COMPENSATION *for* INDUSTRIAL ACCIDENTS

CONFERENCE *of* COMMISSIONS

CHICAGO

NOVEMBER, 1910

PUBLISHED BY

AMOS T. SAUNDERS, *Secretary*

CLINTON, MASSACHUSETTS

PRICE: ONE DOLLAR

PROCEEDINGS

OF

CONFERENCE *of* COMMISSIONS

ON

Compensation for Industrial Accidents

HELD AT

CHICAGO, ILL., *on* NOVEMBER 10, 11, *and* 12, 1910

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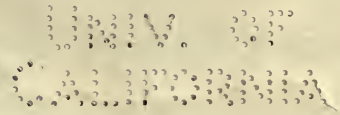

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TABLE OF CONTENTS

CONFERENCE OF COMMISSIONS ON COMPENSATION FOR INDUSTRIAL ACCIDENTS, CHICAGO, NOVEMBER 10–12, 1910.

H. V. MERCER, Minneapolis, Minn., *Chairman.*
AMOS T. SAUNDERS, Clinton, Mass., *Secretary.*

COMMISSIONS PARTICIPATING

UNITED STATES EMPLOYERS' LIABILITY COMMISSION:

William Warner, U.S.S., *Chairman;* Charles J. Hughes, Jr., U.S.S.; William G. Brantley, M.C.; Edwin Denby, M.C.; W. C. Brown, *President,* N. Y. Central R.R.; D. L. Cease, Editor *The Railroad Trainman;* Launcelot Packer, *Secretary.*

ILLINOIS EMPLOYERS' LIABILITY COMMISSION, 317 Fisher Building, Chicago, Ill.:

Charles Piez, *Chairman;* *Edwin R. Wright, *Secretary;* Samuel A. Harper, *Attorney;* Mason B. Starring; *E. T. Bent; M. J. Boyle; Patrick Carr; John Flora; *George Golden; R. E. Conway, East St. Louis, Ill.; Daniel J. Gorman, Peoria, Ill.; P. A. Peterson, Rockford, Ill.

MASSACHUSETTS COMMISSION ON COMPENSATION FOR INDUSTRIAL ACCIDENTS, State House, Boston, Mass.:

*James A. Lowell, *Chairman,* Boston; *Amos T. Saunders, *Secretary,* Clinton; *Magnus W. Alexander, Boston; *Henry Howard, Boston; *Joseph A. Parks, Fall River; *Carroll W. Doten, *Chief Investigator,* Boston.

MINNESOTA EMPLOYEES' COMPENSATION COMMISSION:

*H. V. Mercer, Minneapolis, Minn.; *Geo. M. Gillette, Minneapolis, Minn.; *W. E. McEwen, St. Paul, Minn.

EMPLOYERS' LIABILITY COMMISSION OF MONTANA:

*Judge W. L. Holloway, *Chairman,* Helena, Mont.; Neill Collins, Anaconda, Mont.; J. C. Lowney, Butte, Mont.; J. H. Hall, Helena, Mont.; H. G. Miller, Kalispell, Mont.; C. W. Goodale, Butte, Mont.; J. E. McNally, Butte, Mont.; W. F. Meyer, Deer Lodge, Mont.

NEW JERSEY EMPLOYERS' LIABILITY COMMISSION:

*Wm. B. Dickson, *President,* New York, N.Y.; J. William Clark, Newark, N.J.; John T. Cosgrove, Elizabeth, N.J.; Samuel Botterill,

* Present at Conference.

East Orange, N.J.; Walter E. Edge, Atlantic City, N.J.; Edw. K. Mills, Morristown, N.J.; *Dr. Albert A. Snowden, *Secretary*, Roselle Park, N.J.

NEW YORK COMMISSION ON EMPLOYERS' LIABILITY, ETC., Metropolitan Life Building, New York:

*J. Mayhew Wainwright, *Chairman;* Henry R. Seager, *Vice-Chairman;* Frank C. Platt; Howard R. Bayne; Alfred D. Lowe; George A. Voss; Frank B. Thorn; Cyrus W. Phillips; Edward D. Jackson; George W. Smith; Philip Titus; Otto M. Eidlitz; John Mitchell; Joseph P. Cotton, Jr., *Counsel;* Crystal Eastman, *Secretary.*

EMPLOYERS' LIABILITY COMMISSION OF OHIO:

*James Harrington Boyd, *Chairman*, Toledo, Ohio; J. W. Perks, Springfield, Ohio; *W. J. Rohr, Cincinnati, Ohio; *W. J. Winans, Galion, Ohio; *J. P. Smith, Cleveland, Ohio.

COMMISSION ON COMPENSATION FOR INDUSTRIAL ACCIDENTS OF WASHINGTON:

Harold Preston, *Counsel*, Seattle, Wash. (No list of members of this Commission.)

WISCONSIN INDUSTRIAL INSURANCE COMMITTEE:

*A. W. Sanborn, *Chairman*, Ashland, Wis.; E. T. Fairchild, Milwaukee, Wis.; John J. Blaine, Boscobel, Wis.; Wallace Ingalls, Racine, Wis.; C. B. Culbertson, Stanley, Wis.; Walter D. Egan, Superior, Wis.; George G. Brew, West Milwaukee, Wis.; *Paul J. Watrous, *Secretary.*

CONNECTICUT SPECIAL DELEGATE:

*Walter S. Schutz, Hartford, Conn.

SPECIAL COMMITTEE ON UNIFORM STATE LAWS TO PREPARE A UNIFORM WORKMEN'S COMPENSATION LAW:

*Hollis R. Bailey, *Chairman*, 19 Congress Street, Boston; Charles Thaddeus Terry, *Secretary*, 100 Broadway, New York; *Aldis B. Browne, 1419 F Street, N.W., Washington, D.C.; John R. Hardin, Prudential Building, Newark, N.J.; Peter W. Meldrim, 15 Bay Street, West, Savannah, Ga.; George Whitelock, 1407 Continental Trust Building, Baltimore, Md.; *John H. Wigmore, *Dean*, Northwestern University School of Law, Northwestern University Building, Chicago, Ill.

UNITED STATES BUREAU OF LABOR:

*Charles P. Neill, *Commissioner of Labor*, Washington, D.C.; *L. W. Chaney.

* Present at Conference.

PROCEEDINGS

CONFERENCE OF COMMISSIONS ON COMPENSATION FOR INDUSTRIAL ACCIDENTS, CHICAGO, NOVEMBER 10–12, 1910.

First Session, Thursday, November 10, 1910, 10 A.M.

The first meeting of the Conference was called to order by James A. Lowell, Chairman of the Massachusetts Commission, at ten o'clock A.M., on Thursday, November 10, 1910.

THE CHAIRMAN: This meeting will come to order, and I hope that it will be a very informal meeting. We called it, you might say, from Massachusetts, because we were probably the Commission which knew the least of those which have to report next January, and we are earnestly seeking information.

I am very glad to see the gentlemen here who are here, and I think we have got just about a good working body of men.

The first question that comes up, I suppose, is the organization of this meeting, and the first thing in order is the election of a permanent chairman. Are there any nominations?

MR. ALEXANDER: I move that Mr. Mercer, of the Minnesota Commission, be appointed permanent chairman.

THE CHAIRMAN: Are there any other nominations? If not, all those in favor of the motion will so signify by saying aye.

The motion prevailed.

THE CHAIRMAN: The next question comes on the election of a secretary of this meeting.

MR. GILLETTE: I move that Mr. Saunders, of the Massachusetts Commission, be appointed secretary.

There being no further nominations, Mr. Saunders was declared secretary of the meeting.

THE CHAIRMAN: The next question is, What shall we do pending the arrival of Mr. Mercer?

MR. GILLETTE: I move you that Mr. Lowell act as temporary chairman pending the arrival of the permanent chairman.

The motion prevailed.

THE CHAIRMAN: Thank you. The question comes now on how we shall proceed here. I think we can possibly settle that while we are waiting for Mr. Mercer.

MR. BAILEY: A suggestion was made in the letter of invitation that we have a roll-call, and that each Commission make a statement, by some one of its members here present, of its organization and what it has done, and so forth. I think that was a good suggestion, and I move that it be carried out; that there be a roll-call, followed by a statement from each Commission of the law it works under, what it has done, and anything further in a brief way. Just an outline of what it has done.

THE CHAIRMAN: You have heard Mr. Bailey's motion. Are there any remarks on that motion? If not, all in favor will signify by saying aye.

The motion prevailed.

THE CHAIRMAN: I suppose we might as well proceed with the reports. I will ask Mr. Cease to tell us what the United States Employers' Liability Commission has done.

MR. CEASE: Mr. Chairman and gentlemen, the Federal Commission was organized on the 22nd of October, and a partial plan of procedure was adopted. The first business meeting of the Commission will not be held until the 8th of December. Consequently, the report of the Federal Commission is very brief.

THE CHAIRMAN: Thank you, Mr. Cease. Mr. Wainwright, I think we all know, perhaps, what has taken place in New York, but we should like to hear from you.

MR. WAINWRIGHT: I don't think it is necessary, Mr. Chairman, for me to make any report. I rather assume that the members of the different Commissions are familiar with what has been done in New York. Our Commission was appointed in May, 1909. We made a report to the Legislature in March, 1910, and the bills reported were virtually adopted by the Legislature with very few dissenting votes,—in fact, I think the Senate vote was unanimous, and in the House there were only four votes against it. We placed upon the statute books of our State amendments to our Employers' Liability Statute, modifying the rule as to fellow-servants, changing the rules as to contributory negligence and assumption of risk, and, conjointly with that, providing for voluntary agreements between employers and employees, upon the basis of the Workmen's Compensation Act, which we adopted. Our Workmen's Compensation Act is somewhat limited in scope,

and yet it covers a great many thousands of men. It is modelled somewhat on the English act, and I assume you are familiar with it. It went into effect on the first day of September. It has therefore been in operation but a little over sixty days, and it is hard as yet to pass upon what the effect of its operation will be, except that what we all knew would happen has happened,—the insurance rates have gone up, and therefore it has been demonstrated that the operation of the statute will considerably increase the cost. Within a week or ten days after the act took effect, a case was taken under it at Buffalo, and upon a demurrer to the complaint the constitutionality of the act was argued at the Special Term, Erie County, Supreme Court, and the act was sustained. The appeal has already been heard in the Appellate Division of the Supreme Court, and the judgment of the court below affirmed in a *pro forma* opinion, and it is now in the Court of Appeals. Motion will shortly be made to advance the case in the Court of Appeals, and there should be a decision upon it within the next three or four months.

As far as the New York Commission is concerned, we feel that, for the present at least, the book is closed, that the first act of the drama has been played. We are perfectly willing to stand upon that, and wait the future to demonstrate how right or how wrong we were, and we feel that we have at least made a valuable contribution to this subject in actually getting something done. No people appreciated the difficulty more than we did, but our Commission believed that it was better to make a start on this subject, even though we might not be absolutely correct in our decision, rather than to indefinitely postpone any action upon it; and we hope that what we have accomplished will be of some assistance to the Commissions of the other States. We feel quite sure that we can acquire some further wisdom from their deliberations, and we shall be very glad to follow, and will follow very closely, as long as our Commission is in existence (which will be for another year), the course of this movement in other States, as an indication of how much our act should be modified. The important feature, as I said, has been the very great increase in the insurance rates. The cost has been so high that it must attract the attention and concern of all interested in this subject. What we tried to do was to pass a constitutional law, one in which the cost would not be prohibitive and one which would not handicap our industries, which compete with the industries of other States.

MR. GILLETTE: What questions were raised,—what were the constitutional questions raised on this?

MR. WAINWRIGHT: The simple question as I recall—I am not very familiar with the decision—was that you could not impose upon a man a liability which arose through no fault. The opinion is a very short one. I have it here.* I don't think they went into any other question whatever. They confined it wholly to that one point.

A MEMBER: Can I ask Mr. Wainwright which of the two acts recommended by his Commission last March was passed?

MR. WAINWRIGHT: All the acts recommended by our Commission were passed.

MR. DICKSON: I think in your report, Mr. Wainwright, there is a little table which comprises the report of nine liability companies, and my recollection is that it showed that, of all the money paid to those insurance companies by employers, only about thirty-seven per cent. actually got to the injured workers. Is that correct?

MR. WAINWRIGHT: Well, I don't remember the exact figures, and I want to say to the gentlemen here present that I do not know that I am as competent to be heckled on this proposition [laughter] as some other members of my Commission, because I think it is only fair to state what my province in our Commission was. I was the Chairman of the Commission,—a large Commission of twelve,—composed of representatives of the employing class, employees, legislators, sociologists, and labor people; and others besides myself furnished the expert talent upon that Commission, and my province was to hold the Commission together and to attempt to reconcile conflicting views and to get something done. Now, if you ask me what the proportion shown was, I do not remember. My impression was that it was a mere estimate. I do not think anybody testified to any exact figures. Some of them said it was as high as forty per cent., and others that it was not more than twenty-five per cent. of the amount paid by the employers. I understand your question is as to how much of the fund that was paid, the total fund paid by the employers for insurance to the liabilities companies, actually got into the hands of the injured workmen. As I say, our evidence varied from twenty-five to forty per cent.

MR. DICKSON: I want to follow that by this. If, as the result

*See Appendix "A."

of your law, premiums have been greatly increased, which is no doubt the case, will that same percentage, in your judgment, hold good in the larger amount? In other words, will any more go to the workmen—I mean in percentage—than now goes?

MR. WAINWRIGHT: I should say yes, because, if we decrease litigation—such a large proportion of that, or a very large proportion of it, went to defending these lawsuits. Now, if we decrease the litigation, it will release just so much more money, I presume.

THE CHAIRMAN: Gentlemen, Mr. Mercer has come, and it gives me great pleasure to introduce him as chairman of this Conference.

(Mr. Mercer in the Chair.)

THE CHAIRMAN (Mr. Mercer): I thank you for the honor, gentlemen. You will allow me to make a suggestion. I think that in making these statements, if they proceed to tell what the States have done, and then take up the questions under the various lines that have been indicated here, as I understand your program, we shall get along very much faster, because we shall have to cover the same ground again when we get down to it. There may be things occur to you that you want to ask. I want to do what the rest of you want to do, but in our past experience we have found in our meetings that, if we take up a subject at the end of each gentleman's talk, we are likely to waste a great deal of time before we get through. I simply make that suggestion, and, if you approve it, you can follow it, and, if not, you can decide what you want to do. Ohio is next. Will any one represent Ohio?

MR. BOYD: Mr. Chairman, the Employers' Liability Commission of Ohio was appointed, pursuant to a statute, by the Governor about the 1st of July. The Commission organized on the fifth day of August, and spent a month in historical investigation. We had our first regular business meeting the first part of September. We outlined our plan of investigation somewhat along the lines of the New York Commission. We sent out a great many circulars to employees and to employers, lawyers, judges, and so forth. The Commission has been holding hearings. We held three hearings in Dayton, the 6th and 7th of October; three in Cincinnati, the 13th and 14th of October; three in Youngstown, the 20th and 21st of October; and four very remarkable hearings in Cleveland on October 31st, November 1st,

and November 2nd. Those hearings in Cleveland are typical on the average of what the investigations in the State of Ohio, which are now taking place, have developed. We had quite a large hall, which was crowded from the beginning of each hearing until the end, and scarcely a man left until the hearing was concluded. There were about forty papers read by eminent attorneys, employers of labor, employees themselves, and even the Hungarian consul took part in the hearing. We had three hearings in Toledo on November 3rd and 4th. Our final hearings will begin in Columbus on November 30th, and, as far as I can gather, will last for four or five days, two hearings each day, in which the investigators for the National Manufacturers' Association will open the hearing by Mr. Schweitman and Mr. Emory.

We, of course, have not yet arrived at any conclusions as to what we shall recommend We are trying to educate the public in Ohio as to what are the fundamental principles of the Compensation Act which was created and put through the Reichstag by Bismarck, also the English Compensation Act, of which the New York law is a chip off, and the Montana act, which is an act referring to a single class of employment; namely, coal miners. We are going into the minor details of all the investigations which have taken place; and we are required by statute to make a report to the Legislature next January. We are, of course, very anxious that this Conference of Commissions shall be able to arrive at a uniform bill which can be recommended to the Legislatures of as many States as possible, following this Conference. I take it, Mr. Chairman, that it is not intended to give a résumé of what the statutes in the State of Ohio contain,—in what way they modify the common law defences,—that you simply want to report on the work that has been done and is being done.

THE CHAIRMAN: In connection with their commissions—that is, you have not, as I assume, had any laws passed as yet?

MR. BOYD: No, and we are not in position to recommend any. Of course, we have in our minds the lines along which we will act to a certain extent, but we have not made them public, and do not intend to make them public until the laws are written.

I might state this, that it is almost the uniform opinion of both the employer and employee—I cannot at present recall a single exception—of compensating all injuries, regardless of negligence, except malicious negligence. Both employees and employers are in favor of that unequivocally. Now, as to the question of

making it obligatory, diverse opinions have been expressed on that subject, making it obligatory on the part of the employer, making it obligatory on the part of the employee; and one point which is being very thoroughly discussed is the question of whether the compensation should be raised by an insurance plan, so that the moment the compensation is determined it will be paid out of a fund, and not come so hard on small employers, for in Ohio we have fifty per cent. of our employers who employ less than twenty men. At the end of a year you would have thousands of small employers put out of business, and we cannot recommend an act that would do that, because it would do more harm than it would do good. I think it is safe for me to say that the consensus of opinion of both employers and employees is in favor, if possible, of raising this fund by a plan of insurance along the lines of the German act in that respect.

THE CHAIRMAN: The next State in order is Minnesota, and I will ask Mr. Gillette to represent Minnesota.

MR. GILLETTE: I think I may safely say, gentlemen, that the State of Minnesota has as yet arrived at no concrete conclusion. By that I mean that it would not be safe for me to say that we have arrived at any conclusions which fairly represent the sense of the Commission, because we have not attempted so to do. Our Commission consists of only three members, one representing the labor interests of the State, one representing the state Bar Association, and one member representing the employers' interests of the State. The time of the Commission up to this date has largely been spent in acquiring information upon which to base their conclusions and their recommendations as to a compensation act. I think I can safely say that there is a vast preponderance of opinion in Minnesota in favor of changing from the present theory of negligence to that of compensation. In Minnesota we have not had hearings. The Commission has not deemed it wise to hold these hearings up to the present time, for the reason that it might possibly bring forth expressions of opinion from either the employing or the employed class or representatives of society at large, which, having once been expressed, would be more difficult to change, and the information regarding this subject we found to be not so much a matter of such common possession that the public generally has been enabled to enlighten the Commissions of the States to a very great degree. They are able to express what they would like to have, but not to really express sound

reasons why a thing of this kind or that kind should be passed. We have not believed that the Commission would acquire very much information from such hearings. The Commission started in at first to devote itself to the study of some of the constitutional questions involved, so that we might determine the lines along which legislation could be enacted. We are very fortunate in having on this Commission the chairman of your meeting, Mr. Mercer, and I understand that all the constitutional problems involved have been settled to his entire satisfaction. [Laughter.] I presume he is only waiting a decision in the New York case to sustain his opinion, and then we shall feel sure that we are treading along right lines. These problems are fundamental, because I can see and you can see at the outset how we might frame an act upon the theory that it was within our power to frame such an act, and that the whole work might be upset by the court thereafter.

The other questions which are involved and which relate to the practicability of an act, questions relating to cost, contribution, duration of compensation, waiting period, and all those questions, have been discussed. I am inclined to think that the Commission are fairly well agreed in regard to most of them. All the members of our Commission have been to Europe, and have studied the working of the foreign acts abroad. I know that my own views have been modified somewhat by the information secured over there, and I doubt not that the minds of the other members of the Commission have been likewise affected.

The greatest good which I secured myself there was the information in regard to the difficulties which have been experienced in the operation and administration of these foreign acts, and the greatest help which I have secured, as I say, lies along the lines of having had pointed out in that way the things which should be avoided in the enactment of laws in this country. Our Commission will be obliged to report in January. We have not formed our bill yet, although it is under way, and we are awaiting the results of this Conference. Our Commission is heartily in sympathy with the idea of uniformity in legislation in the various States. There is no question in my mind, and, I believe, in the mind of any member of our Commission, but that through uniformity of legislation probably some of the difficulties—particularly as relates to the operation of any compensation act—will be greatly diminished; in other words, that by reason of the

competitive conditions now existing between the various States the increased cost which is bound to flow from the enactment of any compensation law will not become so burdensome to the industry of any State, provided there is a like increase in cost in all surrounding States.

I do not know of anything more that I can add to what Minnesota has done.

THE CHAIRMAN: The next is Illinois. Who will represent Illinois?

MR. GOLDEN: In the absence of the Chairman, I was asked to represent the Illinois Commission here to-day, and Mr. Wright, our Secretary, will probably be here to-morrow.

I want to say that, so far as the Commission is concerned, that was appointed March 24th. We have made our report, and we have disagreed. The conclusions that we have come to are contained in this book here, which is our full report. We were compelled to report on the fifteenth day of September last: our time was up.

MR. GILLETTE: May I ask what you split over?

MR. GOLDEN: Well, I want to say, gentlemen, that we have a couple of members on the Commission from the labor side that were a little bit socialistic, and they went down state and advocated the compensation plan all the way through, and tried to show different members at the different meetings in St. Louis, Peoria, and Springfield and Rock Island, that it was a very good idea, and then they came right back here to Chicago and took dictation from somebody else, and they simply stated that they would not sign a compensation plan, no matter what the amount might be mentioned in the bill, and we simply found that we were up against something that we could not make good on. And the four commissioners from the labor end of it, Edwin R. Wright and myself and Daniel J. Gorman and Patrick Carr, a miner, we simply agreed that we would disagree with these two members, and this book here contains our full report. I do not think there is anything further I can add. I do not know how soon the Commission is going to take hold of this matter again.

MR. GILLETTE: Were you familiar with the prior Commission of Illinois?

MR. GOLDEN: No, I was not.

MR. GILLETTE: The laboring people, as I understand,—I am just speaking from memory,—were opposed to a compensation act.

MR. GOLDEN: I think they are very foolish. I want to say when we are being paid from three hundred and fifty to four hundred dollars for death, and by a compensation fund they can get from fifteen hundred to three thousand dollars, I think they were very foolish to turn it down. We had the tentative bill brought up before the public in all the little cities that I mentioned down state, and they talked over the different points. Mr. Mercer, I believe, was at one of our meetings, and we at one of his. The laboring people were all in favor of it, but still those two commissioners came back here and made it impossible for us to come to an agreement that would be of benefit to the working people and the employer also. The teamsters and the laborers simply get nothing, and you can see there for yourself just what each different class receives in payment for death or total disability.

MR. ROHR: Might I ask you, Mr. Chairman, if it is possible to have a copy of that for each member of this Conference?

MR. GOLDEN: I believe you will be able to get that, and I believe Mr. Wright will be able to tell you that definitely to-morrow. He was out of the city to-day, and asked me to come down, so that Illinois would be represented.

THE CHAIRMAN: Mr. Dickson is here, I think, to represent New Jersey.

MR. DICKSON: Mr. Chairman, as I stated to one or two gentlemen before the meeting came to order, the New Jersey Commission is in what you might call the ruminant stage. They have held a series of open meetings, at which both employers and employees appeared, mostly officers of labor organizations. The members of the Commission did not attach very much importance to these meetings, for the reason that the entire membership, consisting of six,—two labor men, two members of the Legislature, and two employers of labor,—found themselves practically unanimous in the opinion that changes in the present law were desirable, and we felt that these meetings could bring forth nothing except that same feature; that is, the desirability for a change. We were, however, impressed by the number of employers who were in hearty sympathy with the general idea of improving the present system. We did find, however, on the part of most of those who appeared, a feeling, which may have been justified by a similar feeling on the part of a certain eminent personage, that they did not have any proper appreciation of the fact that both the state and the nation have a constitution, which

must be taken into account. [Laughter.] We have a large amount of information, which, as I say, we are trying to digest. We have prepared within the last week two letters which we propose to send out to the most prominent members of the bar and judges, which, while it does not in any way reflect what is going to be the final act of the Commission, does show the points on which we want information. If you care to have me read them, I can do so at this time. This letter we have prepared and sent out to the prominent members of the bar.

71 Broadway, New York,
November 9th, 1910.

Dear Sir: The Employers' Liability Commission of New Jersey, recently appointed by Governor Fort under authority of a resolution of the last Legislature, has held during the past summer a series of open meetings, at which a large number of employers and representative associations of workmen appeared.

As a result of these meetings and from a general study of the working of the present system of administering the law of employers' liability in this State, the Commission is convinced that, speaking generally, the present status of the law is not satisfactory either to the employer or to the employé. While convinced that some changes are desirable, we are duly impressed with the fact that, if the work of the Commission is to have any practical results, any modifications of the present common or statute law must be in harmony with the requirements of the Federal and State Constitutions.

Having in view the importance of the above requirement, the Commission desires to ascertain the views of prominent members of the bar of this State as to the constitutionality of certain suggested changes. The members of the Commission are serving without compensation, the small appropriation ($1,300.00) being used exclusively for office and other incidental expenses. The Commission has no express authority nor has it means to employ counsel. We therefore seek legal assistance from such public-spirited members of the bar as are willing to give us the benefit of their views as a public duty.

The particular questions as to which we wish your opinion are as follows:

Are there constitutional objections to the enactment by the Legislature of this State of statutes to the following effect:

A—1st: A statute abrogating as a defence the doctrine of "fellow-servant"?

2nd: A statute abrogating as a defence the doctrine of "assumption of risk"?

3rd: A statute providing that contributory negligence of the employé should not bar the action, but that the damages should be assessed by the jury in proportion to the comparative negligence of the parties.

4th: A statute providing that the burden of proof as to contributory negligence shall be upon the employer.

5th: A statute providing that no claims for legal services or disbursements shall be a lien upon the recovery or enforceable in law unless the same be taxed and approved by a Court of Record.

B—1st: A statute providing that the employer shall be directly liable to compensate the employé injured in his employment (without regard to the question of neglect or failure of duty of the employer) unless the injury was intentionally caused by the employé himself, but also providing that the compensation so paid be fixed in amount.

2nd: If the answer to query No. 1 is in the affirmative, a statute making void any agreement to forego or limit the liabilities imposed by the statute suggested in query No. 1.

3rd: If the answer to query No. 1 is in the negative, would you consider a permissive act to the same effect constitutional and desirable?

Aside from the question of constitutionality of each of the above suggested statutes, we would be glad to have your opinion as to the desirability in each instance of making these changes in the law of the State, or as to any other changes pertinent to the subject.

We would appreciate a reply, if possible, by December 1st.

Yours very truly,

For the Commission.

We also propose to send out to the judges of the State generally this letter:—

My dear Sir: We are addressing a letter to prominent members of the bar of this State, a copy of which is enclosed.

We recognize the fact that, in view of your judicial office, it would be improper to ask you to give an opinion as to the constitutionality of the proposed legislation. We feel, however, that your experience at the bar and on the bench has given you exceptional opportunity to form definite views as to the efficiency of the existing employers' liability laws.

If you are willing to express opinions as to the practical merits of the suggestions contained in our letter, they will be greatly appreciated.

Yours very truly,

For the Commission.

I might say, in conclusion, that in conference some eminent attorneys have emphasized the point brought out by Mr. Boyd that, however desirable it may be to abrogate or modify what I think most of us believe to be antiquated,—the doctrine of fellow-servant, assumption of risk, and contributory negligence,—we ought to be exceedingly careful not to take any such steps without putting in some means of protection to the small employer.

The Chairman: Is there any representative of Montana here?

As there is no one here to represent Montana, I will now call upon the Massachusetts Commission. Mr. Lowell?

MR. LOWELL: Mr. Chairman, I will state very briefly what the situation in Massachusetts is, and, in order to explain it, I shall have to say a word or two about our present law there. In the first place, as to the make-up of this Commission. Four are here, and the other one would be here if he were not sick in bed. There is one peculiar thing about this Commission,—peculiar in Massachusetts, at any rate: there were two legislators, members of the Commission, one of whom was a Democrat and the other a Republican, and they were both re-elected. The Republican, Mr. Saunders, is before you.

The law of Massachusetts is that we have the general common law, which you are all familiar with, and we have an Employers' Liability Law, which you are probably all familiar with. None of the defences has been taken away in Massachusetts, as they have in other States. So we have the fellow-servant doctrine, contributory negligence, assumption of risk. The Legislature at the last session passed a resolution which said that the present law was unsatisfactory, so that we have not to consider the question of whether or not it is unsatisfactory. We start with that. And we are also under the obligation to report before the middle of January of next year some kind of a law. Those two things we start with. Now the principal difficulty which we have in Massachusetts is this: as you all probably know, the greater bulk of our Massachusetts trade is the kind of manufacturing which will not be classed as hazardous. That is, it is nothing like a coal mine or tunnelling or the use of compressed air, or anything of that sort. A very large percentage of it is either textile manufacture or machine shops, things of that kind, so that in Massachusetts, in order to have a law which will affect the State very much, we have got to get a law which will cover these industries which are not hazardous. That special distinction will probably come out later when we discuss the constitutionality, and we need not stop now on that point.

Now the principal difficulty which we found in Massachusetts, and I suppose you have everywhere else, is the question of finding out the statistics. There are not now in Massachusetts any statistics of any very great value which would give an indication of what any proposed law which would cover practically all injuries would cost, because it has never been to the special interest of any one to report, and they have never been required by our laws to report all of the accidents. As it is now, we will

say that only two out of ten, or whatever the percentage may be, can recover compensation. So that the only accidents reported—and they are not carefully reported, either—are those that there would be a liability under. As I say, our present statistics are very defective on that account. In order to get at the facts as well as we can in the short time that is at our disposal, we have sent out to a selected list of employers in the more important industries of Massachusetts a report to be made by those industries of the number of accidents which happen. Any time an accident happens,—in the industries which we have specified,—a report must be sent to us. We had to have that cover a short period of ten weeks from the middle of September until some time about now, and, when we get that, we shall have a basis—of course, on any technical idea of statistics, it is a very insufficient basis, but it is the best we could get—for getting some idea of what the number of accidents in Massachusetts is, and a fairly close idea about the accidents which lay up a man for more than two weeks. We shall get a fair basis for that. We have selected the employers in order to give a fair representation of the large employers and the small employers, and of country employers and city employers, so as to get the best general idea we can of what the facts are in Massachusetts. Then, in addition to that, we have sent out to a very much larger number of employers,—and we are getting very good replies from them,—asking them to tell us the entire expense which they were put to during the last year, 1909, with relation to accidents. Not only insurance, if they are insured, but anything which they pay out for injured employees. For instance, when we went to Lowell, which you know is a great manufacturing town, containing many cotton and woollen mills, we found that the companies there had the custom, whenever anybody was injured in their mills, to send him at once to a hospital, and a very large part of the revenue of that hospital comes from these mills. The person who is sent there, if he has means of his own, is required to pay a small amount; if he has not money, the mill pays what it costs to keep the employee there until he is recovered. All these mills besides this are insured, and this is an extra expense to them. That is merely an incident of one industry, which has other expenses besides insurance.

When we get the returns from this investigation, we shall have some idea of what the present cost of the injuries in Massachusetts is. And then from our returns on the present number of acci-

dents, we shall have some basis for determining what would be the cost to these various industries of covering all accidents,—I mean the approximate cost. Of course, it seems to me that you cannot,—and all other countries which have been in this thing have found it so,—you cannot estimate accurately what the cost is going to be. The only way you can find out anywhere nearly what the cost is going to be is by trying it. But you can give a fair guess at it. That is all you can do. The thing which worries me more than anything else about the whole situation in Massachusetts—and Mr. Dickson and Mr. Boyd have already called attention to it—is the effect of this thing on the small employer. It is not going to hurt the large manufacturer, the man with a large plant and a large number of employees, very much, whatever law you pass, because he is in strong enough condition to handle it. The smaller employer is going to be very seriously affected. If the thing doubles or trebles the present liability which he has, it is going to be a very serious thing for a great many manufacturers in Massachusetts, and that is a thing which we have got to take into account. We have had meetings all throughout the State, some of them very well attended and some not. In Fall River especially, which, as you know, is a great manufacturing centre, we found that the representatives of the employees were not well posted exactly, but were quite familiar with the idea of a compensation act. My explanation of it is that in Massachusetts, and especially in Fall River, there are a good many Englishmen who are familiar with what has been done in England; but we found there that, when they spoke of a compensation act, they really knew what they were talking about. In other places it was merely a general very vague idea which they had in their minds.

THE CHAIRMAN: I believe Mr. Schutz has been appointed by the Governor to attend this meeting.

MR. SCHUTZ: Mr. Chairman and gentlemen, Connecticut is in very much the same position as Massachusetts, except we have not gone as far. In 1907 we had a special committee appointed, consisting of one representative of labor, one representative of the employers, and a lawyer, which was instructed to recommend to that session of the Legislature of 1907 a modification of the employers' liability laws. This Commission at once realized what a tremendous task was before it, and got no further than making a preliminary report to that session, and was continued for two years. It made a report to the session of 1909, but that report

was a divided report to this extent: The representative of labor and the representative of the employing class would have been glad to recommend a Compensation Act. The lawyer felt that there were constitutional difficulties which rendered this very difficult, and also that it was perhaps not applicable to the then existing conditions. Furthermore, the representative of labor felt that the fellow-servant rule should be abrogated *in toto*, and that contributory negligence should be abolished, and this the other two members of the Commission disapproved, and therefore they did unite in recommending a bill which is a declaration of the existing law of employers' liability, and also changed the law with reference—or would have changed the law in reference—to the fellow-servant rule on railroads, and also the matter of notice. It was a mild form of Employers' Liability Law, which would make it rather more difficult for the common law defences which have been in existence and are in existence to-day in Connecticut to be applied. So that bill, which was recommended and which is contained in the report of that Commission of January, 1909, failed of passage, and at present there is no Commission actively in existence. In the last campaign both the principal parties and, in fact, all three parties represented favored a Workmen's Compensation Act, or an Employers' Liability Law, and they also all unite in advocating the abrogation of the five-thousand-dollar limit for death in case of accident. And certainly the people are very vitally interested in this question.

What has been said with regard to Massachusetts is true of Connecticut. Our industries there are largely manufacturing of the non-extra-hazardous class, and the small employer of labor must be considered. There is a growing sentiment, however, especially among the employers, that compensation should be the basis, and not liability. We have had numerous meetings of manufacturers and other associations, and there is no doubt about it that the coming Legislature will have before it many bills based on compensation and also in amendment of the existing liability laws. We must not forget, however, that the Governor-elect, our former chief justice, has written the unanimous opinion of the court in the case of *Hoxie* v. *N. Y., N. H. & H. R.R. Co.*, 82 Conn. 352, which holds that the Federal Act of 1908 is unconstitutional with regard to Connecticut, in so far as it attempts to force upon a State court jurisdiction of a case brought under the Federal act. And the court goes on to say in addition: "The provision of sec-

tion 5 of the act that any contract between an interstate carrier and any of its employees in such business, intended to enable it to exempt itself from any of the liability created by the act shall to that extent be void, is, in our opinion, in violation of the Fifth Amendment of the Constitution of the United States as tending to deprive the parties to such a contract of their liberty and property without due process of law." So that practically that decision holds the act unconstitutional on various grounds, but the only necessary point was that a State court could not be compelled to take jurisdiction of an action brought under the act.

While I have no authority to speak for any one except myself and certain gentlemen who are vitally interested in the matter, I do feel strongly that we shall not get far by any tinkering with the common law defences, but that we must have an act which goes to the very root of the matter and makes the question of compensation the basis, and not the question of legal fault. And, furthermore, that the most satisfactory plan, so far as I have been able to see any outline, is the act recommended by, or at least which is embodied in the report of, the Illinois Commission, and which, I understand, was drafted by Mr. Harper. This report contains also a very excellent dissertation on the subject of constitutionality of compensation acts, and will, I think, be very helpful to this Conference. That law, as I understand it, contains a choice of remedies. That is, it allows an employee to elect whether he will take advantage of the Compensation Act or whether he will simply abide by the common law or the statutory law of employers' liability. This scheme, it seems to me, is the one which will be ultimately adopted. And further than that, I think that the German system has an advantage over the English in that compulsory insurance rather than compulsory compensation is the more satisfactory, and will be cheaper in its application. For that reason Mr. Cheney, who is making a special study of this subject, favors a State plan of insurance which shall be based upon the German system, by which this insurance, or the risk, which is incident to a compensation act, shall be borne under a plan which has the approval of the State, and if the employee entitled to take advantage of it elects as to this, and can make that election at the time the employment is entered into, it then cannot be said, if the State approves it, that it is unfair to him. And I very much hope that matter will be considered further in this Conference. Certainly, the cost of the insurance or the cost

of the risk, as has been shown by the New York experience, will bear very hard upon Connecticut, and, while we are a small State, we have great manufacturing interests, and we cannot afford to compete with the other States unless they practically have the same risks that we do, and therefore we are strongly in favor of some uniform act that shall make this burden, which, we believe, should be carried as an element in the cost of manufacture, rest uniformly upon the manufacturers of all the different States.

I am authorized to say that one manufacturing concern in Connecticut, a very large one, that employs some thirty-five hundred men, has during the course of forty years carried its own insurance. It has never contested a single case of accident. It has paid all the expense incident to the injury to its employees. It is not an extra-hazardous line of manufacture, but that concern figures that its expense is less than one-quarter of one per cent. on its general pay-roll.

THE CHAIRMAN: We shall be pleased to hear from Mr. Bailey, the Chairman of the Committee from the Conference of Commissioners on Uniform State Laws, on this subject.

MR. BOYD: May I be allowed to amend my statement?

THE CHAIRMAN: I think so.

MR. BOYD: The Ohio Commission has three experts working in Cuyahoga County with a view to determining the history of partial injuries, total disability, and the payments to married men killed during three years, 1906, 1907, and 1908, with a view to corroborating, if possible, the results of the New York Commission's investigation in Erie County and in New York City, and also the investigations of the Russell Sage Foundation in Pittsburg, so that, when we come up to the Legislature and appear there to argue our position, we may have not only the statistics of the New York Commission and the Russell Sage Foundation, but also our own statistics along one important line of action.

Now another point: The New York Commission's report showed that out of 414,000 injuries there were payments made in 52,000, or one in eight. Now we had before us in Cleveland a gentleman who represented the Ætna Liability Insurance Company, and out of the history of sixty-five thousand and some hundred accidents the average payments were only six in a hundred.

MR. BAILEY: Mr. Chairman and gentlemen, the American Bar Association conceived the idea that uniform legislation was desirable, and they instituted a movement in which the Governors

of the different States, acting by the consent of the Legislatures, appointed commissioners to meet and deal with the question of uniform legislation. The matter began somewhat slowly, but for the last two years something like forty, I think, out of the entire number of States, have had such commissioners. Their duty is in each case to attend a Conference of Commissioners, held usually once a year, in which the different States are represented, and the question of uniform legislation worked over. As most of you know, in the last ten years a good deal has been accomplished in the way of uniform legislation. In 1908 the Uniform Negotiable Instruments Act was formulated and approved, and, when an act is put in shape by the Conference of Commissioners, then they ask the American Bar Association to indorse it and give it its support, and then it goes before the Legislatures. I think a majority of the States have adopted the Negotiable Instruments Act. What I have said of that is true of the Uniform Bill of Lading Act, the Uniform Stock Transfer Act, and some other uniform acts. Last summer at Chattanooga the question was brought up of a Uniform Workingmen's Compensation Act, and a special committee was appointed of five members to meet and consider, first, as to the desirability of such a law, and, second, if desirable, prepare and submit next year a draft of a uniform law. The president of the Conference appointed a committee of seven. Now that committee met in Philadelphia on the 22nd of October, and we had five out of the seven members present. We were unanimously of the opinion that it was desirable that there should be a uniform workingmen's compensation law, and that we should undertake, with all the help we could get, to frame a law to be submitted at the next Conference, which will be held probably next August. So we are here on invitation to learn from you what is being done and to assist, so far as we may, in what you are doing. The committee made me chairman, and made Mr. Terry, of New York, secretary. I hope Mr. Terry will be here before we get through.

The committee has examined the New York acts with some care. We spent a day on that at Philadelphia. We considered a draft of a law that was introduced in Massachusetts some three or four years ago, and have discussed the subject generally. Since the 22nd of October, when we met in Philadelphia, at the suggestion of Mr. Lowell, I have tried to get some light on the constitutional questions, and have invoked the aid of Professor

Samuel Williston, of the Harvard Law School. Mr. Williston is one of the commissioners from Massachusetts on uniform laws. He was preceded by Dean Ames, and on his death Mr. Williston was appointed in his place one of the three commissioners of Massachusetts. Many of you know him, because he was employed by the Conference of Commissioners to draft the Uniform Sales Act, and published a book on that subject. He has very kindly spent more or less time for a week or two, and has given me an opinion in writing, which I have brought here, and shall be glad to read to you and give you the benefit of,—not at this moment, but before we get through.* He discussed the same questions that were sent out in New Jersey, and I think that his views, his review of the cases, and his citation of some of the recent cases will be helpful on those questions. They say fools rush in where angels fear to tread. Since the 22nd of October I have been working on this thing, and have framed an act somewhat along the constitutional lines suggested by Mr. Williston, following in some points the New York act, following in some points the English act. The Illinois act I did not have before me, but, from what was said of it, I seem to have copied some things out of that. That bill is simply brought here for a sub-committee or for the whole body to consider, as to whether it has any merits. Being something that is actually in shape easier to revise than to form something entirely new. I am happy to say that Dean Wigmore is here, and the rest of the committee are all interested.

We have no authority to speak for our committee officially, but are here to learn what we can and to make recommendations to our committee in the light of what occurs here, and I will say this,—that I think our recommendations can be helpful in the general work, because, when we meet next year, if we can go before the Conference with a uniform act which has been worked out by a body such as this, the commissioners can do a great deal, with the aid of the American Bar Association, in getting such a law adopted in the various States. And that, I think, is our chief function and our chief help to you,—to make some suggestions here, as far as we may. We very much hope that a law will be worked out which we can recommend to the commissioners as being a proper bill for a uniform law.

Mr. Gillette: When are the various Commissions represented here, to report? I would like to have that in the record.

*See Appendix "B."

MR. LOWELL: The Massachusetts Commission is to report by the second Wednesday in January.

MR. BOYD: The Ohio Commission is required to report to the next Legislature, which assembles the first of January, about the 2nd of January.

MR. GILLETTE: Minnesota the same time.

A MEMBER: New Jersey the first week in January.

THE CHAIRMAN: When does the Federal Commission report?

A MEMBER: December of next year.

THE CHAIRMAN: Mr. Charles P. Neill, will you speak next?

MR. NEILL: Mr. Chairman, I do not represent any Commission, and the only thing I can say is, in order to make available for the various State Commissions all the European experience, we have been working for the past year or two on a voluminous report, and we shall have in print within the next few weeks a report of over twelve hundred pages, giving the laws and all the experience and all the statistical material available, up to this time, of the principal European countries. It will cover Austria, Belgium, France, Denmark, Germany. We have got down to the I's, but that includes all the principal countries of Europe whose experience is important. I have here now, for Mr. Mercer's use, one-half of the report in page proof. There may be some delay in binding the report, but, if the various members here will give in their names to the secretary, I shall be very glad to take them and have it sent in stitched form to all those who care for it the moment it is available for distribution in that form. The report, as I say, covers all the available data in all the European countries that are of any consequence. Now we also have one or two formal supplemental reports which will be coming out in the Bulletin during the next month or two. We shall be very glad to send those to you. I would also like to suggest that, since the constitutional question is a very vital one and will be discussed at length, Mr. Mercer, the chairman, has prepared a very extensive brief on the subject, and I suggest that those interested secure from Mr. Mercer a copy of that brief also.

MR. WAINWRIGHT: Mr. Chairman, right along that line reference has been made to that very excellent opinion of Mr. Harper's in the Illinois report, and it seems to me those who have not seen that ought to have the report of the Illinois Commission in their hands early in this Conference, if the secretary can get that.

MR. GILLETTE: I would like to ask Mr. Neill if he knows whether the reports made by our consuls are going to be published by the Department of State and made available. I think they are one of the best contributions to the subject that has been made.

At the Washington meeting a committee was appointed to confer with the Secretary of State. They have been coming in for the last six months, and I don't know if the last ones are in now; but I have seen some of them, and they are most valuable contributions, but I am afraid we cannot get hold of them.

MR. NEILL: The trouble is that they are not on any comparable basis. You will get a lot of undigested matter from countries not on a comparable basis. Up to the end of 1907 we had everything, I think, that can be gotten from any source. Not only that, but Mr. Dawson was sent to Europe, and has secured exceedingly valuable data showing the cost in Europe under their system formerly and under the present system. That will be available in a few weeks in page proof. But I will take that up as soon as I get back, and, if there is anything available in those reports, they ought to be published, and unquestionably will be before the report is made.

MR. GILLETTE: These reports consist of interviews with employers and employees, insurance companies and others, as to the difficulties and defects which have developed in the operation of the different systems in the various countries. They are impartial, absolutely. The Secretary of State has very kindly furnished me with a copy of nearly all of them, and I think they are extremely valuable. They would make a large volume, I should say two thousand printed pages.

MR. NEILL: Well, I will tell you what I will do. I will make a note of that, and, when I get back, I will take it up. If they are not going to publish them, we can probably publish them ourselves. If you will write in a letter to me asking about them, I will take it up the minute I get back.

MR. GILLETTE: The questions were formulated by the State Department, and are very pertinent. When I was on the other side, I went into our foreign consulates, and in almost every case found the officials at work on them,—the questions relating to the effect of the laws on malingering, exaggeration of injuries, and the trouble they have had with doctors, with the ambulance chasers, and all the questions which flow out of the operation of such an act. The opinion of the workmen as to whether they

are satisfied with the scale of compensation, the difficulties which the insurance companies have had with the administration of the act, and all those questions as a rule are—well, I say they are impartial. I mean this, that they are not colored by the consul. They give exact replies of the employers and the exact replies of the employees and the insurance companies, and give one a most clear and vivid picture of the satisfaction or dissatisfaction which the various elements of society have with the various laws.

Mr. Doten: Mr. Chairman, if I might be permitted to say a word in regard to these consular reports, I was in Washington about two weeks ago and spent about a day looking over these reports in the Consular Bureau, and I learned from the officers in charge that there was no intention whatever on the part of that Bureau to publish these reports. They will remain buried in that Bureau unless we dig them out in some way. I was very much impressed with the straightforward character of them, and with the human element, so to speak. They got right back to the person who made the reports: it was direct, and it was very valuable in that respect. Many of these things were just what we would expect to find. I agree with what Mr. Gillette said.

Mr. Schutz: May I add one word in that regard? I happened to examine the one in Paris and the one in Berlin. In Paris the statistics, as far as the employers were concerned, were secured by the secretary of the Chamber of Commerce, and would be intensely valuable in making an argument on this bill, because they give the practical experience of the employers, the insurance companies and the employees.

The Chairman: I examined the consular reports myself this summer in Christiania, Stockholm, Denmark, Berlin, Paris, London, two or three more places, and they are the best line of information, it seems to me, of anything there is on the practical working of these laws. You will find what the chronic objections are on behalf of labor, the employers, insurance companies; you will find some very valuable suggestions in nearly every report as to the amendments which they would make in their law. I found in Denmark that there had been a consular report issued purporting to cover the report of the consul there, but on comparing it with the report I found that some clerk or somebody had taken the report and blue-pencilled a considerable portion of it, and published that which did not amount to a great deal. So I got a copy of that report in full, thinking that perhaps they

were going to publish the other in the same way, but, if they are not going to publish them, certainly some department ought to.

MR. GILLETTE: I suggest that the chairman of the meeting is the one to write Mr. Neill in a formal way and request him to publish.

MR. DOTEN: I will say, Mr. Chairman, in regard to that editing that the department is very fearful that any expression of opinion on the part of the consular officers will meet with criticism of foreign governments, so they have gone over them very carefully, and blue-pencilled everything which had the slightest evidence of a personal bias.

THE CHAIRMAN: There may be some objection to their allowing them to be published in the part you mention.

MR. BAILEY: Just a single word as to what is in print on this subject. At a meeting of the International Law Association held in London in August a day was given up to the discussion of this subject of a Workingmen's Compensation Act, and a considerable part of the day was given to the reading of a paper which was presented by Sir John Hill, of Liverpool, giving some defects in the present English law, and contrasting it somewhat with the European laws on the Continent. I have one copy of that. I think Mr. Lowell has one copy, which I gave him. That will be in print a little later and distributed to all the members of the International Law Association. It is somewhat interesting, showing how they view their present law. Mr. Hill has been rather—I understand, from the beginning, rather a critic of their law, and he points out some things which are interesting and gives some statistics which are interesting. Of course, he is not troubled with the constitutional questions, and so that does not help us so much.

A MEMBER: I have an extract here of the replies of the consul in London. If any one cares to see it, he can have it to look at. In my judgment it is not very deep, but it does reflect the general attitude of the employer and the workman and the public.

THE CHAIRMAN: I did not go to a single consular office but what I found them ready to give me any information they could, and I think that every consul that I met, and deputy consul, when the consul was away, told me that he was the most interested in that of any subject that he looked up. Practically every one of them was most enthusiastic over it.

MR. GILLETTE: There was one remark made to me by several consuls. "I suppose, when our reports go back to the Department of State, they will be pigeon-holed; and all our work goes for nothing."

THE CHAIRMAN: I only went to one capital in Europe where I did not find a report, and that was down in Switzerland, and I suppose that Switzerland has what the government understood not to be a Workmen's Compensation Act, although it has something of the features. But I did find some fellow from America had written to the consul there some seven years ago about the subject, and he went and got down the letter and got the documents in German and French, and translated them into English, and for two hours he sat and told me about the legislation they had, and what the vote had been on the last law, and the whole situation, and ended up by telling me they had spent two or three days investigating it, and they never even got thanks for it. Now I think we have reached the point, gentlemen, where we have been around for all of these reports. What is the further pleasure of the Conference?

MR. GILLETTE: I move you that we adopt the order of discussion as prepared by the Massachusetts Commission.

THE CHAIRMAN: The motion is that we start with the discussion in the order of this pamphlet.

MR. WAINWRIGHT: I suggest for the record, that these questions be now put in the record:—

1. What employments shall the act cover?
2. Shall all injuries be covered, irrespective of negligence?
3. Shall all persons engaged in such employments be included?
4. Shall compensation be paid in a lump sum or in instalments?
5. Amount and duration of compensation?
6. Length of waiting period?
7. Shall dependants include aliens and illegitimate relations?
8. Shall employees contribute?
9. Shall it be permissible for employers to substitute voluntary schemes?
10. Method of determination of controversies?
11. Nature of scheme: Compensation, insurance, or State insurance, (*a*) Voluntary, (*b*) Compulsory?
12. Repeal of other laws?
13. Constitutionality?

Might we not adopt some rules, in considering these questions, limiting the time of discussion to each question and the time of discussion by each individual? For example, might we not allot

one hour to each question, and at the end of that time, if anybody desires to further protract the discussion on that particular topic, we can put it to a motion, but, if we are agreed we have exhausted the topic by that time, then the chairman can put the motion.

That was the idea we adopted at our commission meetings where we had thirteen people. It worked very well.

THE CHAIRMAN: The question is on the original motion by Mr. Gillette, that we take up these questions in the order in which they are submitted by the Massachusetts Commission.

MR. WAINWRIGHT: So as to raise the question, I move that we proceed to the discussion of these questions, and limit the discussion to one hour to each proposition, unless a majority of those present shall decide to the contrary. I make that as a substitute.

THE CHAIRMAN: Any remarks?

