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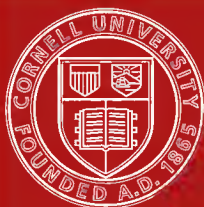
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Employers' liability for personal injury



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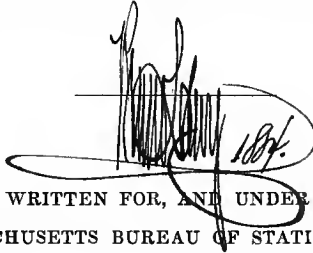
# EMPLOYERS' LIABILITY

FOR

# PERSONAL INJURIES

TO

# THEIR EMPLOYEES.

A large, stylized handwritten signature in black ink, appearing to read 'C. G. Fall', is written over the text 'AND UNDER THE DIRECTION OF'.

PREPARED AND WRITTEN FOR, AND UNDER THE DIRECTION OF,  
THE MASSACHUSETTS BUREAU OF STATISTICS OF LABOR,  
FOR ITS FOURTEENTH ANNUAL REPORT,

BY

CHARLES G. FALL

OF THE SUFFOLK BAR.

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# INTRODUCTION.

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These pages were written for the Commonwealth of Massachusetts, in accordance with a resolution of the Legislature directing an investigation of the law relating to the liability of employers for personal injuries received by their employees while in the discharge of their duties, and a consideration of what changes, if any, are needed in the existing laws relative to such liability; and they are published in this form with the consent of the department of the State Government for which they were prepared. An attempt has been made to state briefly the condition of the law, its origin and growth, and the reasons which support it; to show what is the law of other States and countries, and where it may be found; to analyze the judicial reasons given in support of the doctrine of common employment, as it is called, and suggest some reasons in favor of a change of the law.

C. G. F.

BOSTON, March, 1883.



## EMPLOYERS' LIABILITY FOR PERSONAL INJURIES TO THEIR EMPLOYEES.

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The legislature at its last session directed an investigation of the subject of the liability of employers to workmen for injuries received while in the discharge of their duty, and a consideration of what changes, if any, are needed in the existing laws relative to such liability. A careful investigation of the law and facts which bear upon the subject has been made, and it has been fully considered in its various phases, with especial care, for the first time, so far as known, in this country. It is a subject which, in all its varied relationships, is by no means easy of comprehension. It is fruitful of embarrassments, and hedged about with difficulties, but at the same time of no inconsiderable consequence to the welfare of the community. During the nine years ending with 1881 there were, according to the "Railroad Gazette," 2,372 persons killed, and 9,387 injured, in the United States, on the railroads alone; and of these, 1,266 were killed and 1,478 injured on the railroads of this Commonwealth. A large majority of both the killed and injured were employees. Of those killed in this Commonwealth, 358 were of this class, while of those injured there were 653. During the year 1881 alone, 72 employees were killed and 128 injured in this Commonwealth. When one single branch of employment causes such an annual sacrifice as this, it seems to be time to consider whether something cannot be done to prevent it.

The subject can be easily stated and plainly illustrated. It can be embodied in the simple question: Ought employees to have the same right to recover damages for personal

injuries that all others have? Should the rule of law which forbids employees from recovering damages from their employers for injuries caused by the negligence of fellow-employees and without their own contributory negligence be changed? Should they be allowed, for similar injuries from the same cause, the same right to damages from their employers that the rest of the world has? If, by way of illustration, an accident should occur on a railroad train, should the brakeman have the same right to sue for damages that a passenger has? If the brakeman's arm should be broken through the carelessness of a switchman or a gate-tender, should he possess the same right that a passenger would have for a similar injury? His injury would be the same, his sufferings would be as great. He would, no doubt, be quite as much in need of relief. Nor has he been more negligent, for both were unconscious victims.

To take another illustration. Suppose two persons had been injured in a mill or manufactory through the bursting of the boiler. One was a spinner or a shoe-cutter, the other was, perhaps, a boy who had come in to sell apples and candies. Ought the spinner or the shoe-cutter to have the same right to damages as the apple-boy? They, to be sure, were in the employ of the corporation, and were injured by the carelessness of a fellow-workman in the same employ. But the engineer who neglected his duties, and caused the accident, was as unknown to them as he was to the apple-boy. Not one of them, perhaps, had ever seen the engineer. They knew nothing of his habits or his knowledge of his business; much less could they tell whether he was careful or careless, skilled or unskilled, temperate or a drunkard. Ought they all to have alike the same right to recover damages from the owners of the mill or manufactory; or ought the apple-boy to have a right of action while the spinner and the shoe-cutter have none? Ought the boy to be paid—as well as money can pay—for his broken leg, while the spinner and the shoe-cutter can receive nothing by way of compensation? Ought they to be told, when they apply at the company's office, that nothing can be done for them, and the law affords them no redress, because they and

the engineer were fellow-laborers for the same employer? These are the questions which the resolution directs the Bureau to consider, collect facts concerning, and upon which to report.

#### CONTRIBUTORY NEGLIGENCE.

A majority of the injuries to employees as well as to others occur through their own carelessness, and where it is not entirely due to their own carelessness it is often due to it in part. The law of some of the States allows damages to be recovered where, of the two, the person injured is more careful than the person causing the injury. But the law of this Commonwealth is so strict as to demand that the person injured shall be in the exercise of due and reasonable care, and says that when he is in the least careless, and is not in the exercise of such care, he shall not recover damages. He is then said to have consented or contributed in some way to the accident by his own lack of ordinary care. And ordinary care is defined to be such care as men of ordinary sense, prudence and capacity would take under like circumstances. The law expects a man to have his wits always about him, and declares him guilty of contributory negligence whenever, by the exercise of ordinary care, he might have prevented the injury. And it makes men who are sitting in the calm atmosphere of a court room judges of whether at the time of the accident he did what a reasonably prudent man ought to have done under the exigencies of the moment. It will not allow a man to take the risk of an injury and compel some one else to pay for the consequences. He must have been prudent and careful while the one who caused the injury was reckless and careless. And this rule of law is applied by the courts with great strictness. The application puts out of consideration, in discussing this subject, all cases where the acts of the employees have in any way contributed to the injury.

#### RESPONDEAT SUPERIOR.

There is a well-known principle of law which makes every man liable for his own wrong-doing or breaches of contract whenever they have caused actual or legal damage. It is

founded in natural justice, and is as well recognized and as indisputable as Kepler's Law of Areas, or the axiom of geometry that a straight line is the shortest distance between two points. And not only is every man liable for his own torts and breaches of contract, but he is liable for those of his duly authorized agent, so long as the agent acts within the scope of his authority. He is liable, to quote the words of a celebrated authority, "for the torts, negligences and other malfeasances, or misfeasances, and omissions of duty of his servant, in the course of his employment, although the principal did not authorize it, or justify or participate in, or, indeed, know of such misconduct, or even if he forbade the acts or disapproved them." It is because he has acted through and by the hand of another. The agent has been another self, who has done the bidding of his master and been guided by his mind. The complications of life are so many and so varied, the operations of business are so complex and manifold, that most of the acts of many men are done by others for them. Corporations especially are only impersonalities, and all their acts are done by agents. But these acts are none the less the acts of their principals, none the less directed by them; and the principals are none the less responsible for them. Every hand in a cotton factory that spins a thread or tends a loom under the direction of the superintendent, is the superintendent's hand. Every hand that on a railroad drives a spike or moves a lever or a switch, according to his general orders, is the superintendent's hand. Every arm that in a quarry or a coal mine holds a drill or strikes a blow, is the arm of the superintendent, so long as it obeys his will. And the superintendent is but the mouth-piece of the corporation, or his principals. Were it otherwise, any one, by employing some one else to do his bidding, could escape the consequences of his own acts. When they were to his advantage he would reap the profits; when they were to his disadvantage he could disclaim them and escape the losses.

There are many acts which can be done better by the hand of another than by the hand of their author. A vast majority of the acts done and labor performed in the mechanic arts, and in general business, are better done by agents. How

many merchants are there who could sail their ships as well as the captains whom they hire? or make the goods they sell as well as the workmen they employ? How many builders could erect a staging or frame a house? How many founders could make a mould or finish the casting? How many publishers of a newspaper could set up the type or write the editorials? How many a jeweller could cut diamonds as well as the workman he employs? And they are responsible financially, morally, legally, for the acts of their agents, whether good or bad, so long as they are done within the general scope of their authority. An express company wants, perhaps, a bundle delivered in a hurry, and, in driving through the streets, one of its employees knocks down and injures a foot-passenger who is crossing the street. A banker wants to be driven home at the close of the day's business, and his coachman carelessly runs into another gentleman's carriage. The owner of a quarry wants some stone blasted out, and one of his quarrymen, while tamping the gunpowder into the drill-hole, causes an explosion which injures a passer-by. These agents are generally able to do well what they are told to do — better able than their principals. They were acting within the scope of their agency, and simply doing what they were told to do. They were not wilfully doing wrong, and, perhaps, never before had been careless. They, and through them their principals, were bound to exercise due care always. It was a duty they owed the general public, whom they were bound to protect from harm. They have for once broken this obligation, violated the contract of safety which the law implies in every act of danger. Some one has been injured by their carelessness, and they, as well as their employers, are legally liable to make such compensation in money as a jury may award.

The reasons which are the basis of this principle of *respondet superior*, making a master liable for the negligence of his servant, may be unjust and wrong, but it is too late to controvert them now. They are as firmly grounded as the foundations of justice itself. This principle is found in the law of England as early as the reign of Charles II. The first recorded reference to it is in the second volume of "Levintz's Reports," in the case of *Michael v. Allestree*. Black-

stone enunciates the principle on page 431 of the first volume of his Commentaries; but our ancestors might have found it among the laws of ancient Rome. *Ita scripta est.* So it is written, and so it must remain, unless the legislature would overturn the corner-stone of the law of agency. "It has long been the established law of this country," said Lord Chelmsford, in a famous case which will be hereafter referred to, "that a master is liable to third persons for any injury or damage done through the negligence or unskilfulness of a servant acting in his master's employ. The reason of this is that every act which is done by a servant in the course of his duty is regarded as done by his master's orders, and consequently is the same as if it was the master's act, according to the maxim, *Qui facit per alium facit per se.*" And this general principle is known in the civil and common law by the title *respondet superior* — the master must respond.

#### LIABILITY TO EMPLOYEES.

One of the outgrowths of this principle is the liability of employers for acts of their agents which have caused personal injury to their employes. The first recorded case of this kind that has been found occurred during the magistracy of Lord Holt, who was appointed Chief Justice of the King's Bench at the close of the English Revolution, by William and Mary; who held this high office for twenty-one years, during three reigns, until his death, and twice refused to accept the great seal of the Lord Chancellor. The case appears in the first of Raymond, and is thus stated: "The servants of a carman ran over a boy in the streets, and maimed him by negligence, and an action was brought against the master; and the plaintiff recovered. The servants of A, with his cart, ran against the cart of B, in which there was a pipe of wine, viz., sack, and overturned it, whereby the sack was spoiled and ran into the street: an action was brought against the master, and held good by Lord Holt, Chief Justice at Guildhall." If Lord Holt had sought for any other reason than his natural sense of justice as a basis for his judgment, he might have found a precedent in the rule of the Roman law which made the head of the household, the *pater-familias*, responsible for the negligence of



both his servant and child, and compelled him to make compensation for their negligence, or give up the wrong-doer, whether servant or child, to the person injured. Almost every principle of law has its roots in precedents which have been growing perhaps for centuries. The roots of some principles have been growing since the birth of society. The law of agency, which makes one person responsible for the authorized acts of another, is an outgrowth of the ancient relations of master and servant. In Greece, in Rome, in Judæa even, the servant was the slave of his master, over whom the latter had, under some circumstances, the *jus vitæ et necis*; the power of life and death, as well as the power of sale. And the strictness with which the master controlled his servants' acts was the reason why he was held to so strict a legal responsibility.

#### FIRST EXCEPTION TO THE PRINCIPLE.

It may perhaps be safely said that there is no recorded exception to this principle before 1837. The case of *Priestly v. Fowler*\* is the first variation from the principle which has been found. This was decided without any allusion to Lord Holt's decision. It was decided by Lord Abinger, who is better known as Sir James Scarlett, the ablest and most successful jury lawyer and verdict-getter in the annals of the English Bar, although in eloquence he was inferior to Lord Erskine. But, great as he was at the bar, like Erskine and some other celebrated advocates, he was not distinguished as a judge. The case is as follows: A butcher sent one of his men on a wagon which had been loaded by another employee, but loaded too heavily. The wagon broke down, and the man's thigh was broken. His Lordship decided that the butcher was not liable for the injury. The ground of the decision is not plain. It does not appear whether the wagon broke down because it was not in proper condition for the journey, or because it had been carelessly overloaded; and the opinion does not say whether the butcher is not liable because the law does not imply a contract of warranty as to the safe condition of the wagon, or because the law does not imply a contract to indemnify against the negligence of his servant.

\* 3 M. & W. 1.

There are several instances loosely cited by way of analogy, and with the skill which advocates possess in suggesting analogies, several of which are quite as applicable to other relations as to the relation of master and servant.

It was at this period, which was one of development of patents and of mechanic arts, and of large textile factories, that railroads began to be projected. The principal railroads of England and America were in their infancy, and needed to be fostered and encouraged. Important legal questions were arising as to the liability of corporations, and old principles of law were for the first time applied to the relations of corporations towards their creditors and employees. It was almost the beginning of the centralization of large wealth and capital in great manufacturing and mechanical operations. No man was wise enough to foresee the development which was to take place, or the vast importance which might accrue to some judicial decision made to meet the exigencies of a single comparatively unimportant case. The first case, involving the rights of employees against their employers which arose in this Commonwealth, was *Farwell v. The Boston & Worcester Railroad*,\* which was decided in 1842. It is this: An engine was thrown from the track and the engineer injured through the carelessness of a fellow employee in leaving the switch open. The engineer sued for damages. Charles G. Loring, a name still remembered at the Suffolk Bar, brought the suit, and contended that there was an implied stipulation in the contract of hiring between the railroad company and the engineer, "for the safety of the servant's employment, so far as the master can regulate the matter,"—a contract that the railroad company would indemnify the engineer for the negligence and want of ordinary care of its employees. The only valuable authority which was cited at the argument against this contention was *Priestly v. Fowler*, which the plaintiff admitted would have been a controlling authority had the switchman and engineer been engaged in a similar occupation. Although they were at work for the same employer, their occupations were different, dissimilar, and in every way distinct. One tended a switch on the line of the road, the other drove a locomotive

\* 4 Met. 49.

over the road from Boston to Worcester. Not only were their duties unlike; they knew nothing of each other, nothing of each other's carefulness or personal habits. So far as any knowledge of each other or so far as being engaged in a common employment was concerned, they might as well have been employed in different cities, and by different men. The Court, however, in an elaborate opinion written by Judge Shaw, followed the English precedent. The grounds of the opinion — the *ratio decidendi* — will be alluded to hereafter. It is perhaps sufficient to say here, that the Chief Justice found it unnecessary, because of the plaintiff's admission, to consider this as a case where the principle known as *Respondet Superior* should apply. But he confined the chief ground of his opinion to this point, — that there was no “implied contract of indemnity arising out of the relation of master and servant. It would be an implied promise arising from the duty of the master, to be responsible to each person employed by him in the conduct of every branch of business where two or more persons are employed, to pay all damage occasioned by the negligence of every person employed in the same service. If such duty were established by law, like that of a common carrier, to stand to all losses of goods not caused by the act of God or of a public enemy, or that of an innkeeper to be responsible in like manner for the baggage of his guests, it would be a rule of frequent and familiar occurrence, and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedent. But we are of opinion that no such rule has been established, and the authorities, so far as they go, are opposed to the principle.” He then cites his authorities, one of which is *Priestly v. Fowler*,\* and the other *Murray v. The South Carolina Railroad Company*.† This case is the leading authority in favor of the new rule, and contains the ablest discussion of the subject to be found in any English or American report.‡ And because the injured and the in-

\* 3 M. & W. 1.

† 1 McMullan, 385.

‡ This case was not published, so says an English text-book, till after *Bartonshill Coal Company v. McGuire* was decided, which was in 1858. But it seems this is an error; for, by referring to a volume in the library of Mr. Sidney Bartlett, it appears that the 4th of Metcalf's Reports was published as early as November 9, 1843. And it is remarkable that so able an opinion, which outlined the whole theory that pervaded the English decisions, should not have been seen, or earlier referred to as a leading authority.

juring workman, in all this class of cases, work in common for the same employer, this rule, for lack of a more descriptive title, was soon called the doctrine of common employment.

The similar case of *Hayes v. The Western Railroad Corporation*\* arose some years afterwards. Judge B. R. Curtis was counsel for the corporation, and Judge Fletcher, who had been counsel for the railroad in the earlier case, wrote an opinion sustaining the previous authority. The same question again arose in England in 1850, in the suit of *Hutchinson v. The York, Newcastle and Berwick Railway Company*.† Although *Priestly v. Fowler* was an earlier case, this is the leading English case, properly speaking, upon this subject. Here the question was likewise decided upon the ground that there was no implied contract of indemnity between employer and employee, but an implied contract to run the ordinary risks of the service. Baron Alderson says, in his judgment: "The difficulty is as to the principle applicable to the case of several servants employed by the same master, and injury resulting to one of them from the negligence of another. In such a case, however, we are of opinion that the master is not in general responsible when he has selected persons of competent care and skill." The reason for this rule is, he says, "They have both engaged in a common service, the duties of which impose a certain risk on each of them; and, in case of negligence on the part of the others, the party injured knows that the negligence is that of his fellow-servant, and not of his master;" which seems equivalent to saying that, after being injured, he knows who injured him. "He knew when he engaged in the service that he was exposed to the risk of injury, not only from his own want of skill and care, but also from the want of it on the part of his fellow-servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk." This is an implied contract, "a risk," he says, "which Hutchinson must be taken to have agreed to run when he entered into the defendant's service." And in a single sentence he then defines both the principle and the terms of the implied contract. "The principle is that a

\* 3 Cush. 270.

† 5 Exch.

servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service; and this includes the risk of negligence on the part of a fellow-servant whenever he is acting in discharge of his duty as servant of him who is common master of both." Here is the gist of this whole controversy.

On the very same day Chief Baron Pollock delivered a judgment in the case of *Wigmore v. Jay*,\* in which he affirmed the same principle without carrying it further, citing *Priestly v. Fowler*, which is the only authority cited in either of these judgments. The next year *Seymour v. Maddox*,† in the court of Queen's Bench, likewise affirmed the principle, and even went so far as to decide that the manager of a theatre was not liable for damages sustained by a singer from falling through a hole in the stage. *Skipp v. The Eastern Counties Railway*‡ followed soon after, in which the "risks incident to the service" were defined and extended by the decision that an employer was not liable for an accident caused by keeping an insufficient number of men for the work, because there was no implied contract with his employes that he would employ men enough to do the work. Baron Parke says: "The defendants were not bound to keep twenty servants; they are to be judges of the number. They are, indeed, bound to see that their servants are persons of proper care and skill." And Baron Alderson says: § "The jury are not to be judges of the sufficiency of the number of servants a man keeps. The plaintiff stayed in this situation three months without having an under-guard to assist him, and without making any objection." "He goes into the service," says Baron Parke, "and willingly incurs the danger." In 1854 *Couch v. Steel*|| was decided in the Queen's Bench, which is important because it carries this doctrine to the sea, and applies it to the relation of ship-owner and seaman. This case decides that a ship-owner who "so negligently fitted out and equipped his vessel that by reason thereof she was unseaworthy, and the plaintiff was thereby obliged to undergo unreasonable labor, and was

\* 5 Ex. 354; 19 L. J. Ex. 300.

† 16 Q. B. 326; 20 L. J. Q. B. 327.

‡ 9 Ex. 223; 23 L. J. Ex. 23.

§ *Vide* 3 Cush. 27 *ante*.

|| 3 El. & Bl. 402; 18 Jur. 575; 23 L. J. Q. B. 121.

injured in his health," is not liable in damages. Lord Chief Justice Campbell adopts the above principle, and says, "It seems to me that there is no contract or duty disclosed in this count for a breach of which the defendant is liable," citing *Priestly v. Fowler* in support of his judgment. And Coleridge, J., added, "The plaintiff must rely on a general principle that in all such cases there is an implied contract that the vessel is seaworthy." The law of this case has been changed by a statute which compels a ship-owner to suitably fit out his ship. Seamen are wards of the State, and were taken especially under its protection, because they were notoriously careless of their lives and property; like children, easily imposed upon; and were, especially while at sea, very much at the mercy of ship-owners and their captains, and almost never in a position to make a contract upon equal terms with their employers.

It was during the next year, 1854, that *Brydon v. Stewart*\* was decided in the House of Lords, which laid down the rule that a master who employs workmen in occupations attended with danger is obliged to exercise due care to have the tackle and machinery he uses in a safe and suitable condition, so that his workmen shall not incur unnecessary risks. This principle was made a part of the law of this Commonwealth by the leading case on this whole subject, *Farwell v. Boston & Worcester Railroad Corporation*,† the case before cited, in which Judge Shaw, with the invaluable assistance of Mr. Charles G. Loring and Judge Merrick, took a broad and comprehensive grasp of the whole question of employers' liability for injuries to workmen; and this, too, where it was a case almost of first impression. In *Gilman v. Eastern Railroad Corporation*,‡ Judge Gray, in a single sentence, affirms the rule. It is thus seen that as manufactures and mechanic arts are developing, as workmen are being employed in a variety of new enterprises and untried occupations, it is just and necessary that the law should, for their protection, impose upon employers additional obligations of care and circumspection. The currents of discussion in both countries run in the same direction. Any decision rendered by the English courts always receives consideration in this country, although

\* 2 Macq. 30.

† 4 Met. 49.

‡ 10 Allen, 233, 238.

the compliment has not until recently, with few exceptions, been freely reciprocated.

In 1858 two important cases were decided by the House of Lords. They were the cases of the Bartonshill Coal Company *v.* Reid,\* and the Bartonshill Coal Company *v.* McGuire. They were Scotch appeals, brought before the House of Lords in 1856, and under consideration for two years. Both of them were brought upon similar facts,—injuries caused to miners in hoisting them from a coal-pit, by the negligence of a fellow-workman in not stopping the engineer until he had driven the cage in which they were hoisted against the scaffolding with sufficient force to throw them out. Both overruled the unanimous judgments of the Scotch judges in favor of the plaintiffs, rendered on the ground that an employer is liable to his employee for the negligence of his authorized agent, though a fellow employee. The first affirms the doctrine already laid down,—that an employer is not liable to his employee for an injury caused by the negligence of a fellow employee. It also recognizes the rule already specified, which was first laid down in *Brydon v. Stewart*,† that an employer who employs workmen in dangerous occupations is bound to exercise due care in having his tackle and machinery, his plant, in a safe and proper condition, in order that his workmen may not be exposed to unnecessary risks. And, thirdly, it seems to recognize the rule which had been already laid down in another case, *Tarrant v. Webb*,‡ as well as by the dicta of Baron Alderson in *Skipp v. The Eastern Counties Railway Company*,§ that it is the duty of the employer to exercise due care in the selection of his employees, and see that they are persons of proper care and skill, and generally competent for the work in which they are engaged. And this principle has been incorporated into the law of this Commonwealth by a line of cases, of which the leading one is *Farwell v. Boston & Worcester Railroad*.|| In *Gilman v. Eastern Railroad Corporation*,\*\* the Court, in an opinion by Gray, J., says, “But it is quite as well settled, both in England and America, that a master

\* 3 McQueen, 266; 4 Jur. N. S. 767; 3 Mac. 300.

† 13 Macq. 30.

‡ 18 C. B. 797; 25 L. J. N. S. C. P. 263.

§ 9 Ex. 223; 23 L. J. Ex. 23.

|| 4 Met. 49.

\*\* 10 Allen, 233, 238; and 13 Allen, 443.

is bound to use ordinary care in providing his structures and engines, and in selecting his servants, and is liable to any of their fellow servants for his negligence in this regard." The judgment in the first of these cases was delivered by Lord Cranworth, and was sustained by the judgments of Lord Brougham and Lord Chelmsford, in the second case. A similar case in this Commonwealth was *Wood v. New Bedford Coal Co.*,\* which was decided in 1876.

The *ratio decidendi* of Lord Cranworth, who was then Lord Chancellor, is the same as that first announced by Chief Justice Shaw in *Farwell v. The Boston & Worcester Railroad*,† that there was no implied contract of indemnity, but a contract to run the risks of the employment. He says, "When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness against which their employer can not secure them; and they must be supposed to contract with reference to such risks."

#### IMPLIED CONTRACTS.

What is an implied contract? All contracts are either express or implied. They are either expressed in words, or implied by law. Whenever the parties have failed to express in words all the terms of a contract, which they both intended to express, the law supplies the deficiency. "Express contracts," says Blackstone, "are where the terms of the agreement are openly uttered and avowed at the time of the making—as to deliver an ox, or ten loads of timber, or to pay a stated price for certain goods. Implied are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me or perform any work, the law implies that I undertook or contracted to pay him as much as his labor deserves. If I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their real value." It is one of the fictions of the law, by which a promise is implied where none has been made; and it is a fiction which gained admission after no little opposition and delay. The judges were slow to

\* 121 Mass. 252.

† 3 Met. 49.



give it their approbation, because it compelled them to assist in becoming makers of law, instead of interpreters only. It was said by Chief Justice Holt, in the eleventh year of the reign of William III., "that the notion of promises in law is a metaphysical notion, for the law makes no promise but where there is one by the party;" and as late as the third year of the reign of Queen Anne, "there is no such thing as a promise in law."

Although the doctrine by which they became a part of the law is thoroughly recognized, contracts are implied only when justice, duty, or legal obligation seem to require it. But cases where this doctrine has been applied have grown up one by one, grown up as exceptions, and contrary to the spirit of the common law; and an exception has been made only when the court thought an occasion had arisen where justice required a change. This exception, when once made, has generally stood as a precedent for other judges to follow. A page or more might be filled with instances where such a precedent has been made, which was afterwards engrafted on to the body of the law. If, for instance, a principal is obliged to pay damages in consequence of the negligence of his agent, the law implies a promise by the agent to reimburse him. Or, as has been recently held in England,\* if an agent makes a contract in the name of his principal, he impliedly contracts that he has the authority of his alleged principal; and, if he has not, that he will take the contract upon himself.

#### GENERAL LAWS AND EXCEPTIONS.

Such exceptions have been carefully watched and guarded against by the wisest and most prudent judges. They are like exceptions to the general principle that there must be a privity of contract between the plaintiff and defendant, in order to render the defendant liable to an action by the defendant in the contract. To this general principle there had gradually grown up in this Commonwealth various exceptions, to which the court, in a celebrated decision by Judge Metcalf,† found it necessary to put an end, by col-

\* *Wright v. Follen*, 7 El. & Bl. 301, and 8 El. & Bl. 647.

† *Mullen v. Whipple*, 1 Gray, 317.

lecting and reducing the cases to three classes, and declining to allow the general principle to be further encroached upon. A general rule may sometimes work injustice. By the very terms of the definition, it is made for the generality of cases. If it does not work injustice in the majority of cases, it is about all the law can pretend to do. Laws are made for the benefit of men in the mass, and cannot be made for individual cases. A great many complaints that the law sometimes works injustice would be found unjust, if the person aggrieved would consider that, in the very nature of things, general laws can only cover the majority of cases. It is better that the law be stable and certain than vacillating and unreliable. If exceptions must be made, it is better for them to be as few as possible, unless they also form a class of cases. Legislation for individual cases is burdensome, and wrong in theory. In the very nature of government, a few must suffer wrong that justice may prevail for the majority. In a community where every man is resolved to have exact justice for himself, every man becomes a law unto himself. Anarchy must follow, or society will return to barbarism. In a well-governed society, which is thought to be the happiest social condition, every man must sacrifice something of his preferences, something of his individual rights, for the sake of the general welfare. In such a community as many general laws will be made as general welfare requires, while exceptions will be as rare as possible.

#### WHAT IS THE CONTRACT?

Accepting for the present, for the sake of the argument, the theory that the law implies that the employee makes a contract with his employer, the question at once arises, What is the contract? It is a contract, it is said in the decisions quoted, to run the risk of personal injury from the negligence of a fellow-employee. Now there is, it will be remembered, a fundamental principle of law, that there can be no contract without a meeting of minds, — no contract unless the parties mutually understand its terms, and mutually assent to them. When the contract is expressed, there is an actual assent; when it is implied, the assent is implied by law. Neither can there be an assent unless the

parties know to what they are assenting. It is, therefore, necessary for each party to have in mind, at the time of making the contract, the terms to which he assents. When the contract is implied, the law implies that each, at the time it was made, had its terms in his mind. Whether he had or not is a question of fact, and a question of fact based upon the ordinary experience of mankind. It is said that because workmen, when making contracts of employment, ordinarily have in mind the fact that they are to run this risk of injury from the negligence of fellow-workmen, the law should imply such a fact. This is a fact, it is said, of common experience, such a one as properly comes within the province of a jury.

With all deference to the opinions of the learned judges who declare this to be a fact of common experience, may it not still be questioned whether workmen, when engaging work, ordinarily have this fact in their minds? The law, it is true, is at present settled. But should the subject come before the legislature, it ought again to be argued upon its original merits. The same arguments should again be analyzed. The same facts which were made by the judges the basis of their opinions should again be discussed. The whole subject should be reconsidered as if it were a new question,—a question which the legislature were called upon to consider for the first time. Otherwise they would not come to a view of the subject with eyes open to the admission of all light, but influenced, perhaps, by the opinions of others.

Is there not room for grave doubt whether workmen, when making their contracts, actually consider their prospective danger of receiving personal injury? Is there not room to doubt whether their employers at such a time think of the question of liability, or ask themselves where the responsibility for damages rests should an accident occur? whether the employee runs his own risk, or is guaranteed against injury? This is a question to be decided by the common experience of ordinary men, which is the test the wisdom of centuries has established for the decision of questions of fact. Questions of fact have been left to juries, because it was thought that men familiar with business and

daily life would decide more justly than judges. Occasional flurries of excitement occur, when confidence is shaken in juries, but the great weight of public and judicial reliance upon the justice of their verdicts remains unshaken. If the common experience of ordinary men declares that the danger of injury is seldom thought of at the time of making such contracts, then the fact, which the judges have assumed as the basis of their opinions, does not exist. If, moreover, common experience declares further that workmen are not expected to run their own risks, but to look to their employers for protection, the fact is reversed, the theory falls to the ground together with the hypothesis upon which it rests, and the law should be reversed in favor of the workmen. This is the gist of the question, as presented in these opinions; and there is on both sides abundant opportunity for argument.

Were it not put upon the ground of an implied contract, but upon that of an actual contract unexpressed, a contract which could be proved in evidence by custom and usage, it would be another question based upon the same hypothesis, to be answered by a knowledge of the same fact. It would be in the end the same question, and would require the same answer. It would depend upon whether common experience declares that both workman and employer, at the time the contract to work is made, ordinarily expect the workman to take the risk, or the employer to protect him. When it is remembered that the employer is liable to every other third person for the negligence of his servant, is liable, for instance to a passenger for the negligence of an engineer in running his train, it would seem as though common experience would imply a like contract of indemnity with another servant, a brakeman, for instance, who is likewise a third person. Why should not the law create a similar contract in two cases so similar?

#### JUDGE-MADE LAW AND PUBLIC POLICY.

It is the province of the legislature to make law, and the province of the judiciary to interpret it. Where one class of men have had for centuries the right to declare what the law is, and have been respected for their character and held in honor for their authority, it would not be strange if

sometimes they had overstepped the boundaries of their province. Judges, like other men, are human; and the love of power, with the pleasure of using it, is one of the most natural as well as one of the strongest passions of the mind. For centuries they have administered justice, have arbitrated between their fellow-men, and been the tribunal of last appeal. From their judgment, when a court of last resort, there has been no appeal except by open rebellion. It is no wonder that they have made law sometimes, usurping the exclusive privilege of a co-ordinate branch of the government. It is no wonder that, with the growth of time, new law has grown up, and new precedents have been engrafted upon old principles misapplied; but it is never pretended that judges have the right to make law; never pretended that they have the right to invent a principle; nor can they render a decision contrary to a statute. It is seldom claimed that they can change the law as it has been laid down before their time by a superior or a co-ordinate court. But they may apply an admitted principle to a new state of facts. They may decide upon a different set of circumstances. New combinations of fact are constantly arising, and in applying to these facts a recognized principle, judges are sometimes obliged to establish new precedents. In doing this they are making new law. This is a part of their duty, and as necessary as justice itself.

Decisions are sometimes made because public policy demands it. Public policy is a general term, almost undefinable. It includes the policy of the State, and is always in harmony with good government and good morals. It is always in harmony with the genius and spirit of our laws and institutions, as they in turn are mutually in harmony with it. This is a principle used for various purposes. It is used sometimes to prevent the passage of a law, sometimes to prevent the setting up of a will. When, for instance, Daniel Webster wanted to break Stephen Girard's will, because it refused clergymen admission within the college walls, and encouraged atheism, he said it was a will made contrary to public policy. When, again, he wished to prevent the great steamboat monopoly from having, under an act of the legislature, the exclusive right to navigate the Hudson River, he argued that

such legislation was against public policy, and unconstitutional. When the anti-slavery leaders in the Senate wanted to prevent the spread of slavery to the Territories, they declared its extension to be against the public policy of the country. When Rufus Choate, in the Constitutional Convention of 1852, opposed the election of the judiciary for a term of years, he argued that the public policy of the State demanded that judges should have a life tenure, conditional upon good behavior.

These latter instances are the most common uses to which the doctrine is applied. It is the province of the legislature to decide what is or is not against public policy; and the legislature is usually jealous of any encroachment from this direction upon its ancient rights and privileges. The right to imply a contract is exercised by virtue of this doctrine of public policy. Certain contracts are implied by the courts, because they are in harmony with public policy. Certain other contracts are not implied. In the former instance the judges make a contract for the parties where they have failed to make one for themselves. They can by this means even defeat the real intention of the contracting parties. This power is exercised by virtue of the assumed rights to declare what is public policy, and to make a contract in accordance with this declaration. These certainly are extraordinary powers, which should be exercised with great circumspection, and jealously and scrupulously watched by the legislative branch of the government.

#### COMMON EMPLOYMENT.

The term common employment was early used to designate the employment of two or more workmen by one master. As a defence to actions for personal damages it was first applied to two persons, the person injured, and the person doing the injury, employed in a similar occupation. It was not, however, an appropriate term, because it did not suggest to the mind the principle which was the basis of this defence, but, instead, an example of the principle. It did not suggest that there was no implied contract of indemnity, but merely that both workmen were engaged to work for the same master.

As soon as the rule became recognized law in both England and America, the courts were called upon to define common employment, and say what classes of cases the term included. Having established the rule, they were asked to apply it, and say whether it should receive a wide or a narrow application. As case after case arose, they were asked to decide whether it came under the rule; whether in general the term should include only those employees who worked side by side in a similar occupation, as, for instance, masons building a wall together, carpenters erecting a staging, weavers tending adjacent looms; or whether it should have a wider scope, and embrace all employees who were hired by the same person, as, for illustration, all the hands in a factory, or all the employees of a railroad corporation. These were the limits of the application of the rule.

Between the two extremes there were various degrees where the rule might be held to include occupations more or less dissimilar. The chief question which embarrassed the courts was whether, as in the case where the rule was first announced, it should include only persons engaged in similar occupations, or should extend to any and every occupation, however dissimilar. Some courts gave it the wider, others the narrower, application. Some courts varied in their applications of the rule, and the same courts sometimes varied as new judges took the seats of their predecessors. No court attempted to actually define the term. No court attempted much more than to say that the particular case before it was one where common employment ought to be a defence to the action. Probably the term cannot be accurately defined, because it is impossible to anticipate the various kinds of employment, with their varying degrees of dissimilarity, which may arise. Several eminent authorities have declared it undefinable.

#### APPLICATION OF THE RULE.

If the rule of common employment had been restricted to persons at work side by side in a similar occupation, having a personal knowledge of each other's proficiency and habits of carefulness, it would not have been complained of as unjust. It might have been called a variation from a long-

established principle, and therefore wrong in theory; but it would have been so restricted in its application that it would not have been to employees a cause of severe injustice. Without great injustice it might have been made still easier for employers by excepting domestic and menial servants, such as coachmen and house servants. It is the wide extension of the rule that has done the wrong. Year by year, as case after case arose, and, through the ingenuity and persuasion of corporation counsel one court followed the example of another, the rule of common employment was gradually extended. The tendency has been of late to give it the widest extension, and include within its operation every employee who, either directly or indirectly, is paid by the same person or corporation, that is, from the same till.

