubtedly is that the master is not liable to one servant for injuries occasioned by the negligence of a fellow servant. Some modifications of this doctrine have been adopted in various states. Thus in this state the rule only applies where the servants involved were in fact closely associated with one another in the performance of the work, and in some states the rule does not apply where the servants involved were in distinct departments of a general business. Neither of these distinctions, however, has been generally adopted.

As has already been stated, the decision in the Farwell case has been often criticized or condemned, most frequently by lay-
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men, but occasionally by lawyers and judges. Three questions may be asked concerning it. First, looking at the question from the standpoint of the development of the rule of the master’s liability, was the decision historically sound? If what has thus far been said is correct, this question must be answered in the affirmative. Second, was the conclusion right from the standpoint of justice? That, of course, will depend largely upon our definition of justice. To those who believe, as many do, that the rule of the master’s liability even to strangers, as it is often applied, is inherently unjust and exceptional—meaning by “just” in this connection, the moral relation between conduct and consequences—there can be but one answer, namely, that to have extended the rule to this case would have been to extend an unjust rule to a situation in which the considerations of expediency and policy, which are ordinarily urged in support of it, are lacking. Third, is the conclusion unwise or unreasonable? Upon this question there has been much difference of opinion. Without going into other considerations which I shall mention later, it must suffice here to call attention to the fact that the rule has been adopted by practically every court administering English law, and to submit the answer given to a similar question in a recent case by the Supreme Court of Tennessee:

“The law as it exists in this state is not unfair either to the master or the servant. While on the one hand, it seems, on a casual view, that it is a hardship upon the servant to deny him relief for an injury inflicted upon him by the negligence of a fellow servant in whose selection he had no voice, yet it seems equally hard to make the master liable to one of his servants for the negligence of another servant when he (the master) has exercised due care in selecting such servant. What more could he do? It is impossible that he should supervise and control every act of his servants. Yet if he is made liable to each of his servants for every act of all of his servants in the course of the employment—and there may be and there often are thousands of them—the law then places upon him a duty which everyone knows that no one can discharge. The true and just view is that expressed in our cases—that, after the master has exercised due care in the selection of his servants, the danger arising from the negligence of a fellow servant is a danger which one going into the service voluntarily assumes, and it is a risk for which it is presumed he is satisfactorily compensated by the larger wages he can earn in the service than in other employments.”

Who are to be regarded as fellow servants within the meaning of this rule is too large a question to be gone into here, and its determination does not particularly affect the subject now under consideration. One point, however, is worthy of mention.

114 Tenn. at p. 253.
There has always been a controversy whether the rule applied to servants who were given some degree of control and direction over the others. It has been contended by some that as soon as one servant was given the power of direction and control, he became by that fact, a substitute for the master, and was performing master's duties. An injury arising from the negligent exercise of that control was therefore negligence on the master's part, and imposed liability upon him. It has been contended by others that the question did not properly depend upon the mere fact of control, but upon the nature of it; that there are some powers of direction which properly belong to the general management and supervision of the business—which belongs to the master to perform—and other powers of direction which arise out of the immediate exigencies of the work and are as much a part of it as the mere mechanical applications of force. In this view, the latter power of direction would be a servant's duty and not a master's, and the negligent exercise of it would be the negligence of a fellow servant and not of the master. My own judgment is that this is the proper view, and such I believe to be the weight of authority; but there is respectable authority for the other position. In some states, as will appear a little later on, the legislature has attempted to settle the question by statute.

Passing now from the consideration of this question for a few moments, I wish to refer to another subject mentioned at the outset, namely, the doctrine of the assumption of risk, which is often thought to work most disadvantageously to the servant. This doctrine has two aspects, which it is necessary to distinguish from each other. In the first place, a moment's consideration will make clear that a certain amount of danger inheres in most operative industries. Many occupations are inherently more dangerous than others. It is dangerous to be employed in the operation of railroad trains; mining is an inherently dangerous business; working in rolling mills and saw mills is inherently dangerous. However carefully such enterprises may be carried on, accidents are sure to happen; even when conducted with the utmost regard for safety, danger is constantly present. That every business thus has its dangers is apparent to everyone, and to no one so much as to those whose occupation it is to assist in carrying it on. Whenever a man applies for employment in such a business, it is ordinarily (though, of course, not always) a safe presumption that he is familiar with the risks of the business in which he seeks to
engage. His knowledge of these risks is ordinarily at least as good as the knowledge of the master, and in many cases it is, in fact, much better. With this knowledge of the risks, he asks for and accepts employment. Theoretically at least, although it is often urged that practically the situation is otherwise, he may stipulate for compensation commensurate with the risk to which he is thus to subject himself. Under these circumstances, it is the settled rule of the law that the servant (not now speaking of one known to be ignorant or inexperienced), by accepting the employment, assumes, so far as his employer is concerned, the risks of injury from the ordinary and inherent dangers of the business upon which he enters; and if he receives injury from such a cause or danger, he has no claim against the employer.

