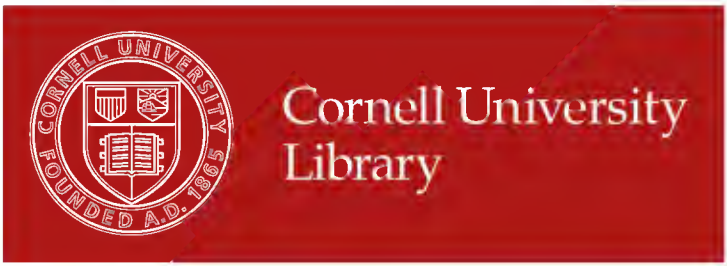

HOUSE . . . . No. 326.

EVIDENCE AND ARGUMENTS BEFORE THE COMMITTEE ON THE JUDICIARY ON THE SUBJECT OF REGULATING THE LIABILITY OF EMPLOYERS, IN CASES OF ACCIDENTS TO THEIR OPERATIVES THROUGH THE CARELESSNESS OF FELLOW-EMPLOYEES.

[For bill reported by Committee, see House, No. 315.]

Commonwealth of Massachusetts.

STATE HOUSE, Boston, Feb. 10, 1885.

The Judiciary Committee began a hearing this morning upon the following order: —

HOUSE OF REPRESENTATIVES,
Jan. 19, 1885.

"*Ordered*, That the Committee on the Judiciary consider the expediency of a law regulating the liability of employers, in cases of accidents to their operatives through the carelessness of fellow-employees."

Chairman HARTWELL presided. Mr. CHARLES G. FALL first addressed the committee, and spoke as follows: —

ADDRESS OF MR. CHARLES G. FALL.

MR. CHAIRMAN AND GENTLEMEN:

Several years ago, in 1880, there was passed by the English Parliament a bill, sometimes called "the Gladstone bill," but called in the Acts of Parliament "The Employers' Liability Act" (43 & 44 Victoria, ch. 42). The principle on which it is based is substantially this: That when an employee is injured through the carelessness of a superior whom he is in duty bound to obey, he shall not be excluded from damages because they are fellow employees. Upon railroad companies it imposes a rather more severe liability. In December of last year, the Supreme Court at Washington made a decision in the case of Ross *v.* Chicago,

Milwaukee & St. Paul Railroad, in which they laid down substantially the same principle: That where an engineer was injured through the carelessness of a conductor, who was his superior whom he must obey, and who, for the time being, personated the company, the company was responsible for the negligence of its conductor. We ask this committee to report a bill substantially like the Gladstone bill, — the bill which the Labor Committee of 1883 reported. It is, I think, Senate Document, No. 215. If the committee do not see fit to report that bill, we ask them to embody in a bill the recent decision of the United States Supreme Court, and make the law of this State conform to the law of the United States.

The CHAIRMAN. Do you mean, Mr. Fall, that the Committee on Labor reported the Gladstone bill, with the clause allowing people to contract out of it?

Mr. FALL. They reported the Gladstone bill. Under the English law, an employee is allowed to contract out of the act; under our law he is not. The legislature, if it sees fit, can of course repeal that law; but while it remains on the statute book, the employee cannot contract out of the act.

Mr. TORREY. Are you willing the legislature should repeal that law as a part of your act?

Mr. FALL. No; for the reason that it spoiled the whole effect of the Gladstone bill, and would spoil the whole effect of any law.

Mr. TORREY. Then, you admit, of course, that you are asking for a rule much more severe than the English rule?

Mr. FALL. Yes; in a certain way.

Judge SOULE. And you quote a part of the English rule as a rule to govern this committee, and leave out the part you don't like.

Mr. FALL. Exactly. I should like to be allowed to go on and make my argument, and to answer questions subsequently, because the interruptions break up the whole thread of what I have to say. Most every week we read in the newspapers an account of some railroad accident. A passenger, if the accident occurred through the negligence of the corporation, can recover damages; the brakeman or engineer on the train cannot. A memorable instance is the Wollaston accident, which occurred through the carelessness of a switchman. The passengers on the train who were injured could all recover damages; the brakeman who stood at his post, obeyed the whistle and tried to stop the train, could not recover damages.

Mr. BENTON. But every employee who was hurt in that case was paid without the law.

Mr. FALL. I am only talking about the law. It is a matter of gift, if he was paid.

Now, gentlemen, we do not seek to interfere with the doctrine of contributory negligence. If a man injures himself, is injured through his own carelessness, nobody here asks that he be paid for his carelessness. Just how far the doctrine of contributory negligence applies to these cases of injury, it is impossible to tell; but this is certain, that the London & Northwestern Railroad, which employs about 90,000 men, three years ago employed actuaries, to make, from such statistics as could be gathered in England, as careful an estimate as possible of the ratio of persons injured through their own carelessness, to the whole number of persons injured. And the president, or the chairman, as he is called, of the London & Northwestern Railway, stated in a circular to his employees, that about 98 per cent. of injuries were caused by contributory negligence.

Before former committees upon this subject, the two medical examiners for Suffolk County, who have the largest experience of any medical examiners in the State, testified, last year and year before, that, according to their books, and the findings of the justices who held the coroners' inquests, about the same ratio prevails in this Commonwealth as exists in England.

Judge Russell, the chairman of the Board of Railroad Commissioners, in a letter published in the proceedings of the Labor Committee of last year, made an estimate of the ratio of damages paid by the eight leading railroad companies, during the preceding year, to the number of tickets sold. And, in order that we may get as accurate an idea as possible of the expense of this legislation we ask, I will read what Judge Russell said: —

"The actual amount paid by the eight great railroad companies which terminate in Boston, during the last year, for all personal injuries, including settlements and gratuities, was in round numbers $139,000. This is more than the average amount, but it is less than one-half of one per cent. of the gross receipts from the operations of the roads, and it would be repaid by adding three mills to the price of each passenger's ticket; or if a due proportion were assessed on freight, it would not average one mill and a half on each ticket. Even if an additional amount equal to this were averaged among the passages over our roads, according to the length of each journey, as the result of a just revision of our law, the travelling public would willingly bear the added burden. And in computing the probable cost, due allowance should be made for the certain reduction of the numbers of casualties which would result from the proposed legislation."

It is worth bearing in mind, in order that we may not be unnecessarily frightened at the outset, that last year the railroads were directed to use on their freight trains patent couplers; and under this law the Railroad Commissioners have since recommended five patent couplers. This will decrease considerably the number of accidents, because it is well known that a majority of the deaths and injuries on railroads are caused in coupling and uncoupling freight cars. Shunters, as they are called in England, — the men who couple and uncouple freight cars, brakemen we call them here, — are injured more than any other class of railroad employees.

In order that we may get some idea of the number of injuries, I would say that, according to the report of the Massachusetts Railroad Commissioners for 1882, pages 21 and 22, 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 killed, and 9,387 injured. During the year ending Sept. 30, 1881, 438 persons were killed, and 1,644 persons injured. According to the reports of the English Board of Trade, during the year 1880 there were in England 1,135 people killed, 3,959 persons injured; 142 of those killed were passengers, and 1,614 of the injured were passengers; and the total number of employees injured, including employees of contractors, was 2,080; and the employees killed, including those who were employees of contractors, was 546. And you will bear in mind, gentlemen, that not only is the employee of the railroad company a fellow servant, but the employee of a sub-contractor is also a fellow servant, under the law.

There is a well-known principle of law that every man who injures another must pay for the injury. There is another principle of law, equally well known, that every man whose servant injures another, must pay for the injury. This latter principle is known to lawyers as the doctrine of *respondeat superior*. It makes the master responsible for the negligence of his servant, and it is as old as the reign of Charles II. Lord Chelmsford, in an elaborate case, states the principle thus: —

"It has long been the established law of the country 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*."

This principle was first extended to negligence by Lord Holt, in a decision which may be found in 1st of Raymond.

The first important exception to this principle that if an injury is caused by the negligence of an employer, or by the negligence of his servant, damages can be recovered, arose in about the year 1837. The case is the famous one of Priestly *v.* Fowler, 3 M. & W. 1. The decision was made by Lord Abinger, better known to our profession as Sir James Scarlett. The first case, that of Murray *v.* South Carolina Railroad, is a little earlier, was decided in 1835 or 1836, and is reported in 1st McMullan, 385; but in neither of these cases was any solid ground laid down as the basis of either opinion. In our own State, however, by our greatest judge, a judge whose opinion has been followed in all the States of the Union, as well as in England, and not only whose opinion has been followed but whose *ratio decidendi* has been adopted, — in the case of Farwell *v.* The Worcester Railroad, 4th Metcalf, 449, — a railroad corporation was excused from liability for an injury which happened to an engineer through the carelessness of a switchman. In 1850, in the case of Hutchinson *v.* New York, Newcastle and Berwick Railroad Company, 5th Exchequer Reports, 343, the English courts announce the same law for England. In the cases of the Bartonshill Coal Company *v.* Reid, and Bartonshill Coal Company *v.* McGuire, House of Lords' cases, 3 Macqueen Reports, the rule which we call the doctrine of common employment is first announced. Passing over the grounds of decision in the first cases, they began, as so many cases had arisen, to define what is meant by "common employment." They extended the rule to a great number of cases. It is the extension which has wrought the wrong. They said that all men are fellow employees who are paid from the same purse.

The CHAIRMAN. What case do you refer to?

Mr. FALL. To the case of the Bartonshill Coal Company *v.* Reid, and the Bartonshill Coal Company *v.* McGuire. But the full extent of the principle is better stated in one of our own reports, and is stated in these words: —

"All persons in the employ of a railroad, whose labors may facilitate the running of its trains, are fellow servants, however widely separated may be their labors." (Holden *v.* Fitchburg Railroad, 129 Mass. 268.)

The English House of Lords, in a decision by Lord Cairns (Wilson *v.* Merry, L. R. 1, 326), saw the danger of allowing

these cases to be decided by simply saying that they came within the rule of "common employment," and brought back the decisions to the principle laid down in the case of Farwell *v.* The Worcester Railroad.

I have not attempted, gentlemen, to enumerate cases. I shall not attempt to give any description of the country, but simply to point out some of the mountain peaks. These are the leading cases, and a knowledge of these cases gives a full knowledge of the reasons which the judges have made the basis of their opinions.

Now, what are these reasons? A careful analysis of all the cases bearing upon this subject, I think, will show only two reasons given, or rather two grounds upon which are based these opinions. One is as an exception to the principle of *respondeat superior*, and the other, which is more generally adopted by the abler judges, is the ground laid down in Farwell *v.* The Worcester Railroad; viz., that there is an implied contract between the employer and employee at the time of the hiring, that the latter will run the risk of his employment.

This is called an implied contract. There are two kinds of contracts, as we very well know — an express contract and an implied contract. An express contract is a contract expressed in words; an implied contract is a contract that the courts imply. An implied contract is not one that the parties have entered into in words, but a contract that the courts have made for them. It is, then, a judge-made contract, and the law is judge-made law. For a long while the courts refused to imply any contract, and Lord Holt said 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 again, "there is no such thing as a promise in law."

Let us see how the courts justify themselves for implying a contract where there is none made. They say that public policy justifies them in making a contract in harmony with what is, or ought to be, the best interest of the State. Now, what is meant by public policy? Public policy is something that legislatures deal with more particularly than judges. Questions of public policy are questions of political economy. What is the public policy of a State upon any great question? That is a question of political economy. And when the judges attempt to say what public policy is, they usurp, in a certain sense, the province of the legislature. If the public policy of a country is to be determined by its representatives, then the courts have no

right to deal with the question. But for the purposes of this argument, it is sufficient to assert that they have no better right to declare what is public policy than has the legislature.

The CHAIRMAN. It is rather complimentary than otherwise to a law, to say it is judge-made, is it not?

Mr. FALL. I should differ with you.

The CHAIRMAN. Of course, it is a mere term; but, at the same time, I suppose that judge-made law is made because it is deemed, in the opinion of the court, to be right and just.

Mr. FALL. The theory upon which our government is organized is, that the legislature shall make the laws, and the judges shall interpret and apply the law; and if the judges are restricted to an interpretation and application of the laws, they have no right to make them.

Mr. TORREY. A little of the old common law, I suppose, is judge-made, Brother Fall?

Mr. FALL. I think not. I do not think the common law is made by the judges. I think the common law is indicated by the opinions of the judges, and is proved by the opinions of the judges; but common law is not judge-made law. I can give you good authority for that view.

Mr. BENTON. I suppose the principal point is whether it is good law, not who made it.

Mr. FALL. Blackstone tells us what the common law is (vol. 1, p. 64):

"The unwritten, or common law, of England, includes not only general customs, or the common law properly so called, but also the particular customs of certain parts of the kingdom, and likewise those particular laws that are by custom observed only in certain courts and jurisdictions" . . . "The monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity."

The common law of Massachusetts is defined in Com. *v* Knowlton, 2 Mass. 530, 535.

The decisions of the courts are merely evidences of what the common law is. Now, if the legislature is the proper body to determine the public policy of a State, then it is their especial province to deal with this question. If the judges have indicated what they thought, years ago, was the public policy of the State, it is a question for the legislature to consider, whether it will approve their opinion, or will say the time has gone by for large corporations and large railroad interests to be fostered, as

they have been fostered by this law: and the time has come for the rights of employees to be looked after. I think "the heart of this mystery," the gist of this subject, is purely the question of public policy.

There are three reasons given as the basis of the judges' opinions in most of these cases. One reason is that the employee takes the risk of the employment. Now, why does the employee take the risk of the employment? It is because the judges have made him take the risk of the employment; because the judges have implied a contract which compels him to take the risk of the employment. The courts have implied a contract of non-liability because the employee takes the risk of his employment, and the employee takes the risk of his employment because the courts imply a contract of non-liability. That is reasoning in a circle.

Another of the three principal reasons laid down as the basis of the opinions of the courts is, that the price of labor is proportionate to the risk of the employment. But this is purely a question of fact. Is the price of labor proportionate to the risk of the employment? That is a question of fact with which you are just as competent to deal as judges or courts. And as a matter of fact, is not the reverse of their position true? Is it not a fact that the chief question which determines the price of labor is the ratio of demand and supply? And, though you may say that the dangerous nature of an employment is a factor in this ratio, it is impossible to tell how important a factor this is, however carefully statistics may be taken. And as a matter of fact, we find that, on railroads, for instance, the shunter or brakeman, who runs the most risk, is the poorest paid man on the road. We find that capacity, ability, is what determines the price of a man's wages, on railroads as elsewhere; that the poorest paid man is the man who deserves the least pay, the man in the position of least responsibility. The facts bear out beyond all question the statement that the poorest paid men on our railroads are the men who take the greatest risks.

A third reason given in the decisions of the courts, is that employees will injure themselves for the sake of getting damages. It has been thought by the judges who made these decisions that there was danger that employees would run the risk of injury for the sake of getting damages. But let us see. If an employee injures himself, contributes to his own injury, and is found out, it is a fraud, and he can get no damages. Is the jury system able to detect such a fraud? We think it is. It

has worked well heretofore. Corporations are seldom, if ever, defrauded by men who expose themselves to danger for the express purpose of getting damages. If they are found out, the doctrine of contributory negligence protects the employer against damages. But, suppose they are not found out? Let us here recall a common principle of human nature. Is not life and limb so valuable that men, according to your experience, — according to common experience,— will not expose themselves to injury for the sake of money compensation? Such cases may happen sometimes; but laws are not made to meet extraordinary cases, they are made to meet the majority of cases.

What we come to ask you for, gentlemen, is not new legislation. But, before I deal with this subject, perhaps I had better show some of the hardships of the doctrine of common employment. This doctrine has been extended so far that an engineer and a switchman and two brakemen have been declared fellow employees. In Albro *v.* the Agawam Canal (6 Cush. 75), the rule was extended so that an operative and the superintendent were declared to be fellow employees.

The CHAIRMAN. I think we should all agree that ought not to be the law of the Commonwealth. If you can meet it by any bill we should like to have you.

Mr. FALL. We have gained something, then; we hope to gain more. In Wiggett *v.* Fox (11 Exchequer, 832), an employee and the employee of a sub-contractor were declared fellow employees. In Johnson *v.* Boston (118 Mass., 114), an employee of a sub-contractor, engaged in extending the sewerage system to Moon Island, and a foreman employed by the City of Boston, were declared fellow employees at work for the City of Boston. In Gilshannon *v.* The Stony Brook Railroad (10 Cush. 228), a common laborer, riding to his work gratuitously on the defendant's gravel train, and the conductor of the train, were declared fellow employees. In Brown *v.* Maxwell (6 Hill, 592), a workman and his foreman, whose orders the former was bound to obey; and in Sherman *v.* The Rochester & Syracuse R. R. Co. (17 N. Y. 153), a superintendent and an employee bound to obey the orders of the former, were declared fellow employees. A hod-carrier and the carpenter who carelessly built the staging which fell in and injured him while he was carrying up bricks, have been declared fellow employees. A baggage master and a draw-tender who left the draw open, are fellow employees. A brakeman and a gate tender; a factory girl and a superintendent who gave the order that started the

engine before the usual hour and thereby caused her death, are fellow employees. A chief engineer, and the third engineer on board a steamer; a painter at his work on an engine shed for a railroad company, and a freight handler who upset a 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; the baggage master of one train and the conductor of another who disregarded a fixed time table, have been adjudged by the courts fellow employees. This shows how far the doctrine of common employment has been extended; and by recollecting how far it has been extended, we see how severe the hardship is.

Now, let us see how the rule works in two classes of cases. I am a cobbler, we will suppose, and while at work at my bench with my awl, I injure a man for whom I am repairing a pair of boots, and because of my carelessness I must pay for the injury. I work on, accumulate capital, start a larger business and employ other workmen. My business prospers, I start a factory, employ a superintendent, to whom I give a general authority to do precisely what I should do if I were there. He stands in my boots as another self. Through his negligence every man in the factory is injured, we will suppose, by a gas explosion, caused by him; I escape all liability. Or, in other words, while I am responsible for my own negligence, the moment I extend my business, take other people into my employ, appoint as superintendent one who represents me as much in my absence as I could represent myself, has perhaps a larger knowledge of the business, is more careful and discreet than I am, I escape all liability.

Now, let us see how this law bears upon corporations. A corporation is an impersonality. It has no existence as an individual.

Mr. Torrey. I know that last year nobody opposed, and I understand this year nobody is opposed to a change in the law making a corporation responsible for the acts of the general superintendent, overruling the case of the Agawam Canal.

Mr. Fall. We should have been very glad of that, but we didn't get it.

Mr. Torrey. I know, but you might have had it; everybody consented to that, nobody objected to it.

Mr. FALL. No such bill was introduced, and no such bill was passed.

Mr. BENTON. You didn't present it, do you say,— I want to get the scope of your argument.

Mr. FALL. I had rather not be interrupted. If you will remember the question till I get through, I will cheerfully answer it then.

Mr. BENTON. I understand now your argument applies to all employers.

The CHAIRMAN. There is no bill before the committee, and I suppose Mr. Fall is directing his argument to the general question.

Mr. BENTON. I understand he wants a general rule for all employers.

Mr. FALL. All the acts of a corporation are done by agents, and as every agent is an employee, and therefore a fellow employee, the corporation escapes absolutely all liability of this kind. Now, how much of the business of this Commonwealth is done by corporations, — railroad corporations and large manufacturing corporations? A corporation has certain liabilities. It has precisely the liability for its works and machinery and for judicious selection of its servants that an individual has, but it has no liability for the negligence of its employees. And, furthermore, this negligence as regards works and materials and engines is a negligence that must be brought home to the knowledge of the person who owns them. It is not sufficient for us to prove that the machinery was out of repair. We must prove, in order to recover damages, not only that the machinery was out of repair, but that somebody knew the machinery was out of repair and didn't tell of it.