#### WHO ARE FELLOW-EMPLOYEES?

An employee who in legal phrase is called a servant, is any person, male or female, minor or of full age, paid or unpaid, who works for another with his knowledge and consent. In the earliest case, *Priestly v. Fowler*,\* which was decided in 1837, two men at work for a butcher, one of whom was injured while they were riding together in his van, were declared to be fellow-employees. Here was a similar occupation, and they had as full knowledge of each other's care and judgment in loading the van as men can generally have. In the next case, *Farwell v. The Boston & Worcester Railroad*,† which was decided in 1842, and in *Hayes v. The Western Railroad*,‡ decided in 1849, an engineer and a switchman, and two brakemen, were in the respective cases declared fellow-employees. In *Hutchinson v. The York, Newcastle and Berwick Railway Company*,§ decided in 1850, and in *Skipp v. The Eastern Counties Railway Company*, the facts were similar to the preceding. In *Albro v. The Agawam Canal*,|| decided in 1850, the rule was extended, and an operative and his superintendent were declared within the rule. In *Wiggett v. Fox*,\*\* decided in 1856, the rule of common employment was still further extended, and said to apply to an employee of a sub-contractor, whose negli-

\* 3 M. & W. 1.  
§ 5 Ex. 343.

† 4 Met. 49.  
|| 6 Cush. 75.

‡ 3 Cush. 270.  
\*\* 11 Ex. 832.



gence caused injury to the defendant's servant, and who was hired to do work by the piece. The wages of the employee were paid by the defendant, but he worked under the direction of the sub-contractor. The rule was followed in this Commonwealth in *Johnson v. Boston*,\* decided in 1875, where one Johnson, who was injured by the caving in of a sewer, was under the "direct charge and management" of a foreman at work for the city, and under the "general supervision of the defendant's superintendent of sewers," and therefore under the general direction and control of the city, whose agent he was. In *Gilshannon v. The Stony Brook Railroad*,† a common laborer riding to his work gratuitously on the defendant's gravel-train, and the conductor of the train, through whose negligence he was injured, were declared fellow-employees. In *Brown v. Maxwell*,‡ a workman and his foreman, whose orders the former was bound to obey, and in *Sherman v. the Rochester & Syracuse Railroad Company*,§ a superintendent and an employee bound to obey the orders of the former, were called fellow-employees by the courts of New York.||

Perhaps it is not necessary to specify further cases so particularly: A hod-carrier, and the carpenter who carelessly built the staging which fell in and injured him; a baggage-master, and a draw-tender; a brakeman, and a gate-tender; a factory girl, and the superintendent who gave the very order that caused her death; a chief engineer, and the third engineer on board a steamer; a painter at work on an engine-shed, and a freight-handler who upset the ladder on which he was standing; a miner, and a workman employed by a sub-contracting engine-builder; the servant of a brewer, and a friend who gratuitously made the plans for a malt-bin, which fell in and injured the servant; a miner, and an overseer whose carelessness, while at work four miles away, caused an explosion, — have been adjudged by the courts fellow-employees. It will be seen by these decisions that the essence of common employment is a common employer and payment from a common fund.

\* 118 M. 114. † 10 Cush. 228. ‡ 6 Hill, 592. § 17 N. Y. 153.

|| In *Davis v. The Central Vermont Railroad*, it has been recently held, by the Supreme Court of Vermont, that the master-builder, under whose superintendence a culvert was so negligently built that it fell in, is not a co-laborer with an ordinary employee who was injured thereby.

The strictness with which the law of fellow-servant, by means of legal refinings, has been applied, and the acuteness which has been shown in discovering a relationship between employees, is worthy of notice. The legal mind has expended, under the golden patronage of large corporations, its scholastic subtlety in extending the doctrine of common employment, until a superintendent entrusted with the entire control of the business of a large corporation, with absolute power to select and discharge his assistants, to hire or discharge fully and freely every man of the two or three thousand, perhaps, who are under him, is the fellow-servant of the boy who sweeps an office, tends a loom, couples a car, or does any service, however menial. Because this doctrine was born in this Commonwealth, and has received here the tenderest care and widest development, it is sometimes called in this country the "Massachusetts doctrine." An acknowledged authority\* thinks "our courts have had a tendency to narrow the remedies for negligence by technical and unsound decisions, and especially to favor corporations at the expense of servants. If the Massachusetts doctrine should be adopted, it would afford complete immunity to a large class of employers, such as railroad companies, owners of large factories, foundries, mines, etc., who are accustomed, and indeed often compelled, to intrust the selection of almost all their servants to one or more superintendents. It would be almost impossible to prove that a superintendent had a reputation for selecting incapable subordinates, and that his employer was aware of it; yet, upon the theory which holds a general superintendent to be only a fellow-servant with those whom he employs, such proof would be necessary in order to maintain an action by one of the servants against the common employer, on account of the negligence of another servant."

*Wilson v. Merry*† is the leading English authority upon this subject. It is a case which arose in Scotland, and was there decided in favor of the plaintiff. The injury was produced by an explosion, caused by the negligence of an engineer employed by the defendants to sink a shaft in a coal-mine. Wilson did not know the engineer, had never seen

\* Shearman and Redfield on Negligence, sect. 102.

† L. R. 1, p. 326.

him, and had no knowledge of his capacity for the work entrusted to him. The engineer was generally competent for the responsibility he had undertaken, but was so specially incompetent in this instance, that fire-damp was allowed to accumulate and cause an explosion. The case was heard in the House of Lords in 1868, and the decision of the Scotch courts overruled. The Lord Chancellor (Lord Cairns) said it was not a question of common employment, but (returning to the *ratio decidendi* of the earlier cases) a question whether there was an implied contract of liability for a servant's negligence.

This decision checked the practice, growing up in the English and Scotch courts, of discriminating between the various kinds of common employment, and returned to the principle that it was purely a question of contract, as had been laid down in *Farwell v. The Boston & Worcester Railroad*,\* decided sixteen years before, and in *Hutchinson v. The York, Newcastle and Berwick Railroad*,† decided in 1850. It rejected the view that there were various grades of superior workmen, whose directions their inferiors were bound to obey; that, because their superiors were the authorized agents of their employers, their employers should be responsible for their acts. By declining to consider the various grades of similar occupations, it virtually re-asserted the wide use and construction by the English courts of the term common employment, by maintaining, in the words of Lord Cranworth, "that workmen do not cease to be fellow-workmen because they are not equal in point of authority." It furthermore destroyed the theory of the Scotch judges that whether they were fellow-workmen was a question of fact for a jury.

The Scotch judges, mindful of the injustice which they thought an indiscriminate application of the English rule would accomplish, decided that there was an important question of fact for a jury to determine. They declined to say that, as matter of law, the person who suffered the injury, and the person who caused it, were not fellow-employees, as had been decided in 1863, in the similar case of *Somerville v. Gray*.‡ They said that as there was, upon

\* 4 Met. 49.

† 5 Ex. 343.

‡ 1 Macph. 768; 35 Jur. 445.

the evidence, a reasonable doubt what relations of employment existed between them, — a doubt whether an engineer who for a handsome compensation planned the work, leaving the general and special details of the execution to foremen and subordinates, was a fellow-workman with an ordinary laborer. There was an important question of fact for a jury to determine. It made no difference if the question was whether there was an implied contract between the injured servant and his employer. It was still a question of fact.

This would seem to be a just and legal solution of the difficulty. It would relieve the courts of the charge of trespassing upon the province of a jury.

It may be thought unwise for the legislature to allow juries to exercise this right. It may be said that the interests of employers would suffer, if, upon any pretence or claim of right, actions for personal injuries caused by fellow-employees could be maintained against them, because it would encourage lawsuits. If the exercise of such a right would promote litigation, — and no doubt it would, — it is no argument against the granting of the right. Should rights remain uncreated, through fear of their enforcement? If so, all courts should be abolished, or all rights should be annulled. The State is bound to protect its citizens, and provide the means of enforcing their rights. Otherwise it is a government on paper, without power, and not entitled to respect. To hesitate to confer a right, lest its exercise may annoy the wrong-doer, is unjust; and no State can ever afford to be unjust. Whatever is morally right should never be politically wrong. Every civil right has its remedy, or the right is worthless. It carries with it the right to be enforced by some appropriate action at law. The same reason which would refuse to confer a right lest it should be enforced by a suit at law, would justify the abrogation of every right that now exists.

#### SUMMARY OF THE LAW.

The law, as already explained, bearing upon this question of liability, may be stated in a compendious form by the following propositions: —

1st. A person is liable to pay compensation in damages

for a personal injury done to another by his own wrongful act, neglect or default.

2d. A master is liable to pay compensation in damages for a personal injury done to another person by the wrongful act, neglect or default of his servant, while engaged in the ordinary course of his employment.

3d. A master is liable to pay compensation in damages for a personal injury done to another person by the wrongful act, neglect or default of his servant, under the master's personal supervision and direction.

4th. A master is *not* liable to pay compensation in damages for a personal injury done to his own servant by the wrongful act, neglect or default of another servant, acting within the ordinary course of his employment,

(a.) Unless he has neglected to use due diligence in the selection of a competent and trusty servant, or unless, upon learning that the servant was incompetent, the master neglected for an unreasonable time to discharge him ;

(b.) Unless he has neglected to use due care in selecting and furnishing suitable materials, implements, tools, machinery or plant to perform the service in which the servant who caused the injury was engaged ; or unless he neglected to use due care in keeping in proper condition suitable means to perform the service in which the servant was employed.

The master's liability is not changed simply by the fact that the servant who caused the injury and the servant who was injured were engaged in a common employment.

Common employment may be said to include every servant who is hired or paid, directly or indirectly, by the same master.

The master's liability is not changed because both servants were engaged in different grades of a common employment.

Neither is it changed because the injured servant was acting at the time of the injury in strict obedience to the orders of a superior servant, a superintendent or foreman, and was injured in consequence of his obedience.

Neither is it changed because the servant who caused the injury was employed by a sub-contractor, if both were under the general direction of a superior servant of the master.

A servant or employee is liable to pay compensation in

damages for a personal injury done to another servant by his own wrongful act, neglect, or default.

A servant or employee is bound to reimburse his master or employer for damages sustained in consequence of his wrongful act, neglect, or default.

But a servant or employee who has performed his work under the eye and immediate direction of his employer, is his agent, responsible (if to any one) to his master or employer only, not to the person injured.

While the master is not liable under any contract of warranty that the materials, machinery, tools, implements, and plant are free from defects, he is liable for injury caused by any secret defects known to himself, and when unknown to the workman, not disclosed to him.

He is also liable for neglect to exercise due care in carrying on his work or business under a safe and proper system or code of regulations.

And liable for neglect to conform to any statute regulations made by the legislature for the safe conduct or management of his machinery.

To any neglect or breach of these liabilities which the law imposes, the servant may by word or act assent, and thereby excuse the master from liability to him for personal damages.

#### LAW OF OTHER COUNTRIES.

It may be interesting in this connection to know whether the law of other States and countries conforms to the law of this Commonwealth in excluding an employer from liability for a personal injury to an employee, caused by the negligence of a fellow-employee.

#### *The Scotch Law.*

In 1680 the earliest Scotch case arose in which the rights of master and servant were adjudicated. But the first which decided the liability of a master for his servant's tort was *Dalrymple v. McGill*,\* in 1804, where it was held that a master was not liable for the act of his servant in cruelly beating another's horse, because it did not appear that he approved or had knowledge of the wrong. In 1813, in

\*Hume, 292.

*Linwood v. Hathorn*,\* the master was held liable for the act of his servant, without his knowledge or consent, in felling a tree with so little care as to cause the death of the plaintiff's intestate, who was passing. This judgment was sustained on appeal to the House of Lords. This tendency to hold the master to a strict liability for the acts of his servant was followed in *Hill v. Merricks*, † decided the same year, where he was held liable for the deliberate act of his servant in cutting down, without his master's authority, the trees of a bordering estate. So strict an obedience was exacted by masters at that time, that it was perhaps thought unwise to make it possible for them to escape liability by denying, after the injury had happened, that they had conferred any authority.

*Sword v. Cameron* ‡ is the leading case. It was decided in 1839, the year after *Priestly v. Fowler*,§ the leading English case, and declined to follow its authority. It was an action to recover damages from the owner of a quarry, because one of his quarrymen, while carelessly blasting a rock, had injured a fellow-workman. The court unanimously held the employer responsible for the culpable negligence and rashness of his workman. The next case, which arose in 1852, is *Dixon v. Rankin*, where the master was held liable for an accident in a coal-pit; and the court, after reviewing *Priestly v. Fowler*, unanimously followed the rule of *Sword v. Cameron*. The *ratio decidendi* of the case is thus laid down by the Lord Justice Clerk: —

“The law of Scotland as to the contract of service in regard to such matters as are here raised is perfectly fixed, and admits of no doubt whatever. The master's primary obligation in every contract of service in which his workmen are employed in a hazardous and dangerous occupation for his interest and profit, is to provide for and attend to the safety of the men. That is his first and binding obligation; I should say paramount even to that of paying for their labor. This obligation includes the duty of furnishing *good and sufficient machinery and apparatus* to enable them, with safety to their lives, to perform the work which they are employed in for his profit, and to keep the same in reasonable and good condition; and the more rude and cheap the machinery, and the more liable on that account to cause injury, without great care, control, and superintendence in the working of it, the greater the obligation to make up for its defects by the attention necessary to prevent

\* Shaw's Scotch App. 20. † Hume, 299. ‡ 1 S. 493. § 3 M. and W. 1.

such causing injury. In this obligation is equally included — as he cannot do everything himself — *the duty to have all acts by others whom he employs done properly and carefully in order to avoid risk.* The obligation to provide for the safety of the lives of his servants by fit machinery is not greater or more inherent in the contract than the *obligation to provide for their safety from the acts done by others whom he also employs.* The other servants are employed by him to do acts which, of course, he cannot do himself; but they are *acting for him, and instead of himself, as his hands.* For their careful and cautious attention to duty, for their neglect of precautions, by which danger to life may be caused, he is just as much responsible as for such misconduct on his own part, if he were actually working or present; and this particularly holds to the person he entrusts with the direction and control over any of his workmen, and who represents him in such a matter. The servant, then, in the contract of service in Scotland, *undertakes no risks from the dangers caused by other workmen from want of care, attention, prudence and skill which the attention and presence of the master or others acting for him, might have prevented.* His master is bound to him in obligations which are to protect him from such dangers. The principle of the contract in England being different, of course different results follow.”

In *Gray v. Brassey\** the same doctrine was emphasized, and the judges again declined to follow the rule of *Priestly v. Fowler* till they had been overruled by the House of Lords. The Lord President said that the master was liable for his own negligence and the negligence of his authorized servants; and Lord Cunningham, who expressed his opinion with most vigor and positiveness, said, —

“Although our reports for many years show that masters have been held liable to all third parties (without excepting fellow-servants) suffering from the negligence and unskillfulness of other servants hired by the employer, followed up by the late case of *Rankin v. Dixon*, in the Second Division, the books hardly show the extent of the understanding in Scotland, as *it is believed there is no man of common intelligence and experience in our affairs who entertains a different opinion.* Many industrious people may have relied on that security; and at any rate, when servants in this country have suffered severe injury from the fault of another workman hired by the master, we are not entitled suddenly to abrogate the responsibility of the latter, existing at the date of their employment. The law of Scotland on this point has been long established and acted on, while this question is new in England, arising merely under an act recently passed; and I must, with perfect deference, remark that the reasons assigned in the English cases for the distinction urged by the defender, do not appear to be altogether satisfactory or reasonable.”

\* 15 Court of Sessions Cases, 135.



Five other cases followed in the same line, — Baird v. Addie,\* Browlie v. Tennant,\* O'Byrne v. Burn,\* Hill v. Caledonian Railway,\* and Reid v. Bartonshill Coal Company, already referred to, and which, upon appeal to the House of Lords, was overruled. What had been declared law by twenty-five judges was changed by this judgment, and the law of both countries was made the same.

#### *The Irish Law.*

The Irish decisions, unlike the Scotch, follow the precedent of Priestly v. Fowler. The question was first raised in 1858, in M'Enery v. Waterford and Kilkenny Railway,† where the rule was affirmed; and all the Irish decisions uniformly accept it.

#### *The Law of France.*

This question arose in England, Scotland, and France about the same time. While the first English case was in 1837, and the first Scotch case in 1839, the first French case was in 1836. During the days of feudalism, and until the revolution of 1789, the authority exercised by the nobleman over his vassal was so great that the question would not be expected to have arisen. The development, in its various phases, of the law of master and servant, was gradual in France, as in the other countries, following likewise much the same course as the Roman law had followed. Pothier, in the "Traité des Obligations," by Dupui, page 278, says that the person who appointed another to perform a function must answer for the injury caused by the agent in exercising the power with which he has been delegated; and if the agent was appointed by one or more persons, they are all liable, without exception, *in solido*. But should the agent, in a matter not connected with the exercise of the function, ill-treat or rob any one, the principle would not be liable. Nothing is said by him as to the liability of a master to his servant for the negligence of a fellow-servant, because the law had probably not reached in his day that stage of development.

The case which arose in 1836 was begun in the court at

\* 16 Court of Sessions Cases, 490, 998, 1025, 569.

† 8 Ir. C., L. R. 312.

Lyons. It was an action against a master to recover damages to a workman, caused by the negligence of a fellow-workman in loading a cargo; and the master was not held liable. A similar decision was rendered by the local Court of Toulouse on the 26th of June, 1839, in another case, where a workman was injured through the negligence of a fellow-workman, by the glancing of a knife, while they were lopping bushes. The ground of the decision was that the servant was paid by the wages he received, for taking the risks of the employment. (See Gilbert's edition [1855] of "Les Codes Annotés de Sirey.") But this case was taken on appeal to the Cour de Cassation, where this decision was reversed on the 28th of June, 1841. The gist of the decision, as found in Dalloz's "Jurisprudence Générale du Royaume,"\* is as follows: "The master is liable for the injury which one of his servants or workmen has caused by negligence to another servant or workman in a work which they were charged to carry out in common. The wages agreed upon between the servant and his master cannot exempt the latter from his liability towards the party injured."

Both of the cases were decided upon a construction of Article 1384 of the Civil Code. The sections of the code which bear upon this subject are as follows:—

"1382. Tout fait quelconque de l'homme qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer.

"1383. Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence.

"1384. On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre ou des choses que l'on a sous sa garde. Le père, et la mère après le décès du mari, sont responsables du dommage causé par leurs enfants mineurs habitant avec eux. Les maîtres et les commettants, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés.

"Les instituteurs et les artisans, du dommage causé par les élèves et apprentis pendant le temps qu'il sont sous leur surveillance.

"La responsabilité ci-dessus a lieu à moins que les père et mère, instituteurs et artisans n'éprouvent qu'ils n'ont pu empêcher le fait qui donne lieu à cette responsabilité.

"1382. Every act of a man, of whatsoever nature, which causes injury to another, obliges him through whose fault it happened to repair the damage.

"1383. Every one is responsible for the injury he has caused, not only by his own act, but by his negligence or imprudence.

\* Vol. of 1841, p. 271.

"1384. A person is liable not only for the injury he causes by his own act, but also for that which is caused by the acts of others for whom he is answerable, as well as for any injury to property under his charge.

"The father, and the mother after the death of her husband, are responsible for any damage caused by their minor children who live with them.

"Masters and employers are responsible for any injury caused by their servants or employees in performing the duties in which they have been employed.

"Teachers and artisans are responsible for any injury done by pupils or apprentices while under their care.

"The above responsibility attaches, unless the father or mother, teacher or artisan, proves that he could not prevent the act which created the responsibility."

Another construction, and an English construction of section 1384, was given by the judicial committee of the Privy Council, on appeal from the Mauritius, which is under the control of French law, in the case of *Serandat v. Suisse*.<sup>\*</sup> This in effect decides that the master (foreman or overseer) is responsible for the acts of his servant done while acting under the orders, directions, and surveillance of his master (*sous les ordres, sous la direction et la surveillance du commettant*); which is equivalent to saying, as the English law says, done while acting within the scope of his employment. It is thus seen that the Civil Code holds the employer liable for the negligence of an employee to a fellow-employee.

#### *The Law of Italy.*

The law of Italy is contained in Article No. 1153 of the Italian Code, which was modelled upon the French code; and the portion of it which relates to this subject is almost a literal translation of the French.

#### *The Law of Prussia.*

The Roman Law has been called the Common Law of Prussia. There has been no complete codification of the Laws, but from Holtzendorff's Encyclopædia, an authoritative work, it appears that the principal or employer is liable,—

1. Where he has committed or directed a wrongful act.
2. Where he should have done the work himself.
3. Where he has not used due care in the selection or supervision of his agent or employee.

<sup>\*</sup>L. R., 1 P. C., 152.

Exceptions to these rules make the principal liable (1) for what is called the contractual fault of his agent; (2) make the occupier of a room liable for an injury caused by throwing out anything; (3) make innkeepers and ship-owners insurers of property intrusted to them. The employer is, in general, liable only for negligence in selecting and supervising his servant.

But, to relieve the hardship of this rule, owners of railroads, mines, quarries, pits, factories, are made liable, in certain cases, for the negligence of employes. The following is the substance of the law:—

Article 1 is as follows: “Where, in the course of the working of a railway, a man is killed or suffers personal injury, the undertaker is liable for the damage thereby caused, so far as he does not prove that the accident was caused by *vis major*, or by the default of the person killed or injured himself.” Article 2 is: “Where, in the case of a mine, a quarry, a pit, or a factory, the agent or the representative, or person employed to conduct or overlook the work, or the workman through his default in carrying out the work, has caused the death or the personal injury of any man, the owner is liable for the damage thereby caused.” Article 3 regulates the measure of damage. Article 5 provides that the undertaker or owner referred to in Articles 1 and 2 may not exclude or limit the application of the rules contained in the articles to their advantage, by means of a contract; that is to say, by means of a special agreement, and that contracts in contravention of this article are to have no legal effect; *i.e.*, railway companies, mining companies, factory owners, owners of quarries, etc., may not contract themselves out of the liability imposed by the law.

#### LAW OF THE STATES AND TERRITORIES.

A careful examination of the law of the States and Territories shows that the rule of non-liability universally prevails, except where it has been modified by local statutes. With the exception of Rhode Island, recent legislation changes the rule only as it affects the liability of railroads.

The following States and Territories have recognized the need of some change in the law:—

*California.* — See Codes and Statutes of California, 6971, sect. 1971; modified, however, by 6970, sect. 1970, to such an extent as to make the change of little importance.

*Dakota.* — See Revised Code of 1877, p. 396, Article 2, which is precisely the same as the law of California, and seems to have been copied *verbatim* from the statutes of the latter State.

*Georgia.* — The old law is completely changed in this State, so far as liability of railroads is concerned. The meaning of the statute is unmistakable; it reads as follows, viz., — Code of 1873, p. 521, 3036 (2981), — “Injury by co-employee. If the person injured is himself an employe of the company, and the damage was caused by another employe, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery.” The old law is laid down in 15 Ga. 349; 30 Ga. 146. The new law was enacted in 1855–56.

*Iowa.* — The law of this State is equally explicit in affording a remedy in like cases. Revised Code of 1880, vol. 1, p. 342, at sect. 1307, reads as follows: “Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed; and no contract which restricts such liability shall be legal or binding.”

The note to this section is as follows, viz.: “Under the statute, prior to the passage of chap. 169, laws of 1862, it was held, in harmony with the consent of common law authority, that the principal is not liable for damages sustained by an employe for the negligence of a co-employe in the same general service; and that the 14th section of the act, entitled An Act to grant railroad companies the right of way, approved Jan. 18, 1853, did not change the general rule on the subject.” (Sullivan *v.* The M. & M. R. Co., 11 Iowa, 421.) After the act of 1862 took effect,

it was held that while the 7th section thereof gave an employee of a railroad company a right to recover for injuries caused by the negligence of a co-employee, the liability was nevertheless measured by a different standard and rule, as to negligence, from what it is in case of injuries to passengers. While extraordinary care and caution are required with respect to passengers, ordinary care only is due to the employee." (*Hunt v. The C. & N. W. R'y Co.*, 26 Ia 363; *Wright, J.*, dissenting, and holding that under the statute the same rule applied to both. See a long list of cases in support of the new doctrine in the same note; viz., Revised Code of Iowa, 1880, vol. 1, pp. 343, 344, 345 and 346.)

*Kansas.* — (See Revised Laws of Kansas, 1879, p. 784, chap. 84, sect. 4914; taken from the Statutes of 1876, p. 869, sect. 4604.) The following law was passed in 1874, chap. 93, sect. 1. It took effect March 4, 1874, viz.: "Every railroad company, organized or doing business in this State, shall be liable for all damages done to any employee of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage." The preceding section, 4603, while not relating to the question of damages done to an employee, is yet worth quoting, as showing the extreme caution which is required of such corporations in Kansas. It is as follows (4603, p. 869, vol. 2, Kansas Statutes): "That railroads in this State shall be liable for all damages done to person or property, when done in consequence of any neglect on the part of the railroad companies." (L. 1870, chap. 93, sect. 1.) This section has changed the law in reference to the liability of railroad companies for injuries done by their trains to cattle on the track. In an action for such injuries it is not error to instruct the jury that the company must exercise ordinary care, and is responsible for ordinary neglect. (*St. Jos. & D. R'y Co. v. Grover*, 11 Kansas, 302.) This section applies only where a railway company, *as a company*, has been negligent; and does not apply to negligence between co-employees of a railroad company. (*Kas. P. R'y Co. v. Salmon* 11 Kas. 93.) The case, just cited, *Kas. P. R'y Co. v. Salmon*, was decided in

1873. It was, no doubt, owing to the hardship felt in this case, that the law was changed in the following year. The jury, in the lower court, had given a verdict for \$7,500 in favor of the plaintiff, for personal injuries resulting in the death of her husband; and a new trial was refused. The case was then taken up on error, and decided against the plaintiff; and the law was changed, as before stated, the following year.

*Mississippi.* — See Revised Code of 1880, p. 309, sect. 1054: “Every railroad company shall be liable for all damages which may be sustained by any person in consequence of the neglect or mismanagement of any of their agents, engineers or clerks, or for the mismanagement of their engines; but for injury to any passenger upon any freight train not being intended for both passengers and freight, such company shall not be liable *except for the gross negligence of its servants.*”

*Montana.* — See Laws of Revised Statutes, 1879, p. 471, sect. 318: “That in every case the liability of the corporation to a servant or employee acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him, as if such servant or employee were a passenger.”

The foregoing provision was enacted as part of a general act providing for the formation of railroads in the territory of Montana, and was passed with considerable difficulty over the Governor's veto. See Laws, etc., of the Territory of Montana, 1873 (extra), 104 and 109, note.

*Rhode Island.* — See Public Statutes of 1882, p. 553, chap. 204, sect. 15: “If the life of any person, being a passenger in any stage-coach or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not, in the care of proprietors of, or common carriers by means of, railroads or steamboats, or the life of any person crossing upon a public highway with reasonable care, shall be lost by reason of the negligence or carelessness of such common carriers, proprietor or proprietors, or by the unfitness or negligence or carelessness of their servants or agents, in this State, such common carriers,

proprietor or proprietors, shall be liable to damages for the injury caused by the loss of life of such person, to be recovered by action of the case, for the benefit of the husband or widow and next of kin of the deceased person, one-half thereof to go to the husband or widow, and one-half thereof to the children of the deceased."

*Wisconsin.* — "Every railroad corporation shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other servant or agent thereof, without contributory negligence on his part, when sustained within this State, or when such agent or servant is a resident of, and his contract of employment was made in, this State; and no contract, rule or regulation between any such corporation and any agent or servant shall impair or diminish such liability." (Published March 18, 1875; approved March 4.)

*Wyoming.* — See Compiled Laws of Wyoming (1876), p. 512, chap. 97, sect. 1, entitled "An Act to protect railroad employees who are injured while performing their duty." "Any person in the employment of any railroad company in this Territory, who may be killed by any locomotive, car, or other rolling stock, whether in the performance of his duty or otherwise, his widow or heirs may have the same right of action for damages against such company as if said person so killed were not in the employ of said company; any agreement he may have made, whether verbal or written, to hold such company harmless or free from an action for damages in the event of such killing, shall be null and void, and shall not be admitted as testimony in behalf of said company in any action for damages which may be brought against them; and any person in the employ of said company who may be injured by any locomotive, car, or other rolling stock, of said company, or by other property of said company, shall have his action for damages against said company the same as if he were not in the employ of said company; and no agreement to the contrary shall be admitted as testimony in behalf of said company." Sect. 2. "This act shall take effect from and after its passage." (Approved December 7, 1869.)

*Missouri.* — Revised Statutes (1879), Vol. I., p. 349, chap.



25, sect. 2121. "Damages for injuries resulting in death in certain cases, when and by whom recoverable." "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskilfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car, or train of cars; or of any master, pilot, engineer, agent or employee, whilst running, conducting, or managing any steamboat, or any of the machinery thereof; or of any driver of any stage-coach, or other public conveyance, whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any steamboat or the machinery thereof, or in any stage-coach or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage-coach or other public conveyance at the time any injury is received, resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay, for every person or passenger so dying, the sum of \$5,000, which may be sued for and recovered: First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant, for his defence, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency. The words 'any person' in this section do not include a fellow-servant." (64 Mo. 112, overruling 36 Mo. 13; 59 Mo. 285. See Revised Statutes, p. 350, note.)

Although at first sight this law would seem to afford a remedy for injuries sustained by a servant, and was quoted

during the discussion in England to show that Missouri had changed the rule of the common law, the Court of Appeals has decided (one judge dissenting) that the phrase "any person" does not include fellow-servant, and that his remedy (see cases above cited) remains the same as it was before the statute was passed.

It is thus seen that out of the whole number of States and Territories there are at least six of the former, viz., Georgia, Iowa, Kansas, Mississippi, Rhode Island, and Wisconsin; and two of the latter, viz., Montana and Wyoming, which have entirely abandoned the old rule, and provided a remedy by statute for the better protection of railroad employees; while there are two others, viz., California and Dakota, which have recently passed statutes defining the limit of liability.

#### *The Law of England.*

On the 7th of September, 1880, Parliament changed the law of England by passing the Employers' Liability Act (43 and 44 Victoria, chap. 42). The act was one fruit of the agitation of the rights and hardships of workingmen which has been in progress there for many years. The Corn Law agitation, which made Richard Cobden and John Bright two of the worst hated and best beloved of Englishmen, besides relieving the necessities of the poor, prepared the public mind for a more general discussion of the rights of labor, and taught workingmen everywhere to assert and defend their rights by systematic organization. Trades unions began to make the laborer's influence felt, began to aid or counteract the power of the conservative press and magazines. The right of petition to Parliament, which in the hands of John Pym was so effective, in the hands of Bright and Cobden, Thomas Brassey and Macdonald, was powerless. The ease with which monster petitions are obtained, by means of quick communication through the agency of railroads and the post, has made a petition an almost worthless catalogue of names.

By means of organization, and the mutual sympathy and courage gained by association and the discussion of grievances; by means of public meetings; by protective union leagues, and strikes, so called; by enlisting the influence of

public-spirited leaders whose hearts were tender to the wrongs and sufferings of poverty; by refusing to vote, wherever the right existed, for any member of Parliament who would not advocate their cause; by various other means, — some of which were wise, while others were unwise, — the workingmen obtained the aid of public opinion, and compelled the English government to stand and listen. All that a just cause requires is the privilege of being heard. As the result of this popular but peaceful uprising, some of their grievances have been alleviated, and some of their wrongs have been righted. They have now more reasonable hours of labor, and wages more proportionate to the labor done. Miners have been protected in various ways. Railway corporations have been brought to a more strict accountability to the public for the safety and convenience of their patrons. A few of the outposts in the great political battlefield of this generation between labor and capital, between the common people and great monopolies, have been taken, and an example set to the world of what political organization can accomplish.

The question under discussion, which, like the question of tenant right now agitating Great Britain, is an outgrowth of this general awakening to the rights of labor, and the absolute necessity of protecting the laborer, has been before the people for several years. The explosions occurring so frequently in mines, — explosions by which miners were killed sometimes by scores, — the frequency of accidents upon railways, — collisions amounting sometimes almost to disasters, — the more accurate knowledge of the number of persons annually killed in the ordinary prosecution of dangerous employments, which was furnished by the reports of the Board of Trade, — helped to awaken the public mind to the urgency of affording more ample protection, especially to miners and railway employees. The subject was at first presented to the public, as is usual, by writers for the magazines. It was then taken up by the daily press. It soon found its way into Parliament, where at first it attracted but little attention. The Social Science Association took it up for discussion. One of the earliest to write about it was Mr. Joseph Brown, a Queen's counsel, who, however,

took a rather conservative ground. Mr. Bulwer and Mr. Commissioner Miller, both of whom are also Queen's counsel, took an interest in it; but the lawyers, as usual, were rather conservative. Lord Shand, Mr. Thomas Brassey, Sir Henry Jackson, Mr. Samuel Morley, the Earl De la Warr, Mr. Knowles, Sir Daniel Gooch, Mr. Shaw Lefevre, all of whom were members of Parliament, took an earnest interest in the subject, and wrote or spoke upon it. Mr. Lowe, now Lord Sherbrooke, was the leader of the cause in Parliament, while Mr. Frederick W. Evans and Mr. Macdonald, for whose services in behalf of workmen they are about to erect a statue, were among the chief promoters.

As soon as the subject attracted sufficient attention in Parliament, the lobby was against it, and the attorneys for the railway, mining, and large manufacturing corporations and associations, also appeared in opposition. But the cause gradually gained friends; and the more they opposed it, the more popular it became with the people and their representatives. Among the friends of the measure there was a difference of opinion as to what should be the wording of the bill. Agreeing as to the end, they differed as to the means.

#### BILLS BROUGHT INTO PARLIAMENT.

Of the several bills brought into Parliament, one was introduced by Mr. Macdonald. By this it was proposed to do away with the defence of common employment, and allow an employee to recover damages as other persons can. The bill was applicable to mines, manufactures, collieries, railways, and to every employment, not excepting even domestic and menial service. If the butler trod upon the housemaid's toes, or spilled kerosene oil over the gardener's trousers; if the coachman, while driving the cook to church on a rainy day, carelessly tipped over the carriage and spilled her out; or if the housemaid left a coal-hod at the top of the stairs, over which the butler tumb'ed when coming down on a dark morning, — liability would attach to their employer. Had this bill excluded from its operation domestic and menial servants; had the cook, coachman, butler, gardener, housemaid, seamstress, — all servants who live under the employer's roof, and become intimately acquainted with each other's

habits, — been excepted from its operation, its chief objectionable feature would have been omitted. It would then have applied only to those servants, employees, or agents who are engaged in commercial, manufacturing, business employments, hazardous operations for profit, where this danger of loss may be taken as one of the liabilities incident to the carrying on of business.

Another bill was introduced by Earl de la Warr, one provision of which made employers liable for the acts of their duly authorized superintendents, foremen, overseers, managers, or whomsoever had the right to give orders and direct the persons injured. The theory of this provision is, that because the injury is caused by obeying the orders, commands, or directions of a foreman or superintendent, whom the person injured is bound by his contract of service to obey, the employer should suffer the consequences of his agent's negligence.

Another provision made the employer a warrantor of the tools and machinery he uses, liable for any secret flaws or defects, imperfections of design, etc., which may exist. The theory of this is, that, as one of them must take the risk of defect, the person who buys the tools, machinery, and plant, who can accept or reject them, who can order them repaired when unsafe or worn out, have them removed and replaced, is the one to take the risk. By the law, as it is at present, he is only bound to use ordinary care in selecting, constructing, examining, designing; he does not warrant the soundness of the materials used, or the suitability of the design. (See *Skerritt v. Scallan*,\* and *Shearman and Redfield on Negligence*.) If, through a defect in the shaft, an engine breaks down, or, through a defect in design or construction, a bridge gives way, as at *Ashtabula*, he would not be liable. This bill would, however, make the railroad liable to both employees and passengers, by virtually saying that the person or company who builds or pays for the engine or bridge, who has the right to examine, test, inspect, accept, or reject, shall take the risk, instead of the too trusting employee or passenger. It likewise, perhaps, extended, as did the former bill, the liability for the acts of domestic and menial servants.

\* 11 I. R., C. L. 389, sects. 86, 87.

A third bill which was introduced was endorsed by Mr. Brassey, Mr. Morley, Mr. Michael Bass, and Mr. Sullivan. It contained the same provisions as the preceding, except the last, and limited common employment to any manufacture, trade or business carried on for profit.

A fourth bill was brought in by the Attorney General, which was supposed to represent the views of the Gladstone ministry. This was the least radical of all, and seemed intended to carry out the views expressed in the Report of the Parliamentary Committee. None of them contained any clause allowing an employer to make a contract exempting himself from the liabilities imposed by each bill.

*The Subject considered by Two Select Committees of Parliament.*

The English Parliament, in the session of 1875-6, appointed a select committee to consider this subject, another in 1877, and, later still, other committees. The first consisted of fifteen members, and included Sir John Holker (then Attorney General), Mr. Lowe (now Lord Sherbrooke), Mr. Wyndham, Sir Henry Jackson, Mr. W. Stanhope, Shaw Lefevre, Sir Daniel Gooch, and Mr. Macdonald, and had full power to send for persons and papers. They began their session with an earnest desire to understand the subject; and, during the summer of 1876, summoned before them the men best informed upon the subject in the kingdom, — parliamentary agents for trades unions, barristers who had made the subject in all its bearings a special study, and were familiar with the law and its workings, secretaries of associations of railway employes, and builders. As they were unable to complete their work during that session, they reported the evidence in print, and recommended a further investigation.