MR. SMITH: It seems to me it would be necessary to give everybody a chance. I would ask Mr. Wainwright to insert in his motion the provision that five minutes shall be the limit for each speaker.

THE CHAIRMAN: Do you accept that, Mr. Wainwright?

MR. WAINWRIGHT: Yes. Some of these topics won't take that length of time.

The question was then put, and the motion prevailed.

THE CHAIRMAN: We are now up to the first topic, and it is twelve twenty-five. Do you want to discuss till one thirty, or do you want to adjourn?

MR. DICKSON: I move that the morning session continue until one thirty, and that we then adjourn until two thirty.

The motion prevailed.

MR. DOTEN: I would like to raise the question, Mr. Chairman, as to how much of these proceedings we shall have our stenographer take?

I felt that we should need a stenographer, and so on the authority of the Massachusetts Commission I have engaged a competent stenographer to take the proceedings, and we are in position to make any number of copies.

MR. DICKSON: I move that the cost of the stenographer's bill be assessed against all the Commissions represented.

THE CHAIRMAN: How about the Committee on Uniform Laws?

MR. BAILEY: The committee may be included.

THE CHAIRMAN: And the National Commission?

MR. PACKER: Yes, Mr. Cease thinks we can come in on this.

THE CHAIRMAN: And, Mr. Neill, how about that?

MR. NEILL: I would be delighted if the auditor would allow me to, but I know he won't.

The question was then put, and the motion prevailed.

MR. DICKSON: I move the matter of printing be referred to the secretary, with power.

The motion was seconded, and prevailed.

MR. DICKSON: Mr. Chairman, Mr. Bailey suggested we start with the question of constitutionality. I think he is right. I think New York found that they could not constitutionally enact any legislation except by resorting to the police power of the State.

THE CHAIRMAN: I am bound to stick to the first one, unless we have a motion to the contrary.

MR. BAILEY: I move we take up thirteen.

MR. LOWELL: I object to that motion, because Dean Wigmore is not here, who knows more about it, probably, than any one else.

The question was then put, and the motion was lost.

NUMBER 1. WHAT EMPLOYMENTS SHALL THE ACT COVER?

MR. BAILEY: Mr. Chairman, we are under number 1, but we necessarily under that, in considering what employments it shall cover, must consider the question, What can it cover? There is a case in 178 Fed. Rep., opinion by Judge Sanborn, in which he says to make such a law as that constitutional, you must not separate according to employments. That won't go. But we must make it, not only according to hazardous employments, but according to the hazardous positions in the employment, and he has a long, careful opinion, and a large review of the cases upon that, because, he says, take railroad employees, one of them is working a typewriter in the office, and you cannot make the same law apply to that employee that you can to the engine driving, and, if you undertake to do it, it is not classification, it is arbitrary, and won't go.

THE CHAIRMAN: Mr. Bailey, have you read the decision in the United States Supreme Court in 218 U. S.? They dispose of some of his difficulties.

MR. BAILEY: Professor Williston adverts to that in his opinion.

I have not had time to read that. I agree that Judge Sanborn went too far, but it does seem to me that instead of picking out a certain class of employments, which is troublesome in any event, (the New York people have undertaken to do it, it is troublesome, certainly), if you pick out and make the law apply to the hazardous position, that is one of inherent danger, and make it apply to that, there is a certain advantage in doing that. In that way you,—instead of making a long list of half a page of hazardous employments, get right down to what Judge Sanborn says is important (namely, to make the thing apply to the hazardous risks of the hazardous business), and you can do it in a short form of words. There is a certain advantage in doing that rather than trying to make a long list of employments, because I do think that the reasoning of Judge Sanborn is fairly good, that you cannot include the typewriter and the brakeman in the same class. You have got to have something which really gets down to the gist of the thing, and that is the real hazard which a man undertakes.

Mr. Wainwright: Would not that become entirely a matter of judicial construction, and, in place of decreasing our litigation, wouldn't we be much deeper in?

A Member: Will not Professor Wigmore be kind enough to give us his view of the Melton case, which has been up to the Supreme Court, on the question of division into hazardous and non-hazardous occupations in any particular employment?

Mr. Wigmore: I am afraid I cannot take up your time with that.

The Chairman: We have just voted down the question of constitutionality. Are we going back to that, or are you going to discuss what you want for dangerous employment?

A Member: It seems to us when we are discussing whether one can do a thing or not, we must know what its constitutionality is.

The Chairman: We have decided that once. If anybody wants to bring that up and you are willing to take it up and dispose of it, the Chair is willing to put it: otherwise, I shall rule it out of order.

Mr. Lowell: Mr. Chairman, our idea was this: every single one of these questions brings up the question of constitutionality. Now it seems to me that should be left, as we have decided, to the end. Now our idea was to find out all along here what we wanted. Now, supposing it be that we all come to the agreement that we

want all employments covered; we want all injuries covered, irrespective of negligence; we want a compensation of three thousand dollars maximum. We want a two weeks' waiting period. We want to let the employer have a way of contracting out, as they have in England. Then, if we are all there together,—then it becomes a question of constitutionality, and you can decide that thing or discuss it, and get as near to a decision as you can, much better when you have found out what you want. Now what we want to get together on now is what we want, and then will come the very serious question of whether we can have it.

THE CHAIRMAN: I think that is the situation. Does anybody want to speak to the question number 1?

MR. GILLETTE: Well, just to bring it further before us, I move you that it is the sense of this Conference that all employments should be covered.

The motion was seconded.

THE CHAIRMAN: You mean all employments or all employments that have accidents?

MR. GILLETTE: All employments having accidents.

MR. DICKSON: What is the distinction?

THE CHAIRMAN: There is a good deal. Any employment that has an accident is dangerous, as far as that particular accident is concerned.

MR. LOWELL: Was there ever an employment of any kind that did not have an accident?

THE CHAIRMAN: Then let the bill cover the accident.

MR. GILLETTE: There may never have been an accident until that time, but the moment that accident happens, then that particular employment becomes dangerous. That is Mr. Mercer's point.

THE CHAIRMAN: Was that motion seconded?

The motion was seconded.

THE CHAIRMAN: Are you ready for the question?

MR. SCHUTZ: Is it simply cases that do have accidents? I don't know any case that does not have accidents.

THE CHAIRMAN: What I had in mind was a section I drew last year, and I will read that, with your permission:—

"Dangerous employment defined. That every employer in the State of conducting an employment in which there hereafter occurs bodily injury to any of the employees arising out of and in the course of such employment is,

for the purpose of this act, defined to be conducting a dangerous employment at the time of that occurrence and thereafter, and consequently subject to the provisions of this act and entitled to the benefits of it."

MR. DICKSON: This is a highly technical legal question, then, is it not?

THE CHAIRMAN: I think so.

MR. SCHUTZ: Why does not that cover every possible employment?

THE CHAIRMAN: It does.

MR. SCHUTZ: Then why not say, "cover every employment"?

MR. NEILL: Have not you done just what Mr. Dickson suggests? Have not you taken a very simple proposition and thrown in an unnecessary legal complication, and may not the court hold that you cannot make a dangerous employment out of one that is not in the ordinary sense of language considered dangerous?

THE CHAIRMAN: That is another constitutional question.

MR. NEILL: Are not you throwing in a possibility there—

THE CHAIRMAN: I considered all those questions, and put it in the form thought best.

MR. NEILL: May I ask a question, then? What is the advantage of using the phrase "shall be considered dangerous employment," and not make it all employments? What is the advantage?

THE CHAIRMAN: For the simple reason it is for the Legislature to define what is a dangerous employment. My idea was that you define them as dangerous only inasmuch as you have accidents.

MR. WAINWRIGHT: May I ask if this motion is intended to cover every field of employment, from farm labor to domestic service?

THE CHAIRMAN: Where there are accidents.

MR. ALEXANDER: I move as an amendment that all employments be covered, and my reason for moving the amendment is that, as the chairman has indicated, the whole question is one of legality and constitutionality. Now, if we pass a motion that all employments shall be covered, then when we come to consider question 13, *re* the constitutionality, we may amend our first motion so as to come within the scope of the law.

MR. BAILEY: It seems to me there is one classification to be considered, and that is that this act shall apply to occupations

which are carried on for business or trade purposes. That strikes out the domestic labor and domestic service, and the theory of this thing, as I understand it, is that a business ought to carry its own risk and put the extra cost into the bill, so that it is a fair line of division to say that this shall apply to trades and businesses, and not to domestic employments, and I think that is worth thinking of. In England, of course, they do not do that. A domestic servant gets hurt, the employee gets compensation, and every householder gets insured, as I am told. He gets employers' liability insurance, and that covers it. But I think, to start with here, we ought to have some language that would leave out domestic service and things of that sort, and if you confine it, as they do in the New York act, to occupations which are carried on as trade and business, that would cover it.

THE CHAIRMAN: It is moved and seconded that we strike out the question of employments having accidents, and simply make it cover all employments.

MR. GILLETTE: I accept that amendment.

MR. WIGMORE: I should be opposed to the broad proposition merely from the broad point of view of policy. If we are going to change the rule for certain employers, it is fair that each employer should know beforehand, so far as simple language can classify him, whether he ought to take out insurance on his new risks, and whether he stands under the law, and, if you say all employments or use any vague language like that, the line between clerical service and all that sort of thing and farm hands and so forth becomes so vague that nobody will know where he stands. Much better, therefore, to begin with the simple way that the English act began, name your employments in fair, ordinary language, and, when the time comes, enlarge them.

MR. LOWELL: My idea of an act is to cover everything, mercantile establishments and domestic servants and everything.

MR. WIGMORE: Then say so.

MR. LOWELL: We do. "All employments." That covers everybody who has any one under him.

MR. SCHUTZ: It seems to me, if we are going to profit by the experience of Europe, in Germany they cover everything but farm labor and domestic service, and I am informed the Reichstag has a committee considering that now, and will recommend covering those two. So it seems to me, if we believe in profiting by experience, we should cover them all.

MR. BOYD: The German act in 1884 first adopted the plan of insurance against sickness alone. It did not apply to agricultural occupations at all. Then they added insurance against accidents, which did not apply to agricultural operation at all. Then they added in 1889 the agricultural occupation. It will be perfectly useless for us to go before the Ohio Legislature and propose a bill to bring in all these occupations at first, even though we intend ultimately to do it. We never would get anywhere. It would not stay in the Legislature over three days at most.

THE CHAIRMAN: Any further discussion on that motion?

MR. HOWARD: In the Massachusetts Commission we discussed the question of covering all employments where five men or more were employed,—five persons. That would eliminate a vast majority of household servants and the small farmer who employs two or three men.

MR. ROHR: It has been our observance and experience that there are a good many people who employ four or five people, and quite a number of accidents occur in those places, and we cannot see the reason why a man who only employs four or five—why the accidents occurring in his place should not come under that head, where he is engaged outside of agriculture.

MR. GOLDEN: The Illinois Commission had that same proposition up, and they came to the conclusion that they could not pass that law, because there were a great many painter contractors, carpenter contractors, and small employers employing three or four or five men, and making their livelihood by it, and we simply make it cover all. We could not say a house that employs five or more. We eliminate that.

MR. BOYD: I point out there, Mr. Chairman, that you did not get anywhere. Your bill was not recommended to the Legislature. We want a bill that we can recommend to the Legislature with some probability of its passing.

MR. NEILL: May I suggest there are two very distinct aspects to this, and it seems to me we would make more progress if we took up the question, first, whether as an ideal all employments ought to be covered, and, second, what the practical question is?

MR. WAINWRIGHT: May I say a word, Mr. Chairman? I recall, although I do not profess to be able to discuss it from the highly technical standpoint some of you gentlemen do,—I recall in a discussion of this what we attempted to do was to frame a compensation act for employments where there was a risk, so

as to be able to insure, as far as it was reasonably possible, its being sustained on constitutional ground. Now a great many of us, because we thought the police power of the State could be more successfully invoked, took certain clearly defined hazardous occupations as to which there could be no question, and we put them in, as I recall, finally, for the purpose of avoiding litigation, so as to make the rights under the act perfectly plain. Now some of us, I recall, wanted to have our act in form so that it would apply to all employments, and using the words of our act, "in which, from the natural condition or prosecution of the work, risks to the life or limb of workmen engaged therein are inherently necessary or inevitable," and there was quite a sentiment in our Commission that, had that been done, we could have had a very much better act than we did, and it seems to me that, if we could at this Conference, in place of attempting to put itself on record as covering all employments, which is manifestly impractical, adopt some generalization of employment which would cover all people who are in any way subject to risks or even slight risks in the particular employment in which they happen to be, we would get better results.

A MEMBER: I would like to understand if that phraseology would be understood as covering farm labor,—the language Mr. Wainwright just used? Are risks inherent in that employment?

MR. WAINWRIGHT: I suppose it would.

A MEMBER: The statistics show agricultural labor to be the most dangerous of any.

MR. WAINWRIGHT: We were perfectly willing to stand for farm labor in our Commission, if our farmers would stand for it, but they never would.

MR. SMITH: There is the danger line. It seems to me the General Assembly or Commission that will recommend or eliminate a certain class are going at the subject in a cowardly manner. There is the great trouble with our legislation in this country. If you will omit a certain fellow or a certain class, you get his vote. I will never be a party, as a member of the Commission, to write my name to a bill that will omit anybody that is subject to accident in our State.

THE CHAIRMAN: Without fear or favor.

MR. DICKSON: Mr. Chairman, as we must necessarily return to this subject, I move the previous question.

The question was then put, and the motion prevailed.

NUMBER 2. SHALL ALL INJURIES BE COVERED, IRRESPECTIVE OF NEGLIGENCE?

MR. DICKSON: I move the affirmative.

MR. GILLETTE: I don't know that I wish to amend that. I just wish to raise this question. I want to see whether the gentleman wishes to exempt any wilful and malicious negligence.

MR. DICKSON: Yes, that I take as a matter of course.

THE CHAIRMAN: I would not take that motion to mean that, Mr. Dickson. I would like to have that thing discussed from the standpoint, first, of the general proposition. I don't want to influence you generally, but I want to know the opinion of the gentlemen here as to whether we want to leave that unlimited. We have discussed that a good deal in our Commission, as to whether we want to say anything about wilful negligence.

MR. BAILEY: I think the question should be divided.

A MEMBER: The question is that it should be in the affirmative.

MR. BAILEY: I will ask to have the question divided, because, as it is now, it applies to negligence of workmen and the employer, and it seems to me there are two questions there, and we ought to know what we are voting on.

THE CHAIRMAN: I take it you mean all injuries, irrespective of negligence on either side. Change the basis.

MR. WIGMORE: I second Mr. Bailey's motion, not because I think we are uncertain about this, but, if we are going out before the public on a matter that involves two totally distinct legal principles, we must express ourselves. Those outside of us may differ with us. Now each field will want to know just where we stand.

MR. SAUNDERS: I move that we cover all injuries irrespective of the negligence of the employer.

THE CHAIRMAN: Let me ask one question. Are we to treat that as one where the injuries arise out of the course of employment and due to the course of employment, is that the understanding of the discussion?

MR. GILLETTE: Why do you exempt the employee?

MR. SAUNDERS: We don't. We are discussing the second motion.

THE CHAIRMAN: As I understand, this motion is to divide number 2 into two questions, and discuss first the question as

to whether or not there shall be compensation irrespective of the negligence of the employer. Am I right?

MR. SAUNDERS: Yes.

THE CHAIRMAN: Leave the question of the negligence of the employee till you come to that. Any remarks? Are you all ready to vote on that question?

The motion prevailed.

THE CHAIRMAN: Now you have a subdivision.

MR. DICKSON: I move that you have a question which you call 2 B, the other one 2 A, "Shall all injuries be covered, irrespective of the negligence of the employee, unless the employer can prove malicious negligence?"

THE CHAIRMAN: That relieves the employee of fault, unless it is malicious injury. But you have always got that question of fact in every case.

MR. BAILEY: I wish to speak against that at the proper time. It seems to me that is narrowing it. Many of the States have abolished contributory negligence.

THE CHAIRMAN: Why don't you move to amend it?

MR. BAILEY: I move to amend it by striking out the last few words.

MR. NEILL: I second the motion.

MR. LOWELL: It seems to me this whole scheme which is going through everywhere is based on this assumption, which I think is a proper assumption, that the industry shall bear the burden of the injuries which are consequent upon it. Now that covers to my mind all injuries,—we have already voted on that,—all injuries irrespective of the negligence of the employer. But it does not cover all injuries irrespective of the negligence of the employee, for this reason: the only part of the injuries which happen to the employee which are really a burden on the business are those where his carelessness is merely such as is necessary in the carrying on of the business. By that I mean this: it is necessary, as I understand it, in modern industry, or it is inevitable, we will say, that in modern industry a man working on a machine may be guilty of what is now known in our common law courts as carelessness, because of the high rate of speed and the amount of attention which he must give to his job, necessitating that every now and then his mind will wander for a moment, and he will be injured. Now that I should cover; but I should not cover a case where he was guilty of a breach of a statutory

regulation, anything of that sort, because that is not a necessary incident of the trade, and that is the distinction which I would make. I admit right off that it is a very difficult distinction to make in words, and that it will lead to lawsuits. I will admit that right off. But, after all, when you come down to it, we must not let this bugbear of lawsuits run away with us. You have got to have a system which has some fair basis to it. Now it is unfair, when you come down to it, that the employers should be stuck if a fellow puts his hand in on purpose. It is not fair. I don't care how much you argue about it, you cannot ever convince an employer or an employee, and I have found that in our hearing. All of the employees in Massachusetts admit right off, when you explain it to them, that it is not fair that their employer should pay them if they go to work and put their hand in on purpose. Now you have got to have that distinction, whether it raises lawsuits or not, in order to have a law which will commend itself to the fair-minded opinion of the public at large, that does not care for either the one side or the other.

A Member: Is it ever possible to decide whether he put his hand in on purpose?

Mr. Lowell: That to my mind is the trouble with all human affairs: you can never positively decide one way or the other, but, in order to have a law that is fair, you have to leave that open.

The Chairman: Have you considered that?

Mr. Dickson: I think you are right, but if I may say supporting Mr. Lowell's proposition, I would put that in for two purposes: first, to meet Mr. Boyd's practical question, you have got to put in something that is fair, that will appeal to the general public and to the Legislature; and, second, in our hearings I have never given any weight to the statements which some employers have made that a workman will purposely seriously injure himself. We had employers come before us and say that they had not any doubt that a man would stick his leg in and have it taken off if he thought he could get compensation. It seems to me such cases would be so extremely rare they ought not to be taken into consideration at all. But, on the practical side, we must put something of that kind in, to put it through the Legislature.

Mr. Bailey: Fraudulent and wilful misconduct of the workman would disentitle him. I understood that went without saying.

I think that should go in. But I do not go so far as to say that this contributory negligence of the workingman—the minute you bring that in, I think you go too far, except for wilful and fraudulent misconduct.

MR. MCEWEN: I have given considerable thought to this question, and I do not believe that there is one man in a million who wilfully wants to commit suicide in the course of his employment. At the mines of the United States Steel Corporation in Minnesota I know of a man who was blinded by the explosion of powder. He went into a tardy explosion, thinking that the fuse was out, after having remained away fifteen minutes: he had not been in there more than half a minute before the explosion occurred, and he was blinded. There would be a chance for a lawsuit, to determine whether that man was wilfully endangering himself.

MR. DICKSON: Suppose such a case as that came to the jury and you put the burden of proof on the employer, how many times, do you think, he would be able to prove that the man was negligent?

MR. MCEWEN: Society's solicitude in this matter, it seems to me, is to minimize poverty and industrial accidents. Suppose a man is fatally injured and leaves a family behind him, ought not there to be some consideration taken there? On the other hand, what has an employer got to bear? I went into a furniture factory in Minnesota the other day, and saw a man operating an old-fashioned buzz-planer. We know any number of men who have lost four fingers on this kind of a machine. Some of them were expert workmen, too, but there will come a time when they will momentarily forget. I said to the employers, "You ought to have a safety cylinder there, and minimize the danger of accidents." "Why," he said, "I have had that machine for twenty years, and there hasn't been a man hurt there." I picked up a paper two days later, and found this operator lost his two fingers. Now what about the employer in that matter?

A MEMBER: He should pay.

MR. MCEWEN: Yes, but labor is more interested in immunity than in compensation, and this man ought to be penalized for his failure to provide necessary safety devices.

A MEMBER: Mr. Chairman, if there is a clause put in there that contemplates the employee's wilful and serious misconduct, I make the very strong suggestion that it should be more exactly

defined. It won't operate, perhaps, when it gets to the jury, but under general words there will be many instances where the argument will be advanced that the injured workman has been guilty of serious and wilful misconduct, and, if it is positively stated in the law what such serious and wilful misconduct consists of, then the workman won't be forced to a great many settlements that he will otherwise be forced to make to his disadvantage if you put in general words. So I urge you to specify any particular cases that should operate to bar the workman of his claim.

Mr. Golden: Take this case. A man is working in a machine-shop or in any kind of a shop, and the employer, through the inspection of the State, is ordered to put guards on those machines. The guards are placed there: the employees don't like to work on a machine with a guard. After the foreman of the employer goes away, he removes that guard, and, while the guard is removed, he is injured. That is what we call misconduct of an employee, and that is what we have talked over time and again in the Commission of the State of Illinois. We do not believe that a man is going to deliberately push his hand into a machine and have it taken off, though he might be absent-minded for a moment, and do that; but, where a guard is used on a machine and it is removed by the employee that is working on the machine and he gets injured or gets hurt or gets killed, we simply claim that that is a misconduct of the employee.

Mr. Howard: That is not my idea of "wilfully." It seems to me such a case as you speak of ought to be against the employer; that is, the employer must feel that he is responsible for seeing that all those rules are carried out, that those guards are kept on there. The exception which I understood Mr. Dickson to make was a case where a man would go, and intentionally, perhaps, commit suicide in order to get compensation for his family or to stick his hand deliberately into a machine to have it cut off and get compensation for that hand. Now it seems to me the number of cases where that will be done are so few that they can almost be disregarded, and the difficulty of proving that a man really did that in a lawsuit would be extremely great. The burden of proof would be on the employer.

A Member: I do not object to a clause of this kind, except I want it to work automatically. I want some additional penalty placed on the employer in addition to the insurance feature.

MR. HOWARD: I would like to ask Mr. Dickson what he meant, —you had in mind just what I had?

MR. DICKSON: Yes.

MR. WIGMORE: Won't Mr. Dickson accept this statement, then? "Injuries self-inflicted for the purpose of receiving compensation."

MR. DICKSON: Yes.

MR. NEILL: May I suggest just one consideration that we seem to have lost sight of. Mr. Lowell was pointing out this was a question of fairness between employer and employee. Now, as a matter of fact, the trend in the European countries has been the other way. The term "industrial insurance" has been propped, and the term "social insurance" has been adopted to emphasize the idea that this is not a question of penalizing the employer: it is a question of getting an equitable social condition. Now, if you could make every man bear his own burden, the burden of his own acts, I should unquestionably agree with Mr. Dickson and those who are advocating this view; but you cannot. In the first place, if the man has a family, the family have got to bear the burden of his loss, and, as a matter of fact, the community has got to bear it. Somebody has to support them. Now you might put it this way. It is a question of the distribution of taxation. Where are you going to raise funds to take care of that family? They ought to be taken care of; they ought not to be made paupers; they ought not to become recipients of charity.

MR. WIGMORE: You are speaking of the man who deliberately injures himself?

MR. NEILL: Yes, and disqualifies himself from continuing.

MR. WIGMORE: Is not the answer to that, if this is written plainly into the law, that he won't injure himself?

MR. NEILL: Oh, I don't think that. I don't think that for a moment, Mr. Dickson. Those cases are so rare, and, even if you do, somebody must take care of the family. In the one case, you are placing the burden of caring for that family on those who are charitable. The other way, you take it out of the industry, and the family does not become dependent on charity, but accepts it as a provision made by the statute to take care of them. So it is not only a question of fairness to the employer: it is a larger social question.

MR. SCHUTZ: I agree with the last speaker, because I think

an incident of this will be that the insurance companies and the employers will see to it, as far as possible, that the safety devices are used, especially if the insurance is mutual, as it is in Germany.

Mr. Gillette: Now, Mr. Chairman, from my own experience, although an employer, I believe that the man who removes the safety device, nevertheless, ought to be compensated for the sake of his family. I am inclined toward that, because I see it frequently happens that these accidents do occur from the removal of safety devices. It is strange to see how that happens. But I would be inclined to believe with my associate, Mr. McEwen, in regard to this case of malicious accident, if it were not for a case I heard in his own office, a case of self-injury, where not only did he do violence to his contract as a railroad man, and recovered compensation after compensation, but he did violence to his own benevolent orders, and perpetrated a fraud upon the brakeman's benevolent funds and I don't see a bit of harm in putting it in. It seems to me it is good and one of the provisions contained in most of the foreign acts.

Mr. Bailey: I don't like the word "serious." Say "fraudulent and corrupt."

Mr. Dickson: May I restate the motion as I understand it? I have accepted the amendments:—

"2 B. Shall all injuries be covered, irrespective of the negligence of employees, except where such injuries are self-inflicted for the purpose of securing compensation and providing that proof of self-injury must rest on the employer?"

I would make it clear, though, for these practical purposes. Shall I read it again? [Rereading the motion.] I move that the answer to that be in the affirmative.

Mr. Alexander: We should go much further than either Mr. Dickson or Mr. Lowell have indicated, and Mr. Neill has furnished one of the arguments why. It is largely a social question. Because of that we are not interested solely in the compensation for injuries, but also in the protection against injuries. Protection can be of a twofold nature, protection through safety devices and proper safety rules, and another one—and here it is where the social question comes in particularly—by training and educating the employees to be more careful. I have had a good opportunity to observe, and through many years of observation I have come to the conviction that not only the American workingman, but Americans as a class, are careless, and I should like

therefore to see a law framed which will educate people so as to make them careful. Now, if we state that compensation under one or another law should not be granted where the employee can be proved by the employer to have injured himself, not for the sake of getting compensation only, but through carelessness, through disobedience to rules, we shall not only be more just to employer and employee, but I think we shall train the employees in greater care. There are not many cases, as has already been stated, where employees intentionally injure themselves or commit suicide, but there are innumerable cases where the employees simply are in the habit of disregarding rules and not taking care of themselves, and I should like to see those cases covered by penalizing the employee, except—this is the only exception I should like to see—where the injury results either in permanent disability or in death, where there may be a family dependent that is now forever deprived of his support. But, where the injury is only of a temporary character, the man may recover again and support his family, he should be penalized for his own carelessness. I think we want to go very carefully before we settle this matter finally, because I thoroughly believe whatever laws are passed must be of a constructive character, must eliminate in our people such characteristics as now cause the conditions that necessitate the consideration of the subject.

Mr. Howard: I represent the employers' class. I am an employer, and I do not believe it ever enters into the employee's mind whether he is going to get compensation or not if he removes the guard from an emery wheel. He does it because it is more convenient for him to work without the guard. I do not believe that other consideration would enter in at all, but I do think, if an employer knows he is not exempted from liability by that removal, he is going to take special precaution to see that the employee carries out all those rules, and I believe you have got to put it up to the employer.

Mr. McEwen: I have observed this in my experience as Commissioner of Labor in Minnesota, having charge of factory and workshop inspection, that with the man who is familiar with the operation of a machine without safety devices, it is hard for him to adapt himself to the machine after the safety devices have been installed, but, if a man gets familiar with the machine after the safety device is put on, he learns to operate it as rapidly with the device as the other man does without it, and he invariably

keeps that safety device in its place. Over in Germany, in the Museum of Safety and Sanitation, I spent considerable time in watching the men being trained in the use of safety devices, and I observed that to be true over there, resulting from conversations with men who came there on Sunday to be trained, and I think that this thing will solve itself in time, so soon as the use of safety devices becomes more general in all States.

THE CHAIRMAN: May I just suggest that it seems to me the interest of the man is just the same and interest of the man's family is the same, and the possibility of a man committing suicide for the purpose of getting compensation is so rare that the employee is better off with the exemption off than he is with it in. The courts are better off, the employee is better off. But the moment you raise the question of fault of the employee, you are going to find from a practical standpoint that you will penalize the employer if he commits a criminal act. That is the danger of the statute. If he is grossly negligent in the way he handles his men, then you will have the question there all the time, political question there, or point of principle, whether you ought to penalize the employer for serious negligence or something the same kind as malice, and you are going to get the question in in both sides of it, and I think I shall stand for the other proposition, just leaving it clear open.

MR. BOYD: Mr. Chairman, your point in regard to negligence of the employer, the remarkable feature about the German act, is that in the law requiring manufacturers to associate themselves in associations the amount he pays depends on the number of risks he has in proportion to the number of employees. If he is negligent, he is penalized, and he is taken care of that way in the act itself. The same is true in regard to employees. They are required to insure against sickness in aid associations, so that, if one man finds out that another is playing sick, he is helping to pay for him, and he will see he is not sick unless he really is sick.

THE CHAIRMAN: That comes under the question of contribution.

MR. BOYD: Yes.

MR. DICKSON: I will say this: I fully agree with the chairman. I should like to leave it out entirely, because I do not attach any weight whatever to the point that the employee would wilfully injure himself. I think it is a negligible quantity, except from a practical standpoint, that while it is so very rare it sticks out

to the average man as an unfair thing to the employer, and you have got to count on it in getting it through the Legislature, and, as practical men, we have taken care of it.

MR. NEILL: May I make one further suggestion? I agree with Mr. Alexander that the education is desirable, but I think a man should be made to pay the penalty for his education, and not his family. I suggest this as a way of meeting the objection, —to pay the man or the family for the injury and penalize the man individually.

THE CHAIRMAN: That is, not allow him to recover?

MR. NEILL: Yes, pay his family and send him to jail if he has intentionally incapacitated himself from supporting them. And further than that, if you are going to require safety devices, since the public has to pay for the man not using them, penalize the employee if he violates the law in taking off the safety device, and, in other words, make him pay the penalty of his misdeed, and let his family be taken care of through the Compensation Act.

MR. ALEXANDER: I don't refer to deliberate injury on the part of the workman. I think that can be easily settled, because there are few cases. But it is the question of compensation that I refer to. You cannot put on an employer the burden of seeing that all safety devices are used, because there are many safety devices that are, after all, only helps to safety.

MR. NEILL: I suggest, penalize the employee in some other way than by depriving him of compensation.

MR. ALEXANDER: Yes, but why should the employer or the employers' association be penalized to pay compensation?

MR. NEILL: You are not penalizing them. You are penalizing the people who use his commodity. I think it is a mistake to consider this as penalizing the employer, because he is, very properly, going to transfer this cost to the consumer.

MR. ALEXANDER: It would seem to me that a law which puts the burden of proof on the employer protects the employee sufficiently, as the employer will have to pay in all cases where he cannot prove that the employee has maliciously injured himself or disregarded common rules of care.

THE CHAIRMAN: Gentlemen, you have two minutes before the time to adjourn.

MR. BAILEY: Many of the States have passed on the question of contributory negligence. We have found that it does not work fairly, that employers take advantage of it to keep a man out

of a just claim, and they have abolished it. Here we want something that is simple and will work fairly, and it seems to me that when you get those words "wilful" and "corrupt" there, or these other words of Dean Wigmore that are the same thing, that is as far as you may go. When you go further you get something that will mean a lawsuit every time, and we ought to keep pretty clear of that, if we are not going to have trouble.

THE CHAIRMAN: Will you read the motion again?

The motion was read by the secretary, as follows:—

Shall all injuries be covered, irrespective of the negligence of employees, except where such injuries are self-inflicted for the purpose of securing compensation, and providing that proof of self-injury must rest on the employer?

The question was then put, and the motion prevailed by a rising vote.

The Conference then adjourned until 2.30 P.M.

Second Session, Thursday, November 10, 1910, 2.30 P.M.

The second meeting of the Conference was called to order by Chairman Mercer.

THE CHAIRMAN: Gentlemen, Judge Holloway of Montana, who missed the opportunity to speak this morning, not being here, has come in, and I think, with your permission, I will call on him now.

JUDGE HOLLOWAY: Mr. Chairman and gentlemen, I have made a memorandum that, in a measure, meets the requirements of the suggestion contained in the letter I received from Mr. Doten some time ago. In Montana we have:—

(1) A general liability statute for injuries.

(2) A statute modelled after Lord Campbell's Act.

(3) A general survival statute.

(4) A statute which leaves to the jury the amount of recovery without limitation.

(5) A statute which makes the employee assume the ordinary risks of the business.

(6) A statute limiting somewhat the defence of negligence of a fellow-servant, by designating certain employees in mining operations as vice-principals.

(7) A statute, of doubtful constitutionality, withdrawing the defence of negligence of a fellow-servant as applied to railroad companies only.

In the absence of statute the common law is in force in Montana, and our courts recognize the defences of contributory negligence, act of God, unavoidable accident and negligence of a fellow-servant, except in the few instances where limited or withdrawn by statute. Our courts, however, treat these defences and the defence of assumption of risk as special, to be pleaded by defendant who assumes the burden of proof as to such defences, except in the instance of the defence of contributory negligence when plaintiff's own pleading discloses that his injuries resulted from some act of his own, when he must absolve himself from the implication of contributory negligence. In other words, we are still proceeding upon the theory of actionable negligence, and while this has been a fruitful source of litigation, burdensome alike upon the employee, the employer, and the general public

who have to pay the court expenses, it has resulted much more favorably to the employee in Montana than in many States, for our juries have been very liberal in their verdicts. Allowances for fifteen thousand, twenty thousand, twenty-five thousand, and even forty thousand dollars have been made. Some of these have been approved, others reduced by the process of scaling the verdicts. But the system is antiquated, and all parties concerned are looking hopefully for some remedial legislation, which, if it cannot supplant the present system altogether, will at least offer a favorable alternative.

(8) At the last session of our Legislature an act was passed and approved which provides for a system of insurance for coal mine operatives. The funds are obtained by requiring the operators to contribute one cent a ton on all coal mined for sale, and by requiring the miners to contribute one per centum of their wages. Three thousand dollars is fixed as the amount payable in case of death by accident, one dollar per day is allowed for permanent disability during disability, or this may be commuted by the payment of a lump sum not exceeding three thousand dollars. One thousand dollars is allowed for the loss of a limb or eye. The management of the insurance is in the hands of the State auditor, who is *ex-officio* insurance commissioner. The act, however, did not take effect until October 1 of this year, and consequently there are not any statistics available and the operation of the law is still a matter of experiment only.

The Montana Commission was not created by law. On September 21 of this year the Governor, acting on the solicitation of many interested parties, extra-officially appointed a commission of eight persons to study the subject of Industrial Workers' Compensation, and, if possible to do so, to report a draft of a bill or drafts of bills looking to the establishment in our State of a different system of compensating the employees engaged in dangerous enterprises, which in Montana are chiefly the railroads, mining, and reduction works.

Our Commission met on October 1, organized and directed the Secretary to obtain for us such reports, statistics, and other useful matter as was available. We have received copies of Bulletin Number 74 of the National Bureau of Labor, Report of Atlantic City Conference, parts of the Thirteenth and Fourteenth Biennial Report of Wisconsin Bureau of Labor, Bulletin Number 1 from Bureau of Minnesota, and the first report of the New York Com-

mission. These and the statutes of New York, British Columbia, and Ontario, particularly, we have been studying.

At the request of Governor Norris I am here to learn from the experience and study of men who have given the subject much greater consideration than time and opportunity have afforded us. We do not have any appropriation whatever, and there are not available any public funds to meet our expenses. I am here at my own expense. If the generosity of our Legislature prompts reimbursement, well and good. If it does not, my interest in the subject is ample justification for my presence here and its concomitant expenses.

THE CHAIRMAN: Thank you very much for your careful paper, judge.

Gentlemen, that brings us back now to the topic of the day, and the next proposition is number 3.

NUMBER 3. SHALL ALL PERSONS ENGAGED IN SUCH EMPLOYMENTS BE INCLUDED?

MR. BAILEY: I move that persons who get above a thousand dollars a year be not included.

MR. LOWELL: The idea of this was whether there should be a limit to the amount of wages, or whether you should have it as it is in Germany, that people earning more than a certain amount of wages should not come under your scheme. That is, if a man earns fifteen hundred dollars, should he be covered by a compensation scheme?

THE CHAIRMAN: Any one want to be heard on this motion?

MR. BAILEY: That is my motion, that people who get a thousand dollars or fifteen hundred dollars should not come in. For one reason, they can buy accident insurance. If a man has got fifteen hundred dollars or two thousand dollars salary, or twelve hundred and fifty dollars, he can use a little of that to buy some accident insurance, and therefore he does not need the thing the way a workingman does, who would become a charge on the community if he did not have some provision made for him. Now we are not considering the constitutional question at all, and I think that the English system, which keeps out people who are earning large sums, might well be followed, and that therefore they should not come under the act.

THE CHAIRMAN: As a matter of fact if some fellow happens

to be getting ten hundred and fifty dollars a year, and is working by the side of a man who is getting nine hundred dollars a year, and they both have a leg broken in the same accident, in the same employment, is it fair to pay one and not pay the other? Or would it not be fairer to limit them both to a percentage of their wages not exceeding a certain amount, which would put the limitation on everybody then? I simply put that question.

MR. GOLDEN: In case of an engineer, there are engineers making from two hundred to two hundred and twenty-four dollars a month. An engineer works every day for his living. That would debar the engineer. It would not be right and just. I am opposed to it for one from the Illinois Commission.

THE CHAIRMAN: You would hardly find a locomotive engineer in this country that, if he works all the time, is not earning one thousand dollars, could you?

MR. BOYD: In that I have some accurate data from Mr. Huntly. He said they earned from a hundred and twenty-five to two hundred and forty dollars a month.

MR. DICKSON: From New Jersey, I feel that the only limitation should be on the amount and not the individual concerned.

MR. GILLETTE: That is, in case of death you limit the amount.

MR. DICKSON: Yes.

MR. GILLETTE: And in case of partial disability, you limit that?

MR. DICKSON: It is automatic in this respect. I think the New York law has it twelve hundred times the daily wage, but in no case exceed three thousand dollars. Then, if a very high-priced man was injured, the three-thousand-dollar limit would come into play.

THE CHAIRMAN: That is the way I have been figuring it in my own mind.

MR. GILLETTE: This question ought to be pretty carefully considered.

MR. ALEXANDER: It might also be put in this way, that anybody earning over fifteen hundred dollars should be considered as earning only fifteen hundred dollars for the purpose of compensation.

MR. LOWELL: The way that has been suggested in theory for us to do is this, that we make no limit under this heading, but that we have a limit of weekly payments, say weekly payments of five to ten dollars, and that that shall not continue for a longer term than would bring up the total to three thousand dollars.

THE CHAIRMAN: How did you cover that in New York,—total three thousand dollars?

MR. WAINWRIGHT: Twelve hundred times the daily wage; maximum, three thousand dollars.

MR. GILLETTE: A man drawing a salary of ten or twelve thousand dollars a year, but being merely a salaried man, and having visited a mine once or twice a year and being injured in an accident there, would, under the method that you are describing, draw compensation, but limited compensation.

THE CHAIRMAN: Limited to the same amount some other fellow would get.

MR. WAINWRIGHT: Would not the man come under the qualification in our law that an occupation where there was an inherent risk,—you can hardly say that, if a president visited a mine, his occupation was one where there was an inherent risk.

THE CHAIRMAN: Suppose he had to go and investigate how the work was going along? He may have been a miner who knew more about it than any other person.

MR. WAINWRIGHT: I would not undertake to say whether that man should come out under our law. I know we did not have him in contemplation.

MR. GILLETTE: I am afraid of it. It would materially add to the cost without accomplishing the purposes for which the Compensation Act is particularly intended; that is, the relief of those who have not drawn salaries by which they can provide for themselves.

A MEMBER: I think the insurance companies would cut that down. They would make the employer state what men were earning above this limit, whatever it may be, and charge on an amount up to that limit, and not above it.

THE CHAIRMAN: They would not need to go above that limit. The only change would come if a man were injured for a short period of time, they would have to pay a bigger proportion, perhaps, because they pay a bigger percentage of his wage.

MR. GILLETTE: Well, I don't know. That would be true, probably, if they did not have a pretty good understanding among the insurance companies, but, possibly, some of you know what has been done in the bonding business. They used to charge for the amount of the bond. If the bond were four thousand dollars and the contract ten thousand dollars, they would charge a certain percentage on the amount of the bond. Now,

since the combine has been formed by the insurance companies, they charge you the premium on whatever is most, the amount of the contract or the amount of the bond. I can see in case of a combine between the insurance companies how it would be very easy for them to get together and say, We will charge on the whole salary.

MR. WAINWRIGHT: We excluded that clause very effectively, —restricted it to workmen engaged in manual labor.

MR. GILLETTE: But, when we apply it to everybody here, I am not clear in my own mind.

MR. WIGMORE: I understand we are really trying to make this an insurance proposition. We are all familiar with insurance propositions generally: anybody, no matter what his salary, may take it out, only his premium is based on his salary. Why, if we fix a maximum of amounts, cannot we get our limit that way? Why need we care, any more than the ordinary accident, life, or disability companies care, what salary a man is getting?

A MEMBER: I think that is answered by the statement that liability insurance companies do base their premium on pay-rolls.

MR. WIGMORE: But, if you have a maximum of three thousand dollars, everybody is scaled down to that.

A MEMBER: They would scale down to the amount of wages the man is allowed benefits on and charge only on that, and, if they failed to scale it down, then they would have the mutual companies, which would no doubt grow up here, as they have in other countries, and be subject to free competitive insurance.

THE CHAIRMAN: Are you ready for the question?

MR. GILLETTE: I am not. I don't know what is the right thing to do on it.

A MEMBER: If you impose a limit on the weekly wage, that takes care of the fact that a high-priced man doesn't get any more. If you impose a limit on the length of period for which he is paid, that will take care of the total. And, if you impose a death limit, you will take care of that. I do not think there is any difficulty, if you have the two limits, the total limit and the weekly limit, and then add the death limit.

THE CHAIRMAN: The question is whether people earning more than one thousand dollars come under this act.

MR. BAILEY: I will make it fifteen hundred dollars.

MR. WIGMORE: Cannot we let everybody come into the act, but keep the maximum at three thousand dollars, but not keep

any individual out, by saying the whole thing shall be based on a maximum of three thousand dollars, or five dollars a day, and everybody who gets more than that comes in under the act if he is hurt, but the reckoning of the insurance is limited to a maximum of five dollars a day wages? I am certainly opposed to keeping any one human being that is working in a factory out of this act, and the proposition so far made is, What persons shall come in? If you say what is the maximum wage that shall be deemed to be the maximum wage, it seems to me that is an entirely different matter.

Mr. McEwen: Let us take the condition of a railroad conductor on a regular run. I have in mind one now earning a hundred and fifty dollars a month, or eighteen hundred dollars a year, who has double expense in the maintenance of a home at one end of the line and board at the other end. As a matter of fact, this board he is paying at one end of the line is really extra: it would not be less than thirty dollars a month, or three hundred and sixty dollars a year, bringing him down below the fifteen-hundred-dollar mark, and possibly lower. I do not believe there ought to be any limitation whatever on a man's earnings. It should be based entirely on the risk of the injury.

Mr. Lowell: Mr. Chairman, it seems to me that it would be unfair to put a limit on, because, whatever you remit, you have a case of gross injustice to the fellow that is just over that, whatever the limit be, because he is earning five dollars less. It seems to me by putting on a weekly limit of ten dollars or any amount you may make, and have a maximum limit in terms of three thousand dollars, you thereby get over all of the troubles, except the one which Mr. Gillette has stated, that the insurance companies will charge you on the total pay-roll, will charge you on five thousand dollars, though the man could only recover on three thousand dollars. I look at it from the point of view of the insurance company, but it seems to me under this new law, if the insurance company go to work and act in that way, they will get the retribution very quickly which is their just due. These employers will at once begin to say, "That is not fair: let us get together and have a mutual." I think that will come pretty quick if they go at it that way. So I should move there be no limit.

The Chairman: You move to amend that motion?

Mr. Neill: Is it true that the reason it is based on a pay-roll

is that a jury, in fixing damages, will probably take regard of the man's income, without regard of what it may be? If the law were so fixed that they would not have that thing to consider—

Mr. Gillette: In all countries it is based on the pay-roll.

Mr. Neill: To-day, under our present law, the amount an insurance company has to pay will depend on a damage suit, and the jury will take into account what the man's earning capacity was. They had to pay some enormous damages in the New York tunnel wreck, because some brokers and men of large affairs were killed.

Mr. Lowell: I should think, Mr. Neill, from what little I know about it, that they base it on the pay-roll merely as a convenient scheme to take. "What is your pay-roll?" "One hundred thousand dollars." "Your rate is so and so." So that I move, either as an amendment, if that is a proper form of it, or as a motion, that all persons engaged in the employments covered be included in the act, without regard to the amount of their wages or salary.

The question was then put, and the motion prevailed.

Number 4. Shall Compensation be paid in a Lump Sum or in Instalments?

The Chairman: I do not know, gentlemen, whether you want to discuss that at length or whether you are ready to vote on it. I think I will consider there is a vote to adopt each of these.

Mr. Lowell: May I say, first, that this is rather intimately connected in my mind with the one we have just gone over,—that is, the way you get at your limit,—and practically covers the one we have been over? By having a minimum limit of three or five dollars, or whatever you say, and a maximum limit of weekly payments, and then you go up to a certain number of weeks, and then your maximum of all, whatever it may be, three thousand dollars. For instance, you have your maximum of ten dollars a week for three hundred weeks, that is three thousand dollars. That is the way you get at your maximum.

Mr. Neill: May I ask if this question only applies to cases of total disability and death?

The Chairman: No, I should think, whether it is for total or partial disability or death, or whatever it was, the question is

whether it is to be paid out in instalments, like wages, or paid in a lump sum.

MR. NEILL: If you are paying for temporary disability, you can only pay by the week, for the reason you don't know how long the man will be injured.

THE CHAIRMAN: But under the present common law you cannot do that.

MR. NEILL: You would pay him a certain percentage of wages in cases where he was injured. In case of permanent injury or death, it seems to me the only case where this would be considered.

THE CHAIRMAN: Isn't that statement just a little bit erroneous? It seems to me, if we did pay in a lump sum, it could be settled on what was supposed to be the length of time the man would be out. This is put to us in the question whether we favor a lump-sum settlement or instalments.

MR. NEILL: The great majority of accidents disable a man for from two to six weeks, a certain period of time. You do not know how long it is going to last in the beginning, and the great majority would be paid on the basis of weekly or monthly payments during the period of disability. It is only in case of actual death or total disability the question would arise at all as to the amount to be paid. Suppose I have a broken arm. I am laid up for a certain period. My compensation would come in at the regular pay-days during the period, wouldn't they?

THE CHAIRMAN: That depends whether they make it a lump sum or weekly payments.

MR. HOWARD: You might pay two thousand dollars for a broken arm all the same.

MR. NEILL: That seems to me unquestionable.

THE CHAIRMAN: Then you would favor the basis of instalments, wouldn't you?

MR. NEILL: I wouldn't favor either one, as a lump proposition. I would favor instalments for temporary disability, and then the other is open for different discussion altogether. My idea is to divide the question. My motion is that it be subdivided: A, for temporary disability; B, for permanent disability or for death.

THE CHAIRMAN: Is there a second to that motion?

The motion was seconded.

JUDGE HOLLOWAY: Mr. Chairman, I would like to make a suggestion to the gentlemen. The experience that I have had in

dealing with the subject of compensation has been from the standpoint of the man who has the last say. While I practised law for a good many years, I never had any experience in personal injury accidents. I acted as trial judge for a term, but did not have any of that class of litigation, but during my term of service as a member of the Supreme Court we have had a great deal of it. You can readily appreciate that, when you recall that Butte is one of the most active mining camps in the world. We frequently have this situation presented to us: A man is injured. You speak of it being a temporary injury or a permanent disability, yet it is impossible to tell. At the expiration of a year, you may not be able to tell whether it is going to be a permanent disability or whether it is temporary. And for that reason, it seems to me, and I was going to make the suggestion that was made, that I would make the division into three classes instead of two. If you pay on the basis of instalments, those payments will continue during the disability, not exceeding a certain length of time. Now, if it is a temporary disability, it would continue until the disability is removed, we will say. If it is a disability, the nature of which cannot be determined at first glance, you will run that along, say, for one year, and then, if investigation discloses that the man's disability is going to be permanent,—then you have a basis for determining the amount of his payment. But in either instance I would make the payment to the man who is temporarily disabled or the man who is permanently disabled on the instalment plan. But, in the case of the man who is permanently disabled, I would give him the option to have it commuted by payment of a lump sum after it is determined that his injury is going to be permanent. But, until it is permanent, you cannot say what amount of recovery he ought to have, and for that reason, I think, the subject here is logically naturally divided into three divisions.

The Chairman: Just let me ask you a question, if you don't mind. What do you think about the necessity of requiring it, in case of permanent injury, to be paid on a wage basis or instalment plan as perfectly fair to the man and his family? As a matter of fact, would not the average man, who receives this money, be a man who is not accustomed to handling funds, and, if he gets it, it would go into some venture and he would lose his money?

Mr. Neill: Of course, that is a condition that is likely to arise

even in the case of men who are used to handling money. [Laughter.]

JUDGE HOLLOWAY: I will admit that. In drafting the bill to which I referred a few moments ago, and for the benefit of coal miners, the coal miners themselves were the originators of the scheme, and they considered this question very thoroughly from their standpoint; and, when it was before the Legislature, it was considered from the standpoint of the coal miner more liberal than the employer, and they preferred the system that I have just indicated. For instance, the coal miner out there will make from three to four dollars and a half a day, but, in case he is disabled, he draws one dollar a day, not to exceed three thousand dollars, which is fixed as the limit in the case of death, and that, of course, is the maximum. Now that is paid to him weekly at pay-days. He gets a dollar a day. But at any time during the period of his disability it may be commuted by the payment of a gross sum not exceeding three thousand dollars.

MR. GILLETTE: At whose option?

JUDGE HOLLOWAY: It would probably be at the option of either party. I don't know that the law states. You cannot deny a man the right to receive the amount in a lump sum if he wants to,—that is, his wife and family that have come into existence by his act must take their chances with him; but it offers to them the opportunity to receive the amount upon the instalment plan, and a great many, I think, would take advantage of it.

THE CHAIRMAN: Have you had this question out in Montana? Any question there as to whether or not over-zealous adjusters representing insurance companies, or claim agents representing the mines, will use their power of settlement to induce the fellow to compromise a claim that ought not to be compromised?

JUDGE HOLLOWAY: No, as I said, our coal mining act, which is the only one that we have that bears any resemblance to the one we are discussing, has been in effect only since the first of October, and there are no statistics available to me.

MR. BAILEY: I suppose we all agree that we want the money to go in the way in which it will do most good. I think that for temporary disability and permanent disability undoubtedly the money would do the most good if it was paid every pay-day. It seems to me that the same is true in case of death. I am not talking about constitutional questions. I am assuming we can take away from the workman the right to have it in a lump

sum. If we can, we should do it for this reason: a man is dead and gone, and has a wife and children, and, if that man's salary can be given to them, it will last longer and do the most good. My wife, some time ago, was called upon to raise a little money for a family in distress, and she got twenty-five dollars, and took it down to the widow, and she went down the next day to see what they had done with it, and they had bought a door plate. [Laughter.] I do believe it is very, very important that, if possible, the amount allowed in case of death should go in the shape of—I won't say annually, because it ought to be paid often, but it should go so that it won't be all squandered at once. I do think we ought to have the instalment plan just as far as we can.