Mr. BENTON. Or might have known by attending to their duty.

Mr. FALL. Yes, or might have known. Now, this is not the first time that legislation of the kind we ask has been adopted. In Scotland for many years the question was left to a jury as a matter of fact, whether the agency was such, and the scope of the agency was such, and the acts of the agent were such, that an employer should be excused from liability. But when the first Scotch case came by appeal to the House of Lords, of course the law of Scotland was made to conform to the law of England. In Ireland the law corresponds with the law of Enggland; that is, with the law of England prior to the passage of the employers' liability act in 1880. But in France the Code

Napoleon prevails, and every employer is liable for every act of his employee. Or, in other words, where our courts have implied a contract of non-liability, the French courts have implied a contract of liability. My authority for this is Article 1384 of the Civil Code, which has been construed by the French courts as well as by English courts. Perhaps the English decision is more accessible to us. It was made in a case decided by the Judicial Committee of the Privy Council, on appeal from the Mauritius, which is under the control of French law, — the case of Serandat *v.* Saisse (L. R. 1 P. C. 152). The law of Italy is as sweeping as the law of France. Article 1153 of the Italian code is almost a literal translation of the French code. The law of Prussia does not go as far as the law of France or the law of Italy; but the law of Prussia makes every owner of a mine or factory, and every owner of a railroad, responsible for the negligence of his employees. It does not extend the responsibility to all employers. See Holtzendorff's Encyclopædia, and the Certified Laws.

Now, let us come to our own country. California and Dakota have both dealt with the subject; they have passed legislation in favor of liability, but the corporations have caused it to be repealed, and the law has been made by the legislature and by the decision of the courts substantially what it formerly was. In Georgia (Code of 1873, p. 521, 3036, 2981), every railroad company is made liable for the negligence of its employees. In Iowa (Rev. Code of 1880, vol. 1, 342, sect. 1307), the same law prevails. The law of Kansas (Rev. Laws of Kansas, 1879, p. 784, ch. 84, sect. 4914), of Mississippi (Rev. Code of 1880, p. 309, sect. 1054), of Montana (Rev. Statutes, 1879, p. 471, sect. 318), of Wisconsin (Statute of March 18, 1875), and of Wyoming (Laws of Wyoming, 1876, ch. 97, sect. 1, p. 512), is the same. In Missouri the same kind of a statute that exists in these States was passed, but the courts destroyed the effect of it by deciding that the words "any person" did not include fellow servants. In Ohio, in the case of the Little Miami Railroad Co. *v.* Stevens (20 Ohio, 415), it was held that where a railroad company placed the engineer in its employ under the control of a conductor of its train, who directed when the cars were to start, and when to stop, the company was liable for an injury received by the engineer caused by the negligence of the conductor. In Kentucky, in the case of Louisville & Nashville Railroad Co. *v.* Collins (2 Duvall, 114), it was held that in all the operations which require care, vigilance and skill, and which

are performed through the instrumentality of superintending agents, the invisible corporation, though never actually is always constructively present through its agents who represent it, and whose acts within their respective spheres are its acts. The rule of the English courts that the company is not responsible to one of its servants for an injury inflicted from the neglect of a fellow servant, was not adopted to its full extent in that State, and was regarded there as anomalous, inconsistent with principle and public policy, and unsupported by any good and consistent reason.

Two celebrated law writers have expressed decided opinions concerning the severity of this principle of law. Mr. Wharton, in his Treatise on the Law of Negligence (Sect. 232a), says:—

"It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases where it is impossible for it to be negligent personally. But if this be true, it would relieve corporations from all liability to servants. The true view is, that, as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation."

And Redfield, in his Treatise on the Law of Railways, says (1 vol., 554):—

"The consequences of mistake or misapprehension upon this point have led many courts into conclusions greatly at variance with the common instincts of reason and humanity, and have tended to interpose an unwarrantable shield between the conduct of railway employees and the just responsibility of the company. We trust that the reasonableness and justice of this construction will at no distant day induce its universal adoption."

The decision in the case of Ross *v.* the Chicago, Milwaukee & St. Paul Railroad, to which I have already alluded, establishes the law upon this subject which prevails in the United States courts. I will, with your permission, read a few words from the decision. The case was this: It was the duty of the conductor, when he received a telegram, the railroad being run by telegraph, to show it to the engineer. A telegram was sent to the conductor directing his train to proceed and stop, it being a single-track road, at some station beyond. The conductor carelessly put the telegram in his pocket; the engineer started his train, did not stop at the station where the train should have stopped, and the collision occurred. The Supreme Court, in a decision by Judge Field, discuss the whole question, go over the cases, cite the principal cases, cite the decisions of Ohio and Kentucky, and then lay down this rule:—

"There is, in our judgment, a clear distinction to be made, in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, the porters, and other subordinates employed. He is, in fact, and should be treated, as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow servant with the firemen, the brakemen, the porters and the engineer. The latter are fellow servants in the running of the train under his direction, who, as to them and the train, stands in the place of and represents the corporation."

Mr. Benton. What judges dissented from that opinion?

Mr. Fall. I have forgotten now.

Mr. Benton. There are four of them, I know. I have it here [reading]: —

"Bradley, J. Justices Matthews, Gray, Blatchford and myself dissent from the judgment of the court. We think that the conductor of the railroad train in this case was a fellow servant of the railroad company with the other employees on the train. We think that to hold otherwise would be to break down the long established rule with regard to the exemption from responsibility of employers for injuries to their servants by the negligence of their fellow servants."

Mr. Fall. That is not given in the book I have. I know some of the judges dissented, but just who they were I didn't know.

Now, gentlemen, we have not presented any bill. We ask, under the order, that you will consider the matter and give us as strong a bill as you can. We should be satisfied with Senate Document, No. 215, of the year 1883, which is substantially the Gladstone bill. We should be satisfied with a bill which should say what the Supreme Court says in that decision, that when an employee is injured through the negligence of a superior, he

shall not be prevented from recovering damages by the fact that they are at work for a common employer.

Mr. Benton. I suppose that in the case to which you have referred, if the conductor had been injured by the negligence of the engineer, the conductor could not have recovered, under the principle as laid down by the court?

Mr. Fall. I should suppose so.

Mr. Benton. Unquestionably they have laid down a rule that will permit the engineer to recover for injury received through the negligence of the conductor; but if the conductor had given the telegram to the engineer, and the engineer had failed to observe it, and the conductor had been injured, the conductor would have had no remedy.

Mr. Fall. I should say so.

Mr. Benton. That is the law of the United States.

The Chairman. Have you ever attempted to frame a law making employers liable for all defects in machinery, and for all acts of superintendents?

Mr. Fall. They are liable for defects in machinery now, substantially.

The Chairman. Making them liable for acts of superintendents? I can see great difficulty in doing that; I don't know whether you have ever attempted it or not.

Mr. Fall. The English act contains words which are designed, I think, to express that meaning. The first section of the English act, sub-section two, says: —

"By reason of the negligence of any person in the service of the employer, whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in personal labor whilst in the exercise of such superintendence."

Mr. Kendrick, of the Committee. Do I understand you do not wish to have a section allowing corporations to contract out from the liability?

Mr. Fall. Yes, I think that would defeat the whole object of the legislation we desire. I have talked with various people connected with railroad companies, and they say that they should simply draw a form of contract, and when a man came in and wanted to go to work, they would say, "You must sign that," and the man would sign it. Because, when men seek the employment of a railroad company they do not stop to think of the question of danger, whether they are going to be injured.

Mr. Kendrick. Take the case of a powder mill, where a man gets extra compensation for extra risk; whether or not in

your opinion the owners of a powder mill should not be allowed to employ men and pay them extra compensation for the extra risk, and not take the risk themselves?

Mr. FALL. I don't know of any powder mills in this State, and it don't seem to me that such a case would arise very often.

Mr. KENDRICK. I only put that as an example.

Mr. BENTON. Or take a nitro-glycerine factory?

Mr. FALL. Men are not blown up in nitro-glycerine factories and powder mills, in this country, much more frequently than they are struck by lightning.

The CHAIRMAN. The difficulty is in making an employer liable in case he employs a perfectly competent man, and in holding him liable for a careless act, even, which he could not guard against in any manner.

Mr. FALL. The burden must rest somewhere. It now rests entirely upon the employee. He has no control over the man through whose negligence he has been injured, he could not hire him nor discharge him, he could not tell him to go this way or go that way; the only thing for him to do, when he finds, if he ever does find, that he is a man of careless habits, is to leave his employment. Now, why should not the burden be placed upon the shoulders of the man who is able in some way to prevent the accident?

Mr. TORREY. Why should it rest upon his shoulders, Mr. Fall, if he was not to blame at all? That question I asked you at the hearing last year, and I don't understand you ever answered it. By what rule of justice do you say that a man who is entirely without fault should pay for the accident? When it is a pure accident, why must it not rest where it falls? If it is a pure accident, and nobody is to blame, why must not the misfortune rest where it falls? Upon what principle of justice must a man who is not at all to blame be made to pay for it?

Mr. FALL. I think the employer is to blame. Suppose an employer hires somebody whom he can control and discharge when he pleases, somebody whom the employee knows nothing about whatever, puts him in a place miles away, and entrusts him with all the authority he would have himself if in that place; now that man, for the time being, is as much the employer, so far as authority is concerned, as it is possible for a man to be. Standing right there, vested with all the authority that the employer has himself, why should not the employer be responsible for this agent's acts?

Mr. TORREY. You are not speaking to the question, excuse

me; that is not the question the chairman asked, nor the question I asked. I am speaking, and I understood the chairman to speak, of an injury done by one fellow servant to another, not by a superintendent.

Mr. FALL. They are both fellow servants.

Mr. TORREY. Not by the superintendent, everybody agrees.

Mr. FALL. Take a conductor, if you please.

Mr. TORREY. No, take the case of ordinary workmen, working side by side.

Mr. FALL. We don't ask for any law which would apply to two men working side by side; we only ask to have the employer made responsible for the acts of a superior, whom the employee was bound to obey.

The CHAIRMAN. That narrows it down somewhat.

Mr. BENTON. That is, you understand, the Gladstone bill.

Mr. FALL. That is the principle.

Mr. BENTON. But incorporated in the Gladstone bill, by authority of the law of England at the time that was enacted, is the authority to contract out of it, and that you don't want.

Mr. FALL. No, sir, we don't want that.

Mr. BENTON. You object to it?

Mr. FALL. Certainly.

ADDRESS OF JUDGE E. H. BENNETT.

GENTLEMEN: — I come here at Mr. Fall's request, not because I have any information in my possession, or any facts which are not familiar to everybody, to every member of this committee, and to everybody who has read on this subject, which has excited so much attention. I do not come because I have any personal measure to advocate for anybody or against anybody. I am not aware that any legislation which should be granted or be denied would affect me in any way, directly or indirectly, or anybody I am at all interested in. Therefore, very likely what I should say, if I said anything, would not be pertinent to the exact phase of the question before this committee and, indeed, I am not exactly aware what that is.

The CHAIRMAN. The order before us is a general order; no bill has been presented to us, but we are asked to consider such legislation as may be suggested in that general way.

Judge BENNETT. Then I can only express, in a very general way, what has occurred to me heretofore in looking at the law theoretically, if I may use that word, without its bearing upon

any specific legislation, or the hardships of the present law upon any particular corporation or combination of persons. And very likely what I have to say will not give the committee any aid or assistance in arriving at any conclusion.

It has always seemed to me that much, if not most, of the dissatisfaction with the present rule, expressed by the applications to the legislature to modify it, unquestionably arises from the undue extension or expansion of the original rule. It has been carried so far, and applied to so many classes of persons beyond what it was originally intended for, — apparently intended for, — that it challenges the notice of everybody as to whether it is a just rule, and whether the courts should be allowed to go on as far as they have gone in expanding this rule, or as much further as they choose to go, in applying it to persons who are very remotely connected together, and can only in a very general sense be called the fellow servants of the employer. I suppose everybody, almost, will agree that the dangers arise from the very great extension of the rule. If it had been confined, as it was originally, as everybody knows, — if it had been confined by the courts to the original rule as it was laid down at the beginning, viz., confined to fellow servants, or at least applied to fellow servants who were such in the very closest and plainest sense of the word, those employed on identically the same job, where they could have an opportunity of watching each other and seeing each other's negligence and avoiding it if they chose to, or of reporting it to their common employer if it was an habitual negligence, — the rule would commend itself a little more to our sense of justice. We would all agree that such a person should not have any remedy against his employer, when he himself, by his negative carelessness, so to speak, had brought on himself the injury. You are no doubt aware, Mr. Chairman and gentlemen of the committee, that that was the very first instance in which the rule was applied. The two persons in Priestley *v.* Fowler, when the question first arose, were employed on identically the same job. One was the driver of the cart and the other was the footman, — if I may use that expression as applied to a butcher cart, — who stood on the rear of the cart and delivered the meat to customers. These two men were engaged in exactly the same work, where they had an opportunity of watching each other, and where the injury to the deliverer arose because the driver, who had the charge of loading, had overloaded the vehicle. The man who was injured had had an

opportunity to see the overloading, to see the negligence from minute to minute and hour to hour, and, therefore, if he chose to ride and continue in the employment where he had the opportunity of seeing this negligence, we might naturally say that he must suffer the consequences. But when we come to extend the rule as far as it is now extended, then the dangers and the evils of it seem to me to be great. Therefore, it has always seemed to me that it was at least worthy of consideration by a legislature, whether a legislature should not say that the courts should not apply the rule to servants who stand in the relation of superior and subordinate. It is so manifestly unjust that a person who suffers in consequence of the negligence of another whom he is bound to obey or else forfeit his employment and his situation, should not have any remedy, that it can hardly be controverted. Now, if there be, between these two extremes, — between persons employed on identically the same job, like unloading a heavy block of marble or a heavy safe, and the carelessness of one of the persons so employed injures the other, — if there could be a rule established, between the rule which relieves the employer from liability in such a case, and the extension of the rule as it now stands to cover also a superior officer or servant, if that is the proper term to apply to a man whom the subordinate is bound to obey, if I were a member of the legislative committee, I should seek to see if I could not find a rule, whatever it be, whether the one adopted by the Supreme Court of the United States or some other, which would be equitable and just. That is the first suggestion which would occur to me, and which has occurred to me in looking upon this subject without any reference to legislation particularly. If the rule could be confined to persons who were acting under the orders of a superior, it would be one great gain, and would do away with what strikes everybody in the community as very unjust and harsh, and as something which should be remedied, either by the courts taking the back track, or, in the absence of any disposition on their part to do that, by some legislative enactment.

Now, there is another class of persons, Mr. Chairman, looking at it merely from my standpoint, who, it seems to me, should be protected by legislation, and that is minors. At least, I think it is worthy of consideration whether they should not be. The theory, as I understand it, on which the rule rests that one servant cannot recover against his employer, and one of the main reasons advanced by the courts, so far as my reading extends,

is that there is a contract between the employee and the employer that the employee shall take the risks of the employment; that he tacitly assumes the risk, and contracts with his employer that if he is injured through the carelessness of a fellow employee or fellow servant, he will bear the consequences; and, therefore, because an adult makes such a contract as that, he shall be bound by it. Well, without stopping to argue whether that is artificial reasoning or not, whether there is in fact, in most cases, any such contract made or understood or implied, it is a question whether that should apply to infants or not. In some cases, undoubtedly, where the danger is obvious, — where the business is such as that suggested by one member of the committee, the manufacture of powder or nitro-glycerine, or any analogous employment, where the danger of the occupation is obvious,— it might be fair and reasonable to assume that a man, certainly if he is paid additional compensation, did assume a contract not to have any remedy against his employer, in case he is injured through the negligence of a fellow employee. But in the great majority of cases, I fancy, it would be considered rather as an after-thought, if I am not mistaken, that there was any such implied understanding or agreement between the employed and the employer. But if there be any such agreement, it always seemed to me there were strong reasons why it should not apply to minors. Because minors are not bound by their express contract, as everybody knows, with an employer. If they have a written contract to serve for a year, they can break it without any redress; and if they agree to work for a dollar a day, they may go and get two dollars a day, if they find anybody to give it to them. Therefore, as they are not bound by their express contracts, it seems to me it would be extending the theory of an implied contract between the employer and the employee beyond its fair bearing, when it is extended to minors. We have instances where children ten, twelve, fourteen years old have been injured in this Commonwealth, without any carelessness of their own, through the carelessness of some other so-called employee, with whom they had no connection, and yet they have no redress.

Judge Soule. Haven't they their action against the person who causes them the injury?

Judge Bennett. Possibly, under the last decision. Possibly the court may have swung around again. What I suggest is, whether the theory on which an adult is supposed to have no remedy against his employer, viz., an implied contract, should

apply to a minor, who is not bound by his express and positive contract; and whether, considering the protection which laws throw around minors, they do not have some claim to be protected against the torts of fellow servants which an adult, perhaps, would not have. I have no ambition about it, and no desire about it, except to suggest what has occurred to me in reading on the subject.

There are two classes of persons whom it has always seemed to me might fairly appeal to the legislature for more protection than the decisions of the courts now give them. There is one other class, and that is those who are rendering gratuitous service and who are injured. As the law now stands, as I understand it, and I suppose it is agreed, a man who is rendering service without pay has no more remedy against the employer for the carelessness of a fellow servant, or a superior who directs him how to do his work, than one who receives compensation. If the theory be that because he is paid therefore he assumes the risk, it is hard to apply that to a man who is going along the street and sees a team delivering some heavy article of merchandise, or a block of marble or a heavy safe, and sees some persons employed in managing the windlass, and is requested by the foreman or overseer having charge of the work to step up and assist, and he does so as a gratuity, and is injured, without any carelessness of his own, while he is rendering service for the employer. He has, however, no more redress than though he is paid fifty dollars a day for his services. If that is the law, it does seem to me that it is worthy of consideration at least. I have nothing to suggest, except the thought whether, if legislation is enacted upon this subject, it should not include persons who render service without pay, and give them redress for injuries which they receive without any fault of their own, and solely through the fault, perhaps, of the person who is authorized to ask them to assist. I assume that a person who has charge of a job says to a man, "Step up here and give us a turn on this windlass; we have got more than we can raise," and the man, out of the best motives, renders that assistance, and through the carelessness of the others, back comes the windlass, and he is down, without any fault of his own, and yet he has no redress. Possibly, therefore, these three classes of persons have some just reason to ask for interference of the legislature in protecting their rights. There may be some others, but these are the three most prominent which have suggested themselves to me. That is all I desire to say, Mr. Chairman, to the committee.

Mr. Benton. Did you ever sit down, Judge, and try to draw a bill which would be just to everybody?

Judge Bennett. No, Mr. Chairman, and I hope I may never be asked to.

ADDRESS OF STILLMAN B. ALLEN.

Mr. Chairman:

I have come up for a few moments at the special request of Mr. Fall, who is in charge of the proposed legislation. I do not come with any hope that I can furnish any material assistance to the committee in this matter. I know the question has excited a good deal of attention, and it ought to. Anyone who reads the reports of the court trials in this Commonwealth will see a vast number of cases brought to recover for personal injuries. They will see a great many heavy verdicts, and they will see that corporations and individuals are subjected to a great many burdens which must rest very heavily upon them.

The Chairman. I think you see more of these heavy verdicts than any of the rest of us.