This is one form of the matter of the assumption of risks, and I have no hesitation in saying that thus far the rule seems to me not to be an unjust one. The question, however, has another aspect, which must be made clear: Even though the servant at the time of the acceptance of the employment may be presumed to know and therefore to have assumed the ordinary and necessary risks of the business, he may find after he enters upon it that the ordinary and usual risks are greatly enhanced in the particular case by reason of the special circumstances or conditions under which the business is carried on. These unusual circumstances or conditions may be those for which the employer is responsible, or they may arise from causes over which he has no control. In the case of a mine, for illustration, it may happen that the dangers of mining in that location are greater than ordinary by reason of some peculiar physical construction which cannot be entirely removed or remedied. Such conditions as these of course impose no moral responsibility upon the employer. On the other hand, the servant may find that the ordinary and usual risks of such a business are greatly enhanced in the particular case because the master conducts his business with so little regard for the safety of his employees that unexpected and unnecessary dangers are constantly present. It may be that the risks are increased because of the master's violation or disregard of express statutory regulations which were designed to diminish the danger. When the servant finds that such unexpected risks are present, he is, of course, legally justified in leaving the employment, and that is often said to be his legal duty. Practically, however, it is often contended, he will be induced by the necessities of keeping his
employment to remain in the business and thus subject himself to these enhanced risks. If, having become aware of them, he complains to the employer and remains in reliance upon a promise from the employer that he will remove them, he may for a reasonable time continue in the service without assuming these added risks. But if, without obtaining such a promise, or if after it becomes obvious to him that such a promise will not be performed, he continues in the employment, it is commonly held by the courts (at least with respect of other causes than the failure to comply with statutory requirements) that he assumes these risks also. This rule is based upon the theory that one should not be allowed to claim damages from another for injuries caused by conditions to which he has knowingly and voluntarily submitted himself.

It is urged, however, as has been stated, that in many cases the action of the employee, owing to the necessity of employment, is really not voluntary, and this is doubtless often true in this case as in many other situations in life; but economic freedom under all circumstances can probably not be afforded under any system of law.

The right in this matter is not entirely easy to discover. So far as the enhanced risks result from conditions for which the master is not responsible, there seems no more reason for exempting the servant from these than from any others. So far as they result from the failure of the master to perform the duties which the common law requires of him for the protection of the servant, we are confronted with the familiar problem whether the State should leave men free to make such contracts and accept such risks, respecting their own safety as they see fit, or, on account of the immaturity or incompetence of some and the economic dependence of many, should undertake to protect them—and not only themselves, but more particularly their dependents and society, which must finally bear the brunt—against the consequences of their own improvidence or necessity. Confining the case to the point now under discussion, namely, whether the servant should be permitted to assume the risks to himself resulting from the master's failure to perform his duties, I think we shall agree that it is a fair rule of policy that these risks should be held not subject to assumption by the methods which now prevail, and that the law in this respect should be changed.14

14See Butler v. Frazee, 211 U. S. 459; Johnston v. Fargo, 184 N. Y. 379; Richmond, etc. R. Co. v. Norment, 84 Va. 167.
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With respect of risks that result from the violation of express statutory provisions, the case is more clear. Unless some other consequence is clearly contemplated by the statute, it would seem to be a sound rule of policy not to permit these risks to be assumed and many cases do in fact so hold, although there is much authority to the contrary. Many of the statutes expressly declare that there shall be no assumption of the risks in such a case, the Federal Employers' Act of 1908 being among the number.

Even though the master may have been negligent, the servant may lose his right of recovery by his own negligence contributing to his injury. The general theory of this defense is simple: The action is based upon the employer's negligence; the employee has been negligent also; without the employee's negligence the injury would not have happened; his negligence has in some degree therefore contributed to his own injury; the law has no means of dividing up the consequences, and it therefore holds that there can be no recovery. Even though the servant's negligence may have been less than the master's negligence, still if the servant's negligence proximately contributed to cause the injury, the servant cannot recover. This is the general rule. It has, without doubt, been very rigorously applied in many cases to defeat the servant's recovery.