Mr. Doten: I got a little insight into this in England from reading those consular reports you were speaking of, and it is a growing practice over there to have a lump sum paid into the court, and to have it doled out to the beneficiary. An added reason for making the payment in instalments is to discourage the activity of the speculative solicitor. If there is no large sum to be obtained, there is not so much interest for the lawyer to over-persuade his client to take a lump sum.

Mr. Dickson: If this were a question of the funds being paid out by state insurance, I think there would be no question that the instalment plan would be the best. But you have to take this into account. Mr. Lowell suggested an instance in which ten dollars a week might be paid for three hundred weeks. The payment of that sum is dependent on the solvency of the employer. What guarantee have you that the average employer is going to be solvent for six years?

Mr. Bailey: I meet that by providing the money shall be paid into court. We know the employer wants to have it over and done with, and make his dividend at the end of the year. Now a man is killed, and there is going to be two thousand dollars paid. I provide it shall be paid to the personal representative in the first instance, and then shall be administered by a guardian *ad litem*. Let the employer get his receipt in full. Let the money not be paid into court exactly, but be held under direction of the court, to be divided as the dependants need it. I think that can be done. You can give the employer his receipt in full, and then the money can be divided in some practical way.

Mr. Gillette: Mr. Chairman, I don't believe that any one

will disagree with the proposition that the method of payment should ultimately be by the annuity or pension system, but I think Mr. Dickson has raised a very pertinent point, which is not entirely covered by what the other gentleman has said. I refer to this matter, the basis of determining with any degree of certainty what the operation of any of these prospective acts will cost as an insurance or an insurable proposition. I had a very interesting talk with Dr. Zacher on this subject. You know the experience they had in Germany. They were prime movers in this sort of legislation, and had no experience to go on, and partially for that reason, and partially for reasons of expediency and not to meet the opposition of the German employer, they made no provision for a sufficient reserve. Austria attempted to do it, but she failed signally, and her reserve has been entirely inadequate to take care of the deferred obligations which were due under the law. Now we have no statistics in existence in this country to tell anything about what the probable duration of a certain class of disability will be. We know very little about the life expectancy of the average American workman who is partially disabled. In fact, we are absolutely destitute in this country of any statistics by which any sort of an intelligent guess in regard to the expectancy of liabilities under the deferred annuity system can be based. I asked Dr. Zacher what he would advise. "Well," he said, "I think it would be wise if you would start out with the idea of ultimately getting to a pension system, but be a little wiser than we have been, and run your law along for five years, we will say to seven years, under a plan of lump-sum settlements, so you will have some experience and know something about what it is going to cost, so that either your insurance companies or your mutual companies, or whatever method of insurance you settle upon, can have a statistical basis upon which to form some estimate of the cost." Now you all know the cost of these things, of the Compensation Act, has been underestimated in every country in which the law has been enacted. The German law started in 1885, and Dr. Zacher and Dr. Manes estimate that the cost of the operation of that act will continue to increase until about 1960. As I said, the Austrian reserve is really insolvent to-day. The only solvency there is about either the German or the Austrian system is the compulsion which is behind it, and that means passing on to future generations the burden which ought to be met by the industries of to-day; and

while I would like to see the pension system established, and I believe it is the ultimate thing to be desired, I seriously doubt whether it would not be wisdom, in the initial acts which are passed, and until experience has been gained in this country, to start on a plan of lump-sum settlements, and thus gain a statistical experience from which we can determine somewhat the cost of operation of these acts. I just submit it to you as a subject that has bothered me very greatly.

MR. HOWARD: I would like to ask what difference it will make whether the lump sum was given in a lump sum to the employee or was given to the court in the manner Mr. Bailey suggests, and then given out piecemeal. I don't see how it affects the cost.

MR. NEILL: Is not the difficulty Mr. Gillette is figuring on permanent liability to continue without limit, and what we have been discussing here is limited amount to be paid in one item or thirty or three hundred items?

MR. GILLETTE: That applies also to both partial and total disability, which are not permanent, but which we don't know whether on the average they will continue for six months or whether they will continue for nine months, or whether they will continue for a year or a year and a half. It is only by the law of averages that the whole question of cost can be determined.

MR. NEILL: It seems to me that comes up in question 5, and all we have been discussing here is, we have assumed there would be a total amount paid, and, having given that item, whether it should be paid all at once or in instalments.

MR. GILLETTE: But the proposed limit applies only to death and permanent disability.

MR. NEILL: No, it applies to all.

MR. GILLETTE: The maximum amount applies to all, but that is not the great element in the cost, the greatest element: it is the payment of the average injuries, partial or total, but not permanent.

A MEMBER: May I suggest that if we are agreed that the weekly payment is best for the workingman (and I certainly am convinced that it is), and that it is wise to allow that weekly payment to continue for a certain period, then at the option of the workingman, at the option of the employer, or either the one or the other, allow a commutation of the payments to become due, to be made for a lump sum? That has this effect: It en-

ables the workingman to escape the importunities of the bogus bond investor for six months. He has time to turn around and think what he is going to do with that money when he gets it; and it enables him at the same time, and it is strongly urged by the gentlemen who got through the Maryland law affecting mines —that applies to the gentleman from Montana, too—that in the mining districts it is often to the advantage of the widow to have a lump sum. Now, if you give her a period before she can get a lump sum, it will do away with the disadvantages that grow out of a lump sum, perhaps. It will enable her friends and advisers to get around her and advise her as to what she is going to do with the money when she gets it. In England it has been found that the permanent disabilities are entirely the most costly of all disabilities, and the commutation to a lump sum has been put under the careful supervision of the court, so that no advantage can be taken of the workingman. It has been safeguarded, but he is allowed to have his lump sum at the end of a certain period, and I suggest that as a compromise of the two views expressed here this afternoon.

Mr. Lowell: There is one point that has not been touched on, and which has given me more thought than anything else. As I said before, it is the small employer I am afraid of, the effect on him. Now Mr. Dickson has talked about the question of insolvency or bankruptcy. It seems to me that a payment by instalments would help the small employer in two ways: In the first place, it will enable him, instead of having to pay down three thousand dollars right off, which might bankrupt him,—enable him to spread that over three hundred payments of ten dollars each, which it might be very easy to do. Now the result, it seems to me, is this: If you say to Mr. Small Employer, "You must pay the three thousand dollars," the result is he goes broke, and the employee gets nothing. If you say, "You may pay ten dollars a week for three hundred weeks," he may be able to tide over it. It is better for him, because it keeps his money in the business instead of taking it all out. It is better for the employee, because the employee gets something instead of nothing. That is one part of this weekly payment plan which appeals to me a good deal.

Mr. Gillette: Is not this true, though, Mr. Lowell, that any compensation scheme without an insurance plan is pretty nearly a failure, and consequently you have got to depend upon the small

employer insuring himself somehow or other, and spreading this over a large area of time to take care of that?

MR. MCEWEN: Is not he subject to the same danger under employers' liability to-day? If he gets a verdict against him of twenty thousand dollars, he is out of business.

MR. LOWELL: Yes, but I want to get rid of that under my new law.

MR. MCEWEN: I found in my investigations in England, where they are not in the habit of using as large sums of money as the workingmen of this country, a nominal sum below that allowed under the law is held out to a widow by the claim agent of the insurance company who is aiming to make good returns to the company. There is absolutely no human element in it at all. The ready money is held out to her as an inducement. She invariably accepts it, and soon becomes a burden on society.

A MEMBER: Under the first law in England that was so. Under the second law they put that under the control of the court, and a release is not binding, and the court can set it aside.

MR. MCEWEN: I am unalterably opposed, from a labor standpoint, to the lump-sum payment, unless after a court of review and on the court's investigation of the condition of the family it found a lump sum would act for the benefit of the family. I told at the Atlantic City Conference the story of a switchman who lost a leg. He lived near me. He was awarded ten thousand dollars, and was given two-thirds of that sum. He had a lot of idle time on his hands. He couldn't work as a switchman any more. Because of his idleness he went about town, and in the saloon was a card-table, and the boys played cards; and he sat there and played cards, which he did not have time for when he was an able-bodied man, and soon that fortune was frittered away and his family became a burden on society. We ought to guard against such a condition in the interests of a man and his family and society. Mr. Gillette refers to the German plan, and to Dr. Zacher's opinion as to the propriety of adopting a reserve fund for mutual companies here. I can readily understand in Germany, where the compensation extends over the entire period of disability, how that might be advisable. But here, under every scheme that has been advocated among the several State Commissions, there is to be a limit of liability, and we shall not have that situation to contend with such as they have in Germany.

MR. HOWARD: Mr. Chairman, I fully indorse, from the em-

ployers' standpoint personally, the last speaker's opinion. I think in every case we ought to guard against a lump sum. If you eliminate the lump sum, it takes away the greatest inducement to have lawyers come in and try to pettifog matters for the sake of getting a share of the lump sum. If the employee is only getting five or six dollars a week over a continuing period, and that is paid directly to the employee, there is very little chance for a lawyer to come in and get a share of it. He has to fight hard to get it. There is only one case that I think of where payments might be commuted, and that is in the case of a widow who remarries. In Russia the law provides that, if a widow remarries, she gets a lump sum of three years' payments paid right off. Now that gives her a good deal better chance to remarry and cease to be a burden on the community, and it strikes me as being an exceedingly good idea.

Mr. Alexander: There are two objections to the lump-sum payment: possibility of insolvency of the employer, also the undesirability, on the part of the employer, to have a liability hang on; and the other, that it may be entirely desirable and necessary for a widow, or for the wife of a totally disabled man, to take up another line of business immediately. There may be a good opportunity for it, too. Now, if we leave it with the court, to whom the insurance company or the employer would immediately turn over the money, the court could make instalments, or commute the instalments into a lump sum at any time after six months It would be entirely safe to leave it to the judgment of the court to take into consideration the circumstances that exist and deal justly with them.

Mr. Doten: Mr. Chairman, I have here a transcript of an opinion of Mr. W. V. Appleton, secretary of the General Federation of Trade Unions of England. They have had a good deal of experience over there, and have studied the matter very carefully; and he says, in regard to this matter, that he favors weekly payments, but that after six months there should be the privilege of commutation. And Mr. Sheldon, another prominent labor leader, voices exactly the same sentiments.

The Chairman: I came away from Europe with the impression, just as a great many of us had before we went over there, that lump-sum payments were very bad in the beginning; that we ought to have payments on the wage scale; that we ought to have them paid less than they would earn if they were at work.

There are a good many advantages to that,—inducement to them not to waste their time, get back to work; and that there ought not to be any possibility of settling and getting a lump sum unless there was something special after a considerable time, where a court could see that they could use this money, and were going to use it, for a special purpose the court would decide was beneficial,—not leave it so that any settlement could be made at any time on application to the court, because you gentlemen who practise law know what that means. A person wants money. There is nobody to contest it. But if they can show some good, sufficient reason why they can take and invest it in a suburban little home, or in something that the court can see is a good business for them, something substantial, even though it might be in a particular instance in setting them up in a news-stand, if a man had only one leg, or something of that sort, then I think it would be perfectly proper; but I would be opposed to any scheme which did not allow it to run as a special sum for some time, and then only allow the court to exercise his judgment in very special circumstances.

MR. DICKSON: But you would have the money paid into court, wouldn't you?

THE CHAIRMAN: No.

MR. DICKSON: Have the court guarantee the solvency of the employer?

THE CHAIRMAN: Carry that out by an insurance plan.

MR. BAILEY: This is very crude. [Reading.]

"The adjuster is the person appointed with large powers of discretion, equity powers, to determine all these questions, and he would set him up in business, if need be, or to buy a little home."

THE CHAIRMAN: Suppose that man who was injured should be Mr. Dickson or Mr. Gillette over here, what would you think of the advisability of having that benefit put into the hands of a guardian?

MR. GILLETTE: I would think mighty well of it! [Laughter.]

MR. BAILEY: The adjuster has got every power of saying it shall be paid over if it is wise to have it paid over. I know that a short time ago they were getting up a fund of a hundred thousand dollars for the benefit of President Eliot, of Harvard College, and they gave him a life interest. I never knew why, whether they thought it would do him more good. I think, with the large powers of the court, the guardian would take care of that.

MR. NEILL: In order to test the sense of the meeting,—and I assume you want to get at certain principles, and we cannot work out all the details,—I move that the Conference recommend that the principle of instalments be approved, with the proviso that a lump sum may be paid, if it is paid into court or some duly constituted body.

THE CHAIRMAN: Mr. Neill, are you moving that as a substitute to your former motion?

MR. NEILL: Yes.

THE CHAIRMAN: Does the second to the former motion approve it?

MR. LOWELL: Yes.

MR. GILLETTE: State it again, please.

THE CHAIRMAN: That the Conference recommend the instalment plan, with a proviso that there may be an exception made by paying the money into court, to be handled under its direction. Are you ready for the question?

MR. ALEXANDER: How do we guarantee payments by the employer who does not insure?

MR. HOWARD: I hope we can stand for the principle of having all sums paid in instalments and no commutations. It seems to me that the cases where commutations can be arranged with advantage are extremely rare; that you immediately bring in a plan which may introduce a good deal of trouble; that a person can get a lump sum, even though the time at which it is given be deferred. Then there is always a chance for them to borrow the money.

MR. BAILEY: It is not assignable: you cannot borrow on it.

MR. HOWARD: That climinates that objection. But it does give the chance for a lawyer or an insurance representative to come in.

MR. BAILEY: No, the court is there. It has got to be approved by the court.

MR. HOWARD: But is it not possible that a lawyer could be employed to argue it before the court?

MR. BAILEY: No.

MR. HOWARD: Do you rule out lawyers from appearing for workmen?

MR. BAILEY: No, you cannot do that.

MR. HOWARD: Then it is possible for a lawyer to be employed to argue before the court for commutation.

Then you also make the court the judge as to whether the business enterprise, which is going to be taken up, is going to be a profitable enterprise. Now I don't know what the feeling of the average judge would be, but I should think he would hesitate a good deal in passing on whether or not a new business enterprise is going to be successful.

MR. DOTEN: Mr. Chairman, I am going to say, in spite of what the gentleman on my right has said about this not being assessable and so forth, that the experience of England is that it does encourage the activity of the ambulance-chaser,—whether it is assessable or not, there is a considerable sum available out of which there can be made a pretty substantial fee.

MR. STARRING: May I inquire whether the court could not also settle the amount of that fee? I should think that would cover the question then.

THE CHAIRMAN: My notion is that the bill ought to cover it; that is, if you make your liability definite. I would not be in favor of limiting the lawyer's fee, because that would outlaw the workman practically.

MR. GILLETTE: I was told there were many hundreds of workmen who were keeping little shops. They have commuted their pensions, and were keeping little shops, and by the investment of their capital were enabled to earn something with it, and in a very large number of cases it has been a great benefit.

MR. DOTEN: The registrar of one court over there said that most cases where it has been allowed have turned out disastrously, so that the courts are now following the practice of denying this privilege in most cases.

THE CHAIRMAN: Gentlemen, we are almost at the end of our hour, but I want to ask one question of Mr. Neill. Mr. Neill, would you feel like changing that motion, so that it would not give the court power to make settlement until after the injured got to the point where there was a reasonable basis for his doing something?

MR. NEILL: In case of death and in case of permanent disability, for example, not only the question of stores, but it may be to pay for a boy's schooling. Oftentimes where a widow has several children, if she could keep them through college, those boys would become self-supporting. Very often an allowance for two or three years might enable the children to increase their earning power. If you give her a small amount, she puts the

children to work immediately. And my idea was to leave it under the protection of some public authority as elastic as possible that would have a great deal of discretion.

JUDGE HOLLOWAY: I don't think there is any danger to be anticipated from leaving this matter with the courts. For instance, you take it in our case, the district courts correspond with your circuit courts here, and are the courts having probate jurisdiction. Now, in the case of the estates of minors, we have plenary powers, you might say. We can direct the guardian to invest in a fund, in a particular enterprise, to loan the money out, or to do just about as the presiding judge sees fit to direct, and it has worked very well in the State of Montana now—twenty-one years old, I believe, to-day.

THE CHAIRMAN: Gentlemen, we congratulate the State of Montana. I thoroughly agree with you that the power of trust arrangements, of trust power, and so forth, is well handled by the courts; but it has seemed to me that where there is a special line of adjusters grown up through the country, as they have in the insurance business on these claims, they are very likely to get before a fellow who wants his money, and they will fish out some reasonable reason why they can go before the court and make a showing that on its face looks very good.

MR. GILLETTE: I am frank to say this: I am in favor of the pension system. I did not state my real reason why I objected to it at the present time, and that is this: I have had in mind that what we ought to have ultimately or immediately, or at least as soon as possible, are mutual associations of employers to carry this insurance, and I do not see how under a continuing obligation of this kind—that is, I can see very great difficulty encountered in organizing these mutual corporations with these continuing obligations. If they knew they could commute them until they could get their expenses, they would not be afraid to go into them. They would know something about what their liability was, how long it is going to last. I shall not object to it at all.

THE CHAIRMAN: Gentlemen, the hour is up. Are you ready for the question?

MR. SCHUTZ: May we have it stated once more?

THE CHAIRMAN: That we recommend for compensation the instalment plan, subject to the power of the court to commute it for a lump-sum settlement on proper showing, and to control

the fund after he has commuted it, as I understand. Is that right?

MR. BAILEY: That is right.

The question was then put, and the motion prevailed.

NUMBER 5. AMOUNT AND DURATION OF COMPENSATION?

THE CHAIRMAN: Will somebody make a motion under number 5, or shall we consider there is a motion? It is very indefinite.

MR. ALEXANDER: I move that the amount and duration of compensation be considered under three headings: first, temporary disability; second, permanent disability; third, death.

JUDGE HOLLOWAY: I second the motion, Mr. Chairman.

The motion prevailed.

THE CHAIRMAN: Now will some one make a motion on the temporary proposition?

MR. NEILL: May I suggest a further division: (A) Temporary disability: 1, total; 2, partial.

(B) Permanent disability: 1, total; 2, partial.

(C) Death.

THE CHAIRMAN: Who wants to be heard on that first?

MR. ALEXANDER: I should like to make a motion. We have heard two statements to-day that we should bear in mind: first, under the present condition, only from twenty-five to thirty-five per cent. of what is paid by the employer goes to the injured; second, that the interests of the small employer must be very carefully considered and safeguarded. We have in our State the shoe industry, which works on an extremely small margin, and the vast majority of shoe manufacturers are small employers, and the greatest amount of their business is outside the State, not inside the State. Any burden of any magnitude put on them would practically put them out of business, because the margin of profit is small, and they could not sell their shoes with the cost of insurance added to the cost of production in States where similar conditions do not exist. It seems to me, therefore, that we may for temporary disability, which we are considering now, accept a sliding scale, starting perhaps with a compensation of forty per cent. average weekly wage for a period of six or ten weeks; then increase the compensation by fifty per cent. for another period, which may bring it up to twenty-six weeks total; and then finally increase it to sixty-six and two-thirds per cent. up to the final

limitation of one year, or whatever it may be. In this way we would safeguard the interests of the small employer. The largest number of accident cases are of short duration, and the insurance rate, therefore, in the vast majority of cases would only slightly increase, and not put that heavy burden on the employer. On the other hand, the employee on a forty per cent. basis would surely get as much as the average employee now recovers under the existing laws. And, furthermore, during the first period of six or ten weeks, every employee may safely be presumed to have laid up a few dollars which he can utilize for tiding himself and his family over this period. But, as the duration of disability increases, his savings may be presumed to dwindle more and more, and finally be gone altogether, so that he and those dependent on him have to rely entirely on what they get as compensation.

Now with this introduction I make this motion in substance, although in particulars it might be amended somewhat: that the compensation for temporary disability shall be forty per cent. of the average wage for a period of ten weeks; fifty per cent. of the average wage for an additional period of sixteen weeks; and sixty per cent. of the average wage for an additional period of twenty-six weeks,—limiting, therefore, the whole to fifty-two weeks, or one year.

Mr. Bailey: I believe we should begin pretty moderately. It will be easy to increase this compensation after we get going, but certainly, until we know where we are, until insurance people know where they are, it should be under rather than above what we ultimately hope to have. I notice that in the Federal compensation law, a little abstract of which I have, they are very moderate. It does not go beyond twelve months, and the death payment is the amount of the year's salary. That compared with the New York law seems very moderate. But we have that precedent for us to go on, and it is stated that that is working pretty well, and that covers, of course, a very large number of Federal employees.

Mr. Neill: I might save time by saying that we have the administration of that act, and it is not a satisfactory one at all. [Laughter.] As a matter of fact, no one has considered the act who does not agree it is very much in need of amendment.

(Mr. Lowell in the Chair.)

Mr. Mercer: I would like to make a motion as a substitute,

and I will say, before I read this, this is a plan I have worked on, and you may not agree with me in amounts, but it works out this way.

"SECTION 3. Compensation allowed. The compensation herein and hereby allowed, if established as herein provided, having arisen out of and in the course of such dangerous employment within this State, shall be on the following basis:—

"(*a*) For immediate death or for death accruing within five years as a result of such injuries, or for injuries causing total incapacity for that service for five years or more, sixty per cent. of the amount of wages the injured was receiving at the time of the accident for a period of five years, provided, such payment shall not continue longer than to aggregate three thousand dollars."

That covers three points. A man dies immediately, he is killed immediately, or dies within three years as the result, or is sufficiently badly injured to be totally disabled for five years.

"(*b*) For total or partial disability for less than five years, sixty per cent. of the wages the injured was receiving at the time of the injury, so long as there is complete disability for that service, and that proportion of the said percentage which the depleted earning capacity for that service bears to the total disability when the injury is only partial or after it becomes only partial."

I guess that is clear. If he continues totally disabled for a year, give him sixty per cent. If he is only half incapacitated, give him thirty per cent. for the next year.

"(*c*) In addition to the foregoing payments, if the injured loses both feet or both hands, or one foot and one hand, or both eyes, or one eye and one foot or one hand, he shall receive, during the full period of five years, forty per cent. of the wages which he was receiving at the time of such accident; or, if he loses one foot, one hand, or one eye, the additional compensation therefor shall be fifteen per cent. of his said wages; or, if he be otherwise maimed or disfigured, then, for such maiming or disfigurement, during the time it shall continue not to exceed five years, he shall receive therefor such proportion of forty per cent. as such maiming or disfigurement bears in depleted ability in the employment to the relative loss of the members specified herein; provided, that in no case shall all of the payments received herein exceed in any month the whole wages earned when the injury occurs, nor shall the said forty per cent. when all received, or any portion thereof, and the said sixty per cent. when all received, or any portion

thereof, continue longer than to make all sums aggregate five thousand dollars."

MR. ALEXANDER: I rise to a point of order. We are discussing temporary disability only. We should limit ourselves to the matter under discussion.

MR. MERCER: All right, I will stop on that. I want to say, in making that sixty per cent., my idea was to make a provision that the employer might keep one-sixth of the carrying charges of that out of the wages of the workman, so as to make it fifty per cent.

MR. DOTEN: I would like to ask Mr. Mercer if his scheme is not more burdensome than that we have been discussing here. As a matter of fact, you are putting a limit of three thousand dollars upon it. That limit, however, might be attained in a much shorter period by one person than by another. That is, if his wages were high, you would attain that amount in a much shorter time than under what we might call temporary disability.

(Mr. Mercer in the Chair.)

THE CHAIRMAN: Take a conductor on a train, or an engineer, as has been stated here, and he has his house rented and his expenses, and he gets a hundred and twenty-five a month. You cut him down to ten dollars a week, and he has immediately to abandon his bills and cancel his lease and move, and he cannot live the way he has been living or anything like the way he has been living. He might live in some other condition longer, but I think that sort of fellow would have a chance to adjust himself within the period of time. Besides, if he should remain totally disabled for seven years, he would get no more than a man earning fifteen dollars a week, because it would continue for the same length of time, and he would not get the proportionate value of his time that the other fellow would.

MR. GILLETTE: Will you restate your motion?

MR. ALEXANDER: My motion was that for temporary disability there shall be a compensation of forty per cent. of the average weekly wage for not more than ten weeks; and fifty per cent. for an additional sixteen weeks, if disability continues during that period; and sixty per cent. during an additional twenty-six weeks, if the disability continues for the whole year.

MR. BAILEY: Mr. Chairman, I always supposed it was part of the scheme that, if the adjuster or the master or the court finds that a man is improving, and it appears at the end of

the ten weeks that he can work half-time, of course he is not going to get the sixty per cent.: he is going to get the difference between what he can earn and what he was earning. So that that wants to be taken into account.

MR. DICKSON: Under your motion what would become of the man on the fifty-third week?

MR. ALEXANDER: He would not receive anything. All compensation must be limited to a certain time. Even if you have a permanent disability, you limit it. Of course, I can concede the case that, if after twelve months the injury proves to be of a permanent character, then he would receive further compensation under the clause providing for permanent disability.

MR. GILLETTE: I don't see just how you are going to discuss this first clause intelligently without subdividing it into total and partial disability, as suggested by you.

Practically, every compensation act with which I have any acquaintance takes into consideration the decreased earning power of the individual, and if he is able to, after the expiration of a short time,—to earn something, that is compared with what he was previously earning, and the reduction in his earning capacity forms the basis of his compensation upon the scheme upon which it is based. If it is a fifty per cent. reduction in his earning capacity, it would be fifty per cent. of the difference between what he can then earn and what he was earning previously.

THE CHAIRMAN: My motion covered that, but there was not any second.

MR. GILLETTE: Now I just say this, that I don't quite see the logic—I am an employer, and look at it from an employer's side, but I do not quite see the logic of trying to run it one year on temporary—well, we will say temporary total disability. I don't know why, if you put the limit of three thousand dollars on the total amount that he can recover for any sort of disability that is total, permanent, or any other kind, or for death, that is not a reasonable and safe limit, and why it is not about the only limit you can place on it. I thoroughly agree with what the gentleman who made this motion said in regard to taking into consideration the whole question of cost. That is really, outside of the constitutional problem, the most difficult one to solve. That is to find the way by which we can frame a compensation act that will follow out any reasonable measure of compensation and still get it down to a point where the industry of any State can stand

it until all the surrounding States have done the like thing. Now, personally, I think that I am—well, I dislike to say that at a Conference of this kind, but I will say this, that I would like to see the darned man that can change my opinion; and that is this, that I am almost absolutely sure that there must be a waiting period without any compensation. That is the first thing.

THE CHAIRMAN: That comes under the next subdivision.

MR. GILLETTE: I know, but I am just using that in the discussion of this. The elimination of this period cuts a very material and marked figure in the question of determining the cost in the operation of the payment of the whole compensation. Now my friend McEwen, who represents the other side on our Commission, and I were over to England together, and everywhere I had *entrée* to sources of information I took him, and we went together. Now he knows that the experience of the English companies is this: that the elimination of the compensation for the first week practically removes the payment of thirty-five per cent. of the accidents which occur; that, in a two weeks' waiting period, practically fifty per cent. of the reported accidents disappear in number. I do not mean by that that it reduces the cost fifty per cent., but in the number of reported accidents that disappear during that period. Now I do not believe it is wise for us, and I say this measuring my words,—I say that I do not believe it is wise for us for permanent total disability to pay less than fifty per cent. of the wages. I think that is really about the mark that is right, for two reasons: First, its effect on malingering, because the payment of more, coupled with the benefits they are getting from the other benevolent orders to which they belong, has in a myriad of instances brought to the injured workman a vastly greater income than he had when at work, and the result is to-day one of the serious questions in England. At the same time, while it should not be more than this, by reason of the evil effects that would flow from it, I do not think it should be less than this, because I do not think that the average American workingman can sustain himself and keep his family from becoming a public charge on less than that amount. Now I think this. Rather than start out with forty per cent., we had far better extend the waiting period, and in that way the least injustice will be done to either party. I am in favor of compensation of fifty per cent. based on total disability, and grade that down as the man by reason of partial recovery is enabled to earn something, and thus

shorten the breach between his former earning capacity and his earning capacity in his injured condition; and I think that ought to be continued during the period of his disability. I do not see any logical reason for cutting that out, but we must put a limit upon the ultimate amount which can be paid. And the same thing which will apply to these injuries which are thought to be temporary, but continue longer than has been expected, would apply to the permanent disability or to death.

MR. DOTEN: You would be in favor of combining the two?

MR. GILLETTE: Well, I mean by that I think you have got to make your provision on the basis of paying fifty per cent. of wages for the period of disability, with the ultimate limit, but reducing the fifty per cent. as you are able to show that the man is able to do some jobs, while he secures less wages.

MR. DOTEN: In proportion to his incapacity.

MR. GILLETTE: Yes.

THE CHAIRMAN: That is the same proposition made, except you put fifty instead of sixty per cent.

MR. GILLETTE: I don't know but I might just as well say what I have to say about that, because I am reasoning backwards. It is this: I have tried to take the cloth and see what we could make out of it, and I, as most of you know, have devoted a very great amount of study to the question of cost of this thing, and I have not been able to figure out any way by which you could pay the English scale of compensation with a two weeks' waiting period, exempting the illegitimate descendants, as they do not in England, and exempting the alien descendants, as we ought to do in this country, because we have no desire in Minnesota to take care of either the ascendent or descendent dependants who are resident in Italy or Bohemia, with a contribution of twenty per cent. from the workingman, and limiting, say, to about six years the payment for death or total disability; and then I believe it is going to cost us at least double under a single liability what it is costing us at the present time for liability insurance.

Now there is another thing—

MR. MCEWEN: Pardon me, you are basing this upon the presumption that the number of accidents is going to remain the same as it is to-day?

MR. GILLETTE: No, I am not. I think there will be somewhat of a decrease. There will be a decrease in certain kinds of ac-

cidents, there will be a vast increase in partial disability claims, a vast increase in those. That is the experience wherever compensation acts have come. There will ultimately be a slight descending scale in the number of permanent total disability accidents and deaths. That has been shown. But I am basing that, too, on a single liability, and I would add twenty-five per cent. to the cost of it, if you leave the elective feature of letting the employee choose between them; that is, allow him to seek his recovery under common law or under a compensation act or under the employers' liability statute.

Now there is just one other thing I want to say, and it is this: it is in the form of an apology. I have said just exactly what the gentleman has said, I have said it a number of times, called attention to the fact of the low-loss ratios of the liability companies. Those loss ratios run from thirty-five to forty per cent. But our loss ratios are not only steadily increasing, but our loss ratios in Minnesota in 1909 were sixty-eight per cent. of the premium receipts. The point I make about this waiting period and cutting that out is this: the benefits it conveys are entirely out of proportion to the cost of investigating the claim and the cost attendant upon those accidents.

MR. MCEWEN: Right there I would like to ask Mr. Gillette a question or two. Have you heard whether or not this year the insurance companies have had a lower loss ratio in Minnesota?

MR. GILLETTE: The insurance companies had a meeting in Minneapolis a couple of weeks ago, and advanced the rate.

MR. MCEWEN: How much?

MR. GILLETTE: I don't know.

MR. MCEWEN: I have learned there will be a fifteen per cent. increase. I have considerable relation with the agents of Employers' Liability Companies, and many of them have admitted to me that they expect to make some money in Minnesota this year, where they did not last year, and I think it is due largely to the fact that the number of serious accidents is decreasing there. And I want to state further, too, it may be all right for us to agree here upon such a low compensation to the injured workingman, but you will never be able to get the rank and file of workingmen of this country to accept this sort of a compensation in lieu of their present common law right of action. It will never get through the Legislature, and they will be aided

in their contention by the ambulance-chasers, who are growing in number.

THE CHAIRMAN: What is that, Mr. McEwen?

MR. MCEWEN: The whole thing, fifty per cent. compensation.

THE CHAIRMAN: This proposition is forty.

MR. MCEWEN: Absolutely ridiculous.

THE CHAIRMAN: Forty per cent. for the first ten weeks, and fifty per cent. for the next ten weeks, and sixty per cent. for the next.

MR. ALEXANDER: I should like to get Mr. McEwen's view-point of what would not be ridiculous.

MR. MCEWEN: I appreciate somewhat, because of our dual form of government, the things we have to contend with, and the purpose of this Conference is to remove such a question. It would be a fine thing, if we could agree upon a principle in law that could be adopted by all of the States represented here, to give labor a little more. I would be willing to agree that the laborer, if he is going to surrender his common law rights, would go without compensation for three weeks. I think he could finance his disability for three weeks, ordinarily, but after that, during the entire period of incapacity, he ought to receive at least sixty-six and two-thirds of the amount he was earning, with a fixed minimum and maximum amount. I know many of the States have a five-thousand-dollar death limitation. Yet we know how that death limitation was put through the Legislature of our State. It was put there in spite of the protest of labor, and I think anything short of five thousand dollars now would be unfair. We simply have to adjust ourselves to meet it. I conscientiously believe that with proper and adequate inspection, such as an insurance scheme and workingman's compensation act will compel, we can reduce the number of accidents that now occur, by one-half, in every State in this Union. If we are going only to allow compensation for just a short period of time for total disability, after that is spent, then the injured falls a burden upon society, and that ought to be avoided. Yet, if industry cannot bear it, why not call upon the State to help bear it? In our county in Minnesota sixty per cent. of the time of our courts is spent on master and servant cases. Suppose we save the forty-two thousand dollars it now costs annually in that county, and let it go into a fund to help compensate the injured workingmen. Why ask labor to make all the sacrifice?

MR. BAILEY: I will allow that Mr. Alexander's idea of making a sliding scale may be a very good one, but it has this objection, complexity, when above all things we want simplicity. Now a flat rate of fifty per cent. can be understood by everybody, and for that reason I should therefore favor Mr. Gillette's idea of fifty per cent. right along rather than to have a sliding scale.

THE CHAIRMAN: I would like to suggest that I disagree with this view for several reasons. In the first place, I think the matter Mr. Bailey suggests is a permanent wrong. In the second place, I think the scheme is one which is an inducement to a man to stay sick. He gets his percentage of the wage pay the longer he is sick. In all these European countries they have found the best thing they can do is to induce a man to get well by getting less money, if he can stand it. I do not know of any reason why the gentleman should take the position that this temporary disability ought to stop at the end of twelve months, whether the man is well or not. If one man is going to get five years for being permanently disabled, or ten years, if you want to extend it to that extent, why should we stop the other fellow when he reaches the end of one year? We are certainly making a distinction there that is not proper. Solely because a man may not be hurt so badly as another, we ought not to shut him off, if he is still hurt. And, personally, I was prepared to see the limit made sixty per cent., see one-fifth contributed by the workingman, and the time limited to five years, rather than make it ten years and fifty per cent. I think it would cost a little more, because two-fifths of the cases would be out of the way at the end of the first two weeks. I should agree to a two weeks' waiting period. I should say there ought not to be any payment for that waiting period, but a man certainly needs more during the first months of his injury, when they have doctor and hospital bills to pay, and medicine bills to pay for, than he does after he has been sick ten weeks and those things are all out of the way; and, personally, I should pay him according to a wage basis, limited in time, allow him to only recover on that basis, so long as he was injured, proportionately. If he gets over half of his injury in three months, reduce it. In France they have had an illustration of that. They have a law that provides, if a man is sick for seven days as a result of his injury, he shall get nothing; if he is sick eight days, then he gets pay for eight days. The result is that almost every fellow is sick eight days; and the more a man is paid, the more he is likely

to remain sick. They find it necessary to limit the insurance so he cannot earn more by being ill as the result of the accident than by being well. They limit the amount of insurance he can take. They make it an inducement to get well and not to stay sick. They simplify the proposition all they can to start.

MR. GILLETTE: May I suggest one thing that has not been taken into consideration? It seems to me as if it enters right into the amount of compensation, and that is the amount of hospital and surgical attendance, or first aid. Now I have sometimes thought that for the workingman, take it between two or three weeks, that is, I mean, for a waiting period, it might be better to make that three weeks and give him free hospital attendance during that waiting period.

THE CHAIRMAN: That brings up a question that is not here, and that is the doctor question.

MR. GILLETTE: That is one of the elements of compensation. I am mentioning it now as compensation. I seriously believe that the best effects would flow from it by making a provision of that kind.

THE CHAIRMAN: Do you mean by your suggestion fifty per cent., and pay the doctor's bill besides that?

MR. GILLETTE: Fifty per cent., and then make the waiting period,—oh, I don't know what it would figure, but as between two and three weeks extend it enough days to offset the cost of that hospital and medical attendance.

THE CHAIRMAN: We have spent half our hour discussing the first subdivision of our question.

MR. DICKSON: I should like to offer an amendment to Mr. Alexander's, that this be made fifty per cent., without any limit except the limit we mean to put on all, three thousand dollars.

MR. HOWARD: With no waiting period?

MR. DICKSON: That comes later.

MR. GILLETTE: Supposing a man is able to go back to work.

MR. DICKSON: Touching on that, I think it would introduce a very complicated feature, if you undertake to determine that, after four weeks; and then, if a man was only partially disabled, you would introduce an element of discord.

MR. GILLETTE: So far as my observation goes, it has operated entirely differently. That is, the employer has been anxious to give that man a job at some light work he can do at reduced

wages, and it has encouraged other men to hurry up and get back to work.

Mr. Doten: I would like to amend the amendment made by Mr. Dickson to the effect that this compensation should not exceed ten dollars a week, and a sum total not to exceed three thousand dollars.

Mr. Dickson: I will accept that.

Mr. Doten: I want to say in regard to that matter that I feel that it is unsafe to leave simply the three-thousand-dollar limit, because we can conceive, under the agreement that we reached on number 4, that a twelve-thousand-dollar man might be injured, and his compensation would be five hundred dollars a month. It would not take long to get three thousand dollars on that basis, and I think that such men can adequately provide for themselves outside of this compensation, that the total amount payable weekly should not exceed ten dollars.

The Chairman: That would be forty-five dollars a month for an engineer earning two hundred and forty dollars.

Mr. Doten: I assume he could take care of himself in some other way.

Mr. Gillette: I wish Mr. Dickson would make this one change,—instead of half wages, half his impaired earnings.

Mr. Neill: If you are looking for simplicity, you cannot complicate it more than by saying "impaired earnings." In the question of temporary disability,—we are discussing the question of the long period these men are going to be injured—I will venture the rough guess that in eighty per cent. of the cases the injury will be less than two months, so that we are introducing an element here which will cost very little, will complicate the bill immensely, and will get the solid objection of an enormous number of people whose support we have got to have in order to get legislation.

Mr. Lowell: It seems to me that we are running here a little bit after a will-o'-the-wisp. Whenever anybody brings up the question of making some little change, it is said, "That is something you will have to have a lawsuit about, you have got to ask somebody about it." You can't get an act through about which you won't have lots of lawsuits. If the proposition is that you are going to pay a man half wages when he can earn three-quarter wages all the time, I say I am not for it. There is no justice in it on either side. Suppose you have got to go to

an adjuster. Let us go. Let us provide a bill with that provision. Let us face the thing, and say there have got to be lawsuits. There has not got to be a jury, probably, but you have probably got to have some one to say what this thing is worth. The reason you have to have some one is not inherent in any workingmen's compensation act or any insurance act or anything else, but is inherent in all human affairs, because we are not ruled in human affairs by mathematics. We are ruled by human nature, and human nature is not an exact science. Now let us go at this thing that way, and let us provide a bill,—not that an ancient scholastic scholar sitting in his cabinet would say, "That is the product of great minds, and there is no logical flaw in it,"—let us have a bill which will bring justice as near as we can get it, and, if we have to make concessions and like things, let us do it. Let us have the best machinery we can, but let us get at it, because this is a practical thing, and you are not going to get a practical thing, if you get what is logical on paper and is not practical.

MR. NEILL: What is to be the test of his earnings? Is a man to appear before somebody and testify he will be able to get so much?

MR. GILLETTE: I mean, I have a man working for me at four dollars, and he gets in shape in ten weeks, so he can come back and work for me at two dollars a day. Now, I say, he ought to come in justice to himself, he ought to come in justice to me, and the additional compensation he ought to draw then would be one-half the difference between two dollars and four dollars a day, and that would be another dollar, and that would be three dollars.

MR. NEILL: The way it is put, he would have his rate reduced, whether he could get a job or not. You say Mr. So-and-so is able to earn so much. Mr. So-and-so has not got a position because of the injury he received in your place. If you want to make it that he shall pay a certain amount, and if he can help to make up part of that amount, that is an entirely different matter.

MR. ROHR: In investigating the conditions under which men work, that can be illustrated by saying that I ran across one man who had two fingers split; the bone was cracked across; they were nice, clean breaks. He was idle for two weeks, and the management persuaded him to come back temporarily until he could have the use of his fingers. But, before his fingers healed up, he accidentally bumped into something again, and the fingers had to

come off, and he got nothing. That is temporary earnings. I am opposed to that form.

MR. BAILEY: Just a single word on the point suggested by Mr. Gillette and Mr. Lowell. It does seem to me it is fundamental that you must cover the situation where the man is partly injured and is getting better, and there is work available for him at reduced wage. The experience in England—it is not guess-work, but over there lots of those men, either from their own employer or by his help, can get a job doing something where they cannot earn quite as much, but half or two-thirds what they were earning, and they are getting well and getting paid for the difference. And I believe you must recognize that, and, if you don't do that, it will be quite unjust. I have undertaken to cover that in the proposed act I have got here. Fifty per cent. for the total disability while it lasts and up to a certain limit of time or amount. I do not care how you limit it. And, if a man is partly injured and getting well, then the proper tribunal will say how much he can earn and scale down. I think it is practical, because they are doing it.

MR. GILLETTE: You will rue the day you don't do something like that.

THE CHAIRMAN: I will make one more suggestion. I quite agree that there ought to be a provision that will allow for an increased earning capacity, but I think, if you are going to rue days, you will all rue the day when you pass a compensation act that won't allow you to take a small percentage out of the workingmen's wages with a view of getting a contribution and share in the expense, and the motive to keep down hard feelings and keep up safety appliances and observe the rules and regulations.

MR. ALEXANDER: Can anybody say what the insurance rates would be under a fifty per cent. compensation as compared with what they are now?

THE CHAIRMAN: Mr. Wainwright, do you know?

MR. WAINWRIGHT: Well, of course, in New York—you mean, if you give them only one remedy under the Compensation Act or leave the concurrent remedy? With us we did not disturb any of the existing remedies. In that situation they seem to have increased in some trades from twice to six times.

MR. GILLETTE: About twice in the more hazardous occupations and six times in the less hazardous?

THE CHAIRMAN: You take away some of the defences, the assumption of risk and contributory negligence.

MR. GILLETTE: Yes. For example, take contractor's schedule: Carpenters, under the old law the rate was two forty-seven on a hundred dollars of the pay-roll. That has been increased to five dollars. The iron men, the rate was six eight on a hundred dollars. That is increased to twelve fifty. Steam fitters, for example, I don't know why there should be this increase, from one thirty-five it has gone up to six twenty-five.

MR. ALEXANDER: I asked the question in order to bring once more to the attention of all that, inasmuch as we cannot pass a law uniform for all the United States, we must face the condition that goods manufactured in one State will have to be sold in other States where such a law may not exist. Can we put a burden, such as a fifty per cent. compensation will bring, upon the small manufacturers? We might be able to put that burden upon them eventually, after, on the basis of gathered statistics, insurance rates have come down to the minimum, but at the beginning insurance rates would certainly go up. I believe that the small manufacturer would be put at a very great disadvantage, and I am sure none of us want to eliminate him from American business.

THE CHAIRMAN: Are you ready for the question? The amendment as it now stands, gentlemen, is that fifty per cent. would be the limit for temporary disability, and that should not exceed ten dollars per week, whether the fellow was earning one hundred dollars or forty dollars or twenty dollars per week, and that should be without limit of time, except as the injury goes, and three thousand dollars permanent disability. The crucial point, as I understand that, is that no more than ten dollars could be recovered by any man in a week, or no more than fifty per cent.

MR. GILLETTE: I am going to offer an amendment to that amendment.

A MEMBER: You cannot do that.

MR. NEILL: Does this at all touch the question of who is to pay it?

THE CHAIRMAN: No.

MR. NEILL: The question here is, it shall be fifty per cent. Your point is contribution by each.

MR. GILLETTE: No, it is the difference between fifty per cent of wages and fifty per cent. of the impaired earnings.

THE CHAIRMAN: Well, make your amendment.

MR. GILLETTE: I move you, in lieu of fifty per cent. wages the motion be made to read fifty per cent. of the impaired earnings.

The motion was seconded.

THE CHAIRMAN: And that to cut out the ten-dollar feature.

MR. GILLETTE: No, no, that is accepted.

THE CHAIRMAN: You have heard the amendment. Any remarks on that?

MR. DOTEN: If this opens up the whole question, I would much prefer to see a limit of time of three hundred weeks at ten dollars a week, or less of course if half the wages is less, so that you will not be obliged to pay three thousand dollars if disability extends to a long enough period to enable you to pay that.

THE CHAIRMAN: Do you make that as another amendment? [Laughter.]

MR. DOTEN: No, that is another portion of the original motion. If a man is earning twenty dollars a week and gets ten dollars, that is half, in six years the three thousand dollars will have accrued, but, if he is getting six dollars a week, it will take eight or nine years to reach that three-thousand-dollar limit, and I would limit it as to the time to six years, and three thousand dollars.

MR. GILLETTE: I accept that.

MR. DOTEN: Then, if we could wipe out the three thousand dollars and simply say the ultimate limit shall be ten dollars a week and the ultimate number of weeks three hundred, you get your three-thousand-dollar limit, and the other effect also.

THE CHAIRMAN: Now that raises an entirely different question.

MR. GILLETTE: No, that is accepted.

THE CHAIRMAN: As I understand, you are all willing to accept the proposition now that you limit the amount a man gets to ten dollars a week, irrespective of what he is earning, and, that that shall not run more than three hundred weeks, and, if he gets six dollars a week, it shall not extend longer than six years. So you might have this situation under that motion. You might have a man earning twelve dollars a week, who would get six dollars on that basis, at fifty per cent. he will get eighteen hundred dollars. He might be injured with another man by the side of him, and the other man would be getting twenty dollars a week. He would get ten dollars a week until he got three thousand dollars. So

that for the same injury he would get three thousand dollars instead of eighteen hundred dollars.

The question was called for.

MR. DOTEN: My objection is that we should not make it obligatory to pay every man an ultimate amount of three thousand dollars, no matter what his wages.

MR. LOWELL: If you are putting your total limit on the maximum, should not there be some minimum, not less than four dollars a week?

MR. BAILEY: The percentage takes care of that.

MR. WAINWRIGHT: As the decision of this Conference may be inconsistent with the conclusion arrived at by our Commission, I think I would rather be excused from voting on these different propositions. For example, this makes a six-year period, and we arrived at an eight-year period, so, the committee having gone on record as favoring an eight-year period, I do not change my stand.

MR. NEILL: It seems to me we have overlooked a very important matter, and that is fixing the minimum of compensation; because a man earning one dollar a day is at his limit already. Fifty per cent. of that would be three dollars a week.

MR. GILLETTE: You see this flaw in that. You are not discriminating between male and female employees, nor minors.

MR. MCEWEN: You ought not to have any.

MR. GILLETTE: Any female employees?

MR. MCEWEN: Any minors.

MR. GILLETTE: I have three in my family.

THE CHAIRMAN: You are discussing the amendments. I believe everybody has amended it. Everybody in favor say aye.

A *viva voce* vote was then had.

MR. GILLETTE: That was on my amendment.

THE CHAIRMAN: Mr. Lowell, if you will take the Chair, I will vote aye.

(Mr. Lowell then took the Chair, and the noes were called for.)

MR. GILLETTE: This is on the question of what?

THE CHAIRMAN: On the question of limiting liability to ten dollars a week and three hundred weeks and fifty per cent. of the earning capacity.

MR. GILLETTE: That is not as I understand it. My amendment was not accepted.

THE CHAIRMAN: Yes, it was. One gentleman said he accepted it, and I put it on that basis. I understand we are voting on that, with a limit as to the maximum and no limit as to the minimum.

MR. NEILL: Before you put that, will you have the matter put in writing?

MR. SAUNDERS: The way it stands now is, "That compensation of fifty per cent. of the impairment of earnings be paid, with a maximum amount of ten dollars per week."

THE CHAIRMAN: Fifty per cent. of the impairment up to a payment of ten dollars per week, not to exceed in any case three hundred weeks. As I understand, your point is, if you have a man getting ten dollars or getting five dollars, he gets that for three hundred weeks, which would be fifteen hundred.

MR. SAUNDERS: Now I move the amendment.

THE CHAIRMAN: Well, that motion has been put, hasn't it?

MR. SAUNDERS: Yes.

THE CHAIRMAN: All those in favor let me know by rising to your feet.

MR. SAUNDERS: There is no minimum in this.

MR. DOTEN: The question is called for again.

MR. SAUNDERS: "That compensation be based on fifty per cent. of the impairment of earnings, with a maximum of ten dollars per week and three hundred weeks," and no minimum.

THE CHAIRMAN: As I understand that, gentlemen, if a man is able to earn half of his wages, then this fifty per cent. only applies to the other half.

A VOICE: That is right.

MR. SAUNDERS: It is not what he is able to do. It is what he is doing. It is the earnings that he is receiving, not his earning capacity.

THE CHAIRMAN: That is not my understanding. Now what is the motion? Let us have it so there won't be any question about it. Is the motion on his earnings or his earning capacity?

MR. SAUNDERS: If you get into his earning capacity, you have yourself involved where you will never get out, because a man might be able to earn fifty per cent. of what he earned prior to the injury, if he could get a job, but might not be able to get a job.

THE CHAIRMAN: That is true.

MR. SAUNDERS: But, if you deal with impairment of earnings, you can find out what he was earning and what he is earning.

MR. GILLETTE: That is the way I put it.

THE CHAIRMAN: All in favor of the proposition with the "impairment of earnings" rise to your feet. Eight, as I view it.

(Mr. Lowell in the Chair.)

THE CHAIRMAN: All opposed stand.

Eleven voted no.

THE CHAIRMAN: It is not a vote.

(Mr. Mercer in the Chair.)

MR. NEILL: May I ask a question that seems to be very important, before we go any further? Discussing the question with Mr. Cease here, I find that he is in doubt as to what is the significance of the votes of this Conference. Is it understood that each man here present is voting his own personal opinion or that the votes express the opinions of the various Commissions represented?

(Cries of "Personal only.")

THE CHAIRMAN: I have been acting on that basis. The amendment is lost. Now the question on the motion is for compensation.

MR. NEILL: Which was forty per cent. of the earning capacity for the first ten weeks, fifty per cent. for the next sixteen weeks, and sixty per cent. for the next twenty-six weeks, ending the compensation at a year for temporary disability.

MR. SMITH: I believe the motion before the body now is Mr. Dickson's amendment to the original motion.

THE CHAIRMAN: What is that?

MR. DICKSON: The amendment now stands that the payment shall be fifty per cent. of the average weekly wage, while the disability lasts, with a limit of three hundred weeks, and ten dollars per week.

MR. ALEXANDER: The weekly wage which he earns while disabled or previous?

MR. DICKSON: No, previous to the accident.

THE CHAIRMAN: Ten dollars a week. With no minimum.

MR. DICKSON: Yes.

MR. NEILL: Without any time off in the beginning, Mr. Dickson?

MR. DICKSON: That comes later. That is another question.

THE CHAIRMAN: All in favor of that motion will rise,—that

amendment. All opposed to it rise. I should say that amendment is lost.

Now all in favor of the original motion. We get back to that. Forty per cent. for the first ten weeks, fifty per cent. for the next sixteen weeks, and sixty per cent. for the next twenty-six weeks. All in favor of that, let me know by rising. All opposed rise.

The motion was lost.

THE CHAIRMAN: Now our time is up and absolutely nothing done.

MR. ALEXANDER: I move that the discussion be continued, if necessary, for half an hour.

