BRIEF ON THE LEGAL ASPECTS OF SYSTEMATIC COMPENSATION FOR INDUSTRIAL ACCIDENTS

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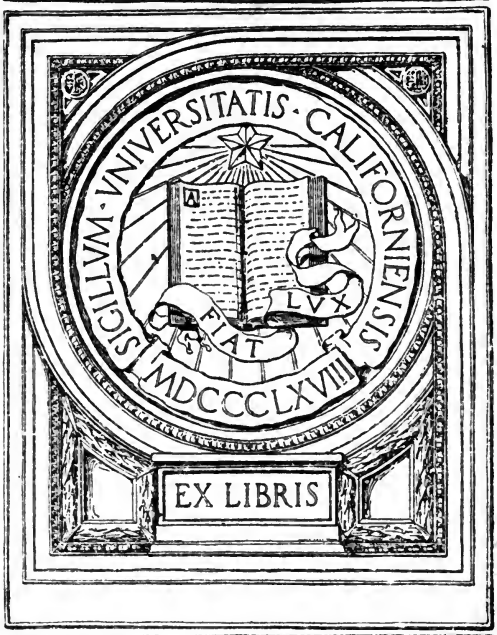

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ANALYSIS.

Brief on the Legal Aspects of Systematic Compensation for Industrial Accidents.

INTRODUCTION.

Systematic compensation for victims of industrial accident has, during the past generation, been instituted by most civilized states one after another, beginning with Germany in 1884.

Until the other day the United States took little interest in this movement. To-day systematic compensation is widely discussed; and it is being investigated by a federal commission, by commissions in Wisconsin, New York, Minnesota, Ohio, Massachusetts, New Jersey and Illinois, and by labor bureaus, trade unions and civic, industrial, legal, ecclesiastical and insurance bodies.

Three compulsory compensation laws of limited scope have already been passed—the Montana and the Maryland acts of 1909 and 1910, creating an accident and disability fund for coal miners, taking effect respectively October 1, 1910, and May 1, 1910; the New York Act of 1910, to amend the labor law in relation to workmen's compensation in certain dangerous employments, taking effect September 1, 1910,—and plans are presaged in great variety.

A number of employers in various branches of industry, desiring consideration of the legal aspects of the subject, and not unmindful of the possibility of inconsiderate legislation, have retained me to prepare a brief on the enlargement of workmen's indemnity for accident beyond the limits set by the common law, and especially enlargement along the line of systematic indemnity as distinguished from a broadening of the range of suits for damages—workmen's compensation as distinguished from employers' liability.

My clients have not organized to retain me, nor is there among them a trade association. Each acts on its own motion, deals with me independently and is entitled

to use the brief at discretion. None is responsible for, much less committed to any views or suggestions expressed in the brief.

The compensation system, whereby a workman receives for any industrial accident an indemnity prescribed by schedule, is a foreign and a comparatively recent invention. Its principle is strange to our institutions. Comprehension of the foreign laws and their workings is not yet widely diffused here even among ardent advocates of their principle. Indeed, English translations of the principal European laws were not available until about a year ago—being then published by our Department of Commerce and Labor.

This important and novel subject, so closely affiliated with other foreign social insurance schemes, still more important and even less widely understood, the American people are pressed to consider, not only with deference to the directions of our constitutional law, but, if lawful opportunities are to be wisely exploited, with that sober and discriminating judgment so peculiarly needed in the initial handling of a far-reaching question.

"Every man," said Francis Place, the "radical tailor," who played so influential a part in English reform in the earlier half of the last century: "Every man who "greatly desires the well-being of his species * * * "has no doubt felt * * * repugnance * * * at "finding himself compelled to abandon, as it were, the "notions he would fain indulge without alloy, and to "descend to calculations and comparisons of losses and "gains, of trade, commerce and manufactures, of the na- "ture of rent, profits and wages, the accumulation of "capital, and the operation of taxes. But he who would "essentially serve mankind has no choice; he must submit "himself patiently to the pain he cannot avoid without "abandoning his duty."[1]

[1]Wallas' Life of Place, p. 157.

PART ONE.

EMPLOYERS' LIABILITY.

A brief consideration of the law of employers' liability for accidents is advisable not only for its intrinsic interest but to compare it with the new proposals for systematic compensation and to indicate their point of departure.

Common law.

For the American workman an action for damages against the master is, at present, the only established form of redress for an injury suffered in the course of employment, and we remark, in this relation, that the shortcomings of the common law in denying a right of action to the heirs of a servant killed outright has long been cured by statute.

The common law holds the master liable only when the accident is due to his fault or neglect. It exonerates him when the workman's negligence contributed to the accident, when the accident is laid to a risk of the employment supposedly assumed by the workman, or when it is due to the act of a fellow servant.

This summary statement of common law principles gives no hint of the familiar complexities and inequalities incident to their application; and, without enlarging upon these we shall show by an illustrative but not exhaustive citation of statutes how far the principles have been modified by legislation.

EMPLOYERS' LIABILITY ACTS.

Negligence.

The defence of contributory negligence has been abolished by certain legislatures when the master's neglect of statutory safety requirements contributed to the accident.[2]

A rule of comparative negligence which holds the master liable where his neglect is grave in comparison

[2]See, for example, Federal Employers' Liability Act, § 4.

with the servant's has been enacted by certain legislatures.[3]

The Federal Employers' Liability Act of 1906, now superseded, provided, "All questions of negligence and contributory negligence shall be for the jury," and a like provision obtains in certain States.[4]

Assumption of risk.

The common law rule that a workman assumes the general risks incident to whatever trade he enters is qualified by the Federal Employers' Liability Act of 1908, "when the violation by a common carrier of any statute enacted for the safety of employees contributed to the injury of such employee," and in certain States the rule is qualified where the accident occurs through a defect in machinery, etc., of which the victim had given notice.[5]

Fellow servant.

Coming to the fellow servant rule, which is really a special application of the assumption of risk doctrine, we note, first, that the British Employers' Liability Act of 1880 modified it by making an employer liable for the neglect of his superintendents, etc.

This "vice-principal rule," as it has been aptly called, had already been adopted in some of our States in respect of railways, and it is has been considerably extended.

In certain States it is prescribed for all employments;[6] for railroad and mining operations;[7] for railroads exclusively;[8] for mines exclusively.[9]

In the following jurisdictions the fellow servant rule has been abolished in respect of all the servants of rail-

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[3]See, for example, Indiana, 1901, § 3520; Georgia Code, § 3026; see also Fed. Emp. Liability Act 1908; Ohio, Apr. 30, 1910; Mich., 1909, C. 104.

[4]See Ohio, Apr. 30, 1910; N. J., 1909, C. 83.

[5]Iowa, 1907, C. 161; Ohio, 1904, p. 547; Texas, 1905, C. 163.

[6]Ala. Code, 1901, § 8910; Colo. Ann. Stat., 1511a; Conn. Gen. Stat., 1902, § 4702; Mass. Rev. Laws, 1902, § 71; N. Y., 1902, C. 600, § 1; Ohio Ann. Stat., § 3365; Pa., 1907, C. 329; Utah Comp. Laws, 1907, §§ 1342-3.

[7]Nev., 1907, C. 215, § 1.

[8]Ind. Ann. St., § 7083; Va. Const., 102.

[9]Md. Code, § 195a.

way companies who are engaged in the work of transportation[10] and in respect of railways and mines.[11]

The most radical fellow servant statute is the Maine law of 1909 "relating to the employment of labor," and abolishing the fellow servant rule for all employees except domestic servants, farm laborers and lumbermen. We note, however, a Colorado statute embracing all employees.[12] The principle of this act was sustained in the case of a mining company,[13] but the act was later declared inoperative because of a defect in its passage.[14]

Scope of legislation.

The above legislation is not very far-reaching. A number of States leave the master's common law defences almost if not quite intact. And no State has qualified any of them for all masters. Invariably are certain employers selected, and the selective process proves that the principle of the defences is not impugned, else would they be taken away from the small employer—farmer, householder, shopkeeper and the like.

Furthermore, while the hazard of the work usually suggests the principle of selection, actual selection is mainly confined to the operation of railways. In short, the assumed ability of railway companies to pay damages largely defines the range, if it does not avowedly give the reason of the statutes. And this discrimination involves a more striking discrimination among workmen—those employed by our most conspicuous and influential kind of

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[10]Ark., 1901, C. 6951; Fla. Con. St., 1906, § 3150; Iowa Code, § 2071; Kansas Gen. St., 1901, § 5058; Minn. Rev. Laws, § 2042; Miss. Const., § 193, Code, § 4056; Mont., 1905, C. 151; Neb., 1907, C. 48, § 1; New Mex., 1907, C. 44; N. C. Rev. St., § 2643; N. Dak. Code, 1905, § 4400; Oregon, 1903, p. 20, § 1; S. Car. Const., Art. 9, § 15; S. Dak., 1907, C. 219, § 1; Tex., 1897, C. 6; see also U. S., 1909, C. 149, § 1; Dist. Col., 1905, C. 219, § 1 (applies to all common carriers).

[11]Oklahoma Const., Art. 9, § 36; Missouri R. S., § 2873, Laws 1907, p. 251.

[12]1901, p. 161.

[13]Vindicator Min. Co. *v.* Firstbrook, 36 Col., 498.

[14]Rio Grande Sampling Co. *v.* Catlin, 40 Col., 450.

corporations are given a benefit withheld from the generality.

A review of employers' liability legislation shows, taking the country and the employments by and large, no disposition to absolve the servant from the consequences of his own neglect except in a rare recognition of the comparative negligence doctrine. And there is little disposition to hold the master liable for the general risks of industry. We do find, however, a wide dissatisfaction with the fellow servant rule, but only in respect of certain employments—chiefly the operation of railways.

LEGISLATIVE POWER OVER COMMON LAW DEFENCES.

Having outlined the actual state of employers' liability legislation it is material to estimate in a general way the constitutional power of the legislature over the subject.

Fellow servant— ***R. v. Mackey.***

In Missouri, etc., R. *v.* Mackey,[15] the Supreme Court of the United States upheld a Kansas statute abolishing the fellow servant rule in the case of railway employees, when the victim is not in fault, saying: "Whatever care and precaution may be taken by a "company in conducting its business and selecting its "servants, if injury happens to its passengers from "the negligence or incompetency of the servants, re- "sponsibility at once attaches to it. The utmost care on "its part will not relieve it from liability, if the passenger "injured be himself free from contributory negligence. "The law of 1874 extends the doctrine and fixes a liability "upon railroad companies when injuries are subsequently "suffered by employees, though it may be by the negligence "or incompetency of a fellow servant in the same general "employment and acting under the same immediate direc-

[15]127 U. S., 208.

"tion. That its passage was within the competency of the "legislature we have no doubt."

No statutory qualification of the fellow servant rule has yet been adjudged unconstitutional in respect of its general principle. There is some difference of opinion, however, whether an employer can be held for the neglect of a vice-principal whose employment and duties are prescribed by statute. The Supreme Court of the United States and the Supreme Court of Illinois affirm liability,[16] but the Pennsylvania Supreme Court invalidated an act making a mine owner liable for accidents due to neglect of a foreman whose function and duties were defined by statute, saying: "This is a strong case of binding the consequences of the fault or folly of one man upon another * * * it is civil responsibility without blame and for the fault of another."[17]

In any event the rule should not be relaxed in the case of a servant who is practically forced upon the employer by influences unrecognized by law—by trade union pressure, for example. I do not mean that a "closed shop" should suggest immunity or an "open" one liability, but simply that labor conditions be given circumstantial weight. Thus, in Farmer *v.* Kearney it appeared that a workman whose negligence caused an accident was by trade union custom practically forced upon the employer. The court held that a statute making the employer liable for a vice-principal's negligence did not apply, saying: "When the workmen delegate to a labor organization which they have joined (and to others in privity with their own organization) the right of selection and superintendence, they agree to accept the membership of their fellow workmen in those organizations, and the action of

Trade unions.

Farmer v. *Kearney.*

[16]Wilmington Min. Co. *v.* Fulton, 205 U. S., 60; Henrietta Coal Co. *v.* Martin, 221 Ill., 460.

[17]Durkin *v.* Coal Co., 171 Pa., 193; see also Williams *v.* Coal Co., 44 W. Va., 599.

those organizations, *ipso facto,* as a good and sufficient guaranty to them for their individual safety and protection, so far as the contractor is concerned."[18]

But while a strict and sweeping application of the fellow servant rule has, in certain forms of modern industry, brought injustices not foreseen when it was first declared, the principle is not essentially unjust. If, for example, a laundress employs two helpers and one be injured through the other's fault, the common law, in refusing to hold her liable, averts a crushing and unmerited burden.

Mr. Augustine Birrell's gibe at the rule "Abinger planted it, Alderson watered it and the Devil gave it increase," epitomizes a now widely held opinion, but even in England the rule still stands in common law actions, except when the servant is a vice-principal. And Chief Judge Parker of New York has referred to a Pennsylvania decision already cited[19] as intimating that, in this country, the rule could not be entirely swept away, though, personally, he was of a different opinion.[20]

Qualification of the fellow servant rule, when contributory negligence is absent is, relatively, a conservative step in point of law, for, after all, the master, in theory of law, selects the servants even when he employs so many as to forbid actual selection on his part, and to hold him responsible for their delinquencies is but making him liable for all negligence in the conduct of industry not attributable to the victims themselves. And it is also relatively unimportant in point of fact, for the percentage of accidents attributable to fellow servants is not large—indeed, the New York Employers' Liability Commission concludes that "accidents by fault of a fellow servant are comparatively few."[21]

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[18]115 La., 722.
[19]National Protective Ass'n *v.* Cumming, 170 N. Y., 324.
[20]Durkin *v.* Coal Co., 171 Pa., 193.
[21]Report, p. 67. See also *infra,* p. 15.

Unquestionably the legislature may ordain that "all questions of negligence and contributory negligence shall be left to the jury," and so also the question of assumption of risk. For there is here no attempt to take away any of the common law defences. There is simply a declaration that the jury may estimate their weight in view of all the circumstances. Negligence.

As yet there has been no attempt expressly to abolish the defence of contributory negligence, but the Supreme Court of Connecticut, in an interesting and acute opinion, discovered an attempt in the Federal Employers' Liability Act of 1908. "The doctrine of comparative negligence," said the court, "as it has been generally understood where "it obtains, is that slight negligence shall not defeat an "action against one guilty of gross negligence. In the "form assumed by the Act of 1908, it sanctions a recovery "where the plaintiff has been guilty of gross negligence "and the defendant of none at all. To hold the carrier "liable in such case because of the imputed negligence of "any officer, agent, or employee, whether the latter be at "the time engaged in inter-state commerce or not, seems "to us not an appropriate or legitimate regulation of com- "merce between the States, but rather an arbitrary and "unlawful deprivation of property, within the meaning "of the Fifth Amendment to the Constitution of the "United States. *Hoxie* v. *R.*

"It serves to confirm this conclusion that the liability "thrown upon the carrier by Sec. 1 is not confined to "damages resulting solely from the negligence of its offi- "cers, agents, or employees. It is fixed and complete if "such negligence contributes in any degree to the injury, "although it be partly due to the act or omission of a mere "stranger. There can be no contribution between wrong- "doers. If, therefore, the carrier in such a case could be "held under the statute, his property would be taken to "pay for a wrong mainly, perhaps, done by one with whom "it stood in no contractual relation and who, except for

"this particular act, had no connection with commerce "between the States."[22]

Abolition of defences.

If a legislature could wholly abolish the three defences of fellow servant, contributory negligence and assumption of risk, it would declare, in effect, that whatever accident may arise in course of the employment shall be charged to the master. In the event of suit the master would be defenceless against an adverse verdict, if not indeed unable to present evidence in mitigation of damages. Legislation thus imposing upon the master an absolute liability regardless of fault would substantially involve the underlying principle of the foreign compensation laws, and we shall refer to it in our discussion of this principle. But, considering such legislation in its direct bearing, I am of the opinion that it would be unconstitutional. (?)

For the prohibition laid upon every American legislature that no one shall be deprived of property "without due process of law" means at least that in case a claim be made on his property a man shall have his "day in court." A "day in court" means not only an impartial tribunal to hear his plea, but opportunity to support it by evidence, and the common law upon which this constitutional prohibition is historically based has ever allowed a litigant to deny or explain allegations. A right to sue at common law implies a right to defend which cannot be emasculated.

FEDERAL LEGISLATION.

Congress has lately injected a disturbing element into our problem by asserting, in virtue of its commerce power, a right to pass employers' liability laws.

Act of 1906.

In 1906 Congress passed an employers' liability act affecting common carriers, but the Supreme Court pronounced it invalid in respect of carriers doing both in-

[22]Hoxie *v.* N. Y., N. H. & H. R., 82 Conn., 352.

terstate and local business within a State because it did not clearly limit its application to the former. The Court said, however, "we fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted on that subject are strictly confined to interstate commerce, and, therefore, within the authority given to use all means appropriate to the exercise of the powers conferred."[23]

Act of 1908.

On April 22, 1908, Congress passed a new act in which it attempted to make the segregation of local from interstate commerce required by the decision of the Supreme Court by substituting for "shall be liable in damages to *any of its employees,*" "shall be liable in damages *to any person suffering injury while he is employed by such carrier in such commerce.*"[24] The new act has been affirmed in inferior federal courts[25] and will soon be submitted to the Supreme Court.

Hoxie v. *R.*

Meanwhile a workman in Connecticut attempted to enforce a claim under the act in the state courts, and the Supreme Court of the State held that Congress did not intend that the tribunals of the several States should enforce the federal law in question; but the Court speaking by the eminent jurist, Chief Justice Baldwin, volunteers its opinion upon the act itself: "By Sec. 1," says the court, "the rule of *respondeat superior* is extended so as "to make the common carrier by railroad between States "responsible for an injury received by one of its servants "in the course of his employment in inter-state commerce,

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[23]Employers' Liability Cases, 207 U. S., 463, 495. The act has been enforced in federal territory, El Paso R. *v.* Gutierrez, 215 U. S., 87.

[24]Italics mine. See Act Apr. 5, 1910, giving the United States and the state courts concurrent jurisdiction, and the Senate debate, Mar. 30-Apr. 1, on this provision, and also on the provision imposing a federal rule of distribution of damages in case of death.

[25]Watson *v.* St. Louis, etc., R., 169 Fed. R.; Zikos *v.* O. R. & N. Co., 179 Fed. R., 893.

"due in whole or part to the negligence of any of its offi-
"cers, agents, or employees, whether they are or are not,
"at the time, themselves employed in such commerce. An
"inter-state carrier is generally also an intra-state car-
"rier. It may have a considerable force of officers, agents,
"or employees, engaged in business that is wholly local.
"Does the power to regulate commerce between the States
"go so far as to warrant imposing on a carrier responsi-
"bility to a servant engaged in that business for the con-
"sequences of the negligence of another of its servants,
"occurring when the latter was not engaged in it, or in-
"deed in any business for the common employer? If a
"freight clerk, whose duties are confined to keeping tally
"of goods consigned from one point to another in the same
"State, in an office devoted to that purpose, should care-
"lessly discharge a rifle, a bullet from which should hit a
"brakeman on an inter-state train, a mile away, we are
"of opinion that it could not fairly be deemed a regulation
"of inter-state commerce to hold the common employer
"responsible for the injury. The Employers' Liability
"Cases, 207 U. S., 463, 498. Nor would it be such a regu-
"lation to make an inter-state railroad company liable to
"a train hand who, while going to work, was accidentally
"struck by an automobile directed by one of its vice-presi-
"dents or land agents while on a pleasure drive. * * *
"Except so far as the Act is a regulation of commerce be-
"tween the States, its enactment was beyond the power
"of Congress. That it remotely affects such commerce is
"not sufficient, if that result is only to be secured by in-
"vading the settled limits of the sovereignty of the States
"with respect to their own internal police. Williams *v*
"Fear, 179 U. S., 270, 278; Keller *v.* United States, 213
"U. S., 29 Supreme Court Reporter, 470. The Act can-
"not be interpreted as referring only to negligence of
"employees while engaged in inter-state commerce. It
"substantially re-enacts in this particular the words of
"the previous Employers' Liability Act of 1906 (32 U. S.

"Stat. at Large, 232), and must be presumed to have been "drafted with knowledge of the judicial construction "which those words had received. The Employers' Liabil- "ity Cases, 207 U. S., 463, 500."[26]

The state court demonstrates, in my opinion, that Congress has failed to meet the objections made by the Supreme Court to the earlier statute. The strength of its reasoning and the cogency of its illustrations should be most persuasive to the federal tribunal. I shall not, however, argue here a case soon to be fully argued before the Supreme Court, but I do not hesitate to say that if the statute be valid it should be promptly repealed. It opposes the wholesome tendency towards systematic compensation and it might seriously interfere with systematic compensation in the States by subjecting our most important group of employees—the railway men—to a less favorable régime.

CONCLUSIONS ON EMPLOYERS' LIABILITY ACTS.

Statutory enlargement of employers' liability, or, to put it in another way, of workman's ability to maintain damage suits, may, as distinguished from the European compensation systems, be called the Yankee notion for promoting workmen's litigation.

The plan is wasteful: Each year an enormous sum is expended for liability insurance, legal costs and damages. When to these expenditures we add the amounts paid voluntarily and by way of compromise we have a yearly outlay by employers which under a systematic method of distribution would go far toward assuring reasonable indemnity to a great number of victims now uncompensated.

The plan is inefficient: A few injured workmen re-

[26]Hoxie *v.* N. Y., N. H. & H. R., 82 Conn., 352. Compare Bradbury *v.* C. R. I. & P. R., Iowa Supreme Court, Oct. 26, 1910.

ceive, after long delay, awards whose relation to their just claims is largely a matter of chance.

The plan serves no public interest: When an award is finally paid it is handed over in a lump sum to be husbanded or wasted as the case may be.

Despite the shortcomings of the plan, which be it remembered are largely the uncertainties and delays incident to all litigation, legislatures are still promoting it in one way or another and we shall consider later important questions in regard to its bearing upon the matter of systematic compensation.

PART TWO.

SYSTEMATIC COMPENSATION.

Systematic compensation for industrial accident will first be considered in its common compulsory form. Afterward we shall inquire whether or how far a voluntary form will meet our conditions.

I.

COMPULSORY COMPENSATION.

In passing from a régime of employers' liability for such injuries and for such amounts as shall be determined in an action at law to a régime of workmen's compensation for such accidents and for such amounts as shall be prescribed by statute, we encounter a new set of juridical economic and political ideas.

Instead of occasionally placing upon an employer the loosely estimated cost of a particular accident we have an attempt to impose upon employers generally a portion of the cost of all accidents. Instead of a few injured workmen receiving damages, which may be more or less than their due, we have rights to definite compensation for all accidents—rights which segregate the workmen affected into a preferred class, which, in effect, confer upon them a distinct status in the community.[27]

Instead of fault in accident being the vital point we have the fact of accident. In this relation we note the German allocation of the causes of industrial accident in 1897. Fault of employer, 17.30 per cent.; of workmen, 29.74; of both, 4.83; of fellow servant or other person, 5.31; unavoidable danger, 41.55; act of God, 1.27.[28]

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[27]See p. 118.

[28]See Report Wisconsin Bureau of Labor, 1908, p. 101.

Accepting these figures as broadly accurate, we perceive how far the legal responsibility of employers under the new régime outruns the idea of personal responsibility which defined their duties under the old. Indeed, responsibility under the new régime takes no account of the personal factor. Its basis is wholly conventional. All accidents are attributed to risk of the trade and dealt with accordingly.

FOREIGN COMPENSATION LAWS.

Compulsory compensation for industrial accident is now the general rule in most civilized states, and we shall first give some account of its laws and methods, its origin, its theory and status, its effects, and then consider it from the American standpoint.

Foreign legislation offers a wide range for the study of compensation schemes, and our Department of Commerce and Labor has performed a valuable service in publishing the principal texts of the foreign laws.[29]

The documentation of the foreign schemes is not fully presented in these compensation laws. Statutes dealing with state insurance offices, sickness and infirmity insurance, old age pensions, etc., etc., must be read in connection with some of them. And ancillary to each law are decisions, rules, orders, etc., effectuating its application to say nothing of insurance company regulations and by-laws of mutual associations.

Fully to analyze this mass of foreign law is beyond the scope of our brief, whose purpose is, in this relation,

[29]24 Ann. Rep. Commissioner of Labor, 1910. Austria, Belgium, British Columbia, Cape of Good Hope, Denmark, Finland, France, Germany, Great Britain, Greece, Hungary, Italy, Luxemburg, Netherlands, New South Wales, New Zealand, Norway, Quebec, Queensland, Russia, South Australia, Spain and Sweden. The Russell Sage Foundation has just issued a useful study—Workmen's Insurance in Europe, by Lee K. Frankel and Mils M. Dawson, which we shall cite by the authors' names.

to indicate in a very broad way the methods of dealing with the more important points of general interest.

EMPLOYMENTS COVERED.

Hazardous trades.

Great Britain excepted, the several countries do not include all employments in their compensation laws. The major classification is the selection of hazardous, as distinguished from non-hazardous employments.