Mr. Allen. Thank you; you are very kind to say so; but I have both sides at times. I think that the committee ought to be conservative, and ought to consider the matter very carefully before they make a change in the law which, on the one hand, is likely to throw great and unexpected burdens upon individuals and corporations, and on the other hand to be of great benefit to the citizens of the Commonwealth who suffer from these injuries.

In regard to this matter of the liability of employers for the negligence of fellow servants, I am frank to say that I am not in favor of it as a rule. There are cases where I think the law ought to be amended. There are cases where these burdens are very heavy for corporations, who have to pay thousands and thousands of dollars in the course of the year, and for individuals, who have also to pay heavy sums annually; but this loss must fall on somebody. If a man has his arm or leg crushed, or is seriously injured for life, the loss exists, and it has got to fall upon somebody; and although it is very hard if it falls upon a corporation, or if it falls upon an employer, it would be very exceedingly hard if it falls upon the man and his family and makes them suffer all their lives, especially if the man is not in fault at all himself. I think, — and I only give my opinion for what it is

worth, Mr. Chairman, — I think corporations and individuals should be held responsible in two cases. Not the three, but in two of the cases mentioned by Judge Bennett, who has just addressed you. One of these is where the injury is inflicted through the fault of a fellow servant who is superior in position, and who is placed where he may give orders which the other man is bound to obey or lose his position. In such a case it seems to me as if the superior officer, when he gives the order, is the corporation. The corporation of itself has no voice, it must speak through its officers.

The CHAIRMAN. You think they should be held as the agents of the corporation?

Mr. ALLEN. They should be held as the agents of the corporation. The other case is where two fellow employees are on entirely different branches of work, where one cannot see what the other is doing. I may give an instance. Let us suppose a railway train running along on the track. The engineer has a right to expect that the switch will be properly placed. The railroad company ought to have it done. If the switchman is negligent and misplaces the switch and the train runs off the track, every passenger — every man, woman and child in the train — has a remedy against the corporation for any injury received through the negligence of that switchman; but the engineer and fireman, who are most likely of all to be killed, have no remedy if they are injured. Now, I do not see, Mr. Chairman, why in that case the corporation should not be liable to the engineer and the fireman and the brakeman in the same manner that they are to the passengers. You may say that when they enter the employment of the company they assume the risk; but they don't do it. That does not form any part of their consideration. You would not get them any cheaper if the corporation was liable; you do not have to pay them any more because they take the risk upon themselves. I cannot see why, in such a case as that, where they are entirely in different branches, one man tending the switch and the other man running the train, the corporation should not be liable.

Now, take another case. We will say that here is a large mill. Way down in the basement there is a steam-engine, in charge of an engineer appointed by the owners of the mill. The engineer or fireman is careless; he lets the water get low and an explosion follows. I have gone into that mill to have some work done, or to attend to some business, and I am injured by the explosion. I have a remedy against the corporation for

whatever injury I have received through the negligence of their engineer; but of all the operatives in that mill,— no one of whom had a hand in the employment of the engineer, no one of whom, perhaps, ever saw him, or had anything to do with him, — who are injured, none have any redress whatever. Now, it seems to me, in such a case the corporation should be liable.

I may mention another case, — I see the learned counsel who represents the Boston & Albany Railroad, Judge Soule, present here, — that we tried; and perhaps, if I speak of it, it may serve as an illustration, as applying to a superior officer. Judge Soule remembers it well, because he fought us hard, and, although we beat him before the jury, he beat us before the court, on the law. The facts were like these: A freight car came from the West. Now, the Boston & Albany Railroad was bound by law and required to receive that car from the connecting road when it arrived at the State line, and the corporation had inspectors there whose duty it was to inspect the car to see that it was in proper condition, and they were presumed to have done so. At any rate the car passed the inspectors and came on to Boston and went out to Brookline. A young man named Mackin, an employee of the road, whose duty it was, as the car started, to climb up on one end of the car, holding on to some little iron rods, — grab-irons, as they are called, — was doing this, and when he reached the third one, it pulled out, and he fell backwards and was run over by the car and was injured for life. The Supreme Court of Massachusetts decided, under the laws as they are now, that the inspector way out on the State line was a fellow servant of James Mackin employed between Boston and Brookline; and because Mackin's injury was caused through the negligence of this fellow servant way out on the State line, two hundred miles away, he could not recover, and he did not.

Judge Soule. That is not quite a fair statement: as it appeared in that case that there were inspectors, not only at Albany, but at Pittsfield and Springfield and Worcester and Boston.

Mr. Allen. There were inspectors in other places.

The case is reported in the 135th Massachusetts, page 201, and the members of the committee can look it up, and Judge Soule, of course, will state it fairly. But the substantial point decided was that the inspectors, hundreds of miles away, and scattered all through the State, although they were negligent, and allowed this car, which was confessedly in bad order, — the wood was decayed and the iron pulled right out, — were fellow

servants of Mackin, and he could not recover anything because those fellow servants contributed by their negligence to his injury. These servants, of course, as inspectors, were superiors. I don't think this extension of the rule is right; and although it would have been very bad for the Boston & Albany Railroad to have paid Mackin $5,000 or $8,000, — I think the verdict was $7,000, — and it would have taken away a good deal of their profits, and it was something they could not have foreseen, yet, on the other hand, it is pretty hard for a man to walk through the world without any right arm; a young man, to be a cripple for life. The loss must fall somewhere; and I think, in such a case, it should have fallen upon the corporation. And I suggest that the committee, if it can, should frame a law which, without being burdensome and onerous upon railroads and employers and manufacturers, should, on the other hand, protect the men who work, and whose injuries would come under this class.

There is another case I call to mind, which occurred in the city of Boston, and I will give the substantial facts of it, so the committee may get the idea. There was a deep trench being dug by the sewer department. One of the laborers was ordered by the foreman to go down and dig. He told the foreman he was afraid the earth would cave in on him, but the foreman said, "It is all right; go ahead." The man was obliged to go or leave the employment. The earth did cave in and crippled the man for life. It was held that he had no redress, because, if there was any fault, it was the fault of a fellow servant. In such a case I think some provision might be made.

We had another case. And you will pardon me, Mr. Chairman, that I speak of individual cases, for they, perhaps, show the truth stronger than anything else. It was the case of Bean *v.* New York & New England Railroad, a matter that was settled afterwards. (I see the counsel of the road here; and, Mr. Chairman, I think I see all the railroads represented as I look around the room.) This road ran a single track down in Connecticut, over which a great many trains passed, — business was better than it is now, — and their movements were regulated by telegraph. Before a train could leave station A for B, the operator at A would telegraph to B that a certain train at A was to start; and the train at B, bound the other way, would not be permitted to start if a train was about to leave A. In this particular case, a train came along to B. Mr. Bean was engineer of the train. A despatch had not come from A, and while he was waiting for the despatch from A, the superintend-

ent of the road came along to him and said, "All right; start ahead." The engineer was bound to obey the superintendent. He must obey. You could not run trains without such obedience. If he had failed to obey the superintendent and refused to start his train, of course he would have been discharged on the instant; and not only that, he never would have been employed on the road again, he having once resisted lawful authority. So, having received that direct order from the superintendent, he started out towards A. Two minutes after the telegram came from A that a train had started towards B. The superintendent rushed into the telegraph office. He had made a mistake. He telegraphed to the other station at once, but the train had left, and there were two trains on that single track coming towards each other. The men at the stations — the superintendent at one end and the telegraph operator and the station men at the other — knew it, but no human power could reach those two trains to stop them. And they went on and on until they happened to meet, as such things will happen, around a curve, and they were very near each other before the headlights showed, — for it was in the night, — and they struck; both locomotives stood up and fell over, and engineer Bean was crushed and crippled for life. We commenced suit against the railroad, and the immediate answer was that it was the fault of a fellow servant, to wit, the superintendent, and that the corporation was not liable. It is fair to say that the matter was compromised and adjusted, but for less than one-third the amount we would have obtained for this poor man if we had felt clear the law was with us. I am frank to say we rested on the ground that when the superintendent spoke it was the voice of the corporation, for it was the only way the corporation could speak. That was the ground upon which we were going to try the case. On the other hand they said the superintendent was simply a fellow servant, and each of us was a little doubtful what the result might be, and so the matter was settled.

Mr. Bolles. The case is not quite accurately stated by brother Allen; in this respect, that the operation of the railroad, in the matter of running trains, is governed entirely by rules passed by the directors, which are printed and placed in the hands of all the employees who have to do with the running of trains. The engineer, in that case, knew the superintendent had no right to give verbal orders for the train to start; that the orders could only be given by a despatch in writing, and that there could be only one person on duty as despatcher at the

time. So he was aware that not only he himself, in acting on this order, but the superintendent in giving it, was in violation of the rule. And one thing further, — not stated, I suppose, as a fact, but simply as a suggestion, — that any employee refusing to obey the superintendent under such circumstances would be discharged. That inference, whatever it may be worth, is not true; but, in fact, on one other occasion, the only one I know of that kind on our road, the engineer absolutely refused to start his engine when ordered by the superintendent, and was not discharged.

Mr. Allen. I take the learned counsel's statement, which is substantially correct, with this exception: The engineer knew he should have received the notice by telegraph, but he did not know that the superintendent was not authorized to give him the order. The engineer in that case, and I suppose any engineer, would understand that the superintendent of the road, being higher than he, had a right to give him any order he pleased; and, of course, when the superintendent came and said to him, "Mr. Bean, start your train out," he assumed that the superintendent had such information as would make it safe to obey. Although there was on that road a printed rule that they were to stop at Station B, till they had a telegram from A, yet when the superintendent of the road gave an order for him to go, of course the engineer obeyed that, supposing that the superintendent had authority to give it and knew what he was about.

The Chairman. He was the man who made the rules?

Mr. Allen. He was the man who made the rules; that is just it.

Mr. Mason, of the Committee. Were these rules notified to all employees?

Mr. Allen. I presume so. The rule was this, that they were to wait for a telegram; but in this case the trouble was, the engineer supposed the superintendent had the information which made it safe for the train to proceed, and, supposing he had it, of course he relied upon him as his superior.

I think you ought to be very conservative in this matter. The burdens are heavy, and there are more and more accidents. There is vastly more machinery in Massachusetts now than there was ten or twenty years ago, and accidents are increasing every year. More people are injured, more people are crushed, more accidents are happening, and there is more suffering and loss that must fall on somebody than ever before. And bear in

mind one thing. When you take away the protection of the workingman, you do not prevent the loss and suffering in the world. The simple question is on whom that loss shall fall; whether it shall fall on the corporations, or whether it shall fall on the men. It has got to rest somewhere. But I think you should be very conservative and very careful how you change the law at all. If you do make a change, I think you should make it slowly and gradually and with extreme care. My own judgment is that the employer should be liable for injury to an employee caused through the negligence of a fellow servant in entirely a different branch of the business, where the person injured knows nothing about him, has nothing to do with his employment, has no control of him, and is not in a position where he can see or know anything about him. And secondly, and strongest of all, I do think, whatever you do, you should make a change in the law by which, if a superior in authority gives an order, and a man obeys that order, as is his duty, and is injured, he should be protected; and that order should be understood as being the order of the corporation, and the corporation should be held, just as if an employer himself had been there and given the order.

Q. (By the CHAIRMAN.) Would you go so far, in the case of an accident happening through the fault of a switchman, as to allow a brakeman who is injured to recover? A. I don't see any reason why he should not. Here is a train coming along from a point fifty miles away. The brakeman has a right to assume that the corporation is going to have its switches right, the same as the passengers have. Here comes a train with fifty passengers, engineer, fireman and brakeman. Now, passengers, engineer, fireman and brakeman alike assume that the track is clear. It seems to me the corporation is bound to have it in order. If they employ a negligent switchman, who throws the whole train off, they are liable to every passenger; and I do not see why it would not be just and right, in such a case, that the employees on the train, who are in vastly greater danger, and who are injured ten times where a passenger is once, should not have redress.

Q. (By Mr. BENTON.) If we employ a man who is known to be negligent we are liable now. A. Certainly.

Q. Now, suppose we employ a switchman who is careful, who is supposed to be careful, who has always been careful, but who on this occasion is negligent? That is the case put by the chairman. A. I will take that very case. If they employ a man

who is drunken, or who is incapable and incompetent, as Col. Benton says, they are liable now. But, suppose they employ a man whom they think is reliable, and that man is negligent, and the accident happens, and, I will say, the engineer is injured for life. Clearly it is not the engineer's fault. The question is on whom should the loss fall, justly and fairly? Should it fall on the corporation, or should it fall on the engineer? Hasn't the engineer a right to assume that the company will see that its rails are properly placed when he arrives? He comes from a distance of fifty miles, and is running along on two thin rails on the faith that the corporation, on their part, will keep the rails in the right positions. He comes along to a point where one of their switchmen has been negligent, though he is a competent man, and has misplaced the switch. Why should the loss fall upon the engineer, who is himself absolutely innocent, while the corporation, although innocent as far as employing the man, did employ a switchman who was negligent, and, not knowing it, they injure the engineer?

Q. No; we didn't hire a negligent man; we hired a careful man, who, at that time, was negligent. Now, isn't this the fact, that the corporation in that case is just as much without fault, it having hired a competent and proper man, as the engineer? A. My answer to that is, the corporation has not hired a careful man, because if they had the track would be right. They have hired a competent man, and a man who is ordinarily careful. But now comes another point, and it is one to be thought of, and that is the corporation don't hire the highest kind of men for switch tenders. Possibly if they paid them more they could get better men. They get men as cheap as they can reasonably. To be sure they don't want accidents, they are liable to their passengers, and don't want to hurt them if they are not liable.

Q. I am putting a case where a man has been switchman for say ten years, has always done his duty, has a good character, is a sober, intelligent and careful man, and in that position is, undoubtedly, as competent as you or I would be. He comes to you as a railroad superintendent, and you hire him and put him in a position to do what he has always done carefully and well; the engineer put upon your train comes along, and unaccountably, as these things, you know, almost always happen, — unaccountably, for some reason or other, this man makes a mistake. Now, I want to know why you, as the corporation, are not just as blameless as the engineer? A. I think not. The point

comes very close indeed, but the distinction is just here: The engineer, Mr. Chairman, has the right to assume that the corporation is going to have its tracks in the right position; and, assuming it, if he is running at the usual and proper speed, he is absolutely without fault.

Q. Hasn't the corporation a right to assume that this competent, faithful and cautious switchman will do his duty at that time? A. Yes; but that is the risk they take, or they should take, on themselves; and they should see he does his duty, and if he fails to do it —

Mr. BENTON. They have done everything in their power to see he did do his duty; they could not do anything more.

Mr. ALLEN. In that case it is a servant of the corporation who is at fault.

The CHAIRMAN. It is the duty of the road, rather than of the engineer, to see that the switch is placed square y.

Mr. ALLEN. I think so. I think the engineer, coming along from many miles away, has the right to assume that it is in proper position.

Mr. BENTON. You make the company an insurer.

Mr. ALLEN. Not at all; I think they should keep the track right for him.

Mr. BENTON. You take the case where they have done everything which could be done to insure him; where they have provided a proper switch, because if they don't they are liable; where they have employed a competent man; done everything possible to keep it safe, and still an accident occurs; and you say they ought to be liable.

Mr. ALLEN. I am taking more time of the committee than I ought to, but I must answer this, and then I will leave you. Take that very case. Why should the railroad pay the passenger who is hurt anything? They have done all they could to insure his safety.

Mr. TORREY. They have agreed to carry him safely.

Mr. DOHERTY, of the Committee. This being a dangerous employment, and the railroad deriving all the profit from the carrying on of that dangerous employment, ought it not to bear the burden?

Mr. ALLEN. I think they ought to bear it, because they employ the man, they select him, they put him there. In other words, they are bound to have that track in the right position. It is said they insure the passengers. No, they do not. The only reason they pay you and me when we are injured, being

passengers, is because the legislature makes them do it. It isn't because they want to do it, it is because they can't help it; they are made to do it.

Mr. TORREY. You don't mean that; they do it because it is fairly a part of the contract.

Mr. ALLEN. The common law of the land makes them do it. I don't think there is any question that if you were to pass a law exempting railroads from paying any money in case of injury to a passenger, where the road used due care, but what every railroad would rejoice. They pay because they have to; and employ a careful engineer for the same reason.

Q. (By Mr. FALL.) Mr. Benton has asked a question about a switchman who caused an injury to the engineer of a train by his negligence in turning the switch; now, let me ask you this question, if you please. Who, for the time being, for the purpose of turning that switch, represented the corporation, and was for all the purposes of turning that switch the corporation for the time being? A. I think it is perfectly apparent, Mr. Chairman. Here are two rails which ought to be in a certain position in which the engineer has a right to assume they are. The corporation should keep them there. The switchman is the corporation for the purpose of keeping them there. It seems so to me. But I am frank to say, Mr. Chairman, that I have some little doubt on this last point. This is the extent to which I would go: There is one thing you ought to do; you ought to settle by legislation that where a superior in authority gives an order which he has a right to give, and it is obeyed, and there is an accident and an injury results, the man should have redress.

Q. (By Mr. MILLETT, of the Committee.) What do you say, in the case mentioned by Mr. Fall, of the hod-carrier who was injured by the fall of a staging improperly constructed through the negligence of the carpenter who built it; should he recover? A. I didn't hear that case.

Q. The case of a hod-carrier who goes up on a staging, and the staging breaks down, on account of the negligence of the carpenter; ought the hod-carrier to recover against the common employer? A. I think every case —

Q. Please take that case as it is stated. A. Even then, I think it would depend entirely on the circumstances. If the stage was constructed in such a manner that the hod-carrier who used it could see how it was constructed, and have the aid of his own eyes, then I don't think the employer should be held

responsible. You are assuming, I take it, that the staging was built by a fellow employee of the hod-carrier.

Q. How could you distinguish a case of that sort from your railroad case, where you give the engineer a claim against the corporation because of the negligence of the switchman? A. I make this distinction. In the one case a train is coming along at 10, 15, 20, or 25 miles an hour, and the engineer has a right to assume that the track is in proper position, although he is not there to see it. Now, on the other hand, the hod-carrier has no such right to assume that the staging is sufficient to bear him.

Q. Suppose the carpenter is not a fellow laborer, but he is directed to build the stage, and he builds it in accordance with his knowledge and understanding of his trade. Now, the hod-carrier simply goes up there under directions of the foreman, and in good faith. He does not examine the nailing and the construction of the staging, but he simply does as he is commanded to do. Now, I want to ask you how you could distinguish a case of that kind from your railroad case? A. It is very difficult for me to distinguish the cases as you now state them.

Q. And yet, the hod-carrier, under the rule as you have stated it here, ought not to recover? A. I do not say that, if the hod-carrier is employed to carry bricks up on to a house by a staging that is furnished by his employer, and the staging is not properly built, and it falls in. Certainly the hod-carrier should not have redress, the case being that with his eyes he could have discovered the danger before him.

Q. Take a case in a factory, where a man is tending a certain machine, and a piece of the machine, by his negligence, flies out and strikes a man passing through the room, who is an employee there, but has nothing to do with the machine, or with the man who has charge of it; should you say that man, simply passing by, should recover? A. I don't think so.

Q. How could you distinguish that from your railroad case? A man in the discharge of his duty is perhaps carrying a burden from one end of the room to the other, or from one room to another room, and passes by a machine, when, by the carelessness of the man who is tending it, something flies out and injures him. A. That is the very case I believe I called the attention of the committee to. If this man came from another room, was in another employment, which called him from one room into the other, and there was a negligent servant who allowed a part of his machine to fly and strike him, I don't see why the

common employer should not be liable. The loss must rest somewhere. It was not the fault of the man who was injured; it was the fault of the man who had the negligent servant.