THE CHAIRMAN: I will take that as the sense of the meeting. Now, Mr. Boyd.

MR. BOYD: Now, Mr. Chairman, I move you that we adopt the following proposition:—

"When such disability is determined to have existed in a *bona fide* form for two weeks or more, then compensation shall be awarded from the day the employee left work, on the basis of fifty per cent. of the earnings, to be paid as long as the disability lasts."

THE CHAIRMAN: Is there a second to that motion?

The motion was seconded.

MR. BAILEY: I desire to move a substitute as follows:—

"That compensation in case of partial incapacity for work, resulting from the injury, shall consist of weekly payments equal to one-half the difference between the average weekly wages of the workman before the accident and the average weekly wages which he is able to earn after the accident, but in no event shall any such compensation exceed ten dollars a week or extend beyond three hundred weeks."

THE CHAIRMAN: That is the same thing we passed on previously.

MR. SAUNDERS: I would like to put Mr. Bailey's substitute, with the addition, "with a minimum weekly payment of four dollars a week." That brings up a question that has not been discussed before.

MR. HOWARD: I second the motion.

THE CHAIRMAN: All in favor of that, let it be known by saying aye.

A *viva voce* vote was then had.

The question was called for.

THE CHAIRMAN: All in favor, let it be known by rising.

A rising vote was then taken, and the motion adopted by a vote of nine to eight.

MR. DOTEN: Mr. Chairman, could we know what the objection of the gentlemen opposed to this is?

MR. GOLDEN: The minimum is too low for me.

MR. BOYD: It is too low.

MR. GOLDEN: It is at least a couple of dollars a week too low.

THE CHAIRMAN: If the minimum was six dollars a week, you would vote for it?

MR. ALEXANDER: The average wage of girls in many factories is six or six fifty a week.

THE CHAIRMAN: Now, gentlemen, if we are going to go around, Judge Holloway.

JUDGE HOLLOWAY: I just want to say this, Mr. Chairman, that, when these matters are presented here to be voted upon, I am voting upon the principle. These figures would not last in Montana for a second. I am voting for the principle that is involved here; and, if a bill should be drafted for presentation, we would leave these blanks and let the Legislature fix it, because you must recognize the fact at once that the cost of living in Montana is very much greater than it is in many other sections of this country, that the average wage out there is very much higher. You talk to a servant-girl about a wage of three dollars a week and she would laugh at you. A servant-girl that cannot earn twenty-five to thirty dollars a month in Montana would not be kept for a minute. And this same ratio exists, of course, throughout. The miners and smelter men are getting from three dollars and a half to four dollars a day, and, of course, you have got to graduate this with reference to the wage scale that prevails in your immediate community, and I say that I am simply voting for the principle. These figures are just like blank spaces to me. I don't care what figures you put in there, because I am not going to be bound by the figures. I am in favor of the principle that you have put in, but not the figures.

THE CHAIRMAN: You are in favor of the principle of a percentage basis and a minimum and maximum?

JUDGE HOLLOWAY: Yes, a limitation of time; but figures, of course, are subject to revision by the Montana Legislature.

MR. NEILL: I move you that the Conference vote that it is

in favor of the principle of a percentage basis of the wages with a maximum and a minimum per week.

MR. GILLETTE: We just carried the motion.

THE CHAIRMAN: But somebody just asked the question if these gentlemen who voted against it would indicate for our benefit what they would be willing to stand for.

MR. DICKSON: The principle that I object to is Mr. Gillette's pet principle; that is, that the impairment of the earning power ought to be a factor. Strictly, logically, that is right. Probably it ought to be. But, as a practical question, I, of course, can only use my own experience in the steel business. I have been thirty years connected with the steel business. As a practical proposition, it is a negligible quantity. There is not five per cent. of the men injured that ever get any employment in other lines that would affect this question.

THE CHAIRMAN: There was a gentleman here wanted to put it up to six instead of four.

MR. GILLETTE: Suppose a man had one eye out?

THE CHAIRMAN: Mr. McEwen?

MR. MCEWEN: Yes, I will state mine. I recognize that we who represent the labor end of it are largely in a minority here.

MR. GILLETTE: No, we are all together.

MR. MCEWEN: Well, what I mean is we men who are appointed to represent the labor men. Now I am not satisfied with a fifty per cent. payment. I thought that we ought to do as well as Germany, and pay sixty-six and two-thirds. I would, for the purpose of getting together, compromise on sixty, but you fix a minimum and a maximum amount not to exceed fifty per cent., and I am not satisfied with a three-hundred-week payment. I can readily conceive, if that is true, cheap men would be much preferred around hazardous work to the man who gets higher pay. If New York can stand for eight years, Minnesota can, and so can Massachusetts, or any other State. We entered into this thing in our State with the idea that we wanted to minimize pauperism among the wrecks of industry. I am ready to establish the principle and have it develop as a whole system as the other States adopt the system of compensation. To begin with, we ought to have at least a sixty per cent. compensation, and it ought to be over a longer period than three hundred weeks. It ought to be ten years minimum, and I would be willing to compromise on eight.

Mr. Dickson: May I answer Mr. Gillette's question, What becomes of the man who loses an eye? In thirty days, I should say, his status would be decided. He is permanently partially disabled, and it would not enter into this.

The Chairman: Somebody else who voted against that motion.

Mr. Neill: I object, first, because I think fifty per cent. is too low. I would vote for sixty per cent. In the second place, there should be a minimum limit, as the very man you want most to take care of is the low-paid man. As you go down, sixty per cent. ought to be increased, and you ought to stop that by taking the minimum. You won't have one case of a servant or shop girl in a thousand cases, and, in order to meet that, we are going to recommend a proposition which will be an injustice to five hundred cases, to prevent one case of a ridiculous nature that will occur. It seems to me there should be a minimum of five dollars and sixty per cent., and make this apply only to adults and in case of disability.

Mr. Doten: I would suggest, Mr. Chairman, if I may, at this point, that we might make the minimum six dollars or the full wage of the injured workman. That is, if it was below six dollars, simply the full wage, so as not to have that absurdity of paying more than the wages.

Mr. Lowell: In this special discussion, it seems to me we are losing entirely the point of view of whether you can pass such a thing as a financial matter. Now it is unfortunate that the mill girls in Fall River do not get more than eight dollars a week, or whatever it is,—something like that. But, as a matter of fact, that is the situation. Now in order to have this law in Massachusetts, you have got to get a law that won't burden the mills of Fall River too much. It is a very pretty thing for us to stand here and say the low limit shall be six dollars, but, as a matter of fact, if that kind of law went through Massachusetts, you would ruin your mills. You are not going to get any law at all. Now we all would say—I would say, every one here would say—that we should have a minimum amount on which the person injured could get along very well, but that is not the situation. We are facing a situation where the result is perfectly rotten, to use a familiar English word, and we as practical men have got to improve it as much as we can.. Now we cannot in Massachusetts say that there shall be a low limit of six dollars, say, or seven dollars, anything of that kind, and make the thing go through. Now it is possible that we might make it five dollars.

MR. MCEWEN: I will agree to five dollars.

MR. LOWELL: As a compromise, I should agree to it, with the possibility, when we come to consider it in Massachusetts, we may have to lower the limit. You cannot burden our Massachusetts industries—you gentlemen in these States out here, I think, do not quite look at it the way I do, because the question of hazard has come in so much you have got into the habit of considering this along the point of view of the miner or the builder or some very hazardous risk. Now in Massachusetts, as I have repeated several times, we are considering it from the point of view of the girl in the factory, which is not a hazardous risk, as risks go, but where there are a great many accidents and where the wage is very low. Now our proposition is to do the best we can for those people without turning over the whole industry and preventing anything. If we were to say six dollars minimum, the result might very likely be that several of the mills in Fall River would shut down altogether, and those girls would not get anything, so that the result for the employees would be a great deal worse under the suggested law than under the one we have.

JUDGE HOLLOWAY: Mr. Chairman, as I stated before, my view of this matter is that these figures are simply put in here to fill space. I would not be bound by them at all. If the principle which is embodied in this is satisfactory, I think it ought to be the sense of this meeting that these figures are put in here just merely for the purpose of filling space. The conditions that exist in Massachusetts do not exist in Washington or Montana or Idaho at all, and you cannot have uniform laws brought down to the point of dollars and cents. You can have uniform principles, and that is the utmost we can ever hope for. We cannot possibly hope to get uniform laws that are going to prescribe dollars and cents.

THE CHAIRMAN: Why don't you make the motion that we commit ourselves to that as a principle, and not be bound by the amounts, but leave that open to the respective States?

JUDGE HOLLOWAY: Mr. Chairman, in order to get the matter before the meeting, I move you that it is the sense of this assembly that we adopt the principle just as voted upon, but that figures indicating the maximum and the minimum and the length of time during which compensation shall continue are merely advisory.

MR. SCHUTZ: I second the motion.

The question was then put, and the motion prevailed.

MR. DOTEN: May I ask whether we have any figures in here?

THE CHAIRMAN: The motion was that the figures were simply advisory.

MR. DOTEN: What figures?

THE CHAIRMAN: Four dollars and ten dollars and fifty per cent.

MR. DOTEN: I would like to have it incorporated in the record that the minimum should be a definite figure, whether it is four or five or six dollars, or, in case the full wage of the injured person is less than that amount, his full wages, so that we should not have the absurdity of a three-dollar-a-week person getting a minimum return which would be more than his full earnings.

MR. MCEWEN: I heartily agree with the gentleman who has just spoken. If we have a minimum, there is no danger of any State going below that, and each State would be responsible for its action above it.

THE CHAIRMAN: Do I now understand you that you make a motion there shall be no figures?

MR. DOTEN: That we should state a definite minimum, but state also "or, if the wages of the injured workman are less than the minimum, his full wages."

MR. GILLETTE: I think there is one thing I have overlooked, and that is this,—the difference between four and five dollars a week. I don't think it would cut a particle of figure in Minnesota with any male employee: the only difference it would make would be with family employees and probably factory girls and office boys. Now I don't know whether you can subdivide things very much better than right there. What I mean by it is this, that that class of people do not have many dependants. As a rule, they do not have dependants, and the compensation which the individuals themselves would receive would probably be greater in proportion than the higher compensation would amount to to heads of families, considering the number of people among whom it would be divided. Now I agree thoroughly that, to accomplish anything, we ought to agree. We ought to be just as unanimous as we can be, and I am very sorry you disagree with me. But what I was going to say was this: it really does seem to me that, if we get into a question of this kind, that possibly we would arrive at more final conclusions if they were passed a little while, and we took them up in connection with other questions which appear of equal importance to some of us, because all

legislation and things of this kind are matter of compromises. I just make that suggestion.

MR. BAILEY: I think we ought to agree, and if we are going to make the workman pay part of the compensation, I might very well vote for the sixty per cent. If there are other things voted certain ways, it might affect me very much on that.

THE CHAIRMAN: Are you ready for the question?

MR. DOTEN: Several gentlemen have spoken about exempting minors. It seems to me we can accomplish this by the motion I have made. The persons affected would be minors very largely, and the English act provides that they shall have their full wages up to a certain amount.

THE CHAIRMAN: All in favor of the principle that, where they are receiving less than four dollars as a wage, they should only get their full wages for three hundred weeks, if they are injured that long, let it be known by saying aye.

The motion prevailed.

THE CHAIRMAN: Now the next question is the question of permanent disability, as I have it marked down here. What are your indications on the question of permanent total disability?

MR. BAILEY: If I understand it, I make this other motion that, "in case of total incapacity for work resulting from the injury, then there shall be a weekly payment equal to one-half of the workman's average weekly earnings while at work on full time during the preceding year; but in no case shall such weekly payment exceed ten dollars, nor extend over a period exceeding six years from the date of the accident."

MR. LOWELL: Three hundred weeks.

MR. BAILEY: Three hundred weeks, if you like that better.

MR. LOWELL: I second the motion.

THE CHAIRMAN: It is moved and seconded, as I understand, that in case of total incapacity for work resulting from an injury, then there shall be a weekly payment equal to one-half of the workman's average weekly earnings while at work on full time during the preceding year, but in no case shall such weekly payment exceed ten dollars nor extend over a period exceeding six years from the date of the accident.

MR. SAUNDERS: I move an amendment, adding a minimum of four dollars per week.

THE CHAIRMAN: Do you accept that?

MR. BAILEY: I accept that.

MR. GILLETTE: The minimum would be twelve hundred dollars.

THE CHAIRMAN: There is two hundred and eight dollars a year. That is total disability.

MR. BAILEY: I think perhaps with this addition,—"not to exceed the actual wage."

MR. NEILL: That won't do at all there.

MR. BAILEY: Why not?

MR. NEILL: Take a sixteen-year-old boy, he is permanently disabled, and you cannot fix his status forever as a sixteen-year-old wage-earner.

MR. ALEXANDER: Where is the difference between this and temporary disability? The same point you make holds good for temporary disability.

MR. NEILL: No. A disability that lasts over fifty-two weeks is going to be a permanent disability.

THE CHAIRMAN: Then why not make our rules exactly the same, so there won't be any question arise as to whether it is temporary or permanent?

MR. NEILL: Because a boy who is getting an apprentice's wage, seventeen years old, may be only earning three dollars a week and is permanently disabled, and the difference between him and the boy eighteen years old, who has just finished his apprenticeship—

THE CHAIRMAN: Why don't you reach it, then, by qualifying the question as to whether or not he was a journeyman or a minor?

MR. GILLETTE: It strikes me it is a mighty good point, but I don't know how you are going to fix his earning capacity.

THE CHAIRMAN: Won't the same thing be true, if he was put on a temporary basis? Would not you have the same difficulty exactly?

A MEMBER: The English act puts that up to the adult earnings after a certain period.

MR. GILLETTE: At the age of sixteen you don't know what his adult earnings will be.

MR. LOWELL: It seems to me you can get over that difficulty this way: In your permanent disability provide a minimum of four dollars, and then say that, if the actual wages of any one over twenty-one is less than that amount, it shall be the actual amount of wages. In that way your minor will have your mini-

mum amount, and four dollars, or make it five dollars, if necessary, should be enough to give him, and fair enough.

THE CHAIRMAN: Do you accept that amendment, gentlemen?

MR. BAILEY: I accept that.

THE CHAIRMAN: Then the motion as it now stands, as I understand it, is that you shall have a limit in time of three hundred weeks, a maximum in amount of ten dollars a week, and fifty per cent. of the wages; that you have a minimum of all persons below twenty-one years of age of four dollars, and above twenty-one years of age the full amount of their wages, if they are earning less than four dollars.

MR. ALEXANDER: Dr. Neill's point ought to be amplified a little. An apprentice, the week before graduation, taking some specific case, would get ten dollars a week: after he graduates, he would get an average of fifteen dollars a week. As a matter of fact, he is worth fifteen dollars just as much the week before graduation as after. If you give that boy injured then only his apprentice wage, I think you do him a great injustice.

THE CHAIRMAN: They seem to in England, from the way the act runs.

A MEMBER: That is admitted on all sides abroad.

THE CHAIRMAN: But the question now before the house is as I have stated, as I understand it. Any argument on that question?

MR. GOLDEN: May I read the Illinois section?—

"Minors, in case of permanent disability to be paid compensation as above, on the basis of fifty per cent. of the earnings of adults in the same line of employment; in case of temporary disability, when they have dependents, to be paid compensation so long as it lasts as above, on basis of fifty per cent. of the earnings of adults in the same line of employment, provided that the compensation paid shall not exceed the full weekly pay; when they have no dependents, on the basis of fifty per cent. of their earnings."

THE CHAIRMAN: All in favor of the motion will say aye.

A *viva voce* vote was taken, and the Chair, being in doubt, called for a rising vote.

THE CHAIRMAN: Now do you understand that question? The motion is lost.

MR. NEILL: May I suggest, as a method of procedure, there are in this matter four or five items? We do not know what the

opposition is opposed to, but we take up the items one by one and get the sense of the meeting on each particular item, first on the minimum and then on the maximum and then on the length of time, so we will find out what the particular element is that meets objection.

MR. ROHR: As I voted in the negative, I might say I am opposed to a minimum of fifty per cent. of wages. I would like to have that sixty-six and two-thirds.

JUDGE HOLLOWAY: I voted for it, but I did not vote for it because I am in favor of fifty per cent., because I am not. But I am in favor of the principle, and I still insist that is all we should attempt to adopt now.

MR. ROHR: If we are going to have a principle, we might make that principle sixty-six and two-thirds instead of fifty.

JUDGE HOLLOWAY: But you cannot do that, because in one locality fifty per cent. might be satisfactory and in another they might insist on seventy-five. I would not undertake to say you could pass a bill through the Montana Legislature for less than seventy-five. I doubt if you could, and I voted for it because of the principle involved, and not of the figures.

MR. DICKSON: I believe that the adverse vote and the non-vote, if I may use the term, are largely due to the fact that we are pretty well mixed and probably don't get the grasp of these subjects that we had early in the day. I would like to make a motion that the Chair appoint a committee of three to consider this question over night and present a recommendation to us, so that we can take it up the first thing in the morning.

THE CHAIRMAN: That is as to amounts?

MR. DICKSON: This question of permanent disability and death.

MR. BOYD: I second the motion.

MR. DICKSON: With the proviso that you don't appoint me on the committee.

MR. ALEXANDER: That would mean no further sessions to-day.

THE CHAIRMAN: A motion is made and seconded. All in favor say aye; contrary, no. That is, to report back in the morning, as I understand. I will appoint Mr. Saunders, Mr. Gillette, and Mr. Winans.

MR. DICKSON: I move that, when we adjourn, we adjourn to meet at nine o'clock.

THE CHAIRMAN: The motion is that, when you adjourn, you adjourn till nine o'clock. All those in favor say aye.

The motion prevailed.

NUMBER 6. LENGTH OF WAITING PERIOD?

THE CHAIRMAN: I suggest two weeks.

MR. GOLDEN: In case they are sick five weeks, do they get paid for the first two weeks?

THE CHAIRMAN: Not as I understand it. If they are sick five weeks, they get paid for the third, but not for the first two. If they are sick three years, they get paid for all.

MR. GILLETTE: I would like to have those who represent the labor people think over night of a proposition of changing that from two to three, and, in lieu of that, furnishing hospital and medical attendance, and see what would be the best.

THE CHAIR: Well, do you make that as a motion?

MR. GILLETTE: No, I would not. But just have it generally understood.

THE CHAIRMAN: Is it the sense of the meeting that, if the men especially appointed to represent the labor interests think they would rather have hospital and doctor bills and three weeks or two, they may have the privilege of taking that up in the morning?

MR. GILLETTE: I think personally that is one of the most important things. To the average man, that means a very great deal.

THE CHAIRMAN: The two weeks' waiting period?

MR. GILLETTE: No, sir, the surgical and hospital service—I speak from the employers' standpoint—is for the interest of the employer to see that that man from the very start of his injury has the very best sort of hospital care and surgical attendance. Otherwise, very serious consequences might flow from the ill care of injury. If we could do both, if we could have two weeks and also give the surgical and medical attendance, I would like to see it done, but I don't believe we can do it within any reasonable limits. I would like to impose it upon them, but, if they could see their way clear to figure it out some way, I believe from every standpoint it would be a very advisable thing to do.

THE CHAIRMAN: I would like to make this suggestion about that. It seems to me it might be a business proposition from the employer's standpoint, after my experience in Europe, to take care of the hospital bills and the doctor's bills during the

first two weeks free of charge. I think he would make money out of it in the end.

MR. GILLETTE: But it is all an element of cost.

MR. GOLDEN: I believe, if any person gets injured, two weeks is long enough for us to wait for pay, and the very least the employer can do is to pay hospital and medical bills, whatever might be used on the man. I think two weeks is long enough time for a man to wait. Three weeks is too long. I think that we made ours one week.

THE CHAIRMAN: The proposition on the motion was two weeks, and that you gentlemen get together and decide what you thought about the hospital bills in the morning, and have the privilege of bringing it up.

MR. GOLDEN: I shan't be here in the morning.

THE CHAIRMAN: Then I would like to hear what you have to say.

MR. GOLDEN: I think two weeks is plenty long to wait, and they ought to receive hospital bills and medicine, and whatever stuff they need while they are sick the first two weeks, free of charge.

THE CHAIRMAN: Let me ask you this. I think one of the most dangerous questions in this whole proposition is the doctor question. Do you think the laboring man would be willing to accept the employer's doctor, if he had the privilege of calling in a neutral doctor?

MR. GOLDEN: Well, if they didn't want to take the company's doctor, they could call in their own doctor. That is up to them.

THE CHAIRMAN: Are you ready to vote on this question?

MR. HOWARD: I would like to amend that by definitely adding medical attendance and hospital fees for the first two weeks.

THE CHAIRMAN: We will leave that to the morning and see.

MR. NEILL: Is it distinctly understood that the waiting period —that under no conditions are they paid for two weeks?

THE CHAIRMAN: Under no conditions. Now all in favor say aye.

The motion prevailed.

THE CHAIRMAN: Now, gentlemen, I think you gentlemen who represent the laboring interests will let us know in the morning what your judgment is.

MR. DOTEN: It occurred to us in arranging for this meeting that it might be desirable to visit the plant of the Illinois Steel

Company and see their methods of accident prevention. They have done a great deal in that line, perhaps more than any other constituent body of the United States Steel Corporation. I wrote to Mr. Robinson, vice-president of the company, and secured his permission, so that, if we so desire, we may visit their plant tomorrow afternoon, and inspect their methods of handling the whole subject of compensation as well as their methods of accident prevention. If we do that, of course, we should probably have to hold an evening session. I simply make the suggestion.

Number 7. Shall Dependants include Aliens and Illegitimate Relations?

Mr. Lowell: Mr. Chairman, I should be thoroughly in favor of saying no to that question, except for this reason: Mr. Doten has suggested to me, and I think there is very great danger, that, if we say that people who have dependants in Finland, for instance, those dependants shall recover nothing, it might very well happen some unscrupulous employer might say, "Well, I will have all Finns in my employ, because I won't have to pay their widows anything." That is a situation that will bear careful thinking.

Mr. Doten: I feel that there is serious danger that there will be serious discrimination against our native Americans if we put in that provision,—a serious discrimination in favor of unattached foreigners without dependants in this country.

Mr. McEwen: I can see force on both sides of this argument. We have in the northern part of our State twelve to fifteen thousand aliens who are simply here temporarily and who are going back to the old country. There is an endless chain of them passing in and out. If we could have it so fixed that the dependants of a person killed who has been a resident of the country for a certain period of time, we ought to do so and encourage the fellow who wants to come over here and bring his family and in a generation or so develop good Americans; but the man who is here for five years and leaves his family in the old country, there might be some exception in a case of that kind. For the fellow who comes here to work two or three years, I can see the force of Mr. Lowell's opinion that that would be encouraging their employment to the detriment of natives.

Mr. Doten: In reply to what Mr. McEwen said, it is this

body of birds of passage that we speak of that we do want to discourage. We want to discourage employers from stimulating their migration, as they undoubtedly do in some cases. If we cut them out, although it is very desirable to cut them out, we emphasize the very thing we don't want.

MR. GILLETTE: I know some of our railroad people there employ a whole lot of Italians and Greeks, and they never bring their families to this country. They don't deposit a dollar in the Minneapolis banks. There is one Italian bank in Chicago where it goes, and some in New York till they get ready to go back. Now the whole theory of compensation law is the theory that we shall not cast on American society our wreckage, but I never heard before that the purpose of this act was to take care of a lot of Dagoes over in the old country.

MR. DOTEN: I regret that that would be the effect of it, but I think you would get a whole lot more of these birds of passage if you don't do it.

THE CHAIRMAN: I remember of being up in Duluth when they had a strike up there, and they told me, as soon as the strike was declared on, there were two thousand Italians went down to the station and bought tickets for Europe to spend the winter.

MR. NEILL: It seems to me that we put this country in a very unenviable position, if we say we are perfectly willing to have our Dagoes come in here and do good work, but, if they are killed in helping us to build up our railroads, their families can go hungry. I should be opposed to any modification of the law that would make the slightest distinction.

MR. GILLETTE: We don't say we want them to come in here. We say by our alien laws that we don't want them to come in.

MR. NEILL: They are coming in now, Mr. Gillette. The question is, when they come in, whether the preference is going to be given to them or to native Americans.

MR. GILLETTE: Why not go to work and make them become citizens in order to acquire the benefits of this law?

THE CHAIRMAN: Do you mean to limit this to those who are citizens of the country or those who in good faith expect to become citizens? If their families were here, they would be here already.

JUDGE HOLLOWAY: I was just going to suggest, Mr. Chairman, that our treaty makes the distinction between resident and non-resident aliens. If we attempt to exclude resident aliens, we

would probably be attempting to enact laws that would be unconstitutional. In fact, I think they would be unconstitutional under our State constitutions: you can discriminate against the non-resident alien, but you cannot discriminate against the resident alien.

THE CHAIRMAN: Then you had better have this question read: "Shall this include non-resident aliens?" All in favor of that will say aye.

MR. MCEWEN: Cannot we sleep over that?

MR. DOTEN: I can conceive of a situation where it would be very favorable to residents along the Canadian border to come across and be employed under entirely different conditions from those who happen to reside a few rods further south, if we say resident and non-resident, and I think the fact of residence is difficult to establish.

THE CHAIRMAN: This is the residence of the family or dependants?

MR. GILLETTE: That is where you want to make the distinction.

THE CHAIRMAN: If they come over for a couple of weeks, they are not residents.

MR. BOYD: The Montana act excludes dependants who are non-resident aliens from taking benefits.

THE CHAIRMAN: How many are willing to vote on that question now?

MR. MCEWEN: What do you mean by aliens?

THE CHAIRMAN: A foreign citizen.

MR. MCEWEN: Supposing their families are in the United States.

THE CHAIRMAN: They would be residents. We are talking about non-residents, those who are not living here.

MR. MCEWEN: I understand. Then, of course, this other question comes up again,—I think it was brought out by Mr. Lowell and confirmed by Mr. Neill,—as to the encouragement of the employment of the migratory laborers at the expense of the native labor.

THE CHAIRMAN: As I view this rule, this does not include the man who is not a non-resident. He can leave and go to any country he pleases, unless you put a limitation in this like some countries, and do not allow that in their laws, but only include the grandparents.

MR. MCEWEN: It would only apply in fatal cases?

THE CHAIRMAN: That is all.

MR. MCEWEN: I can tell you this, when a man is killed in a mine in Northern Minnesota, and there is a chance for a five-thousand-dollar death claim, we seldom hear from the widow or the dependant of the man in the old country. We find some person who is appointed administrator of the estate over here, and he usually gets all the money. Very little of it ever gets abroad.

THE CHAIRMAN: I understand that is done here in the city of Chicago sometimes. All in favor of the proposition that the act shall not include the dependants who are non-resident aliens say aye.

The motion prevailed.

MR. ROHR: I move that illegitimate children be excluded from the act.

MR. ALEXANDER: When the English act was passed, concerning illegitimate descendants, it was rather obnoxious to me; but, the more I think about it, the better do I like it. Now, if I should commit the immoral act, I certainly have the moral, if not the legal obligation to look after the child.

THE CHAIRMAN: In some States you would have a legal obligation.

MR. ALEXANDER: And if I should be permanently disabled or if I should die in the course of employment, should the mother, who still cares for the child and supports the child, not be protected both for herself and the child, just as if I had brought the child into the world legitimately?

MR. LOWELL: Mr. Chairman, just this suggestion. If it be desired to include illegitimate children of any kind, you should certainly have only those that are acknowledged: otherwise, every single case that arose, there would be at least three lawsuits by people claiming to be illegitimate descendants.

MR. MCEWEN: Let me make another suggestion. Those that are acknowledged and dependent on the deceased at the time of the accident.

MR. BAILEY: It seems to me the New York act, as I recall it, covers the thing without saying anything about illegitimate children. It says dependants. Now, if they are actually dependent, they suffer. We are going to take care of the people who are actual sufferers, and we need not bring into the act discrimination as to legitimate or illegitimate. If they are dependent,

that is a matter of fact, and I don't think you need say a word about it.

THE CHAIRMAN: In Minnesota we say if they are acknowledged and found to be legitimate.

MR. SCHUTZ: I move those words "and illegitimate relations" be stricken out from the question.

MR. BOYD: I second the motion.

THE CHAIRMAN: With the understanding, I suppose, that it will be covered by the word "dependants."

MR. BOYD: Yes.

MR. DOTEN: Before we leave this, it seems to me we should consider the question of what the term "dependants" should include.

THE CHAIRMAN: I think that is a very important question myself.

MR. DICKSON: Would not they be governed by the various State laws?

MR. NEILL: You will have to go further even than that. We have had in the administration of the Federal law that question arise. There are wholly and partially dependent parents. A parent may not be wholly dependent on a son, but receive a certain amount. In a case of that kind we ought not to make a recommendation that will include the payment to the dependent parents over what they are getting from the son, so that the whole question of parents will have to be threshed out.

THE CHAIRMAN: I would like, with the consent of this meeting, to appoint a committee of three to report back to-morrow what they think ought to be considered dependants.

Mr. MCEWEN: I make that as a motion.

THE CHAIRMAN: I will appoint Mr. Boyd and Mr. McEwen and Mr. Bailey to report back here in the morning a general classification for dependants. Now is there anything else we need to take up now?

On motion the Conference adjourned until nine A.M. the following morning.

Third Session, Friday, November 11, 1910, 9 A.M.

The third session of the Conference was called to order at nine A.M. by Chairman Mercer.

THE CHAIRMAN: Is the Committee on Dependants ready to report?

MR. BOYD: Mr. Chairman, in comparing the different acts, the committee decided to recommend the following definition for dependant, under Query 7, in this manuscript set of queries:—

"Dependants shall mean such members of the employee's family or next of kin as were entirely or partly dependent on his earnings at the time of his death. Dependants shall not include aliens residing outside the United States."

We did not think it wise to give a particular definition of the word "family" in more detail, on the ground that it would invite all kinds of attack. It would invite the attack of the clergy and people that were specially fond of common law technicalities, and we thought it best to leave it in that form as an initial definition.

THE CHAIRMAN: You have heard the report, gentlemen. What shall we do with it?

MR. ROHR: I move its adoption.

MR. MCEWEN: I second the motion.

MR. LOWELL: I merely want to ask Mr. Boyd. You don't define who dependants are.

MR. BOYD: Who constitute the family.

MR. LOWELL: Who constitute the family? The family or next of kin?

MR. BOYD: "Dependants shall mean such members of the employee's family or next of kin as were entirely or partly dependent upon his earnings at the time of his death. Dependants shall not include aliens residing outside the United States."

MR. LOWELL: Mr. Chairman, there is one merely minor criticism, that you should say "dependants at the time of the accident," the reason for that being the courts in England have refined on this thing, and have said there was not anybody dependent at the time of his death, in this situation, where he was not instantly killed.

MR. BOYD: We will change that without further argument.

THE CHAIRMAN: On the other hand, you might have this con-

dition arise: you might have some person that was a dependant in the way of a father or mother or a grandmother; he might be a dependant at the time he was hurt, yet, if he lived a few months, they might be dead, and the result might be to fix your liability so that the rights would descend to the other heirs of the ancestor.

Mr. Bailey: If a person ceases to be a dependant, either by death or marriage or otherwise, the court would perhaps do more for the remaining dependants.

The Chairman: My only point, Mr. Bailey, was to have something in that clause which would say so long as they remained dependent.

Mr. Lowell: That brings in the trouble which is fairly serious, and that is this: supposing the employee was insured, had life insurance, then his widow is not dependent after the life insurance falls in, perhaps; but at the same time do we want to put in any act which will prevent the employee's saving in order to have life insurance? So it seems to me that that should not be considered. If you bring that in, you—if you say a person who becomes dependent *after*, then you are preventing an employee from getting life insurance. Of course, the whole thing we want to get at is to make everybody as thrifty as possible.

Mr. Bailey: I think, Mr. Chairman, we must not have too many refinements. These will gradually grow up. We have to start simply, and meet the troubles as they come rather than to have so many details that they will cover up the main features.

Mr. Boyd: The gist of the matter is, the clause which creates dependence is put in operation at the time of the accident. Now, if you cover that, I think that is sufficient for the general proposition.

Mr. Neill: Why not leave it as it was, "dependent at the time of the accident," and let it stay right there?

The Chairman: That is all right, except you might have this situation arise: a man might lose an arm, and you might have children more than nine months, as the Supreme Court of Minnesota said, "from a wholly independent cause," and it might leave these children without any benefit from this act if he should die after three years.

A Member: Language, "next of kin," will bring in a whole lot of troubles. It is altogether too indefinite, and will produce a great many bogus claims, and I strongly urge that something

more specific than "next of kin" be put in. You don't want payment to go to a remote gentleman, who may have had a remittance some years before, who will not be needy in fact, but whose representative, so-called representative, will make a claim on his behalf and will pocket the amount allotted, as his fee. That is a very common practice out in certain districts, and I think you must specify more definitely, and eliminate this gentleman known as the next of kin.

THE CHAIRMAN: Why don't you put it?

A MEMBER: "Family" covers practically everybody you want to take care of.

MR. LOWELL: Does not "family" mean those living with the fellow?

A MEMBER: No, it has been defined in England as both ascendants and descendants.

MR. LOWELL: Whether they lived with him or not?

A MEMBER: Oh, yes, whether they lived with him or not.

THE CHAIRMAN: There might be a case of a brother and sister living—

MR. MCEWEN: "Members of the family dependent or partially dependent at the time of the accident."

THE CHAIRMAN: You think the "family" definition would include brother and sister?

MR. MCEWEN: It does include it under the common law.

THE CHAIRMAN: If we had any doubt about it, we could define in the act what "family" meant under the definition of words and phrases in the act.

MR. BOYD: "Members of family" mean wife, husband, father, mother, grandfather, grandmother, step-mother, step-father, son, daughter, grandson, grand-daughter, stepson, step-daughter, sister, brother, half-brother, half-sister.

MR. LOWELL: That is the phrase under the 1906 act. I believe they found—Mr. Packer will correct me if I am not right—that under the 1907 act it did not include step-children.

MR. BOYD: Now the National Civic Federation Bill, section 7, paragraph K, says, "Dependents mean such members of the workman's family as were wholly or in part dependent on the workman at the time of the accident. And members of a family for the purpose of this act, mean only widow or husband, as the case may be, and children, or if no widow and husband and children, then parents and grandparents. Or if no parents or grandpar-

ents, then grandchildren. Or if no grandchildren, then brother and sister. In the meaning of this section, parents includes step-parents, children and grandchildren includes step-children and step-grandchildren, and brothers and sisters includes step-brothers and step-sisters."

A MEMBER: "As to the persons entitled under the English acts to receive compensation, though the definition of workingman in the act was wide, covering all employees whether a man labors or otherwise, the committee recommended the inclusion of brothers and sisters in beneficiaries." You see, the old act had not covered them, because it only covered what was covered in the other act. It did not include brother and sister in addition to the dependants and ancestors. This was opposed by employers, who had said it would tend to increase their difficulties, and that they now had to pay compensation exceeding what was necessary for the support of the dependants, as, for instance, to pay a father, earning good wages, for the death of a son, provided the son contributed slightly to the family sum.

Now the point was that they covered the family, and the new act extended it to cover brothers and sisters and to cover illegitimates.

THE CHAIRMAN: Now we have been discussing this informally without any motion to amend.

MR. BAILEY: In the New York law as it is now they kept very broad on that subject. They simply said "next of kin who are dependent," as I recall it, and, if we can avoid details with some advantage and leave those to come at a later time, I think that we had better do so.

THE CHAIRMAN: I want to say that I have not looked into it from this specific standpoint, but I think, before any law is put in final shape, we should certainly want to study the question as to whether or not the acts would be constitutional if we did not let it follow the same methods of defining dependants of other estates in case of death. I mean the other estates in the State. That is, as to whether there would be equality of laws.

MR. LOWELL: Mr. Chairman, it seems to me that the kind of a definition which has been offered here would be an excellent one for this Conference to adopt. But I think you will want, before you adopt your laws in every State, to see whether the word "family" has not been construed by some decision which might make the law different from what we wanted it. I do not think we

want to go into those details here, but, before we draw the law in each State, we want to look at that.

A MEMBER: Do you want to include next of kin?

THE CHAIRMAN: That is the only objection I have in that definition.

MR. BOYD: We left it "family" because the different States have different definitions of family. Now in Ohio, for example, an illegitimate child living, say, in West Virginia, and its father dies in Ohio, not making a will, but by correspondence and by sending of a small amount of money from time to time it becomes an heir to his estate by statute.

THE CHAIRMAN: Well, I suppose you do not mean the family in the sense of the old Roman paterfamilias doctrine, but in the sense that has been defined in the English act, practically, don't you?

MR. BAILEY: I believe they have gone outside of the roof.

THE CHAIRMAN: It would not need to be, because if it was—it ought not to be, because if it was, it would deprive a man of supporting his father and mother if they did not happen to live right within the house with him.

MR. BAILEY: I am not very keen on those words "next of kin," if you have family.

THE CHAIRMAN: If you make your "family" broad enough, I should say leave out "next of kin."

MR. BOYD: Then it would read this way: "such members of the employee's family as were entirely or partly dependent upon his earnings at the time of the accident."

MR. WIGMORE: Can the matter of aliens be separated out?

THE CHAIRMAN: I have that, Mr. Wigmore.

MR. BOYD: Just for Mr. Wigmore's benefit, "Dependants shall not include aliens residing outside of the United States."

MR. WIGMORE: I want to vote that it shall, and that is what I mean by asking if you are putting the question.

THE CHAIRMAN: State your reasons, please.

MR. WIGMORE: We see a great deal in this part of the world of the killing of aliens not citizens, and the train sweeps round the curve and knocks four hundred and fifty Greek or Italian or Hungarian laborers into eternity. So often does that sort of thing happen—I am acquainted very well with the Hungarian consul in Cleveland—that the question is a very important one from the point of view of dependent persons, I don't say

employees; and I have seen and heard so much of the litigation undertaken by consuls here to protect the rights of their countrymen that I personally have always wanted to see the doctrine of the Kellyville Coal Case made to include the non-resident dependants of aliens, simply for the moral effect on the man who puts the others into eternity. I would like to see this Commission, in trying to regulate employer and employee, not lend its moral weight in favor of the unjust doctrine that the dependants of an alien cannot recover when that alien is a person injured by a wrong-doer's act.

MR. BOYD: Mr. Chairman, cannot we divide that question, and settle Professor Wigmore's question a little later as to whether we drop out "next of kin"?

THE CHAIRMAN: The motion is to strike out "next of kin." Are you ready for the question?

The question was then put, and the motion prevailed.

THE CHAIRMAN: Now are you ready for the question still leaving out the alien question?

MR. SAUNDERS: "Dependants shall mean such members of the employee's family as were entirely or partly dependent on his earnings at the time of the accident."

The question was called for.

THE CHAIRMAN: We will vote on that question if you are all ready.

The question was then put, and the motion prevailed.

THE CHAIRMAN: Now that disposes of that element.

MR. BOYD: The remainder of the report is, "Dependants shall not include aliens residing outside of the United States."

MR. DOTEN: Mr. Chairman, did not we pass on that yesterday, "shall not include the non-resident dependants of aliens"?

THE CHAIRMAN: We did yesterday, but, when we referred this whole matter to the committee to decide what dependants meant, I didn't know but what you meant to open up that question. I think that is for the choice of the committee.

MR. BAILEY: I should like to explain that question. With us in Massachusetts a party living in New Hampshire is a non-resident. We thought "non-resident" was ambiguous.

MR. BOYD: "Dependants shall not include aliens residing outside the United States." That makes it perfectly specific.

THE CHAIRMAN: That was the language yesterday, as I understood it.

MR. BAILEY: No, "non-resident."

THE CHAIRMAN: All in favor of this report, as you are ready for it, make known by saying aye.

The motion prevailed.

THE CHAIRMAN: That passes that report. There was another report, Mr. Saunders?

MR. SAUNDERS: The majority of your committee submit the following report:—

"In case death results from the injury, the employer shall pay the dependants of the employee wholly dependent upon his earnings for support at the time of the accident one-half the average weekly wages of the deceased, but not more than ten dollars nor less than five dollars a week, for a period of three hundred weeks from the date of the accident, together with the cost of medical attendance and funeral expenses, not exceeding one hundred dollars.

"If the employee leaves dependants only partly dependent upon his earnings at the time of his death, the employer shall pay such dependants a weekly compensation equal to the same proportion of the weekly payment for the benefit of the persons wholly dependent as the amount contributed to such partial dependants bears to the annual earnings of the deceased at the time of his injury. In no case shall the period covered by such compensation be greater than three hundred weeks from the time of the accident.

"If the employee leaves no dependants, the employer shall pay the reasonable expenses of his burial and last sickness, which shall not exceed two hundred dollars.

"In case of permanent total incapacity for work, resulting from the injury, the employer shall pay the injured employee a weekly compensation equal to one-half of his average weekly wages, but not more than ten dollars or less than five dollars a week, for a period of three hundred weeks from the date of the accident.

"In case permanent partial incapacity for work results from the injury, the employer shall pay the injured employee a weekly compensation equal to one-half the difference between his average weekly wages before the accident and the average weekly wages he is able to earn thereafter, but in no case shall such compensation extend beyond a period of three hundred weeks from the date of the accident."

Now I might say that that is submitted by Mr. Gillette and myself. Mr. Winans reserves the right to submit a minority report.

MR. WINANS: Mr. Chairman, on behalf of labor, I desire to submit a minority report in so far as the maximum and minimum is concerned. Now I desire this, for payment of partial disablement, that we fix fifty per cent. of the allowance to be paid of the earnings for a period of ten years, with a maximum of five thousand dollars and a minimum of three thousand dollars. That is to cover payment of partial disablement. And for payment of total disablement and death I would suggest an allowance of sixty per cent. of the actual earnings of the employee to be paid for a period of ten years, with a maximum of six thousand dollars and a minimum of three thousand six hundred dollars.

Now I submit these figures, believing that it is only fair and proper, taking into consideration the necessity of providing for the widow and the little children at the death of the husband. Or, in case of total disablement, we recognize this fact, that there is as much necessity for a liberal and fair allowance to be paid in that case as when in death, because, take a man that is permanently and totally disabled, by the loss of both limbs or arms, he is a burden on his family. Therefore, the allowance should be made, in my judgment, greater. But I am submitting those figures for your consideration.

MR. SAUNDERS: I move the adoption of the majority report.

MR. LOWELL: I second the motion.

MR. ROHR: I move the adoption of the minority report.

MR. MCEWEN: I second the motion.

MR. NEILL: May I suggest now, Mr. Chairman? I do not think any of us know what the real difference between the reports is, and if it was put to a vote, as it was yesterday, there may be a vote against it, and every member voting against it for a different reason. I suggest we take it up item by item, and find out first about the maximum allowance.

THE CHAIRMAN: If that is the sense of the meeting, I am willing to state it in that way. As I understand, the majority report recommends a maximum of ten dollars per week for three hundred weeks, and not to exceed fifty per cent. of the wages, not to exceed ten weeks, and not to exceed longer than three hundred weeks.

MR. NEILL: I suggest we take the first question, percentage of wages, and see where we stand on that.

THE CHAIRMAN: Now as to the limitation of ten dollars a week, let us take that up first. Are you ready for the question as to whether or not you shall put that in? I understand that is what the record raises now. Shall you say ten dollars a week shall be the limit, or shall a man have full fifty per cent.? Are you ready for the question?

The question was called for.

MR. MCEWEN: Fifty per cent., based on what?

THE CHAIRMAN: On the average weekly wage.

MR. MCEWEN: I want to speak on that point of average weekly wage, and show you how easily a manufacturer and employer is going to get out of this, and what an injustice is liable to be done to the workingman. Now there are going to be a large number of accidents such as are now due to the negligence of the employer. The men who work for fifty-two weeks a year are usually the low-waged kind. With machinists, and the men who work in shops, who have trades, that may be the exception, but with building mechanics it is not the exception. I am a plumber by trade. We never, in my fifteen years' experience of plumbing, worked more than forty weeks in one year. You strike an average of fifty-two weeks, and you will find we only receive the wage of the ordinary workman. I made an investigation in Minnesota of almost one hundred thousand workingmen, and found sixty-seven thousand received two dollars a day and less, thirty-five thousand receive one dollar and a half a day and less. I have here the report of the shoe industry of Minnesota, and I quote that because the gentleman from Massachusetts referred to it yesterday. We covered an investigation of twelve hundred and thirty-one employees in the shoe factories. That includes every person in the shoe factory who receives a wage, including the superintendent and all persons in the factory, except the officials. We found that forty and sixty-seven hundredths per cent. received two dollars a day or less, twenty-six and sixty hundredths per cent. received two dollars to two seventy-five a day, and then it begins to decrease down as we reach five dollars and a half a day. Here is an industry in which the people may be employed for a period for twelve months without any cessation, and the most that any person under this act would receive would be six dollars per week. I can conceive that the chances in an industry like the shoe industry for permanent disability are extremely remote. It is a non-hazardous industry. There may be pinched

fingers or cuts from a knife, but any kind of injury, except in rare instances, would only go from one to two and not more than three weeks, unless it is a fall down an elevator, which may occur anywhere. But with the building trades and with the work outside, where they depend upon the elements for working conditions, I cannot conceive a man in our part of the country working more than eight months in the year. In the mines up north, in the open pits, they do not work more than eight months a year, and their average wage there is two fifty a day. Then you are going to strike an average for fifty-two weeks.

MR. SAUNDERS: Is not your difficulty in the definition of average wage?

MR. MCEWEN: Well, I want to get that clear in my mind.

MR. SAUNDERS: Of course, average wage has got to be defined in the bill.

THE CHAIRMAN: As to whether it depends on weekly, monthly, or yearly wages?

MR. SAUNDERS: Or what they actually earn.

THE CHAIRMAN: That would cover that point, I should think. Most of the acts abroad cover that in some form. Now let me see what was that question we put there? Whether a ten-dollar limitation should exist where a fifty per cent. rate is above it. Are you ready for the question on that, whether or not the compensation shall be limited to ten dollars a week, if fifty per cent. amounts to more than ten dollars a week? All in favor of limiting it to ten dollars a week, let it be known by saying aye. All who are opposed to limiting it to ten dollars a week will let it be known by saying nay.

A *viva voce* vote was then had, and the affirmative prevailed.

MR. NEILL: What are the two reports on that subject? The majority rule is ten dollars a week. What is the minority report?

THE CHAIRMAN: The minority report is to take the maximum off, and say fifty per cent. of the wage. Now we had the question up yesterday as to whether or not we should vote on three hundred weeks or some other time, but this report raises the question directly as to whether we should limit it to three hundred weeks or whether it should run for ten years. Are you ready for that question?

MR. LOWELL: Mr. Chairman, I want to say just one word here. We all of us want to do the best we can for the employees. There

is not anybody in this room who would not back that statement up. But it is a practical question, and, as a matter of fact, when you go to cover all injuries, you have got certainly in the first part of these,—experience under these laws, to limit it very low. I always look at this, of course, from the standpoint of Massachusetts. You have got to have a limit which you think is unfair to the employees in order to have it a practical matter, if you cover all employments, which we have agreed to do in this matter.

Now, of course, the practical result of this thing is that you limit the compensation to three thousand dollars, and I should say that of course, in a great many cases, that is too low. If you were ordering things,—were a benevolent despot and were ordering things the way you want, absolutely independent of any financial consideration,—you would put it higher, but in Massachusetts you are going to cover hundreds of thousands of accidents where there is no compensation now, and, in order to bring those in and be able to pay for them, you have got to have a limit at least as low as three thousand dollars.

Mr. Wigmore: I would like to remind the gentlemen who are in favor of a higher limit that this is more or less of a compromise; that we have by vote already put out of existence the four limitations which hamper the workingman to-day, and that in return for that the compromise ought to include a limitation of the total amount to what certainly I agree and others say is abstractedly an unfairly low limit. That is a very large concession to make on the other side, and this is a very small concession to make on this side.

Mr. Doten: I want to say that we have talked this over with the labor leaders in Massachusetts in our conferences and at our hearings, and they have generally agreed that, if there is a possibility of obtaining three thousand dollars without expense, without the charge of lawyers' fees, etc., against it, and immediately upon the occurrence of the accident, that it will be much better than the five thousand dollars which they have been entitled to receive under the Employers' Liability Act. As a matter of fact, probably in not one case in a hundred where a verdict amounts to five thousand dollars under the employers' liability law does the injured employee receive three thousand dollars net. And, if he does, he does not receive that amount within a period of three years. In many cases it is four or five years before he gets it. So that they feel in Massachusetts that three thousand

dollars, or instalments which in the end will equal three thousand dollars, will be much better for them than the present law.

THE CHAIRMAN: I want to say on behalf of that, if I may talk myself, that I voted against the last proposition, upon the theory that I perfectly agree that this limitation ought to be three thousand dollars, unless there is some premium or something of that sort. But I do not think the limit ought to be ten dollars a week and also three thousand dollars. If it would reach three hundred weeks, it would be three thousand dollars. But a man drawing thirty dollars a week gets only ten dollars, that is, a third of his wage, and I do not believe that that is as high as it ought to be. I think, if the limit were fifty per cent. and then three thousand dollars, that the limitation of three hundred weeks would be proper, but you passed on that question, and that is the only reason that I should have to vote against this motion as it is put. But, having limited it to ten dollars a week irrespective of the wage, I would not want to vote for this question.

MR. MCEWEN: Now, Mr. President, I recognize the truth of this gentleman's statement. I know that in Minnesota, if a case ever goes to court in case of fatal accident, or even if it does not go to court, if an attorney has the case, the most the dependants or the heirs of the deceased workman who met his death through injury can get out of it is two-thirds of five thousand dollars: the lawyer either takes one-third as his contingent fee or too frequently one-half. But you must recognize in this that only a very, very small proportion of the workingmen will be able to get the maximum of three thousand dollars. I am satisfied that there are sixty-seven per cent. of the workingmen in our State who earn two dollars a day and less. That means that with most of the men who are injured there, the maximum amount they can get for three hundred weeks at six dollars a week would be eighteen hundred dollars. That is for permanent disability or death. Why, you take the wood-working industry, and that includes lumbering also—I have returns on six thousand four hundred and eighty-eight workmen and only one and fifty-seven hundredths per cent. get four dollars a day.

MR. GILLETTE: What is your idea, to get it down to hard facts?

MR. MCEWEN: I rather like the position of the gentleman from Ohio, a maximum of five thousand dollars.

THE CHAIRMAN: What is the length of time,—three hundred weeks or six years?

MR. MCEWEN: Ten dollars a week for five hundred weeks.

THE CHAIRMAN: That is practically what it amounts to.

MR. MCEWEN: The other would be five hundred weeks at six dollars a week, that is three thousand dollars. Now let us take a miner earning two dollars and a quarter a day. Under our statute, if he meets his death because of the negligence of the company,—and frequently he is allowed to-day money without apparent negligence on the part of the company,—the courts have modified the rules of negligence largely in a great many of the industrial States of this Union. I know they have been exceedingly liberal in our State,—his loss is considered of the same value as the engineer earning eighteen hundred dollars or two thousand dollars. Their positions in the courts are relatively the same, and they each stand an equal chance of obtaining a five-thousand-dollar verdict or a five-thousand-dollar settlement out of court.