In some laws the selection is made in brief and more or less general terms.

Thus the French law covers workmen "in the building trades, in mills, factories and workyards, in the business of transportation by land and water, in that of loading and unloading, in public storehouses, mines, surface mines, quarries, and, furthermore, in every enterprise or branch thereof in which explosive materials are manufactured or used, or in which a machine operated by a power other than that of man or animal is employed" (1).[30]

Other laws give elaborate lists of the industries covered.

Agriculture.

The laws agree in covering mining, manufacturing, transportation, building, etc., but there is some diversity in respect of agriculture. For example, agricultural employment is expressly excepted in the Quebec law (1). It is expressly included in respect of accidents due to the use of mechanical power in Austria (1), Hungary (3), and Italy (1.4), and impliedly in respect of power accidents where these are embraced in general terms as in France (1) and New Zealand (1st schedule). In Germany agricultural laborers are insured under a separate statute.[31]

Special Laws.

Some states provide separate statutes or separate treat-

[30]By the law of Apr. 12, 1906, "All commercial enterprises" are brought within the compensation scheme.

[31]See Frankel and Dawson, 96, 98.

ment for certain employments, *e. g.*, mining, navigation, railroading, building. For example, Germany has special laws for navigation and building, and the railroads, being operated by the government, are under an official régime. The British Act contains special provisions for seamen.

Domestic and commercial service.

Few, if any, systems save the British cover the domestic, mercantile and commercial employments, except so far as the occasional power accidents in these employments fall within a general provision of the law.

Petty industry.

Petty industry—an establishment employing only several hands—is, or may be, excepted from the compulsory force of certain compensation laws, for example, Italy (7), Germany (2.3).

The exception seems to be partly based on the theory that the smaller the working body the better the supervision and the lesser hazard, but in view of its results we may fairly treat it as expressing the idea that the small employer may be too nearly in the financial condition of his workmen to warrant the imposition of the burden.

Administrative inclusion.

Generally speaking the legislature defines once for all the employments affected. But we find here and there a provision authorizing inclusion or exemption by administrative order.

For instance, in Germany the Federal Council may exempt "establishments which do not involve special danger of accident" (1.3); and in Austria the Minister of the Interior may exempt or include certain establishments owing to the absence or presence of dangerous features (3).

The British Act.

In sharp contrast with the other systems is the comprehensive law of Great Britain. The Act of 1897 covered certain hazardous employments only and excepted the "workshop"—an establishment not employing more than five hands. Agriculture was included by the amend-

ment of 1900. The Act of 1906 covers "any employment" (1) without regard to its hazard or to the size of a particular establishment; excepting, however, employment of a "casual nature" (13).

INJURIES COMPENSATED.

The nature of the injuries calling for compensation, their occasion, cause, and period of disablement constitute an intricate chapter of the compensation laws, whose main points only will be indicated.

"Accident."

The injury must be accidental and the broadly remedial purpose of the laws is generally emphasized by a broad definition of "accident."

The German Imperial Insurance Office defines an accident as "a happening which, doing injury to the integrity of the human body, is produced by a single stroke and is clearly marked by a beginning and an end." A French publicist defines it as "an injury to the human body due to the sudden and violent action of an exterior cause."[32] The House of Lords definies it as "an unlooked for mishap or an untoward event which is not expected or designed."[33]

Among the "accidents" embraced in the English law are the projection of an anthrax germ in the eye,[34] a strain rupturing an aneurism,[35] even though too slight to affect a healthy man,[36] a heat stroke in a furnace room,[37] a sunstroke,[38] the murder of a messenger carrying his employer's money.

Among those embraced in the French law are an injury from falling in a fit, from the horseplay of a comrade

[32]Sachet, *Législation sur les Accidents du Travail,* I, 256.
[33]Clover *v.* Hughes, 1910, A. C., 244.
[34]Brinton's *v.* Turvey, 1905, A. C., 320.
[35]Fenton *v.* Thorley, 1903, A. C., 230.
[36]Clover *v.* Hughes, 1910, A. C., 242.
[37]Ismay *v.* Williamson, 1908, A. C., 437.
[38]See *Law Times,* June 27, 1908.

unless the victim began it,[39] from voluntarily taking a risk in the line of humanity or duty.[40]

Occupational disease.

We note here that the British Workman's Compensation Act requires the employer to compensate the victims of certain "occupational diseases," anthrax, lead, mercury, phosphorous and arsenical poisoning, for example, to which the Home Secretary has added others.

"Occupational disease" is not, on the Continent, embraced in accident compensation laws.

Accident in service.

The laws broadly agree that workmen shall receive compensation for such accidents only as occur in the master's service—for example, "in the course of their employment," in Austria (1) and Germany (1); "by reason of or in course of their work," in France (1) and Quebec (1); "in the course of and as a result of fulfilling the labor contract governed by the Act of March 10, 1900," in Belgium (1); "arising out of and in course of the employment," Great Britain (1).[41]

The practical construction of these provisions varies somewhat in the several countries, but as a whole they express the principle that a workman shall receive compensation only for injuries occurring during the actual or constructive performance of his labor contract and connected in some way with the work. Furthermore, the accident must cause disability—disfigurement is not material unless it actually interferes with employment.[42]

Victim's misconduct.

In Great Britain, "serious and wilful misconduct" of the victim absolves the master unless the injury result in "death or serious and permanent disablement" (1. 2. c). The continental systems generally provide that compensation shall not be paid for an injury intentionally

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[39]Sachet, I, 416, 421, 422. Compare Fitzgerald *v.* Clarke, 1908, 2 K. B., 797.

[40]See Walton, Work. Comp. Law of Quebec, p. 90.

[41]It seems that the "or" in the French Act gives a somewhat wider range than the "and" in the British Act, Walton, p. 83.

[42]See Walton, p. 125.

caused by the victim, though in Hungary the dependents are entitled in a case of fatality (75). Inexcusable fault is more strictly dealt with in Germany and Austria than in France, where in such case a judge may award a portion of the regular compensation.[43]

Disability period.

All the laws deny compensation for casualties entailing less than a fixed period of disablement, but each falls into one of two grand divisions according as accidents are or are not partially covered by a system of sickness insurance.

In the first division the periods are comparatively long. In Austria four weeks and in Germany three months (ninety-one days), disability elapse before accident compensation becomes due, but in each country a disability of more than three days is compensated through a compulsory sickness insurance system to which the workmen contribute two-thirds of the expense and the employer one-third.

In the second division they are comparatively brief—for example, two days in the Netherlands, three in Russia, five in France, one week in Belgium, Great Britain, New Zealand, South Australia, two weeks in British Columbia, Queensland.

WHO RECEIVE COMPENSATION.

The industries embraced in each law broadly indicate the parties entitled to compensation, except where discriminations are made, as in singling out workmen engaged on the hazardous side of an employment—*e. g.*, the use of machinery in agriculture.[44]

Wage basis.

In each country, however, a right to compensation depends more or less upon a maximum rate of wages.

Great Britain alone distinguishes here between the manual and the clerical employee, imposing no wage

[43] Sachet, I, 415.
[44] See p. 17.

limit upon the former while denying compensation to the latter whose annual wages exceed $1,216 (13).

In the other countries the wage limit affects all employees and works in one of two ways. In one group of laws a victim receiving more than a certain annual wage is not compensated: Belgium, $463; Denmark, $645; Germany, $714; Russia, $772; Italy, $1.35 per diem.

In the second group employees in receipt of more than a fixed sum receive a compensation based upon these figures, and not taking the excess into account: Austria, $487; France, $463; Hungary, $487; Norway, $321; Netherlands, $1.61 per diem.

WHO PAY COMPENSATION.

State payments.

No state appears to contribute to accident compensation (except of course where an industry is operated by the state, *e. g.,* the German railways), the prevalent purpose being, as we shall see, to impose this upon the industries affected and not directly upon the resources of the community at large.[45]

We shall see, however, that certain states take a deep interest in the integrity and distribution of compensation funds, acting as administrators, insurance agents, etc.; and in Germany the government actually advances compensation through the post offices, these honoring orders given by the employers' associations which are thereafter assessed for the sums advanced (97).

Workmen's contributions.

In Austria workmen receiving cash wages are required to contribute ten per cent. thereof to the accident fund (17), the employer making deduction and depositing the amounts.

Austria alone requires, in terms, a contribution to accident compensation, and this a small percentage, but it prescribes that accidents entailing not more than four

[45]See p. 55.

weeks disability shall be compensated from the sickness insurance fund, to which workmen contribute two-thirds to the employer's one.

In Germany a rule of like tenor, save that the four weeks is increased to thirteen, makes the workmen the chief contributors in the majority of casualties—for example, in 1907, out of 662,901 accidents only 144,703 fell within the compensation law[46]—but their contribution to the aggregate cost of accident is relatively slight, the estimates for 1886-95 allotting 92 per cent. to the employers.[47]

Employer's responsibility

All the laws impose upon the employer the immediate, and, excepting the workmen's contribution in Austria, the entire liability for whatever is defined as accident compensation.

Reserving for the present the question whether this statutory liability may be passed on or distributed by some method of insurance, we inquire first whether it excludes liability in every other form, and then whether the employer may substitute a voluntary compensation scheme for the statutory one.

AS TO EXCLUSION OF LAW SUITS.

Master's misconduct.

The fact that an employer is liable for statutory compensation does not, of course, relieve him from prosecution in case the cause of injury falls within the criminal law.

Furthermore, as statutory compensation, being graded to cover all accidents regardless of their causes, presumably falls below the damages probably recoverable by the victim of an employer's negligence and well below the punitive damages recoverable in case of his gross mis-

[46]See Frankel and Dawson, p. 101. On page 124 we read that in Austria in 1906 out of 109,111 accidents over 77,000 fell within the four weeks' period.

[47]Shadwell, Industrial Efficiency, 2d Ed., p. 409.

conduct, it is material to inquire whether or when the victim may sue instead of claiming compensation.

As the laws generally agree in denying compensation to the victim of his own misconduct,[48] so generally they leave open a suit for damages to the victim of an employer's gross misconduct, though in Germany suit is maintainable only when the employer or his agent has been subjected to a penal sentence (133).

Also gross misconduct commonly requires the employer to indemnify third parties for whatever liability they have assumed for him or share with him. For example, if he be a member of an association he must make good to it compensation paid on this account—Hungary (81), Germany (136).

Beyond agreeing that damage suits may be maintained in cases of gross or criminal misconduct the laws divide into two groups in their regard.

Suits barred.

In one group, including Belgium (21), France (2), Hungary (82), Germany (135), the injured workman is barred from action.

Suits permitted.

Great Britain heads the other group. The Workmen's Compensation Act leaves intact not only the common law action, but actions under the Employers' Liability Act of 1880, but it seems that a workman who loses his suit cannot thereafter institute arbitration proceedings under the Act.[49] He has made his election and must abide by it. The Act provides, however, that where it is determined in an action that the defendant is not liable in damages, but would have been liable for the statutory compensation the court shall, if the plaintiff request, assess compensation, deducting, however, all or part of the costs of suit (1 (4)).

In Sweden a workman may both claim indemnity under the "common law or special law" and compensa-

[48]See p. 20.

[49]Edwards *v.* Godfrey, 1899, 2 K. B., 333.

tion under the statute, but if he obtain damages the employer may deduct the compensation (9).

SUBSTITUTION OF VOLUNTARY SCHEME.

"Contracting out."

On the theory that a workman in "contracting out" of a benefit allowed by statute is not really a free agent, the laws generally forbid unofficial agreements between employer and workmen whereby the latter waive the benefit of their provisions.[50]

Some laws provide, however, that a voluntary compensation scheme approved by the authorities as being of at least equal value to the beneficiaries may be substituted in whole or in part for the compulsory one.

Workmen's acceptance of the scheme is required in Great Britain (3 (1); but not in Austria (57), France (6), Italy (19).

THE COMPENSATION.

Funeral expenses, etc.

The laws generally require the employer to pay funeral expenses not exceeding a fixed amount, and first aid to the injured is usually prescribed in one way or another.

Basis of earnings.

All the laws base compensation on the victim's earnings, and in computing these any valuable consideration over and above cash payments is generally reckoned, as for example, a workman's board. In an English case a waiter's tips were taken into account.[51]

In some countries earnings are calculated on a collective basis for certain classes of workmen, for example, seamen and agricultural laborers in Germany.[52]

Fatality.

In cases of fatality compensation is paid to dependents either in the form of a pension or in a lump sum.

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[50]See, for example, Germany (141).
[51]Penn *v.* Spiers, 1908, 1 K. B., 766.
[52]Frankel and Dawson, pp. 98, 99.

A pension of fifty per cent. of annual earnings is paid in Norway, sixty per cent. in Austria, France, Germany, Hungary, The Netherlands; sixty-six per cent. in Russia. Belgium prescribes an annuity of thirty per cent. of annual earnings.

In the following states these lump sums are paid instead of pensions: Three years' earnings, but not under $729 nor over $1,459, in Great Britain and South Australia,—not under $1,000 or over $1,500 in British Columbia, not under $973 or over $1,946 in New Zealand and Queensland. Four years' earnings, but not under $321 nor over $857, in Denmark. Five times the annual earnings in Italy.

Some laws apportion the death compensation among dependents according to a rigid schedule so that the sum actually paid depends on the existence of persons answering the description. For example, in Sweden $32 to a widow during widowhood and $16 to each child until it reaches fifteen years, the whole not to exceed $80 a year. Other laws require the distribution of a specific amount among whatever dependents may be entitled, for example, Italy (10).

Total disability.

For total disability the following states prescribe these amounts by way of pension: Austria, Denmark, Germany, Hungary, and Norway, sixty-six and two-thirds per cent. of the annual earnings; Belgium, fifty per cent. daily wages; Great Britain a weekly payment of not more than fifty per cent. of average weekly earnings and not over $4.87 per week; a weekly payment of not more than fifty per cent. of average weekly earnings, not exceeding $1,500 altogether, in British Columbia, not exceeding $1,459 in New Zealand, South Australia and Western Austrailia, not exceeding $1,936 in Queensland; in Italy six times annual earnings but not less than $579; in Sweden an annual pension of not more than $80. In Germany and Hungary the pension is increased to full

annual earnings when the victim is so helpless as to require an attendant.

Partial disability.

In case of partial disability certain states expressly prescribe compensation according to an estimated diminution of the victim's earning power—that is to say, he receives the assumed difference between earnings before and after the accident,[53] and it would seem that the laws generally operate along this line.

Specific sums.

Most laws do not grade disability compensation according to a classified list of specific injuries. But Sweden (5) specifies certain evidences of total disability and schedules compensation for partial disability from seventy per cent. of the compensation limit in the case of loss of one eye and impairment of the other down to ten per cent. for deafness of one ear. And the second schedule of the New Zealand law prescribes compensation ranging from one hundred per cent. of the limit in such cases as mental incapacity, loss of eyes, both hands or feet, etc., down to four per cent. for loss of finger joint.[54]

Permanent disability—Revision.

Whether disability, total or partial, is permanent or temporary gives rise to various provisions which need not be analyzed, but it is important to note that in a case of continuing disability the laws generally provide for revision of the compensation down or up as the condition of the beneficiary changes for better or worse.

Commutation of pension.

An employer or his insurer who shall become responsible for an accident pension may desire to commute it for a lump sum which the beneficiary may be even more desirous of handling. Whether this may be done depends generally upon how keenly the state is concerned

[53] See, for instance, Germany (9.2).

[54] The editor of the *Law Quarterly Review* finds in "a scale of fixed compensation for different injuries" a "curious reversion to the methods of the archaic European law." Apr., 1910.

to assure a continuing aid to the beneficiaries, for the handing over of a lump sum may well mean a speedy dissipation of the money and an early recourse to that charitable aid which systematic compensation aims to avoid.

The policy of the European states generally is against commutation. For example, in Austria commutation is allowed only when "the commune legally bound to care for the claimant under the poor laws has consented to the agreement" (41). In France (28) the capital sum cannot, usually, be demanded, but the employer may discharge his obligation by paying the sum into the National Retirement Fund (which then assumes the pension) and he must do this in case he ceases to do business. In Germany (95) a partial disability pension of not more than fifteen per cent. of the full amount may be commuted for a capital sum if a request by the beneficiary shall be approved by the authorities.

CLAIMS FOR COMPENSATION AND SETTLEMENT OF DISPUTES.

Record and claim.

The laws generally prescribe that the circumstance and nature of each casualty be speedily recorded, and that a claim for compensation shall be presented within a fixed time.

Establishment of the fact and degree of accidental injury and an accurate estimate of its effect are the essential foundations of every just claim, and the laws endeavor to guard against mistake, simulation and malingering by prescribing an impartial medical service.

It would seem that everywhere a claimant may be required to submit to an impartial medical examination; and, furthermore, that, as in Great Britain, when a simple surgical operation will relieve or lessen disability

Medical examination.

the claimant must submit to it or reduce his claim[55] though he is not called upon to undergo a serious one.[56]

In stating that the laws generally prescribe the opinion of an impartial expert in case the doctors of the respective parties disagree we simply indicate the general method of dealing with a branch of the compensation system of vital importance, and one peculiarly open to errors and deceptions whose rectification depends largely upon the professional skill and standing of the doctors employed.

Disputed claims.

Passing from the special subject of medical disputes to the general procedure for the presentation of claims and the adjudication of the serious controversies that will arise, we find widely different methods among the several systems.

Germany.

In Germany, where the compensation system is wholly within the sphere of public law,[57] the judicial tribunals are, it would seem, practically excluded from all participation in its working and even from interpreting it. The employers' associations determine claims in the first instance, and their decisions may be appealed to specially constituted arbitral tribunals. Interpretation is the function of the Imperial Insurance Office.

The general spirit of the German method is followed in Austria and Hungary, though with important differences in form.

Great Britain.

In Great Britain the question whether a particular case is covered by the Compensation Act is determined by the regular courts in a regular suit, and there is much litigation over the interpretation of important phrases.

When, however, the case is admittedly within the Act the compensation is in the vast majority of instances

[55]See Anderson *v.* Baird, 5 F., 972.
[56]Rothwell *v.* Davies, 19 T. L. R., 423.
[57]See p. 61.

agreed upon according to a simple formula; and, in case of dispute, the county courts are authorized to arbitrate or appoint arbitrators.

Some such system generally obtains in the British Colonies. In Quebec, however, a claimant must institute an action at law without a jury and the judgment of the court may be appealed. In New Zealand a court of arbitration, whose general powers are defined by the Industrial Conciliation and Arbitration Act of 1908, has jurisdiction over all claims for compensation.

France.

France largely utilizes the civil courts in the adjustment of compensation claims, though the procedure is of a somewhat summary nature. The accident itself is the subject of a judicial inquiry conducted by a justice of the peace (12, 13), and, if a claim for compensation is not agreed upon before the president of a district court, suit follows in a court chosen by the more diligent party. The court shall summarily decide the matter, and the decision may be appealed according to the common law (16, 17).

INSURANCE.

Compulsory compensation is the root of every system, and generally, as we have seen, the compulsion is addressed to employers. This element of compulsion needs to be emphasized as being fundamental because some writers seem to emphasize compulsion only where insurance of compensation is made obligatory. But in truth, insurance, even though a statute link it with compensation, is essentially a sequent and not a intrinsic factor thereof. It is a method for at once effectuating and distributing a primary obligation already imposed. In treating insurance, whether compulsory or not, as ancillary to compulsory compensation, we do not minimize its real importance—we simply put it in its proper place.

Insurance of compensation benefits the injured

workman by presumably securing to him the payment of whatever sums may become due, and where it is made obligatory we may assume that the workman's interest is the prominent motive.

But to the party responsible for compensation insurance, whether obligatory or not, is of equal or even greater concern. Indeed it is usually a commercial necessity, for only by some method of insurance may the burden of his risk be lightened through distribution.

This need is completely met in the states where the law at once requires insurance and ordains the method. It is partly met where the law encourages insurance by indicating institutions to which the employer may transfer his obligations. Where the law is silent he who would insure must do it in his own way and at his own risk.

Always bearing in mind that insurance in its passive sense tends to secure the workman, we have also to consider it in its active sense—as something to be done by the responsible party for his immediate protection. With this prefatory word on the double function of insurance, we take up an important and difficult chapter of our subject.

STATE INSURANCE.

"State" insurance means, I take it, insurance at the public expense—a charge on the tax-paying body, and there are those who would thus socialize all insurance under government auspices.

At present state insurance is exemplified fully in such legislation as the British old age pension scheme, and, to a degree where, as in Germany, the taxpayers contribute to invalidity and pension annuities, but as yet it has hardly if at all entered the field of industrial accident.

While state insurance in its primary sense plays at present a relatively small part in workmen's compensation, we shall presently mark its appearance in a second-

ary sense wherever the government acts as the depositary and administrator of accident funds created by private contributions.

EMPLOYERS' INSURANCE.

An employer who, under a compensation law, is liable at any moment for an unforeseen sum of money, should be able to anticipate and assuage the contingency by some method of insurance. Indeed, if the theory of compensation laws that industry should bear the cost of its casualties is to be fairly effectuated it must be possible approximately to calculate the cost, and this cannot be done if each casualty must be financed separately. We have, therefore, to inquire whether a given law imposes upon employers a collective liability, which involves distribution of risk, or an individual liability; and how in either case it deals with the matter of insurance—and whether or how far it permits an employer to shift his liability. In pursuing this inquiry the laws may be conveniently classified according as they ignore insurance, as they encourage it or as they compel it.

Great Britain.

The British Compensation Act imposes individual liability upon every employer within its purview, from the railway company to the small householder.

Except as the Act authorizes the Secretary of State to order an employer to insure his workmen against industrial disease in an established mutual trade insurance company or society which already comprises a majority of the employers in the particular industry (8.7)—an exception, be it noted, not affecting "accident" in the ordinary sense—the British system takes no account of insurance. The employer is left to insure his risk or not at discretion. He cannot get rid of his personal liability, except that in case of a continuing compensation he may purchase an annuity from the Post Office Savings Bank —an opportunity which seems to be rarely utilized.[58]

[58]See Sir Edward Brabrook; VIII *Congrès des Assurances Sociales,* Rome, 1908, p. 382.

The state takes no concern in securing the workman beyond making a compensation claim a first lien in case of the employer's insolvency.

The British Colonies generally follow the mother country in leaving insurance to the employers' discretion, though the recent law of Quebec so far recognizes the functions of insurance companies as to require those who assume payment of the "rents"—pensions—to deposit an adequate fund with the government of the Dominion or the Province and to conform to such conditions as the lieutenant governor may impose (11). In the event of a company's default, however, the employer is not relieved.

In fine, the British Empire prescribes "workmen's compensation" as distinguished from "workmen's insurance," yet it involves insurance in a broad sense, for, as Lord Morris said, "The liability of the employer * * * becomes that of an insurer against accident to the workmen."[59]

CONTINENTAL INSURANCE SYSTEMS.

The workmen's compensation systems of continental Europe differ radically from the British in evincing more or less concern in insurance, and in this relation they are broadly classified according as the insurance is voluntary or compulsory.

VOLUNTARY INSURANCE.

Insurance is wholly or mainly voluntary in Belgium, Denmark, Sweden, France, and in each country the employers are individually responsible for compensation.

In Belgium the employer may shift his responsibility to an insurance company or a mutual association approved by the state (10, 11). In case he becomes liable for

[59]Powell *v.* Main Colliery Co., 1900, A. C., 374. See also Pollock's Torts, 8th Ed., p. 107.

a pension he shall secure its capitalized value by some approved system of deposit or insurance (14-16).

In Denmark individual responsibility of an employer may be transferred to an approved insurance company (8, 9).

In Sweden the employer may shift his liability by insuring in a State Insurance Institute, from which he may also purchase whatever pensions may be charged upon him (10).

France.

In France the employer is individually responsible. He may be released from the whole or a part of the cost of illness and the temporary compensation by satisfying the authorities that he has insured his workmen in an approved mutual association (5, 6).

For securing compensation for death or permanent incapacity the French law provides "Art. 24. Whenever employers who are liable, or the insurance companies, with fixed premiums or mutual, or the guaranty associations whose members are liable jointly or severally, fail to pay, when due, the compensation charged against them as a result of accidents causing death or permanent incapacity for work, the payment shall be secured to the interested parties through the National Old Age Pension Fund, by means of a special guaranty fund, established as hereinafter provided, the management of which shall be entrusted to the said Fund.

Art. 25. To establish the special guaranty fund there shall be added to the charge for licenses of the industries specified in Article 1, four centimes (0.8 cent) extra. A tax of five centimes (1 cent) a hectare per mining concession shall be collected on mines. These taxes may be increased or reduced according to the necessities of the case by the financial law.[60]

The National Retirement Fund may have recourse

[60]They have been increased twenty per cent. for 1910 and 1911 by the law of May 29, 1909.

against the debtor employers for the amounts paid by it on their account under the preceding provisions.

For reimbursing itself for its advances the Fund, in case of insurance of the employer, shall enjoy the preference under the provisions of Article 2102 of the Civil Code relative to the compensation due by the insurer, and it shall have no recourse against the employer" (26).