The subject was again taken up at the next session, and most of the same members were re-appointed on the select committee. At this session, master builders, large employers of labor, secretaries and agents of associations of miners, proprietors of large mines, some of the ablest mining engineers in the country, managers of large collieries, chairmen of mining associations, managing directors of extensive

iron and coal companies, Lord Justices of the Court of Appeal, — Mr. Justice Bramwell and Mr. Justice Brett, — parliamentary solicitors, managers of the London and North Western, Great Western, and Great Northern Railways, Kidderminster carpet manufacturers, managing directors of locomotive works, and others, to the number, in all, of twenty-eight, gave their testimony. The examination of the witnesses was generally conducted by Mr. Lowe, each member of the committee asking whatever questions he chose.

*Mr. Lowe's Report.*

Two draft reports were submitted for adoption by the committees, one by Mr. Lowe, the other by Sir Henry Jackson. After laying down the universally accepted principle expressed by the maxim, *Qui facit per alium facit per se*, he says: —

“6. Your committee are warranted, by the evidence of the eminent judges and barristers examined before them, in regarding these judicial innovations with the utmost jealousy and dissatisfaction. They observe with some surprise that the common law, as it was believed to be up to 1837, has been entirely altered by judicial decision; and that not in any abstruse or remote point, but in a matter which most nearly concerns the interests of hundreds and thousands of Her Majesty's subjects.

“7. This has been effected by means which appear to the committee to be of the most questionable nature, — the inventing and enforcing a contract which never really existed. Where, beside what is expressed in a contract, there is something else in the contemplation of both parties which they would have expressed had either party required it, the committee can understand that the courts of law may be perfectly justified in saying that such a contract must be taken to have been entered into. But, so far from this being the case, the contract which the judges have assumed to be entered into by every operative, involving as it does the cession of most important rights without any consideration, is utterly unknown to the person to be bound by it, and was in its full extent, as will presently appear, unknown to the judges themselves.

“8 Lord Justice Bramwell remarks, ‘that the expression which has been used, that a servant contracts that he will make no claim against the master for injury done by the negligence of a fellow-servant, is an unfortunate one. The obvious difficulty in that mode of expressing it is, that neither master nor servant ever think of such a matter when they enter into the relation of master and servant.’ Justice Brett says (Question 1919), ‘I say now that the law is that you cannot properly import any condition or stipulation into a contract, except one which

in the minds of all reasonable men must have been in the contemplation and intention of both parties to the contract at the time it was made.'

"9. Another hardship connected with the proceedings of the judges is the gradual expansion of the contract which they created. They held that a fellow-servant could not by his carelessness impose any liability on his master; and then the question became all-important, who was a fellow-servant? By degrees it has been held that every one except the master in an industrial undertaking is a fellow-servant with every other person employed in any capacity; thus the implied contract has swelled gradually, till the term fellow-servant is no longer required, and the rule may be stated thus: The master is liable for his own personal negligence, and for no other. Had the court foreseen this result, all discussion as to what constitutes a common employment would have been unnecessary.

"10. Had the law been laid down at once in the full extent to which it has gradually advanced, public attention would doubtless have been awakened, and the whole question fairly considered by Parliament; but the doctrine has been expanding for thirty-five years, and has only just reached its full development in the Court of Sessions in Scotland, to the effect that the servants of a contractor are the fellow-servants of the servants of the person with whom he contracts.

"11. The question for the committee is, how they are to deal with a state of things which Justice Brett fairly describes as a bad exception to a bad law. Shall they maintain the exception on account of the badness of the law, or fall back on the law on account of the badness of the exception; or shall they seek some middle course, which may extricate them from both?

\* \* \* \* \*

"15. The committee, therefore, recommend that the funds of every industrial undertaking shall be liable to compensate any person employed in such undertaking for any injury he may receive by reason of the negligence of any person exercising authority mediately or immediately derived from the owners of such undertaking, with this qualification, that the liability to indemnify shall not extend to persons who, though exercising authority, are *bona fide* employed in actual labor as distinguished from superintendence." \* \* \* \* \*

### *The Committee's Report.*

The draft report of Sir Henry Jackson, less radical than Mr. Lowe's, was substantially adopted, and signed by a majority of the committee. The report is as follows:—

"1. The questions referred to your committee, though apparently two, are in reality but different modes of presenting one and the same inquiry; and they can hardly be considered apart from the much larger question of the nature and extent of the liability of employers for injuries to their servants in the course of their employment.



"2. At present a master is not liable for any injury which arises from the act or default of any fellow-servant, whether that fellow-servant be in a position of authority or not; and in ascertaining whether the person to whose act or default the injury is due is a fellow-servant, the widest possible construction is given to the term, 'Common Employment.'

"3. That a man should be liable for injury occasioned by his own act, neglect or permission, is obviously just. That a man should be liable for injury occasioned by acts which he has neither done or permitted, which have resulted from no neglect of his, or in disobedience to his order, or which he may have forbidden, is a result the justice of which it is not easy at once to recognize, and one which some eminent lawyers do not hesitate to describe as 'essentially unjust.' Such, however, is, and since the reign of Charles the Second, appears to have been, the law of this country as to injuries occasioned by servants in the course of their employment to persons not in the same employment. For such injuries the master employing the servant is liable, notwithstanding that the acts which occasioned them may not have been ordered or authorized, or may even have been forbidden.

"4. There is a strong concurrence of authority against the justice of this law, though there seems to be some difference of opinion as to its origin and historical development. Some regard it as having been established on considerations of policy, as distinguished from justice; others as a mistaken application of the maxim, *Qui facit per alium facit per se*. A very slight examination of the principle involved in this maxim, which obviously relates to agency, will show that it is inapplicable to cases where the act causing the injury is done either without authority, or in defiance of it. The probability is, that the rule was an application of the maxim *respondet superior*; and this probability is increased by the consideration that none of the decisions which have explained and determined the law have ever extended it beyond the limits to which that maxim would properly apply. The state of society in which the maxim *respondet superior* obtained, had passed away long before the English law was established; but there is a certain analogy, so far as affects third parties, between the position of a master hiring servants, and a master or *paterfamilias* employing his slaves or children. In each case there is a single task or enterprise carried on by several persons, and it is not difficult to see how the master, the *superior*, he who puts the enterprise in motion, was held responsible to persons outside for any injury resulting from the enterprise, by whomsoever occasioned; an analogy which may explain, if it does not justify, the law.

"5. But there is no record that the master or *superior* was liable for injury occasioned to any person engaged in the enterprise. The slave or child under the Roman law had no choice and no rights; and the English courts have always considered that a servant, who is free to choose whether he will or will not take part in the enterprise or task, by the contract of service itself undertakes to run all risks necessarily incident to the employment, the principal and most obvious of which is the injury which the negligence of others engaged in the same employment may occasion.

"6. For upwards of one hundred and fifty years after a master was held liable for injuries occasioned to strangers, no attempt to extend the liability to cases of injury occasioned by fellow-workmen is recorded; and when at last such an attempt was made in the well-known case of *Priestly v. Fowler*, which was decided in 1837, the court at once refused to extend the principle to cases to which it was not applicable, and that on the broad ground that a man is free to take the employment or not, but that if he chooses to do so he takes it with all attendant risks. The decision in the case of *Priestly v. Fowler*, if not the whole of the reasoning on which it is based, has been generally approved and followed by the courts in this country and in the United States.

"7. This judgment has, however, been the subject of much adverse criticism. It is contended that, whether the law throwing on the master the responsibility for injuries occasioned to strangers be just or unjust, the exception in regard to injuries occasioned by fellow-workmen is simply an exception to an established rule; and it is regarded as an exception specially directed against and injurious to those who from their position are most in want of the protection of the rule. But your committee consider that this view is not well founded; and they have the high authority of the late Lord Chief Baron Pollock for saying that the court, in *Priestly v. Fowler*, laid down no new law. He says, 'I believe it was the law; I thoroughly understood it to be so before a contention was called to it.' The true principle of law is, that no man is responsible, except for his own acts and defaults; and the rule relied upon is itself not a rule, but an exception, which the courts have explained and confined within proper limits.

"8. It is, however, to be observed that a series of decisions by the Scotch judges denied that the decisions of the English courts were consonant with the law of Scotland. In this condition of the authorities, an appeal was presented to the House of Lords in 1856, in the course of which the Law Lords affirmed that the law was identical for England and Scotland.

"9. There can be no doubt that the effect of abolishing the defence of 'common employment' (as has been actually proposed in a bill submitted to the House) would effect a serious disturbance in the industrial arrangements of the country. Sooner or later, the position of master and workman would find its level by a re-adjustment of the rate of wages; but in the meantime great alarm would be occasioned, and the investment of capital in industrial undertakings would be discouraged. Your committee cannot express their opinion on the question of the public policy involved in the existing law, better than by adopting the language of the distinguished American judge, who decided the case of *Farwell v. The Boston & Worcester Railway Corporation*: 'when several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much upon the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the other, 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 an indemnity, in the case of loss of life by the negligence of each other.'

"10. Your committee, therefore, are of opinion that no case is made out for any alteration in the law relating to the liability of employers to their workmen for injury in the course of their employment, except in the matters to which they now proceed to refer.

"11. A master is not altogether free from liability to his servant for injuries resulting in the course of his employment. If it can be shown that the master has omitted to provide the servant with proper materials and resources for the work (such as engines or scaffolding), or has been negligent in the choice of the persons to whom he entrusts the supply of such materials, or the arrangement of such work, or has been guilty of want of care in the selection of proper servants, the master is liable, even to his own servant, for any injury resulting from such omission or negligence. But, to establish this liability, it must be brought home to the master personally. The development of modern industry has created large numbers of employing bodies, such as corporations and public companies, to whom it is not possible to bring home such personal default; and there are other cases in which masters leave the whole conduct of their business to agents and managers, themselves taking no personal part whatever, either in the supply of materials or in the choice of subordinate servants

"12. Your committee are of opinion that in cases such as these, that is, where the actual employers cannot personally discharge the duties of masters, or where they deliberately abdicate their functions, and delegate them to agents, the acts or defaults of the agents who thus discharge the duties and fulfil the functions of masters, should be considered as the personal acts or defaults of the principals and employers and should impose the same liability on such principals and employers as they would have been subject to had they been acting personally in the conduct of their business, notwithstanding that such agents are technically in the employment of the principals. The fact of such a delegation of authority would have to be established in each case, but this would not be a matter of difficulty.

"13. Your committee are further of opinion, that the doctrine of common employment has been carried too far, when workmen employed by a contractor, and workmen employed by a person or company who has employed such contractor, are considered as being in the same common employment. Such cases do not come within the limits of the policy on which the law has been justified in paragraph 9 of this report."

### EMPLOYERS' LIABILITY ACT.

(43 and 44 Vic., ch. 42.)

In accordance with the recommendations of the committee, a bill was prepared, which, as amended in the House of Lords, on motion of Lord Beaconsfield, provides, in sections

1 and 2, that common employment, so called, shall not be a defence where a workman receives personal injury : —

1. By reason of any defect in the ways, works, machinery or plant connected with or used in the business of the employer, which defect existed in consequence of the negligence of the employer, or of an employee by him entrusted with the duty of guarding against any defect.

2. By reason of the negligence of any person entrusted with superintendence.

3. By reason of the negligence of any superior workman whose orders the person injured was bound to obey.

4. By reason of obeying proper rules or by-laws, or any rule or by-law duly approved by certain public officers therein specified.

5. By reason of the negligence, on a railway, of any person at the time in control of the train.

Unless the person injured knew, or failed, when necessary, to give notice of the defect which caused the injury.

Section 3 limits the sum recoverable as compensation.

Section 4 limits the time for recovery of compensation.

Section 5 makes any penalty received by any other act part payment.

Section 6 relates to the trial of actions.

Section 7 provides for the service of a notice of any injury received.

Sections 8, 9, and 10, respectively, defines terms used in the act, tell when it shall go into operation, by what title it shall be called, and how long it shall continue in force.

#### FARWELL v. BOSTON & WORCESTER RAILROAD CONSIDERED.

This case was decided in 1842, and was a case of first impression. It contains substantially all the arguments which in forty succeeding years have been adduced by the courts in favor of the rule therein adopted. The cause of action was the crushing of an engineer's right hand, through the negligence of a brakeman, a fellow-servant in the defendant's employ, in throwing the engineer's train from the track. The opinion is by Chief Justice Shaw, and follows, with elaborations, the line of defence laid down in Judge Fletcher's brief for the defendant. Charles G. Loring was counsel for the plaintiff. Judge Shaw, in his opinion, says that the case must rest either, first, upon the principle known as *respondet superior*, which makes every master liable, in tort, to third persons, for the negligence of a servant, so long as the servant acts within the ordinary scope of his authority (1 Bl. Com. 431; and 3 McQueen, H. L. 300-306); or, second, the master must be liable in contract, because public

policy requires the law to imply, in the contract of service, a contract of indemnity against the negligence of a fellow-servant. The principle of *respondeat superior*, requiring reparation, rests upon the great principle that every member of society is in duty bound to so manage his affairs as to do no injury to another. It matters not whether he acts by his own hand or by that of his duly authorized agent or servant; because whatever he does by the hand of another, he does by his own hand. (*Qui facit per alium facit per se.*) This ground, which is, as has been seen, the one upon which the advocates of a change of the law rest in part their arguments, was unfortunately abandoned by Mr. Loring, the plaintiff's counsel, and very little considered by the court.

The second ground was said to rest upon the further principle that where, in the contract of service, there is no express contract determining whether the master is liable, the court has a right to make for the parties what is called an implied contract. Public policy, it is said, allows and requires the courts to imply a promise, "arising from the duty of the master to be responsible to each person employed by him, in the conduct of every branch of business where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service." His duty, if it exists, would only be analogous to the duty resting upon every common carrier, to make reparation for any injury to merchandise entrusted to him which was not caused by the act of God, or the act of a public enemy; as it would also be analogous to the obligation resting upon an innkeeper to make reparation for any injury occurring to the baggage of his guests.

Having carefully laid down the two legal propositions upon which either an action of tort or an action of contract can be maintained, Judge Shaw proceeded to argue that the servant cannot recover in tort, because the relations existing between him and his master are "regulated by the express or implied contract between them; and he cannot recover in contract, because, although there is an express or implied contract, it is not a contract of indemnity." There seems to be a fallacy in this reasoning. It is based upon a wrong premise of fact, that there are no causes of action

with remedies, both in tort and contract. If stated in the syllogistic form, it would read thus :—

Major premise, — There is no cause of action for which there is a remedy both in tort and contract.

Minor premise, — If the servant has any remedy, it is in contract.

Conclusion, — But there is no remedy in contract ; therefore, the servant has no remedy. The major premise is false in fact, because there are causes of action with a double remedy both in tort and contract. For instance, a person may become liable by the same act (which is the cause of action) in tort for an assault, and in contract for a breach of a bond given the plaintiff to keep the peace. Again, a common carrier may be liable in tort for the conversion of merchandise entrusted to him for safe delivery, and in contract for breach of a special promise to deliver it to the person to whom it is directed. The person injured may be obliged to elect whether he will proceed in tort or in contract, but he nevertheless has both remedies. The dilemma, then, contained in the major premise of Judge Shaw, is what in logic is called a false dilemma. A servant who is injured by the negligence of a fellow-servant has likewise, say the advocates of a change of the law, two remedies, — one in tort, under the principle called *respondet superior*, and one in contract, under an implied contract of indemnity ; though, before trying his action, he may be obliged to elect which remedy he will pursue.

If, however, he has only one of these remedies, it matters not for the purposes of this discussion whether it is a remedy in tort, as trespass on the case for consequential damage, under the principle of *respondet superior*, or a remedy in contract, by virtue of an implied contract.

#### REASONS IN SUPPORT OF THE LAW AS IT EXISTS CONSIDERED.

A careful consideration of this opinion, of the opinion of Lord Abinger in *Priestly v. Fowler*,\* of the opinions of the South Carolina judges in *Murray v. S. C. Railroad*,† of the judgments of the House of Lords in the cases of the Bartons-

\* 3 M. & W. 1.

† 1 McMallon, 335.

hill Coal Co. *v.* Reid and *v.* McGuire,\* of the opinion of Judge Strong in *Sherman v. The Syracuse & Rochester R. R.* † (the first case in New York which does any more than quote the earlier authority of other courts), and various other leading cases in the various States, has deduced the following reasons in support of the law as therein laid down, which, in a spirit of candor and deference, will be carefully considered *seriatim*.

### I. — *Is the Servant the Master's Agent?*

The master, it is said, is not responsible, because the servant who caused the injury is not his agent.

That he is his agent for certain purposes there can be no doubt. He is his agent for certain purposes by virtue of his being a servant. Whether he is an agent for the purpose of doing the particular act which causes the injury, is the real question, which must carefully be kept in mind to avoid, what is the cause of so many disagreements and discussions, confusion in the use of terms. This is a question to be decided by an interpretation of the words which were used when creating the agency, aided by a full knowledge of the authority usually conveyed by terms of general agency. For instance, whether A has authorized B to do a certain act, is a question of fact to be decided by interpreting the words A used. If, for example, A was the owner of a cotton-mill, and should tell the engineer to turn the steam on five minutes before the usual time, and while the weavers were cleaning their looms; and if one of them through this act of negligence should be injured, there would be no doubt that the engineer did a certain act; no doubt that, for the purpose of doing this act, he stood in the owner's place, acting within the scope of authority conferred; no doubt that, in the usual and legal meaning of the words, he was his agent.

But suppose, further, that the owner denies that he told the engineer to turn on the steam. How can the question of agency be determined? It is a question of fact, is it not, and not a question of law? And, as a question of fact, and not of law, it must be determined upon a full knowledge of

\* 3 McQueen, 266 and 300.

† 17 N. Y. 153.

all the circumstances, the *res gestæ*, as presented by the testimony of whoever knows about the circumstances.

And suppose, further, that there were no words used, but that the steam was turned on, as is usually the case, by virtue of a general authority as engineer. It remains still a question of fact, which must be determined with the aid of any evidence which can be given as to the authority which this engineer had, or which engineers usually have. It is still, however, a question of fact. If the engineer did an act which caused an injury, is it for the court to say, as matter of law, that he was not, for the purpose of doing this act, his employer's agent? Had the steam been turned on in the exercise of a general authority, and no injury had resulted, the agency would not have been disputed. Now that an injury has resulted, can the court say, as matter of law, that because the act happened to work an injury, no agency existed? It is the same act, whether it did or did not cause an injury.

The circumstances of no two cases are alike, and each question of agency must be decided upon its own particular circumstances. Are they not questions of fact which, as was done by the Scotch judges in *Wilson v. Merry*, should be left to a jury? Should the judges attempt to say beforehand that in every case where a servant injures a fellow-servant he is not his master's agent? Are they not passing upon a fact which should be left to a jury? Are they not stepping beyond the boundaries of their legitimate province? Is not law so made what is called judge-made law?

## II.—*Is the Rule of Non-Liability the Better Policy?*

“Considerations of public policy and general convenience, which are the basis upon which implied contracts rest, requires that employees should take their own risk. For example, railway travel would be less safe if the employee knew that in case of injury he could recover damages of his employer. To compel him to take his own risk is strongly calculated to secure his fidelity and prudence.”

This is an argument which is of course based upon experience. It means that, from a knowledge of human nature, there is danger that employees might injure themselves for



the express purpose of recovering damages. This argument (first used by Lord Abinger in *Priestly v. Fowler*), has been repeated often in defence of the existing rule. It is, however, a question which judges are no better capable of deciding than other equally intelligent and experienced men, and one of those questions of fact which the policy of the law has usually referred to juries.

While, no doubt, there are those who would be purposely careless, — for all men are not always honest, — are not such men exceptional? Most people are honest. Most people are prudent. Most people prefer sound limbs and bones; prefer life, health or happiness to death, suffering or misery. Most people are averse to pain. Is not this as true of railroad employees as of the generality of people? Rules of law are made to meet the majority, not the minority, of cases. Is it just or wise to establish so important a rule through fear that a few persons should be dishonest to their employers, and cruel to themselves? Is it not compelling too many to suffer for the probable sins of a few? Is it not depriving too many of a benefit, lest a few should acquire more than they deserve? Is it not refusing to do justice to the many, lest the few should abuse a right? Is it not making too low an estimate of human nature, to think that employees would injure themselves, and perhaps others, in order to get money damages? Should the lives and happiness of all railroad employees, and perhaps the happiness of their wives and children, be left without the damage-right allowed to passengers, lest a few dishonest officers should abuse the right by exposing themselves to the risks and uncertainties of an injury? It should be remembered, as has been elsewhere suggested, that this argument, based upon public policy, is one which comes more properly within the province of legislators, who, in a form of government like ours, are the rightful determiners of what laws the public policy of the country requires.

### III. — *Does the Employee Take the Risks of the Employment?*

The employee, it is said, takes the risks of the employment by entering into it with his eyes open.

That in a legal point of view, so long as the law remains as at present, he takes the risks of the employment, there is no doubt. If he is injured, under the law, as it exists, he can recover no damages; and every man, according to a well-known legal maxim, is presumed to know the law. But the argument rests, not upon this presumption of law, nor upon the fact that a servant, if injured, cannot, under the law, recover damages of his employer. It must rest, in order to have any force, upon another presumption, — a presumption of fact, — that the employee, at the time of entering into the contract of service, actually thinks of the question of damages, and actually decides to take his own risk. In order that this argument may have full force, it is necessary to presume that the employee at such a time actually stops to think of the possibility of his being injured; stops to think of the question of liability for damages in case of injury; that he realizes, with full knowledge of the law, that his employer is not liable, but that he must take upon himself the risk of recovering damages. Unless the employment is a dangerous one, it is improbable that, when engaging to work, the idea of personal injury ever enters his mind. When he enters into a dangerous employment, it is improbable that he would think of the question, who is liable to him for damages in case of injury. Though all men know that they must die, few men, in a healthy state of mind, ever quite realize that the shaft of death is likely to strike them at any moment. We see men dying around us, — friends and neighbors; see others sick or meeting with accidents; but never quite expect that a similar fate will overtake us. We read that an acquaintance has been killed by a railroad accident; has received an injury from a fall of snow while passing a building; has been drowned by the capsizing of a boat; has been accidentally shot: but we go on as before, riding in cars, sailing in boats, or carrying fire-arms. Is not the same true of the employee? Does he stop to think that he may be injured? that he may be in need of compensation in damages? that he cannot recover them of his employer? How many passengers, when they buy their railway tickets, stop to think that they do *not* take their own risks? Why should these same persons, when

entering into a contract of employment, stop to think that they *do* take their own risks? The argument that the employee takes the risk of the employment with his eyes open seems to be open to exception.

IV. — *Is the Price of Labor Proportionate to the Risk of the Employment?\**

It is further said in these judicial opinions, as a corollary of the preceding argument, that the employee is paid for taking the risk by proportionately higher wages. This argument, like all of the preceding, is based upon a presumption of fact, derived from experience.

What regulates the price of labor? Political economy, which deals so much with general theories, tells us that the price of labor generally depends upon the ratio of the demand to the supply, which itself is regulated by the proportion between the number of laborers and the circulating capital employed directly in the purchase of labor. There are various other causes which assist in determining the price of labor, such as the state of trade, the price of food, rent, the price of the commodities used by laborers, the increase or decrease of population; but, more than all, the prevailing standard of living.

There are various causes of the increase or decrease of the price of labor inherent in the nature of the employment; such as the cleanliness or dignity of the employment, the ease or difficulty with which it is learned, constancy or inconstancy of occupation, the degree of confidence required, the responsibility reposed, the certainty or uncertainty of success. There is also no doubt that wages ought to depend in part upon the security or danger attending an employment. But whether they do or not cannot be known except theoretically, as facts which seem reasonable are taken for granted — upon the theory that what ought to be is — without an accurate knowledge of a vast mass of facts, and a calculation and comparison of figures. This does not appear to have been done by the judges, nor by any one, with much nicety and accuracy. The committees of the English Parliament made some examination of the question, by asking the opinion of various employers of

\* See p. 85, *post*.

labor and men of large experience in business affairs. The investigation elicited the fact that the risk of the employment had very little effect upon wages. A Somersetshire collier, working in an employment more than ordinarily dangerous, receives 3s. 6d. a day; while a joiner, whose occupation is attended with little if any danger, receives 5s. a day. The problem can be determined in a general way, by ascertaining whether railroad employees are generally better paid than workmen in less dangerous occupations, than farmers or laborers, for instance, in proportion to their services. It can be determined with a little more nicety by ascertaining whether brakemen and shunters, who are engaged in the most dangerous employment, that of coupling cars, are really paid more or less than other employees of like capacity.

On the English railways the shunter receives from 20 shillings to 30 shillings per week, — less pay than any other employee, and about half as much as an engineer. A “green” shunter — one who has just begun to work — receives from 20 shillings to 22 shillings; while an experienced shunter, who is more useful to the company and less careless of himself, receives on an average from 25 shillings to 30 shillings per week. Both receive less than a porter, whose labor is less dangerous.

#### V. — *Grades of Common Employment.*

As soon as the term common employment came into use, it was evident that there would be difficulty in defining its limitations. Should common employment, as a defence to actions for damages, include all employees who work for a common employer, or only those who work side by side in the same kind of occupation? Should it include, for instance, all the men who work in a colliery, or should it distinguish between the half dozen or more different occupations, — the men who go first into the mine, to test for coal gas, and see if the mine is fit to work in; the miners, who work with pick and shovel; the men at the mouth of the pit, who attend to the hoisting machinery; the foremen of the various gangs of workmen; the managing engineer and his special assistants, who give the general directions as to the sinking and work-

ing of the shaft. In a crude way, Lord Abinger, in the first case decided, cited by way of analogy various instances where, as he thought, the law would work a hardship, most of which were taken from household and menial service, where no sensible man claims that distinctions should be made. But now that the gigantic and manifold operations of business have outgrown the crude simplicity of those primitive days of the development of manufactures, railroads and the mechanic arts, the importance of drawing distinctions is more apparent and necessary.

The Scotch judges, with singular foresight and discretion, saw that the rule could not with justice be made to apply to every person who worked for one employer, and was paid, directly or indirectly, from the same purse; saw the injustice of making a workman suffer in consequence of the negligence of one whom he did not control, knew nothing about, and perhaps had never seen; and attempted to solve the problem of common employment, first, by making an employer liable for the acts of an employee engaged in an occupation entirely dissimilar to that of the person injured; afterwards, by allowing all the circumstances of the employment to be submitted to a jury, who should decide whether, upon consideration of all the facts, the relation between the fellow-employees was so distinct that one ought not to be compelled to suffer for the negligence of the other.

The English and American courts had, however, gone so far in the direction of making common employment include every man who worked for a common employer, that when in 1868 the case of *Wilson v. Merry*,\* on appeal from the Scotch courts, came before the House of Lords, the distinctions which had been drawn in Scotland were overruled.

And when again the same question came before the courts of New York, Judge Strong, in the case of *Sherman v. The Syracuse & Rochester Railroad*,† declined to make any distinction, principally for the reason that it would be difficult to draw the line, and say when the occupations were so similar that the employer should not be liable. This, were it the only reason given, would be equivalent to a refusal to do justice in a court of justice, because of the difficulty of making an attempt.

\* L. R., 1 Scotch Appeals, 326.

† 17 N. Y. 153-156.

The hardship of this rule will be seen when the severity of its application is realized ; when it is remembered that it includes a carpenter building a shed, and the engineer whose negligence kills him ; a weaver, and the engineer who starts the factory machinery before the usual hour ; a hod-carrier, and a slater who, at work for a sub-contractor, drops a slate upon the former's head ; a factory girl, and an architect who, without sufficient professional skill, designs a factory building that falls in ; a brakeman, and a switchman who sleeps at his post of duty ; the baggage-master of one train, and the conductor of another, who disregards the company's time-table ; a laborer riding home from his day's work, and the superintendent who carelessly causes a collision ; all the employees on a train, and the mechanical engineer in the company's employ, who makes the plans of a bridge which gives way, as in the recent horrible disaster at Ashtabula.

VI. — *Is there Need of Further Legislation to Protect Labor?*

It is further urged by the courts, in support of the rule laid down, that the employee is as free to choose his employment as the employer to select his workman ; that, if he wishes, he can avoid a dangerous employment, or point out defects in machinery, or incompetency in fellow-workmen, as well as his employer can. It should not, however, be forgotten that the employee has no supervision or direction over the work ; that he is usually hired and paid by the day or month ; that employers, as a class, are chary of receiving from their workmen suggestions as to how the work should be conducted, or complaints against fellow-workmen ; that workmen usually do not occupy the same position of independence as their employers ; and if, in the hurry of business, they are too much afraid of taking risks, or too much inclined to make complaints, they may receive, instead of encouragement, an unceremonious dismissal. They are at best but sailors, so to speak, on the ship, whose duty it is to man the yards, furl the sails, scour the decks, as the captain orders ; who, it is said, usually prefers to keep the reckoning, take the longitude, and direct the ship's course himself. Business is not conducted by stump speeches and

electioneering, as caucuses are, nor controlled by ballots and majorities. The employment is usually solicited by the laborer. He, too often, has little money in his purse, and often a large and hungry family to maintain. There are usually many more laborers than hirers of labor. If the laborer is too scrupulous as to the qualifications of his employer, some less particular man may get the place. Employers seldom stand on the corners of the streets with certificates of fitness in their hands. Poverty is a blind critic, as well as hard taskmaster. There is no risk it will shrink from incurring, no burden it will not assume. Poverty is the arch-enemy of safety. While Capital, with leisurely care, can select the channels through which it will run, the industries it will set in motion, the wheels it will turn, and the railroads it will operate, Poverty must labor when and wherever it can, often with one eye blind to dangers, and one shoulder bent beneath an unequal load.

Although courts cannot interpose to lighten this burden, is not this a fitting opportunity for the legislature to interfere for the protection of labor? Is it not another occasion when the legislature ought to interpose, and lighten the heavier scale of justice by transferring the risk of personal injury from the scale of labor to that of capital? Would not this tend to raise the wages of persons engaged in dangerous employments, by compelling employers, upon whom would rest a heavier responsibility, to be more careful in the selection and discharge of their workmen? Would it not, in railway travel especially, make the general public more secure by ensuring the employment of more trusty, because better paid, workmen?

Should it be said that the employee can now oblige the employer to use due care in the selection of his workmen, by a suit for damages in case of neglect, the answer springs at once to the lips that this is at best a barren right, because in enforcing it it is practically almost impossible to prove that due care has not been exercised. This, like the other right to compel the employer to use due care in the selection of his materials, machinery and plant, is, both to the employees and the general public, because of the difficulty of proving his neglect to provide them, practically a worthless security.

VII. — *Should a Contract of Liability be Implied ?*

The controlling reason given by the courts in support of the rule laid down, is that the law does not imply a contract of liability.

This is a strictly legal reason, based, however, like each of the reasons previously considered, upon a presumption of fact. What is an implied contract? It is a contract which, in the absence of an express contract between the parties, is implied by the courts. It is, in other words, a contract which, where the parties have failed to express their meaning, the court puts into words for them. It is, however, always based upon a presumption of fact as to what their meaning was.

By virtue of what right does a court assume to put the contract into words? By virtue of considerations of public policy. By virtue of the assumed, but now undisputed right of the courts to say that public policy requires them to express in words what the parties themselves actually meant, or what they ought to have meant. For example, if the grocer sends to a customer's house, upon an order, a barrel of flour, considerations of public policy allow the courts to imply that the customer meant, or ought to have meant, when he gave the order, to pay a reasonable price for the flour. The words "public policy," in order to have any meaning, must mean the public policy of the State or country to which the court rendering the decree belongs. Of this right, Judge Shaw, in the opinion so often referred to, says: "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances." He illustrates this principle by the well-known instance of common carriers of merchandise, for whom the courts make an implied contract of liability, amounting to a warranty that merchandise



entrusted to them shall be safely delivered to the persons for whom it is intended; by the case of inn-keepers, for whom the courts imply a contract of insurance against fire, and warranty that the baggage of their guests shall be kept from injury; by the case of common carriers of passengers, for whom the courts imply a contract to render compensation in damages to those passengers who may be injured through their negligence or the negligence of their agents.

As soon as this principle — that courts, in the absence of an express contract, have a right to imply for the parties a contract in harmony with the public policy and general convenience of the country — is taken into consideration, it at once occurs to any one that if, in the judgment of Lord Abinger, who in 1837 decided the first case upon this subject, the public policy of England had required the adoption of a different rule from the one laid down, the first precedent would have been different, and employers would have been held liable for injuries caused to their servants by the neglect of fellow-servants. It is likewise apparent, if the first case had been different, that when, shortly afterwards, the courts of South Carolina and the courts of Massachusetts were called upon to apply the rule to the liability of railroad corporations, they would have followed this precedent, had they not thought that the public policy of their respective States required the opposite rule. It is likewise apparent that when these latter judges, during the infant days of railroad and manufacturing enterprises, in the exercise of their discretion, adopted so severe a policy of protection, they might have mistaken the true policy of the country; apparent that they and their followers virtually became political economists, and laid down upon this subject the public policy of two great countries; and apparent that this rule is not in harmony with the usual policy which protects American capital against foreign competition, because it protects it at the expense of our own laborers. It is equally clear that they became makers of law rather than judicial interpreters. And not only is it clear that their opinions, which are judge-made law, may have been founded upon a wrong theory as to what was the true policy of the State or country, but it is also plain that what was thought by these judicial political

economists to be the true theory, may, in the growth of years and knowledge, be judged of differently by legislatures of the present time, who certainly have as well acknowledged a right to legislate concerning the continuance or discontinuance of the policy of protecting great monopolies at the expense of their employees; and the English Parliament has seen fit to change the policy of England by adopting a new theory.

#### HOW LARGE EMPLOYERS ESCAPE LIABILITY.

Every man is liable for his own torts and breaches of contract. This is elemental law. Every man is liable for injury inflicted by personal negligence. If, while driving through the streets, he carelessly runs over some one, he is liable. If, while conducting a small manufacturing business, he injures one of his workmen by his personal negligence, he is also liable. If, while running a small cotton factory, which is under his own management and supervision, he carelessly, with his own hand, starts the engine before some workman, while cleaning the machinery in obedience to his orders, has finished, he is liable for the results of his personal negligence.

But if, as business increases and more workmen are employed, he hires a superintendent to direct the work and oversee these men, he thereby escapes liability for personal injuries. The superintendent, it may be, works strictly under his orders, doing precisely what he is told to do. The superintendent is his agent, duly authorized and commissioned. He works strictly within the scope of his acknowledged authority; he never disobeys an order; and all the details of the business are done strictly in harmony with the general authority conferred. He is, it may be, in every legal sense, the employer's other self. His hand is his employer's hand, his eye, the eye of his employer. His hand, his eye, his every act, are guided by a mind so much in harmony with the desires and interests of his employer, that it may almost be called the employer's mind.

We may go still further in our supposition: the superintendent may be even more expert and competent than his employer. He may, perhaps, have had a better training,

a larger experience; he may have learned his trade in a better school, and better understand the secrets and difficulties of the business. If a mechanic, he may be a better mechanic. If a machinist, he may be more adept. If a manufacturer, he may be more skilful. If a railroad superintendent, he may better understand the construction of locomotives, the control and management of trains. If a mining engineer or superintendent, he may know better than his employer how shafts are sunk, and coal or ore is mined.

All this, however, makes no difference. The eye of the law is blind to all these advantages. The employer, by the very act of hiring an agent or superintendent, has relieved himself from such liability for personal injuries to his employees. He is still liable, as before, to third persons, to all the outside world. If a stranger, a passer-by, a visitor, a passenger, is injured, he must make reparation. But the law, by a just or unjust exception, gives him liberty to escape damages from injuries to his employees, so long as they are caused by the negligent hand of a duly authorized agent.

#### HOW CORPORATIONS ESCAPE LIABILITY.

The same rule which excepts large employers of laborers, excepts also corporations. With them it works with added force. A corporation is an incorporeal being, a creature of the law. It is an impersonality. It has neither birth nor parentage. It knows no father but the State. The State is only its foster-father. It does nothing of itself; does all its acts by the hands of agents. Like the fabled daughter of Jove, it is invisible, yet by its influence controls the acts and guides the hands perhaps of hundreds. But whatever is done for it by the hand of an agent, is, in the eye of the law, done by its own hand. It is responsible for the acts of its agents, as corporeal beings are. The maxim, *Qui facit per alium facit per se*, — “What you do by the hand of another you do by your own hand,” — applies to corporations as well as to persons. To this general rule there is, however, one exception. It is not liable for the acts of its agent when those acts cause personal injury to another

agent. It is not liable for these acts, because both agents are fellow-employees of the corporation.

The hardship of this exception becomes more manifest when we remember that persons—almost any and every person, three or seven, according as the law requires—engaged in business may become a corporation by applying to the Secretary of State, and conforming to the simple requirements of the corporation act. By this process of incorporation persons are not changed or regenerated, but their legal liability becomes changed. As persons, they were liable for their personal negligence; as a corporation, they are not persons, and therefore not liable for their own negligence. Neither are they, as we have seen, liable for the negligence of their agents, when this negligence causes personal injury to fellow-agents. For any act of an employee which causes personal injury to another employee, is an act done by a person who is a fellow-employee of the person receiving the injury. Corporations thus escape all such liabilities.\* When it is realized how much of the business of the world is done by corporations, how many manufacturing and railroad corporations there are, how extensive are their operations, and how many thousands of workmen they employ, the importance of this exemption from liability will be better appreciated.