Now I believe that the man who is earning two dollars a day and is killed, his family is entitled to a minimum of three thousand dollars, covering a period of ten years. The danger of any large number of men obtaining the five thousand dollars assessed in this way is remote, or it is at the minimum at least. I do not think you have anything to worry about, if you study over the situation in its entirety, making a complete classification of the men employed in any shop who obtain four dollars a day or more, which would bring them under the ten-dollar limit. You know that won't amount to such a serious matter as you think it will to-day, and we are really taking care of the men who are least able to take care of themselves, men who are getting two dollars a day and less. They need protection more than the man getting four dollars a day, because he carries insurance. I belong to the plumbers' union: I carry insurance. My brother here belongs to the Brotherhood of Railroad Trainmen: he can obtain insurance to the amount of thirteen hundred and fifty dollars. Most of us who have a good wage carry insurance. We do not need the protection so much as these poor fellows who live right up to every dollar they earn. I have wondered how they live. I think that two dollars and a half a day is a minimum living wage in our part of the country, and how they can afford to put anything aside for insurance is a problem with me. These are the men

who need the greater protection under any compensatory act, and therefore, when you put their limit at twelve hundred dollars, you are putting it too low, and they are the men who are entitled to a three-thousand-dollar minimum.

MR. BOYD: What per cent. of your accidents over any given period receive compensation of any kind at all under the present method?

MR. MCEWEN: Well, that depends entirely upon the industry. I rather think that in the mines of Northern Minnesota ninety per cent. of the men who are injured get something.

MR. BOYD: Take the average.

MR. MCEWEN: Oh, it is said that about ten per cent. get anything. Now the insurance companies to-day are making payments to injured workingmen, nominal payments from ten dollars up, to close up a case, so that nothing will come out of it, and get a release. The Steel Corporation in our State has been so bothered with ambulance-chasing attorneys,—we have any number of them there, we know of over one hundred men in one county in Minnesota who make a living that way,—when an accident occurs in the mine, it is a question who will get there first, the claim agent of the company or the representative of the ambulance-chaser. The man who gets there first fixes up the evidence. As a result, the claim agents of the Oliver Mining Company will pay anything to get a release. We have a report from the Steel Corporation in the matter, and I have talked with their claim department and their legal department, and gone up to the mines and talked to the superintendents, talked to the men themselves, studied their club fund features. I know that every man injured in the mines gets something. It may be ever so little. In the other industries, however, that does not apply, because the hazard is less. The employers' liability agent will pay something rather than to have this thing hang on.

MR. GILLETTE: I was just going to suggest whether it wouldn't be possible to work out of this a proposition based on the theory of the French law, a minimum which would be how much under this?

MR. SAUNDERS: Fifteen hundred dollars.

MR. GILLETTE: A minimum of fifteen hundred dollars in the case of a man who was killed or permanently injured who has a large family might be small, but suppose that could be modified on the basis of the French law, and that is by that I mean that

each child would have a per cent. of the wage rate,—if there was one child or two children, thirty per cent., but, if there were six or seven children, the total amount should not exceed the fifty per cent. of the wage rate. By that way it would take care of the bad cases in which there are a large number of children with possibly a low wage rate, and in that way raise the minimum a little bit.

THE CHAIRMAN: Do you make that as an amendment?

MR. GILLETTE: No, I throw that out to think about a little, as to whether that would not cover the cases we are talking about, and in that way, without raising the maximum, raise the minimum.

MR. LOWELL: May I ask, Mr. Gillette, whether that might not tend—whether an unmarried man or a fairly old man with only one child would not be likely to be employed rather than the young fellow who has two children and liable to have more?

MR. GILLETTE: That has not had that effect in France.

MR. LOWELL: Certainly, the birth-rate is lower in France than in any other country in the world. Perhaps that has not had anything to do with it.

MR. GILLETTE: The birth-rate is the highest among the workingmen.

A MEMBER: It has not had that effect in England, either.

MR. MCEWEN: And I beg leave to call your attention to another phase of this, which presents a very serious aspect to the injured English workman, particularly to the man over forty. I do not wish to insist upon such a high compensation or be so exacting in a law that it will discriminate against the man who becomes less alert and less active. In England, in some of the industries, they are weeding out the men who are slow, the men who are prematurely old or who are old because of years, and are looking only for young and active men. The accidents are happening, with the speeding up of machinery, more frequently among men over forty than they are among those under forty.

A MEMBER: I do not think that is the fact.

MR. MCEWEN: Well, now, I will ask Mr. Gillette if we did not get that information there.

MR. GILLETTE: Oh, that is an absolute fact.

A MEMBER: I went to the trades-unions, nearly every one of them, and they said it was not the fact.

MR. GILLETTE: Mr. Holmes, secretary of the Federation of Hosiery Workers, told us, in his opinion, there were a hundred

and fifty thousand English workmen who could not get employment in England to-day by reason of excessive age or some partial disability. In Manchester one employee whom,—I just cite this instance and show you how it becomes necessary,—in Manchester there was an employee who had two accidents exactly alike. One of them, something flew and hit the man in the eye. It destroyed the sight in that eye. He received compensation for eighteen weeks, and then entirely recovered. A short time after he had another accident of the identical kind,—a particle of something flew in the man's eye and put it out,—but that man, when he came to work, only had one eye, and consequently that man had a case of permanent total disability. The result of it was after that they did not dare to employ any more one-eyed men, because it multiplied the liability to so great an extent. Dr. Dobic, of London, who, I think, probably was the most interesting man I talked with in England (he is the general surgeon for the General Accident Association of Perth), told me of a case—I have not my papers here or else I would give you the concern—where an English concern employing four thousand men subjected all their employees to a physical examination, and thirty-five per cent. of them, or fourteen hundred people, were dropped by reason of excessive age or some physical imperfection. The English workman has not become alive to the condition of facts as yet. Within the next year they will begin to appreciate the effect of the operation of that law. Now the London County Council are subjecting all their new employees to a physical examination, and the result of that is they are showing a very marked decrease in the number of accidents and the consequent cost of them, of compensation adjustment, and with their physical examination and the wage qualification they have reduced their cost under the Compensation Act to a very marked degree. We paid quite a little attention to that, Mr. McEwen and I, and it is a thing that we have not heard mentioned by many people, and the English workmen are not alive to it. I think Mr. McEwen will agree with me to-day that very few,—some of their leaders are, but the general body of the English workingmen are not alive to that fact yet, and within the next few years it is going to be a very serious question in England.

Mr. Wigmore: It does not appear to me this bears on the three-hundred-week limit.

Mr. Doten: May I just say a word in confirmation of what

Mr. Gillette said? Perhaps the members of the Conference are not all aware that a bill was recently introduced into Parliament to permit aged and partially disabled workmen to contract out to the extent of receiving less than the stipulated amounts provided for by the act as it now exists. That bill was introduced into Parliament simply to meet this condition, which all parties recognize.

A MEMBER: Here is a statement made by a man who has had thirty years' experience with railroad employees. He says,—

"I feel that on railways aged men have not suffered." The bill that was introduced, mentioned by the last speaker, was fought strenuously by the workingmen, who are in the business of protecting, and it was their action in committee that defeated any amendment on that position.

THE CHAIRMAN: I found quite a division of sentiment over there on that question.

MR. SAUNDERS: It is reflected here.

MR. BAILEY: I want to say a word on the mine proposition. This is going to be an initial step in this matter in the United States, and the insurance people here and everywhere say: "We don't know where we are. We are afraid of this thing, because it is going to make insurance high," and we shall do the cause a serious harm unless we begin with some moderation. Having learned to walk, we can then run a little and do what the gentlemen suggest ought to be done, and what many of us would like to see done; that is, get it up higher, if we can stand it. But let us find out where we are. The insurance people say that, after this is going for a year or two years, they will get some statistics on which they can estimate rates and know where they are. So for that reason I am going to vote for the lower limit, hoping that the thing will so work that, as time goes on, the thing may be made more liberal.

MR. HOWARD: It seems to me that Mr. McEwen a few minutes ago made a pretty good argument in favor of limiting the amount of weekly compensation. He stated that the man who needed the protection was the man who was getting two dollars a day, and that the man who was getting three or four dollars a day could afford to insure, and did as a matter of fact generally insure, and, if you give fifty per cent. compensation without any limitation, it takes away the incentive for the man who does receive enough pay to pay additional insurance to take such insurance, and it

really seems to me as if perhaps the members could get together on some such issue.

THE CHAIRMAN: I simply want to say that, when we get to the proper point, I think we are getting as many constitutional difficulties under this provision as we shall have in our whole law, and perhaps more. We may have to revise our whole notion of this thing. Are you all ready for the question?

MR. GILLETTE: May I just suggest one thing, that the benevolent organizations and insurance organizations,—that within the labor organizations themselves all recognize exactly the same principle, every single one of them is maintaining these minimums of less than these are,—with the exception of one railroad organization, I think every single one of them are for less than they have recommended in this report?

I want to say another thing, and that is, I wish very much,—I have not time to frame it now,—but in lieu of that very low minimum we could incorporate that provision of the French law which would give fifteen per cent. to each child up to the percentage of wage rate which is agreed upon.

THE CHAIRMAN: Now are you ready for the question? Two gentlemen from Wisconsin have come in since we have started.

MR. BAILEY: I wanted to say that Mr. Browne, of our committee, is now here from Washington, and so we have three of our committee.

THE CHAIRMAN: Mr. Browne, we are glad to see you. Now all in favor of the question, which, as I understand, shall be to limit,—if you vote in the affirmative, it shall be to limit the compensation to a period of time of three hundred weeks.

MR. MCEWEN: Does not our motion take precedence?

THE CHAIRMAN: I guess you are right about that. You move to substitute ten years for that. I will take that back. All in favor of substituting ten years as the limit of time that the compensation shall continue for permanent disability make it known by saying aye.

A rising vote was then taken, and the motion lost by the following vote: ayes, four; noes, eleven,—a number of gentlemen not voting.

MR. DICKSON: May I record the reason for my vote on the practicability of securing legislation, and not because I don't believe in the inherent justice of a larger amount?

MR. LOWELL: The same here.

THE CHAIRMAN: Frankly, the reason I voted the other way was that I believed it would be impossible to secure a law that way.

MR. BROWNE: To have a uniform law, you must have a lower rate.

MR. MCEWEN: I thought that was the reason why we are here. The idea of having uniform laws was to be able to mete out just a little more justice to labor, and here we are discussing the problem as if we represented but one State.

THE CHAIRMAN: Don't let us argue it, Mr. McEwen, let us explain our reasons.

MR. SCHUTZ: I object to having my reason so stated by Mr. McEwen. I claim that the three-hundred-week period is a tremendous improvement over existing conditions.

THE CHAIRMAN: That is your reason for voting for it. Now does anybody else want to record his reason? The next question is on the five-dollar minimum. As I understand, the substitute is that we now recommend a minimum of five dollars a week, irrespective of the wage the person is getting at the time. Shall we have a minimum of five dollars a week?

MR. BAILEY: I assume, in case of adults, not to exceed their existing wage.

THE CHAIRMAN: Then do I understand your committee has agreed upon the minimum of five dollars a week?

MR. SAUNDERS: I don't know whether Mr. Winans agrees to that.

MR. WINANS: Yes, I agree.

THE CHAIRMAN: Then this is a unanimous report. I would like to take the employer's side on that thing now. I do not think that minimum,—while I am in favor of a minimum of five dollars a week, it ought not to be more than sixty-six and two-thirds per cent. of the wages the person is earning at the time. A girl working for five dollars a week is going to malinger. Wherever they can get more by being hurt in Europe, that is by being sick, they stay out as long as they can.

MR. GILLETTE: Would the words "but in no case to exceed sixty-six and two-thirds per cent. of the wages" fit the case?

THE CHAIRMAN: May I make a suggestion there? I think, up to the limit you put, you had better put them all on an equality of the percentage which you give them. You can put it sixty-six and two-thirds up to seven dollars a week, and above that fifty

per cent. of the ten dollars. It is hard to reckon. It puts them all on an equality. The other way, if a man is getting thirteen dollars a week and another man getting four dollars a week, you are not putting them on the same basis relatively, and you must adopt some reasonable classification in every instance, it seems to me. Now you are not putting it on a percentage of the basis as it is standing, and your limit of time does not accord with your theory here, and your limit of amount does not accord with it.

MR. WIGMORE: How would you phrase it?

THE CHAIRMAN: I would simply suggest that the principle be covered that we give sixty-six and two-thirds per cent. of all the wages up to seven fifty a week, which would be five dollars a week, if you had seven fifty, and above seven fifty you give fifty per cent. up to ten dollars.

MR. NEILL: Would not a man earning seven dollars get more than a man earning eight and nine dollars?

THE CHAIRMAN: No, because he would get two-thirds of his seven fifty, and above that he would get half of it. That puts them all on an equality.

The question was called for.

MR. GILLETTE: That is a better proposition.

THE CHAIRMAN: Will somebody move that as an amendment?

MR. SAUNDERS: I will move that.

The motion was seconded.

THE CHAIRMAN: All in favor of that as amended—

MR. ALEXANDER: Does that clear away our previous vote on fifty per cent., if you put it that way?

THE CHAIRMAN: My notion is that you ought to limit the whole thing that way, when you get around to it.

MR. ALEXANDER: Can we take a position now that is contrary to all the votes we took before?

THE CHAIRMAN: We are all here. If nobody objects to it.

MR. GILLETTE: By general consent, wipe out that other motion. We want to get along.

THE CHAIRMAN: All in favor of the amendment as stated by me, let it be known by saying aye.

The motion unanimously prevailed.

THE CHAIRMAN: Now all in favor of the question as amended, let it be known by saying aye.

The motion unanimously prevailed.

MR. SCHUTZ: Can that be stated once more?

THE CHAIRMAN: The minimum is sixty-six and two-thirds per cent. on all wages up to seven fifty, on the first seven fifty. Above seven fifty, fifty per cent. of the excess, until you reach ten dollars.

MR. SAUNDERS: There is one other question which, I think, Mr. Gillette and I agreed upon, which has not been brought up, and that is in regard to the minors.

MR. NEILL: Does this also wipe out your minimum of four dollars?

THE CHAIRMAN: Yes.

MR. SAUNDERS: The point under the total disability of the minor. I think Mr. Gillette agrees to this,—if he does not, he can so state,—that in case of a minor that is totally disabled, after he reaches the age of twenty-one, his compensation shall be based upon the average wage of a man working in that line of work; that is, that does not hold the minor down to fifty per cent. of what he was earning when he was injured, but, when he reaches twenty-one, it places him on the basis of fifty per cent. of the average wage in that line of work.

THE CHAIRMAN: Do you understand that question, gentlemen, as stated? That recommendation? I want to know if there is a dissent to it. I understand the proposition to be fifty—

MR. SAUNDERS: In case of a minor, his compensation shall be based upon fifty per cent. of his earning capacity at the time of the accident, until he reaches the age of twenty-one, and then it shall be increased to fifty per cent. of the earning capacity of the average man in similar employment.

THE CHAIRMAN: I think you ought to have that percentage the same as the percentage under the other that we just last passed, up to twenty-one, and increase it as you have indicated.

MR. SAUNDERS: I will agree to that.

A MEMBER: It seems to me there is one point left out in this other matter; that is, you take sixty-six and two-thirds per cent. up to seven dollars and a half and fifty per cent. of the balance up to ten dollars, and you only have there a proposition for a maximum of seven dollars and a half.

THE CHAIRMAN: No, no, until the fifty per cent. makes it up to ten dollars.

A MEMBER: That was not the way it was stated.

THE CHAIRMAN: That there is to be fifty per cent. of the excess above seven dollars and a half until you reach ten dollars. Now are you agreed that the same percentages shall be allowed the

minor until he reaches his majority, then that the classification be raised to accord with the employment of similar persons in the same trade, earning full pay? If so, are you ready for the question?

MR. DOTEN: Why cannot that be left as it is? Because these minors would naturally come under this low-wage group, and simply make the recommendation that, when they reach their majority, the wage on which their compensation shall be based shall be that of adults in that employment. Then you won't have to state over again that you are allowing the sixty-six and two-thirds per cent., because that would apply in any case.

THE CHAIRMAN: I think you are right about that in principle when you come to draw your law.

MR. MCEWEN: I have a modified view on that which I would like to express. I think probably it will be generally agreed to. This might be construed to mean the same thing, although I do not interpret it so. Of course there has got to be some machinery, some institution to raise this from time to time. We cannot leave that to the insurance companies. It has got to be left to the court. I believe that ought to be graduated. If the boy was an able-bodied boy, and suffered permanent disability, he ought to enjoy increased compensation, just as he would have enjoyed increased wages with his experience in a shop or a factory until it reaches his maximum.

THE CHAIRMAN: That is, you mean, if he had gone ahead in the regular channel, he would have been out of his apprenticeship instead of the ordinary limit of twenty-one?

MR. MCEWEN: Yes, we don't have the apprenticeship to-day that we used to have. Machinery has specialized the trades, and all it is necessary for a boy to do now is to serve a couple of years to become a tradesman. If he goes to work at the age of sixteen, at the age of eighteen or nineteen he is a full-fledged mechanic, and I want his compensation to increase just as his wage increases or would increase, were he able-bodied and working. I think that it is only fair.

MR. DOTEN: Mr. Chairman, cannot we bring that in in some way under our definition of average wages, what average means? We are basing all this upon average wages, and we should say that average wages are what the workman was obtaining previous to the time of his injury, except that in the case of minors it will be adjusted, as Mr. McEwen has said.

THE CHAIRMAN: I should like to submit to our friend Judge Holloway, and agree that he may feel otherwise if the case ever comes before him, the case as to whether or not it would be a more reasonable classification if we put in Mr. McEwen's suggestion than the arbitrary wage of maturity; that is, if it would not be better to say that the wage should change at the time the man would have gone out of his apprenticeship rather than at his majority? It might be twenty, it might be nineteen, it might be twenty-three.

A MEMBER: There may be no question of apprenticeship involved at all.

MR. ALEXANDER: You would have to define apprenticeship, because there is such a difference of conditions of apprenticeships.

MR. ROHR: I might cite one case that came under my personal observation a day or two before I left Cincinnati, where a man started in at sixteen, and where he worked the first year for seven dollars, the second year nine-eighty-six, the third year fourteen eighty, the fourth year eighteen ninety, and on the expiration of four years he gets twenty-eight dollars a week. That, I believe, will illustrate the point that Mr. McEwen wants to make.

THE CHAIRMAN: What line of business?

MR. ROHR: The printing business, by the way.

JUDGE HOLLOWAY: In my judgment it is going to become necessary for us to adopt definitions of a great many of these terms, if we ever expect to have uniformity in the construction of these laws, and in my judgment the suggestion of Mr. Doten covers this entirely.

THE CHAIRMAN: Then are you ready for the question, first on the amendment suggested by Mr. Doten, that we simply treat this matter of the minor as an exception to the general rule of the percentages, and after he becomes twenty-one—

MR. DOTEN: It is no exception to our rule of percentages, is it? It is only an exception to the definition of average wages.

MR. LOWELL: It is no exception to this clause at all, in other words.

THE CHAIRMAN: No, but you just add it as a modification of the other.

MR. DOTEN: Yes.

The question was then put, and the motion prevailed.

THE CHAIRMAN: I assume you vote the same on the original question. There does not seem to be any division.

MR. WINANS: I move the adoption of the minority report: "Payment of total disability and death to be made sixty per cent. of the earnings for a period of ten years; with a maximum allowance of six thousand dollars and a minimum of thirty-six hundred dollars."

THE CHAIRMAN: Suppose a man was drawing a wage where sixty per cent. of the wage would not amount to thirty-six hundred dollars. That might be possible in a good many places in the United States, where sixty per cent. of the wage would not amount to that; that is, fifty dollars a month. There are a good many wage-earners where with board even it would not amount to that.

MR. WINANS: I took that on the basis of six hundred dollars a year.

MR. NEILL: What is the proposition?

THE CHAIRMAN: The question now, as I understand, is whether or not you shall put a minimum limit for death at thirty-six hundred dollars and maximum five thousand dollars. I suppose that means sixty per cent. Suppose a man dies at the end of two or three years, what are you going to do?

MR. WINANS: Why, Mr. Chairman and gentlemen, as I understand it, our action yesterday left it open for this to be paid either in a lump sum or in an instalment, and I understand in case of payment of total disablement and death that he is going to get this sum.

THE CHAIRMAN: I didn't understand we left the lump sum open, except in the discretion of the court on a proper showing.

All right, we will put this question as it is. All in favor of the motion, let it be known by saying aye. All opposed, let it be known by saying no.

The motion was lost.

MR. NEILL: In regard to the question of the lowness of this average. I think we are making this mistake in this discussion: we are assuming that you can put a man and his family back in the position after the accident in which he was before. We cannot do that, and it is no use trying. The average man to-day, even if he has pretty good earnings, does not carry three thousand dollars life insurance. We have got to assume that, if accidents are going to happen and, if families are going to be left in more or

less disaster or distress, all we can do is to relieve some part of that. We cannot reconstruct the whole scheme of things,—try to keep every family as they were before the misfortune. All we can consider is to in some way minimize that distress and leave them in some kind of fair condition. It seems to me that we might consider this, for example. We are making a hard-and-fast rule to pay certain amounts to families, the idea being to help the situation. There is a very great difference between a family left with four or five children, all under seven years old, and one with the oldest boy sixteen and no children under twelve. Could we not adopt some rule whereby, if you have a high maximum, that high maximum should not apply in case where dependency was sure to end soon or where there were few children? We have to assume this normally, that in the course of time the parents would be taken care of by the children, and a woman left with five children, the eldest of them seven years old, should be better taken care of than a woman with several children the eldest sixteen. We assume here as a practical proposition that all we can do is to remove some of the extreme hardships. We cannot remove all the hardship that is going to take place in case of death.

Mr. McEwen: My theory of this whole matter has been that the compensation in case of fatal accidents should only be paid to the dependants during the time of their dependency. I coincide entirely with the opinions expressed by Commissioner Neill on that.

Mr. Gillette: I am pretty well in sympathy with what Mr. Neill has said.

The Chairman: I believe there is no question before the house, but I don't want to be technical about it.

Mr. Gillette: It is in line with just what has been suggested, and that is that the provision of the French law,—and the French law, by the way, I do not believe any of us have paid half as much attention to that as we ought to,—as a matter of fact, with the exception of the doctor question, we found less complaint among the French people than almost anywhere.

Mr. McEwen: You did among the insurance people. Among the laborers I found they thought the compensations were exceedingly low.

The Chairman: Let me interrupt you a moment. I find, Mr. Gillette, you have a clause in this report that you and Mr.

Saunders made that on a proper motion to bring up will raise that very question,—on partial dependency.

MR. GILLETTE: That is not just exactly what I am trying to bring up. Just let me read this one clause from the French law. I will read it just as I have it:—

"In case death follows accident, compensation is paid under the following conditions:—

"(1) The surviving widow or widower receives an annuity equal to twenty per cent. of the annual wages of the deceased victim, provided he or she was neither divorced nor otherwise legally separated from the deceased. This annuity continues during life or until the beneficiary remarries. In case of remarriage a final lump-sum payment equal to three times the annuity is made.

"(2) The children of the deceased victim who are under sixteen years of age, including illegitimate children recognized by the victim before the accident, receive: (*a*) in case one parent survives, an allowance equal to fifteen per cent. of the annual wages of the deceased if there is but one such child, twenty-five per cent. if there are two, thirty-five per cent. if there are three, and forty per cent. if there are more than three such surviving children; (*b*) in case both parents are dead, an annual allowance equal to twenty per cent. of the annual wages of the deceased victim for each child, provided that all the surviving children shall not receive more than sixty per cent. between them.

"(3) Each ascendant and each descendant under sixteen years of age who was dependent upon the victim at the time of his death, if no wife or husband and no children survive, receives an allowance equal to ten per cent. of the annual wages of the deceased, the total in no case to exceed thirty per cent. of such wages."

If the annual wages of the deceased exceeded twenty-four hundred francs ($463.20), of the excess over that amount only one-fourth is considered in computing the above pensions.

MR. DOTEN: If there is no motion before the committee, I move you to recommit this section to the committee for report after lunch, and I do it for this reason, that there is no provision in their report in regard to the definition of average wages that we have already suggested here, that that should contain the question of minors, and should contain the further question of what should be done in case wages are paid in part, in kind, or in board,

or so on. There is quite a bit of detail in connection with that question, which is the basis of our whole compensation scheme.

The motion was seconded.

THE CHAIRMAN: You have heard the motion which is made and seconded to recommit.

MR. GILLETTE: Recommit what matters?

THE CHAIRMAN: The matters stated by Mr. Doten to this committee for report at two o'clock. Now will you read what the motion was?

MR. SAUNDERS: I hope this won't be done. The matters Mr. Doten suggested are all matters of detail which each Commission has to thresh out for itself when they draft the law. This committee's report is only a majority report, anyway, and I don't believe we could get any further if we threshed it over through the lunch hour.

MR. DOTEN: I hate to differ with a member of my Commission, but it seems to me we ought to have somewhere in the report of this meeting a definite decision on this question of minors. We have not put it in yet.

MR. SAUNDERS: We have it in the record.

THE CHAIRMAN: Let me make this suggestion, Mr. Doten. I have had in mind all the time that, if we could agree here substantially on the different principles that are to be covered by these laws and upon the general theory of the law, we can then appoint a committee, consisting of some of those outside lawyers like Judge Sanborn and Judge Holloway and Mr. Wigmore, to get together and draft a law which they will recommend to all the Commissions, and do it within the next two weeks or ten days after they get this report, and I think that will eliminate a lot of these details. Now that is not before the Commission now. I simply make that as a suggestion.

MR. DOTEN: There are a number of questions here which we ought to have the combined wisdom of the members present on. One question, for instance, is the seasonal occupations, how they shall be treated on the question of determining the average wage. There are a number of very important questions in connection with this particular one of average wage which, it seems to me, might well be considered at this meeting.

THE CHAIRMAN: That has been voted upon. I shall have to rule, I think, in the question before.

MR. ROHR: My understanding was that it was the average

wage for duration of employment. If he was employed for eight months, it would be his average wage for eight months.

THE CHAIRMAN: All in favor of the motion let it be known by saying aye.

The motion was lost.

MR. GILLETTE: We have taken no action, then, on the question of permanent total disability and death limit.

MR. SAUNDERS: We have acted on permanent total disability. Now we come up to the death:—

"In case of death resulting from the injury, the employer shall pay the dependants of the employee, wholly dependent on his earnings for their support at the time of the accident, one-half of the average weekly wages of the deceased, but not more than ten dollars nor less than five dollars a week, for a period of three hundred weeks from the date of the accident, together with the cost of medical attendance and funeral expenses not exceeding one hundred dollars."

Then we follow after with partially dependent.

THE CHAIRMAN: I suppose we had better take up the first section. Will you state the principle in plain English as to what you want to cover?

MR. SAUNDERS: The wholly dependent is based upon fifty per cent. of the earning wages, with not more than ten dollars a week nor less than five dollars a week for a period of three hundred weeks. Practically the same as we have decided on the total disability.

THE CHAIRMAN: I suppose you have a qualification in there of sixty-six and two-thirds.

MR. SAUNDERS: Yes, I think Mr. Gillette and I would accept that. It would be exactly the same as the total disability.

MR. NEILL: Is that payment for death?

MR. SAUNDERS: Yes.

MR. NEILL: Read that again, please.

MR. SAUNDERS: Just what we voted for the total disability, sixty-six and two-thirds per cent. on the first seven fifty and fifty per cent. on the balance of wage, not exceeding ten dollars a week for three hundred weeks.

MR. GILLETTE: Now, Mr. Chairman, I want to add what they added before. On thinking the matter over, it is most unscientific and it is most unfair. What I mean by it is this. Now first, just to illustrate, I don't know how it would figure out as a

matter of mathematical computation, but I will say this, that you could probably add one year to the total length of time for which you would pay fifty per cent. of wages by limiting it as in the French law,—if there is only one child, you pay so much, two children so much, and three or four children so much, up to that percentage. In other words, you can take that money away from the family where there is only one child left and add it on to the length of time where you are going to pay compensation in case of death or total disability without costing any more money, and it does the family infinitely more good.

THE CHAIRMAN: Are you ready for the question? All in favor make it known by saying aye.

The motion was lost.

MR. GILLETTE: I am going to vote against that, as it is drawn, because I don't think it is quite right.

THE CHAIRMAN: Mr. Gillette dissents from his own report. I think he is entitled to do that.

MR. GILLETTE: I do because I want to see the best use made of the money.

THE CHAIRMAN: The minority report has been defeated and the majority report taken back and partially defeated, as I view it. Now what will you have on the question?

MR. SMITH: I move the whole matter be referred back to the committee.

THE CHAIRMAN: To determine the amount for death?

MR. SMITH: Yes.

THE CHAIRMAN: Do you want to refer back to that unfinished part?

MR. MCEWEN: Mr. Chairman, there are a lot of new views which have been advanced since we acted upon that, and possibly there has been a way opened by which we can all get together on the question of permanent disability and death.

MR. BAILEY: Permanent disability and death. That is the only question left unsettled.

MR. BOYLE: I wish to call attention to the fact we have not said a word about medical attendance.

THE CHAIRMAN: That comes in under another part of the report.

MR. BAILEY: It is right in the thing that was read, and we voted on it.

THE CHAIRMAN: We are taking it up by sections.

MR. BAILEY: I didn't want that referred back again without saying something on it.

THE CHAIRMAN: A suggestion has been made that we refer to the committee the permanent disability and death, also to report back and see if they cannot agree on it by two o'clock.

THE CHAIRMAN: All in favor of that motion will say aye.

The motion prevailed.

THE CHAIRMAN: Gentlemen, take it and let us hear from you.

A MEMBER: We have not touched on the medical question. It has not been referred to the committee. There are only two questions before the committee. Certainty in defining liability, we have got rid of that. Now certainty in defining disability, that is just as important.

THE CHAIRMAN: The committee still has in its report the question as to what shall be done in case of death for hospital bills and doctor bills, but we have not taken that up yet. We will take it up now. Read your provision, Mr. Saunders.

MR. SAUNDERS: There is added to this, in case of death the maximum, "together with the costs of medical attendance and funeral expenses, not exceeding one hundred dollars."

THE CHAIRMAN: Are you ready for that question?

MR. BAILEY: His motion is that that be adopted.

THE CHAIRMAN: Treat it as so.

MR. BAILEY: I want to inquire whether that is meant to be continued absolutely in case of death or whether we are talking now about some medical attendance during the two weeks of first injury. I assume now you are talking about the last sickness.

THE CHAIRMAN: The motion does not limit it to the last sickness, as I understand it.

MR. SAUNDERS: The motion limits it to cases of death because your committee did not have before it the question of temporary disability. Therefore, they did not feel like dealing with the doctor question on either temporary or total disability, but we did have a death proposition before us, and dealt with it there.

A MEMBER: When do we discuss the medical question?

THE CHAIRMAN: The medical question has a good many different phases. It is the question now for medical attendance and hospital bills for the last sickness, what will you do with it?

A MEMBER: I move we discuss it as a whole without limiting it.

The motion was seconded.

MR. SAUNDERS: As a substitute then, if I can substitute some-

thing for my previous motion, I move you that in every case the employer shall provide medical attendance for his injured employees not to exceed one hundred dollars.

THE CHAIRMAN: Then you accept it as an amendment for the motion. Are you all ready to vote on that question?

MR. BAILEY: That question, I understand, involves the merits of the medical question.

THE CHAIRMAN: Not the selection of the doctors, but the cost question.

MR. BAILEY: It has been suggested in England, in this paper of Mr. Hill's that was read in August, that the English act was defective because it did nothing to cure the workman, simply provided for dependence and the family, and gave him some money, but it did not do anything to hasten his recovery nor get him back to work, and that was a defect in the English law. That rather appealed to me as sound, and I understand we are now talking about something to cure that defect, and the idea is that the workman shall be encouraged. He is encouraged in various ways, of course, we know, to get first aid. Take a place like the one at Beverly. The United States Shoe Machinery Company have a plant, and I presume it is true in other large places, where there is medical attendance furnished by the employer free. When a man gets his hand hurt, he goes in and gets good treatment for it. This is somewhat similar that we should do, something not only to relieve the distress, but make the distress as small as possible. I believe it should be done. As to a limit, I think you must have a limit, but I think we should do something, if we can, in that direction.

MR. CHANEY: I am very much interested in this question of medical attendance. I have been over probably five hundred different plants engaged in manufacturing in the last three years, and have taken a special note of the provisions which are made with reference to the care of the injured employee, and it appeals to me very strongly that, in framing these compensation acts, the existing situation should be taken account of and made the most of. Here is already a very large provision for the benefit of the injured workman, and to draw your laws without taking those into account and making the most of them would be very likely to discourage that phase of the compensation movement, so that, when these laws are being framed, facts with regard to what employers are already doing ought to be taken into account,

and ought to be, it seems to me, incorporated in the law itself. I simply speak of this to emphasize the fact that we have already in operation a very important compensation scheme in this matter of medical attendance, and it does seem that it ought to be worked into the law in such a way that the thing that is now being done will articulate harmoniously with what you propose to do further.

JUDGE HOLLOWAY: Mr. Chairman, it seems to me, as I said yesterday two or three times, that the utmost we can hope to do here is to adopt principles, and, as the chairman suggested, some time or other either each separate Commission or the body as a whole will have to submit to a smaller body the drafting of a proposed measure. Now, in harmony with what Mr. Chaney has just said, the respective Commissions or a representative body of this Commission would take into consideration any existing law, then try to harmonize the measures we are to propose to our respective State Legislatures. Now, if we can adopt the principle that the employer shall compensate his injured employee, in addition to the provisions we have already made for furnishing free medical and hospital attendance and funeral expenses in case of death, it seems to me that is all we ought to attempt to do this morning without going into the details. In my judgment that is the most important feature of this work. If there is any time on earth when the injured employee needs help, it is right at that time. If he is badly injured, he must go to the hospital. He cannot afford to do it. The average employee does not have the funds to pay the hospital fees. If we cannot make this a charge upon and a risk of the business, then we might, in my judgment, as well disband. Now I suggest, and, if it is necessary to get the matter before the house, I will move you that we adopt the principle that the employer shall furnish free medical and hospital attendance and funeral expenses in case of death. The limit will have to be worked out.

THE CHAIRMAN: That is covered by the previous motion, that in every case the employer shall provide medical attendance for his injured employee with the limit left out.

MR. BOYD: I move to amend that by saying "during disability."

THE CHAIRMAN: I suppose you all accept that amendment, wouldn't you?

MR. GILLETTE: No.

THE CHAIRMAN: All right. Is it seconded?

The motion was seconded.

MR. GILLETTE: Let me call attention to the distinction. One place there is no limit upon the cost of medical and surgical attendance. That must be limited. I think what we ought to do is to carry medical and surgical and hospital attendance to an amount not to exceed one hundred dollars, and in case of death to an additional hundred dollars for funeral expenses.

THE CHAIRMAN: Do I understand you are moving that second amendment?

MR. GILLETTE: Yes, I am going to move that amendment, and that is that the employer be obliged to furnish free hospital and medical aid to an amount not exceeding one hundred dollars, and in case of death an additional one hundred dollars for funeral expenses.

MR. GILLETTE: If the death is instantaneous, there would be no doctor.

THE CHAIRMAN: Before we get too many amendments, I don't think there is anybody in this room ready to make a motion, and put it in form on this question of determining just what you want one way or the other. Let us leave it open, and discuss the general question for a little while.

MR. BOYD: I insist on a vote on the amendment.

THE CHAIRMAN: You are entitled to it on yours if you want it now. Mr. Gillette's did not have a second.

THE CHAIRMAN: The amendment is to limit the medical attendance to the period of disability. I mean the period that you pay for disability.

MR. GILLETTE: Sure, but it is not a limitation: it is an extension. It might be that you might be obliged to hire nurses and hospital service, that would go to work and equal the amount of your compensation.

THE CHAIRMAN: Well, Mr. Gillette, when we first started this motion, it was agreed, as I understood in the statement of the motion, that we would determine first the principle, and leave the limitations as to amount for discussion after we had discussed this. Now this other question raises the question of time.

MR. GILLETTE: It raises the question of time and amount.

MR. SMITH: Mr. Chairman, I think the whole question is out of order at this time for the reason that you say an employer shall pay for the cost of medical attendance, also for the funeral ex-

penses. Now you have not agreed at this time what kind of compensation fund you are going to have. You do not know whether the employer is going to pay it, whether the liability insurance company is going to pay it, or whether it is going to be paid by contribution from the employer and the employee, but here you say, ahead of all that, that the employer shall pay it. Now I know of a great many employers that the doctor would not trust, small employers—and some big employers. What we want to get at is something definite, safe, and sure, and, when we are working along the lines of a commission like this, we ought to be sure that what we say will be practicable, and not make any guess at anything before us just now. I think the whole question is a little out of order and a little ahead of questions that will come in a few minutes.

THE CHAIRMAN: I think the amendment is proper first, if you are ready to vote on it.

MR. GILLETTE: I shall have to oppose that very strenuously without limitation.

MR. MCEWEN: I am not so sure, Mr. President, that I want any injured workman subject during the entire period of his disability to the doctor chosen by the employer, nor to the hospital chosen by the employer, nor to the nurse chosen by the employer. I want to see the employee have something to say about that himself. I think you are opening up a question that has aggravated the situation considerably in the past.

THE CHAIRMAN: More than any other subject in Europe.

MR. MCEWEN: And in Minnesota considerably. My mind is not perfectly clear. I have no fixed opinion on that.

MR. GILLETTE: Don't you think, Mr. McEwen, you can fix it this way, that, if the employee wants it, he can have a doctor furnished by the company, and, if he wants to employ his own doctor, he can do it at his own expense?

MR. CHANEY: I don't see that the employer has control of the matter at all.

THE CHAIRMAN: The question is whether we shall put the limit on the time stated by Mr. Boyd's motion during the period for which disability is paid.

MR. CHANEY: Does the original motion involve the question of which doctor shall be used? I don't see that it does at all.

MR. SAUNDERS: The form of the motion does provide who shall choose the doctor. It says the employer "shall provide."

The wording is that in every case the employer shall provide medical attendance for his injured employee. Of course, if he provides it, he selects it.

MR. MCEWEN: My answer to Mr. Chaney would be that it would act this way: the employee would be obliged to accept the services of the surgeon furnished by the employer and the hospital provided by the employer.

MR. SCHUTZ: I move as a substitute for the motion before the house, that it is the sense of this Conference that medical attendance and funeral expenses in case of death be considered a part of the compensation to be furnished.

MR. WIGMORE: I second the motion.

THE CHAIRMAN: All who want to speak to that motion may do so.

MR. GILLETTE: You mean by that that it is to be deducted from the compensation?

MR. NEILL: May I suggest as an amendment there, "that, in addition to the compensation provided herein, the medical and surgical fees shall be borne by the same fund"? That is, if it is a joint fund, shall be assessed against the same fund as the compensation.

MR. SCHUTZ: I have no objection to that.

MR. SAUNDERS: I think there you are getting right into the doctor problem that has caused so much trouble abroad. The minute you say that a doctor's bill shall be paid out of a fund or by some one else than the man who employs him, you are getting into trouble. This is put in this form just for this reason: We believe it is for the advantage of the employer as well as the employee to see that the man injured is cured as quickly as possible and taken proper care of, but it is not of advantage to either party that some person shall be doctoring that man and some one besides the man who selected him shall be paying him. In the original motion it simply says that each concern shall do what the best concerns are now doing, providing for the doctor and for the medical attendance in the hospitals or elsewhere for their employees, if they want to take it. Now, if the employees don't want to take it and don't like the doctor and don't like the hospital, they can go where they want to and pay for it themselves. Now I think by this provision you get away from the doctor proposition which has troubled you abroad.

MR. NEILL: I agree thoroughly with that. We have got to

come to the doctor proposition sooner or later, and we might as well face it. There may be an objection to compelling a man to take a doctor selected by the company. On the other hand, it would be equally objectionable if the employee is allowed to get any doctor he wants, and compel the employer to pay any bill that the doctor chooses to send in. On the other hand, if you were going to have the employee contribute to a fund, you cannot then have the employer have the sole right to say who the doctor shall be. So, it seems to me, you have got to make some provision by which whatever mechanism controls this fund shall control the doctor, and, if the employee does not want to take that doctor, he can take any doctor he wants, and foot his own bills.

Mr. Gillette: I don't see why you need get into that question of this fund right now, because all the conclusions of this Conference will have to be codified, but the point where we differ is this: the curse of France to-day is the doctor's bill. The curse of it is that, while an employee selects any doctor he wants to, the employer has to pay for it. The result of it is that the young doctor is going to work to keep the fellow laid up just as long as he can so as to continue the compensation for the injured employee and at the same time continue his own compensation. You have got to put all the safeguards about it, and, in my opinion, the only safe way to do is that the employer shall furnish hospital and medical service; but, if the employee doesn't like that which is furnished him, he can go and employ anybody he wishes to, and pay for it.

Mr. McEwen: How long would you want to do that?

Mr. Gillette: I would want to put a limit on it. Cannot you see the dangers that arise under these laws? Suppose an employee says, "Well, now I need a doctor." He goes along, and he gets a doctor and a nurse there and a hospital, and he wants to lay up for an undue amount of time. Now place a limit on it, so that the total expense will not exceed one hundred dollars.

The Chairman: This amendment opens up the whole doctor question. As I suggested in the beginning, I thought you would have to come to it. Now, for instance, personally, when I was in Europe, that was one question that I paid more attention to than any other, and I have got here half a page of my conclusions on the situation over there that I wrote on the boat, coming over, while my mind was fresh. In the first place there were two

objections that were chronic in every country visited. The laborer objects to the employer's physician because he thinks there is the danger of being ordered out too soon, that is, before he is well, and because he fears that the evidence of the doctor will be prejudicial against him when he gets into court or before the court of arbitration. On the other hand, the employer objects to the laborer's physician, because he is often incompetent. Labor is not as well fitted to select a good professional man as the employer, as a rule. The physicians that employees get, the employer claims, are more inclined to cause malingering. That is terribly so in Paris, according to testimony. It seems to me that the laborer, if he was inclined to be crooked, would go to the physician who would keep him sick as long as he could, if he could select his physician, and the employer also says, when the laborer's physician comes into court, he is prejudiced in favor of the laborer. He cannot get his fees in many cases unless the laborer recovers something, and he can get his fees as long as the fellow needs treatment, and he will continue to keep him sick, and do everything he can to see that he gets a part of the wage.

Now it seems to me that there are two or three things that ought to be covered to meet those. In the first place, what the State, the employer, and the employee wants is, first, competent treatment. They want it immediately. They want the best that can be had, and they don't want to wait for somebody to quibble about it, or somebody who is not competent to select it in the beginning. The second is that, in case they have to go into court, the laborer is entitled to have fair and competent evidence in case there is a dispute, unprejudiced evidence, that is, evidence that is not in favor of one side or in favor of the other, but scientific evidence, and they are entitled to have a treatment that will prevent malingering and fairly determine the period of disability. Now it seemed to me that from the employer's standpoint, in thinking it over, these things might be considered as fairly good from his standpoint:—

A. That the average employer is more competent to judge a physician, that is, a good professional man, just as he is more competent to judge a good lawyer. He has had more experience in the world.

B. His interest is to have good treatment, the very best treatment he can get to his men, get them well as quickly as

possible. But he ought not to be allowed to let that physician, when he gets into court, testify as a medical man on expert testimony, colored by his interest, which he may have in the employer's employment, and that will happen in this case, as it happens in street railway cases. It happens in railroad cases. It happens in damage cases all over the country to-day, so much so that the doctors are considering the necessity of a neutral system.

C. If they can agree on a good physician or a selection of physicians in a town, that is, if the employer and employee can agree on a physician that can be called, that is the ideal system, it would seem to me. If they cannot agree, then for the question of evidence, whichever treats, whether it is the employer's doctor or the employee's doctor, that doctor ought to be compelled to make a diagnosis of his case, to immediately notify a doctor selected by the board of arbitrators or the State. Whichever you determine, let him take that diagnosis, see what that treatment is, be in position to give evidence any time he is called on, of a neutral nature. So, when you come into court, you get something that is not based on one side or the other. Neither the employee nor the employer ought to be permitted to pay that man except out of a common fund. He ought to be an expert witness for the State, and let the State pay him. So that neither the employee nor the employer shall have any rights over him, that is, in case there is a dispute. Now, if there is not any dispute, that is not necessary.

Now, from the standpoint of the laborer, the laborer wants his physician, if he can get him, and that is often quite an important matter with him, as he views it; but I have come to the conclusion that there is a good deal of sentiment in that. If he has a physician of his own, and if he can try his case, that physician ought to give the State's doctor an opportunity to examine and give evidence that would be of a neutral nature, so that we get as evidence one man in that controversy that is not paid by either party, that has not the interest of either party to maintain, but who will give us his expert judgment. And it seems to me that in the whole doctor question we would not have the trouble they had over there.

Mr. Wigmore: Cannot you frame your suggestion?

A Member: May I suggest, as the employer pays the cost of accidents, therefore the employer is entitled to know his medical facts? Consequently, I am thoroughly in sympathy with the

idea that prevents the employee from substituting his own doctor and refusing to allow the employer's doctor to see him. So I suggest that the first burden for the immediate attention—it is the immediate aid that we want—should be put upon the employer; that the employer should have the duty of having a medical examination made within a specified time immediately after the accident, and within six days he should furnish the copy of the report of his doctor to the injured man. Then, if the injured man has his own doctor to make an examination, and there is any clash, the injured man must notify his employer within six days. At the end of that period there must be a reference, if there is a dispute, to the State medical referee for a decision, with, of course, permission to these gentlemen to arrange in those cases where they cannot decide right off for a further examination on the same terms.

Mr. Browne: If the employee shall elect, the employee shall provide. If he does not elect, the expenses will be thrown on him.

The Chairman: If he is knocked senseless, what is he to do about election?

Mr. Browne: Then the employer must act.

Mr. Rohr: "The first two weeks shall not be paid for, but shall include medical and hospital attendance to be furnished by the employer, and, in case of death, funeral expenses not to exceed one hundred dollars."

Mr. Gillette: I will accept that. Give that in lieu of the first two weeks.

The question was then put, and the motion prevailed.

The Chairman: I understand that is a substitute for the whole proposition.

A Member: I beg to submit another proposition. This leaves the whole question of hospital treatment, after two weeks, open. That is useless for a man that is seriously injured.

The Chairman: He gets his compensation after that.

A Member: In other words, there is no hospital payment after two weeks.

The Chairman: That is right.

Mr. Dickson: I regret I shall have to leave the Conference this afternoon, and I want to offer one or two things to change the current of your thoughts for a moment. In the first place, I want to say that, when I received the invitation to this Con-

ference, I had no appreciation whatever of the work that was going to be done. My only regret is that I did not arrange by some means to have every member of the New Jersey Commission here, because I think it is going to be the most important conference that a man could hope to attend.

I want to have the opportunity first of offering a vote of thanks to the gentlemen from Massachusetts, who organized this conference.

THE CHAIRMAN: It will be taken as the unanimous sense of the meeting that the Massachusetts Commission is entitled to a vote of thanks for getting us together on this proposition.

MR. DICKSON: I want to emphasize one or two things we have already mentioned. Mr. Boyd, very early in our Conference, made this statement, that in any bills framed we must be careful not to remove the so-called common law defences, fellow-servant, assumption of risk, contributory negligence, without putting in their place some harbor of refuge, if you may so state, for the small employer. I think we ought to keep that very prominently in view. As a matter of justice, I think they ought to be removed, because I think they are antiquated; but, as practical men, we ought to see that we don't open up means of unfair discrimination, particularly against the small employer.

I am not a lawyer, and I speak with diffidence on that subject. My own conviction is that the final solution of this subject in America is going to come from compulsory State insurance.

I should like to offer a motion that before final adjournment the chairman appoint a committee, requesting them to frame a skeleton bill based on our conclusions. I offer that as a motion.

MR. ROHR: I second the motion.

The motion prevailed.

NUMBER 8. SHALL EMPLOYEES CONTRIBUTE TO THE FUND FOR CARRYING THIS EXPENSE?

MR. SMITH: I move you we answer that yes.

MR. ALEXANDER: I second the motion.

THE CHAIRMAN: Are there any remarks?

MR. SMITH: Mr. Chairman, it seems, in all the different lines of argument regarding the situation as it is in the different States throughout our country, that we all agree upon compensation. We go down the line very quietly until we come to the eighth

question, which is now before us, "Shall the employees pay?" That seems to be the parting. We take then different directions. Now some may have reasons for and against. I would like to hear it discussed thoroughly, and every man express his opinion why he thinks it should be this way or that. My reason for employees paying in part to the fund that will be created is that the main object and the great benefit to be derived from compensation is the prevention of accidents. How are we going to frame a bill that will prevent to the greatest degree accidents? That is the main question, in my opinion, before the Commissions of different States. I claim that, if the employee is a party to this fund, he will be more careful; although he may not like his fellow-man who is working alongside of him, but because he is a party to that fund and his money is in that fund, that he will say: "Here, Jones, pull away from there. You are going to get hurt." And because he knows that, if this fund decreases, his expense advances, it is a selfish proposition on his side, therefore he will try to prevent accidents, and that will be the greatest safeguard of all the machinery that is used in the industry,—the men themselves.

The next reason why he should be a party to this compensation fund is that from what I have learned between fifteen and twenty per cent. of the personal injuries have any cause for action in the courts. It is the eighty per cent., then, gentlemen, that we have to consider. We are going to make a law to take care of the eighty per cent., and the greatest number should always be considered. That is my belief. Now, that being the case, that we are going to compensate those that have no right for compensation, I feel that the American workman is honest, the American workman is fair, and the American workman is not a charitable party, nor does he require or ask any charity from you or from me, and he is always willing to pay his part and do his duty. But the arguments will be brought forth by some workingmen that the industry should pay it all, and then we come down to the industry. What is the industry? The industry, as we look at it, or I look at it, is something that is there where the employer derives an income from and where the employee derives an income from. Therefore, he is a part of the industry. When you come down to saying that, that the industry should stand it all, he is a part of the industry.

THE CHAIRMAN: Any one further want to be heard on that question?

MR. DICKSON: Will Mr. Smith state for all present what particular interest he represents?

MR. SMITH: I am in the horse-shoeing business. I represent the employers in this.

THE CHAIRMAN: Any one else want to be heard on this?

MR. BOYD: We all realize, of course, when we get a compensation whereby fifty per cent. of the weekly wages, or sixty per cent., or two-thirds of the wages is going to be paid as compensation, somebody is bearing the other fifty per cent., the other forty per cent., or the other one-third. The laboring man and the dependants of the laboring man are certainly bearing that burden. Now, under the German scheme, where they have sick insurance covering a short period, thirteen weeks, after that sickness is an accident, or, as Bismarck formed the proposition, it is required that the employer pay all compensation. And, to speak broadly, the theory on which the statesman Bismarck put in the sick insurance was largely because the workingmen were already organized in sick associations, and it is not the point of a statesman to tear down anything that is the natural evolution of society. He also took this point, that he would preserve those associations, and in connection with them they sought to get the co-operation of the workingmen to that limited extent,—prevention of accidents and reducing the amount of sickness for a short period over which he had more control than the employer. Now, as has been said by the gentleman from Montana, we are trying to settle fundamental principles, if possible, on which we can agree throughout the largest majority of the States which have Commissions. If we do not require the employee to contribute, say, to an accident insurance which begins when? It doesn't begin at the beginning: it begins after two weeks, according to the rules we have laid down. Who is shouldering the two weeks? The employee, certainly, is shouldering two weeks. Now, as we have formulated this plan, it would be exceedingly unjust to put in a requirement that the employee should contribute anything, if we are going to recommend only an accident insurance, leaving out old age, leaving out sick insurance, leaving out occupational diseases, or a later action. Now the sole theory on which Bismarck put these propositions through in Germany—and I want to impress upon the minds of some of the gentlemen

here that there is not a scheme suggested, there is not a scheme in existence, of compensation which is not taken bodily from Bismarck's proposition. It is true that England does not make it compulsory on the employer to insure against his accidents, but that is simply an omission from the German provision. It does not require him to insure. He may insure.