COMPULSORY INSURANCE.

Compulsory insurance is the rule in the remaining systems we shall survey. Workmen "are insured" in Germany, "must be insured" in Italy; "shall be insured" in Austria, The Netherlands and Norway; are "subject to compulsory insurance" in Hungary. In such states alone do we find workmen's "insurance" thoroughly exemplified.

Individual insurance.

In The Netherlands, Italy and Norway the employers are individually responsible.

The Netherlands has established a Royal Insurance Bank, with the Post Office as branches thereof. Each employer may pay to the Bank annually a premium based upon his wage account, the Bank paying from the aggregate fund whatever compensation may be due. An employer may, however, be permitted to assume personally his obligation or to transfer it to a company or a mutual association provided he or the transferee shall deposit in the Bank a sufficient pledge. It appears that the Bank gets the poorer risks and is obliged to make up deficiencies.[61]

Norway requires all employers to insure in a State Insurance Institution (2).

In Italy the employer must insure either in the National Fund for Insurance of Workmen against Industrial Accidents or in private companies approved by the State (8), unless he shall establish for at least five hundred workmen an adequate compensation scheme, or be

[61] VIII *Congrès des Assurances Sociales,* 1908, p. 471.

joined in a mutual insurance association, both being approved by the State (19).

Collective insurance.

In Germany, Austria and Hungary compulsory compensation and compulsory insurance are actually interwoven, for each system imposes upon employers a collective responsibility, and this involves the basic principle of insurance—distribution of risk. The employers' accident association is the backbone of each system.[62]

THE GERMAN ASSOCIATIONS.

As Germany led off in adopting the principle of workmen's compensation, so in the employers' accident associations she has made the most striking contribution to its machinery.[63]

Premising that these associations are subject to regulative and corrective powers immediately or finally vested in the Imperial Insurance Office, we shall give a general idea of their organization, functions and responsibilities utilizing largely the literal texts, though not keeping to the statutory order.

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[62]Employers' associations formed especially for insuring compensation risks are substantially developed in Great Britain and France, where insurance is voluntary.

In Great Britain, for example, many mine owners are thus associated. The great Iron Trades Association showed for 18 months ending Dec. 31, 1908, premium income, £252,166; other income, £7,241; compensation paid with legal and medical expenses, £210,996; cost of management, 8 per cent. of premium income (*Post Magazine and Monitor,* Dec. 25, 1909).

In France two kinds of associations—the Mutual Insurance Society and the Guaranty Syndicate—are recognized by the compensation law, and are largely utilized in important industries.

[63]In 1906 there were 66 industrial trade associations including over 659 000 establishments and insuring over 8,625,000 persons; and 46 agricultural and forestry associations, embracing over 4,695,000 establishments and over 11,189,000 persons. Among the industrial associations we note, for instance, 14 in the building trades, 8 in textiles and steel, 4 in wood working and transportation, 2 in metal working and mining and single associations in chemical, gas and water works.

Composition and scope.

Insurance is undertaken on the mutual plan by the heads of establishments subject to the law, who are for this purpose united into accident associations. These are formed for specified districts and comprise all the establishments of those branches of industry for which they are formed, though the latter provision may be waived in the case of railways (28-1).

An association may provide for its division into geographical sections (38-1).

Establishments comprising substantial parts of different branches of industry shall belong to that association to which the main establishment belongs (28-2).

The association shall compensate for accidents in other establishments if these occur in operations for which the order is given and the wages paid by a member (28-4).

Purposes of expenditure.

No contributions may be required or expenditures made except for payment of compensation, administration, reserve funds, prizes for rescue and prevention of accidents and, with the consent of the Imperial Insurance Office, the establishment of hospitals, sanatoriums, etc. (31-1).

Status.

The association may acquire rights, assume obligations and sue and be sued in its own name, and for its obligations the property of the association is the only security for creditors (28-5, 6).

Constitution.

The internal law of the association is contained in a constitution enacted by the members at a general meeting and approved by the Imperial Insurance Office (36-1, 39-1).

Directors and agents.

The affairs of the association, except as they are within the competency of the general meeting, are administered by a board of directors and by agents who shall be members and shall serve without compensation save for expenses (41-44).

It is represented by its board of directors and is bound by all lawful acts of the board (41-1, 2).

Members.

Every owner of an establishment belonging to those branches of industry for which the association is established is a member of the association if the establishment is located in the district of the association. The ownership begins when the establishment opens or when it becomes subject to insurance (55-1).

The owner shall present to the lower administrative authorities a declaration stating *inter alia* the nature of his establishment, the number of insured persons therein and the accident association to which it belongs; and in case of mistake in the latter respect the authorities shall assign it to the proper association (56, 57).

Every member has a vote (55-2) and is eligible to election as a director and an agent of the association, which honorary (unsalaried) offices cannot be declined under penalty of fine, except for reasons justifying declination of guardianship (43).

Law of June 30, 1900.

The law of June 30, 1900, amending the Accident Insurance Laws, thus provides for the institution of new associations and the rearrangement of existing ones (2-1-4).

The establishment of accident associations for the branches of industry newly subjected to accident insurance according to article 1 of the industrial accident insurance law or their assignment to existing accident associations is accomplished by the federal council after consultation with the representatives of the branches of industry and the associations concerned.

Until the constitution of the accident associations established under this law shall have been approved, branches of industry may be withdrawn by decree of the Federal Council, after consultation with the boards of

directors of the associations concerned, from one of the accident associations established under the laws of July 6, 1884; of May 28, 1885; of July 11, 1887, and of July 13, 1887, and assigned to another association, without reference to the provisions of these laws.

In the newly established accident association the constitution shall be adopted by a constituent general meeting. This consists of delegates from chambers of commerce, chambers of industry or similar representative economic organizations to which the employers of the branches of industries concerned belong. The central state authorities designate those bodies which are authorized to send delegates and determine the number of delegates for each according to its economic importance. If the territory of the accident association covers the territory of more than one state, the bodies authorized to send delegates and the number of delegates which each may send are determined by the Imperial Chancellor after agreement with the state governments concerned.

The imperial insurance office shall call the constituent general meeting and shall conduct the proceedings until a provisional board of directors shall have been elected.

General meeting.

The general meeting consists of all the members, unless the constitution places it on a representative basis, as where the association is divided into sections (38).

The general meeting elects directors, amends the constitution, audits and accepts the annual balance sheet unless it confides this to a committee (41-3), determines the rules respecting the legal relations and the appointment of officials (48-1), establishes rules for classifying establishments according to the degree of accident risk in them and for determining the amount of contributions in the different establishments (*i. e.*, the risk tariff, 49-1).

The board of directors determines the compensation (69).

Compensation.

The fund for compensation and expenses is raised annually by contributions assessed on the basis, first, of the wages earned in their respective establishments by the persons insured, or, in certain cases, of the local daily wage of the adult day laborer, and, second, of the risk tariff provided for in the constitution (29).

Whenever an accident is caused by an employer intentionally or "through negligence, with omission of that degree of caution which is especially required" of him in virtue of his position the association shall in the first case, and may in the second, hold him liable for its outlay (136-1).

Contributions may be collected in advance for the first year. Unless the constitution provides otherwise, these shall be made in proportion to the number of persons who are employed by the members in their respective establishments (31-2).

When the association is divided into geographical sections the constitution may require not more than 75 per cent. of the compensation to be borne by the section wherein the accident occurs (50).

Associations may unite for the joint payment of compensation for which they are jointly responsible (51-1).

Risk tariff.

The risk tariff, which is framed by the general meeting subject to the approval of the Imperial Insurance Office, is the basis for classifying the several establishments according to the degree of accident risk and for determining the amount of their contributions.[64] After the first two years the tariff shall be revised every five years in the light of the accidents that have occurred in the different establishments.

[64]For example, in the chemical association the assessment basis ranges from 20 in Class A which includes apothecaries to 150 in Class P in which are makers of high explosives.—Frankel and Dawson, p. 113.

The revision is submitted to the general meeting with a statement of the compensated accidents in each establishment and may be adopted if the Imperial Insurance Office shall approve. The general meeting may then for the ensuing period impose supplementary contributions or grant returns of contribution to employers according to the accidents that have occurred in their establishments (49-1-6).

Payment through Post Office.

Compensation is advanced to the beneficiaries by the postal administration upon orders of the accident associations. Once a year the central postal authorities send to the associations statements of payments made and designate the postal banks to which the amounts due shall be paid (98). These amounts are then collected from the members by the board of directors (99).

Reserve fund.

The accident association shall accumulate a reserve fund. For its accumulation there shall be levied, when the first period for the payment of insurance contributions arrives, a supplementary assessment of 300 per cent. of such contributions; at the second period, 200 per cent.; at the third, 150 per cent.; at the fourth, 100 per cent.; at the fifth, 80 per cent.; at the sixth, 60 per cent., and thereafter ten per cent. less at each period until the eleventh period. After the close of the first eleven years, or provided that the eleventh year has already been passed at the time this law goes into effect, from the latter time, the accident association shall annually add to the amount of the legal reserve, for three years 10 per cent., and then for each succeeding period of three years 1 per cent. less down to 4 per cent., including the interest each time. After the expiration of this time such amounts shall be taken from the interest of the reserve fund as may be required to prevent a further increase in the average amount of the contribution required per insured person. The rest

of the interest is again to be added to the reserve fund (34-1).

In case of stringent need, the association, with the approval of the Imperial Insurance Office, may use the interest of the reserve and even encroach on the principal of the reserve before the accumulation required above has been attained. Restitution to the reserve shall then take place as may be required by the Imperial Insurance Office (34-2).

Safety rules.

The associations issue regulations for arrangements to be made and orders to be issued by the members for the prevention of accidents in their establishments, under threat of punishment for failure to comply by fines of not more than 1000 marks or by listing the establishment in a higher risk class, or, if it is already in the highest class, by the imposition of surtaxes of not more than twice the amount of the contribution (112-1).

The association also prescribes rules of conduct for the insured workmen in order to prevent accidents with a penalty of not more than six marks for violation (112-2).

The regulations shall be submitted to the Imperial Office and shall be made with the co-operation of representative workmen. "The number of these representatives shall be equal to the directors participating and they shall have full voting power." "There shall be sent to the representative of the workmen a draft of the rules which are to be submitted to them for their consideration and adoption (113).

The Imperial Office may consult workmen's representatives before approving the rules (115).

Inspection.

Associations shall enforce the regulations and to this end may authorize inspectors and accountants to investigate the establishments (119).

"If the employer fears that the inspection of his business by the technical inspectors of the association may result in the disclosure of a trade secret or in injury to

his business interests he may claim the privilege of having the inspection conducted by other experts" (120).

Technical experts and accountants shall be sworn and shall not disclose any information, "and shall refrain from copying any arrangement or method of operation within the establishment which are kept secret by the owner, but which come to their knowledge, provided that these are trade secrets" (131).[65]

Associations in Austria, etc.

The compulsory associations of Austria and Hungary differ in many respects from the German model but we shall not only certain radical differences in organization.

In Hungary employers and employees are grouped in an association called the National Workmen's Sickness and Accident Insurance Fund to which are affiliated District Insurance Funds of local operation. The association is a "self-governing organization of the employees insured against sickness and accident and of their employers" (103) under the supervision of a State Workmens Insurance Office.

Austria follows Germany in segregating accident from sickness insurance but the employments are not, as in Germany, grouped by industries.[66] They are grouped by districts conterminous with the territorial provinces of the state and for each district there is an insurance insti-

German reform project.

[65]The German insurance authorities have presented to the Reichstag a comprehensive workmen's insurance plan whose main purposes are to co-ordinate the administration of sickness, invalidity and accident insurances and to simplify and expedite proceedings. Among the proposed changes in the accident law we note these: Inclusion of practically all employees except clerks and commercial travelers: Transfer of authority to fix compensation in the first instance from the employers' associations to local insurance boards whereon employers and workmen are equally represented: A time limit on petty pensions; obligation of pensioner to accept suitable employment, and abatement of benefits when the income of a wage-earning pensioner is larger than before the accident: Strengthening of the reserve of employers' associations. (See Frankel and Dawson, p. 406, etc.)

[66]Railways are exceptional, the Austrian lines, largely operated by the state, are in a special association.

tution of whose directors one-third represent the employers, one-third the workmen and one-third are appointed by the state.[67]

Several states prescribe the compulsory association of employers in certain circumstances. In Italy, for example, the state may order the employers in a particular industry to form a mutual association provided there be at least fifteen thousand workmen employed therein (26).

PERMISSIVE INSURANCE.

We have remarked that most Continental states differ from Great Britain in exempting a large number of employers from compulsory compensation either because the industry is non-hazardous or the plant small.

But some of them offer not only to the exempt employer but to workmen at large an opportunity to participate in the insurance system, an inducement to the former being release from civil liability for accident and to the latter an increased compensation if he be already covered by the law, and if not an assurance of indemnity. This opportunity is, for example, given by the laws of Germany, France and Hungary.

INTERNATIONAL QUESTIONS.

A compensation system, being part of the municipal law of the state, its burdens and benefits may be presumed to affect all persons within the jurisdiction, whether they be foreigners or citizens, and none without the jurisdiction.

This general rule is, however, frequently supplemented

[67]It is said that Austria prefers the territorial to the industrial grouping not only because of her decentralizing policy, but because the latter would offend the Catholics and Slavs by increasing the influence of the greater industries which are largely controlled by the Germans and the Jews. See Sachet, *Législation sur les Accidents du Travail,* I, 34.

by modifications devised in view of the ramifications of industrial enterprise and the migration of workmen.

Foreign employers.

Considering first the case of the employers, we find that an employer coming in from abroad is, under some systems, subject to peculiar obligations.

For example, in Germany a foreigner temporarily engaged in business may be required to double the normal contributions to the proper association and give security (33).

The Hungarian law provides that an undertaking whose plant extends beyond the country is subject to insurance in one state only—the location of the principal office being the controlling factor. If, however, the undertaking has a permanent representative in Hungary the local law governs the Hungarian workmen (6).

A treaty between Germany and the Netherlands, August 27, 1907, deals with compensation in undertakings carried on in both states.

Migratory citizens.

Coming to migratory workmen we first consider the case of citizens.

Several systems provide that when a domestic employer employs a citizen beyond the territory the compensation law follows the person unless he is entitled to compensation under the foreign law, for example, Hungary (4).

The position of a workman or his dependants who leave the country during the term of an accident pension depends on the statute. Germany continues payment so long as the pensioner reports to the German consul (94). Great Britain stops payment except in case of permanent injury (Sched. I, 18). In Sweden a pension is suspended during absence (6). In some countries a lump sum may be reclaimed in settlement, for example, Hungary (76).

In this relation the rule in federated nations is of interest, and we note that the German Empire is, for this

purpose, one country. The Prussian, the Bavarian, the Saxon, moving about within the Empire, may draw his pension wherever he happens to reside.

Foreign workmen.

Foreign workmen are, as a rule, within the benefits of the law, and if they become pensioners are on the footing of citizens so long as they remain.

Some laws provide that if they leave the country they may receive lump sums in settlement—sums amounting to three times the annual pension in Germany (95.2), France (1c.).

The dependants of a foreign workman, if they are also residents, usually stand in his shoes, but their position may depend upon the practice in their own country, for example, France (1 c.), Sweden (6), Germany (21).

Treaties.

In this relation we note that recent development of international law—conventions dealing with various industrial conditions. Among them are several which confer reciprocal benefits in the matter of workmen's compensation.[68]

PARTIES TO ADMINISTRATION.

The parties interested in a workmen's compensation scheme are the state, which orders compensation, the employer, who pays it, and the workman, who receives it, and it is of interest to understand to what extent each participates in the administration of representative systems.

Public authorities.

Under the British Workman's Compensation Act the Home Secretary may appoint medical referees and certifying surgeons, and may add to the list of industrial diseases. County court judges act as, or appoint arbitrators

[68]See, for instance, France-Italy, June 9, 1906; Dec. 23, 1907; Dec. 28, 1908; France-Belgium, Feb. 21, 1906; see also Great Britain, 9 Edw., 7 c., 10.

in a compensation case where the parties do not agree. The Registrar of Friendly Societies is authorized to decide whether a compensation arrangement between employer and employee shall be substituted for the Act. The Post Office offers, but does not force its assistance in the matter of providing annuities. In short, the Act operates with comparatively little intervention by the state—a condition accounted for by anti-bureaucratic traditions which, though somewhat weakened of late are not yet abandoned.

On the continent of Europe, where bureaucracy is thoroughly established, the functions of government are more or less intimate.

Coming to the other parties interested, we find that neither the British nor the French systems afford room for either employer or workman to undertake formal responsibility for administration, with the important qualification that the British law provides for a registered agreement between them by which most claims are settled. Employer and workman.

Germany gives to the employers the prominent place in administration. Their associations are the keystone of the whole system and, whilst efficiently supervised, are granted a large measure of self-government. In Austria and Hungary employers are substantially represented in the associations.

While the German workman is not admitted to the employers' associations, representative workmen co-operate with them in framing regulations for the prevention of accidents (113, 114), and are given a place in the arbitration courts to which are made the first appeals (4, 5).

In Hungary workmen are represented on both the major and the minor insurance associations—the National and the District Funds—and in Austria in the trade associations of each district.

Our survey of foreign laws, short as it is, needs an accentuation of several points.

Deliberation.

Each country has, generally speaking, legislated with deliberation—in many instances after years of study and discussion.

Fixed compensation.

All the systems confer upon the workmen within their purview a legal right to fixed compensation for industrial accidents not caused by their willful act, but except the English, which covers all workmen except the "casual," they generally exclude workmen who are not engaged in "hazardous" employments.

Burden of compensation.

The right to compensation everywhere revolutionizes the old law limiting employer's liability to cases involving his actual or at most his constructive fault. It is based upon the novel economic dogma that industry should bear the burden of its accidents by compensating the victims.

There is no disposition to make good to the victim the entire loss. Partial indemnity only is prescribed, and this is generally based on his earning capacity as evidenced by his wages.

The compensation is usually paid by the employer (with the important exception of the German sickness insurance funds covering a large proportion of accidents and created largely by workmen's contributions) and the outlay is supposed to be charged to cost of production.

Arbitral procedure.

All the leading countries except Great Britain deny actions for damages to workmen entitled under a compensation law, except where the master is in gross fault.

All countries eliminate trial by jury from the procedure in disputed claims, and France excepted, the more important countries do not prescribe a special action in the ordinary courts but provide a scheme of arbitration.

In short, the maxim "he gives twice who gives quickly," so conspicuously pertinent in the case of injured workmen, is reflected in as summary and untechnical a procedure as is deemed compatible with justice to both parties.

Insurance.

The wider the distribution of the burden of compensation the lighter, of course, is its incidence upon individual employers and the greater the security of the beneficiaries. Distribution implies the employment of some method of insurance, and the several systems are broadly classified according to their attitude toward insurance.

Great Britain typifies the systems which officially take no account of insurance—each employer may insure or not at discretion and does not shift his personal liability by so doing.

France typifies another sort of voluntary insurance whereby the employer may shift his liability by insuring in an approved institution.

In systems of the third class insurance is compulsory and may, as in Germany, be necessarily involved in the collective liability imposed upon groups of employers. Or, as in the Netherlands, employers may be required to insure in designated institutions.

Except in Great Britain and some of her dependencies it is, generally, the rule that insurance by a prescribed or approved method discharges the employer from personal responsibility for compensation.

Broad comparisons.

The systems of Continental Europe are, as a rule, more highly organized and more thoroughly worked out than the British system, which, indeed, is crude in comparison. And a reason for this difference is that the state socialism, which underlies all systems, thrives best in communities accustomed to paternalism and disciplined to bureaucracy.

The laws of the several countries agree in their general aim. Certain classifications by groups are more or less marked. Instances of borrowing and adaptation are many. But in the last analysis each country has gravitated to a system whose spirit and form are commended by racial and political characteristics,[69] by local habits and customs. Broadly speaking it appears that those systems work most smoothly where existing institutions of one kind and another capable of facilitating their purpose have been skillfully utilized to this end.

II.

GENERAL CONSIDERATIONS ON COMPULSORY COMPENSATION.

What is the origin of compulsory compensation laws? What is their argument?—their status?—their effect?

ORIGIN—THE GERMAN SYSTEM.

William I.

The message of William I. of Nov. 17, 1881, first emphasized the concern of the modern state in systematic compensation for industrial accidents, though in March of that year a bill was presented to the Reichstag requiring employers in certain industries to compensate injured workmen without regard to the cause of injury, but differing radically from the system finally adopted in not providing for insurance of the obligation.

"We consider it our Imperial duty," said the Emperor, "to impress upon the Reichstag the necessity of furthering "the welfare of the working people. We should review "with increased satisfaction the manifold successes with "which the Lord has blessed our reign, could we carry "with us to the grave the consciousness of having given "our country an additional and lasting assurance of in-

[69] An interesting instance is the influence of the French compensation law upon the law of Quebec. See also p. 44, note.

"ternal peace, and the conviction that we have rendered "to the needy that assistance to which they are justly "entitled. * * * In order to realize these views a Bill "for the insurance of workmen against industrial acci- "dents will first of all be laid before you, after which a "supplementary measure will be submitted providing for "a general organization of Industrial Sick Relief Insur- "ance. But likewise those who are disabled in conse- "quence of old age or invalidity possess a well founded "claim to a more ample relief on the part of the State "than they have hitherto enjoyed."

Social insurance legislation.

The programme of the message was not carried out in precisely the order suggested. An accident bill presented in 1883 failed to pass, and the sickness insurance law of June 15, 1883 was first on the list.

An accident law, including generally the industries utilizing mechanical power, was passed July 6, 1884. To these industries were added agriculture and forestry on May 5, 1880, building operations on July 11, 1887, and marine transportation on July 13, 1887. Invalidity and old age insurance laws were enacted June 22, 1889.

The accident fund is wholly furnished by the employers. To the sickness fund the employers contribute one-third and the workmen two-thirds. Employers and workmen contribute half and half to the invalidity and old age pensions and the Empire adds fifty marks to each annuity besides paying the workmen's contributions during their military service.

The grouping of sickness, invalidity and old age with accident as equally deserving the state's concern demonstrates the wide reach and the logical consistency of the German system.

It is interesting to note that while old age pensions and accident and invalidity insurances are regulated by

imperial authority the sickness insurance is largely administered by the several States of the Empire[70] apparently because existing local institutions could be advantageously employed in administering it.

Bismarck's policy.

While according to humanitarianism its large part in the motive of the compensation law we must not fail to mark the diplomacy which so greatly facilitated its enactment. The insurance laws expressed Bismarck's purpose to countermine a threatening democratic socialism by an autocratic socialism designed to placate with material benefits a proletariate to be persistently denied full political rights. Professor Menger says: "The real benefit of this economic protection may be at all times lessened or even obliterated by import duties, tax exemptions, export bounties and like favors granted to the upper classes."[71]

Bismarck's social policy has not prevented a vast increase of democratic socialism whose revolutionary zeal has, however, become largely tempered by a philosophic patience. German socialism is today rather a creed than a war cry.

The persistence of Bismarck's political policy is shown by the returns of the parliamentary election of 1908. The Socialists cast about 600,000 votes or about 23 per cent. of the whole and elected 7 members. The Conservatives casting about 350,000 votes elected 152 out of 443.

If the social insurance laws were actually created by the stroke of a masterful statesman they were a step or rather a leap in a direction the German people had long faced. In guilds, in an intimate relation between master and servant, in mutual aid associations

Dr. Schmoller.

Dr. Schmoller indicates the precursors of the insurance system. He points out that Germany maintained to a much later date than her progressive neighbors

[70] Laband, *Droit Public de l'Empire Allemand,* IV, p. 6.
[71] *L'État Socialiste,* p. 359.

the old industrial order and plunged into modern industry with habits and organisms which though inadequate to meet the novel strain were capable of useful adaptation. In short he says that the relief associations of the middle and lower classes were between 1840 and 1900 transformed into a vast system of social insurance.[72]

The German environment.

Surveying the political setting of the German insurance system we find what at the moment is, perhaps, the fairest field in the world for the working out of a vast and complicated scheme for relieving misfortunes by a plan neither so niggardly as to be delusive nor so bountiful as to be demoralizing. Here is a people enjoying in large measure the steadying influence of tradition and custom, yet alive with a youthful enterprise which has brought a sudden and a great prosperity.

We have here an industrious and intelligent proletariate whose discontented element is held in check by a powerful military caste and, of peculiar value to the operation of the insurance laws, a bureaucracy whose officials "form," says Bluntschli, "a veritable professional order "with the consciousness of their solidarity; and they have "the importance of a political power. The head of the "State and the representatives of the people must reckon "with them and cannot dispense with their co-operation."[73]

In short the German insurance system flourishes in a peculiarly fit environment—a well-disciplined, or, as we should say, an over-governed community.

Germany's gift.