#### ACCIDENTS UPON RAILROADS.

“In the providence of God there are no accidents,” said one of Massachusetts’ most honored sons, in commencing his eulogy on Abraham Lincoln. This truth, so tersely expressed, applies with equal force to persons killed upon our railroads. No man dies without a cause, though the cause and the causer may remain alike unknown. Every death upon a railroad, like every death by violence, is the result of somebody’s negligence or wilfulness. How many persons in this Commonwealth are annually killed or injured through some one’s negligence, can never be known. It is probable that from ninety-five to ninety-eight per cent. of them are either the proximate or remote cause of their own injuries. They are the victims of either their sole or their

\* See *Howells v. Landore*, L. R. 10 Q. B. 62; and *Wilson v. Merry*, before cited.

contributory negligence; and, in either event, the law excludes them from recovering damages. A good proof of this estimate is furnished by the records of the courts as compared with the number of accidents. In how few of the hundreds of instances where persons are killed or injured are damages recovered!

The railroad is the most fruitful field of violent deaths. According to the Railroad Commissioners' Report for 1882, there were 9,651 train accidents in the United States from 1873 to 1881, inclusive; 1,117 of them causing one or more deaths; 1,676 causing one or more injuries. There were 2,372 persons killed, and 9,387 persons injured. During the year ending September 30, 1881, there were in the United States 1,481 train accidents, as reported in "The Railroad Gazette," by which 438 persons were killed, and 1,644 persons injured. By the Report of the English Board of Trade, the number of train accidents and collisions on the railroads of Great Britain, with their results, is as follows\* : —

Total number killed, . . . . .	1,135
Total number injured, . . . . .	3,959
Passengers killed, . . . . .	142
Passengers injured, . . . . .	1,614
Persons killed on railroad premises, not resulting from the movement of trains, . . . . .	45
Persons injured on railroad premises, not resulting from the movement of trains, . . . . .	2,733
Employees killed (including employees of contractors), . . . . .	546
Employees injured (including employees of contractors), . . . . .	2,080

Of 5,084 persons killed or injured in England by the movement of trains, in nine years, 2,620 were employees, which is over fifty per cent.

During the year ending September 30, 1881, according to Table C of the Appendix to said report †, there were, in this Commonwealth : —

Total number killed, . . . . .	184
Total number injured, . . . . .	231
Passengers killed or injured, . . . . .	42
Employees killed or injured, . . . . .	200
Trespassers killed or injured, . . . . .	126

\* See Mass. Railroad Commissioners' Report, 1882, pp. 21, 22.

† *Ibid*, p. 62.

At highway crossings and stations, killed or injured. . . . .	47
Passengers killed or injured by causes beyond their own control, . . . . .	11
Passengers killed or injured through their own carelessness, . . . . .	31
Employees killed or injured, train men, . . . . .	167
Other employees killed or injured, . . . . .	33
Total employees killed or injured, . . . . .	200

Of 415 persons killed or injured within the year, 200 (about 50 per cent) were employees, 167 of them being employed in the management of trains.

These facts are furnished to the State by the various railroads themselves. There is no record published of the causes of accidents to employees; but it is probable that from 75 to 95 per cent of the 200 were injured by their own contributory negligence.

It will thus be seen that the effect of a change in existing common law will not be so widespread and injurious to the interests of the railroad corporations of the Commonwealth as has sometimes been apprehended.

It is difficult to tell with accuracy the causes of these injuries to employees. No record of causes is published by the Railroad Commissioners, though it is highly probable that the railroad companies keep, for their own protection in case a suit is brought, a record of each injury, its cause, and the circumstances connected with it. This has been the custom of the English companies. James Grierson, the General Manager of the Great Western Railway, testified in 1877 before a Parliamentary committee, "that every accident, even down to the pinching of a man's thumb, was kept a record of by the Great Western Board for many years before an act was passed requiring the accidents to be reported to the Board of Trade; that is, I mean, accidents to servants." As to the proportion of accidents caused by the contributory negligence of employees, Mr. George Finlay, Traffic Manager of the London and North Western Railway, testified before the same committee as follows: "There were 83 who lost their lives; and, of those 83, 77 men were killed through their own want of caution, and three deaths resulted from the acts of their fellow-servants, and three from other causes beyond their control; so that in 77 cases the men were contributory, by their own negligence, to their

death, which unfortunately occurred, and in six other cases they were not contributory."

When asked if the same proportion of employees were injured through their contributory negligence, he was unable to answer the question accurately from statistics which he had brought with him.

Out of 83 employees killed, it appears that three were killed by the negligence of fellow-employees, which is  $3\frac{6}{10}$  per cent, the other  $96\frac{4}{10}$  per cent being killed by their own contributory negligence. These data are meagre, but are all that have been obtained.

According to an investigation made by Cornelius Walford, a well-known English statistician, and published in the *Journal of the London Statistical Society*, vol. XLIV., part iii., September, 1881, there are, per annum, in Great Britain and Ireland, 12,000 deaths by accident and violence, — about one in every thousand (p. 512); and as, according to the tables of the accident insurance companies, there are 99 non-fatal accidents to one fatal, he estimates the number of injuries annually occurring in Great Britain and Ireland at 1,200,000. The ratio of fatal to non-fatal accidents in the dangerous employments he estimates as three to one hundred (p. 513), because the severity of the injury increases the number of fatal accidents. Mr. Neison, in his report in the January number, 1880, of the same journal, estimates the ratio of fatal to non-fatal accidents upon railways to be two and one-half per thousand on the passenger traffic lines, and three and one-half per thousand on the lines doing likewise a heavy goods and freight traffic (p. 51); and from the actual experience of the Miners' Permanent Relief Fund he estimates the ratio of miners temporarily disabled at 140 to 190 per thousand, and fatally injured at two and three-tenths to three and six-tenths per thousand; in case of railway employees, 84 per thousand temporarily disabled, and three per thousand fatally injured (p. 502).

#### ARE COMPLETE RETURNS OF INJURIES MADE TO THE RAILROAD COMMISSIONERS?

It is a matter of State pride that our railroads show as low an average of deaths and injuries as the railroads of other

States and countries. Without intending to impeach the accuracy of the reports of injuries made by the various railroads of the State, it is worthy of remark that the ratio of the number of injuries to the number of deaths is very small.

The number of deaths is, without doubt, correctly reported. Any one desirous of verifying the returns could easily do so by examining the reports of coroners and medical examiners; and perhaps the district attorneys, to whom these officers report each death, keep a record sufficiently complete for this information. Why is it that so many are killed, while comparatively so few are injured? In 1882, for instance, 184 were killed, and only 231 other persons were injured. In 1881, 146 were killed, and only 200 were injured. A railroad train is, to be sure, a fatal instrument of destruction; but why should it be more fatal here than in other States and countries? During the last nine years, 1,266 were killed, and only 1,478 were reported as injured; while during the same years, in the United States, according to the "Railroad Gazette," 2,372 persons were killed, and 9,387 injured, — almost three persons injured for every one killed. It likewise appears by the Railroad Commissioners' Report for 1882, that the total number killed on the railroads of Great Britain in 1880 was 1,135, and the total number injured was 3,959, — more than three persons injured to one who was killed. In 1875 there were, according to the reports of the English Board of Trade, 765 killed, and 3,618 injured, — about five injured to one killed, — on the London and North Western Railway. In 1876, 83 were killed, and 1,898 injured, in the workshops and working the trains, — nearly 23 injured to one killed.

There is, no doubt, a difference of opinion as to what constitutes an injury. One corporation may think that a person is not injured unless he is so severely hurt as to be obliged to lose an arm or a leg; or is unfitted for work for the rest of his life. Another may say that the pinching of a thumb so as to lose the nail is an injury. And if each corporation were to be its own judge as to what injuries to report, it is probable that only severe injuries would be reported.

The accuracy and completeness of reports of the English railways to the Board of Trade were called in question



several years ago, and Mr. Edwin Phillips made an examination and report upon a part of the subject. In this connection it may be well to give a summary of the results which he obtained. He says that a thousand men were killed by the railroads of Great Britain in 1872, while only 590 lost their lives from shipwrecks and other casualties along the coasts. He found that the Lancashire and Yorkshire Company, which had made a return of 39 employees killed, and 73 injured more or less seriously, during the year 1872, had actually killed 54, and injured 1,367, — more than 25 injured to one who was killed. He says further: “The Lancashire and Yorkshire Company have close upon 14,000 men in their employ, but full 4,000 of this number may be deducted for clerks and other officials, who never have to incur danger; so that, taking the number of out-door servants at 10,000, it will be seen that there was one killed to every 185 employed, and one injured to every seven employed. Reckoning the number of railway men on all the lines in the kingdom at 200,000, it may be safely inferred that 1,080 men were killed in 1872, instead of 632, as given in the official returns; and 27,340 injured, instead of 1,395. So that nearly as many men were injured on the particular line referred to, as the Board of Trade returns give for the whole kingdom. It may be added (as I pointed out in my report published in the ‘Times,’ December 20th, 1873) that the result of some investigations conducted by a committee of the Edinburgh Chamber of Commerce strikingly bear out the correctness of my figures. And no person is included among those injured whose injury was not of so serious a nature as to incapacitate the sufferer from following his usual employment for several days.”\* Mr. Cornelius Walford, in an article upon “the number of deaths from accidents,” etc., in the September (1881) number of the “London Statistical Journal,” estimates the ratio of fatal to non-fatal accidents in dangerous employments as three to 100, basing his estimate upon facts gathered from the tables of accident insurance companies.

The inference from these facts is, that accidents upon our railroads are more fatal than upon railroads generally

\* Fortnightly Review, March, 1874.

throughout the United States and Great Britain; or else that all injuries so serious as to incapacitate the sufferer for work for several days are not reported.

PROBABLE AMOUNT OF DAMAGES FROM A CHANGE IN THE  
LAW.

As bearing upon the question of the probable compensation paid annually in damages by railroads, for personal injuries caused to passengers, an elaborate calculation made by Mr. Galt, an English statistician, and published in an earlier number of the "Fortnightly Review," shows that the English railways expend for this cause  $2\frac{3}{4}$ d. in every sovereign of their total expenditures, or about one per cent of their total disbursements. The ratio of the number of passengers killed without their contributory negligence, in the United Kingdom, to the number of passenger trips, was:—

In 1877, one in 50,144,876.

In 1876, one in 14,165,455.

In 1874, one in 5,556,284.

Of the 2,500,000 persons employed in the factories and workshops of Great Britain during the year ending with the 31st of October, 1879, 5,333 received fatal or other injuries, or only about one in every 468 persons employed.

In Massachusetts, during the year 1882, the ratio of persons killed, without their contributory negligence, to the number of "passenger trips," including the trips of season-ticket holders, was one in 20,927,034; and the ratio of persons injured was one in 667,300. According to the testimony of Mr. Evans, the General Secretary of the Amalgamated Society of Railway Servants of Great Britain, of 4,383 persons killed or injured, no instance came to the knowledge of the society where damages were recovered, although 39 of them were killed, and 514 injured, according to the companies' reports, from causes beyond their own control.

It is thus seen that however many persons are killed or injured, whether passengers or employees, a very small proportion of either could recover damages; and if one per cent of the total expenditures covers all the money paid out in the form of damages to passengers, a change in the law

as to the liability to employees killed or injured, who are less in number, can work, it would seem, no great hardship.

#### CAUSES OF INJURIES TO RAILWAY SERVANTS.

The employees, in almost every instance, are the causers of their own injuries. Can nothing be done to make them more careful? Can no additional precautions be taken to make their employment less dangerous? Two hundred were killed or injured in Massachusetts during the last year. The railroad corporations are under a heavy legal responsibility to protect passengers. They are, in a less degree, responsible for the protection of their employees. Do they take sufficient precautions to protect them? If placed under a heavier legal responsibility, would they do more? These are questions which the employees of the British railways have been considering for years. They have addressed petitions and remonstrances to their employers. They have organized trades unions for mutual protection. They have organized mutual insurance companies. They have petitioned Parliament, setting forth their grievances, and asking for additional legal protection. Ten thousand railway servants signed a memorial, which was presented to the Royal Commission when this subject was under consideration. In this memorial they enumerated specifically, as follows, six of the remote causes of accidents to employees: 1st, Excessive hours of labor; 2d, Non-enforcement of certain of the companies' rules, ostensibly made for the protection of the men; 3d, The non-adoption of the most approved appliances conducive to safety in the working of railways; 4th, The want of proper accommodation for the working of freight and traffic; 5th, The employment of inefficient persons for the performance of responsible duties; 6th, The insufficient number of men employed.

In 1876 Frederick W. Evans was the General Secretary of the Amalgamated Society of Railway Servants of Great Britain. He had had a large experience, was familiar with this subject in its breadth as well as in details, and testified before a Parliamentary committee as follows: —

“If you will permit me, I will make a brief statement as to the views which I entertain upon the subject; and as nearly as possible I will

confine my remarks on the subject, in so far as it affects railway servants. Railway servants are, more than any other class, interested in placing on their employers such liabilities as will ensure every precaution being taken for their safety. They are the most interested, because a larger percentage of them are victims of accidents, which, to a very great degree, are of a preventable nature. By the returns which the companies supply to the Board of Trade, it appears that in 1875 alone no less than 4,383 railway servants were killed or injured by accidents on railways. Of this number the companies assert that only 39 were killed, and 514 injured, from causes beyond their own control; while 726 were killed, and 3,104 were injured, from their own misconduct or want of caution. These returns are by the companies. But I look upon the companies as interested parties, and, therefore, not impartial in making such returns. \* \* \* Taking the companies' own figures in the 1875 return as being accurate, there would be even then 553 servants injured by no fault of their own, and to whom, were they not servants, it is probable that the companies would be compelled by law to pay compensation. But, as the law at present (as I understand it) stands, railway servants cannot claim any compensation whatever for the loss they suffer by the acts of others. The companies, at present, are in no way responsible for the safety of their servants. Every act done for a corporate body is the act of a servant; and, whatever the position of that servant to another, any act of his, if injurious to his inferior, the law holds to be the act of a fellow-servant. They are in a common employment. It so happens that, as the law now stands, the life of a railway servant is of less value than the life of a horse; inasmuch as, however gross the mismanagement which produces the death of, or injury to, a servant, there is no responsibility whatever upon the company; whereas, if a horse is injured or killed, it costs the company a certain amount of money in order to replace the animal. It is in consequence of this irresponsibility that companies do not go to any great expense in removing sources of danger to their servants. \* \* \* I hold it to be the duty of the legislature, as the companies cannot act for themselves, but must depute their authority to others, to make the companies responsible for loss sustained by servants through the act of those who wield authority in the companies' names. \* \* \* In shunting [switching] operations, about one in every twenty men engaged are killed or injured in the year. This arises, in a great measure, from a practice termed fly-shunting.

"In the companies' rules this practice is generally forbidden; but, while forbidden in the rules, it is nearly everywhere practised with the consent of the companies' officers; and, with the limited accommodation which the railway companies have for working their goods traffic, I question whether the traffic could be carried on without resort to this practice. Where the rules forbade a practice, and it was carried on with the sanction of the companies' officers, I would hold the companies responsible for all accidents to their servants arising from the practice. There are in the railway service a number of officers of various grades, who each to those servants under them represent the employer, and

exercise, so far as such servants are concerned, the authority which an employer has over those employed. Thus, to the ordinary servant on a railway, the manager, superintendent, station master, inspector and foreman, represent the interests and the authority of the employer, or the company. In any case where the actions of such persons in authority, or the actions of others who carry out their instructions, inflict injury to a servant, I hold that, as the officer stands in the position of employer, the company should be liable for loss occasioned by his neglect, indiscretion, or want of judgment. It also happens that one class of servants are under the direction of another class, and are bound to obey their instructions. Thus, the driver is bound to obey the directions given him by the signalman. Should the driver refuse or neglect to do so, and a fatal accident occurred, he would be deemed guilty of manslaughter; and the companies invariably punish any disobedience by drivers to the directions of signalmen. In this case also, the signalman represents the authority of the employer; and if by his wrong direction a driver, or fireman, or guard were injured, I hold that the company should be liable. It has been asserted that men are paid higher wages in proportion to the risk they run. Nothing could be more inaccurate. In dangerous occupations on railways the risk is greatest when the experience is least, and when the rates of wages are lowest. Thus, the risk to a man just started at from 20s. to 22s. per week as a shunter or brakesman is greater than when, by length of service, he has attained to experience and the maximum wage of 25s. or 30s. respectively. Again, the highest wages are not paid to the class of servants who in the performance of duty run the greatest risk. Thus the shunter, whose duties are by far the most dangerous, receives less than the driver, than the goods guard, than the passenger guard, and sometimes than the signalman. The highest wages are given to those classes whose experience is gained by long service, and whose duties are responsible. It is the interest of the companies to induce these men, by offers of higher wages, to remain in the service. If they became migratory, the work of the lines would be carried on with greater risk, inconvenience, and loss to the proprietors. I am, therefore, of opinion that in the consideration of the liability of railway companies to their servants for injuries, it cannot be maintained that higher wages are paid to cover greater risks. The exemption of the employer from liability for claims to compensation for injuries to one servant, caused by the neglect of another servant, known as the common employment doctrine, bears most unjustly on railway servants. Owing to the different natures of their occupations, there is nothing common in the employment of many railway servants, unless it be that the same shareholders are their employers. There is no real community of employment between a guard and a plate-layer, an engine-driver and a clerk, a joiner and a fireman; yet in these instances the law-courts have ruled to the contrary. And, as between officers and servants, their real relations are those of employer and employed. Thousands of servants never see each other, live miles from each other, are in totally distinct departments, and under different officers. Servants have not the choice of their fellows,

are ignorant of each other's qualifications, and any attempt to interfere with the appointments of the officials would be viewed by them as an insolence. I may state that a little while ago an appointment was made of a driver of some four months' qualification, to the fastest train running on a certain railway. At a meeting of the men I was requested to lay before the chairman this fact; but the chairman has neither had the courtesy to notice my letter, nor has there been any alteration whatever in the state of things. The railway companies generally refuse to recognize any combination of their servants; and therefore the servant would have really no influence in the appointment of other servants by the companies. Nor can the servants judge of the state of the machinery and appliances, other than that immediately under their own control. Any refusal to obey orders may result in an immediate arrest by any officer under the Railway Act of 1842, which provides special protection to the companies against any neglect or wilful disobedience of their servants. These are, to my mind, reasons why the companies should be legally responsible to one servant for the injury done him by another. The whole question presents itself to me in this form: Loss and injury are inflicted on a workman by the carelessness or negligence of a person who has been selected specially by an employer, who acts under the employer's instructions, and who is free from the exercise of any control by the injured workman. The employer is liable for any damage which such a person might, through incompetence or negligence, do to any person not in the employ, or to any property entrusted to the employer; and I am unable to see why the liability should be removed, when the damage is done to an employee through no fault of his own. The servant cannot be expected to undertake a portion of the employer's risk, when he is debarred from sharing in the profits. The servant is a contractor with the company, as is a railway passenger or freighter; and if he faithfully performs his contract, the law should protect him from loss inflicted by other and injudicious or unfortunate contracts which his employer may make with others for the employer's profit and convenience. There can be little doubt that if such was the case, railway companies would more carefully select their servants, and place them under more careful and efficient supervision, and suppress those dangerous methods of doing work now everywhere practised, and which lead to the fearful slaughter of railway servants. It has been urged that if a measure providing compensation for injuries to workmen became law, they would be more careless, and incur unnecessary risk. I am not of this opinion. There are several cogent reasons against such a view. First, for them to do so would in itself invalidate any claim they might make to compensation from their employer. Secondly, if the safety of others was concerned, their conduct would lead, in the railway service, to dismissal from the service, and possibly to imprisonment. Thirdly, it is against human nature to voluntarily incur pain and deformity, and sacrifice family and all natural enjoyments, especially as in this case, when the expected recompense is an uncertainty. Fourthly, such an argument would be equally effective if urged against compensation for injuries to passengers; and, if it has any weight, railway accidents to the public would be more frequent than they are."

In another part of his testimony he says, in answer to a question as to the probable remote causes of the death or injury of the 4,383 railroad employees reported killed, and the 3,104 reported to the Board of Trade as injured in 1875: "In my opinion, if the proper causes were returned *in about one-half of those cases*, it would be found that the want of accommodation, and the other causes mentioned in the memorial, would have contributed to the accidents." (Parliamentary Report of 1876. Ques. 1027.)

#### CAUSES OF ACCIDENTS UPON RAILROADS IN MASSACHUSETTS.

The general causes of accidents already enumerated are: —

- 1st. Excessive hours of labor.
- 2d. The non-enforcement of certain of the companies' rules, ostensibly made for the protection of the men.
- 3d. The non-adoption of the most approved appliances conducive to safety in the working of railways.
- 4th. Want of proper accommodation for the working of freight and passenger traffic.
- 5th. The employment of inefficient persons for the performance of responsible duties.
- 6th. The insufficient number of men employed.

I. In connection with or in addition to these there are various remote causes of more or less importance. Among them, *First*, is the use of intoxicating liquors. Although the rules of all the corporations proscribe their use, malt liquors, lager beer and ale, are sold at most of the station restaurants.

*Second*. The favoritism shown in the appointment of train hands. Men who are unfit for the responsibility with which they are entrusted are not infrequently given or retained in positions upon the request of influential directors or stockholders. Their fellow-workmen hesitate to incur the odium of making complaints; and sometimes, especially while there is a pressure of business, incompetent men retain their positions for some time.

*Third*. The use of the telegraph or block system. Without expressing any opinion as to the comparative merits of this system, it is without doubt sometimes the cause of an

accident. In the hurry of business, while the train is waiting at a station for the order to go on, the conductor sometimes signs, for the engineer, a receipt for the despatch, or the despatch is missent or misunderstood, and in consequence a collision occurs. In a recent case in New York, where a fireman was killed because the conductor had signed the order for the engineer, who, although he had not received it, had started his train, no damages could be recovered, because they were all fellow-servants.

*Fourth.* The neglect of the statute regulation requiring one man for every two passenger cars. Since the adoption of the air and vacuum brakes, this requirement, designed partly for the protection of passengers while getting on and off the cars, is frequently violated; and, partly because no similar law exists in relation to freight trains, trains of from fifty to eighty cars are sometimes sent out with only four brakemen.

II. Among or in addition to the most approved appliances conducive to safety which have not been adopted, may be mentioned, *First*, the Miller platform and air or vacuum brakes, which, though generally, are not universally used on passenger cars, and have never been in use upon freight cars.

*Second.* Faults in construction, sharp and reverse curves, sags in the road-bed, which cause trains to break apart or lurch so suddenly as to throw the men off their balance; truss bridges so narrow that men hanging off the steps, on the look-out, are killed; overhead bridges, so low that brakemen are frequently swept off the tops of freight trains. There are some bridges that have killed their half-dozen men.

*Third.* The insufficient lighting of stations, and the lack of proper platforms and crossings safely arranged and guarded.

*Fourth.* Insufficient car inspection, which usually extends to the running gear, the wheels and brakes, but seldom includes the body of the cars, especially freight cars, or the ladders and handles. Insufficiently fastened or rotten ladder-rounds are not infrequently the cause of a brakeman's falling between the wheels.



*Fifth.* The variation in the height of cars, over the tops of which brakemen are obliged to find their way, and generally at night.

*Sixth.* The lack of a safe railing around the tops of freight cars, a simple and effective contrivance for saving the lives of men, which has been partially adopted by some roads.

*Seventh.* The awkward, old-fashioned method of shackling cars, which obliges the men to go between them.

III. Among needs of proper accommodation for the working of freight and passenger traffic are, *First*, the need on some of our roads of a double track, or sufficient side tracks. As to this need of one of our railroads, its general manager says: "There has been almost constant blockade of freight-movement lately on the divisions referred to, arising from insufficiency of side tracks to accommodate the vastly increased business. Until within a short time, a half-dozen trains would be found on a division of road with side tracks which would hold but a single train; and, in consequence, the passing and passage of trains was necessarily a slow process." On this road, during the past year especially, a shameful, wicked loss of life has occurred from this cause.

*Second.* The lack, at local freight stations, of sufficient sidings, freight-houses and platforms, which necessitates the breaking up of the train into parts, when too long to be accommodated, and the shunting-off of these various parts to different tracks in the yard. This process of "fly-shunting" is the most dangerous operation in the working of freight trains.

*Third.* The sudden adoption of new appliances, before the train men have become sufficiently familiar with their use.

*Fourth.* The sudden adoption of new methods of business. A collision costing one road sixty thousand dollars, and injuring the fireman severely, was caused, say the Railroad Commissioners, "by a general misunderstanding of a telegraphic order," addressed to the freight conductor for information, and understood as an order to go ahead.

*Fifth.* The tendency, in using the telegraph, to make the orders so terse as not always to be explicit. Orders

written by an expert operator are for this reason misunderstood by a freight conductor or engineer less expert in this direction.

IV. The employment of inefficient persons for the performance of responsible duties is a not infrequent cause of accident.

*First.* The management are sometimes deceived by applicants for positions who pretend to be skilled train hands. That economy which discharges employees in dull times, expecting to be able to find competent train men when prosperous times return, is sometimes a mistaken economy.

*Second.* Because of frequent changes in the sets of train hands, caused by discharges and new appointments, in consequence of which train men do not become familiar with each other and each other's ways and habits of doing business.

*Third.* Because of the insufficient wages paid on some lines, where, it is said, there are station agents, for instance, who receive only ten dollars per month. Railroads sometimes employ inefficient persons, men who have been injured on their road, in order to avoid the possibility of a claim for damages, retaining them until the claim has been settled or outlawed. Instead of paying, they pension them, and take the risk of accidents.

V. Whenever an insufficient number of men for the proper management of trains is employed, as a natural consequence, they are obliged to work an excessive number of hours. It is when the employee is worn out with overwork that there is the greatest danger lest, by some lapse of ordinary care or attention, an accident may occur. When an insufficient number are employed, there is even greater danger that, in the hurry of making connections, with the extraordinary strain imposed, some slip may occur or something be neglected. An employec on one of the divisions of the London and North Western Railway says, in a letter already published: "I have before me a report from Leeds of one man having worked  $131\frac{3}{4}$  hours in a week; also a case of an engine-driver working 106 hours in one week, lately; and 40 or 50 hours in two journeys, with only a few hours' rest, is a common occurrence. A goods guard

told me this morning that he had lately worked  $32\frac{1}{2}$  hours without rest, and he received the sum of 12s. 6d., although his employers, in 1872, granted as a concession that ten hours should constitute a day, and afterwards the men should receive overtime at the rate of eight hours per day."

The following are actual cases of overwork and insufficiency of help, which have recently occurred in this State; and, if an accident had occurred, the excuse, if made, that it happened under a pressure of business, would have been no justification for the loss of life.

*First.* A train due at 6.20 P.M. arrives on time at A——. Passengers and baggage must be discharged, and the train backed four hundred feet, in order to clear the main line for an express passenger train which passes at 6.24, four minutes later. During this time both the inward and outward tracks must also be flagged, which means that one man must be sent forward, and another back, each the distance of fifteen telegraph poles; there are only the conductor and two brakemen to attend to the flagging and the switches.

*Second.* On one road a section gang, consisting of a foreman and three assistants, is obliged to keep properly graded, and in proper condition, the same length of road to which a section gang of six persons is usually appor-tioned on other roads.

*Third.* The neglect to provide switchmen has caused many accidents, because the brakemen on the train neglected to leave the switch as it should have been left, and the train which came afterwards was thrown off the track, or on to a side track, where another train was waiting. Had the brakeman even thought of his mistake, after his train had gone on, it would have been almost impossible to rectify it, although a switchman might have done it.

*Fourth.* An engineer went to work Friday at 5.30 A.M., and remained on duty till Saturday at 12 15 A.M. On the same day at 5 30 A.M., about five hours afterward, he went on duty again, and worked till 7.30 P.M., when his day's work should properly have ended; but he received orders to continue work, and did so for 24 hours longer, until Sunday at 7.30 P.M., being on duty 62 hours, with the exception of five hours and fifteen minutes.

*Fifth.* Another engineer worked the same number of hours as the preceding one; but, instead of being relieved from duty at 7.30 P.M. Sunday, he continued on duty until 5.30 A.M. Monday, thus making 74 hours of almost continuous work under a heavy responsibility, without rest or intermission, except for five hours and a quarter.

*Sixth.* The following is a case of overwork by a full set of train men, consisting of conductor, two brakemen, fireman, and engineer. Work begins at 5.30 A.M. Work ends, every second day, at 7.30 P.M., and on every alternate trip at midnight; is continuous all day; every alternate Sunday the same men are on duty from 9 A.M. till 11 P.M., and while on the road are obliged to tend the switches. During the first trip they are on the road 38 hours. During the alternate trips they are on the road  $43\frac{1}{2}$  hours; and on every other Sunday they are on duty for 14 hours. During the day they travel about a hundred miles, carrying about a thousand passengers, and making a hundred and fifty station stops. In addition, the engineer must keep an accurate account, and make returns of various matters relating to the amount of coal used, and the working of his locomotive; and the conductor must make out seven different reports on blanks calling for minute details, with duplicates of five of them.

*Seventh.* Another set of train men work every day from 6 A.M. to 8 P.M., fourteen hours; and from 6 A.M. till 12 P.M., eighteen hours, on alternate days; and likewise work alternate Sundays.

*Eighth.* A freight train gang left the starting point at 11.10 A.M., and returned at 7.10 the next morning, at the end of twenty hours. At 8 A.M., within an hour of the time of their arrival, they took out another train, returning at 4.30 P.M., at the end of eight hours and a half. Three hours after their arrival, at 7.30 P.M., they began work again, returning at 10.30 A.M. the next day, at the end of fifteen hours, having been on duty  $43\frac{1}{2}$  hours, with the exception of fifty minutes' intermission at one time, and three hours at another. "Of course," says one of the brakemen, "I went out with my own train that same night." It was on this road that one of the brakemen, overworked

on a freight train, who had been sent out to flag another train, fell asleep at his post, and was run over and killed by the train he was sent out to flag.

*Ninth.* The following case is given as an illustration of how train men are prevented, while on their trips, from getting sleep: A train left A — for a trip to Boston, where nearly all the train men live, starting Thursday night on time, and not arriving, in consequence of various delays, allowing no opportunity for sleep, until 5 A. M. Saturday, having been one day and two nights on the road.

*Tenth.* A train hand, who had worked from 9 A. M. until 11.15 P. M. on Sunday, continuously,  $14\frac{1}{2}$  hours, and during the rest of the week  $97\frac{1}{2}$  hours, — a daily average of  $16\frac{1}{4}$  hours, — declined to work on the subsequent Sunday, because he needed rest, and was discharged. An engineer, who during the week had been on duty the same number of hours, was asked to volunteer to work on this Sunday; and, upon his declining, and upon being told that such accommodating men were to be had, he consented to work.

*Eleventh.* The plan recently in use on one of our roads, of paying men by the trip, instead of by the day, has been a frequent cause of overwork, by making it possible, in some cases, for train men to do thirty-six days' work in a month.

One reason for the increase of labor imposed upon conductors and engineers is, that they are obliged to make out so many reports with minute specific details.

It is often said that the wages of a railroad employee are higher in proportion to the extra risk which he assumes. As has been already said, the facts do not warrant the assertion. In reply to some recent criticisms upon the low wages paid, the management of one of our railroads say, that while heretofore a conductor has been paid \$2.65 per day, and a brakeman \$1.75 per day, by a plan just adopted, the pay of a conductor has been increased to \$2.90 per day, and that of a brakeman to \$1.90 and \$1.80; which is declared to be a higher rate of wages than that paid by other railroads. Freight-handlers, who work in the freight-house, receive \$1.50 per day; car-knockers, or yard-repairers, who are exposed to no danger from

the running of trains, receive \$1.75 per day; a blacksmith's helper receives \$2.00; a common laborer or a gravel-shoveller gets \$1.50 per day, with regular hours for work, and an hour at noon for dinner. From these figures, and a comparison with the wages ordinarily paid to day-laborers, gardeners, and ordinary mechanics, it will be seen that railway employees are paid, like other men, for the hard work they do, with no extra compensation for the risks incurred. In case one of them is killed, most of the railroads pay the expenses of his burial, unless they are otherwise provided for. In case one of them is injured, the companies usually furnish him with surgical or medical attendance, and provide for his care in some hospital until he can resume work, or until he recovers, if this is within two or three months; but this is done only on condition that he waives his claim against them for damages. Should he have received his injury in consequence of some act of courage, he generally receives some more liberal provision. In the opinion of experienced corporation counsel, of railway employees injured in this State not more than five per cent ever prosecute their claims by suit, and not more than one per cent, one-fifth of these, successfully.

#### RAILWAY INSURANCE.

One method of relieving the condition of employees who have suffered injuries, and the families of those who have been killed, which for several years past has been practised in England, and which in some ways is being practised in America, is Accident Insurance.

The number of persons, passengers and others, who are annually killed or injured on the railways of Great Britain, and the number of persons annually travelling by rail and exposing themselves to danger, attracted the attention of persons familiar with the law of chances which governs insurance and the management of its general business. While passengers, travelling occasionally, were willing to incur the expense of premiums, employees, as a class, were too poor to pay the large premiums which their constantly dangerous employment required. For their benefit another expedient was resorted to, more especially after the famous Henly dis-

aster. It was the organization among themselves, with the co-operation of some of the railroad corporations and proprietors of collieries, of mutual co-operative and provident societies.

The object of these societies was to provide something for the employees or their families in case of death, injury, sickness, superannuation, or inability to work from any accidental cause. Railroad employees and miners were generally too improvident to be willing to pay a quarterly or monthly stipend from their wages for the privilege of receiving an allowance upon the happening of so uncertain an event; and it was necessary that the various corporations and proprietors of mines should be induced to make the deduction of such an allowance compulsory upon those already in their service, or a pre-requisite to admission of others into their employment. As the funds collected must be held and invested, and paid over to the persons entitled to them in such amounts as had been prescribed, and the general duties incident to such a business must be performed by some persons in whom all the members had confidence, it was necessary for the associations to have paid officers. As the amounts which the employees were willing to have deducted each month or week as premiums from their wages were so small that only a small monthly or weekly allowance could be paid in case of death or injury, the corporations and proprietors found it for their several interests to co-operate with their workmen by contributing to the general fund, and by assuming, for the sake of saving expense, the duty of receiving, investing, and paying it out to the proper persons. At the present time there is one of these associations connected with almost every railroad in England, and with nearly every one of the large mines and mining districts. Some of them are large in number, one of them, called "The Northumberland and Durham Mines Permanent Relief Fund," numbering, in 1878, 70,000 members. A fixed allowance is paid over to each person entitled, whether the injury was caused by the negligence of a fellow-workman, or by his own negligence. Unless allowances were made to persons of each class, the scope of such an association would be comparatively limited; because, according to the reports

of the Royal Commission on Railway Accidents, published in the year 1877, there were, during the four years from 1872 to 1875, 2,720 railway servants killed through their own negligence, and 238 from causes beyond their own control; and there were 7,275 injured through their own negligence, and 1,724 from causes beyond their own control, — about twelve killed and four injured through their own fault, to one killed or injured through the fault of some one else.

The plan upon which these associations are organized may be illustrated by the plan of the one connected with the North Western Railway, which employs about 45,000 men, 24,000 of whom are engaged in the actual operation of trains. Connected with this railway are two associations, an insurance and a provident society, — one to provide assistance to men so unfortunate as to meet with accidents, and one to provide for the necessities of sickness. The first, in case of a death, pays over to the family a sum varying from £20 to £40; and, in case of permanent disablement, from £25 to £35, according to the class of risk taken, and the amount of the premium paid. In case of temporary disablement or illness, twelve shillings to fifteen shillings a week are paid for a period of twenty-six weeks, unless recovery takes place before; after this time has elapsed, a half allowance is paid. The premiums paid to the Insurance Society by the workmen, or rather deducted from their wages, vary, according to the class to which each belongs, from one penny to threepence a week; and those paid to the Provident Society vary from two to four pence a week. The company contributes to the general fund of both societies about £2,300 a year, together with all the fines which are imposed upon the men for neglect or disobedience of the rules, orders or regulations of the company. The representatives of a workman who has paid twopence a week to the Insurance Society would receive £35 in case of his death; were he temporarily disabled, he would at the utmost receive twelve shillings a week for twenty-six weeks, and half that allowance during the continuance of his disablement; were he permanently disabled, £25 in addition to whatever weekly allowance he had received; and, were he to die from natural causes, his representatives would receive £10. The allowance to the



representatives of a foreman or a servant of a higher grade, who pays a premium of threepence a week, is £40 in case of his death; if temporarily disabled, he receives 18 shillings a week for twenty-six weeks, and half allowance thereafter; if permanently disabled, £35 in addition to any weekly allowance he may have received. These societies were established in 1871-2, and numbered five years ago 25,000 servants of the London & North Western Railway. The Great Western, the Great Northern, and the Midland Railways have similar societies in an equally prosperous condition.

Of the Midland Railway Friendly Society, the Fourth Report of the Commissioners on Friendly Societies, presented to Parliament in 1874, which contains the fullest and most carefully prepared information upon this subject, says, Part 1, p. lxviii:—

“It is a peculiar feature, both in some of the railway friendly societies and of many of those in collieries, that membership is made compulsory by the employer.