Then you come to the question of pauperism. Why do you tax B to support A? Why did Bismarck limit the clause to those that earn three thousand marks or less? On the theory that you had again reached a point in civilization where you required interference on the part of the State, not on constitutional grounds, but on the same grounds you instituted compulsory education, the same ground you tax B to support A, and solely on those grounds under which we would call police power, and he limited it to a class for the same reason that those who earned more than three thousand marks were able to, and the State did not have to. How can a man in the United States insure himself if he earns only two dollars a day? He cannot buy insurance, and the State does not furnish any means. He cannot buy it, and that is the sole grounds for the insurance act. I shall vote against the motion.

Judge Holloway: I want to say a word in supplement of what has just been said. As I understand the motion, it is now that the employee shall contribute. If that is the motion, I am opposed to it. I did not suppose that that question would arise, but, as has just been said, during the first two weeks the injured employee bears all the loss. During the period of his disability he is bearing either one-third or one-half of the loss.

But there is another consideration. The manufacturer just simply shoves off his proportion on to the good people who buy his product, and he does not lose anything. But who is the laboring man going to put his off on to? He has not anybody. He has to bear his part, if you put any part on to him. But the manufacturer can make his additional risk or cost an incident of the business, and add it on to the cost of production. They take those things into consideration to-day, don't they? Every large manufacturing or mining industry keeps its legal department, and as an item of the cost of its product, whatever it may be,—whether it is raw copper or finished shoes,—the expense of maintaining the legal department, the expense of paying judgments on personal injury actions, enters as a part of the cost of

the copper or the shoes. And, if you add on a little more to the employer's liability, he will simply add a little more on as the cost of his product, and eventually he can escape liability for any part of it. But the employee cannot, and it does seem to me that, in the proportion that we have allowed and ratified, we have imposed upon the workingman about all he is able to stand.

Mr. Rohr: While I do not care to go into a lengthy debate on this question, I do have three or four principles that are fundamental, and I wish to register them. I am opposed to compelling employees to contribute: first, because he contributes when he is injured; secondly, he again contributes by possibly total or permanent or temporary injury; third, the employee again contributes when he or his family purchases these goods which he has had a part in producing; fourth, that society, as a whole, should bear the cost, even to the extent of the State bearing the cost of administration.

In answer to what Mr. Smith said in regard to any working man or woman being opposed to contributing to such fund, I wish to state I have a speaking acquaintance with some twenty-eight thousand men and women of Cincinnati, and a larger one over the State, whom I have conversed with either personally or through their representatives, and with one accord they are of the opinion that it will be one of the greatest incentives on the part of the employer to reduce accidents to a minimum if the burden is borne by the product. He will be very careful to see that all means of protecting life and limb will be put into effect. I am entirely opposed to the motion.

Mr. Lowell: Mr. Chairman, I shall not take your time long. I do not believe in contribution. I shall vote no on this, and there are one or two things that have not been touched on yet. I will speak first to the question of detail in this thing, which, in the practical working out, is really a serious question. How are you going to provide for the payment of the employees of this contribution? Now that has been a serious thing in Germany. They have to cancel stamps, and they have to do all sorts of administrative details which are a great nuisance. There is a great deal of shifting of employment, and while, of course, it is better to have the employees, as a body of a large factory, a pretty permanent force, still it is not fair on the employee to bind him so closely to that one factory that he cannot change. He ought to be able to change.

There is a class of labor which is known in England as casual labor. It is principally, in Boston at any rate, the 'longshoremen. How are you going to provide for contribution? How can you do it? The 'longshoreman there in Boston works for maybe one day for one man and another day for another man and a third day for another man. I don't see how you can provide for that system. If you can provide for it, there is a very serious matter of detail. So that it seems to me that, if you decide for contribution, you must consider very carefully whether the whole thing is not more than set off by the difficulty in carrying it into effect.

Now here is another point which a gentleman from Germany brought out to us. He is the head of the "Mutual Association among the Owners of Vessels engaged in Various Kinds of Transportation by Sea." He advises very strongly against contribution from the employers' standpoint, for this reason: he says that you cannot make the contribution enough so that a slight reduction in the amount which the wage-earner will have to contribute will amount to anything for him. He named various instances, but probably, brought down to American conditions, it would be that if you reduced the total cost of this thing on the employer, if by a very careful supervision, and so forth, you reduced the total cost on the employer, you would only reduce the amount of the workingman's contribution by, say, two cents a week. It would work out something very small, and he says that is not enough, in his opinion, to bring in the factor. If the employer contributes, it is up to him to see that accidents do not occur.

Then this is his main point. He says that, in his opinion, your contribution by the workingmen will, in a short time, relatively to the length of time your law goes into operation, be made up by a raise in wages, and that he is very strong on. He says, if you make the employees contribute ten per cent., that in five years, say, or whatever it may be, the wages will rise ten per cent. simply to cover that. Then you have got the situation of the employer really paying the whole thing, and in the mean while for the future you have all the disadvantages and no offsets, as it seems to me, of the system. Then what I hope to see in the future of this thing is this, and I have voted all through, and I shall vote whenever it comes up again, for fifty per cent. contribution, the idea being that by fifty per cent. contribution you are splitting it in half, because the fifty per cent. from the

employee is contributed by the pain and suffering and by the fifty per cent. reduction in wages. That is my idea of the employee's contribution. Now what I want to see in the final outcome of this thing, is this: I want to see this law go in. It has got to be a first step, anyway: we all realize this. I want to see in future a contribution by the employees, and have the whole thing covered from the day of the accident. Have also accidents outside of the factory covered. I mean accidents on the street, for which the employer cannot be responsible. Then possibly, if it works out so, have the amount of percentage larger, and I think, it seems to me that there is a chance of working that system. It seems to me that it is a good answer, a good legislative answer, if you come to that,—I have been in the Massachusetts Legislature, I am not there now, but I was there for three years,—it seems to me a good legislative answer when they come in, as of course they will come in, everybody knows that, wanting a larger maximum, to say, "If you will contribute, we will frame the law so it covers not only accidents in the plant, but accidents outside, and a certain amount of sickness not due to accidents at all, and possibly a larger contribution or a longer extension of the period," something of that sort. It seems to me that we should not put in the contribution in the first law of this kind for the several reasons which I have already stated.

MR. SCHUTZ: I quite agree with the last speaker that, certainly at the outset, it would be very unwise to have a contribution on the part of the employees. I do think that some form of sick insurance must follow as a correlative to this plan of accident insurance, and we are perfectly justified in stating that, in addition to the contribution which the employee makes through pain and suffering, he will be expected as a correlative to this present plan to contribute to a sick insurance which will benefit him and at the same time benefit the industry. So I am opposed to the contribution on the part of the employee in any system of accident insurance.

MR. BAILEY: Just a single word. I started out believing that there should be a contribution by the workmen, but, since I have thought it all over, I have come around to the other way strongly, and for one reason which has not been stated yet, namely, this: in nine cases out of ten, as I understand it, the employers take care of themselves by employers' liability insurance. The workingman cannot do that to the same extent, and for that reason,

also, I think that the workingmen should not be called upon to contribute.

Mr. McEwen: Just one word. I agree with most that has been said, and I recognize that we are all hungry; but I do not want this opportunity to go by without expressing my views on the subject. I want to do the right thing. Labor wants to escape from no burden it ought to bear in this matter. I do not want to commit one bit of injury to industry, because I recognize, if we penalize industry in any way, we are helping "kill the goose that lays the golden egg," and I realize in the past few years we are coming to look upon the human side more than we have in the past. That is evident by the expression of such men as Mr. Dickson and Mr. Gillette and Mr. Smith here to-day, and others at other meetings of this kind. The ground has been covered, and it has been said that the consumer pays the present cost, and will continue to pay the additional cost that the industry will be obliged to bear because of this new burden. On the other hand, if labor is asked to contribute to this measure of compensation that we suggest here to-day, in addition to that, it will be obliged to bear fifty per cent. of loss in wages up to six years, and then all the loss after that,—the pain, the loss of pleasure from pain, and a multiplicity of things. Now, supposing labor was obliged to contribute, to what fund would it contribute? If it is to be accident insurance, conducted by an accident company, complicated by proof, what voice would labor have in the distribution of this fund? I have stated quite frequently about the community of which I have some knowledge in Northern Minnesota. The Steel Corporation has a club fund up there outside of the employers' liability scheme. Each laborer in the mines contributes seventy-five cents a month to a fund. They organize a society there, and some relief committee dispenses the fund, rather in equity. There is no complaint about how that fund is paid. Now recently there has been organized by the Ocean Company, I think, a scheme of workingman's collective insurance. The workingman pays his seventy-five cents a month to the company, and the company turns it over to this insurance company, and a cold-blooded claim agent settles the amount with an ignorant man unacquainted with business conditions and not in any way his equal in adjusting a claim. As the result of that, there are endless complications, and then there is this feeling, too. This work is mostly of a migratory kind, a seasonable kind. A

man may work for a period of time in the mines, and another period of time in the harvest fields, and another period of time on railroad construction work. I talked personally with one man who contributed to three funds in one month, seventy-five cents to the workingman's fund in one mining company, and worked there about ten days, and then contributed seventy-five cents to another company, and worked there about seven days, and contributed seventy-five cents to the third company, all in one month. In addition to that, he is obliged to pay a dollar a month for hospital service, and I have not noticed any increase in wages arising from this contribution. Now it has been said by Mr. Smith that the workingman does not want charity. I say no, he does not; but he feels that it is a debt industry owes to him for the risk he takes. The wages are not considered. The amount of wages are not considered for the risk. Really, the man who does the most work to-day gets the least wages. Dr. Zacher said labor was responsible for about twenty-nine per cent. of the accidents. These are due to the negligence of the employee. Now I don't believe that. I don't believe it is really negligence so much as momentary forgetfulness. Familiarity breeds contempt. A man moves about hazardous machinery, wants to keep pace with the movement of the machinery. The result is he takes chances to increase the output, and he ought not to be called upon to bear the burden simply because it is called negligence.

You say, "Well, the laborer, if he contributes some, will be interested in seeing that his fellows do not contribute to the accidents." In the first place, you want to remember that labor has nothing whatever to say about who his fellow-employee shall be, whether he shall be competent or incompetent, whether he shall receive a low or a high wage. I noticed in my study of this thing, dealing right with the men who are hurt, considering nine thousand seven hundred and thirty-two accidents which happened in Minnesota from July 1, 1909, to July 1, 1910, that in the hazardous industries the accidents which occur most frequently are to men that have been in the employ of the company but a short time. I think that the record of the Oliver Mining Company in Minnesota will show that, and that a very large portion of the accidents occurred to the men the last half-hour in the morning and the last half-hour in the evening, when they are tired; and taking the whole matter into consideration,

with the small amount of compensation awarded, with burdens that labor must through the risk of an industry be called upon to bear, I think it is asking too much of labor to ask it to contribute at this time. I have this to say about the proposition made by Mr. Lowell, that, if labor is to be compensated for all accidents, whether they occur at the man's work or going to it or from it, probably labor should contribute, and we might build up a system of paternalism that will include sickness, accident, and old age pensions. That may come with the development of time. But at present I don't think you are offering enough to call upon labor to make a financial contribution.

MR. ALEXANDER: I move we adjourn until an hour from now, and then continue the discussion of this very important matter.

The motion prevailed, and accordingly the Conference took a recess until 2.15 P.M.

Fourth Session, Friday, November 11, 1910, 2.15 P.M.

The fourth session of the Conference was called to order at 2.15 P.M. by Chairman Mercer.

THE CHAIRMAN: Gentlemen, we have under discussion the question of whether the employee shall contribute towards the expenses of carrying this liability.

MR. ALEXANDER: Is it your pleasure now, Mr. Chairman, to read this communication?

THE CHAIRMAN: There is a communication which, if there is no objection, I will read, from August Belmont.*

The question we had under discussion was the question of contribution from employees. Who wants to be heard on it?

MR. HOWARD: As representing the small manufacturer, I believe it is in the interest of manufacturers, as well as the employees, to have no contribution made by the employees. I do not believe that contribution by employees will have any deterrent effect upon the number of accidents. In fact, I do not believe that a man thinks when he is doing a dangerous occupation of how much compensation he is going to receive if he gets hurt. He does a dangerous thing which is unnecessary because he thinks he will not get hurt and because it saves time or trouble. The best way, in my opinion, to prevent accidents is to put the burden on the employer. If the burden is on the employer, he will make more stringent rules and see that his employees live up to them.

Another objection to contribution by employees, which has already been made, is that it furnishes at once an argument for increase of wages, and it does not stop there. You give the increase of wages, and then it drifts along for a few years and the men are still having this taken out of their pay, and they forget in a very short time that there was one increase made to cover that contribution, and they will say the cost of living and all that sort of thing has gone up since then, and in this way it seems to me that the tax which is taken out of the employee's wage is a continuing source of irritation that will last just as long as that tax lasts, and will always give an excuse for increase of wages and for dissatisfaction. On the other hand, if the employer pays the whole of it, it gives him a good argument for not increasing wages,

*Appendix "C."

because he can then say justly that this State law has obliged him to make a very large contribution which he had not made before and which ought to be considered in any future wage increase, and that is a continuing argument which he always has, so that from the selfish interests of the employer I think that he should pay the whole cost.

Regarding Mr. Smith's fear that the compensation would be increased to an enormous expense, that it might start at three thousand dollars, the next legislature make it ten thousand dollars, and the next one twenty thousand dollars, it seems to me that by adopting the principle of making no lump-sum payments that we have taken the sting out of that. I do not think that you can conceive of any Legislature making the weekly payments as high as the wage would have been if the man had not been injured. In other words, as Commissioner Neill said, the employee has got to bear a portion of the damage resulting from the accident. You can never expect to put him in the same position he was before the accident, and no Legislature will ever agree to that. I do not think the unions would agree that a member who was not doing any work and who was not working hard day after day should receive just as much compensation as the other man who was working hard. So that the limit to which the compensation could be increased would never go beyond or never go up to one hundred per cent. of the wages. It is conceivable that sometimes it might go to seventy-five per cent., but it seems to me it would be almost absurd to think of it ever exceeding such a point. I think that covers all that I wish to say.

The Chairman: Has any one anything further to say on this question? Gentlemen, I should feel like agreeing with all of you that, if the laborer stands half of the loss from the standpoint of wages, it is not quite right to him to put anything else on to him, especially if he stands the first two weeks. But I should hate worse than anything else that I have seen discussed here to see this Conference adopt a scheme which would limit it to half, limit it to two weeks, limit it to hospital bills of one hundred dollars, and then cut out the theory of letting the laborer contribute. I think it would be the worst possible thing that could happen from the standpoint of labor, because, when you do that, you must essentially cut out the strongest element that the laborer has in the remedy, if you are going to have anything in the way of a board of arbitration, and you leave substantially all the old

feeling as to the wrong, as to the trial of his case, if he has any trial growing out of it, as to the animosity, as to the place where the blame for the accident lies, and you won't accomplish what, in my judgment, is the greatest thing in this scheme, the best that can be done toward the matter of prevention. The compensation is rather for future matters and a secondary consideration. Unless your compensation is so adapted that it will automatically work as a preventive to accidents, you are going to lose, as it seems to me, more than half of the benefits you get out of this thing. It is far better that the men be not injured than that they be compensated after they are injured. So, if possible, let us put it in the position where it will be a motive on both sides to prevent injury. Now, I think, it is conceded by labor men generally that no man thinks he is going to be hurt himself. If he does, he is what is called in the language of the street, a "fraidy-cat." But every other fellow around him can see whether he is in a dangerous position. No man thinks an accident is going to happen to him if he takes the cap off an emery wheel. No man thinks he is going to fall in the river if he undertakes to jump from one girder to another when he is working on a bridge across the river, but he would object to another fellow doing it if he had any voice in it. The laboring man has a better opportunity to determine, when a man is injured, whether he is faking the injury. He has his associations, he knows the conditions, he can tell better and quicker and more accurately whether the men are faking or whether it is a legitimate injury. He has a better chance to put on safeguards than anybody else connected with the business, he has a better chance to know his fellow-employees are observing the rules of the shop; and a little bit of a contribution from him, say one-sixth of the charges, is going to mean so much more than it will to the employer that it will have a moral influence. But those are not the worst things. When you come to the question in Europe, I called on every prominent labor man I could. Every one I put the question to said, "No, we don't want to contribute," but every fellow, when I put it to him in this light, said, "Yes, make him contribute, if you give him a correspondingly increased wage if he is hurt. Instead of fifty, give him sixty, if he is hurt, and charge one-sixth of the carrying charges against him; and, in addition to that, make your arbitration committee composed of one laboring man and one business man and one neutral man." Now the difficulty in

Europe is not that question of payment so much as it is the question of how to determine the proposition after the injury occurs. You go into those countries like Norway and Sweden and those that have taken part of the German system and depend upon the employer to settle the controversy in the first instance, and who give them no voice nor any neutral party at first, but the party who must pay the compensation, and you have a man judging his own case. Now it won't do to put a labor man on this Commission, in my judgment, and have him so that there is absolutely no pay to come out of his fellow-workmen: he can make any judgment he wants on it, because any man, laborer or employer, going on this Commission, is bound to be a little bit prejudiced in his views. If you put him on the Commission, and say, "You shall have a voice in determining it, even though you are a little bit prejudiced in it, yet, if you vote so, part of it has to come out of yourselves or out of the wage fund which you create," he is going to have an impetus to balance him, just as the employer will. Then you put on your third member to reach an equitable conclusion. So it seems to me the very curse of several of those systems in Europe was that the insurance company or somebody else, without any other representative, says to the laborer: "We will give you so much. If you don't want to take that, you can go to the courts." One of the very worst things now in our system is that the insurance companies go to a man, and say: "Now we will give you so much. If you don't do it, your lawyer's fees are going to cost you so much, court fees so much. You cannot maintain your case. Here is a hundred dollars," shake it under his nose, and he takes it. Or, "Here is ten dollars," or "five hundred dollars." And over and over again I have known of those settlements being made, and you all have in your own respective States. You leave all the malice between the employer and employee, all the question of blame, all the hard feelings that will grow out of your accident, that you have now, if you do not put it in position where both sides must feel a little bit of responsibility, both must have a voice in the distribution of the fund, and both must feel, when the fund is administered, they have had a part in it, and it is their obligation, and they must use that fund when it reaches a point where it is fair to do it. And I should very much hate to see this Commission committed to the doctrine that no contributions should be made, but I am not willing from a personal point of view to say all men

should be limited to fifty per cent., and I have not been all the time. I think a man should have sixty instead of fifty per cent., if they are going to take it out of the wages. Then I think he should be represented on the board of arbitration. You cannot say to an employer, "You must be worth one hundred thousand dollars before you can engage in this business, in order to make the credit secure," but you can say to him he cannot take anything out of the workingman's wages unless he insures in a mutual organization that has proper assets and proper reserves to be regulated by the State, or in some other company that will carry out the full terms of this law. Then put an impetus on him: then you put him in position where the bank, when he goes to borrow his money, says: "Here, you have a risk here. Have you any insurance?" "No." "Then your credit is not good at this bank. You are liable to be wiped off the face of the earth." Then your unions will discriminate against the fellow that does not carry insurance in some form, if they think there is any question about his ability to do business. He can carry it a long time and carry it all over the whole industry. It seems to me it would be a very great mistake to put this in a position where it has all got to come from one side, and limit it to fifty per cent., when you can put it to sixty per cent. and let it come out that way, and give people the benefit of representation on the arbitration committee, and we would profit by a lot of the mistakes that have happened on the other side of the water, as I view them, from what investigation I made.

Mr. Lowell: Mr. Chairman, may I ask you what you would do in the case of the 'longshoremen or the other casual laborers, where they may not work for the same employer for more than a day at a time?

The Chairman: Well, that is a matter of detail to be worked out by the committee. I assume the insurance policy would cover the actual wage scale, so that it would be very easy to get at that and define how much it would be. It would be a very small amount. This matter of compensation, in the way you are putting it, is only going to be a few cents a month on employer and employee both. But the opportunity they have to investigate, I think, is a very strong element in this law.

Mr. Schutz: May I ask whether you think ten per cent. additional would be such an incentive to the employee that he would really feel he was getting any adequate compensation?

THE CHAIRMAN: I think it means more to the laborer. I think ten per cent. of that sixty per cent. would mean just as much to the laborer as it would to the employer, in the honest administration of the fund.

MR. SCHUTZ: The only fear was that the laborer, when he received this settlement, would say, "Why, all you are giving me is sixty per cent." He would think, if he was contributing, he ought to get a good deal higher than sixty.

THE CHAIRMAN: Hadn't you just as well charge him ten per cent. of carrying charges and give him sixty per cent. as charge him nothing and give him fifty per cent.?

MR. NEILL: Mr. Chairman, I have lost a good many beautiful opportunities to keep silent. I should be very much inclined to agree with Mr. Mercer if I thought his argument had validity as a matter of fact. It comes down to a question of comparative strength of two motives. I was just figuring here rapidly—I don't assume that, on the average, the expense of any new law will go above three per cent. of the pay-roll. If you put one-sixth of it on the workingman, we will assume that the average wages are six hundred dollars, that is eighteen dollars per year: the workman pays three dollars a year out of that, that is six cents a week. You expect that his interest in that will induce him to keep a certain eye on his fellow-employees and keep them strict. In the second place, it has been suggested that he would on that account oppose a large total payment. He looks at it, and he says: "I am paying six cents a week. If I keep this amount down, I save two or three cents a week. If I let the amount go up and I get injured, I make three thousand dollars." Now it is a perfectly staggering proposition to tell him he can get insurance for three cents a week. It seems to me that the motive you think would affect him is so slight. Now, if he is sitting on the arbitration board, he does not sit there by virtue of his contribution of ten per cent., but by virtue of his right to see the law properly administered. Assume the man sits there: here comes up the case of John Smith. He says, "I am going to deny John Smith one thousand dollars or two thousand dollars, and, on the other hand, I save the individual members of my class two or three cents a week for the period of five or six weeks." Now we all know that, when you look at a benefit that is so widely distributed that it means nothing, it has no force. If you look at the concrete benefit to this man, it will offset that to such a degree I don't think it

would have any effect either as sitting on the board of arbitration or as affecting his fellow-workingman. You introduce an element of extreme friction that all the workingmen will be opposed to, for I have not found one that was not opposed to any contributory plan at all. And, in return for that, you get nothing in the law you are figuring on to justify the contribution.

THE CHAIRMAN: I think the fallacy in your argument lies in the fact that you assume that this is going to be looked at by the man who is on the arbitrators' board for this particular wage, but he is there representing the aggregate of these men, knowing that one-sixth voted for this man must come out of the fund, and you will find in this country, as in the other countries, as soon as the men get their organization in good condition, the labor organization will be furnishing the attorney to prosecute these claims before the board, because they can hire him, under what we call in the West a "kept system," by the year,—you will find they will make a little assessment to take care of the carrying charges of this fund. So he is in just the same position the employer is. He says: "We are giving this fellow ten dollars a week. Now he has got well. That is my business to look into it. He is well now. He should not be drawing it. Are we giving him three thousand dollars, when he is only entitled to eighteen hundred dollars? One-sixth of that comes out of my union."

MR. ROHR: Our records show some seventeen million people are a direct charge on society. The three million men and women to whom I have reference have contributed sums as high as three dollars a month. If you put this additional burden on this three million to carry the seventeen million, I presume they would disband your organization, and the minute you do that a sociological question comes up of who is going to fight the battle for labor. That is one of the fundamental things that has made labor in the United States what it is to-day,—independent, not quite so much of a serf as in the old countries.

THE CHAIRMAN: Anybody else want to argue that question?

MR. WIGMORE: I am going to vote no on this, although I came here thinking to vote yes, and I have no argument to advance after all has been said, except one, which I feel completely disposes of the main argument that you advance,—the moral influence of this payment in watching other workmen. When you think that for seventy years the workman under the fellow-servant rule has had the penalty of life and limb to make him watch his fellow-

servant and keep him from being careless, and that has apparently, to judge by the vote here, proved entirely a failure, how can you say that six cents a week is going to have any effect?

Mr. Sanborn: I just want to make one suggestion that was brought out in the discussion. I shall vote no on this, because I think in principle it is wrong; but you speak of the arbitration, and you speak of putting a laboring man and a manufacturer on the board of arbitration. To my mind, that is fundamentally wrong. When we inaugurated our Commission, that was one of the hard propositions we had to contend for. The shippers wanted a man; the railroads wanted a man. Now, if you are going to make a board of arbitration, make it in fact what you are going to make it in name. You simply put two men on there who are partisans. That is just the very thing a board of arbitration should not be. You leave one man for the board; you have one man for the board. Now make a board in the first place that both the laboring men and the employers have confidence in. Base the character of it in that way. Their acts will be public, just as the judges are. Who would think of putting on our Supreme Court bench one man to represent the railroad companies? Now that is what I object to. When you come to a board of arbitration, make it a board.

Mr. Howard: Mr. Chairman, I would like to say that according to Mr. Krogman, whom Mr. Lowell has already mentioned, the thing that Commissioner Neill was afraid of has actually taken place in Germany. In the case of sickness insurance, where both contribute, the fact that the employee contributes has not had a deterrent effect on the amount paid for accidents. It has had the reverse effect. It is the employee in that case who has the majority vote on the board of control, and through his labor organization he has insisted on having examining doctors who are liberal. In other words, he considers it much better to pay a few cents a week more in the way of contribution, and then have a doctor who will be very liberal if he is injured, and give him one hundred per cent. compensation; while, if the doctor had been appointed entirely by an unsympathetic board, he might have only had seventy-five per cent. According to Mr. Krogman, that has been the case to such an extent that reputable doctors to-day are unwilling to serve as examining doctors for sickness insurance in Germany. It is quite a scandal, especially in Berlin.

THE CHAIRMAN: Gentlemen, you are reaching almost your hour limit. Shall we extend the discussion?

The previous question was moved.

MR. GILLETTE: I do not want to enter into any extended argument on this. Everybody knows I am very strongly in favor of contribution on the part of the workman. I have been unfortunate not to have been present during this discussion, as our committee has been out, but I heard what Mr. Lowell had to say about the difficulty first of collecting this contribution, which I think would be very slight, inasmuch as it could be done very easily in making up the pay-rolls. I am in favor of using this contribution as a means of practically compelling the employer to insure. I think that I would favor a plan by which these contributions could only be exacted in case the employer did insure, thereby nsuring absolutely to the injured employee the solvency of the fund from which his compensation payments were to be made. I agree with most of the speakers that I have heard that eventually, probably soon, it would be a contribution from the employees in name alone. By that I mean that the wage rate would adjust itself to the amount of the contribution, and that therefore it probably would not, except nominally, come out of the employee. But even under those conditions I still would strongly favor the contribution plan. I believe that there would be no effective deterrent against malingering. I believe that the consensus of opinion among those abroad who have had to do with it is,—the vast majority of them,—I grant there is a difference of opinion, but the vast majority of the workers are in favor of the contribution plan. I wish to record my regret that the discussion of a compensation scheme has fallen under that name. Some of you, knowing how I am committed to what is generally known as workingmen's compensation, may be a little startled when I say that I am not in favor of what we might say is the workingmen's compensation act. What I mean is that I believe it is not correctly designated by the name. I believe in what we are discussing as a workingmen's compensation act, but what I believe in firmly is not a compensation scheme. In other words, I don't believe, gentlemen, that there is any compensation for the loss of an arm or the loss of a leg or the loss of a father or the loss of a brother, that there is any compensation that can run through the whole category of injuries which affect the human race engaged in industrial enterprise. My ideal and my idea is in favor of a plan

along the lines which we have discussed, but that the fundamental basis of the whole scheme is an insurance proposition. That is what the German scheme is. It is what the Austrian scheme is, and that is what absolutely divorces it from the basic principle of the English act.

Now any insurance proposition to my mind, under existing circumstances, not in its ultimate amount or its ultimate end, must be mutual. The argument that the workingman is already contributing in his loss of half-wages, or his dependants in the loss of half-wages of him who was their support, or the loss of the first two weeks in the waiting period,—it appeals to the human element within me, but, after all, it does not exactly appeal to my sound reason and judgment. What I mean by it is this, that, after all, when you come to analyze the injuries and the accidents which occur in industrial enterprise, when you come to bring it down to its last analysis and to place human responsibility upon the individual to whom it belongs, then, if each one of us were a man of equal opportunity, equal judgment, and should assume a responsibility in an equal degree for our own acts, we would do away with the basis for a multitude of the actions which are now brought and the majority of the recoveries which are now made. But we cannot found society, nor can we carry it along on that basis. And so you take, as in the German experience, according to Dr. Zocker, twenty-nine and a fraction per cent. of the accidents which occur in Germany to-day are caused by the fault of the workingman himself. A very considerable portion are caused by the natural conditions and inevitable conditions of the industry. We cannot place in these modern days the responsibility upon everybody of taking care of the results of his own fault. So I say that it seems to me that the only logical thing that we can do is to do what Germany with, in many respects, the most scientific act there is, has done, reduced this matter to a social question largely, of a compulsory form of insurance. Now they do, in spite of what has been said, the German workman does contribute. He contributes, and so does the Austrian. They contribute in just about like proportion. They contribute just about practically ten per cent. of the cost of insurance. The figures of that will vary very slightly from that unit.

Mr. McEwen: By the way, he is compensated not only for industrial accident, but for every accident out of that.

Mr. Gillette: But what I mean to say by that is that, when

you come to reduce and charge to the accident fund the proportion which is borne by the sickness fund, it will amount to just about ten per cent. of the cost of the accident fund. In Austria it is exactly that, substantially.

MR. SANBORN: And it takes a two-thirds of the contribution to carry the sickness.

MR. GILLETTE: The statistics of Germany show that, when you come to apportion the care of accidents which are paid for out of the sickness fund during the first thirteen weeks to the accident fund, it means that the workingmen, in addition to paying their share for the sickness fund, are contributing just about ten per cent. to the accident fund.

MR. CHANEY: Does the workman know that?

MR. GILLETTE: Yes. The strange thing about it is to-day that the German workman wants to contribute more.

MR. SANBORN: They are opposed to the manufacturer reducing it one-half. They wish to go to work and contribute more, and they wish to get a voice in the management of the fund. That is the great thing which is agitating Germany to-day, and that is the thing which I dislike very much.

MR. GILLETTE: But I believe, just as much as I believe anything, if you take away from any scheme of this kind the principle of mutuality, to however slight a degree you may be able to inject it into it, you do very great violence to the whole proposition,—I believe that it will prevent malingering. I believe that it will reduce the number of accidents, and I believe that the benefits in general will vastly inure not only to the benefit of the employer, but to the benefit of the employee as well.

And then, finally,—and I beg your pardon for having taken so much time,—to get down to it, I am in favor of it, gentlemen, to-day, as almost a *sine qua non* for the introduction of these acts. I believe that the experience in New York justifies me in making the statement and the assertion,—I do not believe that, in fairness to the industries of any given State which you can name, it is going to be possible to frame an act with the provisions which have been, in conference, sort of agreed to here, without so materially raising the cost of production in some of the various articles and imposing such a burden on the industry that you are going to meet with very serious consequences, and therefore, in the initial stages at least, I say that it is highly important, almost absolutely necessary, that a portion of the cost, at least, should be borne by the employee.

MR. DOTEN: I just want to ask Mr. Gillette one question. I want to inquire how this contribution of the workingman is going to ease the burden for the employer in the slightest degree, when it is based fundamentally upon an increased compensation to the injured employee.

MR. GILLETTE: I didn't say that.

MR. DOTEN: That is the contention that—

THE CHAIRMAN: That was mine.

MR. GILLETTE: I said that ultimately it would end there. It would not at present. By the time it does end there, such legislation as this will practically spread through the country, I think.

MR. ALEXANDER: The German scheme has been referred to again and again, and I feel that I ought to make a statement about it, so that you may not get a wrong view of the German scheme. I spent three months in Europe this summer to study the matter, perhaps not as much as some of you gentlemen have,—but I have the advantage of having grown up under the German system, so as to know its effect, while you get it from a casual observance or from the interrogation of a few people. Many years of business activity in America enable me to draw some comparisons.

First, the statements which have been attributed here to an eminent German manufacturer are correct—as far as they go. But there is something behind it which I suspected from the beginning and which the gentleman admitted before he left New York for the other side, when I put the question to him very plainly. There is a whole lot of politics behind that, the politics of the Social-Democrats of Germany, and that we don't want to forget. When Mr. Krogmann, whom Mr. Lowell mentioned in his contribution, says, "We don't want them to contribute," it is simply for the purpose—and he admitted it—that he and certain other manufacturers may have this matter entirely in their own hands without interference from any source whatsoever.

It is true that German workingmen realize that they are contributing to accident insurance, and I think Mr. Gillette's statement of about ten per cent. for pure industrial accidents is, perhaps, correct. They know that they contribute, and they are satisfied to contribute. German statistics have been cited, for instance, that twenty-nine and some fraction per cent. of accidents can be attributed directly to the workman. Now let us be careful about that, too. It is correct as far as it goes, but remember that the

German statistics reflect the early military training of all Germans. Everybody, practically, has served in the army, and is carrying that spirit into his industrial life, so that, when a foreman or superintendent tells him, "You must do so" or "You must not do so," he comes pretty near doing so. He has been used to being commanded and directed in that way, and he follows, while the American,—and I am not talking about the laborer or employer, but all of us,—the American is not only careless, but it seems to be almost in his character to show his independence by doing almost the opposite thing that he is told to do. So that the twenty-nine per cent. of the German workmen's negligence in this matter does not hold at all for America, where we will have a far larger percentage. How much, we don't know. We have no statistics on which we can base an opinion. We have statements on one side and statements on the other side: both deserve some credence. Insurance companies have told us that they have no statistics that would be of real value, and that is one of the strongest arguments why we should go most conservatively in this matter, so that on a conservative basis we may accumulate statistics, and on the basis of such statistics go step by step in the same direction.

It has been stated that a contributory scheme is impractical. Mr. Lowell raised the question, how we could take care of 'longshoremen or any seasonal employment. That is a matter of detail. I can easily conceive, under a State insurance plan, a provision that whenever an employer pays wages, whether for a day or a week, he must take a certain percentage of the wages and deposit it with the State and add the same amount out of his own pocket. So you can take care of these matters. We should not throw down the plan, because at this moment we may not be able to find a good way of handling this matter.

Now the learned gentleman has told us that the whole problem is very easy, because all the cost to the employer can be put into the cost of production and the sale price of the products. Fortunately, I am in the employ of a large corporation which will not be so much affected by a law that you make. First, we are large enough to take care of it in many ways, and, secondly, we are sufficiently protected by patents, that we can do what the gentleman stated in regard to all employers. But there are many thousands and tens of thousands of small employers, and Mr. Howard is not one of the small employers, for he employs over

three hundred men in an industry in which he can be considered a very large employer, and he does not come into the same class as Mr. Smith, who employs five or six men, with enormous competition. The small employer cannot, or—at least, I ask the question—can he, as easily transfer the charge to the consumer? He might have not only competition in his own State, but competition in all other States where he has to sell a great deal of his products. Shoe manufacturers have told me again and again—I know something about the cost of their products—that only a quarter of their production is sold in Massachusetts. The rest has to be sold in other States, and the least increase in cost may prevent them from selling, may therefore prevent them from doing business and giving as much employment as they are giving now. We must do nothing that will prevent the small manufacturer from growing and prospering under proper conditions. This morning I objected to certain statements. I would not object to them if we could enact a compensation law with all the stringent restrictions and additions that you wish to make effective all over the United States, because we can then adjust ourselves to it and take care of ourselves against foreign competition through the protective tariff, and a good many other ways; but we cannot enact a strong proposition, even though we may concede the justice of it, if we are not sure that our neighboring States will about the same time do the same thing, because in the mean time we are apt to kill off the small manufacturer, who cannot come to the surface again, and we must look out for him as much as anybody. Everybody wants justice done to all. There is practically no one who wants to do an injustice to any one else or who wants to put his foot on his neck and keep him down. That spirit does not exist except in a very few cases, and exists on both sides where it does exist. We want justice done, and we must look out for those people who need the protection of the State. At luncheon I made the remark to Dr. Neill that we are very apt to say we must protect infant industries by the tariff. Why not protect the infant manufacturer, who needs protection much more, by doing nothing else than be conservative in our new enactment?

Now it has been stated with great truth that during the two weeks of waiting period the injured workman contributes,—and I concede the force of this argument,—but I also submit whether it would not be one of the early steps to reduce the waiting period from two weeks to one week. Then the contribution would become very

small, and the load on the other side so much larger. When you have once accepted the plan of non-contribution, you cannot go back to the principle of contribution; but, if you accept the principle of contribution, at the beginning even less than one-half on the part of the employee, you can, under proper conditions, later on eliminate the contribution and come to the non-contribution plan. I want evolution in this legislation rather than revolution.

Mr. Smith has said that, in his opinion there are many workmen who are perfectly satisfied to contribute, and admit the justice of it. We do not know if they are or if they are not. It has been said that the unorganized employees are not heard. It is true they are not heard. We do not know if all workmen who are in labor unions are absolutely opposed to the contributory plan. They have not been examined. It has not been put to them in the light of all the arguments that have been brought up against contribution. But we know this, and if you read the report of Dr. Neill, brought out last year, you will find there are untold thousands of employees in so-called mutual benefit associations. In mighty few cases is the whole expense borne by the employer: in more cases the whole expense is borne by the employees; and in a majority of cases the expense is borne jointly, so that thousands and thousands of workingmen have committed themselves to the contributory plan and see the justice of it.

Mr. Gillette: I would like to move you, as an amendment to the pending motion,—the pending motion being, as I understand, that the answer to this question be yes,—to add the words, "but only when the employer shall provide insurance which shall guarantee the benefits of the compensation act to the injured employee." In other words, that a small employer who does not insure, and therefore does not protect the workingman by insurance against his own insolvency and otherwise, then he shall not be able to have any contribution, but, if he does, then he may exact a small contribution from the employee.

Mr. Rohr: Mr. Chairman, I am opposed to the amendment, more particularly for the reason that the voluntary societies have worked, according to my twenty-six or thirty years' experience in a hard world, a hardship on the men. Some men are forced by the conditions of their employment to become members of these mutual aid societies. They may contribute for a week or a month, take advantage of all of the things, and they are immediately dropped and lose all they pay in. I am opposed to that.

MR. GILLETTE: Under the scheme which I propose, it will be this. Say a man works for one man to-day and another man to-morrow. To avoid the suggestion which Mr. McEwen made this morning, by which he may have to pay half a dozen times in one month, now he would only pay his percentage on his wages, so that he would pay no more if he worked for twenty-five employers in one month than he would pay if he worked for only one employer for twenty-five days of one month.

MR. WIGMORE: How about the mutual payments he has paid already to the aid societies?

MR. GILLETTE: That question is very easily answered. If you are going to put in the Compensation Act a provision such as is put in many accident insurance policies or fire insurance policies, by which the Compensation Act should become a coinsurer with other forms of benevolence, and thus restrict the benefits, then you can see how it is done; but, if he pays for two forms of benefit, he gets two forms of benefit.

MR. BAILEY: Suppose that, after working six months and paying his proportion of his wages, he is finally injured when he is working for a man who is not insured.

MR. GILLETTE: That is why, I say, we should encourage the insurance. The practical result of that would be, in my opinion, to make every employer insure. I do not believe any employer outside of a large corporation, such as the Steel Corporation and the railroads, which can afford to carry their own risks, can afford not to insure.

THE CHAIRMAN: Let me have one word on that. I went to Paris with a letter to Morgan & Company, so that I could see what effect they thought their law had on the financial risk, having letters to labor men and so forth, and the member of the firm with whom I talked immediately said it had no effect on their industries, although it would on ours; that is, on the financial risks, because they do business on an acceptance system entirely. They do not sell bills of goods on credit to some fellow without taking his acceptance. They do not have open accounts. They do not give lines of credit in their banks, as we do. So he said it would not affect them over there, but he was sure it would affect us over here; that is, on the financial standing of the employer, if he did not carry insurance.

MR. HOWARD: Mr. Chairman, before you vote, I would like to say something about one of Mr. Alexander's statements. He

believes that the American workingman has a natural tendency to do the opposite thing from what he is told to do—

MR. ALEXANDER: I didn't say the American workingman. I said the Americans as a whole.

MR. HOWARD: My experience with the American workingman certainly does not bear that out, so far as our small industry is concerned. I should be very much interested to know what Mr. Dickson's opinion is regarding that, with his large experience. It will be extremely interesting. But I would say one other thing, that, particularly in the hazardous employments, a large portion of the workingmen are men who were brought up under the army training system, on the other side, and certainly it is not to be supposed that in coming over here they abandon all their early training and habits.

THE CHAIRMAN: Any further remarks?

MR. ALEXANDER: If we had retained the doctrine of fault, a great many of the arguments that are brought up here for a non-contributory scheme would hold true. But, inasmuch as it has been the tendency to eliminate the doctrine of fault, is it not fair and just, I submit, that the employee should not bear a part of the burden of this whole insurance, and we ought not to raise the question, which has been raised, How much more will he be careful for six cents a week? That is not the proposition. The question is, In what frame of mind will we put him? In what way will we train that man? If we admit, as has been stated here several times, and many of us believe, that eventually we shall have to come to social insurance methods, not only against accidents in the plant, but also accidents outside, sickness, and so forth, should we not accept the contribution plan, as a matter of educating every man in America employed in work, to this greater and final proposition, so that he may take an intelligent interest in it, beyond six cents per week, by watching his fellow-man?

THE CHAIRMAN: I don't want to prolong this discussion. I simply want to say the argument as made in the beginning was directed entirely to the condition that the fund be insured.

MR. WIGMORE: May I ask you to say whether you do accept the fact that for two weeks and for fifty per cent. for six years, and for everything after six years, the employee does contribute?

MR. ALEXANDER: I accept it for one week. I don't accept it in the other respects, because whenever the employee is injured through no fault of his own, through the fault of the employer or

through a trade risk, then he actually contributes in accepting a reduced wage during the time when he is forced by somebody else to be idle. But, whenever he is idle through his own fault, he does not contribute by accepting half-wages where he should by rights get no wages, because it was in his own hand then to continue in employment by being careful or to put himself out of employment by being careless.

MR. BOYD: I can get some figures to sharpen this point Mr. Gillette raised. In 1887 there were 106,000 accidents in Germany; 15,970 of those lasted longer than thirteen weeks; in twenty-four and a half per cent. of those the negligence was attributable to the employee; 19.76 were attributable to negligence of employer; and fifty-four and a half were attributable to the inherent danger of the industry and the combined negligence of employee and employer. You find that in the fourth special report of the Commissioner of Labor.

MR. DOTEN: Mr. Chairman, it seems to me that it is very desirable that we should understand each other's position on this matter. Now we have two members of the Minnesota Commission contending for the same thing, but upon different grounds. Our chairman contends for it upon the ground that by reason of it we shall be able to compensate the laborer more generously, and that we are going to add to the compensation which we have already adopted as a rule a sufficient amount to warrant the taxing of some cost upon the laborer. If his contention is right, then Mr. Gillette's contention that we cannot put a bill of this sort into operation unless we put part of the tax upon the laborer is entirely unfounded unless Mr. Gillette has in mind the reduction of the amount that we have already agreed upon as the basis of our bill. Those two positions seem to me to be antagonistic fundamentally. Now, Mr. Gillette, I would like to ask if you have in mind insisting upon this contribution without this additional compensation which Mr. Mercer has suggested as a *quid pro quo?*

MR. GILLETTE: I am very glad the question is raised, and I think you are absolutely correct that the positions are not absolutely in harmony. I wish to say that I have been hoping that I could see my way to agree with Mr. Mercer. In other words, if you were going to put on—if you were going to make your scale of benefits fifty per cent., you could make it, say, sixty per cent. and let the employees contribute that extra sixteen and two-thirds per cent. I have been trying to work that out, but I tell

you, gentlemen, that the thing that I have been confronted with is that the cloth won't reach; and I don't see how—why, I sat around the table in Perth, Scotland, because I was refused practically all the information by the companies in London, the companies belonging to the tariff, but Mr. McEwen and I went up to Perth, and we sat there with the General Accident Company, and sat around the table, and they brought in their actuaries and experts, and we spent half a day with them, and the very best estimate that we can get is that an act based practically, as has been outlined here to-day, upon a contribution of twenty per cent. by the workingmen, will cost double what the present liability is costing in this country, and if a double liability should be retained, it would add twenty-five per cent. still to that cost.

Mr. Sanborn: Now, on Mr. Gillette's principle, I just have this suggestion. Rather than to put a wrong principle, let us reduce the amount until we know that the manufacturers can bear it, and then start it on a lower amount, and then if the manufacturer can pay more, it is easy enough to raise that amount on the figures that are furnished.

Mr. Dickson: I came into the Conference, gentlemen, with an open mind on this particular topic, leaning, however, to the feeling that there should be no contribution whatever on the part of the employee, because the tentative plan under which the corporation with which I am connected is now working has that provision,—that there shall be no contribution by the employee. I am ready, however, now to vote in the negative: first, because I believe that the workman now does contribute in suffering, in loss of wages, and in the possibility of permanently impaired earning power; second, because the amount which it would be proposed to have him contribute would be too small to affect his motives, his conduct, or the working conditions; third, on account of the shifting nature of employment, casual employment, and the general impracticability of administering any system of workmen's contributions. I should say that, if any system of compulsory State insurance can be constitutionally enacted, I might modify my views on this subject.

The question was called for.

The Chairman: All in favor of the question on the amendment, which is to amend the motion so that it will read, to answer question number 8, "yes, provided the employer elects to take out insurance,"—so you first vote whether you would put the insurance feature into the question. Are you ready for the question?

The question was then put, and the motion lost by the following vote: ayes, six; noes, twelve.

THE CHAIRMAN: All in favor of the original motion to answer this in the affirmative, namely, that employees shall contribute to this fund, please rise.

The motion was lost, only one voting aye.

THE CHAIRMAN: It is almost unanimous, so that answers that question.

There is a report to make on number 5.

MR. SAUNDERS: A majority of the committee submit another report. We make no change in the permanent disability from the previous report on which the Conference voted.

In case of death, first, where the employee deceased leaves orphans, fifty per cent.; where the deceased employee leaves a widow and no children, twenty-five per cent.; where the deceased leaves a widow and one child, the child to receive fifteen per cent., or the widow's share to be increased by fifteen per cent.; two children, twenty per cent.; three children, twenty-five per cent.; four children, thirty per cent.; five children, thirty-five per cent. Those being children under sixteen, and these percentages to be paid during the period that they remain under sixteen years of age. The maximum is sixty per cent. with the widow and five or more children.

In case where there is a widow and no children, and a dependent father or mother, the dependent father or mother to receive twenty-five per cent. That makes fifty in that case.

The payments to be sixty-six and two-thirds per cent. on the first seven dollars and a half of weekly wages, and fifty per cent. on the excess of wages, with a maximum of ten dollars per week for three hundred weeks.

MR. WINANS: I have no minority report. I wish to say I refused to sign the majority report, and shall vote against its adoption on account of the figures being entirely too low.

MR. SCHUTZ: I move the report be adopted.

MR. HOWARD: I would like to amend that by moving the report be adopted in principle, without declaring in favor of any specific figures.

MR. DICKSON: Are you making a distinction between the payment for death and that for total disability?

MR. SAUNDERS: The total is the same, the maximum and minimum are the same.

THE CHAIRMAN: The amendment is to adopt the principle of this report without committing ourselves to the percentages.

MR. DOTEN: I would suggest that the way this is put by the committee report leads to rather serious complications, when you come to analyze it. It would be very much better to have your basis—your percentage basis of the total amount going to dependants the same as under permanent disability, and then, in case of the widow, have her receive fifty per cent. of the total benefit, and in the case of a child or children, eighty per cent., etc., putting the percentage upon the possible amount payable under the provision instead of confusing the matter by in one case talking about forty per cent. of the employee's wages, and in another case about sixty-six and two-thirds per cent., and so forth. You are getting your percentages all tied up in a knot, as the matter now stands.

MR. MCEWEN: Somebody has said that fair and free discussion is the foremost friend of truth. Now let us put ourselves in the place of a workingman with a provision like this in the law. I do not know but I may ultimately come to it. I remember it in France. It did not appeal to me very strongly, but, if we adopt the principle that the laborer shall not contribute anything and the industry bear it all, I recognize as a matter of expediency that we have got to be able to make some monetary sacrifice until other States catch up. If the principle is once established, it can be developed, and the compensations increased to mete out exact justice. In a great many large corporations, men make written application for employment to-day. Suppose an application should read like this "Are you married? Is your wife living? Is your father or mother living? Do you contribute to their support? How many children have you?" Would this situation arise? Here is another man who applies that has a wife, but no children. Wouldn't that enhance his chance for employment at the expense of a man with a large family?

THE CHAIRMAN: Are you ready for the question? All in favor of the amendment, signify,—that is, that we adopt the principle of this report without committing ourselves to the figures.

MR. ALEXANDER: State the principle.

THE CHAIRMAN: The principle, as I understand it, is to work out the percentage somewhere on the basis of the number of children but not wholly.

MR. SAUNDERS: The only value in the percentage basis is that

the figures are right. If they are not right, the whole thing is wrong. I failed to agree to this until I got Mr. Gillette to come up to thirty-five per cent., for the five children or more, making a maximum of sixty per cent.

MR. GILLETTE: This is suggested by what Mr. McEwen said yesterday. I don't think it would cost more. I think it would be a more equitable distribution.

THE CHAIRMAN: All in favor of the amendment, let it be known by saying aye.

The motion was lost.

THE CHAIRMAN: All in favor of the original report, adoption of the original report read by Mr. Saunders.

MR. DOTEN: Mr. Chairman, I insist you have an inconsistent proposition. We have adopted a basis of fifty per cent. and a maximum of ten dollars a week, and here you bring in a provision which in some cases brings it up to sixty per cent.

THE CHAIRMAN: That is conceded, in case of death.

MR. SAUNDERS: But it does not increase the ten dollars a week.

MR. DOTEN: I don't see any reason why that should not be put on the other basis, and apply your percentage to the fundamental percentage of the wage and distribute it on that basis.

MR. DICKSON: Have you now a permanent basis for total disability different from that for death?

MR. SAUNDERS: The percentages are different. Your minimum and maximum are the same.

MR. DICKSON: Why should it be any different?

MR. SAUNDERS: There should be a difference between a man totally disabled who has a wife and that is all the family, where they both have to be supported, and the case where the man is dead and he leaves only a widow.

MR. DICKSON: Your present discrimination is in favor of the man who is yet living.

MR. SAUNDERS: Yes, except in one case, where the widow has five children or more. Then she gets sixty per cent. If the employee leaves dependants only partly dependent on his earnings at the time of his death, the employer shall pay such dependants a weekly compensation equal to the same proportion of the weekly payments for the benefit of the persons wholly dependent as the amount contributed to the said persons dependent bears to the annual earnings of the deceased at the time of his injury, and

in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the accident.

Mr. Lowell: I second the motion.

The question was then called for, and the motion prevailed.

Number 9. Shall it be Permissible for Employers to substitute Voluntary Schemes?

The Chairman: We will consider it has been moved, unless there is objection, and proceed to discuss it. Any one have anything to say on the question?