This defense of contributory negligence is by no means one confined to cases between employer and employee. It is a general principle, applicable in all cases of alleged negligence. It is not in general an unjust rule. Why should one man be compelled to pay another compensation for an injury which would not have happened without the latter's own negligence? The utmost which could properly be claimed would be that the loss should be divided in proportion to the demerits of the two parties, and something like that is attempted in admiralty cases. (These, however, are ordinarily not jury cases.) The common law, however, has not attempted it, and the rule now prevailing is in accord with the general principles of that law. A compensation law could undoubtedly be so framed as to provide for this case, and perhaps ought to be. The Federal Employers' Liability Act of 1908 makes such a provision. The argument urged against it is, that the

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\(^{18}\) Compare, for example, Narramore v. Railway Co., 96 Fed. 298, with St. Louis Cordage Co. v. Miller, 126 Fed. 495 and Railroad Co. v. Norgate, 141 Fed. 247.

\(^{19}\) So also Georgia Code, 1895, sec. 2322.
question is likely to be always decided by juries in favor of the employee.

The courts which have adopted the doctrine of comparative negligence have, I think, all later repudiated it.

This matter of contributory negligence is one of great inherent difficulty. It is often asserted that men are not likely to be indifferent to their own safety. On the contrary, nothing is more common. Here as elsewhere, familiarity breeds contempt. No one can have any practical experience with work as it is actually carried on, or even read the cases which are constantly coming before the courts, without being forcibly impressed with the fact that men are constantly being not only careless but even recklessly indifferent, and not simply as to their own safety, but also to that of their associates. The absolute indifference to, and disregard of, many kinds of safety devices, is matter of common knowledge.

On the other hand, there can also be no doubt that in the hurry and fatigue of industry, attention becomes blunted and sensibility becomes dulled, and that part of that which passes as contributory negligence is simply human frailty. All of us experience the same thing in some form, but most of us have to bear the consequences ourselves.

It will thus be seen that, speaking generally, the right of the servant to recover against the master is limited to the cases wherein the master has been guilty of some breach of duty on his part, and that even in such a case, the servant's recovery may be defeated because he has either assumed the risk or been himself guilty of contributory negligence.

Even if the employer is liable, there is no means (other than voluntary adjustment) by which the liability can be enforced or the amount of the damages ascertained except by an action at law. In such actions the employee frequently fails to make good his case, and loses altogether, and has the costs of the litigation to bear. The employer is sometimes held liable where he ought not to be; he frequently feels that the damages awarded against him are excessive, and even if he is successful he has the expenses of his defense to bear. If the employee is successful, he must pay a large portion of his recovery for lawyers' fees. The situation is not different in this respect from that in other cases of legal action, it is true, but the situation is complained of as un-
satisfactory to both parties. The employer also often pays large
sums for insurance against liability.

There is no doubt that in all these ways a large sum of
money is constantly being expended by employer and employee
growing out of disputes respecting liability which really does
neither of the parties any good, and that if the amount so wasted
could be put to use it would go far toward relieving the situation.

The effect of the doctrines of assumption of risk, contribu-
tory negligence, and the doctrine of the fellow servant is to leave
room for a large number of injuries in industry for which under
existing rules of law no recovery can be had against the master.
In fact, statistics show that in a large proportion of the injuries
actually occurring, the master under existing rules of law is not
liable. On the other hand, it must be constantly borne in mind
that in order to reach this result it must be clear that the master
is not legally in fault or that the servant has knowingly consented
to the risks, or by his own negligence has contributed to the injury
he has received. Stated in shorter phrase, these cases in which
the master is not legally liable are those in which the master was
not at fault or in which the risk has been assumed by the servant,
or in which the servant has contributed to his own injury. These
cases are, however, now annually so numerous, owing to the con-
stant growth of industries which are either inherently dangerous
or involve the use of powerful or dangerous engines and machin-
ery, that they at least challenge our attention and demand our
serious consideration. There is no doubt at all that modern in-
dustries cause a great deal of hardship for which under existing
rules of law no indemnity can be had from anyone. Even if the
law were changed in the manner already suggested, this would
still remain true in a very considerable degree. It is also doubt-
less true that those hardships commonly fall upon a class of per-
sons who by reason of their financial situation are ill prepared to
meet them. When tabulated and arrayed in their most striking
form they tell a very pathetic story and appeal very strongly to
our sympathies. At the same time it must be constantly borne in
mind that hardship is not necessarily injustice, and that there is
a vast amount of hardship in human life for which no remedy
seems to be afforded. So far as the hardships resulting from in-
dustrial accidents are concerned, they are no different in their
consequence from other hardships. We have recently had pre-
sented to us in the magazines pictures of dependent families left helpless by the death of their protector and supporter through industrial accident. The hardship, however, would be just as great if the death had been caused, as it is in so many instances, by tuberculosis or typhoid fever. For every case of hardship resulting from industrial accident its counterpart can doubtless be found in causes having no relation to industrial enterprises. This is, of course, no reason why a remedy should not be found for the hardships caused by industrial accidents, but it is necessary to keep in mind that the situation is not an uncommon one; that it does not cure the hardship simply to remove it from one pair of shoulders to another; and that the remedy which is to be adopted should be one which is consistent with right and justice. As the law of life and the law of the land both leave it, part of the hardship of life has to be borne at least directly by those upon whom it immediately falls.