“The Midland Railway Friendly Society, of which an account will be found in Mr. Stanley's Report, was established in 1860, and had, by 1871 8,295 members, and £7,500 capital. Rule 1 states that the directors ‘have resolved to require all those in their employment who receive weekly wages (subject to the exceptions under the rules) to become members;’ and Rule 5, that ‘it shall be imperative upon all servants employed in the passenger and goods departments, gangers, engine-drivers, and firemen receiving weekly wages, who may hereafter enter the service of the company, to become members of this society. This rule is applicable to every one as above who has been one month an appointed servant of the company, at wages exceeding 12s. a week. Officers and servants in receipt of salaries shall have the option of joining, or not, as they may elect.’

“The society is actively self-governed. Its financial organization does not, however, appear to be satisfactory, as its solvency depends not solely on contributions calculated according to the benefits assured, but partly on a fixed yearly grant from the railway company, which apparently was taken into account when fixing the rates of contribution, but which, in a society with a varying and probably increasing number of members, may or may not be sufficient for the purpose it affects to serve, and is probably relied on for serving.

“The contribution to the benefit is uniform, 9d. a fortnight. The benefits, are medical attendance and 12s. a week, full sick pay, for twenty-six weeks; then 6s. a week for twenty-six weeks; then 4s. a week for the rest of sickness or ordinary illness. If the member be disabled by accident in the course of his duties, he receives 15s. a week

for twenty-six weeks, then 7s. 6d. for twenty-six weeks, then 4s. In case of death from ordinary causes, the member's representatives receive £12. In case of death from accident in the service of the company, £25. There is a separate contribution of 3d. a fortnight for management, out of which the doctor is paid. The members' contributions are stopped out of their wages."

The London and South Western Friendly Society, organized upon a somewhat different plan, makes membership compulsory upon all servants in the traffic and freight department, and has rates of premiums graduated according to age, as general insurance companies have.

The largest associations are among the miners, the Northumberland and Durham Associations numbering, as already stated, 70,000 in 1878; although many thousands of miners in these districts had not then joined it, and nearly half of the owners of collieries had not subscribed to its fund. After a careful examination of its condition by an experienced actuary in 1878, when it had been seventeen years in operation, it was found possible to pay a pension worth £160 in case of death, or an allowance of eight shillings per week in case of permanent disablement, upon the payment by each member of a premium of twopence per week. The contributions of the employers amount to from fourteen to twenty per cent of the amount paid in by the men.

In the counties of Durham, Cumberland, and Staffordshire, as well as in other mining counties, there are likewise large associations which insure against sickness and accidents, some of them receiving contributions from the proprietors of collieries, and some of them aided by their co-operation in making membership compulsory. Among the leadminers of Northumberland and Durham there is likewise a similar society, supported in the same way; and, although membership is not made compulsory, about three-fourths of the workmen in the mines are members. An allowance of ten shillings a week, in case of sickness or accident, is paid upon a premium of fivepence per week; and, in case of death, £20 upon a premium of twopence per week.

Besides these various associations, there is also, in connection with some of the railroads, — the North Western,

for example, — a pension list for the salaried staff, such as station-masters, clerks, and all above their grade, which, in the instance cited, is already supported by a large fund made up of assessments upon the members and contributions from the company. It is exclusively for the benefit of the salaried staff, and provides for cases of superannuation, as well as disability from illness or accident. In Yorkshire, the miners belonging to the association were paid, in consequence of injury, during the three years ending with 1876, the sum of £29,000; and during the five years ending with 1875, no less than 711 persons lost their lives in the mines from explosions of fire-damp, the falling in of roofs and coal, from accidents in shafts, and from other causes.

This species of insurance, which is but the adaptation of the general principles of insurance, and the special features of accident insurance, to associations of this kind, has been in successful operation in Germany for many years; and the English could have learned, if they did not, all the principles upon which their societies are formed, from the miners' associations of Germany. It had reached such a stage of general development seventeen years ago, that it was provided by the *Allgemeineis Berggesetz* — General Mining Laws — of June 24, 1865, applicable to all mines, and furnaces for the smelting of ore, that every mining district should have its own *Knappschafts-Verein* — Workman's Association, — whose constitution should be subject to the approval of the local authorities, and in which membership should be taken by both masters and workmen. By the form of constitution prescribed, every member must pay into a common fund a small proportion of his wages, or allow his employer to deduct from his wages a fixed amount, and pay it in for him. The employer is also obliged to pay in a certain sum, usually amounting to about one-half the sum contributed by the men. The object of these associations is to make some provision, in colloquial phrase, for a rainy day; some provision to meet the exigencies of accident, sickness, or death; some provision in sickness for medicine and medical attendance; together with a regular allowance for the support of any member, if necessary, for the rest of his life, or during his temporary disablement;

or, in case of his death, to give him a decent burial, and take care of his children till they reach the age of fourteen, and his widow during her life, or until she marries again. All associations of miners already formed were obliged to conform to this law, and adopt the form of constitution which it prescribed. In matters of this kind, and in almost all matters which relate to the general protection of the poorer classes, and the distribution of charities, the New World can learn much from the Old, where, in an older form of society, such problems were much earlier presented to social scientists for solution. The system has worked well both in England and Germany. It was necessary to make this form of insurance compulsory, because many workmen would not otherwise make suitable provision for the future, and employers would not otherwise lend their co-operation. If looked upon simply as a provision against the need of public charity, it has been of great service, by keeping indigent miners out of the workhouse. A peculiar feature of the German law provides that the courts may, upon proper request, determine whether the sum paid by way of assistance shall all be paid at once, or by weekly or monthly instalments; and so thoroughly has the system become established, that it is not uncommon now for large employers of labor to insure themselves, in one general policy, against loss by the payment of damages and assessments for injuries to their workmen. And this practice is not uncommon in Great Britain, especially since the passage, in 1880, of the Employers' Liability Act. In these two ways the workman is insured by the association to which he belongs, and his employer by some general insurance company.

In the United States the principal experiment in this class of insurance, on the mutual contribution plan, is that of the Baltimore & Ohio Railroad Company. The employees of this company have an association, organized in May, 1880, under the name of the Baltimore and Ohio Employees' Relief Association. This organization is in successful operation, and its scheme is the best for the employees of American railroads. It is so complete, we have given in Appendix B the letter of the company proposing the plan, and the constitution and by-laws of the associa-

tion. This association has been incorporated by the Maryland legislature by Act of May 3, 1882. Should kindred associations be formed in this State, they could be incorporated under our general laws. There might be a combination of several or all the railroad companies of the State for the formation of such an association, or of the factories of a place or of a county. There seems to be no doubt that with such associations in existence, and in successful operation, much progress would be witnessed in the creation of harmony between employers and employees.

When this question of insurance is considered in connection with the general question under discussion, it is naturally asked whether the provision thereby made for employees, should such a system be adopted in this country, might not be an ample substitute for the proposed increase of the liability of employers. And, while it is true that such a form of insurance would meet the necessities of many more employees than would the proposed change in the law of liability, it is equally true, that because some provision has been made for an employee who has been injured through his own carelessness, is no reason for refusing to make additional legal provision for a person who has been injured through the carelessness of his employer. The first person could in no case recover damages, because the injury was caused by his own contributory negligence. Has not the second person, whose injury was caused by the negligence of his employer, a moral, and ought he not to have a legal, right to receive the additional protection and assistance of compensation in damages for the injury inflicted upon him?

Inasmuch as railroad companies are not charitable institutions, but, like all other business enterprises, are managed chiefly in the interest of the stockholders who furnish the capital, is it impossible that the annual contributions of the companies are made on the basis of the total sum annually paid for damages and assistance to employees? If so, are not the employees who are injured by companies' negligence actually contributing largely to the funds out of which the employees injured by their own negligence receive their money? The force of this inquiry is even more apparent

when considered in connection with the proposals made, after the English act was passed, by railroad companies to increase their contributions, on condition that their employees would contract themselves out of the operation of the act. The employer should not be asked to help pay damages resulting from injuries caused by the negligence of the employer's agent. And it is worthy of remark, that when this same question came under the consideration of the select committees of Parliament, then investigating the general subject, and the amounts paid by way of insurance were stated by the managers of the various railways, the committees looked upon the small stipend which the employee thereby receives as only a make-shift, and no equivalent for the wrong and misery he had suffered. Why should he who has been injured by another, stand upon the same legal plane with him, who, by his own act, has injured himself?

#### INFREQUENCY OF THE RECOVERY OF DAMAGES.

While, during the nine years ending with Sept. 30, 1881, 358 employees were killed upon the railroads of this Commonwealth, and 653 were reported as injured, it is improbable, — so strictly is the law of contributory negligence enforced, so easy is it to avoid liability under the rule requiring an employer to exercise due care in the selection and repair of his machinery, and under the other rule enforcing liability where there is personal interference or supervision, — that in less than ten per cent of these cases have any damages been recovered. And yet, if it is safe to accept the opinion of a man of such large experience and information as Mr. Evans, as well as to believe that the railways of Great Britain and Ireland are as safely managed as our own, at least one-half of these deaths and injuries are in part remotely due to one or more of the six causes mentioned in the memorial of the ten thousand English railway employees; viz., 1, excessive hours of labor; 2, non-enforcement of certain of the companies' rules, ostensibly made for the protection of the men; 3, the non-adoption of the most approved appliances conducive to safety in the working of railways; 4, the want of proper accommodations for work-

ing the freight and traffic; 5, the employment of inefficient persons for the performance of responsible duties; 6, the employment of an insufficient number of men.

During four years not a single instance of the recovery of damages by an employee came to the knowledge of any of the officers of the Society of Railway Servants; although during the four years from 1872 to 1875, inclusive, according to the reports of the Royal Commission, 238 were reported killed, and 172 injured, from causes beyond their own control. This shows the severity of the present law, allowing common employment to be a defence to such actions. In this connection it may be remembered that of 83 employecs killed on the London and North Western Railway in 1876, only six, or about eight per cent, were killed, said the general manager, from causes beyond their own control. And Mr. Moon, chairman of the Board of Directors of this railway, which employs about 50,000 men, said, at a meeting of some of the employees, called to consider whether to accept the provisions of the "Employers' Liability Act," that in not more than two per cent of the cases resulting in death or injury could damages be recovered. It is impossible to give a satisfactory estimate of the number of cases in our own State, because the reports of and to the Railroad Commissioners are not sufficiently explicit, and there are no reports of accidents occurring in mechanical industries, upon which to base an intelligent estimate.

#### SHOULD THE SAME PRINCIPLE BE APPLIED TO DEFECTS IN MACHINERY?

Under the law, as it stands at present, the employer is held to a stricter responsibility to third persons than to his employees, for injuries caused by defects in machinery and plant; and, if his liability to third persons and employees, for injuries caused by the neglect of his servants and agents, is to be made the same, should it not, upon a like principle and for equally sound reasons, be made the same for injuries caused by defects in machinery? At present the employer is responsible in damages to third persons for injuries caused by defects in his tools, implements, works, machinery and plant, which reasonable care on his part could have discov-

ered and obviated; though not for secret defects resulting from the negligence of persons from whom he bought the tools, machinery, etc., used in the business.

The principal reason at the basis of this liability is, that, as some one must take the risk of defects, it is less unjust for him to take it who makes or buys the machinery or plant, who can accept or reject them, who owns and uses them, who ought to keep them in repair, and can direct when they should be repaired, or, when worn out, replaced, than for strangers who know nothing about the machinery or plant. If the employer's liability is to be increased in respect to personal damages caused by the acts of his agents, why should it not be increased in respect to damages likewise caused by the negligence of agents in omitting to discover and remedy the defects?

He is now liable to employees only for defects known personally to himself, and unknown to the servant injured, — in other words, for defects which have come within his own knowledge or information. The practical difficulty of proving in court at a trial this actual knowledge or information, makes such a liability almost a barren security. But if, as is almost always the case in mechanical and manufacturing employments, the tools or machinery are not used by himself, but by his servants, employees, and agents, he is entirely free from responsibility. Such a burden of risk as is imposed upon him in his relations to third persons is entirely removed, and the servant must take the risk upon himself. Unless the employer is made responsible for the acts of his agents, he is not obliged to use even reasonable care in selecting tools and machinery, and keeping them in good condition, in detecting and obviating any defects. He may, so far as this liability to his employees is concerned, allow his servants to do as they please; to select unsuitable machinery, unsuitable in design or execution; to neglect to take proper care of it; may allow them to use it in a careless and improper manner, and therefore escape the consequences of their negligence. When it is remembered that this extension of the rule would not make him liable for secret defects, nor defects which a reasonable care could not discover and obviate, nor defects of which the person injured was aware, either through his



own knowledge or the information of others, the danger of extending the rule does not seem so great.

ARE THERE ANY AGENTS FOR WHOSE ACTS THE EMPLOYER SHOULD BE MADE LIABLE?

In considering the application of any practical method of making responsible large employers of labor, such as railroad corporations, the owners of factories and mines, and persons carrying on any large mercantile, manufacturing, or mechanical business, with employees arranged in different classes, the superior having authority over the inferior grades, the question at once arises, For the acts of what agents should the employer be made liable, in order that the objects sought by a change in the law may be better accomplished? The general object to be accomplished is, in the words of Lord Sherbrooke, to make "the funds of every industrial undertaking liable to compensate any person employed in such undertaking for any injury he may receive by reason of the negligence of any person exercising authority mediately or immediately derived from the owners of such undertaking." To accomplish this object there seems to be no other way than to make the employer liable for the negligence of every superior workman, in whatever grade, from the employer down, who has authority over the servant injured. For instance, as a brakeman on a freight train might be injured by the negligent act, order, or direction of the board of directors, the superintendent, the general freight agent or the conductor of his train, each of whom is vested with authority over him, — it would be necessary, lest the corporation should escape liability for the negligence of some one of them, to make it liable for the negligence of all of them. In an employment where the labor is in such a way classified, where authority may be delegated and sub-delegated, the master should be made liable for the negligence of every man in the chain between the master and the injured employee. When the Parliamentary Committees had this subject under consideration, George Findlay, the Traffic Manager of the London and North Western Railway, being asked where the line of responsibility should be drawn, said that it was no use to make the corporation

liable for the acts of the manager alone; "you must make every man in active control over the staff" [ordinary employees] "responsible, if you are to accomplish the objects of those who brought in this bill;" so great is the authority over the management of trains necessarily left with officers of inferior grades. And James Grierson, the General Manager of the Western Railway, in corroborating this opinion, illustrated it by saying, "In fact, take the case of a signalman at a junction or a station: he then, in fact, is the manager of the railway for the time-being; he has the control of the drivers and the guards, and it is under his instructions that the work is carried on; by a mistake of his an accident occurs, and a driver [engineer] is killed." Mr. Justice Willes, in the case of *Murray v. Currie*,\* has suggested the rule which should be followed out in determining this liability. "I apprehend," he says, "it to be a clear rule, in ascertaining who is liable for the act of a wrong-doer, that you must look to the wrong-doer himself, or to the first person in the ascending line, who is the employer and has control of the work." Where there are other workmen vested with authority which the wrong-doer is bound to obey, and intervening between him and the employer, under the legitimate extension of this rule, he should be responsible for their acts. Reference to section 1 of the Liability Act (Appendix A) will show how the English Parliament expressed in words the object sought to be accomplished.

#### SHOULD THE LIABILITY BE LIMITED IN AMOUNT?

The question naturally occurs whether any limit should be placed upon the amount of damages which can be recovered. In the third section of the English act, the Conservatives, after somewhat narrowing, by section 2, the nature of the liability created by the first section, affixed a limit to the sum which could be recovered equal to the estimated earnings for the three years preceding the injury.

This section prevented a man thrown out of employment for four years or more, made a sufferer for years, or a cripple for life, from recovering more than three years' wages. It

\* 6 L. P. 24.

is not easy to see why all injuries should be treated alike. It is a crude justice which declines to discriminate between dissimilar cases, to investigate the circumstances of each case, to consider the facts on both sides, to weigh the evidence in the scales of a wise discretion, and mete out justice in unequal measure, as the unequal merits of different cases require. What would be thought of a criminal code which punished alike all crimes above a misdemeanor? which attached the same penalty to arson, highway robbery, rape, manslaughter, high treason, and murder? In the progress of criminal injustice towards justice, especially since Jeremy Bentham pointed out the necessity of reforming so many of its abuses, legislatures and judges have become more in the habit of distinguishing between the differing grades of crime, and no longer are all the higher offences punishable with death. What would be thought of a system of rewards and punishments, which bestowed the same praise upon the school-boy who learned his lessons well; upon the statesman or soldier who saved the State from anarchy and disunion; upon Grace Darling, for saving human lives at her own peril; upon Philip Sidney, for giving a glass of water to a soldier dying on the battle-field, more in need than himself? Such legislation as limits the amount of damages to three years' earnings is a step backward. What occasion exists for adopting so unjust a rule in relation to employees, when all other questions of damage are determined upon their merits, — upon the circumstances of each particular case? Damages to the person, to real estate, and to personal property, are assessed by courts or juries as each case requires. Why should such a distinction be drawn against employees? Is it said that juries generally award damages against corporations and wealthy employers? The obvious answer is, that they generally deserve a verdict against them; that in a very large majority of instances the plaintiff in a suit at law deserves a favorable verdict. If objection is made to the jury system as unjust to corporations, why is not the rule made general, that in no instance shall damages above a certain amount be recovered against them? If it is said that this rule has been adopted in relation to highway damages against towns, may it not be asked whether such a precedent ought to be followed?

SHOULD THE EMPLOYEE BE ALLOWED TO MAKE A CONTRACT  
RELEASING HIS EMPLOYER FROM LIABILITY?

After the passage of the English Act, the question arose whether the employee could and would contract himself out of the operation of the act. There was nothing in it permitting or forbidding such a contract; and some of the large railroads and mining corporations attempted to compel their laborers to sign contracts of hire releasing them from liability for damages. There was no law to prevent the workmen from signing such contracts; but they were urged not to do so by their own reason and interest, as well as by the advice of Mr. Macdonald, Mr. William Crawford, Secretary of the Durham Miners, Mr. Benjamin Pickard, Secretary of the West Yorkshire Miners, and every one else who had earnestly labored to secure the passage of the act. Having obtained, after years of labor and agitation, a law of some benefit, — though the benefit was not so great as had been hoped for, — it seemed the height of folly to sign it away.

The chief, if not the only, advantage offered in consideration of this release, was an extension and enlargement of the benefits of insurance. The same paltry benefit which had been used to restrain the passage of the bill while it was before Parliament, — the benefit of receiving, upon payment by them of half the insurance premiums, a continuance of their wages for a few weeks or months, with an allowance of £40 or £50 in case of death, — was again offered to them, together with an increase amounting to about two-thirds of what they were already entitled to, provided they would sign away their rights under the act. Unless they would do this, they were in some instances threatened with a discharge from employment, and a discontinuance of the small contributions already made to their fund. In some places large public meetings were called to listen to these proposals, and to consider the wisdom of adopting them. There were several large meetings, — one in Liverpool, — of the employees of the London and North Western Railway, which were addressed by officers of the company, and also by their fellow-workmen. In most instances the workmen voted to adhere to their rights under the act. At some of the meet-

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ings the vote was unanimous against bartering them away for what were thought trivial considerations. The clause limiting liability to the amount of three years' wages had made it impossible in general to recover more than from £150 to £200; and, because contributory negligence prevented the recovery of damages in all but from two to ten per cent of the cases of injury, the benefits of the act were in reality less than they at first sight appeared to be. But when the excitement had somewhat subsided, and the miners and laborers realized how slight the advantages given them really were, there was little doubt that more harmonious counsels would in many instances prevail, and that, in exchange for a more liberal extension of the benefits of mutual insurance, many of the laborers would be willing to contract themselves out of the act. The clause limiting liability to three years' wages, and the lack of any clause forbidding the making of any contract of release, were the powerful levers used by the employers to secure the adoption of their scheme of mutual insurance. In Durham, West Yorkshire, and other mining districts, it was for awhile feared that trouble might arise; and strikes were apprehended from the course adopted in some of the collieries of threatening to withdraw further contributions to the laborers' insurance and protective fund, as well as in consequence of the refusal to allow them to work, unless they would sign the contract waiving their right to damages.

The injustice of attempting to compel the laborer to sign such a contract, is manifest from the consideration that he is usually less able than the employer to care for himself, less provident and thoughtful for the future, and more ready; upon a slight necessity, to sacrifice a future advantage for a present benefit. Their positions are unequal. While in general there might be a difference of opinion as to the wisdom of making laws to restrict the right of contract, there is as little room as possible for a difference of opinion as to the need of affording the laborer some legislative protection. If ever a law restricting the right of contract ought to be made, if ever the State should extend over workmen a wider protection, making them, as seamen and minors are made, to a certain degree, wards of the State, it should be by prevent-

ing them from signing away their right to recover damages for personal injuries, which the delusion of hope so easily makes them believe is in reality a worthless benefit.

It is the lack of such a provision as this which has made the English Act of little value; has, during the past two years, kept the relation of employer and employed unstable and uncertain; has encouraged the former to persevere in getting the employee to sign a release of liability, and has encouraged the employee to persevere in hoping that Parliament would come to his relief by amending the law.

In January 1881, and within three weeks of the time when the English Act went into operation, Mr. Macdonald, Mr. Broadhurst, Mr. Burt, and Mr. Peddie, members of Parliament, introduced a bill to amend the law in this particular, by providing that the act of 1880 "should have effect, and be enforced by every court in every case, notwithstanding any contract or agreement excluding all or any of the provisions of said act, or otherwise interfering with the operation thereof: provided (1), that this act shall not affect any contract or agreement made before the passing of this act; and (2), that in determining in any case the amount of compensation payable under the said act by an employer, the court shall take into consideration the value of any payment or contribution made by such employer to such insurance fund or compensation fund, to the extent to which any person who would otherwise be entitled to the compensation under the act, has actually received compensation out of such payment or contribution at the expense of such employer." This bill was prepared to meet the exigencies which it was foreseen would arise, by the Parliamentary Committee of the Trades Union Congress. It failed at that time to gain the co-operation of the Gladstone Ministry, because, as Mr. Dodson, who had charge, for the Government, of the Act of 1880 in its passage through the House of Commons, said, when the amendment was introduced, in answer to a question by Mr. Sheridan: "The Government have no intention, at all events before full experience of the working of the act, to propose a bill to amend its provisions. I especially hope that the power of free contract will, if resorted to, be used with such good sense, fairness, and mod-

eration by all concerned, that no occasion will arise for curtailing it in the interest of any party ;" which meant, perhaps, that if the employer made an unfair use of the right of free contract, the Government would pass the amendment. The subject is still, at this writing, under discussion in England, in the press, among the employees, and in Parliament. The law of this Commonwealth at present protects the employee in this respect.

Chapter 74, section 3, of the Public Statutes says : " No person or corporation shall, by a special contract with persons in his or its employ, exempt himself or itself from any liability which he or it might otherwise be under to such persons for injuries suffered by them in their employment, and which result from the employer's own negligence, or from the negligence of other persons in his or its employ."

#### SHORT HISTORY OF THE PASSAGE OF THE ENGLISH BILL.

After several years of discussion and agitation, the question of allowing workmen the same right to recover damages of their employers that other persons have, at last reached such a stage of advancement that it was thought advisable for the English Liberals to adopt the idea as a part of their political creed, in order to secure the votes of workmen who were in favor of it. This question was only a branch of the general subject of the rights of labor, which has been before the English people so many years ; has resulted in the formation of separate societies, trades and protective unions ; and has found advocates among the ablest and most liberal men of the Liberal party, by whom the rights of labor have been advocated in Parliament. And this reform, like many others, has gained its way gradually through the agency of a separate political organization. At the last general election, in 1879-80, the candidates at almost all the hustings throughout Great Britain were asked, before the polls were opened, if they would support this measure, and it was made a party issue. For eight or more years the question had been before the English people and Parliament ; had received general public consideration ; and its friends were too conversant with the arts of successful agitation and reform, to neglect so auspicious an opportunity

to secure a change in the law. On the 10th of February, 1880, the bill presented by the Earl De la Warr—which, with some amendments, on the 7th of September following became a law—was ordered printed by the House of Lords; but the session had progressed into the summer before the House of Commons went into committee for a discussion of the bill. Mr. A. Macdonald, who has since died, was one of the leaders in the cause. This bill fell so far below the wants of the foremost advocates of a change in the law, that Sir Henry Jackson expressed himself as altogether dissatisfied with it; and Mr. Pease feared the bill would do more harm than good to those whom it was intended to benefit.

The Parliamentary discussion, begun in July, was carried on at many sittings through that and the following month, Mr. Dodson having charge of the bill in behalf of the Government. As is usual in such cases, various amendments were proposed by conservative members hostile to the measure, among the first of which was one relating to the subject of mutual insurance,—a make-shift which has been urged through all the progress of this reform, from the time of its earliest discussion down to the present day, and which still threatens to defeat the objects of the act. It is not impossible that the accident insurance companies, which have been, and will probably continue to be, the principal gainers by this amendment, may have early been its promoters. Another amendment easily made, persistently urged, defeated in the House of Commons, but finally adopted in the House of Lords under the leadership of Lord Beaconsfield, limited the amount of compensation which could be recovered to the estimated earnings of the three years preceding the injury.

Another amendment, which forms the fifth sub-section of section 1, relating to damages recoverable by railway employees, at a general conference of members of Parliament, workmen, railway servants, and their representatives, held before the bill was reported to the House, was deemed very unsatisfactory, but was finally assented to on the ground that it was the best that could probably be obtained in opposition to the powerful influence of the railroad lobby. In connection with the subject of accident insurance, it was stated in a published letter, by Mr. David Chadwick, after



a careful investigation, that upon the payment of six shillings a year by the workmen, and £200 by their employer, 3,000 persons could be insured, each in the sum of £50, to be paid in case of accidental death.

One of the motions to defeat the bill was made by Mr. Gorst to include within its operation all the workmen employed in Her Majesty's arsenals and dock-yards; and supported by Mr. Boord, Sir H. Wolff, Sir H. Holland and Mr. Newdegate. But the Attorney General and Mr. Childers pointed out that by a Treasury Minute the men in the dock-yards now enjoyed greater privileges than they would receive under the bill. Instead of receiving, in case of injury, compensation equal in amount to three years' wages, the "establishment men," so called, might be granted by the Treasury a maximum compensation equal to ten years' wages; and the non-establishment men might receive a sum equal in amount to their wages for nine years. In case of death, their widows and children would receive larger gratuities than this bill allowed; but it was, of course, discretionary with the Treasury to grant any allowance of any kind.

Before the bill passed the House of Lords, a powerful opposition was aroused. The associated coal owners of South Wales threatened, in case of its passage, to withdraw their contributions to the insurance fund; which was somewhat of an empty threat, because their contributions did not equal 25 per cent of the total premiums of the men. At the half-yearly meeting of the London and North Western Railway, Mr. Moon, the chairman of the Board of Directors, declared that the capitalists had not a fair hearing before Parliament; and he was, as it now appears, unnecessarily afraid that the passage of the bill would "drive the capital of the country away." And at the North London Railway meeting at Euston Station, on the day after the bill passed the House of Commons, Mr. Bancroft, the chairman, made especial objection to the fifth sub-section of section 1, relating to railways, which had been added as an amendment to the original bill, because it was feared that without it railway companies might escape the imposition of suitable liabilities. But he expressed himself as willing to submit to the other provisions of this section.

The master-builders — how many is not known — petitioned the House of Lords to have the third sub-section of section 1 stricken out; because, as this section stands, with the definition afterwards given to the expression “person who has superintendence entrusted to him,” the defence of common employment is almost altogether abolished; and likewise proposed an amendment to the fourth sub-section, which was afterwards substantially adopted as the third sub-section of section 2; and the powerful aid of Lord Cairns, a Conservative Ex-Chancellor, was invoked.

The former wrote for publication a letter in which, — while saying that the railway companies ought not to complain because they are obliged to assume towards their employees the same responsibility as they agreed, when they received their charters, to assume towards their passengers, — he expressed the opinion that freedom of contract ought not to be restrained.

Lord Cairns, in a letter to the “Times” signed “C,” while acknowledging the right of the workman to say that for the future he declines to be considered as making, at the time he enters into his employer’s service, an implied contract to run the risks of the employment, objects to the substitution attempted by the bill, of what he calls a Parliamentary contract of employers’ liability, for an implied contract of non-liability. He proposes to “get rid of the judge-made law of implied contract by a short enactment, that where a workman would otherwise be entitled to an action for negligence against his employer, he shall not be defeated merely by the circumstance that he and the person actually causing the injury were in a common employment; with a declaration that this enactment is not to interfere with any express contract on the subject which the employed and the employer may make.”

As Lord Cairns enjoys, with Lord Justice Blackburn, the enviable distinction of being one of the two ablest of living English judges, — if the merit of judicial opinions is to be taken as the criterion, — it will be well, perhaps, to print the entire letter: —

“The Employers’ Liability Bill has passed the House of Commons. At this season of the year it is impossible that there can be a real con-

sideration of such a bill by the House of Lords. I do not wish to inquire whose fault this is, or whether it is the fault of any one: I only desire to state what is the fact. The discussion of the measure in the House of Commons has shown one thing, if it has shown nothing else, — that the subject is much more difficult than was commonly supposed. An attempt has been made to lay down certain formulas or rules which are to meet each and every variety of the infinitely varying trades, employments and industries of the country. The result has been the introduction into the bill of a series of qualifications, modifications, limitations, exemptions and enlargements, which must necessarily lead to much uncertainty, great litigation, considerable ill-feeling, and probably considerable disappointment, and to a mass of new law gradually manufactured by judges, or, what is worse, by juries. These reflections, and the circumstance that it is in your columns alone that a deliberate hearing can now be obtained, induce me to ask in this way, Is it clear that this legislation begins at the right end? Or, rather, is it not clear that it begins at the wrong end? How or why is it necessary that Parliament should step in and define when and to what extent an employer of any of the various forms of labor in this country shall be liable to his workman for an injury occasioned by the negligence of a fellow-workman? Some fifty years ago the courts of law laid down that it was an implied term in every contract of hiring that the person hired took the risk of any negligence in a fellow-workman. This was not an unreasonable supposition in itself, and it was probably not untrue in fact, as things then stood. But there cannot continue to be an implied term in contracts where one of the parties to the contracts distinctly repudiates the existence of any such term. That is now the position of the workmen. They say, in substance, that whatever express contracts they may be willing to make, they have not made, and do not choose to have it asserted that they have made, a contract containing this implied term.

“It appears to me that this is the crucial question which the legislature have to meet, and that it would be better either to meet it directly, or else to leave the law as it stands. The present bill does not meet the question. It proposes to substitute, for the implied contract which the workmen disavow, another special Parliamentary contract, which neither employers nor employed have ever entered into, which they probably do not understand, and which, in numberless cases, will be found in practice to be so irksome to one or other or both of the parties, that they will begin at once to contract themselves out of the act. My proposal would be to get rid of the judge-made law of implied contract by a short enactment, that where a workman would otherwise be entitled to an action for negligence against his employer, he shall not be defeated merely by the circumstance that he and the person actually causing the injury were in a common employment; with a declaration that this enactment is not to interfere with any express contract on the subject which the employed and the employer may make. The result of such an enactment would be that every employer and workman would make the contract which would

be suitable for the particular employment. One employer would set up a system of insurance; another would indicate the particular servants for whose acts alone he would be answerable. Some might exclude particular risks, or make the liability or freedom from liability enter as an ingredient into the amount of wages. The employers and workmen are best able to understand their own work and their own interests. They are quite competent to make their own bargain on equal terms, and to regulate, so far as it is right to do so, the rate of wages by the amount of risk incurred. It may be said that a contract may, as the bill stands, be made to supersede the bill. My answer is, that the moral and social effect, where Parliament merely removes legal difficulties, and invites parties to make their contracts in the way that best suits them, is very different from the effect of a bill which makes, as it were, a Parliamentary contract for the parties, and then drives them by its inaptitude to make stipulations against it. I cannot think that the present bill, if it passes, can settle this question, and it may not be too late to suggest a more lasting solution of it."

When the bill came up in the House of Lords, the Lord Chancellor, Lord Selborne, explained at considerable length the condition of the law and the provisions of the bill, together with their probable effect, citing the law of France and of Germany as in harmony with the change proposed, as well as the law of the State of Missouri in this country. But, in this single particular, as has been seen, he seems to have been misinformed; for the effect of the Missouri statute was destroyed by the decision\* of the judges that the phrase "any person" did not include a "fellow-servant." He closed with suggesting, on behalf of the government, two slight amendments.

Viscount Cranbrook commenced, on the part of the Conservatives, the discussion in opposition, using various arguments, not forgetting to present the horror so often apprehended by legislative assemblies, that law attorneys would profit by the litigation with which the country was in danger of being deluged. These apprehensions seem to have been groundless, as, during the first year in which the act was in operation, only thirteen claims, says an English law journal, were brought, of which five were unsuccessful, and the damages recovered in the other eight amounted on an average to £83.

Without attempting to give a summary of the dispute and

\* See *ante*, pp. 41 and 42.

the arguments, which were in the main a repetition of the objections already discussed, the result will perhaps be understood by remembering that, on motion of Lord Bra-bourne, sub-section three of section 1 was stricken out, but afterwards agreed to because the Commons insisted upon its insertion; and the operation of the act was limited, upon the motion of the Earl of Beaconsfield, to Dec. 31, 1887, — seven years. The genius of legislation is compromise; but so much was given up on both sides, that neither the friends nor opponents of the measure were satisfied, and the employees are now insisting upon further legislation.

This history of the passage of the English act has been given to show the difficulty attending the reversal of a principle of common law, and to aid the discussion of the measure to come before our own legislature.

#### THE OPERATION OF THE ACT.

The passage of an act, limited in its operation to seven years, which restricted the amount of compensation to be recovered to three years' earnings, and which, according to the opinion of Mr. Moon, the chairman of the London and North Western Railway, was applicable to not more than two per cent of all the cases of death or injury occurring to employees, would not seem to be the occasion for strikes and disagreements between employers and the employed. And yet some large employers of labor had believed, or during the excitement of public speaking had worked themselves up to the belief, that the act would create a revolution in existing relations, would drive capital out of the country and laborers out of employment, and prove a hardship to one class, and of no benefit to the other. Why the hardship of paying damages is not correspondingly a benefit to the persons receiving them, is not apparent.

The act was to go into effect on the 1st of January, 1881, about four months after its passage; and the first question presented to both parties was whether the workmen could contract themselves out of it. Almost all the solicitors thought such a contract valid; but one of the judges, before whom a claim was presented, thought that to allow such a contract would be against public policy. The Attorney

General, Sir Henry James, said, in reply to a communication from the secretary of the Amalgamated Society of Railway Servants, asking if the signing by a workman of a release from all liability would, in the event of his death, prevent his widow and children from recovering damages :—

“ In the event of a railway servant contracting to relieve the company of liability under the Employers' Liability Act, the company would not be liable, in case of his death, to the man's personal representatives, any more than they would be to him if injured and living.”

Having ascertained that a contract of release would defeat any claim for damages, some of the large employers of labor, unnecessarily apprehensive, as it now appears, began to take measures to secure such a release from each of their workmen ; and, in order to accomplish this purpose, made proposals to extend the benefits of the insurance funds by increasing their subscriptions, and threatened to withdraw the subscriptions they were then making, and perhaps to discontinue work, unless those proposals were accepted. The summary discontinuance of labor called a strike is usually too great an injury to the employer, and the proprietors of mines have of late had too bitter an experience, to warrant their incurring, without due deliberation, the risk of such an event. However, the course which they pursued, without, perhaps, a sufficiently careful estimation of the value of the object sought, precipitated strikes in some of the mining districts, of short duration, to be sure, but sufficiently severe to raise the price of coals at Manchester, through the inability of the collieries to supply the demand of the factories, to almost famine prices.

In reviewing, in the light of to-day, the disagreements which attended the attempt of the employers, railroads corporations and proprietors of collieries, to obtain over their workmen what seems to be so paltry an advantage, it seems strange that a more careful estimate was not made of the benefit sought. It seems strange, if it is true, as reported by a leading law journal, that during the first eleven months eight judgments, amounting in all to £664, were obtained, that such ignorance as prevailed should have been allowed to blind the eyes of so many people ; strange that the leaders

in this reform should not have better estimated the benefits which they hoped to confer upon the workingmen; and stranger still, that intelligent employers, with the best of opportunities for ascertaining their probable liabilities, with the facts in possession or within reach upon which to base a reliable estimate of the vast proportion of cases of injury cut off from the recovery of damages by the contributory negligence of the sufferers, should not have more readily acceded to the wishes of the promoters of this act.

The expectation that the flood-gates of litigation would be opened, and the courts deluged with actions for damages, happily has not been realized. Upon the authority of the "Law Times," a conservative journal of the proceedings of the courts, it is stated that during the first eighteen months of the operation of the act, less than one hundred cases had been brought to trial, a fair proportion of which had proved successful; that probably less than £3,000 had been recovered in damages, and an equal amount in costs; and, if the past year may be taken as a test, "the individual employer would almost be deemed justified in regarding his risk in the same extraordinary way as the risk from lightning or foreign invasion. Moreover, against this risk he can insure by payment of almost nominal rates." And, while the doctrine of common employment remains almost as before, there has been, on account of the ambiguity of the act, and the uncertainty as to its meaning, little gained for the employees except under the section relating to railways. This is not the first attempt at reform, which, in consequence of the legal astuteness of its opponents, has proved abortive.