Mr. Bailey: It seems to me there is a good deal that ought to be said on this question. It has been suggested in the previous discussion here to-day that the aged workman is going to be at a disadvantage. That has been suggested in England as one of the troubles which they experience over there. A man comes in, and he fills out his application as suggested, and he is fifty-five, and the employer turns him away because he will be likely to have to pay a good deal under the compensation law. It has been suggested there that in case of those workmen it is not for their interest or the interest of the body of workmen or the interest of society that they should not have a chance to work. They can do as much work perhaps as they ever did, but there is still an increased chance of their getting hurt, and it was suggested over there by Mr. Hill that the English scheme ought to be supplemented by extending the contracting out principle in favor of those workmen, but to have it in some way regulated, so that they won't be imposed upon, they won't lose all chance of compensation if they get injured, but that there may be some power that would approve the contracting out scheme. I am told that not simply half a million, but perhaps many more than that of employees at the present time in the United States are working under these voluntary arrangements for voluntary relief, and they are getting a good deal of benefit from it. Now, if those voluntary schemes are giving the workmen as much relief substantially as he will get under this, then there is no objection to them.

I think we should encourage the voluntary scheme, where they are good schemes, where they give the workingmen something substantially equivalent to the Compensation Act. So that I am in favor of allowing voluntary schemes which are approved—I think they should be approved by a disinterested person—and

not less favorable in substance than the Compensation Act. I believe that.

THE CHAIRMAN: What is it you move?

MR. BAILEY: I move that number 9 be answered, "Yes, providing such voluntary scheme is approved by some public body or official having charge of the operation of the law."

MR. ROHR: I second the motion.

MR. LOWELL: Mr. Chairman, I am rather at sea on this question, whether it shall be adopted or not, and it affects the people over whom I have constituted myself a special guardian; namely, the small employer. This is the thing as it lies in my mind. This kind of a voluntary scheme will be very good for the employer and for the employee in very many cases. It is working now in many cases, but it can only be adopted by employments or employers who have a considerable number of employees in their employ. The people who have adopted it so far have a tremendous number of employees, like the Harvester Company, the General Electric Company, the Steel Company, and so forth. What I am afraid of is this, if you go into this thing, you may be legislating against the small employer. I am not entirely satisfied in my own mind whether you will be or not, but you take the employer in industries in Massachusetts, who have, say, not more than fifty employees in their concerns. Those people cannot adopt any such scheme as this, because it depends for its successful financial operation on quite a large fund, and the man having only fifty or less—if he has less, it is even more so—cannot get a sufficient fund to run it, because of course every death or every permanent disability will make large inroads on the fund. Now it seems to me that we ought to consider pretty carefully whether we should put that in our compensation laws. Is it better to face the situation,—refuse this scheme and have everybody on the same dead level, in order to help the small employer and not drive him out of the business? Or is it better, as the other alternative, to allow this, and thereby legislate merely against the small employer? It seems to me that that is your dilemma. On the one hand, you give a chance for this thing which will act, very likely, beneficially, but in doing that you may be legislating against the small employer.

MR. MCEWEN: How does it legislate against the small employer?

MR. LOWELL: Because the small employer cannot get a sufficient fund from the employees in his own work to carry it on as a financial matter.

Mr. McEwen: But he does not have to go into it. It is not compulsory.

Mr. Lowell: No. Then you come to this, that, if he does not go into it, then the large employer of labor has a very great advantage over the small employer of labor by the great ease with which he gets labor,—that is where it hits against the small manufacturer. Of course, the obvious suggestion will be made at once that small employers must band together in order to do that, in order to obviate that trouble. I am not at all sure that it would work out that way, and that is really the dilemma that is troubling me.

The Chairman: I simply want to suggest that, so far as my personal views are concerned, I understand that the fundamental reason for all this legislation is that in dangerous employments the employer and employee do not stand on an equality as to ability to contract respecting the danger. Therefore, I should be definitely opposed to any scheme which gave the privilege to the employer and employee to get together and contract out of the law.

As to the amendment which is made by Mr. Dickson, I should be opposed to that, as we have had the same thing declared unconstitutional in our State, where they gave the power to the Fire Insurance Commissioner to approve the form of policy that should be made, and the court declared it unconstitutional. It would not do me any good.

Mr. Alexander: The small employers may not only successfully band together in mutual associations for such purpose, but, as a matter of fact, they are doing it now in many respects. Second, these inequalities, which Mr. Lowell is afraid may arise, exist now. The Steel Corporation offers its people, free of charge, old age pensions, and Mr. Smith has not yet offered his five people old age pensions. Nevertheless, he is getting his men. You will also find there is an inequality in wages that offsets that. As a general thing, I believe the smaller employer pays somewhat larger wages, and in that way gets employees readily. I think we ought to permit under proper safeguards,—I would vote against it if there were no proper safeguards,—we ought to permit the employer and employees to contract out, and accept a scheme which is at least as advantageous as the one adopted by the State.

Mr. Wainwright: Is not Mr. Dickson's motion deficient in just that particular, that it simply provides for voluntary agree-

ments that are approved by some authority, but does not contain the provision that they must be at least as good as that offered by the law itself?

MR. DICKSON: I understand, of course, a public official would not agree to it, unless in his judgment it was as good.

MR. WAINWRIGHT: That does not always follow.

MR. BROWNE: It seems to me you must have somewhere in the Act for the liberty of contract some conditions which will be plastic. You may frame an Act which cannot meet all conditions.

THE CHAIRMAN: Any further argument on the amendment? All in favor let it be known by saying aye.

The motion prevailed.

THE CHAIRMAN: All in favor of the motion as amended say aye.

Motion prevailed.

NUMBER 10. METHOD OF DETERMINATION OF CONTROVERSIES?

THE CHAIRMAN: Now the method of determining controversies is the next number, which is number 10.

MR. BAILEY: I would make the motion on that, Mr. Chairman, and I would make it rather broad. My idea is that controversies shall be determined by a disinterested competent public official.

Now the English law, I understand, does not work very well in that way. They have something they call an arbitrator, and they have a committee, and they then can go up to the court, and there are pages of rules, and the thing is pretty complicated.

Now the New York law, on the other hand, practically puts every case into court. I won't say that, but there is a right of jury trial, and that means expense and delay—

MR. WAINWRIGHT: Say, rather, leaves it.

MR. BAILEY: Yes, leaves. Now I have given this scheme some thought. I think you can get rid of the jury trial, and I think you can do it constitutionally, and I think, if you read Professor Williston's brief, you will be satisfied you can make remedies which are given by this act equitable remedies.

We have worked out in Massachusetts in the last ten years the doctrine that you can dispense with jury trial and deprive parties of jury trial, not only the plaintiff, but the defendant provided the matter is properly on the equity side of the court, and to illustrate:—

I make a promissory note. Ordinarily, if I could sue on that

and collect it, I would have to sue on the common law side of the court; but, if I want to collect that by means of an equitable attachment, that is to reach the property which cannot be reached by law but can be reached in equity, then I file my petition or bill in equity, and I not only lose my right of jury, but the defendant has got to have his rights tried on the equity side of the court without any right to a jury.

He may ask for a jury, he may possibly get it, but ordinarily he does not in Massachusetts, and in most of the States that same thing is being done, that is where the case is properly on the equity side of the court; and you can get rid of a jury.

Now I think that that is something which is worth while. That is not in the New York law, and I think we can get it in here if we have an official who has got equity powers.

Now, as we have been talking here yesterday and to-day, there were various things which required the use of discretion. The apportionment among the partially dependent needs discretion, also the revising of the award from time to time, where the man is partially disabled and is improving.

The law will provide, I think, that there may be an application by either side for revision, for increase or diminution. That requires equity power that you don't have in the New York law. I think that law is very much hampered by the fact that you have not got a tribunal with equity powers that can do that, just the same thing as the probate judge is doing with regard to alimony, by putting it up and down, as need be.

Now it fairly belongs, I think, on the equity side of the court. Any court with equity jurisdiction can do it, because the thing in its nature has certain equitable features which require a court with equitable powers to administer.

Now, if I am right about that, then it means that we should have in any event an official who has equity powers, with perhaps the right of appeal. I think that we should make the thing as speedy as possible and as simple as possible, and we have been talking here to-day more or less about an arbitration committee or a judge. That does not appeal to me, because it means one side appoints a partisan, and the other side another partisan, and it comes down to one that ought to be impartial. Perhaps he is, perhaps he is not; but they say in England, you want a man not only that is fairly well qualified to start with, but who is capable of learning by experience, and he does learn and he administers

the thing with some equality. He confers with other men who are administering it, so that you get a fairly equitable administration of the law.

Now, if you have a Master of Chancery, I would not call him that. I think perhaps adjuster does just as good as calling him the Master in Chancery. He will be a man that can go down and see the workman, if need be. He won't be tied up with rules, won't be held down to technical rules of evidence. It may be he will have power to select an independent doctor, and he can take him down, and the workman will go to him. He perhaps puts in his claim for compensation in writing, sends it to the employer, and then he may apply to the adjuster, or Master in Chancery, who will have large equity power, whose decision will in most cases be final, with the proper right of revision or appeal to the equity court; but you get rid of the jury, the expense of a jury trial.

Of course, if parties agree to a thing, they won't need to trouble an arbitrator or an adjuster, but I do think that, in order to avoid the possibility of the workman being imposed upon, any settlements which are going to be made should have the approval of the adjuster. Otherwise, you will have the lawyer coming in and trying to get more than he ought to. I think the adjuster might do as they do in New York, regulate the attorney's fees, that he can't have more than is reasonable. Something worked out along that line will be helpful, I am sure will be necessary, because, if you don't have those things, you are not giving the public what they have been led to expect; namely, something simple, something inexpensive, something speedy.

Now I have outlined it very generally. I don't know as I have made myself very clear, but my main point is getting it on the equity side of the court. Have an official with equity powers so as to get rid of the jury trial, and then have one official, one in each county or State, have the number flexible, according to the amount of business to be done, not less than one in each county.

Mr. Wainwright: Just to take up a moment, of course our Commission considered this matter with a great deal of care. The advantages to be secured by having some independent arbitrator, of course, is obvious, would not need any discussion. I may say this was the subject which gave our Commission more trouble than probably any other subject that we had to consider.

We considered practically every scheme that you have mentioned here, and maybe we ran away from the subject, but we finally, with the time at our disposal, feeling we wanted to make a report, considered it would be wiser, in view of the other defects of our act, to leave them as they are in the court.

Mr. Saunders: Some of us have given this quite a little thought and some discussion, and we have come to the same conclusions as Mr. Bailey, independently of him.

It seems to me that there are two essentials we want to start out with:—

First, the settlement of controversies between employer and the employees should be local, should be brought right down to the locality where the accident happened, and, if possible, right into the same plant where the accident happened.

Second, that there must be some uniformity in the decisions, else a man injured in one end of the State may get twice what another man injured in the other end would get for exactly the same injury.

Now to get this locality, get the men right down together, some of us have suggested this:—

That there be for each individual case an arbitration board or committee, consisting of one man chosen by the employer, one man chosen by the employee, and a third man who is a State official,—you can call him a judge or arbitrator or anything you might call him. He is permanent.

Now I know Mr. Bailey will say, and many others will say, that the man chosen by the employer and the man chosen by the employee is biassed, and that you might as well leave it to one man; but I think not, because, if each party has an individual in that board sitting there, he is sure that, when they go out and discuss the subject, the points in his favor are going to be brought up and they are going to be given a hearing inside the court itself. He is also going to know when they get through not merely the results, but the reasons which brought that board to their decision. Those two things are going to largely bring him to a sense of satisfaction, or at least a conclusion that he has got as good as he could get under the circumstances.

Now this third member I would have a member of a State board. If your business is not too large, let him be one man. If one man cannot do it and three men can do it, let it be three men. If you need five, why, have five. Have enough men to do this business

in the State, but don't have it by counties or by sections. Have it State-wide.

THE CHAIRMAN: Judicial districts.

MR. SAUNDERS: No, not judicial districts. Don't divide your State at all, so that one member of this board shall sit on every case that is settled in the State. Then you have got in that one board, if the board has an executive officer or secretary,—you have got in that a record of every case that is settled. You have got in there members who sit on every case, who discuss the cases and keep them uniform.

Now it has been suggested that we have a system that, if either party wanted to arbitrate, they should appoint a man and notify the clerk of this board, who should immediately notify the opposite party that the other had requested arbitration, and, if within six days they don't appoint a man, the committee would proceed with two men. That brings them together quickly, very soon after the accident, right on the spot.

MR. BAILEY: The work of the official, call it board of arbitrators or a single man, I assume, would be liable to extend over a period of time five or six years, and would keep the three men in office for that period and have their meeting from time to time for revision and all that?

MR. SAUNDERS: Yes, I would have this a permanent board or court, whichever you might call it, appointed by the Governor for terms of three or five years or longer, at varying periods.

MR. WAINWRIGHT: You would only have the third man permanent?

MR. SAUNDERS: The third man in the committee. Understand, I would have a State board of arbitration, one member of which should be the chairman of the arbitration committee for each individual case.

MR. BOYD: You would have the board, Mr. Saunders, created with judicial power?

MR. SAUNDERS: Yes. Then I would have a revision of the payments made obtainable from the individual board and the State board of arbitration: therefore, you would get your uniformity.

MR. SCHUTZ: May I suggest to Mr. Saunders the possibility that there is an insurance department which already has charge of all insurance matters? Why could this not be done by an official of the insurance department, why should not this board be a branch of the insurance department of the State?

MR. SAUNDERS: If we have State insurance coupled with this, yes. If we don't, why, that is simply a court proposition, that is, a body to determine the issues rather than to supervise insurance companies.

MR. WAINWRIGHT: I would like to ask if he considers it would be competent to make an arbitration committee like that?

MR. BAILEY: For this reason, we have a saving clause that either side has the right of review to the court, to the equity court, and it has been done in Massachusetts quite often. We have an insurance commissioner given powers as to the forms of insurance and the kind of insurance business that may be done, with the right of review in the court; and it was only last week that I saw them up there with a petition for review of his action, so that, if you give to the equity court a right of review or right of appeal, then you meet the point which troubles your people, and I think in Massachusetts it will be all right.

MR. WAINWRIGHT: I would like the other commissioners to understand that the reason we did not reach a course that would be a satisfactory solution of this is that we were advised by counsel that under our constitution we could not do it. We could not do any more than we did.

MR. GILLETTE: I would like to ask Mr. Bailey a question: What questions is it proposed to bring before this tribunal?

MR. BAILEY: I would like to make it complete judicial authority, with full powers and discretion to deal with all the questions upon which the parties fail to agree, with the right of revision, of course, in the court.

MR. GILLETTE: The question of degree of disability?

MR. BAILEY: Everything, and that would meet a former question. If these officials are appointed through the Commonwealth, then, just the same as our probate judges, they could meet every now and then and compare notes, just the same as our Superior Court judges. We have twenty-five of them. In New York they have one hundred. They get together, and to some extent compare notes and to some extent keep things somewhat uniform.

MR. GILLETTE: I just want to ask a few questions, and that is this, a number of questions that occurred to me that would arise before this tribunal, aside from questions which will arise in regard to the construction of the act itself. Of course, there are a lot of those things that will undoubtedly have to be litigated,

but the particular questions will be what is the amount earned, what was the average wage rate? If those provisions were carried out, who are his dependants, etc.?

Then you get in, outside of that,—you get into questions which in their character are medical. Now, it seems to me that that is where you get into the difficult question, and I would like to see as a constituent part of that court a medical man, who by being continued in that position would become proficient and expert and invaluable.

Not only that, one other thing that has bothered me is the question of the method of selection or appointment of these arbitrators. I pray to the Lord that they will be kept out of the realm of politics in some way or other. How they will do it, I don't know.

MR. SAUNDERS: Let me answer some of those questions.

THE CHAIRMAN: Now, gentlemen, I don't want to be technical here, but you have made one motion, you are discussing another. You are discussing whether or not you want the board of arbitrators, while the motion is to have the matter referred to the Chancery Court, and have the Master pass on it. Now, if there is a motion to amend, I think your discussion would be proper, but I don't think it is on this.

MR. BOYD: I would like to state to Mr. Saunders he has a motion there.

THE CHAIRMAN: Go ahead, if you have a motion.

MR. SAUNDERS: I will make an amendment to get this in shape for discussion: that there be a general board of arbitrators, one member of which shall be the chairman of the committee of arbitration in each individual case, the other two members of that committee to be selected, one each by the employer and the employee; that all questions arising under this act be referred first to the local committee of arbitration, with power of revision of the payments from time to time by the State board of arbitration, whose decisions upon facts shall be final, with the right of appeal upon questions of law direct from the board of arbitration to the Supreme Court of the State, or the upper law court of the State.

The motion was seconded.

MR. WAINWRIGHT: Mr. Chairman, before you take that motion up, I am obliged to withdraw. I simply wish to thank the members of the Commission for having given us an oppor-

tunity to be heard. Perhaps it was not much to our advantage, as we have made a final report to our Legislature, but our Commission is still in existence, and I am sure will be very much interested to have the results of the deliberations of this Commission, but will be very glad as long as we are in existence to keep in touch with it; and it is quite possible that the result of the deliberations of this Convention here may move us to make some supplementary report to our Legislature, and I shall be very glad to be advised of any adjourned meetings, as I would like to keep in touch just as much as if we were a commission that had a report to make in the same position as you are.

THE CHAIRMAN: Mr. Wainwright, if I may speak for myself once and also for the whole convention, I think we are very thankful to have had you here. We are glad also to acknowledge indebtedness to your Commission for the able work it has done in getting the first law in the country, getting it through the courts as constitutional.

MR. WAINWRIGHT: Personally, I consider the obligation to be entirely mine.

MR. GILLETTE: I would like to ask Mr. Mercer, so far as this board of arbitration is concerned, does it conflict at all with the plan you have worked out under your constitution?

THE CHAIRMAN: The general idea of their scheme, Mr. Gillette, is all right, except that we have been taking the subject up piecemeal, and we are not going to get a scientific code on the subject. Now, there are elements of this I want to vote for and I want to support, and it is pretty nearly what you have been advocating on this particular line. I am not sure I could agree with you about selecting so many men for each accident. The first thing you know, you would have four hundred arbitrators in Hennepin County who would be outside on the segregated cases, and the one judge who was there would not probably have authority to take up any particular case and dispose of it, and for that reason I think the arbitrators have got to be more or less permanent.

Now I should think also that on the question of the selection of these I would go back to where I was to-day, where I was defeated,—that I should be heartily in favor of that if you would only put the burden on both sides, so you would work out the scheme.

MR. SAUNDERS: One question Mr. Gillette suggested. That is as to the appointment of these officials. Of course, he knows

that in Massachusetts anything that deals with the judicial branch of the government is an appointment by the Governor.

THE CHAIRMAN: It is not in Minnesota.

MR. SAUNDERS: And that we have no politics connected in any way with that judiciary, so that we do not have to trouble with that question at all.

In regard to the doctor proposition, we have included, I think, although it was not in the motion, a provision that this local board of arbitration could employ at any time a physician for an examination and consultation at the expense of the State. Of course, that would work out in difficult cases in having more or less permanent men, because the chairman would be a member of the permanent board, and if he knew of a good man that had a good deal of experience in that kind of cases, why, that would be the man he would have.

MR. GILLETTE: I believe the only point in which I differ is on that medical question. I think he ought to be a fixture there, and that he alone ought to pass on questions of disability.

MR. LOWELL: The point Mr. Gillette mentioned. There is a large amount of arbitration litigation, if you can call it so, in Germany, as I understand it. It is because there is absolutely no fee to be required. Now in Massachusetts the very important part of the scheme is that the expenses of the arbitration board shall be placed partly on the employees, either a limit of five dollars or a limit of one-third of the costs, not to exceed something, so that the employee shall have a very small amount, but still an amount which he must pay if he wants to arbitrate; and we put it in so because we thought that it should not be absolutely free or they would go for it every time, and it should not be prohibitive, but it should be something that a man would think twice before he went before it.

MR. GILLETTE: How do you fix it in Wisconsin?

MR. SANBORN: A general board appointed by the Governor, confirmed by the Senate, a permanent board. They have power to appoint the examiner that may be needed if there is necessity to send to each place and take testimony immediately.

THE CHAIRMAN: You mean finding the facts?

MR. SANBORN: No, an examiner simply reports into the board, and the board makes their findings of fact, and those findings of fact are absolutely conclusive. The only review that can be is on the construction of the act, that is whether the findings of fact afford a conclusion according to the act itself or not.

MR. GILLETTE: Now you have a board sitting there in Wisconsin, you send a man where there is an accident here or there.

MR. SANBORN: We have examiners all through the State. They simply take the testimony.

THE CHAIRMAN: Do you take them down in stenographic notes?

MR. SANBORN: I expect to. That is all done at the expense of the State.

MR. GILLETTE: And those judges sitting there, they don't see the injured man?

MR. SANBORN: They can do that if they see fit, but they are not obliged to. Now that law will depend on the amount of work there is. If there is a large amount, they only see half of them; but, if there is not, they will be all around the different places.

MR. GILLETTE: It seems to me I would be mighty leary on the question of fact, whatever I might think of the question of law, but on the question of fact, the board of arbitration sitting there and not seeing the fellow.

MR. SANBORN: Well, that is true, but you can get some men before the board: it is a physical impossibility with a large number of cases to get all.

MR. GILLETTE: Unless there was a competent man on the spot to settle it and make findings.

MR. SANBORN: Well, that is a matter of consideration.

MR. GILLETTE: I am just raising these questions.

MR. SANBORN: Yes, an examination would be a recommendation to the board, and they would take into consideration, in evidence, but what we are aiming at is uniformity.

MR. GILLETTE: May I ask whether a final report has been made in Wisconsin or whether it is before the Commission?

MR. SANBORN: It has not.

MR. GILLETTE: Have you framed the bill?

MR. SANBORN: No, we have not yet agreed on the final bill.

MR. WIGMORE: I would like to say that each of them avoids what seems to us a defect, on the one hand, in the English act and, on the other hand, in the New York act. The defect in the New York act is the workman has to make his first claim to the court; and I think all lawyers will agree that we must relieve the situation from the maze of technical refinement that comes up as long as any man has to make a claim directly to anything called a court, because that means a lawyer, and that means pleadings, and that means all sorts of expenses. I don't under-

stand that either of these propositions is likely to offend in that way. On the other hand, the English act, it seems to me, makes the great moral mistake of obliging the injured workman to go first to the employer. That is the whole moral crux of the situation to-day. If I am hurt in your factory, and I come to you or my family come to you, and want to get some compensation, there is a lot of resentment right away. I ought not to be obliged to make my first statement to you any more than when I am hurt on the street car to-day, and have an accident policy. I would not expect to go to the street car company. I would settle it up with my friend the insurance company. You know they settle up in good time. You know how they do these things,—there is no hard feeling generally,—and the greatest moral effect is to be had under our new régime here by simply stating that the employee shall make his first claim the moment he is hurt, not to the employer, but to some independent body.

Mr. Gillette: I wish other people would send their bills against me to somebody else.

Mr. Schutz: I move the question and the motion of Mr. Saunders.

Mr. Sanborn: Gentlemen, I understand in your motion you provided the board of arbitration, one to represent the laboring man and one the manufacturer.

Mr. Saunders: In the individual committee, yes.

Mr. Bailey: I would like to ask Mr. Saunders one question. How do you get rid of the jury trial?

Mr. Saunders: Now, that is a constitutional question. I shall be very glad to answer it, but it seems as though it would bring up the whole constitutional question.

The Chairman: We have another constitutional question on this, too. Now, gentlemen, I want to say frankly that I would like to vote for this feature, but I don't want to vote for this motion as it stands. I like to vote for the principle of the board of arbitrators. I would like to have them find the facts.

Judge Holloway: I am just going to state this, that the machinery of a scheme of this kind in Montana should be carried out without any change of the statutes. We have a provision in our statutes for the settlement of all controversies by arbitration, and the machinery is provided for in the statutes. So far as we are concerned, it would not need any change in the law. My notion is in harmony with Mr. Dickson's suggestion,

that we approve of a method of determining controversies between the employer and the injured employee and use the instrumentality of a board of arbitrators, and then leave it to every State to work out the particular scheme.

THE CHAIRMAN: Personally, I could vote for that, I think, if you can substitute that. Now will you have the question upon the original question as amended and substituted? The amended motion is to recommend to the different Commissions the theory of a board of arbitrators to determine the fact in these accident cases in cases of dispute, and leave the matter to each State how they will formulate that board.

The motion was put, and prevailed.

NUMBER 11. NATURE OF SCHEME: COMPENSATION, INSURANCE, OR STATE INSURANCE, (*a*) VOLUNTARY, (*b*) COMPULSORY?

THE CHAIRMAN: Now the nature exactly, whether it should be compensation insurance, State insurance, voluntary, compulsory. That you have under number 11. Is there anybody wants to make any motion on that?

MR. SCHUTZ: I move that we recommend the principle of insurance, a plan of insurance approved by the State.

MR. LOWELL: Compulsory?

MR. SCHUTZ: Yes, I would say compulsory scheme.—I think that is going too far probably. I will leave out the word "compulsory."

THE CHAIRMAN: We have a motion. Is it seconded?

Seconded by Mr. Boyd.

MR. BAILEY: I would move as an amendment that we adopt the scheme which would be in the nature of compensation.

Seconded by Mr. Lowell.

THE CHAIRMAN: Motion made to adopt a scheme which would be in the nature of compensation. If some kind fellow will take the hypnotic suggestion, I wish he would make a motion that compensation be compulsory, with permissible insurance.

MR. BAILEY: I accept that.

MR. BOYD: Voluntary.

THE CHAIRMAN: Well, voluntary or compulsory, either way.

MR. BOYD: Voluntary.

THE CHAIRMAN: Is that seconded?

MR. LOWELL: Seconded.

THE CHAIRMAN: Any remarks on that amendment?

JUDGE HOLLOWAY: Mr. Chairman, I don't know what you mean.

THE CHAIRMAN: Here is what I mean. Here are the three systems in vogue in Europe. I have got it written out here briefly, just three short paragraphs.

A. Requiring the employer to pay compensation as provided in the act, if such injuries occur, and this you may find in the laws of Belgium, Denmark, France, Great Britain, Greece, Russia, Spain, Canada, etc. Almost all of these have provisions allowing the employer to insure himself, and, if properly insured, to be relieved from liability.

B. Laws establishing liability for compensation, and also obliging the risk to be insured either in State or State-regulated companies as a guaranty of responsibility. Finland, Italy, and the Netherlands are examples of that class.

C. Those requiring the risk to be insured in the specific manner or specific institution. Austria, Germany, Hungary, Luxembourg, and Norway, they serve as examples of that.

MR. GILLETTE: Mr. Chairman, I wish some of those in favor of it would make a motion favoring State insurance just simply for the purpose without argument, but I just simply would like to know what the sentiment is with regard to that.

MR. ROHR: Mr. Chairman, I am free to confess I will make a motion.

THE CHAIRMAN: There are several motions before the house.

MR. ROHR: Let it take the form of State insurance, and that the compensation be handled by the State, paid into a fund governed and regulated by the State.

THE CHAIRMAN: It is moved and seconded that the employer be required to pay insurance into the State and the State administer it.

MR. MCEWEN: I think it would be a good idea for our Commission to recommend to the Legislature to provide for a State insurance. It takes a long time to get a constitutional amendment, and we have the machinery here fixed so that it can be brought about. It would be a great saving of time.

Now I recognize that there are a large number of people who are fearfully afraid of the State becoming paternalistic on questions of this kind. We have no hesitancy whatever on being paternalistic in taking care of our mental wrecks, men who have

lost their reason. A man who has lost his reason is a menace to society. We are afraid he will commit bodily harm to others, so we maintain State hospitals for his care and cure, if possible. We maintain almshouses where the Chicago *Daily News* here holds that at least ten per cent. of our industrial wrecks are forced.

I can't for the life of me see where we are interfering with any legitimate private business by going into this form of paternalism. We have got to come to it sooner or later, and we ought to have at least the right to go into it. We ought to have the right as a club to compel the stock companies to be fair with the employers and others. I believe State insurance is the only economic way out of it.

I have heard so much in our discussion of this question and my study of this question about the ambulance-chasing attorney. Under the present system, I don't think he is so bad. Why, he is a necessary adjunct to the present system, just as necessary to the workingman as the employers' liability company is to the employer. That is self-evident. The whole theory of the character of legislation thus far has been to make unprofitable the business of the personal injury attorney, and we fail to reckon with the business of the employers' liability company. In order to mete out the measure of justice to the injured workingman, to save industry from being penalized, why, we ought to get down to the cause of the operation, to a scientific basis.

Now I want to say at the outset, I am not a socialist, so don't think I am advocating anything that means confiscation of private property.

Do whatever you can under the law now, under the constitution now, but look forward to the development of the idea here, that we can have matters so that we can do away with all this waste that now obtains in industry. In New York State, according to the Bureau of Labor, they report about eighty cents of every dollar paid by employers for protection against lawsuits goes to the people who were not injured.

Now you have the cost of your machinery, the cost of conducting the courts, the salaries of judges, the money for jurors, the time of the courts.

Why, in 1906,—if I am making any incorrect statements, I hope I shall be corrected,—but I am given to understand that four million dollars was paid in the city of New York, to try

master and servant cases, and in one year eighteen hundred thousand dollars' damages were paid. Now nine hundred thousand of that possibly got into the pockets of the injured workingman. Why, here we have the machinery of justice to administer nine hundred thousand dollars' damages, costing four million dollars. That waste there under State insurance could all be eliminated. The State could pay the cost of administration, and it could be covered by the revenue received from taxation, and it could be used for the compensation of the injured workingman. We want to look at these laws from a commercial standpoint, but more from a humanitarian standpoint, more with the idea of decreasing the amount of pauperism. While I think I may probably be ten years in advance, we ought to stand for this thing ten years in advance of the time, for it takes a long time to amend a constitution, long time before we can get the bill passed through the Legislature. I think we ought to also recommend an amendment to the constitution of each State for the purpose of enabling us to get ultimately into the idea of State insurance.

Mr. Lowell: Mr. Chairman, I want to be perfectly fair with this Conference, and I have got to state a personal situation. I have been the attorney, one of the attorneys, for the Employers' Liability Association, the first one ever in this country, and, I suppose that without my meaning to, because I have tried to be fair-minded, I naturally am biassed, but I don't believe in this State insurance scheme at present. I think possibly we might develop towards it, and, if the other scheme does not work, that scheme may. At present it seems to me that we have not developed far enough in this country to consider it.

I will say at the start that I think it is absolutely impossible under the Massachusetts constitution to get it without amending the constitution, but it seems to me that the results which you would get in Massachusetts, if you had State insurance, would be a tremendous political body. I don't think you can run a great institution, such as would be required to carry on the insurance of all employers in Massachusetts, without running into the situation whereby it would be a political institution.

I think you would have people pulling and hauling on both sides of the proposition, employers and employees, to get the head people and the under people appointed to represent one side or the other. Now we have in Massachusetts, and I suppose

you do in other States, the Civil Service Commission, fairly rigid civil service laws under which the employees of such commissions as this would have to pass examinations. Now I don't want to give a black eye to civil service, but I will be frank in saying that I consider civil service only a necessary evil. You would want to appoint a man of the highest kind who would come under the civil service, and you might want to appoint a man for his tact in dealing with the relations between employers and employees. You would want a fair-minded man, who could see both sides of the situation.

Now you can't possibly invent a series of examinations for civil service which would test that in the slightest degree. Of course, you have got to have it, for the reason that, if you don't, you are simply getting political appointments. Now I am talking frankly, and the only reason for the civil service in my mind is to get the best man or best man or men which you can under that system.

Now my idea is that the best man that you could get under that civil service is a very much poorer man than you would get if it were possible to have all of your people appointed by a governor or anybody else, whoever the appointing power might be. It seems to me that the present results of State insurance would be to get, as I say, a political body with a quite inferior set of officials governing it.

Now I realize that there are very serious evils connected with this situation. And my idea is that the insurance company is not altogether and not very largely at fault. The trouble is with the present situation that the basis of the law is such, namely, liability for negligence, liability for fault, that the first thing which anybody does, and has got to do, under the law, is to begin to call names: that is really the result of it. In order to recover against your employer now, you have got to prove that he is negligent. Now the minute you come in and try to prove that he is negligent, of course he tries to prove he is not negligent, and the immediate result is that both parties get mad. It is the natural result of our wrong system.

Now, when you come to the insurance companies, they simply insure the situation. Of course there is not any human element involved in their business. That is a business, but it is a perfectly legitimate business, to insure under the present system, and the fault with the result of that part of it is not the fault of the insurance company, but the fault of the system.

It seems to me that the best way to get out of this thing is to go ahead with some different kind of a system, make your details or administration such that there will be as little as possible litigation under it of any kind, and especially as little as possible on the liability end of it, because that is where you begin to call a man names. It is on the liability end of it. Take out of that system all the liability, chances for discussing liabilities, that is possible, and then leave any details in which you don't have to call names, such as the question of the extent of disability, etc. It seems to me that a system of that kind will do a great deal toward helping the situation.

Now there are going to be under any system of compensation, there are going to be a tremendously greater number of accidents which are covered by the law, and therefore a great deal more insurance and very much keener competition for insurance. It seems to me that the natural result of that will be that the various companies, in order to meet this thing, have got to cut the rates among themselves. Of course there may be tariffs and all that, but they have got to cut the rates among themselves, and the result of that will be that a great many expenses connected with insurance will have to come down.

Now one of the chief things which account, perhaps not one of the chief, but a very large thing which accounts for the amount of money wasted in insurance,—and it is wasted,—is the question of getting the risk into the insurance companies. Now the companies pay very largely for that. As it happens, my special company pays less than most, but they pay very largely for that.

Now what the companies have to fear under this thing is the mutual company. They have got to make good, to use a vulgar phrase, or they will get left, so that they have got all the time under the new system to make their charges just as low as they possibly can, with the system of mutual insurance staring them in the face.

It so happens that in Massachusetts, where they have got a large mutual insurance company in the textile trade, their attitude toward paying employees, injured employees, is worse than the private companies. I don't think that is a necessary attitude of a mutual perhaps, but it is because they are in competition with the line companies, and they want to show their clients that they can do it cheaper. The question of mutual

companies will stare these companies in the face all the time under the law, and that will tend to keep down their unnecessary charges, so that it seems to me that for the present we ought to go along under some different scheme than State insurance; and, if it turns out that the thing is not working well, if it be the result of experience that you must have State insurance, why, then go ahead and get it. In that situation you would be likely to get it, but under the constitution in Massachusetts now I don't think there is a ghost of a show of getting this amendment anywhere near through.

Mr. Boyd: On the matter of insurance, as I stated in my opening statement, fifty per cent. of the employers in Ohio employ less than twenty men. Now where the common law defences are eliminated, the number of cases in which there would be a liability placed upon small employers, where you have several thousands of them in the population of six million people, would be very numerous. In order to make a compensation act, which I would rather call insurance against accident, effective in the State of Ohio, it will be necessary to require that the small employer must insure against his liability.

Now there may be a possible solution of that through the French scheme where the employer is required either to insure in the state insurance company or he is required to carry insurance covering his liability in private companies, or he may pay a small tax into the state and the state guarantees his solvency that it will pay the compensations that may be awarded.

Professor Henderson thought, in talking with him a couple of weeks ago, that, if we found that it would be unconstitutional to have State insurance, which in my opinion will be the ultimate solution of the problem, we will be driven to it on economic conditions, because we have to be competitors almost wholly of two nations, the German nation and the Japanese nation, almost exclusively in the next twenty-five years.

Now I want to call your attention to a very important historical fact. In 1866 the English Parliament appointed a commission, of which Matthew Arnold was chairman, to investigate educational conditions on the Continent with a view to correcting their industrial difficulties. That commission made a report in 1869 briefly to this effect:—

That on the Continent they had a diversified industrial educational scheme, which was compulsory upon children from six

to fourteen years of age. Now the Englishman declined to modify his educational scheme, because it was repugnant to the English character, as Matthew Arnold put it, to be compelled to do anything.

Now, then, the facts of the matter are that, while you men think that is a very amusing matter, that poor England's degeneracy and her weakness are almost wholly due to the failure to act upon that report; and the same action cost them immense economic loss.

Now they came up to the same old thing again. They go over to Germany and pick out everything that Germany has got, its compensation scheme, except they must not make it compulsory upon the employer, because it is repugnant to his English character. Now, then, we in our common school system did not follow the English character. We made it compulsory upon children from six to fourteen years of age, and the facts are, if we wish to stay in competition with Germany, we will never do it successfully, taking a period of fifty years, except by doing two things. One thing is to have industrial education diversified, and the other is to have your insurance or your compensation scheme against accidents a State provision. This is just as sure as the sun rises.

Mr. Schutz: Mr. Chairman, I think there might be a misinterpretation of the last speaker's remarks. Certainly in Germany there is no State insurance to-day. The gentleman does not wish to infer that?

Mr. Boyd: They provide by law, the employers are bound to form an association.

Mr. Schutz: In a different way, as I said.

The Chairman: I wish you would bring up your motion, Mr. Boyd, that is the whole question.

Mr. Boyd: Just a minute. The reason I did not go back over this German law and formation of employers into associations and that sort of thing, I thought that would take time and confuse matters. They also form associations, they being required to insure individually. I simply called that State insurance. Probably that is not quite technically correct, but it is compulsory insurance against liability.

Mr. Rohr: We find in one company represented by one gentleman at Cleveland, Ohio, Mr. Wilson by name, in adjusting sixty-five thousand eight hundred claims for accidents of this per-

sonal risk compensation or any kind, out of sixty-five thousand eight hundred less than six per hundred received compensation. The State of Ohio, so far as we gather it from statistics, shows two million five hundred thousand dollars paid by indemnity companies, not counting what is paid by the workmen to insure themselves, and, out of the two million five hundred thousand, eight hundred thousand was recovered by the workmen; and out of that they had to pay their expenses for attorneys and other costs, leaving them approximately forty per cent.

With the State handling the insurance proposition, he might gain nearly all of that. I am not very well versed in law, but the State protects its birds, cows, sheep, pigs, horses. Maine spends approximately sixty thousand dollars per year caring for its fish and birds and game. That is all paid into a general fund, and the State administers it. If it is possible to protect those lowly creatures, yet they are handicrafts of God, is it not possible for the human mind to conceive that they could protect human life and limb, and let the State administer it? That is all my contention in the question.

Mr. Bailey: Mr. Chairman, just a question on this question of State insurance before we take the vote. I understand we are going to vote on State insurance. I understand the situation is, leaving out the constitutional problem, that we are to tax all the tax-payers of the State and raise a fund by which the workmen are to be insured against accident.

The Chairman: The tax classifies the industry is the idea of the thing.

Mr. Bailey: Classifies the employers.

The Chairman: More upon his liability.

Mr. Alexander: Mr. Chairman, is an amendment in order?

The Chairman: Can you discuss it under one of these principles?

Mr. Alexander: We can discuss it, and you can hold whether I should put it in the form of an amendment. We have heard the objections to the private insurance companies, the employers' liability companies. We also have heard Mr. Lowell's defence of these people winding up with the plea that we ought to give them a chance under this new law to show how well they can behave and what they will do.

Now I think we have given them a chance to show how well they can behave, economically, and they have not done it, at

least that is the evidence here and everywhere. Why ought we to give them a few more years to show what they can do? Why should we give them any more time? It has been brought out always on such occasions how liberal they will be and how humane they will be to the employee.

On the other hand, Mr. Chairman, I do not believe in any system that is so iron-clad that it eliminates flexibility, that could not make for good. I have, therefore, the idea that, inasmuch as we want to safeguard payments of compensation to the employee to the amount of one hundred per cent., if we could, or to approximately one hundred per cent., so that all the money contributed for that purpose may go to the injured employee, I would have the economic principle brought to the foreground as much as possible.

It seems to me we can express ourselves in favor of the principle of State insurance in this way: that the State shall establish a department in which every employer may insure at such rates as the State commissioner may establish, but the employer shall be allowed at least the option under this special legislation to insure in private companies, in mutuals, or in any other way, provided these companies are under the supervision of the State department, and their rates are approved by the State insurance department as being at least as low as the State would require for insurance in the State insurance department.

MR. BOYD: That is practically the French.

MR. ALEXANDER: More like the Norwegian system. Can that be put in the form of an amendment?

THE CHAIRMAN: I think that goes to the merits of the question. We are not now after any special form: we are after State insurance.

That is the point,—State insurance; and under State insurance it makes it permissible just as we have made it permissible. That is already in one of the other amendments.

MR. ALEXANDER: What other amendment?

THE CHAIRMAN: Mr. Bailey moved at my suggestion that the compensation be compulsory with permissible form of insurance.

MR. ALEXANDER: But, if you say compulsory, you must provide for State insurance departments.

MR. LOWELL: No, compulsory compensation.

THE CHAIRMAN: Compulsory compensation, allowing the risk to be insured either in a private company or a mutual.

MR. ALEXANDER: You should commit this Conference to the principle of State insurance.

THE CHAIRMAN: That is in the last amendment. Since Mr. Bailey's motion, Mr. Boyd or somebody else made an amendment.

MR. ALEXANDER: Will you state the last amendment then?

THE CHAIRMAN: That we be committed to the theory of State insurance.

MR. ALEXANDER: That is not my idea. I mean we should provide for State insurance, but with an elective scheme approved as being equally good. We want compulsory State insurance, but with the option to contract out, insure in private or mutual companies, provided their rates are approved as being as low as the State's rates.

THE CHAIRMAN: Do you accept that amendment?

MR. ROHR: Mr. Chairman, I will accept the amendment. I will say I have voted for twenty-five years, and I have never voted for a Socialist. If I live twenty-five more, I don't think I shall vote for all the things advocated by them.

MR. HOWARD: I would like to say I am strongly in favor of the State insurance scheme; that is, aside from any constitutional question. I think one of the most important features is the reducing of the cost. We are going to increase the rates on the employers tremendously, and all the evidence has shown the tremendous waste in private insurance companies, and figures from Germany, I believe, show that nearly ninety per cent. of the money paid in reaches the injured employee. As far as the question of Socialism is concerned, we must remember that this insurance, compulsory insurance, was brought up originally by Bismarck. I don't think anybody could accuse Bismarck of being a Socialist.

THE CHAIRMAN: Holding a Socialist meeting at the back stairway was the origin of that bill, if you want to know the history.

MR. HOWARD: As I understand, it was to ward off Socialism, extreme Socialism; and the same situation is likely to arise here within fifty years.

There are many good points in State insurance. For instance, you could put factory inspection under the State insurance department.

Another objection to the private companies which would be of

immense value both in more efficient inspection and in reduction of cost of insurance—the two things naturally go together—is that they are in the business of making money for their stockholders. The State insurance is not in the business for making money.

Mr. Saunders: Just to show that the Massachusetts Commission has not come with any scheme, I want to oppose what Mr. Alexander said. If we are going to have State insurance, regardless of the constitution or anything else, don't let anybody get out of it. The very essence of State insurance is that you can take everybody in and save your cost, and by a system of taxation save accumulated surplus, because you have got everybody in it, and, whether or not some individual is doing business to-morrow that is to-day, the industry is there, and you can do without an accumulated surplus. You can, by a system of taxation based upon costs for a given period of three or six months or a year, collect immediately what is necessary to keep your insurance going. If you allow the big companies to contract out and take something better, you have got in all the poor companies and all the poor risks. You are doing away with all the advantage of your State insurance. Now, if there is going to be State insurance, let us put everybody in it and keep them there, then we will get the advantages of State insurance.

Mr. Alexander: The reason for making this amended motion is that I fully believe that private companies can write insurance at lower rates than the State can; and experience—I believe it is of Norway or the Netherlands, if I am not mistaken —has shown that, where State insurance is in force, private companies have so adjusted their affairs that they have been able to write insurance cheaper than the State. I believe, under such conditions, we shall likely find that very little State insurance will be written, but that the insurance written by private companies will be on a very economical basis.

The State of Massachusetts, to some extent, has already committed itself to this principle. I am not a lawyer. I can argue only on the basis of common sense and some logic. We have a savings-bank insurance department in Massachusetts, as you know, and I believe the insurance department could be extended so as to take in this new insurance.

Mr. Gillette: Now, Mr. Chairman, just one word. Personally, at the present time I am in favor of State insurance.

I am in favor of it for two reasons, which I would like to state. I am in favor of State insurance for the Workman's Compensation Act at the present time, because, based on the experience of the old line and private companies abroad, they have been able to write insurance for less than the mutual has, or even do the business at less cost to the employer than the mutual companies.

MR. MCEWEN: I stand in favor of State insurance. I recognize the importance of it. I recognize the political defects. I live in a city where we own our municipal gas and water plant. It is one of the few successful enterprises of its kind in America. We, however, have had a good mayor, who organized the department, who appointed the best men, no matter what their political views were or whether they had any political views, and the result has been that he has had a very successful administration, but that would not obtain under State government.

I do not advocate immediate State insurance. I simply want enabling legislation now, so that it will be reached when we get ready for it. The Legislature will be more conservative than the people in enacting a State insurance scheme.

MR. BOYD: How about the French scheme?

MR. MCEWEN: I would be committed more to that. If you remember, the burden of my remarks was simply for each Commission to recommend to the Legislature an amendment along that line.

All I wanted to do, if we get an enabling act passed to get the constitutional amendment provided for, then we can gradually work into it.

THE CHAIRMAN: May I just tell you what my views are on that?

I went to Europe with Mr. Dawson, who went with Dr. Frankel, and the result of that was that he wrote a book on the conditions there, and he went back with me. He represents us and the Federal Government in getting statistics on this very question of the investigation of the scheme of insurance in every country that possessed one.

We were together every day, I believe, without exception, and most of the evenings on the boat, and we discussed the different forms of insurance every day from one to five or six hours, as we walked about the boat. I made a memorandum of what we concluded after all that investigation and experience. I did

not agree with him every time, but these are my own views. There are only a couple of pages. May I read them in the record?

In the first place the risk must be an insurable one in some form, none will doubt, for the following among many other reasons:—

(*A*) The law becomes one of chance of accident, which in many industries is more or less regular in occurrence. That ought to be averaged over the particular industries for long periods of time, to prevent serious accidents from destroying the particular industry. This can best be done by some form of insurance.

Unless there is some insurance, the financial standing of the employer, and consequently his credit, will naturally be seriously affected.

(*B*) Any risk of the kind which seriously endangers the employer must likewise endanger the employee and measurably affect the employee.

Now this risk, while necessarily insurable, I think compulsory insurance ought not to be involved, for these reasons:—

(*A*) It is a regulation that even in institutional countries—and those in Europe, it seems to us, from all the experience we had—is seriously a question as a matter of policy, for the good of the cause, and will be a good deal worse, I think, in our country.

(*B*) It requires all to be insured, and does not have the competing interest to properly bring down the rate of private companies—if you are going to have private companies and public companies, too.

(*C*) It wields the paternalistic hand over the one class at the expense of the other, and would create much friction in a republican democracy like ours. That is important. It provides some scheme of taxation in particular industries for general insurance, which certainly would be bad.

(*D*) If provided, it would or might become prohibitive to the small employer, who might not be able to insure in private companies,—instances are frequent where such companies are refusing or turning away the small private employer; and, if his insurance is compulsory, and there is nothing but a private company for him to go to, he is left entirely without any insurance. And, in the case where they have both private companies and public companies, better risks are gotten by the private companies; and the fellows that are turned away, they are going to public companies.

(*E*) If required to be in a State institution, that institution would be held to be a work of improvement, I think,—internal improvement, I think, in Minnesota and in your own State here, the State of Illinois, and not allowed by the constitutions.

(*F*) If compelled to be either in a mutual or private company, the employer not admitted into either would be deprived of his business,—that is, would have that tendency, would not go to that extent.

Now it would be unwise, it seems to me, therefore, to create a system here of compulsory insurance where the constitutionality would be very greatly a question, when I think we could accomplish the same results by the permissible insurance that I have indicated, and which I hoped Mr. Bailey would move, for the following reasons:—

First, I think insurance ought to be voluntary.

Second, I think that the act of the insured ought to be conducive to the furtherance of the interests of the employers and the employees.

Third, it must allow mutual risks or any other insurance to properly reduce costs and reasonably affect competition.

What I mean by any other insurance is that we found it in some cases, in Scandinavia, for instance, one case we found, that where they could not compete with the state institution of insurance because it did not stand on the basis of real business for its expenses, but the state provided its expenses in order to give it a chance to compete with the private companies, because it could not do business in competition with them unless it did have some aid, and these companies, in order to keep up an existence under the circumstances, simply got together, employers, this big employer and that other big employer, and said: "Why, we will pool our interests of insurance, we will save all the commissions for insurance, we will turn over the business into one company, and therefore we will save a big loss on that proposition. We will compete with the state, even though it is having ten per cent. every year contributed out of the state treasury to help carry on the business, because they cannot compete with us."

Fourth, it would allow a saving of the whole or part of the procuring and administration of the fund.

Fifth, it must be properly supervised by the State to secure proper surplus and prevent unnecessary tying up of capital.

Now these things can all be accomplished, I think, in a system

of compensation with permissible insurance, but properly regulated with a number of mutual companies, so that those mutual companies can all the time have a club over the private companies. I state again, all the time, employers can all the time have the control in a situation like this.

Take that situation Mr. Gillette has been connected with, fourteen or sixteen hundred of the biggest employers in the State of Minnesota combined into one association. Suppose those gentlemen combined together and went to the insurance companies, and said:—

"Now your rate is all out of reason. Your rate has been so much; your expenses have been so much; your profits have been so much. You have raised the rate on us three times because of this compulsory act"—if they should do that in the future.

"Now we have got here so many million dollars' worth of risk. You are paying commissions to get your business. You give us a fair rate, and we will give you that business for a period of five years, or we will pool around, so much in this company, so much in the other, divide up, so that they would not all have the full risk. That will get rid of that expense for you. If you do not do that, we will make a mutual company. We will turn all the business into the mutual company, and we will save that risk to start with, and we will hire experts to run it, and we think we can compete with you."

And I believe that will have different results. Now let me give you an illustration by way of that in Sweden. Sweden has a state department of insurance. I mentioned a moment ago, I think, the case of the Scandinavia risk. Practically, it loses these big risks or any other insurance where they could go and say, we have so many hundred employees, we will insure in this private company because we can get a little bit better rate, or some other accommodations that are a little bit better. It has the effect of putting the burden on the state to cover the whole administration of that company, to cover the fee out of its general taxing power.

Then another feature is involved there, as is involved in Norway. The police and postal department is an expense of the government. They have to supervise and collect information on this insurance. They used the institution of the state there for that purpose. Of course, that costs them something. They compete with the private companies. Those states have not

been able to drive the private insurance companies out of business, because they are experts. They know how to handle business. They can do it more economically, and they probably will live along for a great many years, and it is now doubtful if they won't be successful. I don't believe it could be done here; but, if it is done, I think it would be very unwise.

MR. WIGMORE: There are two issues. One issue is, Should any scheme be compulsory on the employer? The other is whether State insurance shall be included or the employer be permitted to elect.

THE CHAIRMAN: The question will be first whether insurance shall be compulsory or permissible, as I understand it. Shall it be compulsory insurance? All in favor of that proposition, let it be known by rising. All opposed to its being compulsory insurance.

MR. LOWELL: I am opposed to it on the constitutional objection.

MR. HOWARD: No, that was not the motion. It specifically eliminates constitutionality.

THE CHAIRMAN: That is correct. It shall be compulsory. Now I assume you are leaving out the constitution on that.

You have another motion here. Now the question is, Shall this compulsory insurance be part of the institution of the State or a larger State department? as I understand it.

MR. DICKSON: May I offer a motion on that, Mr. Chairman?

THE CHAIRMAN: We have a motion.

MR. DICKSON: It is right in line with this. Let me read it. It may clear it a little. I would move that it is the sentiment of this body that it should be a system of compulsory compensation, provided that an employer may transfer his liability by insuring in companies approved by a legally constituted public body or official.