Q. I suppose, under your theory, the employee had a right to assume there wouldn't anything fly out from the machine and hurt him? A. Certainly.

Q. Wouldn't it go to this extent, and result, after all, in coming right down to a common rule, that one employee might recover in any case of injury on account of the negligence of another? A. I think that is a matter the committee should consider.

Q. Wouldn't it come right down to that, if we kept on going that way? A. I think it is a matter the committee should examine with great care, and they should be very cautious how they change existing laws in that respect. In the case of an accident happening through a superior, in the exercise of his authority, I have no doubts.

Mr. MILLETT. I have excluded that in my questions.

Mr. ALLEN. Beyond that I may say I am in doubt.

Q. (By Mr. SARGENT.) How far would you carry your theory in a mill? Would you apply it to the orders of the mule-spinner to the back-boy in the spinning-room? A. If the superintendent, overseer, or any man in authority gave an order to another, which he had the right to give, and which the other was bound to obey, and he was injured on account of obeying that order, through the fault of the person who gave the order, I would not let the fact of their being fellow servants be a defence to the suit. I don't say the corporation should be liable for it.

Q. You know in a mill the mule-spinner has charge of the back-boy, so to speak; he tells him to do a certain thing, and by doing it he is injured. Would you say he was a superintendent, having authority and control of the boy, and if the boy is injured the company should be responsible? A. No; I do not say the company should be responsible, but I say the fact that the superintendent was a fellow servant ought not to enter into the case. There might be other things enter into it.

Q. (By Mr. BENTON.) You would take away the defence of common employment in such a case? A. I should.

Q. As you would between the engineer and the fireman, the engineer being in charge of the engine? A. Certainly.

Q. So you would between the foreman of a gang of men employed in building a railroad? A. Certainly.

Q. So you would in any case where one man went out with another, and one had charge of the job, and the other was to assist in doing the work? A. Certainly.

Q. Practically it would take the defence of common employment pretty much out of the question when you got through? A. Not at all; but I say in the case of a superior officer, the defence of common employment should be taken away. In other words, I say that when an inspector of cars on the State line, way out in the western part of Massachusetts, is negligent and allows a car that is manifestly unsafe to come to Boston, and then a brakeman goes upon that car here, and loses a limb by the operation of the pulling out of an iron upon which he has got to trust his life, — and, under the common-law principle, they are bound to furnish safe machinery for his use, — I say that in such a case the fact that the inspector was a fellow servant ought not to be a defence.

Q. (By Mr. KENDRICK, of the Committee.) What do you say of this principle of the English law which allows employers to contract out of the liability? A. I don't believe in it at all.

Q. How, in a case where the employment is manifestly risky and dangerous, — as, for instance, in the cases I mentioned of a powder mill or nitro-glycerine factory, — would it be objectionable to allow the employer, where he pays his men extra compensation for the extra risk, to agree with his men that he should not be liable in any case for any injury? A. If you put it in this way, that he will pay enough for a life or accident insurance upon a man, I have no objection to it. But if he is going to make every man, before he will give him employment, sign a paper that he will not hold him liable, I don't believe in it. I think such a proceeding is against public policy.

Q. (By Mr. TORREY.) How do you distinguish the case of an engineer injured by the carelessness of a switchman from the old case, put by one of the English judges, of a cook in a private house going down stairs early in the morning, before light, and falling over a pail left by the scullery maid? Would you make the master of the house liable in that case, and if not, what is the difference between that and the railroad case you put? A. I don't think that is a fair illustration.

Mr. TORREY. Why not? Where is the distinction between the two cases? I have asked that question a great many times, of different people, and have not been answered.

Mr. FALL. The cook can see the danger, but the railroad engineer cannot.

Mr. CUMMINGS, of the Committee. Suppose the housekeeper compels her servant girl to get up before daylight, when it is dark?

Mr. FALL. The cook has a chance to see; she could take a light.

Mr. TORREY. Suppose the cook does the injury, by making a mistake and putting poison in the bread, and the scullery maid is injured? The scullery maid cannot see the danger.

Mr. ALLEN. I think there is a difference, but I won't undertake to explain it to you in full. You say you have never been answered; you may continue in the same position.

Mr. TORREY. I have waited two years for an answer to it, and I suppose I can wait longer. Now, isn't there a fallacy in your reasoning when you say the engineer has a right to assume that everything will be all right? Take this case, for instance. You come to my house; you have a right to assume you will not be injured by my servants, of course. You come into my room, and my servant draws a pistol, fires at you and injures you; you cannot recover from me, although you have a right to assume you will be safe.

Mr. ALLEN. But if your servant negligently leaves a pitfall and I fall into it, I can. If you have a carpenter at work in your house, and I go in there, and he has left a hole or a floor that is dangerous, and I fall through it, I do have a remedy, and that is taking the very case.

Q. (By Mr. TORREY.) Isn't there another fallacy in your reasoning, and in the reasoning of most of these gentlemen? Take the case of the workman injured by the carelessness of the engineer way down in the basement who causes a boiler to explode. It is very clear, I admit, that the workman should be compensated; I admit that he is not at fault, and so far your reasoning is good. But when you go one step further and say that the innocent employer should compensate him, don't you go further than the case warrants? A. That is very close upon the line; but my impression is the employer should compensate him, and for this reason: The innocent workman in the upper story, who is injured, is absolutely without fault. But it was the employer who hired the negligent engineer, and, as between the workman and the employer, I think the loss should rest upon the one whose inadvertent negligence, it may be, caused the accident, rather than upon the man who is absolutely without fault. You may call it, if you please, the employer's misfortune in employing this careless engineer, but the person

who is injured is absolutely without fault, although the employer was unfortunate. But still, in all this matter, I say to the gentlemen of the committee, that I have a good deal of doubt in my own mind as to making the employer liable for the mischance or carelessness of fellow servants. But when a superior gives an order which he has a right to give, and which the employee is bound to obey, and if in consequence of that the employee is injured, I don't think the fact they are fellow servants should be a defence.

Q. (By Mr. Cummings, of the Committee.) Supposing the fellow servant, through whose negligence the accident happened, was able to respond in damages in every case, do you suppose that the legislation you ask for now would ever have been thought of? A. Well, I can't say as to that, but it is a supposition that should not enter into the consideration of this matter, because it supposes a state of facts which never existed and never will.

Q. Theoretically, if a person suffers an injury, he has a right of action, and that right of action, in theory of law, is regarded as compensation. If one servant is injured by the carelessness of a fellow servant, he has that right of action. Now, is not the fact that the fellow servant hasn't any money to pay, the reason why this legislation is asked for? A. No; I don't think that is the fact. Take another class of cases, for example. Suppose I leave the coal-hole open in front of my house, and you fall into it; you may sue me, and I am liable, there is no question about that. And yet, if you please, although I am liable and responsible, you may sue the city, the sidewalk being the street; you have a choice of parties. Most of the defects in sidewalks are occasioned by somebody's carelessness; why don't you, therefore, pass a law that the city of Boston shall not be responsible, but that the person who is careless shall be? In fact, you can have your option whether to sue me or the city in such a case, and then I may respond over to the city.

Mr. Cummings. The city of Boston is under statute liability.

Mr. Allen. That is what you propose to make here for the employer; you propose to make a statute that will make him liable. I don't see why that does not answer Mr. Cummings perfectly. To-day, if there is a defect in any sidewalk in Boston, you may take your option whether to sue the city or to proceed against the owner of the premises. The owner is liable the same as a fellow servant, and yet the law permits us to sue either him or the city; we can take our choice.

Mr. CUMMINGS. This judge-made law, I suppose, is based a good deal upon the theory that travellers have peculiar rights. They are given peculiar rights by statute, if they travel on the highway; and by the theory of the common law they are given peculiar rights if they are carried for hire on railways or otherwise. It seems to me the principle is not exactly the same.

Mr. ALLEN. Don't you think a man who is at work faithfully for another ought to have the same protection as if he was walking idly along the street?

Mr. CUMMINGS. If a man is injured entirely without fault on his part, in the way you have spoken of, there is no doubt about that; but the question is whether the employer is to blame, and why he is the one who is to pay this unfortunate man, who was injured because somebody else has been negligent. I am not arguing the question.

Mr. ALLEN. I am very glad this committee has got this matter to wrestle with, and I have no doubt you will come to some wise conclusion. One thing is certain: These losses are occurring every day; somebody is injured to-day, somebody was injured yesterday, accidents are happening every day, and here and there heads of families are stricken down. There is suffering, there is poverty, and there is misfortune. It has got to be borne by somebody. Now, you don't want to place it unjustly upon the corporations or upon employers. On the other hand, you want to give these men who work and who suffer, a fair and reasonable standing. You don't want to place an improper burden upon either class; you want to place the burden where it most properly belongs. Do not place it on the man who is absolutely innocent, if anybody else is at all in fault. That is the matter which you gentlemen of the committee must consider.

Q. (By Mr. FALL.) If the cook should put poison in the bread, should you think the cook was acting in the scope of her authority? A. Of course not.

Mr. TORREY. I don't mean by authority, I mean by accident.

Q. If a switchman should switch a train off the track, do you think in handling the switch he would be acting within the scope of his authority? A. That is perfectly apparent.

ADDRESS OF MR. A. A. CARLETON.

Mr. Chairman and Gentlemen: — I come here as a workingman. I am also the executive officer of the Knights of Labor of this State, and am here in their behalf, to say a few words to you upon this subject, and to urge upon you the necessity of the legislation proposed. I am also authorized to speak for the Boston Central Trades and Labor Union. And let me say that the question before you is receiving thorough discussion, not only throughout this State but throughout the country, in the organization I have the honor to represent. We believe that we should not bear unjust burdens. We feel that the tendency of the times is to place burdens upon the back of labor, and we feel that some legislation is needed to relieve us of some of the burdens which have been put upon us. We desire to continue, as we have been, law-abiding citizens, and to seek remedy only through the law, and only through such enactments as shall bear justly and equitably upon all, and not be in the interest of a few. We do not think that a few persons should be entitled to special privileges at the expense of the many.

Now, in speaking of the relations between employer and employee, I desire to deal with the matter practically, in a business-like way, and not as a sentimental question. If I engage in business, I do it for my own benefit, and not for the benefit of anybody else. If I were to go into business to-day, it would be for myself. That would be the only sensible conclusion I could come to, and that is what everybody else does. If there is any danger in the business, and I expose my employees to that danger, I ought to bear the burden of the risk of it, for without their labor I cannot gain one solitary cent. Therefore, if I place dangers about them for the purpose of increasing my private gains, I should be responsible for it. If I am running a railroad, it is for the same purpose of profit. If I am running a cotton mill, it is for the same purpose. If I am manufacturing shoes or making baskets, it is for the purpose of increasing my own individual possessions; and, therefore, if there is any danger in the business, I ought to assume the risk, and not allow it to fall upon those who are less able to bear it. But I find that when I am riding on a railroad train I am exalted by the law above the man who is working on the railroad, although he may be more worthy and an abler man than I am; I am exalted above him, because if I receive an injury I can recover and he cannot.

Q. (By JUDGE SOULE.) Does the railroad company pay you for riding over its road? A. It does not.

JUDGE SOULE. But it does pay the man who is at work on it.

Mr. CARLETON. Will you allow me to answer the question as it occurs to me, and to make my own answer? The railroad exacts a certain sum of money from me for riding over the road. On the other hand, the railroad hires its employees in order that through them it may increase its possessions and add to its wealth. Therefore, I claim that I should receive more consideration as an employee than I should as a passenger, because I am adding to the wealth of the corporation a great deal more as an employee than I am as a passenger.

As organized labor, we do not ask for more than what we think belongs to us fairly. We only desire equality. We only ask for equal rights with all others. We only ask that employees may stand on the footing with other persons. We do not ask for any special privileges; we only ask for perfect equality. We believe the time has arrived for the enactment of this legislation which is asked. We look upon those with whom we are thrown in contact as officers or foremen or superintendents, as being our employers. If I am employed in any sort of a manufacturing establishment, the foreman is practically my employer; that has been my experience, and I have been compelled to take his orders just the same as though the actual employer was on the spot himself. There is nothing for me to do but to obey his orders. For the time being he is my employer, and he is clothed with authority to compel me to do such work as he may designate. Therefore, in view of these facts, and the arguments that have been made, I hope you will grant us the relief we ask. I speak as a workingman, for organized labor. We think the time has arrived when this legislation ought to be granted to us, and we believe there is nothing unjust in it. We have become convinced that the tendency has been to place unjust and unequal burdens upon the back of labor. You will, of course, agree with me that the workingmen comprise the larger portion of the community. As workingmen, we are all citizens of the State. Special privileges have been granted to corporations; and, taking advantage of these special privileges, we find that natural selfishness leads them to grasp after all they can. That is natural, and we would do the same thing. Corporations are continually coming before you and asking for certain privileges. We now come and ask for certain privileges, if you may call it that, or special legislation, but it

is only for relief from some of the burdens which have been placed upon us. As citizens who have assisted heretofore in the granting of special privileges to corporations, we ask to have some privileges given to us, so that we can enjoy life to a greater degree than we now do.

Q. (By Mr. FALL.) How many people are there in the organizations which you represent? A. Well, to-day I am representing, possibly, 25,000 people who are organized.

Q. (By Mr. KENDRICK, of the Committee.) In Massachustts? A. Yes, sir.

Q. That is, the Knights of Labor? A. I am speaking for two organizations. If I was speaking exclusively for the Knights of Labor I might be compelled to evade, to a certain extent, the question; because there is a rule of the organization, by which we are not permitted to state the number of members, in order to protect our members in localities where they would be victimized. But I am representing to-day, possibly, some 25,000 people.

Q. (By JUDGE SOULE.) What is the other body? A. The Boston Central Trades and Labor Union.

Q. How many members are there in that? A. You will pardon me if I do not answer that question.

Q. Why, sir? A. For the reason I have just given the committee; if I were to answer that question, you could make an estimate of the other.

Q. (By Mr. BENTON.) What is the objection to stating how many members there are? A. I have just stated the reason.

Q. (By Mr. FALL.) Did the organized trades have a convention in New York last year? A. They did; they have a convention every year.

Q. Let me ask if this legislation which is here asked is not one of the cardinal principles of their creed? A. All the confederated trades and the organization known as the Knights of Labor have practically united on the same thing. They are to ask for the adoption of measures to promote the safety of those engaged in manufacturing, mining and other pursuits, and for the indemnification of parties employed therein for injuries received, caused by lack of proper safeguards.

Q. In the constitution or by-laws of the confederated trades of North America is there any provision relating to securing an employers' liability act? A. There is; yes, sir. There is in all national labor organizations something bearing upon that subject.

Q. (By JUDGE SOULE.) Anything about strikes in the constitution? A. Yes, sir; I am pleased to say, before this committee, that the body that I represent does not believe in strikes.

Q. Which body are you speaking of now, sir? A. I am speaking now of the Knights of Labor.

Q. Not of the other one? A. Not of the other one.

The hearing was then adjourned to Monday, February 16th, at 10 A. M.

MONDAY, February 16, 1885.

The hearing was resumed this morning, Mr. HARTWELL presiding. Mr. CHARLES G. FALL first addressed the committee. He said: —

MR. CHAIRMAN AND GENTLEMEN: The time to which we are limited is so short that it will not be possible for us to make as extended or useful a presentation of the case as we made last year. All that will be possible for us to do is to present in as condensed a form as we can some of the principal arguments in favor of the passage of some bill. I may say here that Senator Wadleigh had expected to be present this morning, but he writes me a note saying he has a bad cold and asking to be excused. This subject has been before several special committees of Parliament, and long arguments and a large array of evidence has been presented on both sides by leading railroads and manufacturers and leading lawyers. The joint special committee of the Houses of Parliament made a report in which they set out in the main the leading features of the proposed legislation. The last two sections of their report the committee might like to hear read, because they state the principle on which the parliamentary committee think legislation ought to be framed.

"SECTION 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.

"SECT. 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 nine of this report."

The liberal members on this committee asked for more sweeping legislation than this; but the recommendations of the conservative members of the committee, the legislation afterwards adopted upon principles recommended by the conservative members of the committee, is what we ask.

I have thought it might be well, in the few minutes that are allowed me, to go over some sections of the bill enacted, in order that the committee might see practically how, by legislation, what we ask can be accomplished. The Gladstone bill is the basis of the legislation we ask. The first two sections of the Gladstone bill are the sections which define and impose liability. Section one says: —

Whenever a workman is injured —

"(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"

The first sub-section of section two qualifies this by adding, which defect —

"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 entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition"

This, as I understand it, does not impose upon the employer any responsibility for secret defects in his machinery. Neither does it make him a warrantor of his machinery. It simply imposes upon him responsibility for the negligence of any agent who has not made a careful inspection of the machinery to see that it was originally in good condition, and has remained in good condition. Sub-section two of the first section is as follows: —

"(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."

It seems to me, gentlemen, that this section covers the legislation which our friends on the other side are willing to concede, so far as superintendence is concerned.

Mr. Benton. You don't mean we accede to legislation which will cover any superintendence as expressed in that clause?

Mr. Torrey. We will not accede to such a broad proposition as that, anyway.

The Chairman. I have here an act, prepared by the labor committee in 1883, in which there is a section defining a superintendent as a man "whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor whilst in the exercise of such superintendence."

Mr. Fall. If you will permit me I will show where that came from. If the section I have already read applies to general superintendence it is limited by the definition of the word superintendence in a further section of this act. The word "superintendence" is made to have a narrower application than it might seem to have in the clause I have already read. The eighth section of the English bill says: —

"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."

Now, gentlemen, I think the third sub-section of section one covers precisely the ground laid down recently by the Supreme Court of the United States, in the case of Ross *v.* The Chicago, Milwaukee & St. Paul Railroad. The court have there made an employer liable for the acts of an employee of a *superior grade*, and I think this intention is well expressed in the Gladstone bill, in the third sub-section of section one. It reads: —

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

Should this committee see fit to adopt the principle of Ross *v.* The Chicago, Milwaukee & St. Paul Railroad, decided on the 8th of last December (1884), perhaps they could not express it in more accurate language than this. This English bill was drawn, I believe, by Lord Chancellor Selborne, and was only adopted after long and able inspection and discussion in both Houses of Parliament. It was the fruit of years of agitation, and every word was no doubt carefully weighed. The fourth sub-section reads: —

"(4) By reason of the act or omission of any person in the service of the employer, done or made in obedience of 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."

The first part of that paragraph, it seems to me, makes the employer liable, if a corporation (and this applies entirely to corporations), for negligence in framing improper or unsafe by-laws and regulations. If an accident occurs in consequence of the negligence of a corporation in framing its rules and by-laws, the corporation is liable. The second part of the paragraph, "or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf," evidently applies to a case where an injury occurs through the exercise of general authority by an agent, who has given particular instructions to the persons injured; where the man who is injured is not exercising any discretion himself, but is obeying absolute, specific, direct instruction given to him by some agent duly authorized by his employer. The last sub-section imposes additional obligations upon railroads. Most, perhaps three-quarters, of the deaths and injuries incurred in any employment occur upon railroads. The act does not change in any way the liability of cities and towns. There is solely a statute liability, and would be in no way affected by the passage of such an act. But railroad companies employ one of the most powerful of all agencies, one of the most dangerous and destructive, and there seems good reason for holding them to a stricter accountability, just as the common law holds to a stricter liability the keeper of a dangerous animal. If a man chooses to keep a wild animal, a lion, a tiger, or even a dog, the laws of this State compel him to keep him securely. Sub-section is as follows: —

"(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 whole of this first section defining the liability I have now read. The rest of it, imposing liability, is as follows: —

"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."