It is said, however, that the burden of industrial accidents should not be left to be borne by the class upon which it now so largely falls, and that our laws should be so readjusted as to make the loss fall somewhere else. Where else can it be made to fall? There are obviously but two other places: Either upon the employer or upon society; that is to say, the employee must bear it, the employer must bear it, or society must be made to bear it, or it must be apportioned among part or all of them. The remedy which is most commonly proposed is that the law should be so readjusted that the whole of the loss should fall upon the employer. What are the reasons which can be adduced in favor of making this change? Two classes of reasons are sometimes advanced; one calculated to satisfy our sense of justice, and the other finding its justification in expediency or policy. Under the first it is urged, as it is in support of the rule permitting the stranger to recover of the master, that the master should bear all the risks of the business, because he initiates and carries on the business, and because the business is conducted for his benefit. The second of these is the one most commonly emphasized, and it is said because the master is to get all of the benefits of the business, he should bear all the risks. The reason is without foundation; the master in no proper sense gets all of the benefits of the business. It is true, of course, that in the ordinary case nobody starts and conducts a business merely for the sake of giving employment to others; but to say that the benefits of in-
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Industrial enterprise inure to the employer alone is to shut one's eyes to the obvious facts. Being employed is of as much benefit to the employee as being able to employ him is a benefit to the employer. The employee takes none of the risks of the business, but he gets his pay whether the business be successful or unsuccessful.

It is sometimes said that the employer insures his factory, machinery and other plant against loss or injury, and the question is asked why should he not also insure the human contribution of the employee in the same way. The answer to this question is not far to seek. The master insures his contribution because it is his. The laborer's contribution is his own, and following the same analogy he should insure it if he desires it to be insured.

From the standpoint of policy it is often urged that the employee is financially unable to carry the risk of injury. It must be carried by someone. The employer is financially better able to bear it and therefore, it is urged, the risk, regardless of any considerations of abstract justice, should be borne by him. As already pointed out, the shifting of the burden from the person upon whom it naturally falls to someone else for no better reason than that the latter is financially better able to bear it, is a most unsound proceeding and nothing short of the very strongest considerations of policy could make it justifiable.

But it is urged that though the risk should primarily be put upon the employer, he will not ultimately have to bear it because he can shift it upon someone else; and this undoubtedly is either consciously or unconsciously at the foundation of the opinion of those who insist that the loss should be thrown upon the employer. Upon whom can the employer shift the burden? The reply is, upon the consumer, and, through the variety of consumers, finally upon the general public. This proposition involves two queries, first, can the risk be so shifted, and second, is it just and proper that the persons upon whom it is thus to be shifted should bear it?

With reference to the first question, whether the risk can be shifted, this of course depends upon the circumstances of each case. In the case of some enterprises, dealing directly with the public, it is a simple and easy matter thus to shift the loss. In the case of railroad companies, for example, dealing constantly and directly with the public, the cost of insuring against injuries in the business could be easily added to the cost of transacting the business, and, except for the power of the same public to inter-
fere in the fixing of rates, could easily be charged upon the
patrons of the road in the same way that the cost of compens-
sating for accidents to goods and other property and to passengers
is already added. Many other kinds of business relating to the
public service will readily occur to mind, which stand upon the
same footing, and could be dealt with in the same way. On the
other hand, there are some kinds of business in which it would
be impracticable or impossible. Can a mine owner who carries on
mining operations under natural conditions which render the busi-
ness unavoidably more hazardous charge more for his coal than
his competitor whose operations are carried on under more favor-
able conditions? Can the grocer who employs servants charge
more for his goods than his competitor next door who employs
none? The small farmer, the greater part of whose product is
directly or indirectly consumed upon the farm, would have little
opportunity for shifting the loss upon the general public. The
same thing would be true of all kinds of domestic service. It
would be true in the case of most educational and philanthropic
enterprises. It would be true in most cases of professional under-
takings. In fact, it would be true in substantially every business
which is not affected by monopoly or in which industrial condi-
tions are not such as to leave the producer some power of con-
trolling the price of the output. On the other hand, in this con-
nection, it is fair to take into account that the kinds of business
in which it would probably be most easy to shift the loss are the
kinds of business in which the greater number of industrial acci-
dents occur.