Other countries have, in following Germany's lead, chosen methods usually differing materially from the original, but one and all have adopted the fundamental principle of the German law—systematic compensation as opposed to casual suits for damages. This principle is

[72] *Principes d'Économie Politique,* IV, pp. 186, 208, 240.
[73] Theory of the State, p. 502.

one of Germany's gifts to the world, and her system is the standard of comparison for all countries.

THE ARGUMENTS FOR COMPULSORY COMPENSATION.

The modern community is said to be peculiarly pressed to enact compulsory compensation because of what is assumed to be an increased hazard incident to the implements and organization of modern industry. Upon this assumption are based questionable assertions.

MODERN HAZARDS, ETC.

It is asserted that the common law rules of employer's liability, however fitting in an earlier day, fail to meet the conditions of the modern industrial system with its large employment of workmen in dangerous trades.

Is it not unfair to say that modern hazards discredit the old rules of law? If these rules are essentially unjust to-day they were quite as unjust in their earlier environment. For hazardous employments are no new thing. In sailing on the sea, in building above the ground and burrowing into it workmen have from time immemorial risked their lives, and all things considered it is not improbable that, in the older employments, the risks are less to-day than in the rude conditions of earlier times. Modern methods have reduced the risk in many industries —the Plimsoll line, the Davy lamp, for instance—and improved medicine and surgery have mollified thousands of casualties.

Corporate influence.

It is asserted that corporate, as distinguished from the individual management of an earlier day is largely responsible for existing accident conditions. If the remoteness of stockholders—owners—from their workmen and the nominally impersonal administration of great establishments give some substance to the charge, is it not outweighed by the fact that concentration of industry into large corporations bespeaks a notable faculty of

organization and a wide range of activity that give a better opportunity to promote workmen's welfare than obtained when a multitude of small concerns competed strenuously in narrower markets?

Past and present.

Whether accident conditions are better or worse than aforetime—whether the locomotive and the live wire have relatively increased disablement, are quite beside the mark. It is enough to realize that conditions are serious—in some ways increasingly serious, we shall see, despite compensation schemes—and that the modern community seems more sensitive to human suffering than its predecessors and, assuredly, is more confident of ability to relieve it.

INDUSTRY SHOULD BEAR COST OF ACCIDENT.

The prominent argument for the compensation laws is that industry ought to bear a part of the loss inflicted upon workmen by accident instead of letting this press wholly upon them, and in making the employer the paymaster, it is assumed that the expense will be passed on to the consumer as an item of cost of production.

Who are the consumers?

Who are the consumers to be charged with the ultimate payment of compensation? Many current propositions for social reform gyrate on the notion that the capitalist, the workman and the consumer represent three distinct classes, and they intend that the first and the last shall be burdened for the benefit of the second. In reality there is no such rigid segregation. The workmen themselves are the largest consumers of each other's products, and they bear their share of any increase in price. This share is borne directly when the workman is the actual buyer. It is borne indirectly when his employer is the buyer.

After making all allowances, however, there remains a large class which may, in this relation, be fairly distinguished as consumers. But it is not a patient class upon whom the producer may lay all additions to cost

without bearing the penalty of a shrinking market, and this is especially true when the addition is due to legislation, and not to natural causes. Indeed, those public service companies which would be so markedly affected by a substantial increase in accident cost are being subjected to a control in the matter of rates which makes them the more solicitious to avoid compulsory additions to cost of service.

Even where employers are legally free to fix prices at discretion, increasing the cost to the consumer without loss to the producer and his workmen is generally more easily said than done.

Distribution of burden.

How shall a compensation law actually deal with "industry" which is to bear the cost of the accidents?

Industry is actually divided into a multitude of units of infinite variety—ranging in size from the workshop to the establishment with tens of thousands of workmen, in purpose from digging a ditch to operating a railroad, and among units of the same class there are marked differences in financial condition in character of employees and in business efficiency.

If a law proceeding on the theory that industry should bear the accident loss takes no account of the individual incidence of the burden, it will lead to gross inequalities in respect of particular trades and particular establishments. In these circumstances many employers would be justified in complaining that their business is not able to bear the strain, but here we encounter the

"Parasitic" trades.

charge that an industry or a plant unable to bear the cost of its accidents is "parasitic"—something which if it cannot be mended would better be ended.

"Parastic" aptly describes an economic defect inherent in all immoral traffic and of the useful trades with which we are concerned one or another may, conceivably, fall into this low estate, but the term as employed in the small change of socialist argument, is in-

tended to describe and discredit our whole industrial system.

Reviewing the proposition that industry shall bear the cost of its accidents we find that its substitution for the common law rules is reasonable only where the responsibility for compensation is so widely distributed as to preclude serious loss to a careful master. Review.

This means a system of insurance wherein individual ability to bear the burden is to be measured by that cardinal principle of all insurances—distribution of risk. In short, a burden theoretically borne by an industry as a whole will bear unequally upon the individual units. A burden actually borne by an industry as a whole will be more equally distributed among the units.

If a fair distribution of risk be assured the main proposition has a decided value as a working basis for systematic compensation, whether compulsory or voluntary. But Great Britain has already forged ahead of the proposition. She has affirmed the right of every injured servant to compensation from the master; and in the case of domestic, or other uncommercial service there is no cost of production to be passed on.

THE STATUS OF THE COMPENSATION LAWS.

Workmen's compensation laws are broadly classed with what are called the "social insurances." They are but one branch of a comprehensive project widely discussed, and in some countries already far advanced for the compulsory relief of hardships due to involuntary cessation or interruption of work by reason of old age, invalidity, sickness, maternity, accident, lack of employment, etc. Social insurances.

Social insurance laws are obviously intended to relieve indigence, but they disclaim affiliation with pauper Pauper relief.

legislation. According relief in consideration of past service or in expectation of future service and not as a dole they distinguish industrial disablement from pauperism and they propose to relieve the one without encouraging the other.

Not many years ago few thoughtful men of affairs would have deemed this proposal feasible on any large scale, but the attitude of many to-day is fairly stated by an English writer, who, after surveying poor relief, old age pensions, workmen's compensation, etc., says: "This "brief analysis of the progress of thought and policy in "relation to destitution testifies clearly to a change in the "dominant conception of society. We find first, a growth "of the belief that every member of society has an equit- "able claim against it, if it acts so imperfectly that he "cannot by reasonable diligence and honesty, maintain "himself and his family in tolerable comfort. Secondly, "it may be noticed that a different view of psychological "effects of destitution and relief prevails. On the one "hand it is held that want is as destructive of character "as charity, if it passes beyond that just measure of "economic pressure which gets the work of the world per- "formed. On the other hand it is thought possible that "the relief of evils which are unavoidable by individuals "of normal intelligence, character and earning capacity, "may be so far assimilated to other sides of collectivist "practice as to rob it of any deteriorating influence on "those who are relieved."[74]

In the development of this modern idea there is a notable difference of opinion in regard to the position of the beneficiaries. Great Britain, clinging to the spirit of the poor laws, exacts no contribution from the beneficiaries of her old age pension and compensation laws.

On the continent, however, workmen contribute to social insurances generally and in some cases to accident

[74]Meredith, Economic History of England, p. 293.

compensation.[75] And the old age pension law just enacted in France is notable for its sound requirement of contributions from the beneficiaries.[76]

Insisting that differentiation from poor relief must be conspicuous in fact if social insurance is not to encourage pauperism, we make no difficulty about its accuracy in point of law and shall, therefore, assume that compensation acts are not to be classed with pauper legislation. But, while we distinguish compensation laws from poor laws in spirit and in method, we must clearly mark their common end—relief of destitution.

The New York Employers Liability Commission not only emphasizes this point, but squarely recognizes compensation as an alternative is poor relief. It imagines the state saying to the employer, "The good of the community makes it essential that your business shall go on, but likewise essential that you should share the burden of loss from accident with the workers so that these citizens of the state may not, by this trade risk, from which you largely profit, become destitute or charges on the public."[77]

Peculiarity of accident compensation.

The practice of accident compensation differs materially from that of the other social insurances in this respect—that while in the other cases the pecuniary burden is either assumed by the state or apportioned between the state, the employer and the beneficiary, in the case of accident it is invariably imposed upon the employer, with here and there a contribution from the workman.

Socialism.

From a political viewpoint workmen's compensation legislation is "socialistic." But it is not the socialism of the socialist. It is the pseudo-socialism of the state.

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[75] See p. 22.

[76] See *Quart. Jour. of Economics,* Aug., 1910.

[77] Report, p. 52. The preamble to the Maryland Act (see p. 79) goes further. If indeed it be "the duty of the Government to provide sustenance" for the victims in question how can the taxpaying community shift this obligation to a special class arbitrarily defined. Who ever heard of such a class being singled out for poor relief?

As state socialism it is frankly recognized not only by statesmen but by jurists. "The socialist doctrine of the state," says Dr. Laband, "according to which the state should not only guarantee to its citizens the protection of its codes, but also the material sustenance of life has found partial application in the workmen's insurance laws.[78]

"State" socialism, however, hardly covers a case where, as in the accident laws, the state makes no contribution. In the placing of this burden upon the employing class we mark a nearer approach to real socialism, especially when the selection of industries gives a peculiar privilege to employees of supposedly rich employers.

Legal status.

Coming to the legal status of compensation laws we quote Dr. Laband's comment on the German law: "The Im-
"perial legislation starts from this idea—that the under-
Dr. Laband. "taker of an enterprise who employs workmen in order
"to appropriate to himself the economic value of the fruits
"of their labor owes them not only the agreed wages for
"this labor, but ought also to bear with them the risks
"of accident resulting from this labor. This conception
"has not taken the shape of a principle of private law
"which governs the relations resulting, in a juridical
"sense, from the labor contract; it has become one of the
"tasks laid upon the State to take care of the victim of an
"industrial accident or of those he leaves behind him; and
"this task is accomplished with the means and according
"to the forms dictated by public law. The right of the
"workman to the solicitude of the State is therefore
"wholly independent of an agreement relating to his work
"and the clauses it contains; he enjoys this right even
"when there is no agreement of this sort and this conven-
"tion can neither modify this right or deprive him of it.
"So, this right is not founded on a fault committed by
"the master or one of his employees, and even a fault of

[78] *Droit Public de l'Empire Allemand,* IV, 12.

"the workman does not affect it at all unless he has in-
"tentionally caused the accident. The obligation to aid
"the workmen is not a legal obligation, or what is called
"a 'state obligation' of the master toward his workmen,
"for master and workman are not set against one another
"like debtor and creditor, and they are powerless to vary
"the right of one to aids and the obligation of the other
"to give them. The workmen or their survivors receive
"the aids which come to them by an intermediary that the
"Empire of the State has delegated to perform this duty,
"an intermediary who has with them no private legal rela-
"tion, who simply performs a public administrative func-
"tion, confided to him by imperial order, when he de-
"termines the indemnity to be given to the workmen or
"effects its payment."[79]

Dr. Laband points out, however, that in case a law imposes only an obligation to make compensation leaving the insurance of the risk a separate, subsequent and discretionary affair, the obligation alone falls within public law—whatever may be done in the way of insurance falls within private law.

The upshot is that the German accident scheme, though in fact it compels the employer to supplement wages by compensation, is within the sphere of public law and is not supposed to interfere with or even regulate the private labor contract, for the simple reason that this contract is set in another sphere.

The British law.

"Public law," while not unknown in English jurisprudence, is not employed in the Continental sense as indicating a sphere of obligation wholly distinct from that of "private law"—as a law meeting the needs of a personified state and applied largely by administrative as distinguished from judicial officers.

The British Workmen's Compensation Act is, in point of law, simply a statutory regulation of the relation of

[79] *Droit Public,* etc., IV, p. 35.

master and servant. It involves a substantial interference with the private labor contract.

EFFECTS OF COMPENSATION LAWS.

The immediate results of the foreign compensation laws in the way of relief and the cost thereof, their bearing upon the condition of the workmen and especially on the accident rate, and their general effect on the community suggest a line of investigation which this brief can neither wholly ignore nor yet thoroughly pursue—which it can only touch in a general way.

MEASURE AND COST OF RELIEF.

Grand totals and their meaning.

In Germany, from 1885 to 1907, about four hundred millions of dollars of accident compensation have been paid to a multitude of workmen and their dependents. To this must be added the large sum paid under the sickness insurance system for minor accidents.

When to these figures are added those of other countries we have a vast body of beneficiaries who have received an enormous sum almost entirely made by employers' contributions.

Unquestionably a great part of this sum has in strict accordance with the theory of the laws been paid finally by consumers, and so has contributed to that increased cost of living which is quite as marked abroad as at home.

Of the remainder it is altogether probable that a portion has been imposed on the wage account not so much perhaps by actual reductions as by retarding advances. The rest is borne by individual employers in the shape of decreased profits or even of substantial losses.

Cost.

The following extract from a report on the working of the British Compensation Act is of interest: "This

year there are available for the first time substantially complete returns from the seven great groups of industries—mines, quarries, railways, factories, harbors and docks, constructional works, and shipping. These returns furnish materials for a general review of the working of the Compensation Act of 1906 in relation to the main body of the industries of the United Kingdom. In these seven groups of industries, the number of employers included in the returns was 117,391, and the average number of persons employed coming within the provisions of the Act was over 6½ millions, of whom over 4½ millions come under the heading 'factories.' In these industries in the year 1909 compensation was paid in 3,341 cases of death and in 332,612 cases of disablement. The average payment in case of death was £154, in case of disablement £5 6s. The annual charge for compensation, taking the seven groups of industries together, averaged 6s. 10d. per person employed. It was lowest in the case of persons employed in factories, being only 3s. 5d. per person; in the case of railways it was 7s. 1d.; it rose to 9s. 2d. in quarries, to 10s. 8d. in shipping, and to 14s. 11d. in constructional works; it was highest in docks, 16s. 8d., and in mines, 20s. 1d. It is noteworthy that in the coal mining industry the charge arising under the Act works out at about 0.8d. only per ton of coal raised." (The coal charge for 1908 was about 0.7d. per ton and the compensation about 17s. per head.)[80] British Returns, 1909.

While in no country has there been, I believe, any substantial increase in the rate of compensation originally adopted there is reason to believe that taking the countries by and large the average expense per claim has increased.

This is conspicuously illustrated in Germany where the statistics of cost are thoroughly worked out and cover the longest period.

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[80]Blue Book (cd. 5,386), London *Times*, Oct. 13, 1910.

In 1902 the average compensation per case was, in marks, 128,7, in 1906 132,35, and the average charges for each person insured 7,1 and 8,63.[81]

It should be noted also that so far as a compensation law imposes upon employers continuing obligations by way of pensions or otherwise, each year's additions will substantially increase the aggregate cost until, at a distant date, these shall be offset by terminating pensions.

LITIGATION.

That compensation laws have not, even when coupled with wider social insurances, promoted industrial peace is demonstrated by the industrial conditions abroad. In their best estate these laws have, in relation to industrial conflict, done no more than deal with a factor of discontent in a broad-minded, business-like way. Yet in doing this they have done much.

Considering the relation of these laws to actual litigation it must be understood that systematic compensation in its compulsory form does not mean automatic compensation. Since the very change from liability for a few accidents to responsibility for all multiplies opportunities for controversy, the number of disputes over accidents has increased. So far as this increase is concerned with the interpretation of a new statute—witness the British Compensation Act—it ought to simmer down as point after point is settled unless recurring amendments keep the pot boiling.

But, after general principles are fairly settled, there may still remain much litigation over their application—witness the experience of Germany where a substantial percentage of claims is carried to the arbitration tribu-

[81]It should be noted, however, that the employers associations have reduced the ratio of cost of management to compensation paid. In 1886 the average percentage was 28.49. In 1907 the percentage was 16.—Frankel and Dawson, 111.

nals and a goodly number taken on appeal to the Imperial Insurance Office.[82] Great Britain seems to make a better showing. A Blue Book giving the returns of the Compensation Act for 1909 shows that the number of claims settled judicially is less than one in five in fatal cases and less than one in two hundred in cases of disablement.[83]

If a compensation law increases the actual volume of controversy, it should, however, improve its tone, provided the methods are simple, certain, and above all, expeditious as compared with actions at common law. This improvement should be most marked in countries where actions are forbidden except in case of the master's gross fault.[84]

THE ACCIDENT RATE.

Increase of accidents.

Statistics emphatically disprove the plausible argument for the compensation laws that they tend to prevent accidents by making the employer more solicitous for the safety of his workmen.

The course of accidents in Germany for sixteen years is shown in the following table:[85]

	1890	1906
New accidents compensated.....	100,250	936,491
	Per 1,000 insured.	
New accidents	3.03	6.67
Fatalities	0.44	0.43
Permanent total incapacity.....	0.20	0.07
Permanent partial incapacity.....	1.65	2.93
Temporary partial incapacity more than 13 weeks	0.74	3.24

[82]See Frankel and Dawson, p. 109.
[83]*N. Y. Jour. of Commerce,* Oct. 25, 1910.
[84]See p. 24.
[85]*Bulletin des Assurances Sociales,* 1908, No. 1, p. 82.

In 1898 a compensation law was enacted in France, and there were recorded in 1904, 222,124 accidents, and in 1907, 359,947, or 52.8 and 96.1 per 1,000 workmen included. And of serious accidents there were in 1900, 6,543; in 1904, 15,305, and in 1907, 26,138.[86] In the textile industry accidents increased 41% in three years, and in the years 1900-1906, permanent disablements increased 100% in metal working and 250% in the building trade.[87]

In Great Britain the reports under the Factories and Workshops Act alone show for the years 1897 and 1907, respectively, fatal accidents, 658 and 1,179; non-fatal, 39,816 and 123,230.

A writer in the *Bulletin des Assurances Sociales* quotes from the *Popolo Romano,* "Despite the great progress of Italian industry in general no industry has prospered so brilliantly as the accident industry," and he cites, for example, a company who for one class of workmen recorded 155 accidents among 450 men prior to the compensation law, and in 1907, 607 among 637.[88]

In Austria there were recorded in 1895, 448.4 accidents per 10,000 full-time workmen, and in 1900, 631.9.[89]

The foregoing figures seem to be fairly typical of prevalent conditions. If they are to be taken at their face it might be argued that compensation laws substantially raise the workman's risk—the employer, being able to reckon and charge off the cost of accident, becoming less mindful of the workman's safety, and the workman, being assured of compensation, becoming less careful. But a marked increase in *reported* accidents is a natural consequence of allowing claims for slight casualties, which formerly went unnoticed, and for injuries within a statutory meaning of "accident" broader than the common one.

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[86] *La France Judiciaire,* Apr. 3, 1908, p. 78.
[87] *L'Économiste Français,* Feb. 13, 1909.
[88] 1908, No. 5, p. 201.
[89] Frankel and Dawson, 121.

Furthermore, a marked growth in industry increases accidents not only positively but relatively, and seasons of great prosperity with their inevitable work at high pressure notoriously raise the accident rate.

Yet, after making all allowances, we do find a substantial increase in the accident rate suggestively coincident with the operation of compensation laws.

A thorough analysis of all the cases would, perhaps, show that in most countries compensation laws have a comparatively slight influence upon the number of serious accidents (the marked decrease in the German figures for total incapacity is mainly attributable to preventive measures), but the analysis would show an increase of less serious, and especially of trifling hurts, with a considerable exaggeration of effect—to say nothing of malingering and simulation.

EFFECT ON WORKMEN.

We will assume that, taking the countries by and large, the bulk of compensation money is paid on meritorious claims, but this does not relieve us from inquiry as to the effect of the compensation laws upon workmen as a whole.

Whatever the relation of the compensation laws to actual pauperism they develop the pauper spirit so far as they beget malingering and simulation. We cannot accurately estimate the incidence of these evils. Much depends on the structure of the particular law, more on the spirit in which the law is administered. Local conditions and racial characteristics have some weight. Malingering and simulation.

In the testimony taken by a British Departmental Committee in 1904 we find a substantial amount of malingering alleged but, seemingly, not enough seriously to discredit the law. It is said that malingering has increased under the act of 1906 because this reduces the

disability period from two weeks to one, and, if disability lasts two weeks, allows compensation from the date of accident.[90]

A report of a special commission of 1905 accompanying proposed amendments to the Italian compensation law asserts that workmen frequently, not to say generally, display a tendency to exaggerate and prolong the effect of accident, "And futhermore simulation is not infre-"quent especially lumbago, muscular distentions and "nervous affections. In certain centres, Rome for exam-"ple, simulation has reached such degree of frequency and "perfection that eminent medical experts and alienists "such as Professors Parisotti and Mingazzi have gone so "far as to suppose the existence of an actual medical "school of simulation, a supposition which suffices to "account for the extremely clever doings of workmen "who, calling scientific ideas to their aid, know how to give "illusions of the gravest affections though they merely "have slight injuries.[91]

In France a new word *"sinistrose"* has been coined to define the fraudulent practices developed by the compensation law,[92] and the average of time lost by accident has risen from 17 days in 1890 to 23 days in 1907.[93]

The German system with its workmen's contributions for accidents of less than three months' disablement and its administration by associated employers should and probably does lessen opportunity for fraud, yet fraud is by no means unknown.[94]

If simulation and malingering are nowhere serious enough to discredit the compensation laws they are everywhere serious enough to cause solicitude, and the slighter the disabilities covered by a law the more are these practices encouraged.

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[90]Jour. of Insurance Institute of London, 1909-10, p. 59.
[91]*Bulletin des Assurances Sociales,* 1908, No. 1, p. 193.
[92]*La France Judiciaire,* Mar, 12, 1910, p. 35.
[93]VIII *Congrès des Assurances Sociales,* 790.
[94]VIII *Congrès des Assurances Sociales,* 138.

Unemployment.

The relation of a compensation law to unemployment is attracting attention in Great Britain.

The Poor Law Commission finds that the number of the unemployed and of the "casuals" is somewhat increased by the Compensation Act which tends to discourage the employment of elderly men who are, supposedly, peculiarly liable to meet with accident.[95] The minority dissent from that conclusion.[96]

Whether or not the Act materially shortens the age limit its interpretation by the courts tends to discourage the employment of men falling below a certain physical standard.

Clover, Clayton & Co. *v.* Hughes is the most significant of several decisions allowing compensation for a happening which would have done little or no damage to a man in ordinary health—a workman suffering from an aneurism dropped dead from a slight exertion. The House of Lords, two judges dissenting, pronounced the death an "accident" within the meaning of the Act.[97]

In view of such decisions there seems to be forming among workmen what, from the insurance standpoint, is a class of "bad risks" whose opportunity for work must be somewhat curtailed since insurance companies are taking notice of the conditions.

A recent Scotch case is of interest in this relation. A workman somewhat weakened by an accident sued the Iron Trade Employers' Insurance Association alleging that he was unable to follow his trade because owing to his condition he had been blacklisted by the Association. The court held that the Association acted within its rights as an insurance organization in warning its mem-

[95]Report, 1909, pp. 220, 363. See also C. S. Loch, Charity and Social Life, 357.

[96]Report, p. 1167. That liability to accident increases with age is shown by the figures for the German Employers' Associations giving the number of accidents per 1,000 insured: 18-20, 3.6; 20-30, 5.4; 30-40, 9.2; 40-50, 12.3; 50-60, 13.8. Frankel and Dawson, 103.

[97]1910, A. C., 242.

bers against applicants for work who were not up to the physical standard.[98]

Mutual aid.

Some of the British unions have long given sickness and death benefits, covering accidents, but this inducement to join is so slight in comparison with trade compulsion that free compensation under the law has not drawn away members. An injured member gets both compensation and benefit and it seems that this duplication, sometimes equalling the victim's wages, tends to encourage malingering. Many unions take a direct interest in the operation of the Act by pressing claims for their members.

From the trade union wherein accident benefits are of minor importance we pass to the benevolent or friendly society wherein sickness and death benefits, covering accidents, are the notable inducement to membership.

Friendly societies are of broader purpose than trade unions, being designed to promote fraternity and thrift rather than a distinctive industrial interest.

A compulsory accident law should not, by itself, impair the usefulness of friendly societies, but if sickness, accident, invalidity, old age, unemployment, etc., etc., are brought within compulsory relief voluntary associations covering their ground must sooner or later give way unless indeed they be effectively dovetailed into the administration of the new system, as for instance in Germany, where the old friendly societies have, as we have seen, been largely utilized for the sick insurance system.

Some of the British societies seem apprehensive of their fate if broad social insurance projects shall be executed, but Mr. Winston Churchill intimates that trade unions and friendly societies conducted on sound lines "will be regarded by the state as among its most valuable

[98]Mackenzie *v.* Iron Trades Emp. Ass'n, 1909, 1 Scots L. T., 505.

instruments for securing the good administration of its insurance schemes."[99]

There are thoughful publicists who apprehend the impairment of solid voluntary associations by the competition of public relief or by the proffer of public subventions.