The Labor Committee of the year 1883 took these two sections, and, after long hearings and careful consideration, framed a bill, embodying substantially the provisions of the Gladstone bill which I have read to you, and reported them as Senate Document 215. The bill is as follows: —

SECT. 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, which arose from or had not been discovered or remedied, owing to the negligence of the employer, or of any person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition; or

(2) By reason of the negligence of any person in the service of the employer, who has had 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, points, locomotive engine or train upon a railway or railroad, — the employee, or, in the 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. In case of death, the damages recoverable shall not be less than five hundred, or more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer liable, or of the person in his service as specified in this act.

SECT. 2. Written notice of any injury, whether resulting in death or otherwise, 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 such injury, stating the time, place and cause thereof; and the action thereon shall be commenced, if at all, within one year from the date of the accident; or, in case of death, within one year of the date thereof. But no notice given under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury: *provided*, it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.

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

Section two exacts substantially the same notice as our statutes direct shall be given before bringing a suit for damages against a city or town. The bill further limits the amount recoverable in case of death, to the sum recoverable when a passenger is killed upon a railroad. In case of instant death in any other employment no right of action survives.

There is another feature of the existing law which strikes me, and I hope will strike the committee, as one which ought to be

changed, and that is the extension of the rule of common employment to include an employee of a sub-contractor.

Mr. KENDRICK, of the Committee. That goes further than the Gladstone bill; I believe there is no provision of that sort in that.

Mr. FALL. My impression is that the Gladstone bill would exclude an employee of a sub-contractor, but I am not certain.

Mr. KENDRICK. I interrupted you, because my mind was on the Gladstone bill as substantially what you wanted, with the omission of the provision allowing the employer to contract out of the liability.

Mr. FALL. I am not certain whether, under the Gladstone bill, an employee of a sub-contractor would be regarded as in a common employment.

The CHAIRMAN. Wouldn't section No. 3 cover cases of sub-contractors?

Mr. FALL. Suppose the injury was caused by the negligence of an employee; not caused to a fellow employee in the sense of an employee paid from the same purse, but caused to an employee of somebody who held a contract to perform work from the original employer; I should think, in further consideration, the English bill has made no change in the law. I have, however, drawn a section which will perhaps cover this injustice. Would not these words meet the case?

"In a suit to recover damages for personal injuries, the person receiving and the person causing the injury, shall not be considered as fellow employees engaged in a common employment, unless they are both at work for a common employer."

The Judiciary Committee of the year 1883 reported the same bill as the Labor Committee, making it applicable solely to corporations. It is Senate Bill, No. 255.

Should the committee see fit to limit legislation solely to *railroad* corporations, it could be done by inserting before the word "corporation," in Bill 255, the word "railroad."

There is another way in which the committee, if it saw fit, could make legislation applicable solely to railroads; and that is by the passage of such a law as they have in Wisconsin. It is a simpler way of doing it, and more effectual, than the Gladstone bill, and more in harmony with the spirit of our legislation in this country. The Wisconsin law is this: —

"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 negli-

gence 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.]

Mr. TORREY. Wasn't that the year of the Granger legislation there, when they spent most of their time in using up railroads?

Mr. FALL. I am sure I don't know; it seems to be a good species of legislation for this purpose.

The words "and his contract of employment was made in this State" ought to be omitted, for fear the statute might be avoided by hiring the employees at the other ends of the lines, in Maine, Rhode Island, Connecticut and New York. The statute of Georgia is shorter and more strict: —

"If the person injured (on a railroad) is himself an employee of the company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery." [Code of 1873, p. 521, sec. 3036 (2981)]

Should the committee see fit to recommend a statute abolishing the defence of common employment, it could be done by a bill, No. 249, Senate Documents of 1883, which is as follows:—

"SECTION 1. Whenever an action is brought against a corporation to recover damages for the death of, or personal injuries received by, an employee while in the discharge of his duty, the fact that the death or injury was caused by or through the negligence of a fellow employee shall not prevent the recovery of damages, unless the employee himself materially contributed thereto by his own negligence.

"SECT. 2. Written notice of any injury shall be given to the corporation, addressed to any officer thereof, 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 with substantial accuracy the time, place and cause thereof; and the action thereon shall be commenced, if at all, within six months of the date of the injury, or, in the case of death, within six months thereof."

I have tried here, gentlemen, simply to show in words how legislation may be accomplished, so that the committee may be aided in drawing a bill. You can have these bills, already drawn, for your inspection and approval, to change as you see fit. That is all I have to say this morning.

ARGUMENT OF MR. GEORGE A. TORREY.

Mr. Chairman and Gentlemen of the Committee: I don't propose to occupy more than a few moments. This is a matter which it is very difficult to discuss, because Mr. Fall, who is the only person who appears here to ask for legislation, does not seem to know what he desires himself. He submits to you a great number of bills, involving a great number of principles, and suggests to you whether you had not better report some one of them. Now, I have a bill here, which I should like to submit. It is entirely on my own account; I have not consulted my railroad associates upon the matter; but it seems to me, from Mr. Fall's point of view, that this is the bill you ought to report, although I really don't ask it myself.

"Railroad corporations shall compensate all persons in their employ for injuries received from any cause whatever."

Now, that covers the whole subject at once. Everybody knows what that means.

Mr. Mason, of the Committee. You are ready to accept that, I suppose?

Mr. Torrey. Well, sir, in point of fact I don't know as I should exactly say I would accept it, but it covers the whole subject without any circumlocution, and I venture to say there is just as much justice in it as in the other bills to which your attention has been called by Mr. Fall. He commences his argument this year and last year with substantially this proposition: That if a railroad train is wrecked on account of the carelessness of a switchman in having misplaced a switch, a passenger upon that train is compensated, while a brakeman is not compensated; and he claims that that presents a case of hardship. I agree that it does. It is a hardship to the brakeman to be injured. But it does not present, I submit, any argument why the railroad company should compensate the brakeman. I never have known before of an instance where men of acute minds have spoken with such lack of consideration, or else have become so confused in their ideas, as they have in the case which is now under discussion.

Take, for instance, the statement, which may be considered as the most preposterous statement made here, which this Mr. Carlton, I think his name was, who appeared for the labor organizations, made. He says there is more reason why the brakeman should be compensated than why the passenger should

be compensated. Because, says he, the brakeman contributes more to the profit of the corporation than the passenger does, and ought to have more than the passenger. My learned friend who appears for the Albany road, immediately suggested to those about him, that if that proposition was sound, he should advise the road he is connected with to discontinue the running of passenger trains, and fill all its trains with brakemen and other employees, in order that they might make more profit. Now, a man who cannot see the distinction between a passenger and a brakeman, injured under such circumstances, is a man, I submit, to whom you cannot address a legal argument. The railroad company agrees with the passenger to transport him — substantially agrees to transport him—from one point on the road to another, and to do it safely. If it violates its contract, it has to pay damages. It makes no such agreement with the brakeman. The brakeman, on the other hand, represents in part the party who is making this agreement of carriage. He is engaged in carrying out this agreement of carriage; he is not the person carried, he is one of the carriers. And to say the two cases are similar, as I have said before, is a proposition which I do not think a person can argue against, because the opposing minds cannot meet on the same plane.

It seems to me that to say a corporation or an individual shall be subject by law to compensate another for an injury, received without the slightest fault on the part of the corporation or individual, is unjust. It seems to me such legislation cannot be defended upon any ground. I think the call for such legislation is simply another form of Socialism, which demands that the goods of the rich should be taken for the benefit of the poor.

I asked at the other hearing, and I have asked during this hearing once or twice, if some speaker would define the distinction between the case of an employee on a railroad who was injured by the negligence of his fellow servant, and the case which is put in the books, and which I put here, of the chambermaid who receives indigestion through the bad cooking of the cook. Now, I suppose there is not a person in the world but what would say at once it would be nonsense to come before the legislature and ask for a law that the householder should compensate the chambermaid who was injured by the bad cooking of the cook, or for a law that the householder should compensate the cook who fell over the pail carelessly left on the stairs by the chambermaid, the accident happening without any fault of the cook. Any man would say at once, in reply to such a

request, "You are talking nonsense." Well, I asked several of the witnesses who appeared last year, and I asked Mr. Fall this year, to trace the distinction between that case and the case of the railroad corporation compensating the brakeman who is injured through the fault of the switchman, and I have never heard any answer to that proposition. I do not think it can be answered. It is not necessary for me to say to this committee that if the corporation is in the slightest fault, it is responsible already. Why should it be responsible if it is not in the slightest fault? It seems to me it is abhorrent to the principles of natural justice to say it shall pay in such a case as that. That is the answer, it seems to me, to the whole of this discussion. I don't see how a law could be framed which would be just, and yet which would make a person smart in damages who is not in any fault whatever.

Now, take so acute a mind as that of Gov. Long. He wrote a letter to the committee last year,— he did n't appear in person,— and he made this proposition, which to my mind was astounding. He says, "If an expressman goes into a dry-goods store and is there injured through the fault of one of the clerks, one of the salesmen, the proprietor of the dry-goods store has to pay the expressman; but if one of the clerks is injured through the fault of another clerk, the proprietor does not have to pay. Now," says he, "this is not justice, and the cases are parallel." With all due deference, I submit they are not parallel; they are as different as daylight and darkness. It is not only the legal duty, but it is the moral duty of that dry-goods dealer to so carry on his business, which he carries on for his own profit, that he shall not injure those outside, who are not connected with his business. It is the same principle that is announced in the case of Rylands *v.* Fletcher, I think. If a person collects a large quantity of water in a reservoir, he must take care of it. If he keeps a dangerous beast, a lion, he must take care of it. He cannot keep a dangerous beast and if anybody is injured by it say, "The fault is the lion's and not mine." It is the same principle which runs through every branch of business. He must so conduct his business that he shall not injure you or me or any person who is receiving no profit from it. The dry-goods dealer must not injure me as I am passing by the store, nor my wife who is trading there, nor my boy who goes there to deliver a letter; if he does he must pay for it, whether it is his own fault or the fault of one of his employees. But when you come to the clerk, the case is differ-

ent. He goes into the store for his profit, to draw his wages. He is one of the parties who are carrying on that business, and he takes the risk of the business, does n't he, or else he would n't have gone into it?

Now, my friend Mr. Fall says about these implied contracts, that they are contracts the judges have made. I don't understand that to be the definition of an implied contract. There are certainly many implied contracts which exist if the case does not come before the judges, if judges have nothing to do with it. For instance, if I should engage a person to dig a trench for me in front of my house, there is not an implied contract that that person shall do it with his own hands; he may send whom he pleases to dig that trench. But, if I engage my brother Fall to argue a case, I take it he cannot send any lawyer he sees fit to argue that case; there is an implied contract he shall argue it himself, in his own person. Now, that is not a contract made by the judges; it is a contract made by common sense, always understood or implied. So, whether I go into a gun-powder factory, whether I go upon a railroad, or into a dry-goods store as a clerk, there is an implied contract I shall take the risks of the business; because, if I am a man of common sense, I know I do subject myself to just that risk. The gentlemen upon this committee took the risk of being lawyers, when they entered that profession. There is a risk connected with the business, and a man cannot say, "I supposed I would reap the emoluments of the profession, but I didn't propose to take the risks." So, all of these persons who engage in any business are supposed to take the risk; they do take it; and when an accident happens to them, through the fault of an employee without the fault of their employer, I say there is no reason in justice why the employer should compensate them. It is one of the risks they assume when they enter into the business.

I had the position assigned me of opening the discussion last year, and if I supposed the committee would read what was printed of my argument then, I should be very happy to furnish each member with a copy, and refrain from saying anything here. But I have been on legislative committees too much myself to be under the impression that committees read these documents which are left with them. If they do now, it is a new custom which has grown up within the last ten years. But I do not care to repeat my argument, whether you will read it or not. The substantial basis of the suggestions I made last

year was that you cannot materially change the common law of Massachusetts, as it is to-day, without working injustice. There is, however, one decision which I do not think any of us favor, and that is the decision in Albro *v.* Agawam Canal Co. I think the court erred in making that decision. I think, where the general superintendent of a corporation or an individual is guilty of an act of negligence, that act of negligence is the act of the employer. If the employer sees fit, as a railroad does, to have its business conducted through the superintendent, or if I see fit to open a dry-goods store and to pay no attention to it myself, but remain in my office and put a person in the store who actually represents me and conducts the whole business, I cannot see, and never could see, why his act of negligence was not mine; because I am not there myself, I am not directing the business, and there is no head to the concern except this other person who is left in charge. And I have always apprehended that if that case should come again before the court, the court might be induced to overrule that decision. I certainly should not object to any law that would make a railroad corporation responsible for the negligence of its general superintendent, and I never should stand up before a jury and defend a railroad on any such ground as that decision offers.

Q. (By the CHAIRMAN.) Would you carry it any further than the general superintendent? A. No, I would not; because the moment you go beyond that there is no stopping, as I see. Judge Knowlton wrote last year: "I think it would be just and proper to hold employers responsible to their employees for accidents growing out of the misconduct or negligence of other employees who are in positions of authority or control, and that it would be unwise and dangerous to permit suits by employees founded upon the negligence of ordinary fellow servants." Now, when you say that you go a very great length. Take, for example, a case that was put last year. Here, in a machine shop, are some men rolling a heavy pulley.

Mr. BENTON. That is a case put by Mr. Livermore, the chairman of the committee, as having actually occurred in his own experience.

Mr. TORREY. I think so. One of the men is called the "boss." He is not a boss exactly, but, of course, where there is a lot of men working out doors some one must have the control of the others, and so they have this man who is called the boss. They are rolling this pulley, and the boss says to one of the men, "Step around on the other side." He steps around

on the other side and is injured. Now, that man would have stepped to the other side just as quickly if somebody else had told him to go. He does not go because of fear that if he disobeys he will be discharged. But, because this man who happens to be the boss suggests it to him, it is claimed that the employer ought to pay the damages. I cannot see why he should. There is some justice, perhaps, in the case put by Judge Bennett, where some particular order was given to a workman by his superior, and he must either obey that order or be discharged. Take an extreme case of that kind, and there seems to be some justice in it. But take the ordinary case, where the order comes from some person who has some superintendence and authority, I do not see why the employer in chief should be made liable. Take the case cited by the Supreme Court of the United States; I think any railroad man would say that case is utter nonsense. They hold there that the engineer, being under the orders of the conductor, the railroad company was responsible for an injury received by the engineer in obeying the orders of the conductor.

Mr. BENTON. No, no; because of the negligence of the conductor.

Mr. TORREY. He gave the order to start the train.

Mr. BENTON. The trouble was he failed to give the order to stop it.

Mr. TORREY. In the first place, it is utter nonsense, to my mind, to say the engineer is under the orders of the conductor. He is under the orders of the conductor just so far as this, and no more, that when the conductor puts out his hand as a signal, the engineer starts the train. But the engineer is bound to obey his own rules, and the conductor has no authority to cause him to violate them. The conductor is under the orders of the engineer in one sense; when the engineer shuts off the steam on the engine, the conductor has to stop his passage on that train. One is as much under the orders of the other, as the other is under his.

Q. (By Mr. BENTON). There is a specified order that the engineer shall be governed by the regulations of the road? A. Certainly.

Q. That he shall be governed by them as much as the conductor and independently? A. Precisely.

Q. (By the CHAIRMAN). Is there any hardship in holding an employer liable to an employee in case he is injured by any defect in the works or machinery? A. In case of any defect

which might have been remedied by due care, the employer is liable under the law as it is to-day, I take it.

Q. Is it the law, as held in the case cited by Mr. Allen, of the Boston & Albany car inspector up at the State line? A. Judge Soule will discuss that case better than I can, perhaps; but it always seemed to me that that case was decided rightly upon the premises which the court assumed. I don't understand it to be the law, as the court assumed, that the company was obliged to take this very car.

Mr. BENTON. The court did not assume it was to be taken in that condition.

JUDGE SOULE. As common carriers they are bound to take cars which are offered them for transportation, unless they find they are unfit for transportation.

Mr. TORREY. I don't think there is any such law. We are bound to take the freight, but we can unload it into one of our own cars, if we want to, I think. But the court put it upon the ground that they were bound to take this car; that they had no right to say, "We will not take this car," but they were bound to take it. Now, being bound to take it, what was their duty? Why, it was the duty of the corporation to inspect that car and see it was safe. They did inspect it, as I am informed; they appointed a proper person to inspect the car at the State line.

JUDGE SOULE. And at half a dozen different places on the road.

Mr. TORREY. That person, the inspector, as the jury must have found, was guilty of an act of negligence in this case.

JUDGE SOULE. The court below ruled it didn't make any special difference, and that they were bound to have a safe car anyhow; that was the trouble with the ruling in that case.

The CHAIRMAN. Is that case reported?

Mr. FALL. It is in the 135 Mass., 201.

Mr. TORREY. This is the distinction I started to make: You take the case of Ford *v.* Fitchburg Railroad, and it settles this, that the corporation is bound to use due care to furnish sufficient and proper machinery; and it is no excuse to the corporation to say that the defect occurred through the carelessness of their master mechanic, whom they put in the control of the motive power of the road. They must exercise due care to provide suitable machinery; and if they entrust that care to the master mechanic or anybody else on the road, that does not relieve the corporation from responsibility. Now, to go a step further than that, I don't think you would be in favor of enact-

ing a law that the corporation should be liable for injuries caused through any hidden defect in the machinery, as when a person buys a proper machine and there is some flaw in the iron or steel. I understand the law to-day to be as laid down in the case of Ford *v.* Fitchburg Railroad, and I do not understand that the court in the Boston & Albany Railroad case intended to overrule any such proposition as that.

Q. (By Mr. MILLETT, of the Committee.) A moment ago, in speaking of the pulley case, you supposed the man went around to the other side upon simply the suggestion of the boss, and would have gone if any other person had made the suggestion; supposing the boss made the suggestion and the man had remonstrated because of the danger, and the boss had commanded him to go ahead? A. If you could have a law to apply to just such a case as that I don't think there would be much objection to it, — a case like that, where he was actually ordered and compelled to go, or else he would lose his place. If you could frame a law to meet such a case, I should not object to it, for one.

Q. (By Mr. KENDRICK, of the Committee.) Why should not the doctrine of contributory negligence come in there, if a man, even at the order of his superior, puts himself in such a position that he is liable to be injured? A. Of course, if a person is guilty of carelessness in going there, that would be against him. The case supposed is where the man remonstrated, but still where he would have the right to think that the man who ordered him would have more knowledge than he as to whether or not there was danger, and was assured by him there was no danger, and ordered to go ahead.

Mr. MILLETT. That was the case cited by Mr. Allen, of the digger in the sewer who said there was danger in going down, and the foreman replied, "No, no; go ahead; there isn't any," and he went and was hurt.

Mr. TORREY. Lawyers can find some cases, way up above the line, which appear like cases of hardship, and there is hardship, perhaps, in those particular cases; but it seems to me that when you undertake to remove them by a general law, you may impose still greater hardship.

The CHAIRMAN. I desire to call your attention to Senate Bill 215 of the year 1883. Sub-section 1 of section 1 is substantially the law of the Commonwealth to-day; sub-section 2, holding an employer liable for the acts of the general superintendent, you say, is proper. I wish you would discuss sub-section 3.

Mr. Torrey. There is a difficulty in sub-section 2, where it makes the employer liable for the negligence of a person who has any superintendence entrusted to him. That I object to. As far as it applies to any one who has the general superintendence, I do not object to it. I am not speaking, of course, for my associates; I am only speaking for myself; I may differ entirely from them. I have always said I do not object to a law which would make the Fitchburg Railroad responsible for the negligence of its general superintendent; that is as far as I want to go.