With the first clause, which made them liable for "any defect in the condition of their ways, works, machinery and plant," the opponents of the bill seem to have expressed no dissatisfaction. With the second clause, which made them liable "for the negligence of any person in the service of the employer who has any superintendence entrusted to him," they seem to have been satisfied. Against the fourth clause, which made them liable for "the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer," etc., they seem to have made little opposition, and to have been satisfied

with the amendment made to it, providing "that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of Her Majesty's principal secretaries of State, or by the Board of Trade, or any other department of the government, under or by virtue of an act of Parliament," etc., which allowed a railroad corporation or the proprietors of a mine or factory, or any employer of labor, to submit the body of rules and by-laws, made for the government of its workmen and the general conduct of its business, to proper government officers for approval; and if they were approved, the employer was released from liability under that clause of the act. And clause five, which made every railroad corporation liable for "the negligence of any person in the service of the employer, who has the charge or control of any signal, points, locomotive engine, or train upon a railway," does not seem to have been considered by several of the railroad companies as imposing a very unreasonable responsibility, does not appear to have caused, during almost two years, a loss worth considering by a wealthy corporation. It seems to have assisted, by awakening through fear of losses an unusual anxiety concerning the lives of their passengers, in creating a more general confidence in the safety of railway travel; and, if the immediate effect of the act has not been altogether what was expected by its friends, the remote effect has been a general benefit to the general public. Although this real or fancied security may not be lasting, because the railroad companies may soon relax the unusual efforts they have been impelled of late to make, it would seem at this time as though the substantial benefit which the workingman has failed to get under this clause has been realized by the general public.

Clause three, which imposed liability for "the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed," awakened the most apprehension, because of the vague uncertainty as to how heavy a responsibility was really imposed. Lord Bra-bourne, at the instigation of some of the master-builders, vainly attempted, as has been said, to prevent its passage



through the House of Lords. The apprehension awakened by it seems, however, to have been unnecessary; for, upon the best information obtained, it has not permitted the recovery, in a single year, of an amount of damages equal to the sum total of the judgments ordinarily obtained in a single week in the municipal court of the city of Boston.

The resolution of the legislature directed an examination of the law and an investigation of the facts bearing upon this subject, which has been done fairly and candidly, as an inquiry after information, and not as an attempt to prove a theory. And, so far as the operation of the English act is concerned, it seems just to say that, in the direct benefit conferred upon workmen in the form of damages for personal injuries, it has fallen far short of the anticipations of its promoters. The amount of labor expended by some of them in securing its passage seems to have been well directed, but to have fallen short of their sincere desire to benefit a deserving class of men.

In view of the efforts being made in some of the mining districts to compel the miners to sign contracts of release, and of the fact that notices were being served upon them to the effect that work upon the old terms would cease upon the 1st of January, 1881, the day when the act went into effect, as well as in view of the negotiations with them commenced in consequence of the system of intimidation inaugurated, to which the attention of the government ministers had already been called in Parliament, Mr. Benjamin Pickard, the secretary of the West Yorkshire Miners' Association, which included a large number of men over whom he had a strong influence, wrote to them an earnest letter, urging them upon no consideration whatever to consent to the proposed arrangement, declaring against the amount of litigation apprehended, referring to the manner in which the provisions of the Mines Regulation Act of 1872 were accepted, and avowing that while his constituents had not obtained all which they desired, "they certainly are not about to sell for a mess of pottage what they have got." In the same month of December Mr. A. Macdonald, M. P., a leader in the cause, also wrote strongly urging the miners of South Wales to refuse to enter into any such arrange-

ment; and Mr. William Crawford, secretary of the large association of Durham miners, says in his monthly circular for December: "The act of Parliament has been passed at the special request of the workmen, and for their special protection, and it ought to be allowed to fully operate, irrespective of any other consequences whatever. To contract out of the act by any system of insurance would be turning all the efforts put forth, and work done for many years, into a meaningless farce, and expose ourselves to the merited contempt of all right-thinking persons. One great difficulty which presents itself to the owners is the immense costs which will be incurred in the law courts. I have given the matter much thought, and I think that this difficulty can be easily obviated to the satisfaction of all parties. What we must obtain is the unquestioned right of the workmen to claim from owners compensation in case of accidents which might, or would, by an exercise of care and caution on the part of charge men, have been prevented. Any step which leads to a shifting of the personal responsibility of owners for the safety of the men from their own to the shoulders of insurance companies, is a step in the wrong direction."

These may be taken as types of the opinion almost universally prevalent at this time among miners and operatives.

In December (1880), the London and North Western Railway began negotiations with the men in their employ, numbering over fifty thousand; and a meeting of more than one thousand of them was held at Crewe to listen to a report from a deputation sent to the directors; who it appears had found the latter anxious to know whether their employees preferred to accept the act, or a revised scale of insurance. As illustrative of the sentiments which, at this time, seem generally to have prevailed, it may be noted that at this meeting the workmen interrupted the speakers, who were urging the acceptance of the suggestions of the directors, with cries of "Let's have the act!" and it was resolved at the close of the meeting to settle the question by a ballot.

During the next few days various other large meetings of the men, embracing many thousands of them, were held, one at Leicester, one at Wolverton, one at Liverpool, and another among the men employed in the company's mines at

Wigan. The proposal submitted to the men by the directors was as follows: To raise the scale of benefit for those in the first class, who paid 3d. a week, from £40 to £100 in case of death; from £35 to £100 in case of disablement; and from 18s. to 21s. per week in case of temporary disablement. For those in the second class, who pay 2d. a week, to raise the scale from £35 to £80 in case of death; from £25 to £80 in case of disablement; and from 12s. to 14s. per week in case of temporary disablement. And for those in the third class, who pay a penny a week, to raise the benefit from £12 10s. to £40 in case of death; from £18 15s. to £40 in case of disablement; and from 6s. to 7s. per week in case of temporary disablement.

In the collieries of the Earl of Dudley in South Staffordshire and East Worcestershire, the severe course adopted by him in discharging the surgeons hitherto permanently employed by him to attend to the men injured in his service, and in withdrawing all subscriptions for assistance, together with the sum which it had been his custom to allow for funeral expenses, at first had the effect of provoking the miners to refuse absolutely to sign releases; but an arrangement was afterwards effected. The first case carried to the Court of Queen's Bench was a suit against him in which damages to the amount of £184 were recovered. In this case the implied effect of the act of a workman in accepting his proposal, by returning to work, was tested.

The miners of Fife and Clackmannan, the colliers and iron-workers of Thorncliffe, Chapeltown, and many of the miners of South Yorkshire and North Derbyshire, declined to contract out of the act. Among the miners of West Lancashire, who had established a permanent relief society, which was in a prosperous condition, was assisting two hundred widows and three hundred children, and had an accumulated fund of £20,000, there was a difference of opinion as to the better course to follow, and a general disposition to accept the terms proposed. In Monmouthshire and South Wales, as well as in South Staffordshire, there was early manifested a like disposition, and permanent relief societies were founded in both districts.

As fair a proposal as any was made by the Great Western

Railway, which not only offered liberally to increase their subscriptions to the insurance fund, but also (which manifested a disposition not to take advantage of their men) to allow them, or their representatives in case of death, six weeks in which to elect whether to accept the provisions of the fund, or to rely upon the provisions of the act. The feeling of mutual confidence existing between the officers and employees of this company, and of the London and North Western, resulted in the acceptance of the proposals finally made.

Of 30,000 miners, members of the Lancashire and Cheshire Miners' Permanent Relief Society, 20,000 expressed their willingness to enter into an arrangement, 200 were unwilling, and 2,000 were willing to act with the majority. In some collieries in the Leigh and Wigan districts, and in Durham, strikes occurred; the men refused to contract out of the act, and passed resolutions requesting Mr. Macdonald to endeavor to have the act amended by making such a contract invalid. And in general about all that can be said is, that in some cases where fair and suitable proposals were made by the employers, they were accepted, while in others they were not.

It may be said that usually where large employers of labor did not succeed in securing releases, they resorted to the protection afforded by the accident insurance companies, who issued what are called "floating policies," assuming the risk of all damages which the person insured had been obliged to pay.

In speaking of the uncertainty which prevailed at the passing of the English act, as to its operation and the number of cases to which it would be applicable, Mr. F. G. P. Neison, a member of the London Statistical Society, in the discussion which followed the reading of Mr. Walford's paper "On the number of Deaths from Accidents, Negligence, etc., in the United Kingdom" (see *Journal of the London Statistical Society*, vol. XLIV., part iii., September, 1881), is reported as saying:—

"At that time a great number of employers were in deadly fear and tremor as to the responsibility which would be placed upon them by the passing of the act; and instructed him to inquire into the matter, to

ascertain what would be the practical operation of the bill; and for that purpose he had special facilities. Well, they naturally thought that if they took the question of mines first, they would undoubtedly be dealing with the most dangerous class of occupation in this country; and therefore the reports of the inspectors of mines for twenty years were carefully analyzed, and some large colliery accident funds supplied additional information. To sum up the matter, as far as mines were concerned, he might state that the result arrived at was that the rate of fatal accidents among miners might be safely put down at 23 per 10,000. It had, been, some ten or fifteen years ago, as high as 36, but he was glad to notice that each year the rate had been reduced. They next proceeded to the subject of railways, and here he must say they were obliged to have recourse to returns other than those of the Board of Trade, which did not take in all the accidents that occurred. Well, the result of their investigations was this, that the rate of accidents was found to depend materially upon the nature of the traffic conducted upon the line. If they took a passenger line, like some of the lines south of London, they found that in the course of the year some 25 out of every 10,000 employees met with fatal accidents. But when they went to large goods traffic lines, like those north of the Thames, the rate ran up to 35; so that they were surprised to find that, while the accidents in mines were only 23 in 10,000, in railways, under the most favorable circumstances, the rate was 25. Since that inquiry he had had special facilities in connection with the large trades union in connection with the railways, and it was found that the facts arrived at were completely borne out by the experience of the union. They next proceeded to a branch of inquiry not mentioned there that evening. They investigated the returns of the navy for twenty years; and they found, although the rate of accidents in the navy had decreased very considerably in the last few years, taking an average of fifteen years, the rate of deaths from violence in that service was 40 in 10,000. In the mercantile marine the rate was astounding. They found there that instead of 40 the deaths were as high as 150. They found one very considerable element to account for this, and that was, that the deaths from shipwreck alone in the mercantile marine amounted to 80 in 10,000, which still left 70 due to causes other than shipwreck. Hitherto he had dealt with fatal accidents; but now, as far as non-fatal accidents were concerned, they found, taking the country as a whole, that about one-fifth of the men employed in and about mines met with an accident of greater or less intensity every year. In some mines they found the rate ran up to a half of those they employed. A significant fact in their inquiry was this, that they ascertained with regard to the north of England, that when the coal trade was bad, the rate of non-fatal accidents increased wonderfully, and men whose backs were sprained in times of depression, were never heard of in times of prosperity; but always, when the price of labor went down, the men got their backs sprained with greater intensity."

In considering these figures and the number of railway employees annually killed, which is about 25 in every 10,000

employed on passenger lines, and 36 in every 10,000 employed on lines doing both a passenger and freight business, it should not be forgotten that these figures do not represent the per cent of employees who can recover damages, because the defence of contributory negligence, as has been seen, greatly reduces this per cent. To increase to a considerable extent the workman's right to recover damages, will it not be necessary to lighten the severity of the rule of contributory negligence? From the estimates already given on page 94, it will be seen that in only a small per cent of cases of death or injury can damages be recovered. Mr. Moon, the chairman of the London and North Western Railway, in a statement to his employees, put the estimate as low as two per cent. To illustrate: This great railway employs over 50,000 men; and, if 23 in every 10,000 are annually killed, the number would amount to 115 persons, of which number six is about five per cent. If these six can each recover £450 as the maximum damages recoverable under the act, — which may be called, for the purpose of an estimate, three years' earnings, — the whole amount which for deaths can annually be collected of this railway company is £2,800, about \$14,000. If, as stated by Mr. Walford, 12,000 persons are annually killed by violence in Great Britain and Ireland, and, — as all are not killed in dangerous employments, — say two per cent can recover damages of £300 each, for three years' average earnings, the total amount which would probably be recoverable, under this act, for deaths throughout the United Kingdom, would be £72,000, about \$360,000. In Massachusetts there were 49 employees killed on the railroads in 1880, and 72 in 1881; and if, allowing for the dangerous nature of the employment, in five per cent of the cases damages are recoverable, there would have been less than three cases in 1880, and less than four cases in 1881, of deaths on the railroads for which damages could have been recovered. If \$5,000 could be recovered in each case, there would have been \$15,000 recoverable in 1880, and \$20,000 in 1881. And, in case there were three times as many serious injuries as deaths, — which is twice as liberal a proportion as the returns of the railroad companies and the reports of the railroad commissioners indicate, — there were nine

employees injured in 1880, and twelve in 1881, by whom damages were recoverable. If, on an average, \$5,000 was recoverable in each case, the amount of damages which could have been collected for all the injuries to employees on all the railroads of this Commonwealth, would have been \$45,000 for the year 1880, and \$60,000 for the year 1881.

CONSTRUCTION OF THE ENGLISH ACT.—DECISIONS UNDER IT.

Since this act<sup>a</sup> went into operation, two years ago, several cases have been decided in the English courts, showing the effect of the act, the circumstances to which it is applicable, and the construction that should be put upon some of its various clauses.

The defence of common employment has not been abolished; and where the employee who causes and the employee who receives the injury are fellow-servants of the same grade, the liability of the master remains as before. Had it been intended to abolish this defence in all cases, it might have been done by a single sentence, without specifying in sub-sections the classes of cases to which it should be no longer applicable. In *Harrington v. Westthorp*,\* it was held that a stevedore who, while stowing a cargo, was struck by a bale of goods, and injured through the negligence of another person engaged in manual labor, could not recover damages of their common employer. See also *Robins v. Cubitt*.† The act has made employers liable to workmen for the negligence of persons in authority over them, on the theory that the injury results from obedience to the orders of the employer or his agent; but it has not extended the liability to the acts of fellow-laborers of the same grade, not commissioned with authority over the person injured.

A husband is liable for the act of his wife, through whose negligence an injury is caused, because she is his agent, and her act is his act;‡ and a volunteer working without pay or reward is in no better position for recovering damages than a hired servant;§ a corporation is liable to its employees for the negligence of its manager or superintendent, who is their servant, and intrusted as their agent with

\* L. T., March 11, 1882.

† 46 L. T. Rep. (N. S.) 535.

‡ *Miell v. English*, 15 L. T. 249.

§ *Degg v. Midland R'y Co.* 26 L. J. Ex. 171.

<sup>a</sup> For full text see Appendix A.

their authority; and is also liable for the acts and resolutions of its directors, if within the scope of the authority vested in the corporation by its charter, because they are the acts and resolutions of the corporation itself;\* and all the members of a partnership are liable to its servant for the negligence of one of the partners,† although they are not liable to one of their servants for the negligence of another servant of the same grade and without authority over the person injured. Under the partial definition of common employment as an employment where the person injured and the person doing the injury are at work to accomplish one and the same ultimate object, are at work for the same master, and derive their authority from the same source,‡ the master cannot be held liable for negligence except he was so liable before the act was passed, or has been made specifically liable by the first and second sections of the act. It is still a defence when not in the act specifically declared otherwise.

None of the duties which, before the act went into effect, the master owed to his servant, have been changed: the duty of exercising due care (1) whenever he personally superintends or engages in the work;§ (2) of exercising due care in the selection and employment of proper and competent servants, in order that each one of them may not be exposed to extraordinary risks by the negligence of unfit fellow-servants;|| (3) in providing and maintaining proper materials, tools, implements, machinery and plant,\*\* which duty does not, however, amount to a warranty that they are absolutely fit for the purpose for which they are used, and free from all defects; (4) in carrying on his work or business under a safe and proper system of regulations;†† (5) in conforming to any statutory regulations which have been prescribed by the legislature, as regulations in relation to the erection of fire-escapes on factory buildings. But, while these duties remain the same, other addi-

\* *Hough v. Railway Co.*, 100 U. S. 213-218.

† *Ashworth v. Stanwix*, 30 L. J. Q. B. 183.

‡ *Farwell v. B. & W. R. Co.* 4 Mct. 49, cited in 3 Macq. 316.

§ *Roberts v. Smith*, 26 L. J. Ex. 319.

|| *Wilson v. Merry*, L. R. 1 Sco. ch App. 326-332.

\*\* 3 Macq. 266, 288.

†† *Sword v. Cameron*, 1 D. 493; see 3 Macq. 266, 289.



tional duties have been imposed by the addition of other liabilities, and the increase of the number of remedies.

The act is designed to extend benefits to persons engaged in physical and manual labor, and affords no additional protection to persons engaged in intellectual pursuits, to persons who may be said to work with their heads, instead of their hands. The first section begins with these words: "Where, after the commencement of this act, personal injury is caused to a workman;" and workman is defined by the eighth section to mean "a railway servant and any person to whom the Employers' and Workmen's Act (1875) applies." By this act of 1875 the term "workman" "means any person who, being a laborer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labor, whether under the age of twenty-one or above that age, has entered into or works under a contract with an employer, whether the contract . . . be expressed or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labor;" but it does not include a domestic or menial servant. It is also enacted by section 13 that the term shall not include seamen or apprentices to the sea; and by section 12, that it shall apply only to an apprentice to the business of a workman, as that term has already been used, upon whose binding to apprenticeship no premium is paid in excess of £25; or to an apprentice who is bound under the provisions of the act which relates to the relief of the poor. It does not include workmen in the employ of the government, — workmen engaged in the royal dock-yards, — because an act does not apply to the crown without an express provision to that effect. The compensation awarded is not intended to be exemplary damages, nor an absolute remuneration for pecuniary loss, but what, under all the circumstances, is a reasonably fair compensation; and any sum recovered by suit, or accepted on agreement, is a bar to an action afterwards brought by the representatives of the person injured.

Various decisions have been made under the first and second sections, as to what are the circumstances under which the right to compensation exists; but it can never

exist where the injury is too remotely the result of the act, complained of. Upon this subject Baron Pollock, in *Rigby v. Hewitt*,\* says: "Every person who does a wrong is at least responsible for all the mischievous consequences *that may reasonably be expected to result under ordinary circumstances from such misconduct.*" By the terms of the act, "the workman, or, in case the injury results in his death, the legal personal representatives of the workman, and any person entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

That the workman can contract out of the act is no longer doubtful, unless the House of Lords should reverse the decision of the Court of Queen's Bench in the case of *Griffiths v. the Earl of Dudley*.†

Soon after the passage of the act, the attorney general and several leading solicitors expressed the opinion that there was no restriction upon the right of contract; and in consequence the Earl of Dudley, among other large employers of labor, notified the miners in his collieries on the first of January, 1881, the day the act went into operation, that they must, if they continued to work, waive the benefits of the act. "Conditions of employment," so called, were circulated through the collieries, containing stipulations,— "that the persons employed at the colliery must be, and continue to be, during such employment, ordinary members of the colliery club or Permanent Relief Society, under its then present or any future name; that the employer should be, and continue to be, an honorary member of the society, and should subscribe thereto not less than theretofore; that, in consideration of such payment by the employer, and on being employed at the colliery, and as part of the terms of employment, every person so employed undertook for himself and his representatives, and any person entitled in case of his death, to look to the funds of the society alone under the rules and constitution thereof for compensation in case of injury sustained in such employment, whether resulting in death or not; and that neither the employer, nor any

\* 5 Exch. 243.

† L. R. 9 Q. B. D. 357.

other person in his employment, whether a fellow-servant or not, should be liable in respect of any defect, negligence, act or omission under the Employers' Liability Act, 1880, or otherwise, or in respect of any negligence occasioning such injury; that the contract should remain in force and operate as a contract between the workman and the owner for the time being of the colliery, so long as the workmen continued to be employed at the colliery." This document was also posted in the hovels of the workmen, and in conspicuous places throughout the collieries.

Upon a suit brought in the Dudley County Court, and carried to the Queen's Bench, by the widow of one Griffiths, a workman killed in the pit-shaft through the negligence of an inspector of machinery, it was held by the Queen's Bench that such a contract was not against public policy; that the workman could and did contract himself out of the act, and could and did bind his widow and legal representatives by such a contract. The effect of the act was simply to negative the implication of an agreement by the workman in the contract of service, and in this way to render his contract not to claim compensation invalid; but the implication was overcome by an express contract of release.

Under the first sub-sections of the first and second sections which cover injuries caused "by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the service of the employer," if the defect "arose from or had not been discovered or remedied owing to the negligence (1) of the employer, or (2) of some person in the service of the employer, entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition," the term "ways" may be taken to mean the streets, lanes, passages or approaches leading to and connected with the employer's business or place of business. In *Etherington v. Harrison* (L. T. Dec. 31, 1881), and in *Huxam v. Thoms* (L. T. Jan. 28, 1882, Q. B. D.), it was decided that a plank "run" or "gang-way" leading from one building to another, and in *Moore v. Shaw* (L. T. Nov. 20, 1882, Q. B. D.) that a scaffold erected for the use of workmen in building a church, was a "way;" but it had before been held not to apply to a tramway which rests upon the soil without being

affixed to it.\* “Plant” is a general term, used more especially in England, and includes tools, implements, machinery, rolling-stock, fixtures, apparatus, or appliances ordinarily used in carrying on any trade, manufacture, or business.† These clauses do *not* impose an obligation of absolute *warranty* or *insurance* against defects. In *Langham v. Young*,‡ decided in the Westminster County Court, it was held that they did not impose a warranty against *latent defects*, which decision was affirmed in *Whittaker v. Balmforth*,§ although in this case the employer was held liable for his foreman’s negligence in selecting an eye-bolt. Neither do they impose a warranty that the machinery is as *safe as possible* against accidents, and adapted to prevent every *possible* carelessness.¶

The second sub-section applies to “the negligence of any person in the service of the employer who has any superintendence intrusted to him, whilst in the exercise of such superintendence.” The meaning of the words, “in the service of the employer” depends upon the relations existing between the master and servant, the characteristics of which relationship are (1) a hiring, together with the several rights of (2) direction, and control, and (3) dismissal (4) upon payment of wages.\*\* The injury must have occurred during the exercise of this superintendency, although in point of time it may have happened after the superintendency had ceased.††

The third sub-section applies to the negligence “of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed.” An “order” has been called negligent when the acts which, in discharge of the order, it is reasonably necessary for the workman to do, involve extraordinary risk; as, for instance, to use a hand crane for the purpose of moving a wheelbarrow of sand, when the sand

\* *Beaufort (Duke of) v. Bates*, 3 D. F. J. 381, s. c. 31 L. J. Ch. 481.

† See Wharton’s Law Lexicon.

‡ Law Times, July 30, 1881.

§ Law Times, Sept. 10, 1881.

¶ *Robins v. Cubitt*, L. T. R. (N. S.) 535 s. c. L. R. Q. B. D.

\*\* *McGinn v. Pilling*, L. T. Dec. 31, 1881.

†† *Owen v. Maudslay*, L. T. Nov. 19, 1881; Q. B. D. Feb. 18, 1882.

might instead have been carried by spadefuls.\* But if there is no negligence attributable to the workman who gave the order, and the accident occurred without negligence on the part of any one, the master will not be liable; and where a workman was assisting, under the direction of the foreman, in raising a steam engine, and when it had been raised several inches, the foreman let go for the purpose of putting a brick under it, thereby causing the engine to fall and crush the workman's fingers, it was held that the "order" was not negligent.†

The fourth sub-section of section 1, and the second sub-section of section 2, relate to an act or omission "done or made in obedience to (1) the rules or by-laws, or in obedience (2) to particular instructions given to any person delegated with the authority of the employer in that behalf," provided "the injury resulted from some impropriety or defect in the rules, by-laws or instructions therein mentioned." These clauses amount to an absolute warranty that the rules and by-laws shall be free from "improprieties" and "defects," and make the employer responsible for the injury caused by the act of any workman of any grade which results from his execution of such an order. An "impropriety" in a rule may be defined to be an unfitness in the method prescribed to accomplish the purpose intended, — unfitness either in the manner in which the purpose shall be accomplished, in the time or place at which it shall be done, or the circumstances which shall attend its accomplishment; and "defect" may be defined to include any neglect or omission in the rule to provide for the accomplishment of the purpose intended. There is nothing in the act which makes it necessary that the rule should be in writing, although the term "by-laws" may have been intended to mean a written rule. The further provision allowing a rule or by-law, which has been approved or accepted by certain public officers, to be considered free from improprieties or defects, is similar to provisions in the Petroleum Act of 1871, the Mines Regulation Act of 1872, the Explosives Act of 1875, and the Alkali Act of 1881.

\* *Laming v. Webb*, L. T. Feb. 4, 1882.

† *McManus v. Hay*, 19 S. L. R. 345.

Sub-section five, which relates to "the negligence of any person in the service of the employer, who has the charge or control of any signal, points, locomotive engine, or train upon a railway," extends to railway companies a wider liability than is imposed upon other employers, because of the peculiarly dangerous risk attending this employment, upon the safe conduct of which the security of travellers so much depends, and because of the unusual difficulty of making it sure that railroads may not escape liability through the variety of dissimilar occupations in this employment. The framers of the act found this section, not included in the original bill, absolutely essential to the accomplishment of their purposes; and it is quite likely that this is the only section of any special value to the persons intended to be benefitted. The terms "charge or control" are important words in the clause; and in *Haysler v. Great Western Railway Co.*\* the question as to the extent of their meaning was raised, and they were given, for the purposes of the case, a construction sufficiently broad to allow two persons at the same time to be in charge and control of an engine.

The same words were also under consideration in *Cox v. The Great Western Railway Co.*,† where a "capstan-man" in the employ of the company, engaged in propelling a series of trucks along a line of rails for the conveyance of goods and freight, injured a fellow-employee engaged at the time in a similar occupation at the other end of the line, and about one hundred yards off. The motion was given to the trucks from a capstan moved by hydraulic power from a stationary engine. The questions of fact were allowed by the court to be left to the jury, — (1) whether the "capstan-man" had the charge or control of a train upon a railway, and (2) whether he was negligent; and both were answered in the affirmative. This case also decides that a series of trucks (twelve trucks in this case), laden with goods instead of passengers, constitutes a "train upon a railway;" and perhaps the further question that the act applies to stationary or traction engines.

Under section 7, which provides that "a notice in re-

\*L. T. Dec. 17, 1831; Q. B. D. Dec. 10, 1881.

†L. R. 9, Q. B. D. 106.

spect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury, and the date at which it was sustained," it was held in *Stone v. Hyde*,\* that the notice shall not be expressed in technical language with the particularity of a statement of claim; that a statement, in ordinary language, of the name and address of the person injured, with the cause and date of the injury, was sufficient. This notice, it is apparent from the context, must be in writing; a verbal notice cannot be served on the defendant, as the section further prescribes.† It need not be given by the person injured, but may be given by his solicitor, or perhaps by any person, in behalf of the workman, who has knowledge or information of the injury; and it is thought that it may even be contained in more than one letter or document.‡ And by the same section it is also provided that any defect or inaccuracy shall not render the notice invalid, unless the defence is prejudiced thereby, or there was an intention to mislead.‡

The defence of contributory negligence remains unchanged by the act. In the original bill it was provided, at the end of the first section, "that this section shall not apply where the workman injured materially contributed by his own negligence to the cause of his injury." This clause would have mitigated somewhat the severity of the rule of contributory negligence, the application of which prevented the person injured, in ninety-five cases out of a hundred, as has been seen, from recovering damages, by allowing him to recover damages where his negligence had not contributed materially to the injury. But in the process of revising the bill, under the supervision of able counsel, in order to make it conform more completely to the interests of employers, this clause was stricken out, and thus the work was finished of making the bill what may now, with propriety, be called a sham reform.

The term "contributory negligence," which is used to designate this doctrine, is likely to mislead, because it seems

\* 46 L. T. R. (N. S.) 421.

† *Moyle v. Jenkins*, L. T. Dec. 16, 1881; 51 L. J. Q. B. 112.

‡ *Keene v. Millwall Dock Company*, 46 L. T. R. (N. S.) 472.

to indicate that the person injured cannot recover where he, by his negligence, consented or contributed to the injury. But when more carefully expressed in ordinary language, the rule is that the person injured cannot recover damages, when, however negligent the other party might have been, the injury might have been prevented by the exercise of ordinary care on his part, — of such care as a reasonably prudent man of ordinary intelligence would have exercised under like circumstances. It may be true that the negligence of the other was of the grossest kind; but, when it is equally true that the injury might have been prevented by the exercise of ordinary care, the law says that the negligence of the other would have done no injury without the negligence of the person injured; and says, furthermore, that the burden of proof shall rest upon the latter; and, because he is the plaintiff, he shall show by a reasonable preponderance of evidence, that he was in the exercise of ordinary care, and the injury is in no degree attributable to the want, on his part, of such care.\* If a railway train should pass a station without giving warning of its approach by whistling, and a person crossing the track without looking for the approach of a train should be injured, he would be guilty of contributory negligence.† If the proprietor of a colliery should for weeks allow a statutory special rule, requiring the hoisting ropes to be examined every day, to be disregarded, and in consequence of this violation a workman should be injured who himself neglected upon this notice to examine the rope after a fire had occurred in the mine, he would be guilty of contributory negligence.‡

In the application of this rule its hardship becomes more manifest because it is applied by jurors, in the calmness of a court room, upon evidence submitted after the act has resulted in an injury, and argued upon by counsel able to point out some way in which the injury might possibly have been avoided. While the doctrine of contributory negligence in all its severity remains unchanged,§ another clause

\* *The Margaret*, L. R. 6, P. D. 76; *Horton v. Ipswich*, 12 Cush. 488.

† *Slattery v. D. W. & W. R. Co.* 3 App. cases 1155.

‡ *Senior v. Ward*, 28 L. J., Q. B. 139.

§ See *Pitman v. Bennett*, L. T., February 25, 1882.



of the act defines a failure to give notice of a known defect or neglect to be such an omission as is equivalent to contributory negligence. Sub-section three of section 2 says, "No right to compensation shall exist in any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence." This, without doubt, places upon the person suing an obligation to give notice of any defect known to him, and to prove at the trial that he has not violated that obligation. The information must relate to the defect which caused the injury; and, when the notice has been given to the employer or any superior servant, the workman cannot be accused of contributory negligence. Should he, however, continue in the service, and receive injury from this defect or any other neglect complained of, there is nothing in the act to prevent the use of the defence that he thereby consented to take the risk of the defect or neglect.

Attention has already been called to the fact that only partially has the defence of common employment been abolished, and that little more has been done in this direction than to make the employer liable for the negligence of a person entrusted with superintendency or with superior authority. "At the time of the passing of the act, the law stood thus," says Mr. Justice Field, in the case of *Griffiths v. the Earl of Dudley* :\* "It was an implied term of the contract between employer and workman, that the latter should not recover damages if he was injured by the negligence of a person in the common employment." And if, he continues, the effect of section 1 is to do away with this implied term, the contract of service, upon which both rely, is likewise done away with, and there is no contract left by virtue of which any right of action exists; and, moreover, the workman becomes a trespasser upon the employer's premises. The cases of *Priestly v. Fowler*, † of *Farwell v. the Boston & Worcester Railroad*, ‡ and of the *Bartonsbill*

\* L. R. 9 Q. B. D. 357, 363.

† 3 M. &amp; W. 1.

‡ 4 Met. 49.

Coal Co. v. Reid,\* already cited several times, established this doctrine of implied contract, and the common employment incident thereto, which was carried so far in *Wilson v. Merry* as to excuse an employer from all liability for the negligence of his foreman or superintendent. And the act seems only to have gone so far as to change the rule of *Wilson v. Merry*, and leave the principle of implied contract and common employment as it was laid down in these earlier cases.

No consideration of the operation of the act would be of much value which failed to mention the relief afforded the employers by the aid of insurance. Two courses were open to them; either, first, to make their contributions to the insurance and protective funds large enough to induce their workmen to contract out of the act; or, second, to submit to its terms, and, by obtaining floating policies in accident insurance companies, to make the burden as light as possible. It was soon found that by the payment of almost nominal rates, general floating policies could be obtained; and that those employers who did not succeed upon payment of small contributions to the funds in avoiding the provisions of the act, might safely submit with little fear of the ruin and bankruptcy so foolishly apprehended. The lamentable ignorance which prevailed two or three years ago, as to the amount of damages recoverable, was dispelled only when some persons, first among whom were the accident insurance companies, made a careful collection of the facts and statistics in relation to violent deaths and injuries, and therefrom estimated the proportion of deaths and injuries probably resulting from contributory negligence. When it was found how very small a proportion was left, for which in each case the maximum rate of damages was only about £225, the employers must have laughed at the obstacles which they found existed only in their imagination, and the friends of the reform must have felt that they had gained a hollow victory. For even this slight liability the employer has a remedy, sometimes perhaps of little value, against the person by whose negligence he has been compelled to pay damages to his workman; and even when this liability has

\* 3 Macq. 266, 283.

been assumed for him by some accident insurance company, the latter, upon payment of the loss, has, by what is called the right of subrogation, the privilege of prosecuting the remedy in his name.

#### DECISIONS IN COUNTY COURTS UNDER THE ENGLISH ACT.

The county courts have, under section 6, original jurisdiction of all actions under the act, subject to removal to a superior court, in like manner and upon the same conditions as other actions begun in the county courts. While the decisions of these courts are not of like character with those of the higher courts, some of them at least are worthy of grave consideration, as they are rendered by lawyers of the rank of Queen's counsel, appointed to try questions of fact with the aid of a jury. All the decisions under the act of the higher courts have, it is believed, been referred to, and, unless some oversight has occurred, all the decisions of the county courts made between November, 1881, when the act may be said to have been fairly in operation, and the present time (December, 1882), have been digested here. In the absence of opinions by judges of appellate courts, they are of peculiar importance, as the only judicial construction placed upon the act.

*Ways, Works, etc.*—*Topham v. Goodwin*, Law Times, Nov. 5, 1881; section 2, sub-section 1, and section 2, sub-section 3.

The question was, whether a certain form of machinery (viz., a loose pulley or some other proper means of throwing a saw out of gear) rendered it defective within the meaning of this section. The court decided in favor of the defendant.

*Etherington v. Harrison*, L. T., Dec. 31, 1881, section 1, was decided by the jury in favor of the plaintiff on a question of fact, whether a loose plank in a scaffolding was such a defect in the "ways and works" used by the defendant in his business as to make him responsible, upon its being brought to his notice, for an injury sustained through the plank falling down upon the plaintiff.

*Huxam v. Thoms*, L. T., Q. B. D., Jan. 28, 1882, section 1. A scaffold is part of the ways and works. The

plaintiff fell off the scaffold. It was held that there was evidence on the part of defendant, sufficient to make him liable under section 1.

*Smith v. Lafons, L. T., July 22, section 1, sub-section 1.* The plaintiff, in the course of employment, was standing on a bridge owned by the defendant, which overtopped a public road, and while there standing was knocked over by a team attempting to pass underneath it, causing the injury for which he sued. The driver of the team was ordered to go ahead by a policeman in the employ of the defendant. It appeared also that the bridge was insecurely fastened to the walls on either side. The defendant was held liable, under section 1, sub-section 1, for a defect in ways, works, etc.

*Batchelor v. Tilbury, et al., L. T., Aug. 12, 1882, section 1, sub-section 1.* Plaintiff was a "bricklayer's laborer." Defendants were in partnership as builders. Plaintiff sued for injuries caused, while in their employ, by the "fall of a scaffold placed on joists supported on a quartering sustained by 'corbels.'" The corbels in this case were flat iron plates, "without any turn-up at the ends or sides," and used for the purpose of insertion in the wall. The wall which was being built was a party wall between two houses. One of the corbels had to be removed, as it crossed a chimney or flue; and it was owing to the careless manner in which this corbel was reset by one of the bricklayers, that the scaffolding fell and injured the plaintiff. It was held that "scaffolding was no doubt part of the works in building; and the works should be sufficiently supported and firm while in use, to insure safety to the workmen employed in the work, that they might go about their work with a free mind and ready will;" and judgment was accordingly given for the plaintiff, who was held to have exercised due care under the circumstances.

*Franks v. the India Rubber, etc., Co., L. T., Oct. 7, 1882, section 2, sub-section 1.* The plaintiff, while engaged in operating a cutting-machine, was standing on some loose planks, which, slipping from under him, threw him on to the machine, and caused the injury for which he sued. It was held that this was not a defect in the "plant" within the meaning of the act, and, even if it were, that the defendants could not have been held liable, as it was not shown

that the defect had arisen "or had not been discovered" through his negligence or that of his superintendent.

*Notice (defective), Service, etc.* — *Moyle v. Jenkins*, L. T., Dec. 16, 1881. This case involved the question of giving notice. It was decided that it must be in writing, all the judges intimating, however, that perhaps the act might be improved by amendment in that respect.