The venerable Frédéric Passy says in a preface to *La Mutualité* by *M.* F. Lépine: "Thrift is, as you say, a virtue; and virtue is not ordained. It is voluntary or it is non-existent. Thrift is, as you assert and prove, a business. And a business is not built upon desires and ambitions; it reasons and calculates. Mutuality, as you say, finally, which subsists not to do away with sickness, old age or death, but to soften the blows by distributing them, to reduce, following an expression I think I introduced in the language of insurance, the individual catastrophes that destroy, into a dust cloud of accidents that distributes itself. Mutuality should be self-sufficient, and to produce all its good effects, in remaining truly fraternal, should borrow nothing from the deceptive favors of the state and should cause the charge of the sacrifice it involves to fall only upon those who profit by it." And *M.* Lépine says in his book: "Mutualism, instead of patterning itself more and more after socialism, its enemy brother, by appealing for an ever-increasing aid from the state, that is to say, by employing constraint and spoliation, will finally show itself, as it is and should be, radically opposed to socialism since it is founded wholly upon personal vigor and willing association, upon justice and liberty."[100] *F. Passy.*

These views of Frenchmen have a peculiar signficance, for France is the home of thrift—the seat of petty capitalists whose vast accumulations so dramatically uncovered years ago for the redemption of the land from the

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[99]London *Times,* June 21, 1909. See Mr. Lloyd George, *Times,* Nov. 3, 1910.

[100]P. 217.

German occupation, are to-day so potent in the world's money market.

GENERAL RESULTS.

In no country where a compensation law is the only or the main type of social insurance does it seem to have markedly affected general conditions one way or the other, but we may safely assume that except as its working may be marred by malingering, unemployment and the improvident use of lump sums, where these are given, its effect is beneficial.

Even in the comparatively long experience of Germany with this and other insurances it is impossible to estimate their precise relation to the industrial progress of the nation, though we may accept the following comment by a foreign observer: "No one can doubt that the general well-being of the working classes in Germany, which is strikingly visible to the eye and confirmed by vital statistics in spite of many unfavorable circumstances, is in a large measure due to the insurance system."[101]

In most civilized states workmen's compensation has become a permanent factor in industry, and at present there is no disposition to shift the direct payment from the employer to the community, which, however, ultimately pays the greater part of the cost in purchasing the products.

Hundreds of millions of dollars have been distributed among millions of injured workmen and their dependents since the enactment of the first compensation law by Germany in 1884, and it is safe to say that, so far from the distribution becoming restricted in a country where it has once begun, any change will be in the way of enlargement.

At first blush it might seem that the direct alleviation

[101] Arthur Shadwell, Industrial Efficiency, p. 403.

of misfortune indicated by the grand totals demonstrates the wisdom of the laws, but, in truth, proof of this sort would justify any compulsory transfer of money from those who have to those who lack.

If these compensation laws are to be widely and permanently useful they must be conceived and executed on the line of sound economy, not of almsgiving—they must find their justification in a general improvement of industrial conditions and not solely in meeting the needs of their beneficiaries. The law framed for the disabled fraction of the working body must tend to raise the standard of life for the active majority—a movement wherein increased efficiency must accompany an increase in well-being that shall be real and stable.

If the precise effect of the foreign laws is not clear in all respects, they at least demonstrate that systematic compensation for industrial accidents is practicable on a large scale.

III.

COMPULSORY COMPENSATION IN THE UNITED STATES.

RECENT LAWS.

Three States have lately enacted compulsory compensation laws of which we note some important features.

A New York law of June 25, 1910, entitled "An Act to amend the labor law, in relation to workmen's compensation in certain dangerous employments," provides (Article 14a) :[101a] *N. Y. Law of 1910.*

"§ 215. This article shall apply only to workmen "engaged in manual or mechanical labor in the following

[101a] See pp. 88, 101, 106, 119, 123, 124, 130.

"employments, each of which is hereby determined to be "especially dangerous, in which from the nature, condi- "tions or means of prosecution of the work therein, ex- "traordinary risks to the life and limb of workmen en- "gaged therein are inherent, necessary or substantially "unavoidable, and as to each of which employments it is "deemed necessary to establish a new system of com- "pensation for accidents to workmen.

"1. The erection or demolition of any bridge or build- "ing in which there is, or in which the plans and specifi- "cations require, iron or steel frame work.

"2. The operation of elevators, elevating machines "or derricks or hoisting apparatus used within or on the "outside of any bridge or building for the conveying of "materials in connection with the erection or demolition "of such bridge or building.

"3. Work on scaffolds of any kind elevated twenty "feet or more above the ground, water, or floor beneath "in the erection, construction, painting, alteration or "repair of buildings, bridges or structures.

"4. Construction, operation, alteration or repair of "wires, cables, switchboards or apparatus charged with "electric currents.

"5. All work necessitating dangerous proximity to "gunpowder, blasting powder, dynamite or any other "explosives, where the same are used as instrumentalities "of the industry.

"6. The operation on steam railroads of locomotives, "engines, trains, motors or cars propelled by gravity or "steam, electricity or other mechanical power, or the "construction or repair of steam railroad tracks and road "beds over which such locomotives, engines, trains, "motors or cars are operated.

"7. The construction of tunnels and subways.

"8. All work carried on under compressed air.

"§ 217. If, in the course of any of the employments "above described, personal injury by accident arising out "of and in the course of the employment after this article "takes effect is caused to any workman employed therein, "in whole or in part, or the damage or injury caused "thereby is in whole or part contributed to by

"(a) A necessary risk or danger of the employment "or one inherent in the nature thereof; or

"(b) Failure of the employer of such workman or "any of his or its officers, agents or employees to exercise "due care, or to comply with any law affecting such em- "ployment; then such employer shall, subject as herein- "after mentioned, be liable to pay compensation at the "rates set out in section two hundred and nineteen-a of "this title; provided that the employer shall not be liable "in respect of any injury which does not disable the work- "man for a period of at least two weeks from earning full "wages at the work at which he was employed, and pro- "vided that the employer shall not be liable in respect of "any injury to the workman which is caused in whole or "in part by the serious and willful misconduct of the "workman."

"§ 219-a. The amount of compensation shall be in case "death results from injury:

"(a) If the workman leaves a widow or next of kin "at the time of his death wholly dependent on his earn- "ings, a sum equal to twelve hundred times the daily "earnings of such workman at the rate at which he was "being paid by such employer at the time of the injury "subject as hereinafter provided, and in no event more "than three thousand dollars. Any weekly payments "made under this article shall be deducted in ascertaining "such amount.

"(b) If such widow or next of kin at the time of his "death are in part only dependent upon his earnings,

"such proportionate sum not exceeding that provided in "sub-division a as may be determined according to the "injury to such dependents.

"(c) If he leaves no dependents, the reasonable ex- "penses of his medical attendance and burial, not ex- "ceeding one hundred dollars.

"Whatever sum may be determined to be payable "under this article in case of death of the injured work- "man shall be paid to his legal representative for the "benefit of such dependents, or if he leaves no such de- "pendents, for the benefit of the persons to whom the ex- "penses of medical attendance and burial are due.

"2. Where total or partial incapacity for work at any "gainful employment results to the workman from the "injury, a weekly payment commencing at the end of the "second week after the injury and continuing during such "incapacity, subject as herein provided, equal to fifty "per centum of his average weekly earnings when at work "on full time during the preceding year during which he "shall have been in the employment of the said employer, "or if he shall have been in the employment of the same "employer for less than a year, then a weekly payment "of not exceeding three times the average daily earnings "on full time for such less period. In fixing the amount "of the weekly payment, regard shall be had to the differ- "ence between the amount of the average earnings of the "workman before the accident and the average amount he "is able to earn thereafter as wages in the same employ- "ment or otherwise. In fixing the amount of the weekly "payment, regard shall be had to any payment, allowance "or benefit which the workman may have received from "the employer during the period of his incapacity, and in "the case of partial incapacity the weekly payment shall "in no case exceed the difference between the amount of "the average weekly earnings of the workman before the "accident and the average weekly amount which he is

"earning or is able to earn in the same employment or "otherwise after the accident, but shall amount to one-"half of such difference. In no event shall any compensa-"tion paid under this article exceed the damage suffered, "nor shall any weekly payment payable under this article "in any event exceed ten dollars a week or extend over "more than eight years from the date of the accident."

The act further provides *inter alia* that no existing rights of action shall be affected thereby, but that one who brings an action shall forfeit claim to compensation, also that "any question which may arise under this act shall be determined either by agreement or by arbitration as provided in the Code of Civil Procedure or by an action at law as herein provided" which action "shall be conducted in the same manner as actions at law for the recovery of damages for negligence."

Montana Law of 1910.

An Act creating a State Accident Insurance and Total Permanent Disability Fund for Coal Miners[102] provides that "all workmen, laborers and employees employed in "and around any coal mines or in and around any coal "washers in which coal is treated, except office employees, "superintendents and general managers, shall be insured "in accordance with the provisions of this Act, against "accidents occurring in the course of their occupation."

The operators shall pay to the auditor of the State within five days after the monthly payment of wages one cent per ton on the tonnage of coal mined and shipped or ready for shipment, and operatives shall submit to a deduction of one per cent. of their gross monthly earnings which shall be paid by the operators to the State Auditor within five days after the payment of monthly wages.

The amount so paid to the auditor is called a "tax." The auditor shall pay the moneys to the State Treasurer who shall place them in a distinct fund called the Em-

[102]Laws of Montana, 1909, c. 67. See *infra,* pp. 108, 119, 122, 130.

ployers and Employees Co-operative Insurance and Total Permanent Disability Fund.

The auditor "upon being satisfied by adequate evi- "dence of accidental death" shall issue a warrant upon the treasurer to the dependants of the deceased in the sum of $3,000.

A workman receiving permanent injury shall receive a monthly compensation of not more than $1.00 a day for each working day. Loss of a limb or an eye shall be compensated for in the sum of $1,000. "If there are no funds "available to pay the auditor's warrant this shall draw "interest at the rate of 10 per cent. per annum until such "warrant is called for payment by the treasurer which "shall be as soon as the fund is sufficient to pay the same "with its interest then due." When any monthly payment has been made the beneficiary may claim a lump sum not in excess of $3,000 from which any payments already made shall be deducted.

The auditor "shall have plenary power to determine "all disputed cases which may arise in his administration "not herein provided for and to recommend in his report "the rates or premiums necessary to preserve such fund "and shall order paid such indemnifications as herein "provided. He shall have power to define the insurance "provisions of this Act by regulations not inconsistent "therewith and shall prescribe the character of the "monthly or other reports required of the parties liable "hereunder and the character of the proofs of deaths, or "total permanent disability, and shall have power to make "all other orders and rules necessary to carry out the "true intent of this Act."

Acceptance of benefits shall relieve the employers from liability to suit and the commencement of a suit shall operate as a forfeiture of the right to benefits.

Maryland Law of 1910.

The preamble to a Maryland[103] statute reads as follows: "An Act to create a fund for the relief and suste-

[103]1910, c. 153. See *infra,* pp. 108, 119, 130.

"nance of employees injured in coal and clay mining in "Allegany and Garrett Counties, and the dependents of "employees injured or killed in such mining, and provid- "ing for the imposition of a tax of twenty-seven cents per "month, for such employee, upon all employers engaged "in the business of coal and clay mining, in said counties, "and for a like tax upon each employee to be deducted "from his monthly wages, by the employer, both taxes "to be paid monthly, and a report made thereon, to the "Treasurers of said counties by such employers, the same "to be kept by the Treasurers in distinct funds to be "known as 'Miners and Operators Co-operative Relief "Fund,' providing for certain payments therefrom "under the orders of the County Commissioners, as re- "lief money, to persons injured and disabled while in the "discharge of their duties in or about such mines, and "for the payment of relief money to the extent of fifteen "hundred dollars, under orders of the County Commis- "sioners, to the personal representative of such employee "who may meet death in the discharge of his duties, for "the relief and sustenance of the indigent dependents of "such employee; defining the administrative powers and "duties of such Commissioners in relation to such relief "fund, and their right to enforce the payment of the tax, "providing for advancements by the Treasurer of one "county to the Treasurer of the other to cover temporary "depletions of such county fund, and for the remission "of the tax when such fund reaches fifty thousand dol- "lars; * * * exempting parties complying with this "Act from suits for injuries, disability and death sus- "tained by their employees, when relief has been accepted "or sued for under this Act; * * *

"Whereas, it is the duty of the Government to pro- "vide sustenance in the case of helpless indigence to those "who are or may become paupers and charges upon the "public and is the settled practice of Governments to do "so; and

"Whereas, experience has shown that the occupation "of coal and clay mining in Allegany and Garrett "Counties is attended with peril peculiar to the occupa- "tion itself, and that a great number of employees in the "mines, without estates and having large families and "dependents are annually disabled or killed in conse- "quence of injuries sustained in their employment and "they and their families become objects of charity and "charges upon the public authorities, and their infant "children are unable to secure the proper support and "education; and

"Whereas, it appears that such injuries, disabilities "and death occur with such regularity as to be susceptible "of approximation in advance and are inherent in the occu- "pation and a part of the business itself and the monetary "loss therefrom ought to be charged up to the occupation "and business; and

"Whereas, sound policy requires that some provision "be made for the sustenance of the family and dependents "of such injured or disabled employee and the widows "and infant children and dependents of such employee "when death results from such injuries, therefore," etc.

The County Treasurer shall make payments when directed by the County Commissioners; specific amounts are paid for specific injuries, *e g.,* loss of hands or blindness $750; there is paid in addition a dollar a day during medical treatment of not more than twenty-six weeks; for total disability other than specified, one dollar a day for not more than fifty-two weeks; in case of death within a year payment of $1,500, less what may have been paid as above. Commissioners shall determine what dependents are entitled, how much they shall receive, and whether in lump sums or allowances, and they may invest $750 in home for widow and infants. The bringing of suit for damages forfeits rights under the Act.

The above acts will be referred to here and there, but the purpose of this general brief will not permit a full and separate consideration of all the important questions which they suggest; and they are cited here as an introduction to a broad discussion of the legal aspects of compulsory compensation in the United States.

FUNCTION AND POWERS OF GOVERNMENT.

We have seen that European governments may engage in any scheme of "social insurance"—accident, old age, sickness, infirmity, unemployment, maternity—either as sole or part contributor or as guarantor.

Having differentiated, in point of law, social insurances from pauper relief,[104] we perceive that the former are not within the powers of a State of the Union as these have hitherto been employed.

State insurance.

But whether a State may levy taxes for social insurances in general suggests broad constitutional questions we need not discuss, for there is a specific objection to its financing of the workmen's compensation schemes in contemplation.

These are distinctively class legislation, and whatever discrimination our rule of "the equal protection of the laws"[105] may permit in imposing liability upon selected employers, I am of the opinion that a State cannot levy taxes for the exclusive benefit of "workmen" as such, much less for workmen in selected employments.

And if it be worth while to speculate as to the taxing powers of the Federal Government in this relation I should deem it quite as incompetent as the States.

In short, waiving consideration of social insurances generally and fixing our attention upon workmen's compensation, we conclude that the state cannot in this country assume financial responsibility, but that if com-

[104] See p. 57.
[105] See p. 112.

pensation can be lawfully imposed, it must of necessity be the private burden, which in other countries it generally is by choice.

State regulation.

While an American government is not competent to finance a workmen's compensation scheme it may regulate whatever scheme may be devised, and the established powers of the Federal Government and of the States to regulate the insurance business within their respective territories point to an ample jurisdiction.

TAXATION OR POLICE POWER?

If a legislature shall pass a workman's compensation act shall the imposition of private contributions be referred to the taxing power or to the police power?

A compensation scheme contemplates what, in an economic sense, is, in effect, a tax on the industries included. If, also, the necessary contributions are taxes in a legal sense (they are called "taxes" in the Montana and the Maryland Acts)[106] they would seem to lack the essential justification of being strictly of public purpose. Furthermore, a scheme singling out certain industries might well offend against the federal requirement of "the equal protection of the laws."

But the taxing power is not involved here. The purpose of compensation laws is such that if there be authority to exact the necessary contributions it must be derived from the police power.

LEGISLATIVE JURISDICTION.

In this federated nation of ours it is of first importance to delimit federal and state jurisdictions over our subject, and turning to other federations we observe that in Germany the Empire assumes entire control of the

[106]See p. 77, 79.

accident insurance system; and the system under consideration in Switzerland provides for federal control.

In the Dominion of Canada and the Commonwealth of Australia whatever has been done in the way of workmen's compensation has been done by the provincial and the state legislatures.

Interstate commerce—*Sabath Bill.*

The United States and the States have, respectively, exclusive jurisdiction over the subject so far as it appertains to their territorial domain, and if Congress has in addition a special jurisdiction commensurate with its power to regulate interstate commence the States may, nevertheless, cover the ground until Congress shall act. Has Congress jurisdiction?

The Sabath Bill,[107] introduced in the House of Representatives, prescribes compensation for employees engaged in interstate commerce and in handling the mails, and it defines these employments with such exaggeration as to suggest even graver invasions of state jurisdiction than were found by the Supreme Court in the Employers' Liability Act of 1906.

Considering the principle of the Bill, I am of the opinion that affirmance of the Liability Act of 1908 would not predetermine the validity of the principle. It is one thing for Congress to confer certain rights of action. It seems quite another to segregate a particular class of the community for a great social programme wherein accident compensation may be only the initial step. If, however, the one is really linked with the other, the Supreme Court should find in this logical sequence of the Liability Act a convincing proof of its unconstitutionality.

Even if compensation laws tended to make operations safer (increased safety of transportation was given by Mr. Justice Moody as a reason for the Liability Act, 207 U. S., 533), they would still lack the pertinence of a

[107]See pp. 120, 122, 123.

Safety Appliance Act, but in view of European experience it must be deemed matter of common knowledge that these laws, to say nothing of the less searching liability statutes, do not reduce the accident rate. In fact the rate has increased in spite of them.[108]

All things considered a compensation law is in my opinion unnecessary, inappropriate and, indeed, irrelevant to an effectuation of federal power over commerce and the mails. It deals with social relations which are the peculiar province of the States and policy no less than law condemns federal intrusion. Relief of destitution which is, as we have seen, the real end of the law is not a normal federal function.

The "New Nationalism" would add a new mischief to its list if in each State Congress might segregate for special social benefits, and, if for benefits for burdens, that fraction of the community who happen to be employed in interstate commerce and the mails.

Objections to federal legislation.

The practical objections to a federal employers' liability law are increased in the case of a workmen's compensation system, which should involve a single authority over employers and employees and a single classification of accidents and of compensation rates. This unity is beyond the reach of the Federal Government, which is forbidden to deal with accidents in local undertakings. It is within the reach of a state government which, as we have seen, may deal with accidents in interstate commerce in the absence of federal regulation.

The complexities and inconsistencies of interstate commerce legislation warn us against increasing the difficulties of administering systematic compensation in the States by adding this disturbing factor.

A federal law which should sufficiently segregate accidents of local from those of interstate character would, in

[108]See p. 65.

practice, encourage much litigation over the jurisdictional question and in the last analysis it would beget discrimination between victims equally deserving, but sorted into sheep and goats by wire-drawn distinctions between local and interstate commerce.

From whatever viewpoint, it is evident that any attempt to distinguish accidents in interstate from those in local commerce must lead to much confusion and injustice.

If, after all, Congress should succeed in confusing the situation to the extent of its power the great bulk of accidents will still remain within the exclusive jurisdiction of the several States. This means that a system of national scope cannot be instituted here. Instead of covering our country with a single law, one national and forty-eight state legislatures may deal with the subject or not at discretion, and, conceivably, may enact forty-nine varieties of law.

Concluding that the United States cannot and ought not enact, under the interstate commerce power, a compensation law, but, like the States, may act, if at all, only within their exclusive territory, we pass from the subject of jurisdiction to the fundamental question—whether or how far an American legislature may lawfully apply to employers the principle of compulsory compensation.

IS THERE LEGISLATIVE PRECEDENT FOR COMPULSORY COMPENSATION?

Before considering the status of a compulsory compensation law in this country let us see whether there is any American legislation whose established principle predicates or even suggests its constitutionality.

The exaction of contributions from individuals within a class and the application of the fund to insurance or indemnity purposes is almost, but not altogether, unknown in this country.

Seamen's aid.

In 1798 Congress required every sailor on an American ship to contribute twenty cents a month for the support of marine hospitals, and in 1864 the sum was increased to forty cents,[109] where it remained until the law was repealed by the Act of June 26, 1884.

A Pennsylvania statute of 1803 required shipmasters not employing pilots in certain circumstances to pay half the pilotage fees to the widows and orphans fund of the pilots' associations.[110]

Over and above this legislation in the seamen's interest we have the ancient rule of the maritime law entitling a seaman who becomes sick or disabled in course of the voyage to proper care at the expense of the vessel,[111] which rule it has been held was not affected by the Marine Hospital Act.[112]

Neither the maritime law or the foregoing statutes is a precedent for a workmen's compensation act. Seamen are and have ever been in a class by themselves, and in Reed *v.* Canfield,[113] Judge Story clearly distinguishes the common law regarding master and servant from the sea law.

But the ancient law of the sea does not give the modern legislature opportunity to deal with mariners at pleasure. Their constitutional rights and obligations are simply construed in some respects with reference to their peculiar status.

Excepting the Montana, the Maryland and the New York laws already cited,[114] I have found but one genuine workmen's compensation act in our statutes, and this was not compulsory. A Maryland statute of 1902 enlarged the common law liability of corporations engaged in certain

Maryland Act of 1902.

[109]R. S., 4385.
[110]See Cooley *v.* Wardens, 12 How., 299.
[111]Emerigon, p. 488.
[112]Holt *v.* Cummings, 102 Pa., 212.
[113]1 Sumn., 199.
[114]See pp. 73-80.

industries, and exempted from the act corporations who should deposit with the State Insurance Commissioner funds sufficient to pay $1,000 on account of each fatal accident happening in their establishment. A few employers made deposits, a few death benefits were duly paid, but the act was declared invalid.[115]

Our survey of American legislation discloses no established precedent for the fundamental principle of a compulsory compensation law—the placing of the burden upon the persons interested—employers or employees, or both. The project is novel, but its validity must be determined by established standards.

STATUS AND PRINCIPLE OF COMPULSORY COMPENSATION LAWS.

A compensation scheme not only expresses everywhere a broad public policy, but in Germany it originates and operates within the sphere of public law.[116]

While the public side of a scheme is in this country quite as apparent in fact as it is in Germany it does not here dominate. Under our system of constitutional guarantees an act of the legislature which imposes burdens upon individuals raises dominant questions in respect of private rights. The German viewpoint and ours are antipodal. The German Government frames a social programme assured of the complete subordination of private interests. An American legislature must square its programme with private rights, and we shall, by determining in what category of legislative projects a compulsory law properly falls, discover what rights it touches and also what particular legislative power it involves. Does it involve, exclusively, a regulation of "dangerous trades"? Is it distinctively an obligation imposable upon incorporated industries in virtue of the state's re-

German *vs.* American theory.

[115] See p. 120.
[116] See p. 60.

served power over corporate charters? Or is it broadly and simply a regulation of the contract between master and servant?

Theory that dangerous trades are alone subject to compensation.

Believing, apparently, that hazardous employments alone can be constitutionally subjected to a compensation scheme, but realizing the injustice of denying relief to the many workmen who are injured in employments that are not normally in the "hazardous" class the Minnesota Commission makes this naïve proposal: "That every employer in the State of Minnesota conducting an employment in which there hereafter occurs bodily injury to any of the employes arising out of, and in the course of such employment, is for the purposes of this Act hereby defined to be conducting a dangerous employment, and consequently subject to the provisions of this Act, and entitled to the benefits thereof." On the effective date of such a law a brakeman falls from a train and railway operation, always considered hazardous, becomes superfluously so defined; a few days later a kindergarten teacher falls downstairs and the education of children, never considered hazardous, becomes so during the life of the act. Thus all employments are, one after another, dragged into an arbitrary and a false list of "dangerous trades." Courts have gone far in accepting legislative assumptions of fact as accurate foundations for statutes, but in estimating "matters of common knowledge" the judge is not concluded by the vagaries of the legislator, and no court could decently subscribe to so gross a perversion of facts.[116a]

The New York Commission also seems to think that compulsory compensation can be lawfully prescribed for "dangerous trades" alone, though it does not define these in the absurd Minnesota manner. After noting the power

[116a] The absurdity of the Minnesota proposal was thoroughly exposed at the National Conference on Workmen's Compensation, Chicago, June 10-11, 1910. *Proceedings,* pp. 44-50, 76.

to prescribe regulations for the safe conduct of industries, it says: "We are of opinion that it is competent for the "legislature to take a further step and provide conditions "of [*sic*] the carrying on of such dangerous industries— "not, at the moment, conditions as to the method of "carrying them on, but conditions providing that any man "in the State who carries on such dangerous trades shall "be liable to make compensation to the employes injured "either by any fault of the employer or by these un- "avoidable risks of the employment." "Though quite "within its powers," says the Commission, "it is almost "unthinkable that the legislature should prohibit the con- "struction of tunnels * * * [or] the construction "of bridges with iron or steel framework. * * * But "we argue with confidence that since the legislature has "the power to prohibit such inherently dangerous work "and is unwilling to do it, it may prescribe that any em- "ployer who carries on such dangerous work shall pay "for the loss of limbs and lives of the workmen who are of "necessity sacrificed in it."[117]

If the premise that "the legislature has the power to prohibit such inherently dangerous trades" were sound law, we might perhaps accept as a plausible inference a right to license them under compensation conditions. But the premise so coolly assumed, is on its face and in its implications an assault on our body of personal rights. Whatever the rule in Continental Europe, American citizens engage in enterprise by right and not by state permission.