With reference to the second question, whether it would be
just and right to shift the burden to the general public, many
considerations must be taken into account. In the first place it
cannot be conceded that it is just that the burden should be shifted
simply because it is possible to shift it. In the second place, no
one who follows the course of current events can fail to notice
that, between the great forces of organized capital on the one
hand and organized labor on the other, there is a constant, and
what to many at least seems a dangerous, tendency to shift an in-
creasing number of burdens upon the unorganized public. Theo-
retically the public always has its representatives who are alert in
its behalf. Practically, no one can fail to observe that the advo-
cates of the special interests, whether of capital or of labor, are
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everywhere most active and persistent. In the third place, it cannot fail to be noticed, and to impress us as well or ill according to our political and social theories, that this is a decided step in the direction of the socialistic or paternalistic activities of the state. Finally, there is a more important question which lies at the foundations of the whole matter. Any project in which the state embarks should be not so much remedial as preventive. Every inducement ought to be brought to bear upon employers and employees to make industrial accidents as few as possible, and therefore to cast upon the public only that residuum of the loss which proper care on both sides has not been able to prevent. Any assurance of protection from the public which is likely to make either of these parties relax in vigilance is to be deplored. In view of these considerations it is an important question—which must be solved before the general question can be properly determined—whether the loss ought not to be directly borne in some part by both employer and employee as well as by the general public. Personally, I have no doubt that if the solution of the problem is to be found in this direction, some scheme by which all of the parties in interest contribute is the one which should be adopted. It is, of course, true, as must always be taken into account in dealing with this question, that in the last analysis, society is driven by its sense of humanity to take care of the wrecks which either industrial accidents, dissipation, improvidence or misfortune strew so frequently along the pathway of life. This fact, however, should not be a justification for casting directly upon society a burden which in fairness and justice it ought not to bear.

But supposing it be admitted that some change is necessary, we must next inquire what changes are possible and how they are to be brought about.

In the first place, it must be recognized that no radical change can properly be expected from the courts. Courts sit to enforce the law as it exists and not to start out to revise or reform it in accordance with new principles. Whatever is to be done in this direction must be done by legislation. Something has already been done in the way of legislation, and some attention must now be paid to that. Very much more has been done abroad than in the United States, and we are often blamed for lagging behind in this important work. Some reason for this difference may be apparent when we come to consider the situation.
It is not within the limits of my time to attempt to review all of the foreign legislation, but that of Germany may fairly be taken as typical of one class, while that of England furnishes another type.

In Germany, the general method of dealing with the situation has been that of compulsory insurance, rather than that of the imposition of a legal liability to pay damages. Under the present law, which is the development of a process of legislation begun in 1884, the employers are required to insure all of the ordinary workmen, and provision is made for the payment of compensation for temporary injuries, for permanent injuries, and for death. The amounts to be paid are limited and depend upon the earning capacity of the person injured. The sums paid seem very small to us, but they are paid in many cases in which under the American law no sum could be recovered, and litigation with its delays and its expenses is practically unnecessary. In some of the more dangerous occupations, special provisions are made, and funds are established to which both employer and employee contribute, and to which the state also contributes a definite sum. The insurance is effected by insurance associations of the employers, based largely upon trade associations previously existent and to which we have nothing in this country which can be very closely compared. More or less conflicting reports respecting the results of the German system are heard, but the general result is said to be satisfactory, and it is certain that Germany, in the way of sickness and accident insurance and old-age pensions, makes more elaborate provision for the protection of its working classes than has yet been attempted in the United States.