Q. (By Mr. Benton.) Are you aware that any hardship has arisen from the decision in Albro *v.* The Agawam Canal? Do you know of any case where a corporation has set up the common employment of its superintendent? A. It may have happened in manufacturing corporations.

Q. Has it in any railroad case? A. I know of no railroad case, except that of the New York & New England, which, if it was correctly stated the other day, might be a case of that kind.

Q. Any case in the books? A. No case in the books; there has never been any such case. Practically, I think that case has never hurt anybody employed on a railroad.

Q. (By the Chairman.) What would you say as to any hardship which would arise under sub-section 3? A. As this is printed, I think there would be considerable hardship under it. It is all covered, I think, in the case of an engineer injured through the carelessness of a conductor. The engineer, although he is not a servant of the conductor, is, by his contract of employment, bound to conform to the orders of the conductor; and when the conductor orders him to go ahead, if the rules of the road permit, he is bound to go ahead. Now, I don't see any reason why he should be compensated for any injury he receives through the negligence of the conductor, more than the brakeman on the train should be, or any other employee. If you were legislating for individuals, there would be no trouble about this, — if the employer was always an individual. When I say to my man, "You go down into that hole and dig," and he goes and is hurt, very likely I ought to pay for it; but when you come to corporations, you will find that that principle would extend to many classes of injuries which you did not intend to hit.

Q. (By Mr. Mason, of the Committee.) The rules of a corporation may be considered as the orders of a corporation? A. Yes, sir.

Q. And if a man acts in pursuance of those rules, he acts in pursuance of the orders of the corporation? A. Yes, sir; but that is not this section, Mr. Mason. I do not object, and should never object, to a person who is injured by reason of following the rules of a corporation, receiving damages; and I take it that is the rule of law to-day. If the rules are imperfect, so they tend to danger, the corporation is liable.

Q. (By Mr. KENDRICK.) Is there any modification in the law which you think would be advisable? A. I do not, sir; unless the committee should think it was advisable to change that decision in Albro *v.* The Agawam Canal Co. I think that is an unjust decision.

Q. You think the law at present works substantial justice between a person injured and the employer? A. I think there are some cases, possibly, where there is the relation of sub-contractor, — which do not affect us much, because we do not employ many sub-contractors, — where the rule seems possibly to work some injustice; but I don't know as it does there. I think the difficulty is as I suggested the other day. You take a man who is injured in the service of a rich corporation. You say it is a hardship! And it is a hardship; it excites our sympathy, and we say the man ought to have some money given him. So far, we all agree. And the fact that the corporation is perfectly able to compensate him, has money in its treasury, I think, is apt to warp our minds, when we consider the justice of the case.

Mr. KENDRICK. It is apt to warp the mind of the average juror.

Mr. TORREY. Very decidedly; and it is apt to warp the minds of very intelligent lawyers. They do not draw the distinction between the proposition that a man who is injured ought to be compensated, — as every man who is injured, and not through his own fault, ought to be, — and the proposition that the employer ought to compensate him, which is entirely a different question.

Q. (By Mr. FALL.) The question whether the employer ought to compensate him, depends upon the question whether the law compels him to, does it not? A. No; not at all.

Q. We are talking about the legal question now. A. The question is whether the employer is in fault or not, in my mind.

Q. What determines the question of whether the employer is in fault, or not? A. Common sense, I suppose; or you examine the circumstances of the case, and see if you can find any fault on the part of the employer.

Q. We are talking of fault under the law, now. The employer is not at fault, because the law does not impose any liability upon him. Isn't that it? A. No, sir; not at all; that is begging the question. The employer is not at fault, because he has done no wrong whatever; he has done his entire duty; he has employed a person who is a competent person; he knows him to be competent; he has inquired and found out he is thoroughly competent, and has employed him. Now, he has done his duty, as far as the employment of that man is concerned.

Q. Isn't it the law which determines what the employer's duty is? A. No, I don't think it is by any means.

Q. What determines the question of the employer's duty? Isn't it the law? A. No, sir; I think not. I don't know any law that determines that.

Q. We are talking about liability under the law, aren't we? A. I suppose you are; yes.

Q. We are seeking to change a law? A. Yes; you are.

Q. Now you say there is no duty exacted of the employer; isn't the reason there is no duty exacted of him because the law has not exacted it? A. No, sir; I think not. My position is this: You are asking here for a law which would make an employer liable when he has committed no fault, — I don't mean fault under the existing law, because that would be begging the the question, — but who has done his whole duty in the sight of God and man, in employing a man whom he knows to be competent. An individual act of carelessness on the part of that man does not show any act of carelessness on the part of the employer; he has done his whole duty.

Q. Supposing the law instead of implying a contract of non-liability, implied a contract of liability; then should you say there was no duty exacted of him? A. I should say the law was most iniquitous and unjust which would punish a man who has done his whole duty, and who had committed no fault.

Q. Isn't the question of duty to be determined by whether the court should imply a contract of liability or non-liability? A. Not at all; not in the slightest degree. There is no more natural justice, in my mind, in making me liable because one of my competent servants injures another of his fellow servants, than because one of your servants injures another. There is no justice in either proposition to my mind. I don't care to say anything more, unless to answer more questions.

REMARKS OF J. H. BENTON, JR.

Mr. Chairman and Gentlemen: You are asked to recommend a change of the existing law by an arbitrary statute. It is obviously the wise thing, under such circumstances, to find out what the present law is. Now, the whole question here, as it seems to me, is whether Chief Justice Shaw, in Farwell *v.* Worcester Railroad, was right, or whether Mr. William A. Simmons, who came here last year and said that that decision of Judge Shaw was "all wrong," is right. Chief Justice Shaw said that a man who enters into the employment of another in running a powder-mill or nitro-glycerine factory, or a railroad, or a cotton-mill or a cordage factory, is presumed to understand what he is about to do, and to impliedly agree to take the necessary risks of the business in which he is about to engage; not the risks that arise from *improper* management by his employer, but the *necessary* risks which arise from his employer's *proper* management. Mr. Simmons says that is not true, because, as a matter of fact, the employee does not think of it, and everybody knows that he does not think of it at all.

Something has been said by Mr. Fall about implied contracts and judge-made law. I don't understand that the judges make any law; they declare the law; and if out of the nature of a transaction there necessarily arises, to the mind of an ordinary man, an implied contract by the parties to that transaction to do a certain thing, then the judges say the contract was one which they made, whether they thought of it or not; just as the courts would say "if he had notice, or if he might have known, in which case it makes no difference whether he knew or did not know." We are constantly enforcing in courts implied contracts which arise where parties do not think anything about them. I might almost say that implied contracts arise because people do not think of them, and do not make any express ones. Why, pray tell me, how an employer is held liable for having a proper "plant," and proper machinery, except upon the ground of an implied contract. I enter into the service of my friend, Mr. Fall, to do some sort of labor connected with machinery. I do not say anything about taking the risk, and he does not say anything about giving me a proper machine. The law says, out of the nature of that transaction two things are implied: One is that Mr. Fall shall furnish Mr. Benton with the proper machinery and keep it in proper repair. If he is to run a locomotive, he

shall be furnished with a properly constructed locomotive, equipped with all the latest appliances for safety, and it shall be kept in good repair. That is Mr. Fall's implied contract. The judges do not make that contract; they do not make the law. They say that out of the nature of the transaction that contract is one that should have been made, and if we had thought of it we should have made it. On the other hand, the court says that Mr. Benton understands what the running of a locomotive is, and he must be understood to have had the nature of that transaction in his mind, and to have taken upon himself the necessary risks in running it; that is, not the risk which would arise from the running of a locomotive improperly constructed or out of repair, but the risk which would arise from running a locomotive properly constructed and properly repaired. The judge-made law which protects the servant who runs the locomotive, is the same kind of judge-made law, and no other, that protects the employer.

Now, in Ford *v.* Fitchburg Railroad, the doctrine that the employer is bound to provide proper machinery, is very clearly stated. Of course, the cases are all familiar to the committee, but I beg leave to call your attention to this. The court said in Ford *v.* Fitchburg Railroad: —

"The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating it"

I have had that rule of law administered against my client in the courts, and the Supreme Court has sustained it. In a case where a man was injured by reason of a bridge-guard being out of repair, I tried to have the court say it was left out of repair by the servant employed to take care of it; but the court said that was no defence, and that for the purpose of looking after the bridge-guard the servant was the corporation.

Now, an employer is bound not only to have proper machinery and to keep it in proper repair, so that the risk of the business shall be only the necessary risk arising from the use of proper machinery kept in proper repair, but he is bound to the same rule with reference to his employees. He is bound not to employ negligent persons, incompetent persons; and he is bound, so to speak, to keep his employees in proper repair. That is to say, if he knows a man is getting drunk and is growing inattentive and negligent, he is bound to discharge him, or to correct his habits, if he can, so he may be a safe and suitable person for the employment in which he is engaged. The employer is bound to furnish proper machinery and to furnish proper persons to run it, and to keep them, both the machinery and the fellow servants, in proper condition, and he is responsible for their improper condition.

Mr. Fall. If he knows it.

Mr. Benton. If he knows it, or by the exercise of ordinary care and diligence ought to have known it, in which case "it don't make any difference whether he knew it or not." He is bound to use the same care and diligence in ascertaining whether there is any defect in the machinery, or any defect in the servant who runs it, that he is in doing any other thing in his business; that is, the care which reasonable, prudent, cautious business men use in their own affairs. He is bound to be careful. That is all there is about it. I don't understand that degrees of care are of any particular consequence. He is bound to furnish suitable machinery and to furnish suitable persons to run the machinery; and he is bound to keep the machinery and the servants in proper condition, if by reasonable and proper care in the inspection of the machinery and the inspection of the servants it can be done. The law says that that is the implied obligation, that that is the implied contract of the employer.

Now, Mr. Chairman, it is an implied contract and judge-made law, which makes the employer liable if he does not do this, just as much as it is an implied contract and judge-made law which makes the employee, who enters into the service of the employer, agree that he will take the necessary risk of the business properly prosecuted by the employer. And the law says, chapter 74, section 3 of the Public Statutes, that no employer shall make with his employee a special contract to exempt himself from the consequences of his own negligence or the negligence of those whom he employs.

Now, the proposition is, — and I do not propose to discuss

any subsidiary question, — the real question is whether Mr. Simmons is right or whether Judge Shaw was right. Either it is true that when a man enters into the employment of another to do a particular business, — such as to run a mowing machine, or to work in a powder factory, or to run on a railroad, — he understands the nature of the business into which he is about to enter, and impliedly takes the risk of that business as properly prosecuted; or it is not true, and he does not make any such contract, and there is not any such implication as between the employer and employee, and the legislature ought to so declare.

It is asked here that you shall make a rule of law by which the employee shall recover, although he is injured by the necessary risk of the business in which he is employed; that is to say, through the negligence of a fellow-servant. For that is just as much a risk of the business as the risk that an engine properly run and managed will sometimes explode, or that accidents will happen from hidden defects. Mark you, if an employer engages a negligent servant, or has a servant in his employ who becomes negligent, and he knows it, or ought to know it by proper inspection and observation, then he is liable under the present rule, because the employee does not impliedly contract to take such a risk. It is the *necessary risk* that he impliedly contracts to take. Now, the proposition is to make the employer liable for the necessary risk of the business, or one necessary risk.

That is to say, my brother Fall comes here every year, comes thoroughly equipped, with great ability, — perhaps he is the best read man on this subject in the United States, because he has made a specialty of it; it is a hobby, and he rides it well; he says it is a hobby, — he comes here every year and says, "I want the employer made liable to the employee for the necessary risk of the carelessness of a fellow servant, and I want the English law." I have no doubt he thinks he is right; and I do not suppose he wants this new law because it is the English law, but because he thinks that is right. . . . But when he is asked, "Do you think that it is right that if that rule is established, the employer and the employee should have the right to contract with reference to it?" he replies, "Oh, no; I want to make the employer liable for this necessary risk of the business," — he is liable now for any unnecessary risk, — "for the necessary risk of the business; and I want the employer and the employee to be prohibited by law from making any contract about it." Well, now, Mr. Chairman, if that is fair, if that is

right, if that is just, then I don't know what would be unfair and unjust and wrong.

Q. (By Mr. MILLETT.) Does that provision exist in the English law. A. No, sir, it exists here by special statute, which is section 3, chapter 74 of the Public Statutes, with regard to the Employment of Labor.

Q. (By Mr. MASON.) Under the Gladstone bill they can contract out of their liability? A. Yes; but Mr. Fall wants the English law imposing the liability, and is not willing to take the English law with regard to the right of contract. Under the employers' liability act in England, sometimes called the Gladstone bill, because it came in under his ministry, it has been held that employers may contract out of any liability.

Q. (By Mr. MILLETT.) Then the English rule has a different feature in it than what is contemplated here? A. The English law, as I understand it, is this: It permits, in the first place, the parties to contract as they please, with reference to this matter, by an express contract; there is no statute against it. If there is no contract, then the employer is liable in certain specified cases, upon certain specified notices in a limited time, to a certain specified amount, limited and fixed according to the amount of wages and the grade of employment; and the words and terms in the bill are very carefully defined and guarded. I should be entirely content, for the interests I represent, to take the Gladstone bill and the right to contract, as the law of Massachusetts.

Q. (By Mr. ADAMS.) You would be in better condition than you are now, you think? A. I have no doubt the rights of the employers of labor would be increased over what they are to-day. I think our law is the best one.

Q. (By Mr. MILLETT.) Then the English law, as it may be made to operate in England, is different in its effect than it would be if merely the English law were enacted here. A. Unquestionably.

MR. MILLETT. That is what I wanted to understand.

MR. BENTON. Unquestionably; nobody denies that. I have no doubt, and I do not think anybody will dispute it, that the operation of the English law, with the right to contract, which exists in England, would be more burdensome to labor, if that is the proper expression to use, would give the employers of labor more power, and make them less liable, than they are to-day under the laws of Massachusetts.

Q. (By Mr. KENDRICK.) If we should enact the English

law, we should have at the same time to repeal section 3 of chapter 74. A. I think you would, or else it would be very unfair. But my friend Mr. Fall says that would not be right, and Mr. Stillman B. Allen says it would not be right. Why? Because they want a paternal government. That is the root of the whole thing. This whole application is simply one phase of the desire which a great many people have to get the legislature to make things other than they are. A man says, "I am not as tall as my neighbor," or "I cannot earn quite as much money, I am not as thrifty, I am not as sober, and I want the legislature to pass a statute which will remove these differences and put us on an equality." Mr. Simmons comes up here and gets in a great rage, and he says the people of Massachusetts are deprived of their legal rights because the man who is employed to run on a railroad as a conductor at seventy-five or a hundred dollars a month, cannot recover, if he is injured through the negligence of the engineer, as well as the passenger who pays his fare can; and Mr. Simmons wants them to be put on an equality. Why, the conductor is an insider, a part of the thing itself. When he undertakes to run the train, he knows there is a risk about it.

Mr. DOHERTY. So does the passenger, when he goes on board the train.

Mr. BENTON. Yes; but he pays for going on the train, that is the difference.

Q. (By Mr. ADAMS.) If the legislature should pass a law which would materially increase the liability of railroad corporations, where, eventually, would the hardship fall? A. It would fall on you and on everybody else who pays his fare on the railroads or sends freight.

Q. It would lead to an increase of rates, you think? A. Yes. When I appear for a railroad corporation before the legislature, I always say I do not think it makes any great difference to the corporations. I think they are bound to come here as trustees of the public highways, and to give all the information they can with reference to their management.

Q. It is a public sentiment which affects them; it makes no difference to them, you think? A. The Old Colony Road is the only highway for Southeastern Massachusetts. Its stock is pretty nearly all owned here in Massachusetts, and of course its stockholders are interested, both as stockholders and as a part of the public.

Q. (By Mr. DOHERTY.) Don't you think the public would

willingly assume the extra burden? A. Whatever burden you put upon the railroad comes, in the first instance, upon the stockholders as an added expense; it comes ultimately upon the people. If the legislature in its wisdom sees fit to put a liability upon them different to what is borne by other roads with which they connect and other employers of labor, it has a right to do so. You ask me if I think the public would acquiesce in assuming the burden. No; I never knew the public to agree willingly to any increase of rates.

Q. (By Mr. Burdett.) Have you any means of giving to this committee a statement of what would have been the average loss to the Old Colony road, during the last ten years, providing there had been such a law as is asked for in force during that time? A. I think that would be the purest kind of speculation.

Q. How many employees of the Old Colony road have been injured? A. I can simply say this, with regard to our management, that in the seven years I have been counsel for them in their matters in court, perhaps a little longer, I have tried only one case against an employee. Of course we injure about the same percentage that other roads do, but our policy is to treat our employees in such a way that they will feel, if they are injured, that they will be retained in some capacity or other, and if they are sober and industrious, they are retained and taken care of. You won't find any call for this law on our road.

Q. That goes by the point I wanted to raise, which is simply this, How great a burden would there be? A. How much more money it would cost I cannot tell; I don't know how much it would cost.

Mr. Burdett. You say the burden would fall upon the public; I should like to know how many men have been injured on your road the last ten years, and what would have been, as near as may be judged, the additional expense upon the public during that time, taking your aggregate income under this law. If we knew that, we could then be in a better position to judge about the matter. If this would make a tremendous increase of rates, undoubtedly the public would not bear it; if it would make simply an inconsiderable increase, I think the public would bear it.

Mr. Benton. I suppose the public will bear anything; they can't help it.

Mr. Fall. Judge Russell makes an estimate of that in a letter he sent to the committee last year.

Mr. Benton. You ask how much difference it would have made to the Old Colony Railroad during the last ten years if there had been no defence of common employment, if the doctrine in Farwell *v.* The Worcester Railroad had not existed. I tell you no man can tell about it, in my judgment. You can go back and find how many people were injured, and how many were employees, and figure it up; but you can tell nothing about how much they would have recovered; you will have this element of contributory negligence in every case. I don't suppose it is meant to abolish that, although I think it would be as wise to abolish that as the one you are asked to abolish.

Q. (By Mr. Doherty.) You don't mean that, do you? A. Yes, sir, I do. I stand upon this broad proposition: If a man enters into the service of another, as between man and man, he impliedly contracts to take the necessary risk of the business.

Mr. Doherty. Contracts to do what the statute expressly forbids him to do, by exempting the road from all liability!

Q. (By Mr. Mason.) Suppose the defence of common employment was abolished, do you think it would have any tendency to make employees less careful? A. I must say I do not think that is a very important consideration. I know it is thought it would, and I suppose that is the opinion of those who are wiser than I, who hold that a man, out of regard to his own interests, will, if he knows he cannot recover anything when he is injured by reason of the negligence of a fellow servant, be more careful than if he knew he could recover. I do not believe the fact that a man cannot recover damages tends to make him more careful. I think all employers of labor should be treated alike. I agree with Mr. Simmons in that respect, and I agree with Mr. Fall in that respect. They should all be treated alike. I don't see why a man who runs a farm and is worth $10,000, should have any different rule applied to him than if he had his $10,000 in a little manufacturing establishment; and there are a great many of those in Massachusetts.

Q. (By Mr. Doherty.) I suppose you recognize the fact that a corporation has special advantages given to it, as to the protection of its capital? A. I do not think there is that protection. I think corporations to-day bear a greater burden than private capital. I think the right to aggregate capital, the fact that you and I and our friend on your left have the right to come together and combine our resources in a joint enterprise, like the running of a factory or a railroad, has done a great deal to build up Massachusetts.