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[117]Report, p. 47. Bertholf *v.* O'Reilly, 74 N. Y., 509, which the Commission cites as "perhaps the strongest authority for [their] position" really exposes its weakness. In that case the court sustained a statute making the owner of premises knowingly leased for liquor traffic liable for damage done by persons intoxicated by liquor dispensed thereon. Surely the Commission will not say that the lessor of premises for a "dangerous trade" may be made a responsible party in a workmen's compensation law. Yet the whole reason for this drastic statute is the inherent vice of the liquor traffic, and this quality the Commission would, in effect, wrongfully attach to their "dangerous trades."

To this broad rule there is an express exception, affecting the form of enterprise, in the case of incorporated undertakings. This will be considered presently. Of immediate interest there is an implied exception, affecting the substance of enterprise, in a power to prohibit undertakings which lawmakers and courts agree may be banned. In this category are, for example, traffic in liquor,[118] lotteries,[119] cigarettes[120] and oleomargarine.[121]

Prohibitory powers.

Because a legislature may place a ban upon such things it does not follow that it may block railways, tie the Gloucester fishing fleet to its wharves, or close the mines—all because of the accompanying risks. On the contrary, the Supreme Court has implicitly limited prohibition to enterprises which it could not, as a matter of common knowledge, assert are essentially useful and innocent. Should the "mollycoddle," so persistently shaken in our faces, seek to sap our manhood by apron-string laws, we may be sure the Supreme Court will not give the lie to history by affirming that danger is essentially demoralizing. The most necessary of the useful arts may be regulated,[122] but none may be prohibited merely because of its danger.

Reserved power over corporations.

We have remarked that corporate undertakings are an exception to the general rule of free enterprise. An American legislature is authorized to grant new charters on its own terms which would-be incorporators may take or leave. In these circumstances we might concede its legal right to impose accident compensation as a condition precedent. This course, however, will not commend itself for new enterprises could not, with such a handicap, compete with established concerns.

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[118]Mugler *v.* Kansas, 123 U. S., 623.
[119]Champion *v.* Ames, 188 U. S., 321.
[120]See Austin *v.* Tennessee, 179 U. S., 343.
[121]Powell *v.* Pa., 123 U. S., 6.
[122]Barbier *v.* Connolly, 113 U. S., 27.

The critical question is whether the legislature may, under the reserved power to amend charters, impose the burden upon such concerns. If so we shall have to amend our statement that authority for a compensation law must invariably be sought in the police power. If so, most of the industries that are being conspicuously urged for compulsory compensation may be immediately taken in hand and any corporation, unless, perchance, protected by the peculiar terms of an ancient charter, may sooner or later be gathered in.

In several States the courts have upheld, as expressing reserved power statutes affecting the contract of employment—for example a requirement that wages be paid weekly or semi-monthly, or in cash;[123] and in Leep *v.* Railway Co.,[124] it was held that a statute ordering the payment of employees on the date of discharge under penalty of full wages until paid was valid as to the corporations and invalid as to the other persons mentioned. A decision closer to our subject affirms a statutory modification of the fellow servant rule as being authorized under reserved power.[125]

If the foregoing decisions suggest that a compensation law might be forced upon corporations but not upon individuals or partnerships the suggestion must be rejected not only as involving an unlawful discrimination both against corporate employers and the employees in unincorporated industry, but as attainting the police power which, if the principle of compulsory compensation be valid, is broad enough and strong enough to apply it to any industry wherein accidents happen. This conclusion is supported by the following citations:

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[123]N. Y. C. & H. R. R. *v.* Williams, 199 N. Y., 108; Lawrence *v.* Rutland R., 80 Vt., 320; State *v.* Brown & Sharp Co., 18 R. I., 16; Shaffer *v.* Min. Co., 55 Md., 74.

[124]58 Ark., 407.

[125]Lewis *v.* N. P. R., 36 Mont., 207. See Bedford Quarries Co. *v.* Bough, 168 Ind., 687.

In Knoxville Iron Co. *v.* Harbison,[126] the Supreme Court affirmed a statute requiring cash redemption of "store orders." Replying to the argument that the statute did not assert reserved power as was the case in St. Louis, &c., R. R. Co. *v.* Paul,[127] the Court said: "It is also "true that inasmuch as the right to contract is not abso- "lute in respect to every matter, but may be subjected to "the restraints demanded by the safety and welfare of the "state and its inhabitants the police power of the state "may, within defined limits, extend over corporations "outside of and regardless of the power to amend char- "ters."

In an Opinion of the Justices, as to extending a weekly payment of wages act to persons and partnerships engaged in manufacturing, the court said: "We "know of no reason derived from the Constitution of the "Commonwealth or of the United States why there must "be a distinction made between corporations and persons "engaged in manufacturing when both are engaged in the "same kind of business. The existing statutes on the sub- "ject relating to manufacturing corporations we do not "regard as having been passed necessarily in amendment "of their charters. They relate to all the corporations "described whether there is any power reserved in the "legislature to amend their charters or not, and they do "not purport to have been passed for the purpose of re- "stricting the corporate power of the corporation. With- "out attempting to define the limits of the power in the "General Court of Massachusetts to control the right of "its inhabitants to make contracts generally, we cannot "say that a statute requiring manufacturers to pay the "wages of their employees weekly is not one which the "General Court has not the power to pass if it deem it "expedient to do so."[128]

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[126]183 U. S., 13.
[127]173 U. S., 404, affirming Leep *v.* R., 58 Ark., 407, cited above.
[128]158 Mass., 589.

The foregoing opinions should dissipate any idea of treating corporate industry as being peculiarly amenable to compulsory compensation on the theory that a corporation, having received from the state a peculiar privilege, may be affected by whatever conditions subsequent the state may choose to impose.

While incorporation is, in theory of law, the same privilege to-day that it was in the days of rare and special charters, it has become the convenient, and in many cases the imperative form for carrying on a large part of the world's business. The real value of the old-time privilege is to-day outweighed by the public interest in accomplishing by associated effort what individual effort could not obtain.

If the legislature could, under the reserved power, impose burdens upon corporations at will, a vast amount of property would be cast beyond the pale of the constitutional guarantees. This highway to spoliation is blocked by the courts, which hold that property acquired under a corporate franchise is inviolable even when the charter itself is lawfully repealed.[129] And, in my opinion, the State cannot, in virtue of reserved power, impose upon corporate enterprise conditions which it could not, under the police power, impose upon unincorporated enterprise, except the conditions be peculiarly pertinent to corporate affairs. Who would say, for example, that the state, while unable to fix wages for a partnership, could fix them for a company? Equally absurd is the notion that a company could be affected with an obligation for accident compensation from which a partnership is exempt.

MASTER AND SERVANT.

MASTER'S RESPONSIBILITY.

Any compensation scheme likely to be seriously pressed will impose upon the master the greater part, if not the whole, of the pecuniary burden; and the obliga-

[129] See *People* v. *O'Brien*, 111 N. Y., 1.

"Contracting out."

tion, being a matter of public policy, cannot be avoided by arrangements whereby servants "contract out" of the scheme, unless this course be expressly permitted. Permission should not be given except, following English practice,[130] upon the condition of substituting an equally beneficial scheme.

The primary question of constitutional interest is whether an American legislature may lawfully impose the obligation.

Obligation unaffected by insurance or by shifting cost to consumer.

It must be understood that the validity of the obligation does not depend at all upon the master's ability to shift its burden to an insurer. This is so not merely because insurance may be, in fact, exorbitant or unobtainable, but because, on principle, the validity of a statutory obligation shall be determined according to its very nature and not by any circumstantial ability to pass it on.

This principle serves a more important purpose in correcting what seems to be a prevalent misconception of the force and effect of the formula that industry should bear a part of the cost of its accidents,[131] namely, that whatever sums the employer may pay out under a compensation scheme will be repaid by the consumer. Hence the popular notion that the formula is so conspicuously accurate and reasonable that a legislature may effectuate it as a matter of course. But even if the ability of the employing body thus to shift the burden were as assured in fact as it is in theory the circumstance would not suggest the validity of the obligation.

In truth, the formula and its implications are not within the sphere of our jurisprudence. If the legislature shall attempt to exploit the economic formula the courts will first have to decide the purely legal question whether a master may be affected with an inevitable and prede-

[130]See p. 25.
[131]See p. 55.

termined pecuniary responsibility for an accident not only beyond his reasonable power of prevention, but, mayhap, actually preventable by the victim.

Absolute duty.

We have already denied the power of a legislature so far to preclude a master from contesting liability in a workman's suit as to impose upon him an absolute duty in respect of accidents regardless of their cause.[132] Yet even in such case the quantum of damages would be left for determination. A compulsory compensation scheme goes farther. In predetermining the indemnity it creates absolute duty in its most radical shape.

R. v. Zernecke

Now the imposition of an absolute duty, or let us say an absolute liability, regardless of actual fault or responsibility, is not altogether unknown to our law. "Our jurisprudence" says the Supreme Court "affords examples of legal liability without fault and the disposition of property without fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in admiralty law is another. Other examples are afforded in the liability of the husband for the acts of the wife—the liability of the master for the acts of his servants".[133] So radical a departure from ordinary standards of justice is rare, and of the exceptional cases cited by the Court the last one only requires consideration.

Masters' liability at common law.

An interesting analysis of the rule of masters' liability is thus summarized:

"Whatever may be thought about the reasons for this "rule, two or three things are certain and significant. "*First,* that the rule making the master liable does not "depend upon foundations of natural justice, but is de- "fended upon considerations of expediency. *Second,*

[132]See p. 10.
[133]C. R. I. & P. R. *v.* Zernecke, 183 U. S., 586.

"that in all the cases which arose during the time the "rule was taking shape, the injured person was a third "person; and *thirdly,* that of the various considerations "of expediency urged in its support, the most important "and significant contemplate that the person seeking a "recovery is an outsider, in no way participating in or "connected with the enterprise.

"It is also true that the rule that the master should be "liable, or as it is more shortly put, the rule of *respondeat "superior,* is not a statement of a universal principle at "all, but is in itself an exception to a more general rule "and is based merely upon considerations of expediency. "As is well stated by Mr. Beven in his work on Negli- "gence: 'There is no general rule making one man liable " 'for the negligence of another. The rule of law is the " 'other way. *Culpa tenet suos auctores tantum.* To " 'this law there has long been an exception established— " 'that the master must answer for the act of his servant " 'when strangers are injured thereby' (3d ed., Vol. I, "p. 657)."[134]

Understanding that *respondeat superior* is itself an exception from the sound rule that one man be not held for another's fault, we perceive that the courts, in declaring the fellow servant rule, did not, as is now frequently charged, inject a discordant note into the common law; on the contrary, they simply declined to extend an exceptional doctrine beyond what they deemed the imperative limits of its just operation. But after all we might concede the legislature's right to extend *respondeat superior* to injuries caused by fellow servants without affirming the principle of a compensation law, for this must cover all accidents, and not merely those attributable to the master or his servants.

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[134]Prof. Floyd R. Mechem in Illinois Law Rev., Nov., 1909, p. 249. See also Mr. E. D. Robbins' argument in Hoxie *v.* R., (82 Conn., 352) unfortunately not printed in the report.

Precedent for a compensation law is not found in the Supreme Court's illustrations of "legal liability without fault." Nor is it found in the rule making common carriers practically insurers of goods in transit except for losses arising from the acts of God or of public enemies, if only for the reason that a carrier's servants cannot be accorded, as such, a constitutional preference in the matter of accident indemnity. And a similar reason will suffice to differentiate C. R. I. & P. R. *v.* Zernecke,[135] wherein the Supreme Court upheld a statute making a railway company liable for injuries to passengers in transit, except where the accident is due to the victim's criminal negligence or to his violation of regulations actually brought to his notice.

Duty of master to servant.

If there be a warrant for the master's duty contemplated by a compensation law it will be found, not in exceptional rules and statutes imposing absolute liability to persons other than servants, nor in any peculiar relation between this or that class of masters and servants, but in a personal relationship between all masters and servants of closer intimacy than has yet been recognized in our jurisprudence, and it will be instructive first to view it in the light of duties appertaining to other relationships.

Family relations.

The reciprocal obligations of parent and child are natural duties, and I am not now concerned to set any limit upon the state's power to coerce the neglectful where the child is immature or the parent aged. At all events the state may assuredly compel able parents to support disabled children and able children to support disabled parents according to the means of the one and the needs of the other.

Of marriage, the closest of contractual connections,

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[135] 183 U. S., 586.

it is sufficient to note that the duty of the husband to support the wife may be enforced by the state.

In contrast to the family relations that of master and servant is ephemeral, for, excepting the seaman who is bound for the voyage,[136] neither party to a labor contract can force its continuance even though a term be specified—the master may discharge, the servant leave at pleasure. In point of fact it is, in the majority of cases, of not long duration, and in certain industries seasonal or casual employment is the rule.

The relation of master and servant differs radically from the family relations in being essentially of commercial quality, and our organic law consistently holds them wide apart in the matter of responsibilities. Who would maintain, for example, that an American legislature could require from employers to workmen that care in sickness and old age so clearly enjoined in the family relations, yet while these misfortunes are not so impressive as the occasional accidents, their resulting hardships are quite as distressing in fact and far greater in volume.

Accidents during service.

Nevertheless, accidents which "arise out of and in course of the employment," to borrow the words of the British Compensation Act, being broadly referable to the commercial relation, are sufficiently differentiated from all other misfortunes to suggest a master's duty in some degree. This duty the law affirms in prescribing reasonable care to prevent accident and liability for casualties due to his actual or constructive fault; and the common humanities—first aid to the injured for example—may well be made a legislative obligation.

But a duty partially to support the victim without regard to the cause of accident would tend to assimilate this commercial relation to the family bond. Indeed, it is not altogether fanciful to say that they who declare

[136]Robertson *v.* Baldwin, 165 U. S., 281.

the duty unconsciously assimilate the workman to the serf whose master was, in theory of law, bound to support his human chattel.

In calling the relation of master and servant a commercial one I do not minimize its obligations of a social nature. I merely emphasize what, from a legal standpoint, is its dominant note—the commercial motive for the contract of employment. And this brings us to the crucial question—May the state thrust into this commercial contract a condition that the master shall compensate the workmen for all accidents arising out of and in course of the employment?

Freedom of contract.

While freedom of contract is the rule,[137] all contracts are subject to whatever regulation a constitutional public policy may demand. For example, the Supreme Court has sustained statutes prescribing reasonable regulations in the interest of health and safety,[138] and employers may be required to pay wages in money.[139]

The principles thus far laid down by the Supreme Court do not, however, forecast the validity of compulsory compensation. It is one thing to order an employer to take reasonable measures to prevent accident. It is quite another to order him to pay compensation for accidents beyond his normal, or his possible power of prevention. One thing to require him to pay wages in money to an active workman and quite another to require payment of part wages to a disabled one or his dependents, for this is what workmen's compensation laws really involve.

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[137]Allgeyer *v.* Louisiana, 105 U. S., 590.

[138]Johnson *v.* S. P. R., 196 U. S., 1; Holden *v.* Hardy, 169 U. S., 366; Schlemmer *v.* R., 205 U. S., 1; Mueller *v.* Oregon, 218 U. S., 412. See Lochner *v.* N. Y., 198 U. S., 45.

[139]Knoxville Iron Co. *v.* Harbison, 183 U. S., 3.

Small employers.

The movement for workmen's compensation is largely inspired by the concentrated wealth and the great plants so conspicuous in modern industry. But side by side with the big things a multitude of small employers and petty industries operate along the old lines. If the master's duty be approved on principle it may, in point of law, be imposed as well upon the small farmer as upon the railway company; and the correlative servant's right may be accorded as well to a ploughman as to a brakeman.

Let us test the proposed duty by the case of the householder, referring to a decision under a statute enacted by a legislature of unlimited powers—the British Workmen's Compensation Act.

A charwoman who worked for a householder three days in every two weeks pricked her finger with a pin while cleaning steps. Blood poisoning necessitated amputation and the employer was ordered to pay her seven shillings per week for permanent incapacitation.[140]

I am of the opinion that so harsh an exaction would in this country be adjudged arbitrary and extortionate—a deprivation of property without "due process of law." It would bespeak a duty of master to servant more onerous within its sphere than that which obtains in the family relations. The father or husband has never been, nor could he be required to contribute beyond his means. The master, however, must pay a statutory rate regardless of his means, and it is, from the viewpoint of legislative power, immaterial whether the rate—which must be calculated on a uniform basis for all victims[140a]—happens to be actually proportioned to his means or not. And this burden is cast upon a blameless man because a servant meets with injury through his own fault or by pure misadventure.

It may be urged, however, that current proposals do not generally affect the petty employer. This is true. It

[140]Dewhurst *v.* Mather, 1908, 2 K. B., 754.

[140a]See p. 111.

may be asserted that he never will be affected. This remains to be seen. But, whether he be ultimately affected or not, if the duty may not be lawfully laid upon him they who would impose it on the large and supposedly well-to-do employer must demonstrate a valid principle of differentiation.

Considering the primary question of constitutional law involved in a compulsory compensation system—the imposition of an absolute and comprehensive responsibility upon employers—we mark at once a large measure of uncertainty and even dissent among partisans of the system.[141] And the first American decision on the subject gives but a perfunctory assent. "The legislative

[141]In no case are these doubts more plainly expressed than by the framers of the New York act. We have seen that the Commission rejects all idea of a comprehensive compensation law and they say of their limitation to "dangerous trades" "that the matter is clear beyond peradventure we do not assert" (p. 47).

A member of the Commission writes: "Our written constitutions go so far in protecting the liberty and property of employers that there is grave doubt whether a law requiring them to pay even moderate compensation would be upheld by the courts.

"The New York Commission on Employers' Liability and Unemployment created in 1909 gave much thought to the matter. In the preliminary report which it submitted to the legislature in March, 1910, it proposes to meet the constitutional difficulty by prescribing a system of workmen's compensation for specially hazardous industries, as a part of the policy of regulating these industries under the police power. For other industries it hopes to secure the adoption of the system of workmen's compensation by permitting employers and employees by voluntary agreement to substitute it for the requirements of the employers' libability law amended so as to weaken some of the present defenses of the employer."—H. P. Seager, Social Insurance, p. 75.

Another member says: "We had only two lawyers in the State who wrote us [226 were addressed] that they thought a general compulsory compensation act similar to the English law would be constitutional," though "a great deal of advice" approved the selection of hazardous trades (*Proceedings,* National Conference at Chicago, June 10-11, 1910, p. 17). Perusal of the *Proceedings* shows a widespread doubt as to a general act and advocates of a limited act seem not so sure of its intrinsic soundness as they are of its popularity with the voting army of householders and farmers who, it is supposed, would cheerfully impose upon operators of railways, mines, etc., a duty which could not be laid upon themselves.

Ives v. *R.*

power to deal with employers' liability on a basis other than fault," says Judge Pound in sustaining the recent New York act,[142] "is not clear beyond peradventure, but "every presumption is in favor of the constitutionality of "the act; nor do I find its constitutionality so doubtful "as to warrant this court [a court of first instance] in "holding that such action is not within the constitutional "powers of the legislature."

Opinion against absolute duty.

In my judgment a legislature has no power to impose such a responsibility. I shall not, however, cut short consideration of our novel subject by opposing a personal opinion, but, contenting myself with expressing it, take up important questions of secondary interest.

WORKMEN'S CO-OPERATION.

May an American legislature follow the example of Germany and Austria,[143] and oblige a workman to devote a fraction of his earnings to an accident fund?

Observe that there is no question here of forced contributions to present needs as where a capable head of a family is ordered to pay for their maintenance. The immediate question is whether the state may prescribe thrift in contemplation of a possible disablement; and this is a branch of the broader question as to its prescription in view of the relatively probable incapacities from sickness and old age.

But even if the state may prescribe for all men a measure of the latter sort, it does not follow that it may compel a "workman" to contribute to an accident fund, which is created for a "class" as distinguished from the community at large.

The solidarity of "labor" is being strenuously advo-

[142]Ives *v.* South Buffalo R., Buffalo, Sept. 28, 1910. On Oct. 21 the decision was affirmed by the Appellate Division, without opinion, one judge dissenting, and the case is on its way to the Court of Appeals.

[143]See p. 22. The New York Commission would prefer to add to the employers' contribution of fifty per cent. of earnings a workmen's contribution of twenty-five per cent., but "see no way to accomplish this by force of compulsory law" (Report, p. 67).

cated; it is being realized in some degree; but it is not yet assimilated in our jurisprudence to the solidarity of the family, on the one hand, or to that of the community on the other. However, if it shall be held that a legislature can so reverse our traditional conceptions of legal responsibility as to compel the master to compensate for all accidents regardless of their cause, this relatively minor matter of workmen's contribution may well take the same course.

If workmen cannot be affected with direct contributions to compensation it may happen that indirect contributions will be obtained by employers by shaving the wage scale, in case the compensation rate is so high as to necessitate searching economies in cost of production. But whether or not workmen shall, directly or indirectly, give pecuniary aid to a compensation scheme they should, in certain callings, be made to give it moral support by observing safety rules. Several States have already made infractions of certain safety regulations misdemeanors,[144] and we may find it expedient to make a liberal use of the German practice of imposing small fines for infractions.

Furthermore, it is worth considering whether the wholesome principle of Farmer *v.* Kearney[145] cannot be worked into a compensation scheme. Surely when workmen force upon the master a servant of their choosing there should be at least a reduction of compensation in case accident results from his incompetency or misconduct.

Here is a good place to emphasize the true position of accident compensation in the workman's list of wants. We in America perceive constitutional as well as economic obstacles to assuring every one that "right to work" which some foreign politicians are dallying with,

[144]See, for example, Pennsylvania Mining law, Brightly's Digest, 1895, s. 384; Utah Mining law, Comp. Laws 1907, s. 1524.

[145]See p. 7.

but we realize that opportunity to work is the workman's first need. Like obstacles discourage the enactment of the "living wage," but linked with opportunity to work is the fair reward. Only when work is abundant and wages fair are casualties to the few of prime concern to workmen as a whole, and prevention is of greater concern than compensation. A compensation scheme will be distinctly injurious if, by reason of its cost, it shall substantially curtail work or wages. It will be defective unless it shall be accompanied by suitable measures of discipline tending to prevent accident.

INSURANCE.

We have pointed out the practical need of insurance in relation to compensation and we insist that no scheme will be fair unless it be accompanied by a reasonable opportunity for distributing the risks at a reasonable cost. We have shown that in some foreign systems insurance is voluntary and in others compulsory.[146]

Premising that when insurance is compulsory it necessarily supersedes an employer's individual responsibility whether it be undertaken by a public institution or by an association, and that when it is voluntary the location of responsibility depends on the statute, we consider the attitude of our legislatures toward insurance.

COMPANY INSURANCE.

Considering that insurance companies are purely private organizations of commercial purpose, there is no reason to suppose that the state would, and I deny that it could prescribe them, or any of them, as the recourse of the employer. But they are likely to play an important part in any comprehensive scheme, for an employer who can neither carry his own risk safely or distribute it in a mutual association will be driven to them. I say "driven" advisedly, because this course means the

[146]See pp. 32, 33.

intervention of a commercial concern which for its own protection will frequently be compelled to contest claims which master and servant would adjust. Furthermore, associations, having no concern for profits, operate, when soundly organized, at a lower cost than companies.

While a few employers may be unable to insure their compensation obligations in conservative companies because of the extraordinary hazard of their industry, opportunity for insurance will, generally, be commensurate with the need, and how far it shall be embraced depends upon the security and the cost.

Concerning security, we may assume that responsible companies will furnish ample facilities, except so far as state exclusion laws may restrict their range; and the legislature should, as I urge elsewhere,[147] provide that insurance in approved companies shall shift the employer's obligation.

Concerning cost it is evident that if commercial insurance is to be a permanently useful factor the premium rates must attract the insured and profit the insurer. In this relation British experience is of interest. After the Compensation Act of 1897, the companies charged for the new risks much larger premiums than for employer's liability, and so with the industries added by the sweeping act of 1906. Yet the new premiums do not seem to be generally remunerative. An insurance journal after giving the company returns for 1908, says: "A margin so meagre as 1.26, or even 1.55 per cent., affords neither protection for risk of capital nor opportunity for division of profit, and it is doubtful whether the investment of the funds at interest can yield an average of more than 2 per cent. in the premium income."[148]

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[147]See pp. 109, 131.

[148]*Post Magazine and Monitor,* Dec. 25, 1909. See also *N. Y. Journal of Commerce,* Mar. 28, 1910. Commercial insurance in France seems to be quite as unsatisfactory as in England. See VIII *Congrès des Assurances Sociales,* p. 777.

In view of foreign experience we should not enact a compensation law which is likely to entrain recourse to commercial insurance without an approximate idea of how our companies will play their part, for even if the employer's responsibility shall be maintained in law it will not be justified in fact if he be unable to insure his risk at a reasonable cost.