In England, the common-law rule respecting the employers' liability was substantially the same as our own, inasmuch as both were drawn from a common source. The fellow-servant doctrine, first suggested in England, but first elaborately worked out in the United States, was accepted in its entirety by the English courts, and has been less modified by the superior servant or vice-principal doctrine than has been the case in the United States. In 1880, Parliament passed an employers' liability act which in general made the employer liable for injuries caused by negligently defective plant, appliances and machinery, or the negligence of servants clothed with the power of superintendence or direction, or given the control of signals, switches, engines and trains. This act, which is still in force, has furnished the model for some of the
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legislation in the United States. In 1897 a new measure was adopted which proceeded on the theory, new in the English law, and declared by the Departmental Committee to be not only anomalous, but "a departure from legal principle," of making an employer liable to pay indemnity to the servant without reference in general to the negligence of either of them. Various changes were made in the statute which it is not necessary here to enumerate, until 1906, when the present Workman's Compensation Act was adopted. That act provides in general that if in any employment personal injury by accident, arising out of and in the course of the employment is caused to a workman, his employer shall be liable to pay compensation in accordance with the schedule fixed by the Act. If the injury was caused by the personal negligence or the wilful act of the employer or of some person for whose act the employer was responsible, the employer may be held liable as before the passage of the act, for example, under the common law or the Liability Act of 1880, already referred to. If the injury was caused by the serious and wilful misconduct of the employee, no compensation shall be paid unless the injury results in death or serious and permanent disability. In case death results from the injury and the employee has dependents wholly dependent upon his earnings, the compensation to be paid shall be a sum equal to his earnings in the employment of the same employer for the three years next preceding the injury, with a minimum limit of £150 and a maximum limit of £300. If death does not result then certain stated sums are to be paid from time to time during the continuance of his disability. The act also makes provision for indemnity where the workman is incapacitated by an industrial disease of the classes enumerated in the act. The act makes elaborate and minute provisions for settling the immense variety of questions which must arise under such a provision, which it is not necessary to enumerate here. The indemnities to be paid under the act seem small to those who are accustomed to the verdicts often awarded by juries in the United States, substantially $1,500 being the maximum to be recovered in case of death; but it must be remembered that the act gives compensation in a great variety of cases in which under the common-law rules the employee could recover nothing, and the amounts recovered are usually received without the expense and delay of litigation. As pointed out by the Departmental Committee on Workmen's Compensation in 1904, the English acts do not attempt to give
complete pecuniary compensation. Their aim is to offer substantial relief from the consequence of the misfortune, but not complete indemnity.

With respect to the results which follow from the English legislation, the same report declares that it has not yet been long enough in force to enable that matter to be accurately determined, but that it has been in force long enough to indicate that there will be no return to the common-law system.

Much complaint is there made that the employer still remains liable under previous laws, and that the employee may practically try out each liability in succession, thereby breeding litigation and hard feeling. In order to bear the burden imposed upon them by the act in England, the employers have recourse to insurance in the casualty insurance companies. This puts in the hands of these insurance companies very great power of determining who shall in fact be employed, because if for any reason the insurance companies refuse to carry the risk with respect of any particular workman, he can obtain employment only from employers who are willing to take the risk themselves. A writer in the April number of the Scottish Law Review calls attention to that fact in very emphatic language, and declares that unless the law be amended or some other type of insurance provided, the result will be the virtual elimination from English industry of every person whom the insurance companies regard as a doubtful risk. Much complaint has also been made of the uncertainties of the act, and it is inevitable that in any scheme as complex and intricate as this one much time will be required to settle the meaning and construction of the Act.

The latest evidence that I have seen tends to show that the burden put upon the employers is considerable even with the low benefits prescribed by the act, and tending to increase; also that the cost of insurance under the plan has not yet passed beyond the experimental stage.

When the question arises as to what can be done in these respects in the United States, a number of considerations require attention which are not present in Germany or England. There are differences both economic and legal. Legislation respecting the relations of employer and employee must in general be state legislation. Congress has no control over the matter except so far as it affects interstate commerce. Uniform state legislation is

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exceedingly difficult to secure. Much of the business to be affected by any general legislation is more than state wide in its operation. A statute of Illinois which would impose a real burden upon an industry in Illinois might under modern competitive conditions entirely disable it in its competition with an Indiana industry of the same kind which has not been subjected to such a burden. I do not know how serious this objection may be, but if England, with the very moderate benefits provided for by the English act, finds that an appreciable burden is added to industry, the objection cannot be dismissed as imaginary in view of the much larger benefits which would probably be demanded in the United States.