Q. But you don't think we would be likely to do that unless the rest of our fortune was specially protected, do you? A. What do you mean?

Q. If we hadn't the special privilege which exempts the rest of our fortune from any contribution, if there is a loss? A. I think the capital which is put in should be burdened by the business, and I do not think any other capital should be. I don't think there is any special privilege in that.

Q. Isn't there a distinction between a corporation and a farmer in that particular? A. I don't think there is any particular privilege. It is the creation of a new person which has obligations and rights like one of ourselves.

Q. It is that special privilege which makes a corporation desirable for purposes of investment. A. Not at all; it is not a special privilege as I understand it. You and I and the chairman have $10,000 apiece. We can't either of us alone start a factory in our town, because we haven't got money enough; so we combine together, and each of us takes $5,000, making $15,000, and on the strength of that we are enabled to go ahead and commence the business. Every dollar of that $15,000 is put at the risk of the business, just as much as the $10,000 which one of us had would have been put at the risk of the business, if he had started it alone. We are simply shareholders in a new, intangible legal person, to wit, the corporation. I don't call that a special privilege.

Mr. DOHERTY. I call the exemption of the rest of our property a special privilege.

Mr. BENTON. It is not an exemption.

Mr. DOHERTY. It is exempted from any liability by reason of the debts of that corporation.

Mr. BENTON. It is not exempted any more than the fact that your property is not liable for my debts, is the exemption of your property. That is the way it seems to me, but of course we may look at things differently. I do not see that it is a special privilege. I think the capital invested in corporations bears a much larger burden of the whole taxation and is very much more trammeled by legal enactments than individuals are. I see a reason, of course, for this; you can control them because you have the power to destroy them, and it is a great thing to have absolute power.

Q. (By Mr. KENDRICK.) But a very wrong thing to use it unfairly. I suppose your point is that all the property of a corporation is liable for its debts, the same as the property of

an individual is for his? A. Yes, sir. We three unite and form a corporation called the Hartwell Manufacturing Co., and put in $5,000 apiece, making a capital of $15,000. Every dollar of that corporation's capital is liable for every act of that corporation, just as much as my $10,000, which I had before, was liable for my acts.

Q. (By Mr. DOHERTY.) If we three formed a copartnership and it was unsuccessful, we would not only lose the money we put in, but the rest of our fortune besides, if the liability was as great as that. A. Of course, because we should not create any new individual.

Mr. DOHERTY. That is the privilege that is given to men who form a corporation.

Mr. BENTON. I don't think it is a privilege; I think it is a power. I think as many persons have been ruined by going into corporations as by going into partnership.

But I do not wish to weary the committee; I have already talked longer than I meant to. It does not seem to me that the proposition made here is a fair one. I put it to you: You are asked to say that a man is not to be presumed to contract to take the necessary risk of the business into which he enters, but to say that the other person, the employer, shall bear this risk; and then to say that the two persons, employer and employee, shall not make an express contract about it. Now that is the worst form of the worst kind of paternal government. It is one phase of the idea that the legislature can cure everything. It is perfectly evident to me that if every co-employee was able to respond for his own negligence, there would be nobody here asking for any bill of this kind, not even a lawyer; and I must say my observation has been that there have been very few people here for this bill except lawyers.

Q. (By Mr. TORREY.) Is not this legislation which has been enacted recently, and more which is asked for, tying up the laboring classes, and forbidding them to contract, a return to the legislation of years ago, which the laboring classes were fighting for a long time to get out of? That is, wasn't their contest for years to be freed from these very trammels; and now they have got free, doesn't this seem to be returning to where they formerly were? A. It is to my mind precisely like legislating that you shall not charge but so much for a pound of sugar, or a day's work. That government is best which governs least. That government is the wisest and safest and ministers best to the people under it, which leaves the utmost independence

of individual action. All these statutes are in the wrong direction. Private employers of labor in Massachusetts employ about 160,000 people, according to the last census. The corporate employers of labor in Massachusetts employ 110,000. Now, I think it goes without saying that if the present rule is just and right for one class, it is for the other; and I don't believe the legislature of Massachusetts, having invited you and me and others to put our property into corporate form, in order that we may build roads and establish factories, and do what we have done to build up the business interests of the Commonwealth, will come in and apply a different rule of liability to us from that which they apply to others doing a like business by our side. I don't think it would be fair, and I don't believe the people of the Commonwealth would approve it.

Mr. FALL. If the legislature should see fit to repeal the law prohibiting employees from contracting out from under the provisions of this act, should you be willing that this bill should pass?

Mr. BENTON. I do not see any objection to giving the right to contract.

Mr. FALL. Suppose the employee was allowed to contract out of the act, do you think that you could employ all the men on your road that you wanted to by compelling them to sign that contract?

Mr. BENTON. I don't think we should have to compel anybody.

Mr. FALL. You think they would be willing to do it?

Mr. BENTON. I don't think there is any sensible man in the employ of the road who would not be willing to do it. Seventy-five per cent. of our employées are permanent men; that is, men who have been there a long time, some of them thirty years. They understand that they take the necessary risk.

Mr. FALL. Would they willingly sign it?

Mr. BENTON. I have no doubt of it at all. I have no doubt if you could get them all up here and ask them if they wanted this bill they would say, "No, we take the necessary risk of the business." Make them understand the present rules of law with regard to the liability of employers, and I think the majority of them would say, there was no reason for anything further. A good many of them are stockholders in this very road.

Mr. FALL. If they signed such a contract that would defeat the whole object of the bill, wouldn't it?

Mr. BENTON. I should hope so. I think the purpose is bad and it ought to be defeated.

Mr. FALL. That has been the effect of such a provision in the Gladstone bill in England, has it not?

Mr. BENTON. I don't know what the effect has been. I think it ought to. I think that the doctrine of Farwell *v.* Worcester Railroad is right.

Mr. BURDETT. Don't you think if such a law could be passed those men would be glad to have it passed, thereby increasing their chance to recover provided they were injured?

Mr. BENTON. I presume a good many of them would, and there are a good many of them who are stockholders who, I think, would not.

Mr. BURDETT. Then, except as they are influenced by their interest as stockholders in the road you think they would be glad if such a law was passed?

Mr. BENTON. I don't know. I should not want to say that the employees of our road were not fair-minded men.

Mr. BURDETT. That is assuming something.

Mr. BENTON. Well, you asked me the question and I must assume something. I say the proposed legislation is unfair, and I think it is unnecessary.

Mr. BURDETT. Are not most men willing to take all they can get?

Mr. BENTON. I don't think they would be willing to pick my poeket or yours.

Mr. BURDETT. Are they not willing to take all they can get under the law?

Mr. BENTON. Yes, sir, and therefore I don't think any such laws should be passed.

Mr. BURDETT. Provided any law should be passed?

Mr. BENTON. I never knew anybody to refuse to take advantage of a law which was for his interest.

Mr. SOULE. I have. Take the ursury law. I have known of men who paid usury refusing to take advantage of the provision in the law giving them the penalty.

Mr. BURDETT. Beeause they did not dare to.

Mr. BENTON. I hardly think that is a substantial basis for gentlemen like yourselves to legislate upon.

Mr. BURDETT. I don't know that it is. I am not speaking of it as indieating any opinion in favor of or adverse to the bill. You said that the employees on your road would oppose

the bill, and it occurred to me that perhaps they would do so because they thought it was policy to do it.

Mr. BENTON. I think if you should empanel a jury of a hundred of the average engineers, conductors and firemen, the most intelligent men on the road (and of course you would go to the most intelligent men to get the true feeling), and let them try this question, let them examine it and decide it according to their sense of justice, you would defeat this bill. I have no doubt of it.

Mr. BURDETT. I don't want you to think that in asking these questions I am expressing or indicating any opinion.

Mr. ADAMS. This is upon the supposition that the law is framed for corporations.

Mr. BENTON. I supposed it was. I do not think it is fair or wise to apply the doctrine of implied contract, which, as between man and man, does exist, to corporations, without applying it to their employees. If you employ me to work in a powder mill, the law directly says to you that you impliedly contract with me to give me a powder mill equipped with all the appliances necessary to work safely. Is not that a good contract? And on the other hand you say to me: "You take the risks of a powder mill, with all the appliances to run that mill with safety. When I have done all I can to run the powder mill safely, you take the risks, and one of the risks is the danger arising from the negligence or carelessness of your fellow servants." One implied contract is as good as the other, and they are both right. If you take away one of them, take away the other. If you want to destroy the implied contract that the employee takes the risk of the business, then destroy the implied contract that the employer gives him suitable machinery, and let them contract as they like.

Mr. SOULE. I will say a few words in reference to this matter, though I did not come here supposing that the opponents of this proposed legislation were to be called on this morning. It was my mistake. I thought that my suggestion the other day was adopted, that the promoters of this bill should be heard, and then the rest of the day would be occupied with your other business, and that we should come at some other time. I came down this morning expecting to try a case in the Superior Court, but it did not happen to be reached. I do not propose to make any extended or elaborate discussion of the questions involved, but will say a very few words.

The promoters of this legislation come here assuming that because the principle exists in the common law which is shortly

stated by the phrase *Respondeat superior*, they are right in asking for this legislation; and they say, if I understand them, that the whole difficulty comes from an error which has crept into what they are pleased to term "judge-made law." Now, that phrase "judge-made law" is a sounding phrase, and, as used by them, is intended to cast a reproach upon that part of the existing law which they refer to by that name, and when they cast that slur upon the existing state of the law they cast the same slur upon the phrase *Respondeat superior*, on which they base their whole proposition here. That is "judge-made law" in the same sense in which the decisions of our Supreme Court on this question of employers' liability are "judge-made law." They are all and each the expression of the Court as to what they understand the principles of justice to require under the circumstances of the several cases. It is upon that that all of what is called "judge-made law" stands.

Now, if you go back to this doctrine of *Respondeat superior*, it is certainly very difficult to base it upon any principle of right and wrong. A man who is in your employ, driving your carriage, if you please, and you are not in it, runs against somebody, hurts him, breaks his carriage; that somebody may recover of you. You had nothing to do with it. You employed your man because you supposed and understood him to be a careful man. The result would have been the same whether it was your carriage or his carriage, or some third person's carriage. You have no connection with the accident itself, but because the horse was yours which was driven, and the carriage was yours, and the man was driving it at your request or under your instruction, you are held responsible. Even if you had told him not to go over that street where he went, it would make no difference. Now, it is a pretty far-reaching application of any principle of right and wrong which should make the owner of that carriage liable for such accident; but that is the doctrine of *Respondeat superior*. Now, that doctrine, for the purposes of the promoters of this legislation, is a fine one, and "judge-made law" is excellent as far as it tells on their side, but they think "judge-made law" is the sum of all iniquities so far as it tells in opposition to what they wish to accomplish. So that I do not suppose this committee will be affected in any way by this cry of "judge-made law!"

The question whether this legislation which is asked for ought to be made or not, I suppose depends upon the question whether in the nature of things it is proper, whether there is such a state

of things that justice requires that the employed should be aided by such legislation. If the principle of justice is not at the bottom of it, if the burdens already put upon the employer are large enough, if the law as it now stands gives the employed every protection which it is just as between him and his employer that he should have, of course this legislation ought not to be. In other words, if the employer is already under as great liability as he ought to be, looking at what is fair and right as between him and his employee, the burden laid upon him ought not to be increased by legislation.

Now, this whole thing seems to me to be in a nut-shell, and it seems to me that it has been stated over and over again here, and that it is entirely unnecessary, probably that I should say a word about the matter. It was stated in the case of Farwell, by Chief Justice Shaw, and it has been stated here in various forms of expression this morning by Mr. Benton, that when one enters the employment of another, by doing so he assumes the risks which are incident to that employment. Those risks, I mean, which all reasonable care on the part of his employer cannot eliminate from the business. An employer is bound to use all reasonable diligence to make the employment as safe as from its general character and purpose and what it necessarily involves it can be, but the man who runs a powder mill is not under any obligation to make it as safe a business as the man who runs a cotton factory or a blacksmith shop. As we all know, there are elements of danger in the manufacture of powder which there are not in the spinning and weaving of cotton or in the work of a blacksmith's establishment, and nobody, not even the promotors of this legislation, would ask you to pass a law which shall require the manufacture of powder to be as safe as the making of cotton cloth. But it is the duty of the manufacturer of powder, as between him and his employee, to use all reasonable diligence that his powder mill shall be as safe in its construction and in the implements which are used, as the nature of the business will allow. Beyond that he is not under any obligation to go. He knows, as we know, and the employee knows just as well, that when one goes into the employment of another, whether it be in the making of powder or in doing any other business where other employees are employed, one element of insecurity in the business is the fact that men are not perfect; that men make mistakes, — the best of men; that employees make mistakes; that competent, skilled, experienced, faithful employees at times make mistakes, become negligent, do something

wrong, or fail to do something which ought to have been done, which results in mischief, and that possibility of error on the part of their fellowmen is one of the elements of danger which enters into the employment, and therefore it is one of the risks which the employee takes. It is said that the doctrine that the employee by implication assumes the risk is "judge-made"; but as has been said here, it is not a judge-made implication, it is an implication which occurs to every man the moment he thinks of going into the employ of another. The element of the possibility of mistake on the part of other men employed is one of the dangers which everybody has to consider, which every contract is made under, and when judges have that so, it is not that they have made any new law, but simply that they have declared the necessary meaning and scope of what a man does when he goes into the employ of another in any business.

Now, this legislation asks you to change this thing, to make the law different from what the common sense of the community has heretofore regarded as exact justice between the parties. This legislation asks you to make that law which has been regarded heretofore as unjust, as not justice, as not right and fair and reasonable between the parties.

Now, what reason do they give for it? They come with a plausible and an effective cry. They picture to you the man who has suffered from an accident, whether it be on a railroad train or somewhere else; they tell you of his agonies, of his helplessness, of his crippled condition afterwards, of the destitution of his family, and so on, and they say, "This man has suffered a loss — where should the consequences fall?" And they argue to your feelings, to your sympathies, to your sentiment, rather than to your reason, and ask you to jump to the conclusion that the consequences should fall upon the employer, no matter what he has done, no matter how diligent he has been for the purpose of preventing such accidents, and although it is perfectly clear that the accident and injury resulted not from any negligence on the part of the employer but from negligence on the part of another employee which could not be foreseen and could not by any diligence on the part of the employer have been provided against. On whom shall the consequences fall? Some of the consequences of those things it is impossible to remove from the person who has suffered. No law which you can make restores a man's limb, and it is not in the expectation of doing anything of that sort that this law is asked for; but it is asked on the ground that this employee has suffered and

somebody ought to pay him something, and they make this great jump — the logic not carrying them over, reason not carrying them over, a sense of justice not carrying them over; they appeal to a sentiment and ask you to compel the employer, no matter how far removed he may be from all moral responsibility for the occurrence, to pay the man who is hurt simply because he is in a bad situation; that is all. There is no other reason.

Mr. DOHERTY. Is it not partially, Judge, because he was at the time he was injured engaged in a dangerous business carried on by the corporation for their own benefit?

Mr. SOULE. No, it is not for that, because that reasoning would not carry you there. He knows when he goes into it that it is a dangerous business.

Mr. DOHERTY. So does the investor who puts his capital into the corporation.

Mr. SOULE. The investor does not put him there; he does not go there against his will. The employee goes there of his own free will, for his own profit, for gain, just as much as the man who runs the business does it for profit, for gain.

Mr. DOHERTY. Yes.

Mr. SOULE. A man undertakes a dangerous business, as he has a right to do, for gain, and his employee goes into that business voluntarily, as he has a right to do, recognizing its dangerous character, for gain; not as a matter of sentiment, not as a matter of duty, but solely and purely for the sake of gain, so that in that particular the employer and the employee are on precisely the same level.

Mr. DOHERTY. Except that this question arises, How far is it unfair or unjust to say that the employer who gets the advantages of the gain or profit from the manipulation of that enterprise should bear the results of its being dangerous?

Mr. SOULE. There is no reason why we should, for those things which happen not through any negligence of his own. The question assumes that the employer is under some peculiar obligation and duty to the employee for going into his service, whereas it is a matter of equality between them. The man may go or not as he pleases; he makes his own bargain, he accepts his wages, knowing what the possibilities with reference to danger are. There is no principle that I can see which should reach this case any more than the case of inevitable accident for which nobody is responsible. It would be just as proper to require by law that the employer should pay the employee for

injuries sustained by inevitable accident as to ask him to pay for injuries sustained by the negligence of a fellow-servant. His responsibility is just as remote in the one case as the other. In neither case could he do anything which should prevent the accident; in neither case could he foresee the accident. In both cases he has gone into the business for the purpose of making money, and in both cases the employee has gone into the business as his employee for the purpose of making money. There is no reason, there is no argument, there is no statement, that I can think of, which would make it any more reasonable that he should pay for an injury caused by a fellow-servant's negligence, than that he should pay for an injury caused by inevitable accident.

Mr. TORREY. I should like to call your attention to this proposition, if you are willing. Is there any more reason why the investor in that enterprise should compensate the employee for the loss which the negligence of his fellow servant has brought upon him than that his fellow employees should share the loss?

Mr. SOULE. Should pool in with him?

Mr. TORREY. Exactly.

Mr. SOULE. I can see no reason.

Mr. TORREY. Should not the loss fall where it happens to? Each one takes the risk of the business, and should not the loss fall where it happens to?

Mr. ADAMS. The loss does, does it not?

Mr. TORREY. No.

Mr. BENTON. Is it not the fact that the profit upon railroad investments in this Commonwealth has been something less than four per cent.?

Mr. SOULE. I am not familiar with these statistics. A good deal has been said about the Gladstone bill, and it has been presented here as if the fact that this bill has been passed and become a law in England was a strong argument why it should become a law here; and of course it is true, that so far as in any other country, or State, or nation, there has been legislation in the direction which the promoters of this scheme desire to go, there is a suggestion that some people, some communities, have thought it desirable that the law should be changed. But in taking this Gladstone bill as a foundation, the promoters overlook or keep out of view, so far as what they wish is concerned, the peculiarities of that bill. There are peculiarities in it which seem to me to grow out of the fact and to recognize

the fact that the bill itself is not founded upon any principle regarding legislation in behalf of the employee. It is apparently a make-shift affair, else why does the law itself limit the amount which a man may recover, no matter how much he has suffered? Why does it limit the amount which he may recover to a proportion of the amount of wages which he received, if he has a right, according to the laws of eternal justice, to recover whatever damage he receives under those circumstances? It seems to me that the mere fact that the law does provide such a limitation goes very far to show that the framers of it and the passers of it were fully aware that it was not founded in any right which a person who had suffered harm had to compensation for the injuries which he had received. But it is not proposed in the legislation which is asked for here, as I understand, to make any of the limitations or to throw any of the protective features around the employer which are thrown around him in the Gladstone bill, but it is assumed in asking for legislation here that the Gladstone bill recognizes a principle entitling the employee to recover compensation and that therefore the same doctrine ought to prevail here. But, as I said, it seems to me rather that the Gladstone bill is a recognition of the fact that there is no principle, but that they are throwing out something, they are promising something, they are conceding something, and it is not intended in the legislation asked for here that there shall be any mutual concession, as there is in that bill.

The CHAIRMAN. What troubles me in this matter, Judge, is something like this: Corporations have to act through employees, and as they enjoy some privileges at the hands of the legislature, ought we not at least to put them on an equality, so far as liability is concerned, with individual employers of labor?

Mr. SOULE. They are.