Of the action taken by insurance companies in view of the New York compulsory compensation act, we have only to say that the rates for the new risks are naturally much higher than the old employer's liability rates. Judging from foreign experience, these rates are not likely to be lowered. Whether they shall be raised depends upon conditions yet undeveloped, and especially upon the judicial interpretation of the act.

Advised that the private company is available only in connection with voluntary insurance, as in Great Britain or as a permissible alternative to official methods of compulsory insurance as in The Netherlands we perceive that the normal basis of compulsory insurance is a fund furnished by the parties responsible for compensation and administered either by themselves as in the German associations or by some official institution as in Sweden.

GOVERNMENT INSURANCE.

Whether an American government or one of its agencies is authorized to collect and administer an accident insurance fund is a novel and a doubtful question, but I shall not labor the point here because we might concede its authority yet doubt its ability to assure an impartial, economical and efficient administration.

EMPLOYERS' ASSOCIATIONS.

Turning to compulsory associations of employers we could not, for all industries, adopt that admirable feature of the German associations—the grouping by industries and not, as in Austria, by districts. For the

German associations operate without regard to State boundaries, while here associations by industry would be multiplied by as many States as a particular industry should cover. This parcelling would in many cases result in organizations differing widely in cost and efficiency.

Constitutional embarrassments.

More importantly, the compulsory association of employers grouped according to the will of the state would raise a grave question of constitutional power. We have much legislation forbidding individuals to associate for certain purposes deemed inimical to public welfare, but to compel the association of individuals is a different matter, and I doubt the validity of statutes compelling employers generally to so far sacrifice their independence as to associate themselves in the foreign fashion—especially if they include, as they should, the provision of the German law giving certain rights of mutual visitation and search for the purpose of discovering violations of safety rules. Our courts will not say that there is in the various branches of industry a natural relation which an American legislature may seize upon as an excuse for imposing a legal connection.

Were we concerned only with certain markedly individualistic industries we might find at least some economic reason for their connection, but the variety of modern industry would necessitate much grouping of a wholly arbitrary character. And how completely the grouping in foreign systems is dictated by convenience is illustrated in Austria, where employers are grouped by territorial districts and not by industries.

Finally, a compulsory association of employers means that A, B and C are each affected with a measure of pecuniary responsibility for accidents in others' establishments; and when the establishments are classified, as in Germany, according to their respective accident risks

and the contributions graded accordingly,[149] the law of averages is in the long run supposed to relieve each employer from disproportionate payments.

An American scheme without such classification would deny to some contributors "the equal protection of the laws." Hence, if different industries be grouped together, as, for example, in Austria and Hungary,[150] the paper maker should pay a lower rate than the powder maker, or, if like industries be grouped, the risk variations of the several establishments should be met by differential rates as in Germany[151]—a point which is ignored in the Montana and Maryland compensation acts.

But no device for neutralizing mutual obligations would conceal the fact that the legislature, in prescribing an association, imposes immediately upon each member an absolute duty in respect of accidents in establishments having no connection with his own save the one arbitrarily declared by the statute. Even those who would hold an employer responsible for all accidents in his own works will, I think, perceive the unconstitutionality of a statute projecting his responsibility into another's.

The gist of my argument against compulsory association is that the enforced contribution to a common insurance fund involves an unconstitutional spreading out of individual responsibility. Hence the argument applies as well to a fund controlled by a public authority as to one administered by the employers themselves.

Review.

Reviewing our discussion I am of the opinion that, because companies are private commercial agencies, the legislature cannot prescribe insurance in them, nor can it prescribe contributions to a mutual insurance fund

[149]See p. 40.
[150]See p. 43.
[151]See p. 40.

because this would impose upon independent employers unconstitutional responsibilities in respect of each other's misfortunes and delinquencies as these affect each other's servants.

Unless there shall be devised some other method of compulsory insurance free from constitutional defects there remains only voluntary insurance, and herein we should prefer the French to the British system—we should allow an employer to shift his obligation by insuring in an approved institution whether this be a company or a voluntary association.[152]

"EQUAL PROTECTION OF THE LAWS."

A workmen's compensation statute is essentially class legislation and none may be drawn without more or less classification of a particular kind.

Now the States of the Union are forbidden by the Federal Constitution to deny to anyone "the equal protection of the laws," and the broad purpose of the prohibition is to prevent invidious discrimination while leaving free that power of reasonable classification so essential to efficient lawmaking.

Federal prohibition.

Were the Constitution construed like a private document the fact that the prohibition is expressly laid upon the States alone might imply that the United States are free to single out persons or classes or sections for invidious benefits or burdens. But the corner stone of the Republic is the equal rights of a free people. If this axiom, which was at a late date in our history emphasized only through fear of local discrimination against the freed negro, needs chapter and verse for its national obligation, the clause of the Fifth Amendment forbidding the United States to deprive anyone of life, liberty and

[152]See p. 105.

property "without due process of law" will serve. For who will deny the negro's right to the "equal protection of the laws" of the United States as well as those of the States.

Understanding that the States are expressly, and the United States implicitly governed by some rule of equality, and that any initial compensation scheme likely to be proposed will single out certain employers for its burdens and exclude certain employees from its benefits, the question is whether or how far a selective process will be compatible with the rule.

The rule of equality does not oblige us, in framing a compensation law, immediately, or ever, to do what Great Britain did after some years of experiment with selected industries—namely, embrace practically all masters and servants; though I maintain that, from a constitutional standpoint, if any, then all can be embraced.[153]

On the theory that in petty establishments the accident risk is relatively slight, I should make no difficulty in excepting them from a compensation law, as they were in England, under the Act of 1897, distinguishing "workshops" from "factories,"[154] and as they are generally in Continental Europe.[155]

The Supreme Court has sustained an exemption of mines employing less than ten men from the obligation of a check weighing act,[156] and the principle of decision would seem to warrant the exception of petty plants from a compensation law.

Exemption of employments.

The exemption of certain employments from a compensation law entrains of course the exclusion of the

[153]See pp. 100, 142.
[154]See p. 18.
[155]See p. 18.
[156]St. Louis Coal Co. *v.* Ill., 185 U. S., 206.

masters and servants connected therewith and thus leads indirectly to a personal classification.

Personal classification.

Coming to direct personal classification it seems only necessary to say of employers that there must be no discrimination among them based upon an arbitrary estimation of their personalities. For example, the decisions that corporations, as such, cannot be singled out for an employers' liability not imposed upon individuals and partnerships, apply, *à fortiori,* to a compensation law.[157]

In regard to the personal classification of employees, we find that while the employer may not be expressly included because of his financial resources, the omission of employees on this score is not only permissible but advisable. For the proper purpose of a compensation law is to aid the employees whose earnings are presumably too small to tide over the effect of accident and those of higher estate are properly omitted by grouping the beneficiaries under a wage limit.

We have seen that this is the rule abroad, excepting in England, where the manual workers are distinguished from all others in being freed from the limit[158]—an exception repugnant to our rule of equality.

Whatever workmen are included in a compensation law must be on an equal footing in regard to compensation figures, whether these be expressed in money or in rate of wages,[159] and I repeat that if a legislature shall commence a compensation system with the richer industries, it is enjoined to a moderate compensation that will permit its later extension to the poorer ones.

Broadly speaking, it will be a nicer task to pick out workmen for benefits than employers for burdens, for the whole purpose of a compensation system is to benefit

[157]Ballard *v.* Oil Co., 81 Miss., 507; Bedford Quarries Co. *v.* Bough, 168 Ind., 675; Kline *v.* Iron Co., 96 Minn., 66. See also L. & N. R. *v.* Melton, 218 U. S., 36.

[158]See p. 21.

[159]Austria, be it noted, gives railway employees a preference in the matter of compensation. Frankel and Dawson, p. 121.

workmen, not to burden employers, and even if the courts accept the argument that an employer's burden will be ultimately shouldered by the consumer,[160] they must still find a just reason for leaving workmen who are excluded from the law to bear the full weight of the accident whose incidence is lightened for their preferred brethren.

Selection of employments.

The principal classification in the foreign compensation laws is the selection of employments—none save the British law being all-embracing[161]—and the principle of selection is, broadly, the inclusion of hazardous and the exclusion of non-hazardous employments.

Our courts recognize a legislative power to differentiate hazardous from non-hazardous employments in subjecting the former to special regulation—as for example in statutes prescribing safety appliances, sanitary rules, etc. I see no reason to deny a like power in framing a workmen's compensation law to the extent, at least, of excluding non-hazardous employments, though I dissent emphatically from the suggestion that those employers who are engaged in hazardous industries can alone be constitutionally affected.[162]

Selection among hazardous employments.

But how shall compensation laws deal with employments that may be fairly classified as hazardous. May one be taken and another left? May the law embrace the employees of an industry who are not actually working on its hazardous side?

Decisions on Liability Acts.

The Supreme Court says, in passing upon an employers' liability act, that all persons must be "treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed."[163] This generalization illustrates the rule of equality and we inquire as to its application to a com-

[160]See p. 55.
[161]See p. 18.
[162]See p. 88.
[163]Missouri, &c., R. *v.* Mackey, 127 U. S., 205.

pensation system, first considering some decisions on employer's liability acts.

In Missouri R. *v.* Mackey, the Supreme Court held that a Kansas statute qualifying the fellow servant rule in the case of railroad companies alone did not deny them the equal protection of the laws. "The hazardous char- "acter of the business of operating a railway," said the Court, "would seem to call for special legislation with "respect to railroad corporations, having for its object "the protection of their employees as well as the safety "of the public. The business of other corporations is not "subject to similar dangers to their employees, and no "objection, therefore, can be made to the legislation on "the ground of its making an unjust discrimination."[164] *R. v. Mackey.*

The doctrine of the Mackey case has been reaffirmed by the Court, and it is settled that railroads may be singled out for statutory qualification of the fellow servant rule.[165]

In another case, the Supreme Court sustained a statutory proviso declaring that a qualification of the fellow servant rule in the case of railroads in general should not apply to lines in course of construction and not open to the public, saying, "there is no objection to legislation "being confined to a peculiar and well defined class of "perils."[166] The emphasis here laid upon the actual operation of a railway is even more sharply accentuated in several state decisions which hold that a statute qualifying, in terms, the fellow servant rule for all the employees of a railway company cannot, constitutionally, be applied to employees who are not engaged on what is called the hazardous side of the business—that is to say, the operation of the railway—for to include clerks, laborers, etc.,

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[164]127 U. S., 205.
[165]Tullis *v.* R., 175 U. S., 348.
[166]Minn. Iron Co. *v.* Kline, 199 U. S., 593.

would deny the equal protection of the laws to clerks and laborers in other callings.[167]

R. v. Melton.

In the recent case of Louisville and Nashville R. *v.* Melton,[168] the Supreme Court of the United States reaches a different conclusion. The Indiana Employers' Liability Act of 1893 is directed to every railroad and other corporation except municipal. The state and federal courts agreed that it was effective as to railroads in respect of employees engaged in moving trains,[169] but the state courts had not only practically declared the act invalid except as to railroads,[170] but, following as they thought the true construction of the federal rule of equality, had restricted it to employees in train service.[171]

The Supreme Court in the Melton case disapproves this restriction. It affirms judgment in a suit under the act brought and won in the courts of Kentucky by a carpenter who was injured in the course of railway construction work. The Court deals with railways alone and says in effect that the power to impose upon them a singular liability because of their singular hazard is not limited to workmen in the hazardous side of their business but applies to all their employees.

Compensation schemes.

Considering now the "equal protection of the laws" respecting the relation of a compensation scheme to hazardous employments I shall not assert in advance that a scheme is essentially defective because it omits this or that dangerous trade or even singles one out—possibly either classification may be justified by some peculiarity in the scheme or in the trade.

I maintain, however, that the exceptional subjection

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[167]M. K. & T. R. *v.* Medario, 60 Kan., 151; Deppe *v.* R., 36 Va., 32; Jennings *v.* R., 96 Minn., 302.

[168]218 U. S., 36.

[169]Tullis *v.* R., 175 U. S., 348.

[170]See Bedford Quarries Co. *v.* Bough, 168 Ind., 675.

[171]Indianapolis & R. *v.* Kinney, 171 Ind., 612; C., C. & S. L. R. *v.* Foland, Apr., 1910.

of railroads to liability laws should not be projected into a compensation scheme not only for the broad reasons presently given, but for this specific reason. The pregnant statement in the Mackey case that the business of "corporations [other than] railways is not subject to similar dangers to their employees"[172] is conspicuously erroneous, as a glance at the rate tariffs of insurance companies will show. There should be no broader application of so inaccurate a statement.

In the Mackey case Mr. Justice Field said of the railway liability in question: "As said by the court below it is simply a matter of legislative discretion whether the same liability shall be applied to carriers by canal and stage coach and to persons and corporations using steam in manufactures."[173]

I am convinced that the legislature has not such power of picking and choosing in framing a workman's compensation law and I cite first a recent decision of a circuit court of the United States denying this power even in employers' liability legislation.

In Chicago, Milwaukee & St. Paul R. *v.* Weston,[174] the court speaking by Judge Sanborn said that the North Dakota Employers' Liability Act of 1907, which for all common carriers and all their employees abrogated, *inter alia,* the fellow-servant rule denied the equal protection of the laws to persons in substantially similar conditions. *R.* v. *Weston.*

Judge Sanborn concedes that, owing to the peculiar position in which the courts have placed the railways, the act might be valid had it applied to them alone, but he properly declines to effectuate for railroads only a statute intended for "any common carrier," and declares the act invalid, saying: "This statute denies the equal "protection of the law to persons in the same situations

[172]127 U. S., 210.
[173]127 U. S., 210.
[174]178 Fed. R., 619.

"and circumstances relative to the subject-matter of this "legislation. There is no reason of necessity or propriety "—there is no reason whatever that occurs to us—why a "common carrier should be subjected to liability to his "bookkeeper or to his clerk in his general offices, or to "his driver or loader of his dray or truck or to any other "of his servants who is not actually engaged in some such "hazardous occupation as operating engines or trains, or "handling or working about machinery, while the mer- "chant, the manufacturer, and all other persons are "exempt from such liabilities to their servants engaged "in the performance of the same work under the same "circumstances. And there is no just reason—nay there "is no reason whatever that we can ascertain—why such "servants of common carriers who are not engaged in "any dangerous or hazardous occupation should be "granted the right and privilege of recoveries from their "masters for damages caused by the negligence of their "fellow servants which their own negligence contributed "to cause, while the servants of other persons doing the "same work in the same situation and circumstances are "denied this right and privilege. The discrimination "which this statute works violates the indispensable condi- "tions of a constitutional classification. There is no dif- "ference between the situation and circumstances of all "the members of the class which the statute forms and "those of all other masters and servants in the state "relative to the subject-matter of this legislation that "presents any natural or sound or just reason of neces- "sity or propriety for the difference in their liabilities "and rights it attempts to make, and it does not bring "under its influence all masters and servants who are "in a situation and in circumstances relative to its sub- "ject-matter indistinguishable from those of members of "the class. All employés of those who are not common "carriers who are engaged under similar circumstances "in the same or similar occupations to those of the em-

"ployés of common carriers that are not engaged in "dangerous occupations are entitled to the same rights "of action and to the same privileges that are granted to "such servants of common carriers, and the denial of "them by this statute is a denial of the equal protection "of the laws. And all common carriers are entitled to "the same exemption from liability to their employés, who "are not engaged in any dangerous occupation, for in- "juries caused by the negligence of their fellow-servants "which their own negligence contributed to cause that "other employers enjoy. The statute deprives them of "this exemption and thereby denies to them the equal "protection of the laws. Because there is no sound "reason of necessity or propriety for the difference of "liabilities and rights which this law makes between the "members of the class it forms and the other masters and "servants in the state in the same situation and circum- "stances as members of the class, and because it does not "include and subject to its provisions all masters and "servants in the state who are in the same situation and "circumstances relative to the subject-matter of the legis- "lation as are members of the class it forms, the conclu- "sion has been irresistibly forced upon our minds that "this statute denies to many citizens the equal protection "of the laws and violates the fourteenth amendment to "the constitution."

As the Indiana statute which the Supreme Court upheld as to railroads in the Melton case[175] emphasized these corporations in defining its subjects, the Court, if called upon to consider the broader question presented by the North Dakota Act, may differentiate them and consistently approve the admirable reasoning of the Circuit Court, but whether or not Judge Sanborn's opinion shall prevail in respect of employers' liability it prefigures the just relation of the rule of equality to the matter of workmen's compensation.

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[175]218 U. S., 36.

Broad equality in compensation scheme.

Compensation plans will, as I have intimated, require a broader treatment than is called for by mere qualifications of common law rules.[176] It is one thing to hold that railway masters and servants may be singled out for a modification of the fellow servant rule. It is another and a more serious thing to hold that this employer shall bear the burden of all accidents and that one conducting an equally, perhaps a more hazardous, business shall go free; that this workman shall be compensated for an accident loss which that one, subject to substantially equal, perhaps greater, risk shall continue to bear. Instead of conferring mere rights of action here and there compensation laws create a social class as truly as do the pauper laws—though, unlike these, a class without a stigma. As Professor Dicey says: "The rights "of workmen in regard to compensation for accidents "have become a matter, not of contract, but of status."[177]

Our discussion will at least indicate the need of extreme care in the drafting of a compensation act lest it deny someone "the equal protection of the laws," and Mr. Justice Bradley's generalization might well have been framed in view of this very workmen's compensation system: "Clear and hostile discriminations against particular "persons and classes," said he, "especially such as are of "an unusual character, unknown to the practice of our "government, might be obnoxious to the constitutional "prohibition. It would, however, be impracticable and "unwise to attempt to lay down any general rule or defini-"tion on the subject that would include all cases. They "must be decided as they arise."[178]

SETTLEMENT OF CLAIMS.

In order that the cost and delays attending ordinary litigation in the courts shall not mar a scheme whose

[176]See p. 83.
[177]Law and Opinion in England, p. 283.
[178]Bell's Gap. R. *v.* Pennsylvania, 134 U. S., 237.

value largely depends upon cheap and prompt relief, the foreign laws generally provide for the settlement of disputed claims a more or less summary procedure as distinguished from the ordinary court proceedings.[179]

As every disputed claim necessitates a formal adjudication of rights, and every claim approved involves a compulsory transfer of money—property—from one person to another, we inquire whether or how far a summary procedure will conform to our constitutional law.

Due process of law.

Premising that "due process of law" will in this relation obtain where the disputants have opportunity to appear before an impartial tribunal let us consider the bearings of our constitutional requirement of trial by jury and of our constitutional rule that judicial functions shall be performed by a judicial, as distinguished from a ministerial body.

Several forms of procedure enacted or proposed disclose different views.

The Montana and the Maryland acts[180] not only dispense with a jury, but the one authorizes the state auditor and the other county officials to pay all claims and settle all controversies.

N. Y. Act.

The New York Act refers all disputes to an action at law. "Under our Constitution," says the Employers' Liability Commission in its Report, "the courts cannot be deprived of jurisdiction of industrial disputes. While we deplore law suits over industrial accidents, we realize that they must occur, and, after a great deal of consideration, we have determined that any disputes under the proposed statute had best be litigated in the courts" "It was impossible, in view of the constitutional pro-

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[179]See p. 29.
[180]See pp. 77, 80.

visions to eliminate the jury trial from the compulsory bill.[181]

Minnesota Commission.

The Minnesota Employees' Compensation Commission presents for discussion a compensation bill which would impose responsibility upon the employer "on the condition precedent only, that in case of dispute as to the amount," etc., the employee or his representatives "shall comply with the provisions of this act," and significant provisions relieve the employer from all liability for injuries covered by the bill except by the procedure provided therein, and create a Board of Arbitration and Awards for the adjudication of all claims.

Sabath Bill.

The Sabath Bill in Congress creates a Federal Commission of Injury Awards, which shall take all proceedings to effectuate the act and, if a claimant object to its award, the Commission shall bring an action in the nature of a bill of review in a circuit court. In case an employer fails to comply with an order of the Commission it may apply by petition in a summary way to a circuit court, which shall hear and determine the matter as a court of equity, speedily and without the formalities incident to ordinary suits.

In connection with these plans a quotation from our first judicial opinion dealing with the general subject is of interest. The Maryland Co-operative Insurance Fund of 1902,[182] already cited, was held unconstitutional by the Baltimore Court of Common Pleas—the court saying: "For the handling and disbursement of this "entire fund 'plenary power' was lodged in the hands of "the insurance commissioner, thus investing him with "judicial or quasi-judicial power, and that without any "provision for a trial by jury, or any right of appeal from "his conclusions. Had the act stopped here, it might well "have been argued that inasmuch as it provided for a "fund for the benefit of certain widows and orphans who

Franklin v. *R.*

[181] Pp. 55, 65.

[182] See p. 86.

"would otherwise be remediless, it was within the power "of the legislature to place the administration of that "fund in the hands of such officials as it might see fit. "But the act did not stop with the provisions already re- "ferred to, but also embraced cases where the death had "been caused by the negligence of the employer; cases "where there would be a clear right of action in the "courts under existing law. It also enacted that the em- "ployers who made the payments provided in the act "should by such payments be exempted from further lia- "bility.

"The effect of the act was, therefore, not only to vest "in the insurance commissioner powers and functions es- "sentially judicial in their character, but to take away "from citizens a legal right which they had theretofore "enjoyed, and which could be enforced by them in the "courts, and also to deny to them the right to have their "cases heard before a jury. It is only necessary to clearly "understand the provisions of this act to see that they are "in direct conflict with several of the provisions of the "constitution of the State. Thus, article 5 of the declara- "tion of rights assures to the people the right of a trial "by jury. Article 19 gives to every one for injury done "to him in his person or property a remedy by the course "of the law of the land. Yet both of these guarantees are "completely ignored by the act in question.

"Without prolonging the matter, therefore, it is so "clearly evident that the act in question is framed in total "disregard of the provisions of the constitution that the "act must be declared void, and the demurrer sus- "tained."[183]

Jury trial.

If, contrary to the admirable practice in other countries, trial by jury must be attached to American compensation schemes their value will be sensibly diminished. Indeed, if the phrasing of the New York statute

[183]Franklin *v.* United Rys. Co., 87 Md., 684.

—"any question which may arise under this act" not determined by agreement "shall be determined by an action at law as herein provided," is really compelled by the law of the constitution, the virtues of systematic compensation may be seriously compromised.

Arbitration.

Only in case it shall be held that a compensation scheme may dispense with trial by jury will the status of its alternative—the arbitral tribunal—be of interest. This tribunal, if not a distinctively judicial body, must be, at least, competent to exercise a sufficient judicial power consistently with the prohibition against an improper joinder of judicial and ministerial functions.

The courts broadly agree upon this principle of classification—On the one hand a ministerial officer may not be vested with judicial power in a matter having no close or proper relation to his normal functions. On the other hand, we find a recognition of bodies which combine judicial with ministerial functions, especially where they are created for a particular work.

According to the principle of classification the state auditor designated by the Montana Act would seem to be an improper depositary of judicial power, the commission created by the Sabath Bill a proper one.

Whether or not a compensation act may provide a summary procedure will in each jurisdiction,—federal and state—depend, in the last analysis, upon the construction placed by the governing courts upon the jury provisions of the governing constitution, for, be it noted, the "due process of law" of the Fifth and Fourteenth Amendments does not require a jury trial.[184]

It must be understood, however, that in whatever States the legislatures are forbidden to take away trial by jury in any class of cases where it has once obtained,

[184]Montana Co. *v.* St. Louis Co., 152 U. S., 171.

they cannot, in framing a compensation scheme, deny an injured workman his "day in court"—cannot make the claim for compensation the exclusive remedy in point of law. As to exclusion of suits at law.

Yet the legislature may do something toward making a claim preferred in fact by compelling a workman to choose between the comparative certainty of a claim and the lottery of an action. The presentation of a claim should be made a waiver of action. The bringing of an action, a waiver of claim. This proper provision is embodied in the New York Act.[185] The Sabath Bill, however, follows the British Act in allowing a suitor who fails to recover damages to have compensation assessed by the court if the injury be covered by the compensation law.

The legislature may do much more in this direction. Wherever actions for damages have been encouraged by an enlargement of employers liability, they should be correspondingly discouraged by repealing them in the case of workmen who are embraced in a compensation scheme.

Furthermore, the legislature should so exert its power over litigation as to restrict the recovery of damages to cases where the master is so grossly in fault as to make punitive damages desirable.[186] In this way we may, in effect, largely assimilate an admirable feature of some of the foreign laws.[187]

INTERNATIONAL AND INTERSTATE QUESTIONS.

The international and interstate bearings of a compensation scheme seem, as yet, to have attracted but little attention in this country.

We may anticipate that American compensation schemes will, generally speaking, accord to alien work- Alien workmen and employers.

[185] See p. 77.
[186] See p. 134.
[187] See p. 24.

men within the jurisdiction the same consideration so generally accorded in the foreign laws.[188]

Regarding the dependents, residing abroad, of an alien workman accidently killed here we should anticipate a reasonable recognition of their claim to compensation, especially where their own country has adopted an equally liberal policy.