But there are also serious differences in the legal situation. We live and legislate under written constitutions. Not only has each state its own scheme of constitutional limitations, but over all is the Fourteenth Amendment of the Federal Constitution demanding due process and the equal protection of the laws, and the Supreme Court of the United States with power to declare unconstitutional all legislation conflicting with it. Neither Germany nor England has such a condition to reckon with.

So far as the compulsory insurance system of Germany is concerned, we have practically no constitutional precedents, or business conditions, which would justify us in embarking upon it at the present time. Unless some scheme of voluntary insurance can be established, we are practically limited in this country to some form of legislation seeking to impose greater liability upon the employer. What can be done in this direction?

Suppose a statute to be enacted undertaking entirely to abolish the fellow-servant rule. Is such a statute valid? The fellow-servant rule was said in the Farwell case to rest upon the contract which the law implied from the circumstances and upon general considerations of policy. Legislation may no doubt declare a different policy and provide that no such contract shall hereafter be implied. But suppose it is said that not only shall such a contract no longer be implied, but that it shall not be lawful for the parties expressly to make such a contract. Here is not only an assertion of a new policy, but an interference with the freedom of contract. Freedom of contract is not, however, absolutely sacred. As put by Mr. Justice Holmes in a recent case: "There is no doubt that that freedom may be limited where there are visible reasons of public policy for the limitation." Are there

1"Minnesota Iron Co. v. Kline, 199 U. S. 593.
such visible reasons in this case—a case originally based in large measure upon the theory that public policy supported the precisely opposite view? There is no doubt that conditions change, and that views of public policy may change with them. With reference to the present question, it has been held in many cases that, so far as railroads are concerned, such a statute may be upheld.28 The same thing has been said as to carriers generally.29 There have been many suggestions that other kinds of business might be so dangerous or otherwise so specially situated as to sustain special regulations; but I know of but one case in which it has been decided that a general rule abolishing the fellow-servant doctrine for all kinds of business could be upheld, and that case relied largely upon the decisions which had been made in the railroad cases. It related, moreover, to a statute which seems not to have come legally into existence and apparently has not been re-enacted.30

Is a statute valid which declares that an employee may recover notwithstanding that his negligence was the direct cause of his injury, the employer being guilty of no fault? A statute has been upheld which made the employer liable where, though the employee was negligent, the employer had been guilty of a willful violation of a statute aimed to afford protection. The Federal Employers' Liability Act of 1906 provided that the contributory negligence of the employee should not bar his recovery if his negligence was slight and that of the employer gross in comparison, but that the employee's recovery should be diminished in proportion to the extent of his negligence. Such cases, however, fall far short of sustaining the original proposition.

Is a statute valid which undertakes to impose an absolute liability upon the employer without regard to any negligence either


29Employers' Liability Cases, 207 U. S. 463.

on the part of himself or of his servant or agent? Would such a statute amount to the taking of property without due process, or would it deny the equal protection of the laws? This question, perhaps, cannot be categorically answered. Common-law liability rarely if ever went so far as that. The liability of the common carrier of goods—one of the most stringent of the common-law liabilities—admitted of the exception of the act of God, the public enemy, the default of the owner. Statutes imposing liability upon railroad companies for the killing of cattle, without any fault on the part of the company, have been held unconstitutional in a number of cases.\(^2\) On the other hand, statutes imposing a very rigorous liability for fires set from locomotives, have been sustained in a number of cases.\(^2\) The common-law liability for fire was also very rigorous. Doubtless there may be some kinds of business so inherently and uniformly dangerous as to justify throwing all the risk upon those who carry them on, so far as outsiders are concerned, at any rate; but these cases must be exceptional. One who voluntarily aided and participated in carrying them on, however, like an employee, would have less satisfactory standing than a stranger. In deciding upon the list of such dangerous businesses we would be immediately struck by the fact that many of our most useful occupations are among the most dangerous.

It will be obvious from what has thus far been said that there is no practical difficulty in framing an employers' liability law which will modify the existing rules of the common law as to all employments in some respects, and as to certain of the most dangerous employments in other respects; though I think it quite clear that this statutory change cannot constitutionally go so far as is sometimes demanded. Some of these changes are desirable, and something has already been done in this direction.

A number of states have adopted statutes based largely upon the English Act of 1880, making the employer liable for injuries caused by negligent defects in premises, equipment and appliances; for the negligence of servants entrusted with the power of superintendence; and for the negligence of servants put in charge of specially dangerous instrumentalities like switches, signals, and the


like. These statutes are partly declaratory of the common law and partly in modification of it. The effect of most of them is to modify the fellow-servant doctrine as to railroads to a considerable degree, and often to abolish the assumption of risks caused by the neglect of the employer of his duties under the statute.