*Adams v. Nightingale*, L. T., Dec. 24, 1881, sections 4 and 7. It was held that "notice of injury, left after business hours, under certain circumstances was insufficient." In this case, one copy of the notice was left at a late hour in the afternoon (five minutes to six) with a little boy from five to seven years old, son of the foreman; while another was left at the same hour in a little wooden house belonging to the foreman, where he paid off his laborers. Still a third was left with a laborer on the premises at 5.30 o'clock.

The same case was decided in the Queen's Bench, April 15, 1882. It was held, in this court, that "a notice under the act must be served in such a manner that it is reasonable to expect that it will come to the defendant's knowledge in the ordinary course of business;" and further, that "the defendant's knowledge of the injury suffered by the plaintiff, within six weeks, did not cure any informality with regard to the notice."

*Hunter v. Dickinson*, L. T., March 25, 1882. This was a case of defective notice. The court, in commenting upon the latter part of the seventh section, is reported as saying that an error inadvertently made in giving notice, as a wrong date, etc., might be amended; but, where there was no statement at all of how the injury happened, except the words "in consequence of certain defective arrangements," it could not be said that any notice had been given.

*Macey v. Hodson et al.*, L. T., Dec. 24, 1881. This case involved the question of waiver of notice. It was held that the fact that one of the defendants promised on three separate occasions to compensate the plaintiff, was not "'a reasonable excuse' for the want of notice."

*Franks v. Silver & Co.*, L. T., May 27, 1882, section 4, County Court rules, 1880, rule 3. This is the same case as

*Franks v. India Rubber Co.* (*ante*, p. 132). It was held that, where a notice under section 4 merely stated that the injury was caused "in consequence of being directed to stand upon a loose board in running water," and the bill of particulars, required by the county court rules (rule 3) to be attached to the summons, stated that it was the result of a "defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employers," the plaintiff had not fulfilled the requirements of the act.

*Who is a Contractor?* — *McGinn v. Pilling & Co., L. T.*, Dec. 31, 1881, sections 1, 2, and 8, and sub-sections thereof. Where the plaintiff was injured by the negligence of a sub-contractor, in whose employ he was at the time, it was held that, under a strict construction of the word "employer," as contained in the sub-sections of section 1, the defendants were not liable, as the plaintiff was not employed by them. In this case all the materials for the work were furnished by the defendants, and the sub-contractor who hired the plaintiff was a man of no substance, having, it appears, just come out of the workhouse.

*Harrison v. Dawson, L. T.*, Oct. 14, 1882, section 8. "The plaintiff was employed by the defendant to take a barge" to a dock and unload it. "In pushing the barge from its moorings," he "stepped on a carling or beam" used to support some boards, some of which proved to be rotten, and others had been taken away. The "carling" went from under him, and he was precipitated into the hold, breaking his leg by the fall. The plaintiff received a stipulated amount for his services, having the liberty to employ help if he saw fit. He did, as a matter of fact, employ others. It was held that, under these circumstances, a "lighter man" was a contractor, "and not a workman, within the act."

*Negligent Order.* — *Haysler v. the Great Western Railway Company, L. T.*, Dec. 17, 1881, section 1. The plaintiff, while in the course of his employment of tending an engine, was injured through the negligence of an engineer or fireman in the employ of the company. The court declined to express an opinion as to who was "in charge" of the engine, but

decided that there was evidence sufficient, on the whole, to give judgment for plaintiff, and accordingly decided in his favor.

*Hatfield v. Enthoven*, L. T., Dec. 31, 1881, section 1, sub-section 1. (Discretion allowed workmen in obeying a negligent order.) This case involved a question of "some nicety" as to whether it was within the scope of employment to perform a certain act (*viz.*, removing a crane) which caused an injury to plaintiff, and which it was necessary for him to perform before he could obey orders. The court, "although with some doubt" as to the fact in this particular case, decided in favor of the plaintiff.

*Laming v. Webb*, L. T., Feb. 4, 1882, section 1. Held, that it was evidence of negligence, sufficient to create liability, to order a minor to alter some machinery while it was in motion.

In *Smith v. Lafons*, before quoted, the defendant was held liable, under section 1, sub-section 2, "with some doubt," for the negligence of one entrusted with superintendence.

*Harrington v. Westhorp*, L. T., March 11, 1882, section 1, sub-section 3. An employer is not liable for negligence of manual laborer. Admitting that the defendants were negligent in this case, contrary to the finding of the jury, still *semble* the defendants would not be liable, as the act which is alleged to have caused the injury was done by one who was only temporarily acting as foreman, "but whose usual duties were those of manual labor."

*Boatwright v. Downing*, L. T., Aug. 15, 1882, section 1, sub-sections 2 and 3. A person engaged in manual labor is not a superior workman. A person ordinarily engaged in manual labor, whose order, as to how a pole should be used in raising a beam, the person injured obeys, is not a superior workman or a superintendent under sub-sections 2 and 3 of section 1. The plaintiff was directed by the foreman of the defendant to obey the orders of E, an under foreman; E directed him to assist two manual laborers in raising a beam by the aid of a pole. The injury was caused by the unskillfulness and want of proper judgment of plaintiff and E in putting up the pole. As E was an ordinary foreman, and usually engaged in manual labor, it was held that he was not

a person for whose acts the employer was liable, as one intrusted with superintendence, or as a superior workman, under sub-sections 2 and 3 of section 1. This case is not quite so strong as *Harrington v. Westhorp* (*ante*, p. 135), because here the person who caused the injury was not only ordinarily engaged in manual labor, but also had no authority whatsoever to superintend the particular work in question.

*Owens v. Maudsley & Co.*, L. T., Nov. 19, 1881, section 1. This case turned on the question whether the under foreman of the company was negligent. The jury found that there was negligence in not turning a boiler-plate in such a manner as to make it safe to remove a boiler, and held the company liable. The appeal to the Queen's Bench was afterwards dismissed, and the judgment sustained.

*Trivett v. Midland Railway Company*, L. T., June 3, 1882, section 1, sub-sections 2 and 3. The plaintiff, while at work on one of the company's engines under the orders of a foreman, was injured through the negligence of a superintendent in giving an order for reversing the engine without previously warning the plaintiff, according to the rule of the company, whereby the plaintiff was injured.

*Clowes v. the Atlantic Patent Fuel Company*, L. T., Oct. 28, 1882, section 1, sub-section 5. The plaintiff was employed by the defendant as "handy" man, his duties being simply to obey orders. While obeying the orders of a foreman, or superior workman in the employ of the company, who directed him to sand the rails so as to give the engine a better start, the engine was suddenly set in motion, without any warning, as was the custom in such cases, and caused the injury for which this suit was brought. The court held that the company was liable for the negligence of its driver in starting the engine without warning, under section 1, sub-section 5, which makes the master liable for the negligence of a workman in the management of a locomotive.

*Contributory Negligence.* — *Pitman v. Bennett*, L. T., Feb. 25, 1882. It was held that contributory negligence was a defence, except where the employer or his superintendent have notice of a defect within the meaning of the third exception in section 2, which obliges a workman to give



notice to his employer, or some superior person, of the defect, if known to him, which caused the injury.

Warren *v.* Bates, L. T., Oct. 14, 1882, section 1, sub-section 1, and section 2, sub-section 1. "The plaintiff, being in charge of an engine and boiler at the defendant's mill, improperly placed heavy weights upon the safety-valve; and, although he was aware that the gauge-glass was out of order, owing to there being a quantity of mud in the boiler, failed to try the test-taps attached to the boiler for the purpose of ascertaining the amount of water in it. The plaintiff having been injured by the boiler exploding: Held, that the above facts constituted contributory negligence on the part of the plaintiff, and that he was therefore not entitled to recover, under section 1, sub-section 1, and section 2, sub-section 1, notwithstanding that the boiler was in a defective condition from want of cleaning, owing to the negligence of the defendant's foreman."

In Topham *v.* Goodwin, above cited, the question whether there was any contributory negligence on the part of the plaintiff (a minor), in handling machinery while it was in motion, was decided in favor of the defendant.

*Actual Employment necessary.*—Lovell *v.* Charrington, L. T., March, 1882. It was held that the act did not apply in this case, as it was proved, as matter of fact, that the plaintiff was not in the employ of the defendant at the time the injury occurred.

*Employee's Right to Contract himself out of the Act; Widow and Legal Representatives deprived of any Claim for Damages.*—Griffiths *v.* Lord Dudley, L. T., June 3, 1882, Q. B. D. It was held that, even if the employee could contract himself out of the act, "yet he could not contract to deprive his widow or other personal representative of the benefit of that statute." (On a rule *nisi* granted to show cause, etc., this decision was afterwards over-ruled, the court holding that under such a contract his legal representatives would be cut off from all right of action.)

*What is Plant?* — *Banks v. Murrell*, L. T., June 17, 1882, section 1, sub-section 1. The plaintiff, while at work filling coal bins for the defendant, was injured through the giving way of a defective partition in one of the bins. It was held that this was a defect in the "plant," for which the company were liable under sub-section 1 of section 1, which makes them responsible without being notified of any defect.

*Compensation.* — Amount of compensation for injuries to be recovered by an "army reserve pensioner."

*Bolton v. Midland Railway Company*, L. T., July 8, 1882, section 3. The plaintiff, who was on the "reserve list," and entitled to a pension of sixpence per day, sued the company for extra compensation on account of the loss of his pension through injuries sustained by the negligence of a superior workman in the company's employ. It was held that he was entitled to damages under section 3, allowing a sum not exceeding the estimated earnings of three years; but it does not appear distinctly whether the loss of his pension should be included in the compensation awarded.

#### DISCUSSION OF THE SUBJECT IN THIS COUNTRY.

This subject has for years attracted the attention of lawyers, who in their professional practice have abundant opportunity of seeing the hardship and misery caused by the unjust distinction made between the liability of employers to third persons and to their employees. It is of frequent occurrence to hear or read of an instance where a corporation which is answerable for an injury to one of its workmen at the bar of conscience and of public opinion, is released from liability at the bar of what is called justice. A single instance will illustrate the hardship of the rule. An Italian, just landed in this country, ignorant of its language and its people, was hired to shovel gravel on one of our railroads by a sub-contractor of the company. He worked at loading and unloading a gravel train with a gang of men, two of whom were assigned to each car. He worked, with another laborer, on the last car. The train had been loaded, and was backing down, over a temporary, poorly-laid track, to be unloaded, which was done by dump-

ing or upsetting the car. The train had backed down, and had stopped, as he supposed, at the place where his car was to be dumped; and he, with the others, had got up from the gravel where they had been sitting, when the engineer gave the train a sudden jerk forward, in order to get headway for the purpose of backing still further. The Italian was thrown off backwards under the wheels, run over, and seriously injured. Upon a suit for damages, it was proved at the trial that, although the railroad company owned the engine, and the engineer who caused the injury was in their employ, the engine, and with it the engineer, was let to the sub-contractor, to work under his direction and control; and therefore, under the rule of common employment, the engineer and the Italian were fellow-employees for the sub-contractor. The poor fellow, who could recover no damages, had no money, was unable to work, was a cripple for life, and shortly afterwards became an inmate of one of the State almshouses.

It may be said that he ought to have sat still on the top of the gravel until the train had finally stopped; and that by getting up he was guilty of contributory negligence. But this was a fact for the jury to pass upon, which they were prevented from considering by the application of the rule of common employment. It may be said that, admitting the engineer to have been careless, while the laborer was not, the company ought not to be held responsible for his carelessness, because it had done its best to employ a competent man. But, even if it had done its best, the law, whether justly or unjustly, has for centuries made every company, every partnership, corporation, or individual, responsible for contributory negligence to every other person who is thereby injured, except to its own employee. Why should the law make an exception in the case of an employee?

This question has been often asked by lawyers and others, and the conventional answer given is, that the employee agrees to take the risk of the employment, and is paid for taking it. That he is paid for taking the risk is proved to be a mistake by a comparison of the rate of wages paid employees in dangerous employments with the wages paid

men of like capacity in other employments. On the other hand, that he agrees to take the risk is proved by saying that the courts have made for him an implied contract to this effect. To which it is answered that the laborer, while denying that the courts ever had a right to make for him such a contract, denies further their right to imply such a contract any longer, in the face of his express denial that he agrees or will submit to such a contract. No court can imply a contract contrary to the express desire of one of the persons made a party to it. While there may have been among lawyers and others a difference of opinion as to the justice in all cases, or wisdom, of a general change of the law, the hardship of compelling the workman to endure in silence an injury caused by another workman acting in strict obedience to the authority conferred upon him by their employer, has generally been recognized, although of late but little discussed in the courts, because the rule of common employment has become so strongly established as to make exception to it of no avail. When, however, in consequence of the terrible explosions occurring in English, Welsh, and Scottish coal mines, by which scores of miners were killed at a time, public attention in England was called to the poverty and misery resulting in part from what many thought a gross defect in the law; and when, also, after years of agitation, Parliament had passed the Employers' Liability Act, it began to be thought possible in this country to effect a reversal of the common law.

Within the past few years this subject has been before the legislatures of several of the States, which, as has been seen, have passed laws making employers liable for injuries in certain cases, although no such general change has been made as that by the English Parliament. During the past two years the subject has been before the legislatures of several States, New York and Connecticut among others, which have as yet made no change. Two years ago it was brought before the legislature of Massachusetts by a petition signed by Wendell Phillips, Benjamin F. Butler, Delano A. Goddard, Edwin B. Haskell, and editors of several other leading newspapers published in the State, and other prominent citizens; but, upon reference to the judiciary committee,

and a hearing thereon, the petition was opposed by counsel for all the railroads running into Boston, and defeated. Last year the subject was renewed, and, upon hearing, on the recommendation of the committee, was referred by a resolution of the legislature to the Bureau of Statistics of Labor for consideration.

#### SUMMARY OF REASONS AND OBJECTIONS.

In closing the discussion of this subject, it may be well, even at the risk sometimes of repetition, to give a summary of some of the objections to and the reasons in favor of a change in the law. One of the most frequent objections against compelling the employer to compensate his employee for the negligence of a fellow-workman is, that he ought not to be obliged to answer for the acts of another, when he is himself without fault. To which objection the answer is made, that when the employer, by the employment of another whom he vests with a general authority to act in his stead, chooses to part with his own authority, and trust to the judgment and discretion of some one else, he ought to abide the consequences, whether good or bad. When the employee does well, he reaps the profits; when the employee does ill, he ought to suffer the losses; and public policy requires that, as some one must bear the burden of the risk, it should rest upon the shoulders of the person who employs, pays and controls the workman. And, moreover, as the law has for centuries imposed upon the employer a similar obligation towards all other persons, making him answerable to the world in general for the negligence of his servants, such an exception to a general principle of liability ought not to exist without some special reason therefor. If it is a hardship to be obliged to pay for the wrong-doing of a servant whenever the act is not a wilful act, it is a hardship which the wisdom of our ancestors imposed, and which has not been removed by the wisdom of later times.

Another objection, often urged, is that the employee enters into the contract of employment with full knowledge of the dangers, with the risk computed in his wages. As to the first part of this objection it may be asked whether, unless the employment is of a very dangerous nature, the risk of injury is often considered at the time the contract is

made, or any thought taken as to where the responsibility for damages would rest. And, as no such risk is assumed, on a railroad for instance, by the traveller when he buys his ticket, while, on the contrary, the company is made by law responsible for the competency of its servants and the safety of the journey, it is natural to ask why a different rule should be made to apply to a brakeman or conductor. Whether the danger of injury is computed in the wages, is a question of fact dependent upon a knowledge of the wages paid to workmen of like capacity in less dangerous employments, which it is evident could be obtained only after a careful investigation of the manifold causes which determine the rate of wages. If, however, only a casual inquiry were made as to the wages paid to laborers of the same grade in other employments, it would be found that the workman is paid for the labor performed, with no compensation whatever for the risk of injury.

But the present state of the law, it is said, rests upon a contract of service implied by the courts; because, when the rule was adopted, the judges thought that public policy required an agreement of non-liability, rather than one of liability. But is not this rather a question of political economy than one to be passed upon by the courts? And is it not possible that what was thought a wise public policy for the State to adopt a half-century ago, when manufactures and railroads were in their infancy, ought to be changed by the legislature, now that the consolidation of capital in great monopolies has become an object of apprehension? In order to foster these commercial enterprises, is it any longer necessary to exact so heavy a contribution from the laboring class, and impose the burden of so severe a protective system upon our own instead of foreign laborers? While the judges who made this law may have been wise in their generation, is it not probable that the wisdom of time and experience may think that public policy requires a change in the law?

Again, it is urged that the employee ought to be left to his remedy against the fellow-employee who caused his injury. Hardly any one would be so simple as to consider this remedy of any practical value, because, unfortunately, most workmen are not able to pay a judgment for damages,

or even a bill of costs. Besides, until within a year, — until the case of *Osborne v. Morgan*\* overruled the case of *Albro v. Jaquith*,† decided in 1855, it has been impossible for such a judgment to be obtained. Neither does it seem altogether right to compel an employee, acting in good faith, using his best judgment, as the agent of some one else known to be his principal, to pay for the consequences of doing as he was generally authorized. But, waiving this for the sake of the argument, the law gives the employer a like remedy, by allowing him to recover of the negligent employee any damages he has been obliged to pay as a consequence of his negligence.‡

In view of this condition of the law, the question may with some pertinency be asked, Why should not the employer be left to his remedy against his employee for reimbursement?

That the dictates of humanity, as well as the promptings of self-interest, stimulate employers of labor to do a great deal towards protecting the lives and limbs of their workmen, there is no doubt. That they would not intentionally allow any neglect in the selection of workmen, of the materials used in the machinery worked, is equally certain. But, notwithstanding all this, there are doubtless many accidents and injuries occurring daily, which, with a little more precaution in the particulars mentioned, might have been prevented. Workmen generally are not in a position to say with whom they will work, or what materials or machinery shall be used; and, if greater precautions are to be taken, they must be provided for by employers. If the ordinary dictates of humanity and self-interest are not sufficient to make life more secure, ought not their interest in the welfare of their workmen to be increased by imposing a heavier pecuniary responsibility? Where an appeal to the generous impulses of the heart is not a sufficient protection, should not an appeal be made to the more subtle instincts of the pocket?

And in this connection it may perhaps be well to allude to the argument that a heavier responsibility is already imposed by requiring the employer to use due care in

\* 130 M. 102.

† 4 Gray, 99.

‡ *White v. Phillipston*, 10 Met. 111; also 1 Allen, 102.

selecting and maintaining the tools, implements, stock, materials, and plant used by his workmen. Upon consideration, this, however, will seem to be an insufficient safeguard, because its value has been frittered away by the decisions of the courts, which declare that there is no liability unless the defect complained of was unknown to the person injured, while it was known to the employer, but not communicated. The employer is not liable unless he knew of the defect and declined to communicate it; or, in other words, he is not liable for his ignorance; and if for any reason he leaves the duty of detecting defects to another employee, he escapes all risk of damages. While perhaps it would not be wise to make him liable for secret defects, by making him a warrantor or insurer of the safety of the stock or appliances used in his business, would it not be well, instead of leaving him almost entirely free from liability, to make him responsible for defects to his workman, as he is now responsible to strangers? Is not this one of the exceptions to a general principle, one of the anomalies in the law which works an injustice?

Should it be said that the servant is not the master's agent, and therefore the master should not be responsible for his acts, the question is at once asked why he is not the master's agent. This brings up the real legal question at the bottom of this controversy, which involves the making of an implied contract for the parties by the courts, in the absence of an express contract. How is an agency created? Principally by virtue of the contract of service. What is the agency created? That depends principally upon the contract of service and the general authority usually conferred by the customs and usages of business upon workmen in the same class of employment. That the workman is an agent for the performance of some acts there is no doubt; but whether he is the agent for doing the particular act which caused the injury, is the question in dispute. How can this be answered? It is a question of fact simply, and not of law, and one manifestly to be answered from a knowledge of all the facts tending to explain the scope of the agency. And, as it is a question of fact, is it not one which, by analogy to the practice established in the courts for deciding



other matters of fact, ought to be decided by a jury, upon consideration of all the evidence? Even if decided by the judges, should it be determined by simply saying that the employee is not an agent for doing the act which caused the injury, because they (the judges) think it against public policy to imply a contract of liability?

That a workman knows the habits of his fellow-laborers better than does his employer, is doubtless true of persons engaged in domestic and menial service, working in the same household and under the same roof, at the same bench, in the same shop, or in the same gang, or, in brief, when engaged in similar occupations. And for this reason the Scotch courts attempted to limit the operation of common employment to the class of similar occupations; and, if they had been allowed to persist in this direction, and their example had been imitated by the courts of England and America, it is probable that by this limitation the hardship of this rule of non-liability would have been avoided. The doctrine of common employment, so called, was evidently intended by the judges who invented it to apply only to persons engaged in similar occupations. By widening its application to all persons at work for one master, or paid from one purse, it was made to include persons entirely unacquainted with each other's character, habits, ways, and manners of doing work, traits of carefulness or carelessness; in large factories, workshops, manufactories, or upon railroads extending over miles of country, with workshops in various places, workmen at many stations, engineers, conductors, firemen, brakemen, baggage masters on many trains, hundreds of employees, in manifold and dissimilar occupations; it was made to include men who never saw or perhaps never heard of each other, and therefore knew less of each other's habits than the superintendent, the board of directors, or the employers, who engaged them with some knowledge at least of their character, skill, proficiency and capacity.

That a change in the law would diminish wages is not certain, because it would seem the natural result of heavier responsibility to employ, with more care and circumspection in the selection, more competent and experienced workmen, who, being of a superior grade, would require superior pay.

As a legitimate result, in railroad and other specially dangerous employments, the public as well as the employee would be more secure.

A frequent objection to changing the burden of liability from the employee to the employer is, that employees would thereby become more careless of their own lives and safety, as well as of the welfare of others; and railway travel especially would become less safe. This objection presumes that employees would purposely and dishonestly injure themselves in order to obtain damages. But the consideration should not be overlooked, that whenever any person is found guilty of such an act of wickedness, he is prevented from recovering damages by the rule of contributory negligence. It is only in instances of dishonesty towards himself and his employer, which remain undetected or unproved at the trial of the cause, that unjust damages would be recovered. Would not such instances be of infrequent occurrence? Are not the means for eliciting the truth, and the securities against imposture provided in the administration of justice, through the agency of judges, jurors, counsel, parties and witnesses, so perfect that little danger need be feared? Seldom does a sham or fraud withstand the ordeal of a jury trial. Is it often that such a man could long remain in any employment without his true character becoming known? Most men are almost always honest. And not only are most men honest because it is right, but many refrain from doing wrong, because honesty is the best policy. Moreover, is not life too dear, and pain too much dreaded, to make it probable that any man could become not only so degraded, but so callous to suffering, as to wilfully run the risk of losing an arm or a leg or his health, for the purpose of getting a partial compensation in money? And, if such instances are likely to occur so infrequently, ought the law, which tries to prescribe a rule of action that will do the greatest good to the greatest number, to be restrained from doing an act of justice to the many, lest a few dishonest persons should abuse the right?

Against the danger that excessive damages would be awarded, the ordinary protection afforded by courts of justice exists, which, in all other causes where damages are in

question, has for centuries existed as a suitable means of estimating the amount to be awarded. If verdicts are usually for the plaintiff, and against corporations, it is likewise true that plaintiffs are usually right. At least, no better and more practicable method has been devised for determining what is right and what is wrong, than what are called courts of justice. There seems to be little force in an argument which declines to pass a law because the amount of damages recoverable under it must be determined in the same way that land damages and other personal damages are determined; especially when the rule suggested is the best known method of deciding such a question; or, if it is not, some better method may be easily incorporated in the act.

The kindred danger, that a change in the law would be followed by a flood of litigation, seems to be groundless. A similar fear, existing prior to the passage of the English act, proved to be a mere fiction of the brain. How many bills have been defeated because it was feared attorneys would profit from resulting litigation? How many times has this argument been used by persons interested in defeating a measure? In the first eighteen months after the passage of the English act, as the statistics show, less than a hundred actions were brought under it in England, Scotland, Ireland and Wales, and less than £3,000 in damages recovered, with a like amount in costs. According to an estimate already given, based upon the most reliable data to be obtained, the probable number of maintainable suits against the railroads of this State during the year 1880-81 was twelve, and the probable amount of damages which could have been recovered was \$60,000.

Should it be said that one reason why it is sought to make the employer liable is simply because he has money, it might be candidly admitted that no wise friend of the laboring man would be in favor of a change in the law unless it was likely to do him some good; but it might also be answered that, as the employer reaps the profits of every profitable act, why should he not suffer the losses of unprofitable acts? Admitting that the workman is his employer's agent, commissioned with a general authority to use his own discretion, in place of the judgment of his principal, why, when the exercise of

this discretion proves unfortunate, should not the principal suffer the consequences? The prosecution of business is not like the game of pitch-penny played by the gambler, according to the rule of "Heads I win, and tails you lose." The same objection might be made with equal force against the liability of employers to third persons, or against any bill which seeks to make persons of property responsible for their wrongs or breaches of contract.

Several objections having been alluded to, it remains to summarize some of the reasons not specifically suggested in favor of a change in the law. Without asserting that an employee has a natural right to compensation for injuries directly or indirectly caused by his master, — which is a right oftener asserted by philosophers and publicists than by lawyers and legislators, — there is no doubt that ever since the reign of Charles the Second an established principle of common law has held every man responsible for his own torts and breaches of contract, a precedent which our ancestors might have found in the Roman Law. As early as the reign of William the Third, Lord Holt held a master liable for the negligence of his servant. The application of this general principle was without exception till the year 1837, when, as has been already related, Lord Abinger, in a case not very carefully considered, judging from the analogies reasoned from in the opinion, decided that a master was not liable for the negligence of his servant, whenever injury was thereby caused to a fellow-servant.\* Shortly afterwards, at the time when railroads and manufacturing enterprises were in an early stage of development, this exception was followed and emphasized in this State by Judge Shaw in the case of *Farwell v. the Boston and Worcester Railroad*; † ever since which time the exception may be said to have been a part of the body of our law.

The liability imposed upon a master for the negligence of his servant may be said to exist under two sets of circumstances, in one of which there exists a relation between the master and the person injured, while in the other no relation exists. In one class of circumstances it exists by virtue of an express or implied contract; while the ground of

\* *Priestly v. Fowler*, 3 M. & W. 1.

† 4 Met. 49.

liability in the other is the general obligation resting upon every member of the community so to act that no harm shall, by his negligence or that of his servant, be caused to any other person. This latter obligation is known as the principle of *respondet superior*, which compels the master to respond for such negligence in damages; and is stated by Blackstone in these words: "If a master by his negligence does any damage to a stranger, the master shall answer for his neglect." Those who seek to base upon this principle their right to a change in the law of liability for the negligence of fellow-employees, say that the term "stranger," because, in the development of railroads and commercial and industrial enterprises, of the wide extent and remoteness of the relationship existing between an employer and his workman, should apply to all workmen not at work strictly under the eye and supervision of the master.

On the other hand, those persons who seek to base their right to a change of the law upon the relationship existing by virtue of the contract of service, say that where nothing to the contrary is expressed, the courts should imply a contract of liability, instead of implying, as they have done, a contract of non-liability. They assert, furthermore, a fact which is not denied, that the implied contract of non-liability is judge-made law, established by virtue of the right of the courts to decide what is public policy, and what the public policy of the country requires; that public policy no longer requires, if it ever did, the existence of such a rule of law; and that the legislature should, as it has a right to do, assert its prerogative, and declare a different public policy, by abolishing the exception made to the general liability of the master for the negligence of his servant.

In emphasizing the injustice of this exception, an argument is drawn, by analogy, from the liability imposed upon a common carrier for the loss, by fire or other means except the act of God or public enemies, of merchandize, live-stock, and chattels entrusted for conveyance and safe delivery. And, as a change in the law will in this country affect railroad companies and common carriers of passengers more than other employers of labor, the analogy,

drawn from the contract of warranty and insurance that no injury shall occur to whatever is entrusted for safe delivery, is thought to be perfect. If this be so, — and it seems to be, — why should the law be more careful in the protection afforded to merchandize, than in the security placed around human life? Why should the State compel a railroad company to pay for the loss or injury of a horse, an ox, or a bale of goods, and allow men to be killed and maimed without the risk of paying damages?

And, as one of the incidental results of compelling common carriers of passengers to be as careful of their employees as they are of trunks and merchandise would be the employment of more competent and careful men, the security of travellers would be increased; and this is one of the weightiest reasons for changing the law. Scarcely a week occurs without an accident on some of the railroads of the State or country. As has been stated, during the nine years from 1872 to 1881 inclusive, there were 11,759 persons reported killed or injured on the various railroads of the country; and 2,744 reported killed or injured by the railroads of this Commonwealth. Almost every one of these deaths or injuries might, by the exercise of proper care, have been prevented. No one will deny that every step taken in the direction of making life more secure, and suffering less frequent, is a step in the right direction. Is it not possible that such a change in the law may be such a step?

Should it be asked if the workman cannot better provide against the carelessness of his fellow-workman than can the employer, it might be replied, that, although their co-operation is always necessary to secure safety, the value of any suggestions or complaints is diminished by the fact that the workman has no power to carry his ideas into execution. Employers of labor would naturally consider frequent complaints against their employees, frequent suggestions as to the necessity of repairs in the works or machinery, as officious interferences. And those who receive with good grace what are always in the nature of accusations, might not wish to encourage their occurrence, and might not accede readily to requests for improvements. It is a natural

characteristic to prefer to manage one's own business in one's own way, without too much interference from men hired and paid for their labor. But some one must be held responsible for every act of negligence, if its repetition would be prevented; and, when attempting to make accidents less frequent, is it not wiser to increase the employer's responsibility than to trust to his workmen to correct the evils of his manner of carrying on business?

It should not be forgotten that, in many cases where the employer escapes legal liability by means of the defence of common employment, the servant who, entrusted in his master's absence with the exercise of a general discretion, caused the injury, is more competent for performing the duties than his employer. In operations requiring skilled laborers, mechanics, and artificers, how seldom is it that the employer can do the work imposed upon those under him! How many men who can pay for the labor can perform it? When, therefore, it is thought unjust to impose responsibility for negligence upon the man who hires the workman, it should be remembered that oftentimes the person commissioned to act for him is better able than he to perform the duties imposed.

The injustice which sometimes is wrought in applying the defence of common employment is seen by remembering the variety of dissimilar occupations which it includes. The essence of common employment is a common employer, and all persons paid by the same person, or paid from the same purse, are fellow-employees. All the employees of a railroad company, of a colliery, of a steamboat company, of a factory, of a foundry, of a horse railroad or express company, whether employed in the same city, county or state, under the same or different foremen or superintendents, engaged at the main office or a branch office, known to each other or unknown, are fellow-employees, and are by law presumed to be sufficiently well acquainted with each other's habits and character to be compelled to run the risk of injury from each other's carelessness. Menial and domestic servants employed under the same roof, and therefore well acquainted with each other, should without doubt be considered fellow-employees. But the earliest use of this

doctrine was in its application to similar occupations only.

Because every man is liable for his own wrongful acts, employers who personally superintend or direct their own workmen are liable for personal injuries caused by what is really their own negligence. But when, in the increase of business, it becomes necessary to employ others to work for them, away from under their eyes, but obedient to their general authority, this liability for injuries to their employees ceases, although they still remain liable for similar negligence to others. It is thus seen that while the small manufacturer, in order to avoid suits for damages, must take precautions against the carelessness of his workmen, the large manufacturer is relieved from such a necessity.

And this anomaly becomes more marked in the organization of individuals into corporations. For, while a few persons acting together as co-partners are justly liable for their own and each other's negligence, upon complying with a simple perfunctory requirement of the law, and thereby becoming a corporation, they escape this liability, because they are no longer acting for themselves and each other, but as agents for the corporation, which is exempted from liability for the negligence of its agents in causing injury to each other.

It should not be forgotten that the laws of Great Britain, France, and Italy impose a general liability upon employers, whenever the negligence of their servants causes personal injury; while the law of Germany, as well as of several of the United States, has been so changed as to impose special liability upon railroad corporations for such acts of negligence.

#### DIFFICULTIES OF DRAWING A BILL.

It is oftentimes easier to point out the necessity for reform than to show how to accomplish it; and easier to prove that the law should be changed, than to show how it should be done. And, while many persons will agree in thinking that something ought to be done to change the law, they will doubtless differ as to whether the change shall be radical, liberal, or conservative; while there will be, perhaps, a dif-



ference in opinion among some of each of these classes as to the form and the particular phraseology of a bill looking to a change

The first subject to be considered is how far the law should be changed; and upon this it must be conceded that it would be useless to make any change, unless the employer was made liable for the acts of his authorized agents in all cases where he has delegated his authority. Whether this should be done by saying that common employment shall no longer be a defence to actions against employers for personal damages, or that the particular instances in which he should be liable should be specified, is an important question. This problem has been solved in some of the States, as has been seen, by enacting that in actions of this kind against railway companies common employment shall not be a defence. The difficulty of accurately defining the term, of saying exactly what common employment is, and the danger lest some uncertainty should exist as to the exact scope of such a bill, as well as the consideration that it might not be wise to make so sweeping a change, are objections to this form of a bill. For example: The term, no doubt, includes menial and domestic servants; and would it be wise to make the head of a family responsible for the negligence of the servants who live under his roof? responsible, to use an illustration of Lord Abinger's, to one servant for the negligence of the chambermaid in putting him into a damp bed, or the cook's neglect to keep clean the copper vessels in the kitchen? Should it be attempted to draw the bill in this way, as was done by Mr. Macdonald, it might be advisable to except the master from liability for the acts of domestic servants. Should it be desired to draw the bill by specifying particularly when he shall be liable, leaving him free from liability when not otherwise specified, there is room for difference of opinion as to how far it shall be extended, — whether, for instance, an action shall be created for the negligence of the principal person in authority, the superintendent, which action has been shown to be of little value; or for the negligence of every superior workman, of whatever grade (which seems to be the only way to accomplish an important change), are questions for consideration.

One of the earliest of the bills presented to Parliament was brought in by Mr. Morrison, Mr. Hind-Palmer and Mr. Andrew Johnson in the year 1872; and Mr. Wright, a London barrister, assisted in drawing up and settling its terms. These gentlemen adopted this latter course, and specified in considerable detail the instances wherein a liability should be allowed to attach. But, while the discussion of the subject went on in Parliament among the friends of the employees, and the able secretaries, Parliamentary agents, and solicitors of their large associations, and when several special committees of Parliament had had the subject under consideration, and at last it had been thoroughly considered and comprehended by several of the leading members of the present Gladstone Ministry, — it was found possible to draft the bill in the few words of the second, third, and fourth sub-sections of the first section of the Act of 1880. These make the employer liable for the negligence of any person entrusted with superintendence, and of any superior workman whose orders or directions the person injured was bound to obey, or the act or omission of any workman who was acting in obedience to the rules or by-laws of the employer.

#### THE GLADSTONE BILL.

The caption and first section of the bill brought in and advocated by the English Liberals (before it was amended in the House of Lords by the Conservatives) is as follows: —

“AN ACT to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service.

“*Be it enacted, etc.:*

“SECTION 1. Where, after the commencement of this act, personal injury is caused to a workman: —

“(1.) By reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer; or

“(2.) By reason of the negligence of any person in the service of the employer, who has any superintendence entrusted to him, whilst in the exercise of such superintendence; or

“(3.) By reason of the negligence of any person in the service of the employer, to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or

"(4.) By reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

"(5.) By reason of the negligence of any person in the service of the employer, who has the charge or control of any signal, points,\* locomotive engine or train upon a railway, —

"The workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

### BILLS PRESENTED.

We present for the action of the legislature, as the result of the very full consideration of the subject committed to us, two bills; the first, comprehending the features of the Gladstone Bill presented to Parliament by the Earl De la Warr, with sections added to make the measure practical in this State. This bill changes the doctrine of the courts on common employment to a limited extent, and is incorporated in this report for the reason that many legislators may desire to act upon a limited bill.

The second, and the bill we recommend as being most in harmony with existing legislation and the course of law in this State, is a bill which simply seeks to abolish common employment as a defence in actions contemplated by it.

### I.

#### COMMONWEALTH OF MASSACHUSETTS.

In the Year One Thousand Eight Hundred and Eighty-Three.

AN ACT relating to the Liability of Employers for Personal Injuries sustained by their Employees.

*Be it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same as follows: —*

SECTION 1. Where, after the commencement of this Act, personal injury is caused to an employee, —

(1.) By reason of any defect in the condition of the ways, works, machinery or plant connected with, or used in, the business of the employer; or

(2.) By reason of the negligence of any person in the service of the

\* As the railroad trains of this State are not run and controlled in precisely the same way as English railways, this, in order to be applicable to our system, would need to be slightly changed; "points" should read "switch."

employer, who has any superintendence entrusted to him, whilst in the exercise of such superintendence; or

(3.) By reason of the negligence of any person in the service of the employer, to whose orders or directions the employee at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or

(4.) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

(5) By reason of the negligence of any person in the service of the employer, who has the charge or control of any signal, switch, locomotive engine, or train upon a railway, — the employee, or, in case the injury results in death, the legal personal representative of the employee, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of, nor in the service of the employer, nor engaged in his work.