The CHAIRMAN. Individual employers to some extent, give directions to their employees themselves and are thus held liable; while corporations, unless we pass some law about it, speak only through some of their employees, and ought not some of their employees be regarded as the corporation, as their agents?

Mr. SOULE. The thing is reached, it seems to me, and the difficulty which seems to be on the chairman's mind is met, for all practical purposes, by the law as it stands. A corporation is responsible under the existing state of the law, with reference to a great many matters. A corporation is responsible for the premises in which it does its work, for the machinery with

which it is done, and I do not know of any situation, any case, any circumstances, in which there is any injustice done to anybody where there is a distinction made in favor of a corporation as against an individual employer. It is perfectly true that the individual employer is exempt to-day from liability for injuries done to his employee by reason of the negligence of a fellow employee. It is not a railroad or other corporation merely that is thus exempt; it is every employer. But for certain things they are both responsible, although in neither case are those particular things made or put in place or the fitness of them judged of by the employer himself.

Mr. BENTON. May I put an illustration, Judge?

Mr. SOULE. Certainly.

Mr. BENTON. Take Mr. John P. Squire. He employs a large amount of labor in his pork-packing establishment; he has foremen and superintendents; he can act practically in his business only by agents. He cannot transact that business himself; it is beyond the reach of any one man. If you make corporations liable for the acts of their servants upon the ground that they can act only through their servants, should not the law be broad enough to reach all persons who cannot practically act in the management of their business? Take a farmer who sends out two men with a mowing machine. One is boss and the other goes with him to assist him.

The CHAIRMAN. Take the case of a small employer; he gives directions himself personally to his laborers; whereas, if he extends his business so that he employs somebody to superintend it for him, should he escape liability for the acts of the person representing him.

Mr. BENTON. I think this suggestion of Mr. Lincoln last year, "One entrusted by the employer with authority as complete as his own and equally extensive over the business of the employer, while in the exercise of such authority," covers your case. I do not know that anybody would object to that.

Mr. TORREY. Is not the distinction really in your mind not between corporations and individuals, but between large and complex operations and small and simple ones? That is, as brother Benton says, would not the same rule apply to Mr. Squire as to the Fitchburg road?

The CHAIRMAN. I think it would, precisely.

Mr. BENTON. There are many corporations where the managers are the owners, their people all know them, they are practically the persons who manage the business, and they exercise

much more personal supervision than Mr. Squire can or than many large firms can.

The CHAIRMAN. The point that I had in mind was, that we should not exempt people from liability because their business is extensive, but that we ought to make it as nearly equal as we could.

Mr. BENTON. Why does not the suggestion of Mr. Lincoln, to which I have referred, meet that point? "One entrusted by the employer with authority as complete as his own and equally extensive over the business of the employer, while in the exercise of such authority."

Mr. SOULE. I don't know that there is any occasion to say anything more. I think that the difference between the position of the promoters of this scheme of legislation and of its opponents must be clearly understood by the committee by this time, and if that is so, I do not know that anything can be accomplished by any more talk about it. There are, however, one or two little matters which are incidental. They do not affect the great question, but they have been spoken about here and it is proper, perhaps, that I should say something about them.

One thing which has been spoken of is the case of Mackin *v.* The Boston and Albany Railroad.

The CHAIRMAN. We shall hear a great deal about the case and would like your explanation of it.

Mr. SOULE. It is simply this. A brakeman was injured on a car which had been delivered to the Boston & Albany road at Albany, and which had come from somewhere in the west, loaded with flour, I think, but of course it is immaterial what, the car being owned by the Merchants' Despatch Transportation Co., not by the Boston & Albany Railroad. It appeared that when the man was injured, out here in Brookline I think it was, the car had gone out there to be unloaded, had been unloaded and was being taken on to a freight train for the purpose of being brought into Boston, as it necessarily must in order to be returned to where it belonged. The car was attached to the train, becoming the rear car of the train. Just before the brakeman who was injured got up on it, another brakeman had gone up, I think, at any rate had stepped upon the grab-iron, as it is called, by which the brakemen help themselves up from the ground to the top of a car, and gone over it in safety. This brakeman attempted to haul himself up until he could get his feet on the grab-iron lower down, and one of those rods on which he had his hand gave way, he dropped down and was

injured by a wheel passing over his hand. It appeared that the Boston & Albany road had a sufficient corps of inspectors and a sufficient body of laborers, with all proper material and means for making repairs at Albany, at Pittsfield, at Springfield, at Worcester and at Boston, and that it was the duty of the inspectors at each of those places to inspect every car that came to those places from either direction and throw out, as it is termed, every car which was not in a condition to do its work properly. There was no evidence, as there naturally would not be any evidence, as to what was done at either of those places with reference to this particular car, because unless it was thrown out for repairs no memorandum would be made with reference to it, as you see very well; so that that was the whole evidence about it. Judge Rockwell tried the case in the Superior Court and ruled that the duty of a railroad company with reference to a foreign car coming on to its road and drawn over its road was precisely the same as its duty with reference to its own cars; that is, it was an absolute obligation on the part of the railroad to furnish safe cars, cars in a proper condition. The Supreme Court said that the law requires the connecting road — the Boston & Albany Railroad in this case — to draw over it the cars which are delivered to it by connecting railroads for the purpose of being drawn, and that they satisfied their duty to their employees by providing proper inspectors and repairers for the purpose of inspecting these cars and seeing that they were in a proper condition. The cars not being theirs and being the cars of other corporations which they were obliged by law to carry, they fulfilled their duty if they furnished proper and sufficiently numerous inspectors and repairers, with materials to repair, and that if by reason of negligence on the part of the inspectors this car went along in an unsafe condition, it was the fault of fellow servants.

That is the whole of that case, recognizing, as you see, a full liability and duty on the part of the road as to its servants so far as it relates to its own cars which are furnished for their use; recognizing a difference between that duty and its relations to its servants with reference to the cars of other owners which the law compels them to carry when delivered to them for that purpose.

Mr. Mason. Was this defect in the grab-iron apparent until it actually fell?

Mr. Soule. Not at all. That is, there was nothing to show that it was. The man did not see any defect before taking hold of it.

Mr. BENTON. Suppose the court had ruled in the Ford case, where Judge Colt gave the opinion, that the company's duty was not the same as it was with regard to its own cars, but that the servants or agents who were bound to see that the car was in repair were not the fellow servants of the brakeman, don't you think it would have stood under the present law in Massachusetts?

Mr. SOULE. No; I don't think it would.

Mr. BENTON. I do. I don't see how you can distinguish it from the case of Ford *v.* Fitchburg Railroad where the court held that the persons who kept a locomotive in repair were not the fellow servants of those who run it.

Mr. SOULE. The chairman asked the question the other day, or, if not the chairman, one of these gentlemen here, whether the call for this legislation did not arise very largely from the fact that the fellow servant who was guilty of the negligence was not able to respond in large damages to the person injured. Of course, the committee all know, that as the law now stands, there is a remedy for the servant who is injured, against his fellow servant whose negligence caused the trouble; and the meaning of the question was, I suppose, to ask the gentleman who represents this proposed legislation, whether, if there were an opportunity in fact to recover compensatory damages and *collect* them of a fellow servant, anybody would suppose there was any necessity for this legislation; and, it seems to me, that that question touched the bottom of the motive in asking for this legislation. Not that the law is not right, but that some men are poor.

Mr. DOHERTY. That is the reason of the liability of a railroad to passengers, is is not?

Mr. SOULE. Because some men are poor? No, not at all, if I understand your question, sir.

Mr. DOHERTY. Then why should not a passenger look to the employee whose negligence causes his injury, if that is a proper thing for a servant to do?

Mr. SOULE. Because the corporation has agreed to carry him. The relation of a passenger to a corporation is entirely different from that of the servant of the corporation.

Mr. DOHERTY. Settled merely upon considerations of public policy, however, is it not?

Mr. SOULE. Well, that is one way of stating it.

Mr. KENDRICK. If we should pass this Gladstone bill a corporation could contract with its workmen in the same way that it contracts to carry passengers.

Mr. SOULE. That would not be the result of the common sense of mankind with reference to what justice requires. It would be a special piece of legislation to compel them to do it.

Mr. BURDETT. It would be the common sense of the legislature.

Mr. SOULE. Well, I do not propose to say anything on that point.

Mr. TORREY. You have been there, Judge.

Mr. SOULE. Yes; I have been there.

Mr. DOHERTY. Judge, one question, if you please. I would like to ask if the operatives who run the most risk are not the lowest paid by the railroad corporations?

Mr. SOULE. I don't know about that, sir. I don't think that is true.

Mr. DOHERTY. Are not the brakemen the lowest paid employees in most railroad corporations?

Mr. SOULE. Perhaps so.

Mr. DOHERTY. And are not more injuries caused to them than to any other class of servants of a railroad corporation?

Mr. SOULE. I don't know. I don't think they run the most risk. I think engineers and firemen run a great deal more risk than brakemen.

Mr. DOHERTY. The firemen are paid about the same as brakemen, are they not?

Mr. SOULE. I don't know.

Mr. KENDRICK. Do you think that the increased burden which the passage of such legislation would put on the railroads would necessarily compel them to raise their rates so as to interfere with competing travel or competing carriage of freight?

Mr. SOULE. Every additional expense which is put upon a railroad, of course makes it necessary for it to earn more money in order to meet expenses. We have no means, Mr. Kendrick, of knowing what the effect of this legislation would be; no man has. If you are going to allow every man who is injured by the carelessness of a fellow servant to recover a verdict for whatever a jury chooses to give him, no man can be safe in limiting the sum at any particular point. I would not undertake to say what it would be; I do not think any man could say with safety. Everybody can guess, but nobody can give an opinion which is worth anything.

Mr. BENTON. Is there any reason why it should be applied to railroads any more than to any other corporations?

Mr. KENDRICK. I do not think there should be any difference in that respect, but we have naturally drifted into railroads because you are all railroad men.

Mr. BENTON. Here is a factory on one side of a street which is owned by a partnership or by one man, which is worth $250,000. On the other side there is a little factory worth twenty-five, or thirty, or fifty thousand dollars, owned by people of small means, organized as a corporation. Would you have one law on one side of the street and another law on the other?

Mr. SOULE. Take the case of a manufactory owned by an individual or by a corporation, on the one hand, and the case of a machine-shop or car-building establishment owned by a railroad corporation on the other hand — should there be any difference in the relations of the corporation to the employees in the one case from the relation in the other? And if there should be no difference between the relations of employers and employees in those cases, why should there be any difference when you come to the running of a railroad? Why does not the same principle govern in all those cases? I am unable to see.

Mr. DOHERTY. I remember, Judge Soule, being present in the Supreme Court and hearing you argue a case where one of the employees of a railroad corporation had been killed. It was claimed on behalf of the plaintiff that in attempting to get on the top of a car, there being an accumulation of ice on the side of the track, he was swept from the car, thrown under the wheels and instantly killed. It seemed to me that there was very great hardship in the decision of the court in that case. Do you think any change is necessary in the law to meet such cases? That hardly involves the question of negligence of a fellow servant, but in regard to keeping the road in repair, and the question of the right of the relatives of the person who was instantly killed to recover damages.

Mr. SOULE. That case was decided upon a principle which does not touch the matter under discussion here in any event. That case was decided upon this principle, that where the whole evidence in a case leaves the matter entirely in doubt, no verdict can be found for the plaintiff, and the court said in that case, which was the case of Corcoran *v.* The Boston & Albany Railroad, if I recollect right, that there was no evidence as to whether the man was in the exercise of due care when he was hurt, or how he was hurt, or that his death was not instantane-

ous, and that in the absence of any evidence on those points, the ruling of the court below was correct. It does not reach this case at all. I don't suppose anybody would suggest that there ought to be legislation that corporations should pay damages to employees in case of injury or death from causes unknown, or under circumstances unknown. That would have to be done in order to reach such a case as that.

Mr. BURDETT. Was the defence of contributory negligence set up in that case?

Mr. SOULE. They could not tell. There was nothing in the case which showed. All the evidence was that the man was seen at a certain time and the next that was known of him he was dead.

Mr. DOHERTY. The plaintiff undertook to show by circumstantial evidence that the man was swept from the car.

Mr. SOULE. They tried to.

Mr. DOHERTY. But the court held that there must be some evidence in the case showing that fact.

Mr. FALL. If an employee was allowed to contract out of the act would you have any special objection to this law?

Mr. SOULE. That is not the question about which I am talking. It is a question of reasonable and appropriate legislation.

Mr. FALL. Should you object to that legislation?

Mr. SOULE. I should object to anything in the way of legislation on this subject. I think that the law as it stands is right.

I should like to hand the committee a little pamphlet containing the arguments which were made upon the employers' liability bill before the committee on labor last year by the opponents of the bill. They are much more elaborate than have been made at this time, and I think they contain everything.

The CHAIRMAN. Have you anything to say, Mr. Fall?

Mr. FALL. I might have appeared here in behalf of large labor organizations, and I do appear, in a certain way, in behalf of a large labor organization, embracing, as Mr. Carlton has said, twenty or twenty-five thousand men; but I preferred to appear with limited authority, because these organizations asked to have a stricter liability imposed than I think we are likely, perhaps, to get. This bears, however, rather on my personal position in appearing here as counsel. It does not make any difference whether a man appears for one person or for a million as long as the legislation for which he asks is right. There can be no doubt in the minds of the committee or

of any one else that there are thousands of people in this Commonwealth desirous of such legislation. Why? Because it will give them better protection under the law than they have now.

There are objections made to this legislation as there are objections made to all legislation. Let anybody come here and ask for a bill which is not purely a private bill and somebody will oppose it; therefore we expect to meet objections to this legislation. The only question for this committee and for the legislature to decide is this, it seems to us, whether it is expedient and wise, *on grounds of public policy*, to enact such a law. In making objections to legislation it is always possible to state cases of apparent hardship. Something is said here about cases of apparent hardship. Something is said here about cases of poisoning; something is said about dynamite; something is said about powder mills; something is said about a cook spilling water on somebody's head. These are certainly extraordinary cases, but such cases as these, even if they come within the scope of any bill which you may recommend, should not defeat the legislation, for they are really *legal conundrums* — nothing more, nothing less. There is not the ghost of a chance that any such case will ever occur; and the legislature in determining as to the expediency of legislation should simply consider this question — Is it for the general interest of the State that such legislation should be made? You cannot do any more than make legislation to meet the majority of the cases. This is all the law ever accomplishes; it covers the majority of cases, but works injustice in extraordinary cases.

Now, the arguments made by my friends upon the other side are based upon this proposition to a large extent. There is no fault on the part of the employer; he has done all he could do. That means simply this — he does all that the law compels him to do, does it not? When they talk about obligation, about negligence, about fault; when they argue as they have argued here, they argue upon the existing state of things and the existing state of the law. We go beyond that, deeper than that. We do not say that there is any obligation now on the part of any employer to do anything beyond what the law compels him to do; we simply say that there ought to be such an obligation. We say there is injustice in the present condition of the law, and that you ought to go behind the law and imply a contract of liability instead of a contract of non-liability. Then you have a rule of negligence, then you have obligation, and then

you have fault. And we say further, that when you consider the question of public policy you ought not simply to inquire what obligation is imposed by the law now, but you ought to inquire, as if this were new legislation and you were sitting here to consider a question of first inception, what obligation *ought* to be imposed upon a railroad company or an employer?

Mr. BENTON. You mean, then, that the doctrine of Farwell *v.* The Boston & Worcester Railroad is wrong in principle?

Mr. FALL. I mean to say that the legislature should consider this question as if the case of Farwell *v.* The Worcester Railroad had never been heard of, and as if the reasons for and against it were considered for the first time.

Mr. BENTON. And decide contrary to the decision in that case?

Mr. FALL. Yes. Now, my friend Mr. Benton drags in Mr. Simmons. Well, lawyers sometimes set up a ten-pin for the sake of knocking it down. It is true that he appeared before last year's committee, but when he opposes the opinion of Judge Shaw he simply stands upon the same ground with the present judges of the Supreme Court, with the English Houses of Parliament, with the law of various States and the opinions of various law writers as to the expediency of this legislation. The English bill is a failure, and it is a failure because under the English law the employer can contract out of the act. As a matter of fact, the directors of the London & North-western Railroad stated to their employees, 90,000 of them, "We will not employ you unless you will sign a contract." There were large meetings held up and down the line of the road, and after some remonstrances, all the employees came in and contracted out of the act. How did the railroad company protect itself? It went to the insurance companies, who had made most careful examination of the probable liability, the probable cost to them of insuring each employee's life, and took out a general policy covering all liability for any accident occurring on the line of the road; and, if we may take the opinion of the leading law journal in England, after this law had been in operation a year, it had proved a perfect failure. The "London Law Times," as reliable a journal as is published in England, says that "in the whole of the first year of the operation of the act it was probable, according to the best estimate they could make of damages recovered, throughout the whole of Great Britain, that the amount paid in damages did not exceed three thousand pounds."

Mr. TORREY. In the first year?

Mr. FALL. In the first year of the operation of the act. This was an estimate made eighteen months after the passage of the act, and made for the first year of its operation; but courts of justice proceed much faster there than here. And the "Law Times" goes on further to say that so great a failure has been the operation of this act that "the unfortunate employer would almost be deemed justified in regarding his risk in the same extraordinary way as risk from lightning or foreign invasion; and, moreover, he can insure against this risk by the payment of almost nominal rates."

Mr. BENTON. Then the evil is not so great as you represent it to be.

Mr. FALL. Well, I don't know as I have ever said anything about the probable expense of this legislation: it is not my purpose.

Mr. BENTON. Then the evil or injustice which is done is not so great pecuniarily as you represent it to be.

Mr. FALL. The injustice is in the absence of liability. The money injustice I have just spoken of for the first time.

The time granted by the committee for this hearing has expired. I should gladly have tried to answer some of the objections of the counsel for the respondents, but I find it impossible to do any more than suggest a reply to some of them. In conceding a change in the law, by making the employer liable for the acts of his superintendent the whole *principle* contended for is conceded. A superintendent of a railroad is simply an agent for general purposes, as a conductor is for limited purposes. If the corporation should be made liable for the negligence of its superintendent while acting within the scope of his authority, why should it not be liable for the negligence of any other agent acting within the scope of his authority?

The injustice of considering the employee of a sub-contractor a fellow-workman with the employees of the original contractor seems to be conceded by one of our opponents; and this extension of the doctrine of common employment to the limit it is carried in Johnson *v.* The City of Boston is one of the severe hardships of which we complain.

Judge Soule says that this is not the only instance of "judge-made" law. But, if judges have no right to make law, is one usurpation of power any the less wrong because another instance can be cited? Do two wrongs make a right?

Mr. Benton cites another instance of a judge-made contract. Does this weaken the argument against this implied contract of

non-liability? This contract, made by the courts, is, it seems to us, not only wrong in principle but unsound in reason. Moreover, it is contrary to the spirit and policy of a statute passed in 1877 forbidding an employer from making a special contract with his employee excusing him from liability for negligence. (P. S., chap. 74, sect. 3.)

Again, an employer profits by the wisdom and loses by the negligence of his agents acting within the scope of their authority in every other instance; why should this be an exception? He grows rich or grows poor as his employees are wise or foolish. He must pay for his negligence. He must pay third persons for the negligence of his agents. Why in this single instance should he escape the consequences of his agent's act?

Why should a different rule of liability apply to the small employer who directs his own work and to the large manufacturer who directs it by a hand often more skilful than his own?

Why should corporations, whose business is done solely by agents, escape nearly all liability?

But the time has expired, and I have already trespassed too long upon your indulgence.

The CHAIRMAN. We will regard the hearing as closed.