Alien employers within our jurisdiction will, of course, be subject to a compensation scheme, and if the nature of their work renders the giving of security advisable it may be prescribed here as it is in some of the foreign laws.[189]

The relation of the several States to each other, the national ramifications of many of our leading industries and the interstate movement of employers and employees give rise to interesting questions.

Interstate competition.

A few years ago a Massachusetts commission reported against a compensation law that the industries of a State taking the lead would immediately suffer from the competition of rivals in other States. This objection has no force in respect of industries which do not seek the general market but serve local needs. When, however, keenly competitive industries are involved the objection is forceful enough to warn a pioneer State from enacting a law that will substantially add to the cost of production.

The New York legislature has emphasized this distinction by passing a compulsory law for what it assumes are non-competitive industries and a voluntary law for supposedly competitive ones. It remains to be seen, however, whether this classification is valid in law, for if it be valid the employees in certain conspicuously danger-

[188]See p. 46.
[189]See p. 45.

ous trades may be forever barred from compensation, since a beginning must be made somewhere.

We shall presently see that a pioneer rate of compensation should be moderate where great industries are first singled out in order to permit the later inclusion of smaller ones,[190] and in competitive conditions we perceive another reason for moderation.

Migratory workmen and employers.

As "the citizens of each State are entitled to the privileges and immunities of citizens of the several States" it follows that a workman who shall come temporarily into a State having a compensation scheme is entitled to its benefits if he be within its classification, though his own State, having no scheme, offers no reciprocal advantage.

The position of an accident pensioner who leaves the State and of the non-resident dependents of a workman killed therein will depend wholly upon the statute. The pension of the former may be cut off, or it may be continued, suspended or commuted, and the dependents may be compensated or not at discretion.

Turning to the employers, we find that when these are individuals or partnerships they, like the workmen, are entitled to enter a State with full privileges and immunities, though there may be cases where requirement of a guarantee fund will not be unreasonable.

Undertakings in several States.

When the employers carrying on industry beyond the home State are corporations our system of state corporations with national activities suggests some interesting questions.

These corporations are not citizens of a State within the meaning of the constitutional provision just cited. They may do business in another State only by the latter's permission which is, in some cases, expressed by

[190]See p. 126.

statute, but generally implied by absence of statutory prohibition.

As a matter of fact, practically all corporations likely to be embraced in a compensation law are able to do business anywhere, and are not likely to be seriously prejudiced. Corporations whose business requires the acquisition of a local charter become for the purpose of a compensation law local corporations. As to the others, beyond the requirement of security for compensation when this would be reasonable in the case of individuals, it is not perceived how they could be subjected to substantial discrimination. Certainly no greater compensation could be exacted from them, if only for the reason that this would unlawfully prefer one class of workmen over another.

THE COMPENSATION RATE.

An initial compensation law will probably select certain industries whose hazards are widely advertised, and whose workmen belong to influential trade unions.

As in these industries will be found many establishments representing large concentrations of capital a markedly liberal compensation may be advocated. But it should be clearly understood that an initial rate must be fixed, not only in regard to all the establishments affected, but in anticipation of the ultimate extension of the scheme to industries in general, if not even to domestic service, as in Great Britain.

Initial rate.

For example, accidents to farm hands attract but little attention. Few States, if any, require them to be reported. Yet agriculture is wholly, or on its mechanical side, covered in important foreign systems,[191] and should not be permanently ignored here. Indeed, the Wisconsin Labor Bureau has already made some inquiry into accidents in agriculture, and reports for 1907, 293 accidents to farm

[191] See p. 17.

hands, and 684 to independent farmers. This means that agricultural employment shows 977 casualties—ranking in respect of mere numbers next to railway employment with 1,305.[192]

If to-day the railroad company be obliged to compensate the brakeman, to-morrow the farmer may have to do the like for his laborer.[193] And the company and the farmer will have to pay on the same basis for one of the fixed points of compensation schemes is that they shall operate equally and uniformly in respect of all workmen included, and not unequally and discriminately according to the occupation or financial position of the employer.[194]

The history of pension legislation teaches that if there be any alteration in the original rate we should expect an increase rather than a reduction, so on all accounts we are well advised that an initial rate should, as a matter of policy, be moderate. Moderate rate.

But a moderate rate is not only commended by policy. It is dictated by the law of the constitution which forbids spoliation under forms of law.

If the master can be made responsible for injuries beyond his fault his burden must be, at least, a reasonable and not an exorbitant one.

Now we have shown that the compensation rate must be uniform for all workmen, in order to assure to every one the equal protection of the laws. This quality of benefit for workmen involves an inequality of burden for employers, who, rich and poor alike, must pay the same proportional rate. And an unequal incidence of burden may occur in other ways. A, employing fifty workmen in a dangerous trade, is subject to a far heavier risk at $2,000 death compensation than B, who employs a thousand in a safe one, would incur at $4,000. C, with a dozen plants,

[192]Rep. Wisconsin Bureau of Labor, 1908, p. 24.
[193]See p. 100.
[194]See p. 111.

might weather a catastrophe, whose resulting liabilities would bankrupt D, were his single plant destroyed.

While I do not assert that the unavoidable inequality of burden would necessarily amount to a denial of "equal protection," and thus block any comprehensive scheme, I do insist that a compensation figure based upon the ability of well-to-do employers, or of great industries, would work an unlawful discrimination against their weaker associates. All employers would not "be treated alike under substantially similar conditions."

The "moderate" rate may be broadly described as one which each and every industry or employer within the actual or the potential purview of a compensation scheme may be lawfully required to bear—a rate imposed on the railway company to-day must be one which can later be laid upon the small manufacturer.

GENERAL CONCLUSIONS AS TO LEGISLATIVE POWER IN RESPECT OF COMPULSORY COMPENSATION.

Absolute liability.

Dismissing state accident insurance as not, at present, in question, and considering compensation at the employer's charge, I am of the opinion that he cannot be affected with an absolute liability and a fixed indemnity for all industrial accidents. If the courts shall decide otherwise (and I remark in passing that a denial of legislative power in a few States would tend to check its application to competitive industries in neighbor States), they must, I think, enunciate a new principle broad enough to draw contributions from workmen, if this shall be expedient. If the employer may be required to help the workman, the workman may be required to help himself, and so far as the cost is shifted to the public, the workman is as likely to be recouped by higher wages as is the employer by higher prices.

Assuming for the sake of argument that the principle of compulsory compensation shall be substantially affirmed we pass to several ancillary matters.

A compulsory rule need not be applied immediately, or ever, to all employments; but it must be, potentially, applicable to all. No employment can plead constitutional exemption because of its relative freedom from danger—the "dangerous trades" are not alone subject to the obligation. No employer can plead exemption because of his pettiness—the obligation is imposable upon rich and poor alike. General application.

To assure the "equal protection of the laws," the rule must be applied impartially, and while this mandate allows reasonable classification respecting the inclusion and omission of employments, it exacts an uniform basis for computing compensation, if only that no set of workmen shall be arbitrarily preferred above another—that is to say, the locomotive engineer, if the basis is the wage scale, must not be paid at a higher rate than the farmhand, though his higher wages will give him a larger sum; if specific sums be prescribed for specific injuries, his lost leg cannot be valued higher than the farmhand's. Equality.

The compensation rate must be moderate and not confiscatory, and since all employers may ultimately be gathered in, and since the rate basis must be uniform, it is perceived that the incidence of an initial burden should be estimated in view of its potential imposition upon all sorts and conditions of employers, and not simply by the standing of those at first affected. Moderate rate.

In planning the administration of a compensation law we must reject, as unconstitutional, the compulsory association of employers. Instead of the collective responsibility of the German system, we must impose the individual responsibility of the British system, though we should improve upon this by allowing responsibility to Association—insurance.

be shifted by insuring in an approved company or voluntary association, as is the rule in France.

Arbitration.

There is reason to fear that in many, if not most, of our States, the summary procedure so essential to the useful operation of a compensation law will be embarassed by an indefeasible right to trial by jury, with its inevitable delay, expense and uncertainty.

Complex administration.

The simple motive of a compulsory compensation scheme cannot be simply effectuated. Complexity is its dominant note, and it should be observed in passing that the New York and, more markedly, the Montana and the Maryland legislatures have, in straining for simplicity of procedure, but drawn attention to the insistent complexities they would fain ignore.

Every one of the many accidents covered in a separate "case," and while each is in many ways happily differentiated from a damage suit, they form collectively a vast congeries of small affairs which must be administered with judgment and precision. Each accident must be proven and, what is often a matter for medical experts, its degree established. The compensation awarded in due form ought, in many cases, to be thereafter doled out to the beneficiary, and a change in condition for better or worse may require the amount to be lowered or raised.

In short the simplest compensation scheme of real value implies a particular attention to petty details and, as we cannot adopt the German plan of casting these upon associated employers, we must invoke a substantial measure of official intervention.

Review.

Reviewing the foregoing points, we perceive that even if the legislature may lawfully decree the naked principle of compulsory compensation, the practice is likely to be sufficiently embarrassed by constitutional re-

straints and directions to preclude the adoption of a thoroughly satisfactory scheme.

IV.

VOLUNTARY COMPENSATION.

GOVERNMENT ESTABLISHMENTS.

An American government may grant accident compensation to its servants. In so doing it acts like a private employer who voluntarily assumes a similar charge in respect of his employees. And on this line Congress lately passed a law providing that federal artisans or laborers, injured in the course of their work through no negligence or misconduct of their own, shall receive regular pay for such part of a year as incapacity shall last, and in case of fatality the pay shall go to the dependents.[195]

Government aid to its employees is too remote from our subject to receive extended consideration here, but one point should be noticed. The recent attempt of the General Confederation of Labor to paralyze France by a strike of public servants warns us against any scheme of aid which, even if it should include employees' contributions, shall give to a public servant any ground for asserting anything like a property right in his office. In this relation the New York State Civil Service Commission, in its report for 1910, says: "Any property right in a fund attached to the public service would tend unreasonably to hamper that power [to remove for reasonable cause], and to put the administration of the public service at the mercy of organized public servants."[196]

PRIVATE ESTABLISHMENTS.

If the compulsory principle of the foreign compensation schemes be, as I maintain, repugnant to our institu-

[195] May 30, 1908.
[196] P. 31.

tions we may, nevertheless, accomplish, by voluntary methods, a substantial measure of systematic compensation.

Insurance companies, etc.

Private organizations—companies, societies and unions—may yet develop the will and the ability to proffer a sound and cheap accident insurance, but we leave these organizations to define their position in their own time and way. Our concern is with systematic compensation at the employer's instance.

Employers' plans.

Voluntary accident relief has already made fair progress. Besides a widespread proffer of medical and hospital service to injured workmen we mark a number of schemes founded by employers to provide accident indemnity alone or in conjunction with sickness or old age relief. Some involve workmen's contributions. In others the employer bears the whole cost, and among these the most notable of the purely accident schemes are those recently formulated by the Steel Corporation and the International Harvester Company.

To the objection that few employers are likely to make a free-will offering to their employees I reply that the voluntary method I have in mind would not be inspired by philanthropy though by no means lacking the humane spirit. It would be grounded in the proven fact that there are industries and establishments which can be made to bear a reasonable share of the cost of their accidents with benefit to all concerned. It would be facilitated by the marked ability of the modern business organization to co-ordinate and administer a great number of petty affairs.

Most significantly, the legislature may, by a tactful exercise of power over the conduct and effect of litigation, persuade many employers to the voluntary method.

While the legislature cannot, in my opinion, strip the master of all defences to a suit for damages[197] it may so narrow them as to encourage the bringing of suits with their inevitable delays, uncertainties, irritations and waste.[198] Legislative encouragement.

The mere holding of this power in leash suggests a special motive for employers to volunteer compensation schemes in the hope thereby of discouraging its exercise, but assuming that the legislature should wish actively to encourage such schemes these questions arise. Shall it attempt to drive employers to voluntary compensation by laying heavy liabilities by way of suit upon those who shall not adopt it? Or shall it persuade them by lightening the liability of those who shall adopt it?

The New York legislature is experimenting with the first alternative by a law framed on the main lines of a bill presented by the Employer's Liability Commission as a "voluntary" compensation scheme.[199] *N. Y. Act of* 1910.

The act provides that where an employer and an employee shall have agreed to a plan whereby the former shall pay scheduled compensation for all accidents excepting those due to the victim's "serious and wilful misconduct" (that is to say the plan prescribed by the "compulsory" compensation law) the latter shall have no other remedy save the action for compensation therein provided. Where the plan is not thus agreed to the employer remains subject to all common law and statutory liabilities. These last are somewhat enlarged in this experimental act and we may assume that the greater the enlargement the more strongly would the employer be pressed to promote a voluntary plan.

The New York act does not, from the employer's standpoint, contemplate a really "voluntary" plan for

[197] See p. 10.
[198] See pp. 7-9.
[199] 1910, c. 352.

none may be even started without the workman's consent. More importantly an agreement made may be broken by the workman. While the workman is, in signing an agreement, supposed to waive his right of action, except in case of the master's gross fault, he may, unless he has actually accepted compensation, maintain an action at will, but the commencement of action bars him from all benefit under the plan.

The upshot is that an employer may, if the workman consents, promote, at his own cost, a compensation plan; then, if an injured workman does not recall his consent by suing for damages, the employer may acquit himself by paying compensation.

The Act has been in effect over two months but thus far it seems to be practically a dead letter.

A dead letter also is a recent law of Massachusetts authorizing employers to formulate workmen's compensation plans subject to the approval of the State Board of Conciliation and Arbitration.[200] It is provided that compensation shall be based upon a percentage of average earnings and shall be paid without reference to liability at common law or under the employers' liability act. While assent to the plan shall not be made a condition of employment, the act says that a workman may, by signing an agreement, release the employer from other liability for one year, but, as the release is voidable, the act offers hardly more than an official stamp upon an arrangement which may be made privately.

Promotion of voluntary method.

Voluntary compensation may, I believe, be substantially promoted if the legislature shall discard the idea of threatening employers with more litigation if they reject it and hold out, instead, the promise of less litigation if they embrace it. And we derive the principle of persuasive legislation from a rule embodied in the best of the foreign laws—the master who is bound to systematic

[200] 1909, c. 489.

compensation is relieved from all liability in suit except when the accident is due to his culpable act or neglect.[200a] This is the complement of the general rule that a workman shall not have compensation for an accident due to his wilful act. In other words, as the workman is denied compensation only when his fault is conspicuous so he should get super-compensation—damages—only when the master's fault is conspicuous.

The absolute fairness of this position is evident to all who are not bemused by the notion that continued subjection to damage suits somehow tends to make the master more careful and somehow maintains the dignity of the workman, but such persons have really no business to advocate systematic compensation at all, for if this is not better than the lottery of litigation it should be rejected. If it is better it should discourage litigation except when public policy commends this for the punishing of culpable masters.

As the legislature may restrict a master's defences to an action for damages provided it shall not leave him substantially defenceless[201] so it may enlarge his defences provided it shall not make him substantially immune. In this enlargement we find the basis of a persuasive law.

Let the legislature declare that an employer who has, by a proper plan, obligated himself to pay compensation for all accidents shall be liable in damages only when an accident is the result of his culpable act or neglect, and that the mere institution of a suit shall bar all claim to compensation.

This declaration should so discourage suits in all except flagrant cases as to offer a strong inducement for the voluntary plan.

Conceding that this plan would in its best showing leave out a fraction of workmen whom compulsion would have covered (if I have rightly estimated the inducement

[200a] See p. 24.
[201] See p. 10.

the fraction would not be large), the community might well be gratified with a great achievement, and the fraction would be no worse off than the tens of thousands of employees who are not, as a rule, included in current compulsory proposals.

Advantage of voluntary method.

Even if a legislature shall be free to compel systematic compensation, it should prefer the voluntary method which, with compulsory power in reserve, might be more widely commended to employers. For, all things considered, it will appear that this method is the better one.

It will be objected that compulsion would gather in more employers than would persuasion, even with the threat of force behind it; but there is every reason to believe that a successful initiation of the voluntary method would promote its extension especially among the so-called "dangerous trades," which are the conspicuous objects of systematic compensation.

It will be objected that employers would accord a lower compensation than the state would impose; but the voluntary rates must conform to a standard approved by the public authorities. This standard would require reasonable compensation as an invariable but, as we shall presently see, not necessarily the only factor in a scheme.

We may concede, however, that did these objections really dominate the whole problem, a legislature, had it the power of choice, might choose compulsion, but they are outweighed by the positive advantages of the voluntary method.

Among the industries commonly suggested for systematic compensation, some are located in all the States, others in many of them, and a number of single establishments operate in several States. For these the voluntary method promises, in various ways, a better opportunity than the compulsory.

It is, manifestly, desirable that an industry, and es-

pecially a single establishment, shall not be subjected to divers compensation schemes in divers jurisdictions if only for the reason that diversity must increase the difficulties and the cost of administration. But uniform schemes as widely effective as industrial conditions would commend, were they allowed free play, would be narrowed or blocked by an extensive adoption of compulsory schemes among the States. For, even assuming a wider agreement on cardinal points than is likely to obtain, the remaining disagreements coupled with inevitable variations in matters of detail would be sufficiently vexatious.

While uniformity would not be perfectly assured by the voluntary method it would be greatly facilitated. The very simplicity of the basic law I have suggested—the release of the employer from all liability in damages except in case of his culpable negligence—should commend its enactment in the several States, and, while there would be more room for differences in respect of the standards for a voluntary system, these should be so simple in comparison with the provisions of a compulsory law as to render a wide uniformity attainable.

Development of voluntary method.

All voluntary plans being held to the cardinal requirement of reasonable compensation, each may, from this point, be developed according to the best interests of employers and employees in the several industries or in particular establishments. Here an employer will present a plan of his own devising; there employer and employees may agree upon one embodying special and mutually acceptable conditions. In short, there will be a useful freedom of choice; and in no specific direction will this freedom be more advantageous than in facilitating employers' associations.

Under a voluntary régime employers, whom the legislature cannot compel to unite in associations,[202] will have

[202]See p. 107.

for associated effort not only a better choice of means, but a broader field of action than a compulsory régime would afford. For the latter will tend to divide and cramp effort by state lines, while the former should encourage the operation of associations over whatever area convenience shall dictate.

In reviewing the foreign laws I gave the largest space to the German employers' associations for the very purpose of emphasizing the main features of a scheme whose principle should be widely adopted because of its broad distribution of cost and its service in the matter of safety regulations. This encouragement to associated effort of broad range is, in my judgment, one of the strongest arguments for the voluntary method.

Pensions—sick benefits.

The freedom of action assured by the voluntary method is likely to be of special utility in view of a rising interest in workmen's sick benefits and old age pensions. Influenced partly by the admirable workings of existing benefit and pension systems and partly by foreign social insurance schemes, there is a growing impression that accident has been over-emphasized—that the greater, though less tragic, misfortunes of sickness, invalidity and superannuation should be also put in the way of systematic relief.

Without discussing the state's ability to institute general benefit and pension schemes wholly or partly at the public charge and considering these as connected with particular industries or establishments, it will, I think, be agreed that neither master or workman can be forced to maintain them. Such schemes must be purely voluntary and, though master and workmen might be willing to contribute to each in agreed proportions, the sickness benefit will, broadly speaking, be largely the concern of the workman because its moving cause affects him so sharply while the master may assume the larger interest

in the pension because it tends to encourage long and efficient service.

Now, the combining of accident, sickness and superannuation relief under one general system obviously makes for homogenous and cheap administration, and in this relation we remark the co-ordination of these things in the new Hungarian law. It would, however, be difficult, to say the least, to combine a compulsory accident scheme with voluntary sickness and pension plans. Indeed, it is worth serious consideration whether a compulsory compensation law would not only discourage the institution of new plans but affect existing ones. On the other hand a voluntary compensation scheme could be administered with sick relief and pensions with advantage to all concerned.

A compulsory scheme requires an intimate participation by courts, commissions or other public bodies, which means more red tape, delay and expense than under the voluntary method. This needs from the government only recognition and supervision. For the rest it assures the handling of a complicated business matter by a business organization—an assurance quite as valuable from a social, as it is from a business standpoint, for every voluntary arrangement by employer and employee equitable in its nature and executed in good faith improves their relations.

GENERAL CONCLUSIONS.

The number of industrial accidents in the United States and the resulting loss to victims and their dependents are sufficiently serious to demand reasonable measures to lessen the one and—special concern of this brief—to mitigate the other.

Foreign experience demonstrates the advantage of moderate compensation systematically given by employers to many victims over damages wrested from them by a few.

Foreign experience demonstrates the intrinsic complexities of a workmen's accident compensation scheme and its relation to other industrial problems—notably the greater problems of sickness and unemployment.

Foreign experience demonstrates that systematic compensation does not, to say the least, tend to reduce the number of accidents, and that the cost, while generally on the increase, is not as yet a noticeable burden on employers as a whole, especially if it be reasonably distributed by means of insurance, of which the German associations afford the best type.

Foreign experience demonstrates by persuasive example the need of deliberation in formulating a scheme. And each country, while scrutinizing its neighbors' schemes and adopting or adapting this or that feature, must finally square its own with local habits and institutions.

Compulsory compensation is the rule abroad and, assuming for the moment that it can be constitutionally enforced here, we emphasize several features essential to a just scheme.

A compensation rate that shall be both fair to the workmen and reasonable, not only for the employing classes embraced in an initial scheme, but for other and

perhaps financially weaker classes, to whom, in justice to their workmen, its extension may be expedient.

A speedy settlement of disputed claims.

A framing of the statute that will discourage malingering, and a medical service that will deal adequately with disputes respecting the fact or degree of injury.

An opportunity for insurance so that the workman shall be assured of his just dues and the master enabled to distribute his risk. And insurance by the master in an approved institution should shift his obligation.

Coming to the law of the constitution, and considering first the question of jurisdiction, I am of the opinion that the Federal Government is quite as incompetent to enact a compensation scheme for any class of workmen within a State—excepting, of course, federal employees—as it would be to undertake local poor relief. And, constitutional obstacles apart, federal intervention could only make mischief—a mischief already done to a degree by the federal Employers' Liability Law. Workmen's compensation is practically as well as legally a matter for the States so far as state territory is concerned.

Considering the constitutional powers of the States in respect of a compulsory compensation scheme, it appears that certainly in some States, and perhaps in many if not all others, a requirement of trial by jury will inject the slow and costly process of suits at law into a scheme where a speedy and cheap procedure is of prime importance.

Furthermore, each State, being forbidden to deny anyone "the equal protection of the laws," is obliged to adopt for all workmen affected a uniform basis of compensation; and the rule that classifications shall be reasonable and not arbitrary, while not a bar to a working scheme, will require most skillful drafting in order to respect its obligation.

That constitutional requirements will at least embarrass a compulsory compensation scheme is generally conceded. More importantly, there is, even among intelligent sympathizers, a widespread uncertainty and unbelief as to the validity of its very basis—masters' responsibility for injury regardless of fault.

Considering this vital question, I am of the opinion that, from a constitutional standpoint, a master's responsibility can no more be made to depend on the nature of his industry than on the size of his bank account. Whether the employment be safe, hazardous or extra hazardous, injury to the servant is the vital fact—the inevitable point of departure for all legal reasoning.

To hold otherwise would give a preference abhorrent to our rule of equality before the law. We cannot say that one maimed by a scythe is constitutionally barred from a relief that may be lawfully given one maimed by a locomotive or—a more glaring prejudice already contemplated—to one injured while merely employed by a concern operating locomotives. The fact that the man with the scythe is not "organized" may account for his not demanding relief, but it does not affect his position in law. I am far from maintaining that a scheme must at once embrace all servants. I do not anticipate its ultimate extension to all as inevitable, but certainly its principle must be potentially comprehensive. In short, if the principle of compulsory compensation is constitutional it must, potentially, be applicable for the benefit of any servant and imposable upon any master.

But I am of the opinion that the principle is unconstitutional—that an American legislature cannot lawfully require a master to pay a fixed compensation to a servant injured in his employ without regard to the cause of injury.

If compulsory compensation is barred by constitutional limitation a large measure of systematic compen-

sation may be attained by voluntary methods. Indeed, even if compulsion be lawful, the voluntary method is preferable. Our faculty of business organization would thus be employed in a most beneficial kind of social work. Under this method alone could we utilize to the best advantage the principle of that admirable foreign invention—the German employers' association.

Legislatures should persuade to this course by relieving employers who shall adopt satisfactory methods from being mulcted in damages for accidents except where they are grossly in fault. This assurance should greatly promote the voluntary method which is already gaining ground through its own merits. It is demonstrable—nay, it is demonstrated abroad—that modern business organization is competent to administer broad compensation systems with benefit to all concerned, especially by distributing the responsibility and the risk by means of association.

Whatever the ultimate disposition of the constitutional problems, the plans of the States that are seriously considering compulsory compensation should show a reasonable uniformity, of which there is no sign at present, and a more careful drafting than is disclosed in the several laws already enacted.

CARMAN F. RANDOLPH.

NEW YORK, November, 1910.