The most important piece of legislation yet adopted in the United States is the new Federal Railroad Employers' Act of April 22, 1908, the full significance of which has yet to be determined. This act provides that every common carrier by railroad in the United States while engaging in interstate or foreign commerce shall be liable to any person employed by such carrier for any injury caused to such person while employed in such commerce by reason of the negligence of the agents or servants of the carrier or of negligent defect in its premises, tools and equipment; that the contributory negligence of the employee injured shall not bar a recovery but that the jury shall diminish the damage in proportion; that contributory negligence or assumption of risk shall not affect the recovery when the employer's failure to comply with any statutory requirement for the safety of employees contributed to cause the injury; that no contract or other arrangement shall release the carrier from the liability created by the act; but that any insurance, benefit or indemnity provided by the carrier shall be deducted.

Inasmuch as most railroad companies in the United States will fall within the provisions of the act, and a very large number of their employees will come within its terms, though by no means all of them; and inasmuch as the federal law, so far as it relates to the commerce regulated, is supreme, this act, if upheld, is certain to have a very decided effect upon the railroad business throughout the United States. Many difficult questions are likely to arise under it, especially in determining what employees will come within its provisions and how it will be adjusted to the purely state conditions. It probably leaves out of its operation a large

28Alabama, Code of 1907, 3010; Arkansas, Kirby's Digest 1904, 6638-60; Indiana, Burns' Ann. St. 1901, 7083; Massachusetts, Rev. St. 1902, p. 931; Mississippi, Const. 193; Code 1906, 4056; New York, Laws 1902, p. 1748; Laws 1906, p. 1682; South Carolina, Const. Art. IX, 15; Virginia, Const. 162; 1904 Stats., 1294k.

29See Watson v. St. Louis, etc. Ry. Co., 169 Fed. 942, where Triebert, D. J., in the United States Circuit Court for the Eastern District of Arkansas, holds the act constitutional; Hoxie v. New York, etc. R. Co., (Conn.), 73 Atl. 754, where the Supreme Court of Connecticut, per Baldwin, C. J., holds several of its provisions invalid—both decided since this paper was written. See also 69 Cent. L. Jour. 235; 69 id. 277.
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class of the employees of the company, like those connected with
the manufacturing side of its business, and with construction and
repairs; and it imposes no liability where there is no negligence
on the part of the company or its servants or agents. The act
does not attempt to fix or limit the amount to be recovered, but
leaves that to be determined by the jury as at present. The deter-
mination of the construction and effect of this act will be awaited
with great interest. It probably marks the limit of the legislation
which can at the present time be expected from the Federal Gov-
ernment, and it necessarily leaves great fields untouched.

And now one more word in conclusion as to policy: If we
are to endeavor to spread some portion of the burden upon the
public, a liability law is not the means by which it should be at-
temted. Nothing more crude, unscientific, or generally unsatis-
factory could very well be devised. A liability law simply means
lawsuits, delays, aggravations, and, worse than all of these, abso-
lute inequality of operation. One jury will fix the compensation at
one sum, the next jury at another sum, and anything like adequate
prearrangement to meet such liabilities becomes obviously imprac-
ticable. It fosters, moreover, the speculative feeling which is inspired
by the possibility of a large verdict and prevents mutual adjustment.

The fact that in some cases more or less public burdens are
fixed as to amount by juries, as in condemnation proceedings, does
not meet the difficulties of this case; since in those cases not only
is the subject matter more definite in value but the temptation to
be influenced by mere sympathy or prejudice is not nearly so great.

Another great difficulty with a mere liability act is that it does
not dispense with the economic waste of litigations, or eliminate
the hard feelings and antagonisms, between employer and em-
ployee, which result from the same cause. Such legislation, more-
over, leaves a large class of cases unprovided for.

The most rational solution of the whole difficulty under pres-
ent conditions appears to me to be found in the efforts of those
who are attempting to induce both employer and employee, in
consideration of the undoubted advantage to each of them, to unite
in furnishing an adequate insurance in view of the exigencies of
the employment; and to eliminate entirely the question of legal
liability, which is not likely to be settled to the satisfaction of
either of them.

It will be a matter for sincere regret if it shall prove that the
contract clause of the new Federal Employers' Liability Act will
interfere with such arrangements.