SECT. 2. Written notice of any injury shall be given to the employer or his legal representatives by or on behalf of the person injured; or, in case of his death, by or on behalf of his legal representatives, within sixty days of the injury or death, stating the time, place, and cause thereof; and the action thereon shall be commenced, if at all, within six months from the date of the accident; or, in case of death, within six months from the date thereof.

SECT. 3 This act shall take effect on the first day of January, eighteen hundred and eighty-four.

## II.

# Commonwealth of Massachusetts.

In the Year One Thousand Eight Hundred and Eighty-three.

## AN ACT

Relating to the Liability of Employers for Personal Injuries sustained by their Employees.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. Whenever an action is brought  
2 against an employer to recover damages for per-

3 sonal injuries received by an employee while in  
4 the discharge of his duty, the fact that the injury  
5 was caused by or through the negligence of a  
6 fellow-employee shall not prevent the recovery of  
7 damages, unless the employee materially contrib-  
8 uted by his own negligence to the cause of the  
9 injury, or both the person causing and the person  
10 receiving the injury were engaged at the time of  
11 the injury in domestic or menial service.

1     **SECT. 2.** Written notice of any injury shall be  
2 given to the employer or his legal representatives  
3 by or on behalf of the person injured; or, in case  
4 of his death, by or on behalf of his legal repre-  
5 sentatives, within sixty days of the injury or death,  
6 stating the time, place, and cause thereof; and  
7 the action thereon shall be commenced, if at all,  
8 within six months from the date of the accident;  
9 or, in case of death, within six months from the  
10 date thereof.

1     **SECT. 3.** This act shall take effect on the first  
2 day of January, eighteen hundred and eighty-  
3 four.



# APPENDIX A.

## EMPLOYERS' LIABILITY ACT, 1880.

(43 & 44 Vic. c. 42) 7th SEPT., 1880.

AN ACT to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service.

*Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—*

SECT. I. Where, after the commencement of this Act, personal injury is caused to a workman, — Amendments of law.

(1.) By reason of any defect in the condition of ways, works, machinery or plant, connected with or used in the business of the employer; or

(2.) By reason of the negligence of any person in the service of the employer, who has any superintendence entrusted to him, whilst in the exercise of such superintendence; or

(3.) By reason of the negligence of any person in the service of the employer, to whose orders or directions the workman, at the time of the injury, was bound to conform, and did conform, where such injury resulted from his having so conformed; or

(4.) By reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

(5.) By reason of the negligence of any person in the service of the employer, who has the charge or control of any signal, points, locomotive engine, or train upon a railway, —

The workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman or nor in the service of the employer, nor engaged in his work.

SECT. II. A workman shall not be entitled, under this Act, to any right of compensation or remedy against the employer in any of the following cases (that is to say): — Exceptions to amendments of law.

(1.) Under sub-section 1 of section I, unless the defect, therein mentioned, arose from, or had not been discovered or remedied, owing to the negligence of the employer, or of some person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition.

(2.) Under sub-section 4 of section I, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade, or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed, for the purpose of this Act, to be an improper or defective rule or by-law.

(3.) In any case where the workman knew of the defect or negligence which caused his injury, and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or some person superior to himself, unless he was aware that the employer or such superior already knew of the said defect or negligence.

Limit of sum recoverable as compensation.

SECT. III. The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment, and in the district in which the workman is employed at the time of the injury.

Limit of time for recovery of compensation.

SECT. IV. An action for the recovery, under this Act of compensation for an injury, shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death; provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action, if the judge shall be of opinion that there was reasonable excuse for such want of notice.

Money payable under penalty to be deducted from compensation under act.

SECT. V. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under or through a workman in respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this Act, by any workman, or the representatives of any workman, or any persons claiming by, under or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or part of



a penalty, under any other Act of Parliament in respect of the same cause of action, such workman, representatives or person shall not be entitled thereafter to receive any penalty or part of a penalty under any other Act of Parliament, in respect of the same cause of action.

SECT. VI. (1.) Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may be by law removed.

Trial of actions.

(2.) Upon the trial of any such action in a county court before the judge without a jury, one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

(3.) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied and repealed from time to time, in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts.

“County Court” shall, with respect to Scotland, mean the “Sheriff’s Court,” and shall, with respect to Ireland, mean the “Civil Bill Court.”

In Scotland any action under this Act may be removed to the court of session at the instance of either party, in the manner provided by and subject to the conditions prescribed by section 9 of the Sheriff Courts (Scotland) Act, 1877.

40 and 41  
Vic. c. 50.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

SECT. VII. Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

Mode of  
serving notice of injury.

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

The notice may also be served by post by a registered letter addressed to the person on whom it is to be served, at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice,

it shall be sufficient to prove that the notice was properly addressed and registered.

When the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice, shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

**Definitions.**     **SECT. VIII** For the purpose of this Act, unless the context otherwise requires, —

The expression, "person who has superintendence entrusted to him," means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor;

The expression, "employer," includes a body of persons corporate or unincorporate;

38 and 39  
Vic. c. 90.

The expression, "workman," means a railway servant and any person to whom the Employers and workmen Act, 1875, applies.

(38 and 39 Vic., chap. 90, sect. 10. In this Act, the expression "workman" does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a laborer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labor, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer; whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service, or a contract personally to execute any work or labor.)

Commence-  
ment of act.

**SECT. IX.** This Act shall not come into operation until the first day of January, 1881, which date is in this Act referred to as the commencement of this Act.

Short title.

**SECT. X.** This Act may be cited as the Employers' Liability Act, 1880, and shall continue in force till the thirty-first day of December, 1887, and to the end of the then next session of Parliament and no longer, unless Parliament shall otherwise determine; and all actions commenced under this Act before that period shall be continued as if the said Act had not expired.

## APPENDIX B.

## EXTRACTS FROM CIRCULAR ISSUED BY BALTIMORE &amp; OHIO RAILROAD COMPANY, PROMULGATING THE ORGANIZATION OF AN EMPLOYEES' RELIEF ASSOCIATION.

BALTIMORE &amp; OHIO RAILROAD COMPANY,

BALTIMORE, May 1, 1880.

*To the Employees of the Baltimore & Ohio Railroad Company and of its Divisions and Branches:*

The Baltimore & Ohio Railroad Company having been petitioned by its employees to aid and countenance them in the organization of a benevolent relief society, and being desirous of securing to them the advantages which experience has uniformly shown may be enjoyed by the employees of railroad and other large corporations, where associations of that character are in operation, has devised for them a plan embodying, as it believes, the best features of such associations

Reasons for organizing society.

Also, having learned of the pecuniary necessities of persons formerly in its service, and being anxious and solicitous that its present and future employees, although escaping accidents and sickness whilst in the discharge of duty, shall not find themselves without the means of support, whenever, through approaching old age or the contraction of infirmities, they become unable to perform the services assigned them or earning a livelihood in other pursuits, it has added to the indemnity features of the plan a superannuation or annuity provision, which it commends to their consideration and adoption.

Reasons for introducing annuity feature.

To give force and effect to this plan and as an earnest of its solicitude for their comfort and welfare, the company has contributed \$100,000 as the nucleus of a fund from which its employees can derive pecuniary relief in the event of becoming incapacitated for earning their livelihood, or by means of which, in the event of death, they may leave some provision for their families, upon condition that they will second its endeavor to promote their welfare by making such contributions to the fund as will secure its permanency and effectiveness.

Contributions of B. &amp; O. R. R. Co. to fund.

The company will also, without expense to the fund, give the services of its staff in conducting the clerical and other business necessary to its proper management; office-room for

B. &amp; O. R. R. Co. to pay expenses of management.

its records, etc.; and, whenever it is necessary or desirable to employ females or children for such work as they are qualified to perform, preference will be given to the widows, wives, sisters and children of its faithful contributing employees, over other applicants, in the order above named.

Free transportation of contributor's children.  
Half rate transportation for contributors and families.  
Medical attendance.

It will also make arrangements by which the children of those contributing to the fund, under sixteen years of age, shall travel free when going to or returning from school, over all its lines, for distances under ten miles, and will give half-fare transportation to contributors, their wives and children, travelling over its lines.

Skilful medical attendance will be provided free of expense to all contributors who may be injured while performing any duty assigned them by competent authority.

#### AN INDEMNITY FOR ACCIDENT AND DEATH CONSEQUENT THEREUPON, SICKNESS AND DEATH FROM NATURAL CAUSES.

Division of contributors into classes.

In order to insure a proper and just discrimination in the imposition of rates between the employees whose occupations render them peculiarly liable to accidents and others not so liable, they will be divided into two classes, viz. :—

1st Class. Those engaged in operating trains and rolling stock ;

2d Class. Those not so engaged.

The first class will contribute monthly, in advance, according to the following scale, viz. :—

Specifying who shall contribute to 1st class.

Those receiving \$35 and under per month will contribute \$1.00 a month, entitling each to one benefit.

Those receiving over \$35 and not more than \$50 per month, will contribute \$2.00 a month, entitling each to two benefits.

Those receiving over \$50 and not more than \$75 per month, will contribute \$3.00 a month, entitling each to three benefits.

Those receiving over \$75 and not more than \$100 per month, will contribute \$4.00 a month, entitling each to four benefits

Those receiving over \$100 per month will contribute \$5.00 a month, entitling each to five benefits.

Specifying who shall contribute to 2d class.

The second class according to the following scale, viz. :—

Those receiving \$35 and under per month will contribute 75 a month, entitling each to one benefit.

Those receiving over \$35 and not more than \$50 per month, will contribute \$1.50 a month, entitling each to two benefits.

Those receiving over \$50 and not more than \$75 per month, will contribute \$2.25 a month, entitling each to three benefits.

Those receiving over \$75 and not more than \$100 per month, will contribute \$3.00 a month, entitling each to four benefits.

Those receiving over \$100 per month will contribute \$3 75 a month, entitling each to five benefits.

As the Baltimore & Ohio Railroad Company agrees to bear all the expenses incident to the management of the fund, the contributors to it will receive, *without deduction for expenses*, all the benefits secured by their own payments and the company's contribution, and any surplus remaining at the end of each year will be devoted to the reduction of the rates of their contributions.

Participation in the benefits of this Association is to be voluntary as regards officials receiving an annual compensation of over \$2,000, and those whose duties are in nowise hazardous and such as to render them liable to railroad casualties. All other employees on the main stem, branches and divisions are expected to subscribe to so much of its relief features as relate to indemnity, for injuries or death, occurring while in the discharge of duty and in the company's service.

The fund thus constituted is to be controlled by a committee of management, partly elected by the contributors, and partly appointed by the Baltimore & Ohio Railroad Company, in manner hereinafter explained, and devoted exclusively to relieving the necessities of those contributing to it, in the following contingencies, viz. : —

1. In case of the temporary disablement of any contributing employee whilst in the discharge of duty and in the company's service, the payment to him or to his order, of a daily allowance, payable monthly, for a period not exceeding six months from the date of accident.

2. In case of permanent disablement, happening to a contributing employee, from accident whilst in the discharge of duty and in the company's employ, incapacitating him from earning a livelihood, the monthly payment of a specified allowance for his support *during the continuance of such disablement*.

3. In case of the death of a contributing employee by accident arising whilst in the discharge of duty and in the company's service, the payment of a specified sum to the person designated by him to receive the same, or to his legal representative.

4. In case of injury or sickness from any cause *other than* accident whilst in the discharge of duty in the company's service, causing total inability to labor, the monthly payment of a specified allowance for his support, for a period not exceeding one year from commencement of disability.

5. In the event of the death of a contributing employee, occurring from any *other* cause than accident arising whilst in the discharge of duty and in the company's service, the payment of a specified sum to the person designated by him to receive the same, or to his legal representative.

The allowances thus indicated shall be based upon the contributions made by the beneficiary, according to the following scale : —

Fund not to be taxed for expenses, and contributors to receive benefit of surplus.

Designates who may participate in benefits of fund.

Funds — how controlled.

For what purposes used.

Temporary disablement payments.

Permanent disablement payments.

Indemnity for death by accident.

Sick payment.

Indemnity for death from natural causes.

Allowances — how calculated.

SCALE.

	1.	2.	3.	4.	5.
	In case of temporary disablement by accident, whilst in the discharge of duty and in the company's service, the same being professionally certified in such manner as may be required by the committee of management, the monthly payment, for a period not exceeding six months, of	In case of permanent disablement and incapacity to resume employment arising from accident whilst in the discharge of duty in the company's service, the same being professionally certified in such manner as may be required by the committee of management, the monthly payment (after the sixth month) during continuance of such disablement, of	In case of death arising from accident whilst in the discharge of duty and in the company's service, subject to rules governing this class of cases, the payment to the person designated by the deceased, or to his legal representative, within sixty days after death, of	In case of injury or sickness from any cause other than accident whilst in the discharge of duty in the company's service, causing total inability to labor, subject to the rules governing this class of cases, the payment (not longer than one year) of a daily allowance of	In case of death arising from any cause other than accident whilst in the discharge of duty in the company's service, subject to rules governing this class of cases, the payment to the person designated by the deceased, or to his legal representative, within sixty days after death, of
	PER DAY.	PER DAY.			
Those receiving per month \$25 and under.	\$0 50	\$0 25	\$500	\$0 50	\$100
Those receiving per month over \$25 and not more than \$50,	1 00	0 50	1,000	1 00	200
Those receiving per month over \$50 and not more than \$75,	1 50	0 75	1,500	1 50	300
Those receiving per month over \$75 and not more than \$100,	2 00	1 00	2,000	2 00	400
Those receiving per month over \$100,	2 50	1 25	2,500	2 50	500

Contributors may take higher benefits. Contributions — how levied.

Any contributor will be entitled to the higher rates of relief by paying the contributions provided for those rates.

Contributions will, in all cases, be deducted monthly from the members' wages, so that payments will be required of them only when they have earned wages; and the allowance will, in all cases, be proportioned to the monthly contributions paid by each person in the several classes into which the contributors have been divided.

Disablement allowances to be paid monthly.

In cases of disablement the allowance will be paid not less than once every month; before each payment, whether for temporary or permanent disability, satisfactory evidence of its existence must be furnished.

\* \* \* \* \*

To constitute a lawful claim for accident indemnity there must be:—

1st. Exterior or patent evidence of injury, and satisfactory testimony that it resulted from accident whilst in the discharge of duties assigned the contributor by the company, and incapacitates him from earning a livelihood.

What constitutes a legal claim for accident indemnity.

2d. In case of death, that the injuries sustained by such accident were the sole and direct cause of death; or

3d. Not resulting from accidents whilst performing the company's service, that it was not caused by injuries received whilst engaged in unlawful enterprises or riots. The managers are to be the exclusive judges as to whether the injuries have been so caused and received, and their decision shall be final and conclusive.

What constitutes a claim for death indemnity.

All legitimate claims for death allowance will be paid in full, irrespective of any previous payments which may have been made under the head of temporary disability allowance; but the managers are to have power to require such information and particulars as they deem necessary to establish the validity of the claim of any person applying for allowance.

Death claims to be paid in full, irrespective of previous payments.

In urgent cases the managers have power to pay part of the death allowance within a shorter period than sixty days, but the whole will always be paid within that time.

Death allowance to be paid within sixty days.

\* \* \* \* \*

The several subscriptions to the fund will be deducted monthly, or whenever salaries are paid by the company's paymasters, in advance, and will be held subject to investment or disbursement as the managers may decide.

Collection of subscriptions.

\* \* \* \* \*

The managers are to be chosen partly by the Baltimore & Ohio Railroad Company, on account of its interest in the fund, and partly by the contributors to it. The company are to choose four, and the contributors five—the majority of those selected.

Managers—how chosen.

\* \* \* \* \*

The condition of the fund is to be annually investigated and reported on by a proper and competent person, to be selected by the managers for that purpose.

Annual investigation into condition of fund.

\* \* \* \* \*

The Baltimore & Ohio Railroad Company guarantees fulfillment of the benefits herein indicated.

B. & O. R. Co. guarantees benefits herein enumerated

## RELIEF AND ANNUITY FEATURES.

## CONSTITUTION.

Title of Association.	ARTICLE I. This society shall be known as "The Baltimore & Ohio Employees' Relief Association."
Objects.	ARTICLE II. Its object shall be to provide for its members while they are disabled by accidents, sickness or by old age, and, at their deaths, for their families.
Surgical attendance.	ARTICLE III. Such provision shall include:— 1st. Surgical attendance for its members, when injured by accidents while in the discharge of duty and in the service of the Baltimore & Ohio Railroad Company, or of any other railroad company whose employees shall be admitted to the privilege of membership by a vote of the managers of this society, who shall contract with physicians and surgeons residing at all practicable points along the lines of the roads aforesaid for such attendance
Allowance for temporary disablement.	2d. There shall be paid to every contributor of the smallest (or 1st) class thus injured by accident, while totally unable to labor, fifty cents for each working day thus lost, and to contributors of higher classes larger sums, proportionate to their contributions; but, after six months' disability, these payments shall be reduced one-half. They shall not be made until certificates satisfactory to the managers have been received from the supervisor or head of department or division, that the accident occurred while the person injured was in the discharge of duty and in the company's service, and from one of the society's surgeons that this accident had caused total disability for labor for the time specified in the certificate.
Allowance for permanent disablement.	3d. In the event of the death of a contributor, occurring solely by reason of, and at the time or within six months after an accident, while in the discharge of duty in the service of either of the companies aforesaid: in the case of a contributor of the smallest class there shall be paid to the person designated by him in the application for membership to receive the same, or to his legal representative, if there be no such person, the sum of \$500, and in the cases of contributors of higher classes larger sums, proportionate to their monthly contributions; but all the payments shall be conditioned upon the
Indemnity for death from accident.	



certification of the requirements above specified, by one of the designated surgeons of the society and by the member's supervisor, head of department, or other official of higher authority.

As it is not contemplated in this scheme to give double benefits in cases of disability or death resulting from accidents, the benefits herein promised shall not be payable nor paid when the contributor, or any person entitled to damages because of the accident to him, whether resulting in death or not, has or makes a claim against said company, or any of the companies operating its branches or divisions (including the Chicago division), until there be first filed with the committee a release, satisfactory to them, releasing said companies from such damages, signed by all persons entitled to the same.

Relinquishment of claims for damages.

4th. There shall be paid to every contributor of the smallest (or 1st) class, in the case of injury or sickness arising from any *other* cause than accident occurring in the discharge of duty in the company's service, while totally unable to labor, fifty cents for each working day thus lost, and to contributors of higher classes larger sums, proportionate to their contributions. But these payments shall only continue one year after the employee ceases to contribute to the relief fund, and shall not be made in cases of disablement of less than six working days' duration, and then only when certificates satisfactory to the managers have been received from a duly registered medical practitioner, corroborated by the contributor's superintendent or head of department, that sickness or injury had caused total disability for labor for the time specified in the certificate.

Indemnity for sickness from ordinary causes.

5th. In the event of the death of a contributor, occurring while in the service of either of the aforesaid companies, neither by his own act, nor by the hands of justice, nor in violation of the laws of the State wherein he was injured or died, nor by such accidents as will secure relief from this society as already provided for in this constitution, there shall be paid: in the case of each contributor in the smallest class, to the person designated in his application for membership to receive the same, or, if there be no such person, then to his legal representative, the sum of \$100, and in the cases of contributors in higher classes larger sums, proportionate to their monthly contributions; conditioned, however, upon the presentation of proof satisfactory to the managers that death occurred within the requirements herein set forth.

Indemnity in case of death from natural causes.

ARTICLE IV. Participation in the benefits of this Association shall be voluntary as regards officials receiving an annual compensation of over \$2,000, and those whose duties are in nowise hazardous and such as to render them liable to railroad casualties. [All other employees on the main stem, branches and divisions are expected to subscribe to so much of its relief features as relate to indemnity for injuries or death occurring while in the discharge of duty and in the company's service.

Subscriptions.

When employees may waive ordinary death payments.

Employees who are unmarried or who have no immediate families dependent upon them for support, may waive the benefits accruing in case of death from any cause other than from injuries received in the discharge of duty; in which case a reduction of twenty-five cents per month on smallest, and proportionately larger reductions on other contributions, will be allowed.]

Contributors disabled from natural causes shall hold their right to death indemnity for one month.

ARTICLE V. When a contributor shall be disabled by sickness or accident from earning any wages, and it shall be so certified by a surgeon employed by the society, he shall, notwithstanding, be entitled to the benefits of this society for one month after the time for which his contributions have been paid, and also for a period extending from the day he resumes labor to the first subsequent payment of wages.

Nature and amount of members' contribution.

ARTICLE VI. For the several benefits herein set forth — medical attendance, temporary and permanent disablement indemnity, allowance for death by accident and death from other causes — each member receiving a monthly compensation of \$35 and under shall pay, in advance, a monthly contribution of \$1, if engaged in operating trains or rolling stock, or 75 cents per month if not so engaged; which shall entitle him to the benefits above assigned to the contributors in the smallest class.

First, or smallest class.

Payments by 2d class of contributors.

Those receiving over \$35 and not more than \$50 per month, shall pay double the contributions paid by the smallest class of contributors, and receive double their benefits.

Payments by 3d class of contributors.

Those receiving over \$50 and not more than \$75 per month, shall pay three times as much as the smallest class of contributors, and receive three times their benefits.

Payments by 4th class of contributors.

Those receiving over \$75 and not more than \$100 per month, shall pay four times as much as the smallest contributors, and receive four times their benefits.

Payments by 5th class of contributors.

Those receiving over \$100 per month shall pay five times as much as the smallest contributors, and receive five times their benefits.

Provision reducing rates of contribution.

ARTICLE VII. These rates of payment shall continue only the first year of membership, and at the end of September of every year the managers shall make up a statement of the receipts from the members and of the payments to them, and of the future liabilities of the Association to them, as ascertained by some competent person to be employed by the managers for that purpose; and the whole of the surplus thus ascertained shall be used to reduce the next year's contribution, or to increase the allowance for natural deaths, or shall be otherwise devoted to promoting the interests of the Association, in such manner and at such times as shall be deemed best by the committee of management.

Under to which company's con-

ARTICLE VIII. As the Baltimore & Ohio Railroad Company for the purpose of guaranteeing the above payments and of

lessening the contributions of the members of this society, have consented to bear all the expenses necessary to the proper management of its affairs, and have contributed \$100,000 towards its funds, the whole of the interest received from its contribution shall also be used every year to lessen the contributions of the company's employees.

tribution shall be applied.

ARTICLE IX. The managers shall, from time to time, provide for the visitation of the persons on the allowance list, besides that of the attending surgeon or physician, and no member refusing to submit to an examination by such visitor shall be entitled to receive any benefits from the fund during the continuance of such refusal.

Extra visitation of disabled members.

ARTICLE X. All liabilities on account of death shall be payable within sixty days after receipt of notice of death.

Payment of death liabilities.

ARTICLE XI. The monthly payments shall, in all cases, be deducted from the wages of the members; when there are no wages, no payments can be made.

Contributions — how and when collected.

ANNUITY FUND.

ARTICLE XII. Any one may make regular contributions to this fund, of any amount he sees proper to set aside as the basis of an annuity.

Annuity contributions.

ARTICLE XIII. If he continues his contributions until he has arrived at the age of sixty-five, he shall receive an *annual* allowance, as long as he lives, of ten cents for each and every dollar he has paid into the annuity fund; and an addition of one half cent on the dollar for every year his contributions have continued. To illustrate: —

Nature and extent of annuity allowance.

If he begins at thirty-five and continues his contributions until he reaches the age of sixty-five, at the rate of five dollars a month, he will have paid into the annuity fund, in the thirty years, eighteen hundred dollars; which will entitle him to an *annual* allowance for the remainder of life, of ten cents on the dollar, or one hundred and eighty dollars, and an addition of one-half cent on each dollar for the thirty years his contributions have continued, or fifteen cents on each of the eighteen hundred dollars he has paid; making an addition of two hundred and seventy dollars, and the whole allowance, four hundred and fifty dollars, each year he lives after attaining the age of sixty-five

Illustration.

ARTICLE XIV. If at any time he stops his contributions to, but does not withdraw them from the annuity fund, he shall receive, after arriving at the age of sixty-five, an *annual* allowance, for the remainder of life, of ten cents on the dollar for all he has paid into it, and an addition of one-half cent on the dollar for each of the years — counting from the middle of the period during which he contributed — to sixty-five. To illustrate: —

Rights of those discontinuing contributions.

If he begins at forty-five to contribute at the rate of five

Illustration.

dollars a month, and stops at fifty-five, his contributions will have amounted to six hundred dollars; which will entitle him, after arriving at the age of sixty-five, to an *annual* allowance of ten cents on the dollar on all he has contributed, or sixty dollars a year, and an addition of one-half cent on the dollar for each year counting from fifty — the middle of the period during which he has contributed — to sixty-five; making in all fifteen years (seven and one-half cents on each dollar paid), or forty-five dollars a year; which, added to the sixty, will make one hundred and five dollars *annual* allowance to be paid him as long as he may live.

Rights in event of death.

ARTICLE XV. If he shall die before arriving at the age of sixty-five, the person designated in his certificate, or, if there be no such person, his legal representative, shall receive all he has contributed to this fund, *and one-half more.*

Amount returned in case of withdrawal from fund.

ARTICLE XVI If he shall withdraw from participation in the benefits of this fund, there shall be returned to him three-fourths of the total sum he has contributed thereto.

Annuity may compound life payments.

ARTICLE XVII. Any member, after becoming a recipient on this fund, may at any time before arriving at the age of seventy receive a sum, in one payment, equal to five years' allowance under the schedule. in place of all future allowances.

#### COMMITTEE OF MANAGEMENT.

Constitution of Committee of managers.

ARTICLE XVIII. The president of the Baltimore & Ohio Railroad Company shall be, *ex officio*, a member of the committee of management, which, in addition, shall consist of four members to be appointed by the Baltimore & Ohio Railroad Company, and five elected by the contributors.

Election for managers.

ARTICLE XIX. The first election for managers shall take place on the first Wednesday after the first day of July, 1880, and until that election takes place the president of the Baltimore & Ohio Railroad Company shall designate the persons to represent the contributors in the board. Subsequent elections shall take place on the first Wednesday following the first day of January of every year.

Voting by contributors.

ARTICLE XX. At these elections for managers each person shall be entitled to vote in proportion to his monthly contributions, and shall have the right to vote by proxy.

Managers not entitled to compensation.

ARTICLE XXI. No person shall be entitled to receive any compensation or salary by reason of his service upon the committee of management.

Investment of funds.

ARTICLE XXII. The moneys belonging to the fund of this society, not wanted for immediate use, shall be invested by the managers in United States bonds, Maryland State and Municipal bonds, Baltimore & Ohio Railroad bonds, stocks or other obligations, and other first-class securities. All securities and the moneys necessary to meet current expenses shall be entrusted to the official custody of the treasurer of the Baltimore

Custody of funds.

& Ohio Railroad Company, to be held subject to the requisition of the committee of management.

ARTICLE XXIII. All the benefits offered by this society are guaranteed by the Baltimore & Ohio Railroad Company.

Benefits guaranteed by B. & O. R. R. Co.  
Appointment and duties of secretary.

ARTICLE XXIV. The managers will elect a secretary from the contributors, who shall perform the usual duties attached to that office.

Settlement of disputes.

ARTICLE XXV. Should any difference arise between any claimants for the benefits herein set forth and the committee of management, it shall be submitted to three arbitrators; one to be chosen by each party and the third by the two thus chosen; whose decision shall be final.

ARTICLE XXVI. All the contributions due by the members of this society shall be paid in advance, by being deducted from the monthly wages due them by either of the companies aforesaid, and every person signing these rules hereby assents to such reduction.

Contributions — when paid.

ARTICLE XXVII. None of the provisions of this constitution shall be altered, modified or repealed, nor shall any new rule be made, except at a general meeting of the committee of management. Three months' notice must be given of any such proposed change or modification, and every such amendment, repeal, of an old rule, or introduction of a new one, shall be inoperative until confirmed by a two-thirds majority vote of the members of this society, or by two-thirds of the committee of management, at a subsequent general meeting.

Modification, repeal, &c., of rules.

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#### BY-LAWS OF THE RELIEF ASSOCIATION.

1st. Whenever suit is brought by a member of the Association against the B. & O. R. R. Co., or any of the companies operating its branches or divisions, including the Chicago division, such member shall forfeit all claim to any benefits accruing to him subsequent to the date of the institution of the suit.

2d. No member of the Association shall, without the assent in writing, of the Secretary of the Association, assign or transfer to any person, other than the one named in his application, any benefit due him by the Association under its constitution and by-laws, and any such attempted assignment without such written consent shall be a forfeiture of all claims of the beneficiary or transferee to such benefits.

3d. Each and every vacancy occurring in the committee of management shall be filled through the election, by the committee, of a member of the Relief Association, to serve the unexpired portion of the term of the committeeman whom he succeeds.

No em-  
ployee over  
forty-five  
years ad-  
mitted to  
Relief As-  
sociation.

Regulations  
regarding  
joining As-  
sociation.

Examina-  
tion of ap-  
plicants for  
admission  
to com-  
pany's ser-  
vice.

Minors.

Premiums.

Liability of  
Association  
for pay-  
ments to  
members.

Return of  
premiums  
on leaving  
service.

4th. 1. Ample opportunity to investigate the merits and witness the practical operations of the Association having been given all employees, and it being important for its future welfare that some attention be given the physical condition of those hereafter seeking admission, notice is given that no employee of the company over forty-five years of age, and who cannot produce a medical certificate of sound health, will be admitted to share its privileges and benefits.

2. It is the duty of all officials employing men for the company's service to see that they are in good physical health and free from disease, and are not over forty-five years of age. In order to enable them to do this, they can at all times command the services of the medical inspectors to examine applicants for admission to the service. It is also their duty to see that applications are properly filled up, witnessed by some person permanently employed by the company, and promptly forwarded to the Secretary of the Association at Camden Station.

All minors' applications for membership must have the consent of parent or guardian written on their faces.

Employees are entitled to the benefits of the Association only from the date of perfecting their applications for membership.

3. Premiums are deducted monthly, in advance, on the pay-rolls of the company (the word month in this connection being construed to mean calendar month). They must be paid for the time intervening between the date of the application and the next month's payment. The amount thus due may be paid on entering the service, otherwise it must be added to the first full monthly premium, and deducted on the pay-roll, — proper notation thereof being made.

4. As the Relief Association was organized by the Baltimore & Ohio Company solely for the benefit of its own employees, and as, under the terms of the constitution, the responsibility of the Association ceases from the date a member leaves the service of the company (unless he be then drawing allowance from the Association for sickness incurred or accident received while in the service), no insurance premium is to be deducted from the final payment to a member, and so much of the premium last paid by him as covers the fractional part of the month succeeding the date he leaves the service is to be returned to him by the person paying his wages. A separate receipt is, in every instance, to be taken for such refundment, and forwarded to the Secretary of the Association at Camden Station, when the money thus refunded will be properly credited to the party paying it. The retained pay-rolls will ordinarily show the amount to be refunded, but where they are not accessible, or the amount cannot be satisfactorily ascertained, the information can be procured from the Secretary of the Association.

5. When disabled for duty by any cause specified in the constitution, members are entitled to the payments provided therein, for every day during the time thus *totally disabled* (Sundays and legal holidays excepted), upon complying with the regulations for the establishment of claims announced in the constitution and orders heretofore promulgated. Allowances cannot be made where the disablement does not cause *total* inability to labor.

Sundays and holidays not included in allowances.

6. It is the duty of each and every member abstaining from labor on account of physical disability to perform his work, to immediately inform his timekeeper or other person designated to receive such reports.

Reports of disability.

*The Association is bound to the payment of allowances only when the disablement is thus reported; and no claim that has not been so reported will be considered.*

Payments made only when disability is reported.

It is also the duty of every one having control of men, to report to the Secretary of the Association with the utmost promptness, each case of accidental injury or sickness or death occurring among the members. At the same time they must send duplicates of such notifications to the nearest medical inspector, through the head of department, or those designated by him, whereby examination of the claims will be greatly facilitated.

*Allowances will in no case antedate such notification.*

7. It is incumbent upon every member entitled to allowance from the Association to see that his claim is prepared in due form and forwarded to the nearest medical inspector or the secretary at Baltimore

Claims to be forwarded only after being perfected.

The receipt attached to the certificate of disablement should in each case be signed before it is forwarded to the secretary, in order to obviate inconvenience and delay in afterwards procuring such signature.

8. The counter-signature of a higher official than the one certifying to the disablement is required in every case where the certifying official is not above the rank of a supervisor. The official signing such a certificate of disablement must have personal knowledge of the facts therein stated or, at least, satisfy himself of their correctness before certifying; being held responsible for the consequences of such certification.

Certification.

9. Under the terms of the constitution of the Association no claim for *death* allowance, either accidental or natural, can be entertained or allowed, unless it be established to the satisfaction of the committee that the member, at the time of death, or at the time of receiving the injury or incurring the sickness causing death, was in the service of the Baltimore & Ohio Company.

Death allowance — when made.

A member of the Association leaving the service of the company, while he is undergoing injury or sickness, for which

Members leaving company's ser-

vice — to what entitled.

allowance is made, is still entitled to continuance of the same as provided for in the constitution and for the period therein stipulated.

When claims will be paid.

10. Vouchers for money due by the Association will only be issued once a month, on the following dates:—

On Main Stem and branches.

In payment of all claims originating on the main stem and branches, received at the office of the Association in Baltimore, in proper shape for settlement, on or before the tenth day of each month, vouchers will *only* be issued on the 20th of the same month (on the 21st in case the 20th be Sunday).

On Pittsburgh and Trans-Ohio Divisions.

For all claims originating on the Pittsburgh division and Trans-Ohio divisions, received at the office of the association in Baltimore, in proper shape for settlement, on or before the last day of each month, vouchers will *only* be issued on the 10th of the succeeding month (on the 11th in case the 10th be Sunday).

To enable the management to carry out this programme effectively, it is absolutely essential that all parties use the utmost diligence in preparing and forwarding claims as promptly as practicable.

Members notified when vouchers issue.

Each member entitled to allowance will be notified to whose care the voucher issued in settlement thereof has been sent. Those to whom such vouchers are sent will be held responsible for their prompt and safe delivery to their owners. Should a voucher be lost, no duplicate will be issued for sixty days, and no original voucher presented for payment *after* sixty days have elapsed from its date must be paid, until it is ascertained from the Secretary of the Association that no duplicate has been issued.

Allowances made only upon final certificate by inspectors.

11. It is the province of the medical inspectors to decide when a member is unfit for duty, and the payment of sick or accident allowance is usually made dependent upon their favorable report. No allowance will be paid a member after the date fixed by the inspector for his return to duty, unless unforeseen circumstances render it clearly impracticable for him to obey the direction, which must be clearly shown before further payment will be made.

Medical attendance — when furnished.

12. Medical attendance is only furnished at the expense of the Association in cases of disablement from injury received from accident occurring in the discharge of duty. It is not made compulsory upon a member to secure the services of a physician simply for the purpose of signing the certificate required to perfect his claim. If the Association is promptly notified of the sickness, one of its inspectors will at once look into the case, and inspectors are authorized to sign all certificates in lieu of physicians.

Surrender of certificate of membership.

13. Every member leaving the service must surrender his certificate of membership to the official paying him, who will indorse upon its back, over his signature, the cause of leaving



the service and the amount of premium returned to the member.

14. Any employee discharged or leaving the company's service, must, on re-entering the same, make application for membership in the Association, without reference to previous employment

Applications for membership.

15. Attention is called to Article XI of the constitution, which provides that "the monthly payment shall in all cases be deducted from the wages of the members; when there are no wages, no payments can be made." In explanation of this provision it may be stated that premiums are *only* deducted from the *wages* of members, and that when, through *sickness* or *accident*, absence with leave, or suspension, they have earned no wages, no premium is expected from them.

When premiums are to be paid.

ARTICLE V. of the constitution provides that when a contributor shall be disabled by sickness or accident from earning any wages, and it shall be so certified by a surgeon employed by the society, he shall, notwithstanding, be entitled to the benefits of this society for one month after the time for which his contributions have been paid, and also for a period extending from the day he resumes labor to the first subsequent payment of wages.

In other words, though *sickness* or *accident* prevent a member from earning wages and paying his premium, he is not to be thereby debarred from the benefits of the Association *from the time he does resume work to the time he again commences paying premiums*; but, without charge for back insurance, is entitled to all benefits between the time of such resumption of work and the time he again commences paying premiums in advance from wages earned.

It being a recognized fact, that in severe cases of injury, hospitals offer better facilities for securing speedy recovery than can be had elsewhere, the management in the interest of those members of the Association who may meet with accidents whilst in the discharge of duty, and may prefer hospital treatment, have made special arrangements with prominent hospitals in Chicago, Columbus, Wheeling, Pittsburgh, and Baltimore, for *boarding* and attending those so disabled, who will thereby secure to themselves the advantages of the best surgical treatment and appliances, careful nursing and all the comforts of a home. Under this arrangement the Association is to pay for the medical attendance and the member for his board — which latter, in no event, need exceed \$2.50 per week, and which can be paid out of his allowance from the Association.

Hospital treatment for members.

The management reserves to itself the power of approving or declining each application for this privilege.

All requests for admission to hospitals will be addressed to the Secretary of the Association.

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