MR. ALEXANDER: My motion would now stand as follows: We approve the principle of State insurance, with the proviso, however, that the employers may insure in private companies or mutuals or otherwise, if these companies run under the supervision of the State insurance department, and their rates are approved as being at least as low as the State rates—

THE CHAIRMAN: That is the question we are coming to. First, shall we approve State insurance? If you say yes, then will you have any permission to contract that out?

MR. ALEXANDER: We should not vote on State insurance without permission to contract out.

THE CHAIRMAN: Do you approve the system of compulsory State insurance?

The motion was carried, eleven to five.

THE CHAIRMAN: Now do you approve of the idea of Mr. Alexander's motion, added on to that? What was that?

MR. ALEXANDER: The right to contract out by insuring in private insurance companies or mutuals, if their rates are approved by the State insurance department as being as low or lower.

THE CHAIRMAN: All in favor of that, let it be known by rising.

The motion was carried by eleven to five.

MR. GILLETTE: I move that it is the sense of this Conference that, in case it shall be ultimately found to be impossible by reason of the constitutional limitations to provide State insurance, it shall be recommended that the bill apply for the elective form of insurance with permission to contract liability out to private companies.

MR. DICKSON: At all times have solvency in mind. You may say that those men that have the view that providing State insurance is not constitutional, then they will recommend a system of compulsory insurance, providing the employer may transfer his liability if it is approved by a legally appointed official.

MR. BOYD: I think that Mr. Dickson has emphasized the real meaning of Mr. Alexander's proposition. Now, if the employer puts his risk in a company, it has to guarantee the solvency and safety of the whole scheme, and he gets out of the absolute liabilities that the law puts on him.

MR. GILLETTE: That covers it as far as you can do it. Take the Steel Corporation of Minnesota. I don't know that the Steel Corporation should be compelled to insure, or to contract out its liability, provided there is some provision made in the law by which, for instance, a corporation should make a deposit with the State as to insure the carrying out ultimately of the deferred obligations under the Compensation Act. So you would not be absolutely compelled to insure, provided you put up a sufficient guaranty with the State.

MR. DOTEN: Mr. Chairman, I would like to inquire what the force of our first vote was.

THE CHAIRMAN: Mr. Doten: there is no question but what this Conference has committed itself on the proposition of compulsory State insurance, as I understand it, with the qualifications put on it.

MR. DOTEN: Compulsory insurance?

MR. GILLETTE: I did not understand that that was included.

THE CHAIRMAN: That was included in that motion, and this Conference has voted first for compulsory compensation as it has gone along. Now for compulsory insurance, and then for compulsory State insurance.

The motion was then put, and carried.

MR. DICKSON: I move that a committee of three, of which the chairman be one, be appointed to draft a bill.

The motion was carried.

A MEMBER: I move that one hundred copies of the report of these proceedings be furnished by the secretary to each Commission participating.

The motion was carried.

The Conference adjourned until eight o'clock of the same evening.

Fifth Session, Friday, November 11, 1910, 8 P.M.

The Conference was called to order by Chairman Mercer.

Number 12. Repeal of Other Laws?

Mr. McEwen: Personally, I am committed to the idea of a single liability, if it can be under the bill, if this system of workman's compensation can be devised that will give adequate and just protection under the new scheme, wipe out everything else.

Mr. Chairman: This goes to the question of repealing the common law, repealing the liability statutes so far as they give liability, and substituting this.

Mr. McEwen: I should say, while we might commit ourselves to single liability, the matter of repeal ought to be left to the judgment and discretion of the Commission.

Mr. Lowell: The way this stands is this: We have a common law which covers only a few cases where the amount is unlimited. We have an employers' liability law which covers, besides the common law, practically the question of negligence of the superintendent, not much else than that. The limits under that are four thousand for the man, if he lives; five thousand for the family, if he dies.

Now my idea is that you can't get a scheme which will be financially successful in Massachusetts without taking off those amounts. That is, you have got to reduce down the maximum, and the scheme which I favor in Massachusetts is to leave the common law and wipe out the old employers' liability act and put the Compensation Act in its place.

Now there are several reasons for that. One is this, that, if you leave your common law, you will leave a chance of punishing the employer, if he really is grossly careless in something that he should have been careful about. Only where practically he himself is grossly careless or where he has given it over to somebody who has not taken care of the business, for instance, the safety of the premises or something of that sort.

You can recover in Massachusetts under the common law if the place is not safe, and he has not made it safe, and if he has not given proper instructions, and all that kind of thing. If

you leave that in the law, you give a chance which, I believe, ought to be left in to punish the employer, where he is wilfully negligent, —where he is a wilfully negligent man and does not care whether his employees are killed or not.

THE CHAIRMAN: That would of itself in our State create a liability for tort action, independent of your other system, if he violated that.

MR. LOWELL: What?

THE CHAIRMAN: If he violated the penalty or penal provision, that would subject him to a civil suit for damages for that violation in our State.

MR. LOWELL: Violated the penalty, what do you mean?

THE CHAIRMAN: In criminal law. For instance, any law that might be made, placing a penalty on the employer for negligence in a certain respect, gross negligence in a certain respect, where it was otherwise limited, subject the employer to an independent tort action outside of the criminal action because of violation of the duty, but I don't say including the particular fellow injured, and including the violation of a duty to the man injured.

MR. LOWELL: Our law is not a criminal law at all. You mean the safety appliance act.

THE CHAIRMAN: I thought you said that.

MR. LOWELL: I said, if you leave the common law in Massachusetts, it gives you a chance, it gives the employee a chance, to recover unlimited damages, and so in that way to punish for gross negligence, or something of that sort.

MR. WINANS: May I ask to what extent Massachusetts applies the doctrine of assumption of risk?

MR. LOWELL: We have all these doctrines stronger in Massachusetts than anywhere else, I think, in this country.

MR. MCEWEN: That is where one of them originated.

MR. LOWELL: Yes.

MR. WINANS: Isn't that the reason it is almost impossible to recover under the common law?

MR. LOWELL: The common law only covers the workmen in a few cases. We have the Employers' Liability Act in addition to the common law.

MR. WINANS: Now?

MR. LOWELL: Now, and that covers a good many more, so that, of the successful suits by the employee, I suppose seven—

well, eight, out of ten, perhaps—would be under the Employers' Liability Act rather than under the common law. But we have not done away in Massachusetts with the defence of fellow-servants and contributory negligence and the assumption of risk.

MR. WINANS: You have not now got rid of the fellow-servant, contributory negligence, and assumption of risk.

MR. LOWELL: None of them.

MR. MCEWEN: We have in Minnesota, but it only covers the railroads and railroad employees in the operation of trains.

THE CHAIRMAN: That is the principal part of it.

MR. ROHR: May I ask, Mr. Lowell, if, in anything contemplated in the way of compensatory law, you would rather abrogate the liability laws before you enacted the compensatory law?

MR. LOWELL: Why, what the laboring people have said to us in Massachusetts is this, which is a perfectly fair deal: they have said, We want you to have your repeal in such a way that, if the court holds that your new law is not constitutional, you shall not wipe out the employers' liability law altogether and give us nothing in exchange,—which is a perfectly fair proposition. My idea would be to pass the Compensation Act which would take the place of our Employers' Liability Act.

MR. ROHR: Still leave the common law.

MR. LOWELL: Still leave the common law. The reason for this is, as I said, to give a chance for a larger recovery where there ought to be one, and another reason is that it is very much easier probably, both as a legal proposition and a legislative proposition, to do it, because they have got a kind of idea that the common law is sacred; but they don't like the Employers' Liability Act. It has got a bad name there.

MR. ROHR: Is it your opinion that liability laws should be wiped out before you enact a compensatory law?

MR. LOWELL: Well, at the same time, in the same act.

MR. ROHR: Under the same act?

MR. LOWELL: Yes.

MR. ROHR: And then, if a compensatory law was defeated, the other would still remain in force.

MR. LOWELL: Oh, surely.

MR. ROHR: As it is, so would it remain.

THE CHAIRMAN: No practical difference, repealing all other laws.

MR. WIGMORE: What is the motion?

THE CHAIRMAN: There is not any motion: there is only that question, Shall we repeal the other laws? We have been arguing it under that theory with the rest of the question, whether we want single or double liability.

MR. SCHUTZ: Mr. Chairman, I presume that some time, probably under the thirteenth unlucky head, we shall discuss the question of election of remedies. I feel that we may save some constitutional difficulties in my own State by such election, so that I don't feel that we can finally settle this question until that is discussed.

MR. WIGMORE: I would agree with Mr. Schutz on that same group, that, if that election clause becomes necessary, as it possibly will, the whole thing is saved.

MR. SANBORN: If you have an elective act, the great contest will be when the election shall take place, whether at the time of hiring or after the accident. Now that will be the contest on that, but I don't think anybody would advocate a double liability for a moment; that is, compensation liability in addition to the common law or statutory liability.

MR. SAUNDERS: That is what they did in New York.

MR. LOWELL: They have done it in New York. Many people in Massachusetts want it.

MR. WIGMORE: It would be an alternative, not two remedies. If you took one, you could not have the other; but the proposition is now, to enact the law which we are now debating, and at the same time not to repeal the other.

MR. LOWELL: The only alternative between the common law—you probably don't understand our system in Massachusetts. We have the common law, and added to that the employers' liability.

Now, as a legislative and also a legal question, you can do it easier by leaving the common law, and wiping out that Employers' Liability Act, which I think, as a legislative question, is possible in Massachusetts, or may be.

MR. WIGMORE: I entirely agree with you, except that, in States where they do not have a special Employers' Liability Act, you would not need to do what you said.

THE CHAIRMAN: Gentlemen, I would like to be heard, if this is a good time, on that proposition. We are, of course, all agreed that a man should not recover twice. That involves

the principle that there should not be but one liability in fact for every man each time.

MR. BAILEY: One right of action.

THE CHAIRMAN: One right of action. Now the only way that we can make a system, as it has appeared to me, that will be at all satisfactory in remedying the present unsatisfactory conditions is to make one liability from the start. If there was not any objection to the present system of the common law, the present system of liability act, we would not be here to-day and yesterday.

Now, if we leave all the evils that exist under those two systems, all the uncertainty, all the bad feeling with the uncertainty that grows out of that, all of the waste, all of the opportunities for chances, all the expenses of the court that are there now, your insurance policy, if you have one, all the risk of your industry, you must essentially cover practically everything you have got now, your State must stand practically all the burdens it has now. Simply add this certainty to it, and you won't have gained anything. You may cut it down somewhat by the fact that that would not all go under the old system, but what we find, I think, would probably be that, in cases where the lawyers could advise their clients that there was a good chance for heavy verdicts, you would find that they would sue under the old system.

MR. BOYD: That is strictly the common law system.

THE CHAIRMAN: Yes, the common law system. Especially is that true if they had as you say in England, say you could assess it on this side and then lose on the other. Now it seems to me that the weakness of the English system lies more largely in the fact that it retains the statutory liability and the common law liability and adds this other system to it. More than any other one thing, aside from the constitutional question, I think, the State of New York has made a system that is less scientific by reason of that fact than anything else in the act; and I have committed to writing here at one time in a little book my own views of that and a paragraph that I would like to read to you, because you will get it much more quickly:—

"It is our opinion from observation of the English laws that the weakness of that system lies in the fact that instead of one liability there are three distinct liabilities elective to the injured,—common law liability, the liabilities act (which would be repre-

sented in various of these States by certain statutes), the compensation act. It is a revision of the uncertainties of the old system; it adds direct liabilities now. It leaves all the waste of the old system; it requires protection against all the certainties. It does not tend to lessen the cost in theory. It does not tend to make reasonable regulations under extreme cases of the old system. It does not simplify the differences between the employer and employee to further mutual advantages or lessen the burdens of the State."

It seems to me that, as soon as we get one liability, we can give the workers a higher rate if we repeal the necessity of defences and prosecutions and costs of trials, uncertainties, trying insurance, and the uncertainties of the other systems, and that we can come down to the place that we ought to come to on a subject like this, to a single code that will repeal the common law as a whole on this subject, repeal all of the statutes that give under liability, and make liability as you want it and as you think it honestly ought to be, as you and I think it ought to be,—make your whole system as easy, simple, and as speedy as you can possibly make it.

Now, if you do that, you will have dispensed with the waste, you will have dispensed with all of the hard-feelings question, all of the annoyances, all of the expenses that you can possibly get.

The only difference between that and what you are discussing is, the fellow shall have the right to elect to take under some other system than this. I think you ought to make this system as strong as it ought to be. You ought to make your compensation as strong as you can afford, as the employer can stand, to be equitable under all the circumstances; and then you ought to relieve him of the risks of anything above that.

Now that is a simple matter. You can do that whole thing under the one law. Then, if it gets up to Judge Holloway's court, he would look at it, and say that as a principle of constitutional construction, that, if we must declare this law void in the element that it gives compensation, it is so connected with the whole of this code that we will have to hold that the Legislature would not have passed this code if the compensation feature had been left out. Therefore, we will hold that the common law and the statutes are not repealed; and I think you will have a satisfactory system.

MR. HOLLOWAY: I have some doubt in my mind as to whether you can accomplish what you have stated. I have great doubt as to whether or not you can supplant the common law doctrine by a measure of this character. In addition to that I doubt the wisdom of it.

When I left home, I had given considerable study to the New York statutes and as much as I could to the English statutes. Now I don't approve at all of the English system, but I did approve of the New York system. It seems to me a reasonable measure.

My theory of this was just this, stated in a few words: that by the measure that we could adopt, if we could adopt one, we would offer not only to the employee who is injured, but to the employer, a scheme that was so much preferable to the common law or statutory liability that ninety per cent. of them would probably choose it. Where they would not choose, it would be in such aggravated cases as that the maximum charge we fix here would not be just compensation to the man who was injured.

Now suppose that you rob the employer first of his defence of negligence of fellow-servants, assumption of risk, contributory negligence, and the defence of fellow-servants, on the one hand, and, on the other hand, you limit the amount that may be recovered under the common law of your employers' liability statutes. Now, when the man is injured, he has the alternative of proceeding under this Compensation Act or going into the law courts. If he goes into the law courts, he may hope to recover the maximum of liability, but he understands in the first instance that he has got to divide that with his attorney. Now, if he can recover any more or a great deal more under those circumstances than he can get under the Compensation Act, certainly any sensible man will choose the Compensation Act, which gives him a certainty, to the uncertainty of going before a jury and taking his chances.

They are well taken care of even under the present system. As I have said yesterday, there is a demand quite general on the part of both employers and employees that will in a measure supplant our present one. At the same time I doubt whether it can be made a successful remedy in the first instance, and I doubt the propriety of attempting to do it, but I think that they ought to offer to both parties a scheme that is so much preferable that they will resort to it.

Now there, with the common law liability omitted and only a compensatory act upon the statute books, what shall we do with the employer, like one I am about to tell you of?

THE CHAIRMAN: If you put a penalty upon the one side, you have got to put it upon the other. If you put a penalty upon the employee, as I suggested yesterday, not let him recover when he happens to be at too gross fault, then you must put it on the side of the employer. While, if you leave it off of both sides, you will find that the insurance rate will regulate the employer better than any criminal law will do under these circumstances, unless it be a case of wilful injury, which the criminal law will take care of.

MR. ROHR: Just a word, Mr. Chairman, in that connection, that in the repealing of other laws and in the enactment of compulsory laws, isn't it reasonable to suppose that, with the adoption of what we will call a compensatory law, that will prove so attractive and offer such inducements that it will relegate those laws known as liability laws at the present time? In other words, will eventually dispense with our former laws, which are and have been acknowledged to be entirely unfair to the worker, rather than take and wipe off those things, which is a danger in reference to the case cited by Mr. McEwen. Why not leave them where they are? and, if the compensatory law be enacted by the various States and operated as it is intended it shall operate, it will in itself do away with the other laws. That is my conception of the automatic or compensatory law.

MR. LOWELL: Mr. Chairman, if I may add a word here, I have thought over this question, which Mr. McEwen has just suggested, very carefully, and my first idea was to have compensation, assuming that we could get it,—to have compensation that will cover everything of this character and to cover the tunnel case; but, Mr. Chairman, you can't do it without providing for a very much higher compensation in such a case as that than you can possibly bring into a general compensation law, and have the whole thing work. And, if you put that in, then you have the situation elective, practically common law injected into your Compensation Act. So it seems to me that leaving the common law is better, although I admit it has serious disadvantages from the point of view of litigation: you leave the chance of punishing that fellow.

Everybody here wants to punish him, and you leave that

chance because the common law is unlimited. A jury that could get hold of that fellow in court would give fifty thousand dollars against him. And that is something which no man would object to.

Now you have all the schemes and all the laws to cover that case. It seems to me that a new law, if it be added on merely to the common law, would cover that case all right. In order to bring in any particular provision in your compensation law, you would have to make a provision for practically unlimited damages, which would simply bring back the same scheme under the Compensation Act.

MR. WIGMORE: May I ask a question, Mr. Lowell?

MR. LOWELL: Surely.

MR. WIGMORE: You say this common law, if left, would have this effect of being able to punish the man in this case.

THE CHAIRMAN: Yes, that is the point.

MR. LOWELL: I admit that there is danger of lawyers getting together.

MR. DICKSON: Is it necessary, then, that the employer take advantage of the fellow-servants, assumption of risk, and contributory negligence?

MR. WIGMORE: But Mr. Lowell's proposition is to leave this risk in the common law precisely the same as it is.

MR. MCEWEN: It works both ways.

THE CHAIRMAN: Now, gentlemen, there is another objection. I don't want to talk too much, but there is one fellow that I think is concerned in this liability business, and I notice he has a perniciously active tendency of wanting to talk to me on this very question about keeping all the liabilities in. So the other day I said to him, "I take it for granted that you could use those liabilities and the chances in verdicts in your arguments to settle with your friends, I mean with the injured."

MR. DICKSON: You mean these three laws?

THE CHAIRMAN: Yes, the three of them. "You could have all these uncertainties to argue, which would have a better chance to give you a good premium on the chances for a settlement?" And he flushed a little, and said that was not his idea at all, but he ended the argument there; and I came to the conclusion that that was true.

MR. LOWELL: Isn't that evidence showing, Mr. Chairman, the provision in the law, Compensation Act, that would adequately take care of the situation?

THE CHAIRMAN: Would it do so?

MR. LOWELL: Yes.

THE CHAIRMAN: No, because he would have a chance to use the club of the court in litigation, in the Compensation Act, and the uncertainties of it along this line, with other arguments that he might use to a man or woman in a hospital, say he might get twenty thousand or seven thousand, or he might get seventy-five hundred, but you won't get it until you have been through this court, it will take six months. You won't get it until you go through the Supreme Court. Then your lawyers are not good enough to get a record that will not come back reversed, and it will be three years before you get it. Now we will give you forty-five hundred. Now it is better to take it now.

MR. SCHUTZ: I would like to ask Mr. Lowell, would his scheme of common law leave the question whether before the accident or at the time of the accident the employer or employee should be allowed to elect whether he would proceed under the common law or under the compensation act.

MR. LOWELL: That is touching on the question of constitutionality.

MR. SCHUTZ: Yes, I should think it does include that. Your idea is he should have a chance to elect at the time of the accident.

MR. LOWELL: As I understand, I will answer briefly, although it is on the forbidden subject. As I understand our Massachusetts law, you have got to give them a right to go to the jury if they want to. You would have both sides given the opportunity of coming under the compensation or taking their common law remedy.

MR. BOYD: I would like to ask Mr. McEwen,—he has not expressed himself on the question,—will you leave the common law and also the liability law and the Compensation Act, all three of them, side by side?

MR. MCEWEN: I believe in just a single liability and criminal punishment to the employer, who is wilfully negligent, criminally negligent, criminal punishment to the employee when through his negligence a fellow-employee is injured; and, while I recognize that the man that loses an arm pays the penalty himself for his negligence, I feel like penalizing him if he is wilfully negligent or criminally negligent by reducing the compensation. But,

if it should result in death, I would not make his innocent dependants suffer.

Now that is not new. On the railroads to-day, if an engineer wilfully and criminally violates the order of the railroad company, and it results in a collision and a number of people are killed, the engineer gets jailed.

MR. LOWELL: He is subject to conviction for manslaughter.

MR. MCEWEN: Why not make it general?

THE CHAIRMAN: I think there is a provision in our statute governing it that would leave that remedy outside of the act.

MR. ROHR: Mr. Chairman, in this connection, under the common law, we have been working prior to the adoption of some of the State liability laws. Isn't it a fact that we should make these things a subject for revision before reviewing the case or trying it?

I recall to mind one case particularly, which caused the loss of two eyes. A man had a family, he was thirty-five years of age. He sued in the lower court, and under the common law, prior to the enactment of the liability law of the State. The judge, in compassion and with magnanimous sympathy, tendered to the attorney a check for a hundred dollars, took the case from the jury,—and the lawyer stated to the court that he did not come before it pleading for sympathy, he came for justice,—carried it to a higher court, and received a verdict. It was carried to the Supreme Court of the State, and the Supreme Court awarded twelve thousand five hundred dollars. However, later on it was reduced, and through the sumptuariness of the judges and under the common law then in force the man who lost his two eyes received the magnificent sum of thirty-two hundred dollars out of twelve thousand five hundred.

Now it seems to me that to abrogate these laws which take away that sumptuariness of the judges is going back to those antediluvian times when human life was the cheapest thing outside of shot and shell, and I believe those times date back from the time of Christianity. I, for the life of me, can't see where any constructive age should go back at all. If we are going to enact anything at all, recommend anything, it should be to displace that which is now on the statutes rather than remove what is on the statutes with something which has not been in active operation in this country.

I myself personally gaze with fear and trepidation on some of

these—well, some of the gods who are clothed with robes of justice, with due respect to the court,—I sometimes feel as though my life was in jeopardy. I had rather not appeal to a court who would take it away from my fellow-men, and who will say you are guilty, as he did in the case of twelve thousand five hundred dollars. When he says you have got my sympathy and here is one hundred dollars, I don't like that person, neither do many of those to whom I have talked.

THE CHAIRMAN: I want to tell a story on the other side of that proposition there, if I may have just a minute right in that connection. A certain federal judge, who is very well known in this country, told me that he had a court in one of the Western States, giving the place of the court, the term of court, where it happened. He found that a lawyer had been offered forty-five hundred dollars to settle a damage case, and refused it. The client wanted to settle. They went to trial, and recovered a verdict of twenty-seven hundred dollars. In the mean time it had come to the ears of the judge that this lawyer had a contract for half of the verdict that he should get, and that is the reason why he would not settle for forty-five hundred dollars. He asked the attorney to bring the contract to court. He brought it. He asked him to step up to the desk, and he handed up the contract, and the court read it. He said: "I see you are entitled to one-half of the verdict. Now they tell me that you have had an offer to settle for forty-five hundred dollars, your client wanted to do it, and you would not do it because you wanted to get half of that verdict." "Yes," he said, "I don't think that is any of the court's business." "Well," the court said, "I believe you are an officer of this court. I shall make it my business. Now, if you want to take two hundred dollars for your fees in this case, give the client twenty-five hundred dollars. We will rest right there on it. If you don't, I shall see that such proceedings are taken as I think are proper under the circumstances." The fellow said, "Give me the two."

MR. ROHR: In that connection, Mr. Chairman, I want to say that I would have been honored in clasping that judge's hand.

MR. HOWARD: Mr. Chairman, what you said was in line with what I was going to suggest, whether it would not be possible to provide that in suits brought under the common law, if the common law is left, it should be provided that any judgment be paid

to the court and turned over by the court to the plaintiff, and that the court should fix the fee of the counsel.

MR. MCEWEN: I don't suppose there would be so many cases under common law if some sort of arrangement as that could be effected. The worker, the injured workman, will not voluntarily, I think, want to go into court and take his chances before a jury on an uncertainty, when he has the certainty under the Workmen's Compensation Act, unless he was influenced by some over-zealous attorney who sees in the case an opportunity for a good fee.

MR. SANBORN: Just a word I would like to say on this subject. Now we have had more trouble with this subject that we are discussing now than we have had with any other subject we have dealt with from the start, and I think those who have been present at all the other conferences will agree with me there has been wider differences of opinion how we are going to take this very subject than on any other. I very firmly believe that we must absolutely do away with all the other liabilities in this matter, absolutely do away with them in some shape.

Now, whatever way it is, we must reach some conclusion whereby this takes the place of them, and need not anybody be alarmed, because it is easy enough to frame a law so that, if this law that we undertake to pass is held unconstitutional, it will not repeal the other laws. They will continue in force. But here is one thing that you must guard against. There is a tremendous waste to-day that you have got to take into consideration. Now, if you are going to have common law liability, if you are going to give the employee the right to elect some time after the accident, the employer in order to protect himself has got to keep up his whole force of investigators. He has got to understand who is to blame on each and every occasion, and that force he has got to keep in existence. He has, naturally, insurance, that is a liability to be undertaken.

Now it won't do to do that. Now what is the object in doing that? Now what is to be gained in these cases? We hear sometimes where a man is so injured and the employer solely negligent, and he recovers a large verdict. In our State it is about twenty-five thousand dollars, I believe, which is the largest.

THE CHAIRMAN: Forty thousand is the largest.

MR. SANBORN: He recovers that, but one man gets the bene-

fit. Now when you put that under the compensation system, then here is a case where the man recovers under the employers' liability. Now in this case we are going to come around compensation for it, even if he is responsible himself. Now, in order to understand this, you must remember that the employer can stand about so much of a burden. If you are going to put this additional burden, so as to give this exceptional ground of more chances of getting the forty thousand, as my friend said, or twenty-five thousand, what is the result? Doesn't it naturally follow as economic law that the great bulk must take less, in order to let him have more? How can you get around that proposition?

If you can make compensation to the great mass, as in all fairness you ought to, if you are going to keep up this and give this one occasional one an opportunity to get a great big verdict, do you think that is the proper way?

Now there is another thing that I think you should take into consideration there. One of the great troubles to-day of unrest is the fact that Harry Brown over there recovers five thousand dollars. John Jones over here, he is injured about the same way, can't see any difference, don't get a cent. Now that is robbery. That is not a fair deal. When you bring the thing down so there is an absolute stated rule they can understand and figure out and know what it means, you are going to get a better system in vogue, you are going to have less high feeling of distrust, less feeling that for some reason this fellow had the advantage and was treated better; and all these things, I say, we must take into consideration.

Now I don't know whether I understood my friends from Massachusetts distinctly to say that it is impossible to contract at the time of hiring, whether it is express or implied that an employee can waive his right to claim any other compensation than under the act. Now we feel very confident on that proposition, that at the time he hires out he can agree at that time, as part of his contract to hire, to accept this compensation in lieu of all other compensations, so that the employer knows that, if he has so many men in there and there is nobody got in, they are all under the Compensation Act, and he stands squarely upon that footing.

I feel confident that, when the laboring man understands the system and gets to work on it, we shall have no trouble, because

they will feel that they are getting so much more than they were under the old system that they will never want to go back to it. That is the whole proposition there; but we must discourage the idea that we are going to protect one occasional man on this large verdict, because I can't see how you can do that without taking from the mass enough to make up the great loss. I mean the loss that will be occasioned thereby.

MR. BAILEY: I would like to ask the gentleman a single question. There was something said about repealing the common law or leaving it out. You stated that they could be allowed to contract out and leave the common law right.

MR. SANBORN: We provided that as part of the contract. Make it up by repealing the common law act. We provide that this takes the place of everything else.

MR. BAILEY: Whether they agree to anything or not.

MR. SANBORN: Leave that right to contract absolutely free.

MR. MCEWEN: When?

MR. SANBORN: At the time of hiring.

MR. BAILEY: If they don't agree then, they have the common law right. If they don't agree to this scheme, they have the common law right.

MR. SCHUTZ: Then you don't repeal the common law?

MR. SANBORN: No, we don't repeal it; but, if it is going to be compulsory, and we can make it that, which I am not altogether prepared to admit or to deny on that proposition,—if we are going to do that, why, it should absolutely take the place of everything else.

THE CHAIRMAN: It would be your judgment that it should?

MR. SANBORN: Yes. One other suggestion in connection with this, to meet the case my friend refers to here,—if we deem it advisable, why shouldn't we do just as we do to-day in a great many of our laws? For instance, we have the Wisconsin law for the railroad companies. Supposing fire started by reason of the negligence of not cleaning up, that is a double liability. Then couldn't we also make a double compensation against the man who is wilfully negligent?

MR. MCEWEN: Do you know what our Legislature does in those cases?

MR. SANBORN: What is that?

MR. MCEWEN: It holds the engineer for not taking care of the spark arrester in the smoke-stack, and allowing it to get out

of order. Suppose there is a fire, a forest fire, and the engineer is liable to arrest by reason of this.

MR. SANBORN: Why wouldn't that be better than to leave the common law to punish him? I think we could work that out just the same.

MR. LOWELL: I think double liability is enough in the common cases.

MR. SANBORN: Well, it might not be enough, but we could fix it in cases, so it would be enough so as to deter the man from taking such chances as that fellow did.

THE CHAIRMAN: How about your criminal law on that fellow?

MR. SANBORN: I have not so much faith in the criminal law as in something that reaches his pocket-book.

MR. MCEWEN: Mr. Chairman, I want to say this, it is hard to prove in these cases who was the cause of the death of the man. With the question of the fellow-servant here, it is difficult to get them to testify, because their jobs are in jeopardy and they have to work.

THE CHAIRMAN: They are the closest things of any in a lawsuit that is contested, I can tell you that.

MR. BOYD: I think, Mr. Chairman, we can meet Mr. McEwen's proposition.

While we have been thus far speaking of the employers who are more or less negligent, I think we should learn something from what they do in Germany, and I am very much delighted to see Mr. McEwen take the position he does.

Now it certainly is very difficult—it is impossible, it seems to me—to have, say, three, common law remedies, statutory liability, and the Compensation Act, all side by side, because then, the employer insuring, his liability is multiplied and his rate raised beyond reason. The rate of insurance will rise just the same.

MR. MCEWEN: I want to say this, in spite of the defect of the Belgian law, of the Austrian law, and of the French law, of every workingman we consulted relative to the operation of the law and its defects I invariably asked, "Well, which would you rather have, the old employers' liability or the present laws of compensation?" And they without any exception said the present law, and they would not go back to the old scheme. I rather think it would work out this way in due time under any kind of compensatory act we might have in this country.

MR. BAILEY: In order to get this thing before us, I would make

this motion: that it is the sense of the meeting that, if it is possible, the common law, what we call employers' liability or statutory laws, would be suspended during the existence of the compensation law, which means repeal, if it is constitutional.

Seconded by Mr. Howard.

THE CHAIRMAN: Anybody want to speak about that?

A MEMBER: I wanted to state the double remedy, if I might be permitted to object, is to penalize the employer, and so prevent him from doing the things which he ought not. Now, in doing that, it is spoken of as retaining the old common law. Now that covers the act which the employer is personally responsible for, and also an act which he has absolutely no control over, no moral responsibility for at all,—namely, acts of certain of his agents, who might be the cause of the accident.

The common law goes to the extent of covering any agents with any power or authority or control over anybody else. So it makes the blacksmith and his helper master and servant; and what I want to suggest is this, that, if there is any idea of penalizing the employer, you should divide that, and you should leave the responsibility only where he has been personally negligent, and cut out all his agency responsibilities. There you get direct incentive to the employer to see that his plant is properly equipped, and to see that his superintendent is properly coached and all the personal duties of the master are enforced, and he should be penalized if he fails to carry out those personal duties, but he should not be held responsible for the acts of his agents, as well as holding him responsible for the acts of these same agents under the compensation law.

I suggest that, if you leave the common law in at all, the double remedy in at all, you restrict it to the personal act of the master, and in that way it will result in penalizing the master where he is morally to blame only.

THE CHAIRMAN: Are you ready for the question?

MR. ROHR: Mr. Chairman, before you settle that, I want to understand whether it has to do with going back to the system in which it relieves the master, which may result in the death or injury through negligence of a fellow-servant, done in obedience to him of instructions or orders given by the employer or any person who has authority to direct him doing any such act under the rules and regulations for the government of such employee.

THE CHAIRMAN: The motion does include that, as I understand.

The motion includes disposition of the common law, statutory liabilities, and the substitution of a workmen's compensation act so far as it remains in force.

MR. ROHR: It has nothing to do with the foreman direct?

THE CHAIRMAN: No, it cuts that out, because that goes away with the common law department.

THE CHAIRMAN: Are you ready for the question?

The motion was carried.

THE CHAIRMAN: A rising vote I would like to have, if there is any question.

MR. ROHR: May I have the motion read?

The motion was thereupon read as follows by Mr. Bailey: In order to get the thing before us, that it is the sense of the meeting that, if it is possible, the common law, what we call employers' liability or statutory penalty laws, would be suspended during the existence of a compensation law, which means repeal if it is constitutional.

The motion was thereupon duly carried.

MR. MCEWEN: I want to say in explanation of my vote that I live in Minnesota where we have not such favorable legislation on employers' liability as they have in Ohio.

MR. BOYD: We are not taking away the proposition that the employer is to be penalized under the criminal law for malicious negligence.

MR. DICKSON: That goes without saying.

MR. MCEWEN: It is not specific enough.

MR. ALEXANDER: I want to call attention to one subject that might be discussed and settled here, that is with reference to the question of compensation of the lawyer, which is pointed out as one of the great defects of the working of the present law. Now can it be provided for, and is it the sense of this meeting to provide, that in all these cases, if taken into court, the fee of the lawyer shall be such as the judge decides?

THE CHAIRMAN: When you have disposed of the common law, if your recommendations are followed, which I suppose would rid most of that question, it might be possible, might be necessary, might be advisable anyway, to limit the percentage in this act, but I think you want to proceed very carefully in that. You don't want to get the laboring man in such a position,—for instance, the first six months of this act, some man files a claim, the attorney for the employer raises the consti-

tutionality of this law, that claim may be and is likely to be for seventy-five hundred dollars or for ten dollars a week for three months. The question can be raised just the same, and it may go to the Supreme Court; and who is going to try that? Who is going to fight for the preservation of that law? Are you, gentlemen, going to join in and fight it, or what is going to become of it?

MR. SANBORN: When a similar situation arose with our Commission and one of its decisions was attacked, the State defended it.

THE CHAIRMAN: I think it ought to myself.

MR. SANBORN: That is the policy.

THE CHAIRMAN: Now that may raise the question as to whether or not you should have an attorney prosecuting these claims where they need a lawyer. That is a thing I have had in mind, but I should have to rule that out of order unless there is a vote otherwise, because you have a definite program here, and the next thing in order is thirteen.

MR. ALEXANDER: We could hardly take it up after thirteen.

THE CHAIRMAN: What is the motion? We will pass on it.

MR. ALEXANDER: In case it should be considered unconstitutional to do what we have provided for, should we not, for the benefit of the committee that is going to draft the bill, provide that the common law employers' liability will be left in and that the attorney should be limited to such fee as the judge decides?

The motion was seconded.

MR. BROWN: The New York statutes, I think they have a very commendable provision, and I think the language is most excellent,—and it seems to me quite in accord with what you are doing here, that all the benefit should go as far as possible to the injured employee and his dependants, other than as it is now, for the benefit of the attorney. We would find the act most beneficial if there was a provision limiting it to a percentage or leaving the lawyer's charge to the court.

MR. DICKSON: Mr. Chairman, I would like to make a motion. I don't know whether I can frame it in legal language.

THE CHAIRMAN: There is a motion made, unless you make an amendment.

MR. DICKSON: Let me read it:—

"Attorney's lien in a claim of an attorney at law for services in securing such recovery or for disbursements shall be an en-

forceable lien on such recovery as long as the amount of same be approved in writing by a justice of the Supreme Court, or in case same be tried in any other court, before a justice presiding at such trial."

I think that such a provision as that will be very desirable in any law that we might pass. I would not advocate putting any definite limit on it. That ought to be left to the fixing of the judge.

THE CHAIRMAN: What are you going to do? I think the board of arbitration, if you have one as you indicated, where the matter comes up, are ready to settle, and it does not get near the court at all. Unless you give the board of arbitrators the right to fix that, what are you going to do?

MR. DICKSON: Well, I would say, don't frame it to be a lien on the recovery unless approved by one of the Circuit Court judges.

MR. ROHR: The court of equity?

MR. DICKSON: Yes.

MR. LOWELL: Wouldn't the board of arbitration be sensible enough to do it?

THE CHAIRMAN: They know what has been done in the case better than anybody else.

THE CHAIRMAN: Are you willing to accept the idea that the tribunal before which it is first tried, whether a board of arbitration or a court, shall ultimately fix the fee?

MR. DICKSON: Yes.

THE CHAIRMAN: I just want to ask one question there to make that clear. In these cases there ought not ordinarily to be an attorney. It ought to be so simple that it won't be necessary. Now I think you ought to say that, if he asks for more than a certain amount, a certain percentage, that will have to be done, unless you think it would complicate it too much.

MR. DICKSON: I think it would.

THE CHAIRMAN: I simply want to make the suggestion that every claim that is filed, where an attorney is to go through it, you may have a considerable lot of detail there that would involve trouble, before any court could fix compensation.

MR. DICKSON: This says he must tax every one but the attorney. He cannot legally collect.

THE CHAIRMAN: Has no lien?

MR. DICKSON: Yes.

THE CHAIRMAN: As far as the lien, I believe you are right about that. All right. Anybody want to speak to the motion?

MR. MCEWEN: May I ask, if you have a board of arbitration, whatever the board that meets on this case may determine, it is not necessary to have a member of the bar.

MR. DICKSON: No.

MR. MCEWEN: Any layman can do it.

THE CHAIRMAN: It ought to be fixed so that there will be a limit on it.

MR. MCEWEN: I rather like the German idea. The secretaries of societies appear before the justice of the peace and plead cases, and they are developing a fine lot of fellows over there. I have personally formed a great deal of fondness for some of them. The German societies have a number of schools where men deprived of opportunities in early days, are now taking courses in insurance to get familiar with the law on it, and it may help to develop a lot of our secretaries of trades-unions and secretaries of beneficial societies.

The motion was carried.

THE CHAIRMAN: There has been a motion passed here that requires the chairman and secretary to formulate under each of these special advices the results of our practical agreement. You have placed on me the burden of sitting on this committee to draw that bill, and I think that I ought to be relieved from the other. I think the secretary simply ought to be permitted to do that himself.

MR. DICKSON: I move to reconsider the vote on that.

The motion was duly seconded and carried.

MR. DICKSON: I move that that really devolve on the secretary alone.

Motion was duly seconded and carried.

THE CHAIRMAN: All in favor of adjourning till nine o'clock to-morrow morning.

The motion was duly carried.

The Conference then adjourned until Saturday, November 12, at nine o'clock A.M.

Sixth Session, Saturday, November 12, 1910, 9 A.M.

The Sixth Session of the Conference was called to order at nine o'clock A.M. by the chairman, Mr. Mercer.

THE CHAIRMAN: Gentlemen, are we ready to begin?

Your motion, as it stands here now, is that this Drafting Committee consist of three, and the chairman should be one. I had hoped to not be on that committee, and to appoint some member from Massachusetts on that, for two reasons. You know we regard Massachusetts in the West as having about as able a bar as any State in the Union. I would not say the most able, because that might flatter them. At least, the way it is reflected in our courts leads us to consider that it is of excellent standing, and we want the benefit of the opinions of the gentlemen from that State. And, in the second place, we know that, in addition to the work they have done, Massachusetts was more responsible than any other State for calling this particular meeting together. The committee is limited to the three, and I think that is a good working number, considering the question, which is a practical one, of getting the committee together, which is one of the things that has to be considered, together with the question of the interests which they represent here. So I would like to name the committee, to have the privilege of naming the committee from the West, to let them draft it up, and having such a conference as we will have this afternoon with the other gentlemen, and then within a few days they could send a draft to Mr. Bailey, Mr. Lowell, Mr. Saunders, Judge Holloway, and Mr. Boyd, and hold the draft up for a few days for your criticism. I would like to make that suggestion. We may be able to get some very valuable suggestions this afternoon. That is my thought. And I considered that by putting Dean Wigmore and Judge Sanborn on that committee they will be so near together that we can get at it some day next week and get it out. I could not go to the Atlantic Coast,—I have been so much away this year on this particular matter,—and I think the time that we would spend in travel we could spend to better advantage if we appointed members located near one another, and they ought to be able to draft such a bill. In accordance with this suggestion, I propose that we get a few of these gentlemen together some

time this afternoon after we adjourn, and that we make our draft, and that we submit a copy of it to all the lawyers on the Commissions that are here, and that they take it up within as short a time as possible, and return it with any suggestions they may be able to make. Does that meet with your approval?

Mr. Lowell: Mr. Chairman, that thoroughly meets with my approval. Of course, the practical thing is that we must get this thing as fast as we possibly can. This is a matter we are all obliged to report on by next January, and it is my intention, and, I think, the intention of our Commission to get the act into fairly complete shape, and then have hearings as to it. We should want to get that, if we could, certainly by the first of December. That would only give us a month for having hearings and thus getting criticisms and so on. Of course, to get this thing through eventually is a legislative matter; but in order, after it has become a law, to make it work well, we should get both sides, both the employers and the employees, get them familiar with the subject, and get them together. Perhaps they won't get together, but we should try to get them much nearer than they are at the start. In Massachusetts we have had workmen's compensation acts suggested for a good many years,—the employees' side of it. The labor unions are familiar with the proposal, and are thoroughly committed to the main features of the act. They may differ in details, but the employers, by and large, don't know as much about it as the trade-union leaders do. For instance, the Fall River men. The trade leaders there are a mighty good set of men, and they know about this thing from the theoretical side of it, and I will say that there have been indications in Massachusetts of certain bodies of employers who very recently have taken a very much more advanced stand towards the Compensation Act than ever before. And the way to bring this about is to let them have as much time as possible for discussion, so that they may become acquainted with this before it goes into the Legislature. Of course, they will discuss it afterwards, so that, as I say, the main thing is to get it out just as soon as we possibly can. I think your scheme is a very good one.

Mr. Wigmore: So do I.

Mr. Boyd: I thoroughly approve of the views of Mr. Lowell. We had four hearings in Cleveland, of four hours' duration each, where about forty papers were read from prominent lawyers,

manufacturers, and leaders of the workingmen. Two or three days after that I received letters from prominent manufacturers who had changed their views entirely and come over to the general plan that we were talking of here; and even the National Manufacturers' Association, which showed little indication in the Cincinnati meeting, after that Conference sent their views to the chairman of the Conference at Cincinnati, and asked to be permitted to come to the Columbus meeting later on and restate their position, which showed from the outset a change in their mind, they having come into an attitude which would be co-operative and uniform throughout the State. I think the plan of the chairman is perfectly satisfactory.

MR. HOWARD: As a detail, I want to know if it would not be wise to have an arrangement made for a duplicate typewritten set of the record here, so as to have it immediately available, so that we would not be obliged to wait until it is printed.

THE CHAIRMAN: The secretary, Mr. Saunders, has been keeping a close record, so that I think we can have the substance of it, so that we may have a workable basis, with our own recollection of the record.

NUMBER 13. CONSTITUTIONALITY?

THE CHAIRMAN: As to number 13, I assume that the reason that you did not take that up last night was because it was Friday, and you certainly had not worked enough hours to justify us in stopping at twenty minutes to ten. [Laughter.] There is one thing I would like to know as to constitutionality. Is this question to be settled by this vote or is it merely advisory? If it is only advisory, then I would like to know whether both lawyers and laymen are to vote on it, or limited to laymen. Then I would like to know whether laymen and lawyers are both going to discuss it. Let me make this suggestion. The laymen may have questions that they would like to have answered, and, if they can put forward any questions here that they would like to have discussed, they could be discussed here informally.

MR. SCHUTZ: May I offer the suggestion that we hear on the constitutionality question, first of all, from Messrs. Mercer, Bailey, and Wigmore, in the order that I have suggested, and that afterwards others discuss the subject?

MR. WIGMORE: I would make the brief suggestion that any

quotations of opinions from decisions and any extended arguments on the constitutionality question is wasted time, wasting the time of this body.

THE CHAIRMAN: I think so.

MR. WIGMORE: The mere statement of our views is enough. The most valuable thing while we are here, in these brief hours, that can be done, is to formulate together by a vote what should be done if there is doubt on any particular point.

THE CHAIRMAN: I think that is an excellent suggestion. I could stand up here for two days, and send out and get law books and read them to you, and I know that Professor Wigmore and other gentlemen might stand here and entertain you with long arguments from now till next Wednesday night, but I do not think it would do you any special good.

MR. SCHUTZ: I withdraw my motion.

MR. BAILEY: There is one question we have not thought of, and that is how the arguments that employees may have the benefit of insurance which the employer is carrying should be considered. I know that Professor Williston was asked to work his brains upon that, and he in his short opinion has given his word upon that, and, following his views in the draft of the act which I made, I put in a section on that. It is not exactly a constitutional question, but it is partly that, and it might be well to have the views on that subject stated.

MR. WIGMORE: I think we should do so, but not in the way it was to be done in the act introduced in Massachusetts three or four years ago; namely, to say that the workmen should have a lien when the employer becomes bankrupt or insolvent. He knows a good deal about the law of bankruptcy, and he found that would not do. But, when the employment was hazardous, it might be done another way; namely, by giving the workman a lien that would take effect when he made his claim for compensation and gave notice to the insured. The English law provides that, when a workman is hurt, he has to give notice, and he also has to make a claim for compensation, and if, coupled with that, he sends a notice to the insurance company, of course there is some difficulty as to finding out who the insurance company is, but he will get over that. Professor Williston says in his opinion that, if the lien takes effect from the notice to the insurance company, coupled with a claim upon the employer, he thinks that is legal, and that that will make a good lien that will be recognized in the bankruptcy court or elsewhere.

THE CHAIRMAN: I might say that up in Minnesota two or three years ago they passed a law—I don't know who enacted it—giving the lawyer a lien on the cause of action at the time he starts the action. I think it is done with a view of giving the ambulance-chasers a lien on negligence claims. At least, it has acted that way more than any other to prevent settlements of this sort. Courts permit such settlements to be opened up and investigated for the lawyers, because they wish it.

MR. BAILEY: That rests on different grounds. The lawyer has a workman's lien. He contributes to the judgment or result obtained.

THE CHAIRMAN: That is, in this particular case?

MR. BAILEY: I don't think we need any more than state that, and whoever desires to can examine Professor Williston's opinion, and may like to see the language I use in framing it. There is one point we considered, whether these liens should take effect—the first one having priority over the others—or whether it should be arranged that they would all share and come in each class pro rata, receive them all the same and then split the claims. As I framed it, I gave them priority as being more analogous to the proposed basis, and the question of priority would not matter very much. Where there are a number of insured injured, the insurance would not be enough to go around. That would be considered, whether you would make them share pro rata, like mechanics' liens, or not.

MR. DICKSON: May I suggest that my feeling is that you should attack the fundamental question before us here? Is it possible to get a single liability law?

THE CHAIRMAN: Do you make that as a motion?

MR. DICKSON: Yes.

MR. HOWARD: I second the motion.

THE CHAIRMAN: The question is whether it is possible to make up a single liability law and enforce it, meaning the repeal of other remedies. Are you ready for that question?

The question was then put and carried.

THE CHAIRMAN: What are your views on that question?

MR. WIGMORE: I would rather not give my opinion at present on the theory that the junior member, being the one of least experience and whose opinions are of the least value, should not speak first.

THE CHAIRMAN: The junior member often precludes argument on a good many points.

MR. WIGMORE: As I understand Mr. Dickson's question on the topic of constitutionality, it is that of substituting exclusively compensation liability for the common law liability.

MR. DICKSON: Yes.

MR. WIGMORE: I see two sides to it. There is the employer's side, making him accept this for the other, and then there is the employee's side, making the employee accept this for the other. There are two different constitutional questions. The one is the taking of a man's right, and the other is substituting a man's liability. From the standpoint of substituting the employer's liability, a new kind, at present I don't see any real ground for doubt that the Supreme Court of the United States—and you would have to go there, I suppose—would come out to sustain the law; and I don't go entirely on the grounds in this Zernecke case cited by Mr. Williston. The railroad fire cases, as treated in Mr. Justice Gray's opinion in the 167th, page 1, make it pretty plain that the court as then constituted would put an absolute liability on anybody, analogous to absolute liability of the common law, unqualified by any fault or negligence of any sort. And they would not question whether it was *per se* hazardous or not. They would put it on the ground that a man has created a harmful agency. From the employer's point of view, I think the court has changed its complexion somewhat.

From the point of view of the employee's right being taken away and another given, I don't know of any definite authorities, except from the point of view of the impropriety of classifying the risk, and that is not the present question. Suppose everything has been done, and you give the employee a new right, query if you can make him take a new right. You can only do that on condition that he has got some way of election at the outset or at the injury. I doubt if anything else would go.

A MEMBER: I want to ask two questions, if you have taken into careful consideration whether liability can be imposed where there is no negligence and the fact that railroad fire cases are placed on special ground.

MR. WIGMORE: I looked over the railroad fire case yesterday morning, and it looks to me the strongest case we have for a long while. The other case stands on a different footing, the nitroglycerine case.

A MEMBER: Justice Holmes is on the Supreme Court bench, and a great many years ago he wrote a book, and in that book

he covered the question of liability where there was no basis for it in negligence. It was discussed. Have you considered that carefully?

MR. WIGMORE: Yes: there are dozens of instances of that same common law of liability without fault.

MR. LOWELL: Dean Wigmore has written the best article on the subject, whether under the old common law there was absolute liability without fault.

MR. SCHUTZ: Where was that published?

MR. WIGMORE: The title of the book is "Select Essays in Anglo-American Legal History, Volume 3."

MR. SCHUTZ: And what is the title of the article?

MR. WIGMORE: "The History of Tortious Responsibility."

THE CHAIRMAN: The specific point is, Can we have but one liability? Can we repeal the common law and the statutory law, and substitute a system of single liability?

MR. BROWNE: I understand. I came to the Conference, gentlemen, with an absolutely open mind on other questions, save this, and, if I can aid you at all in anything that I can suggest, it would be along the line of this question.

The three elements in the statute itself which appear to me to be essential are: first, simplicity of expression, so that the workman—he who runs—may read, and may understand for himself, what are his rights and responsibilities under the statute; second, its certainty in respect to compensation, that it shall be set out as clearly as it is possible to give human thought and expression in written language for his benefit; and, third, celerity of remedy. To my mind the most essential thing is to demonstrate to the workman at the beginning that his interests lie in this new legislation from substantially every point of view. That being done, my idea is that the common law remedy will seldom be invoked.

The courts always sustain the statute, if there be a way to uphold its validity. The courts, if possible, uphold a statute bad in part and good in part, if they can separate the good from the bad. And that leads me to make the suggestion that in respect to this legislation, whatever may be put into it, which the courts can construe along the line of validity, ought to be so clearly expressed and dissociated from the rest of the statute that what is bad, if it must fall, will not drag the rest down with it. Finally, I don't believe in making experiments with statutes. I am the more convinced of that since reading the arguments of

the New York Commission's report, because there must be uniformity in order to have any hope of a successful outcome to this legislation. We are confronted now in all the States, practically, with some different verbiage in their constitutional provisions. We can pass the best statutes, and we can take this test, —and this is the ultimate to which I shall come,—we can take the test of the Federal Constitution, because, if the statute does not stand the test of the Federal Constitution, it is bad. What are the constitutional limitations? The first constitutional law, and I hope Mr. Wigmore will not think that I am going to give any long lecture on a very dry subject as to the procedure and practice and jurisdiction of the Federal Court—

THE CHAIRMAN: Mr. Browne, I don't want to interrupt your line of thought, except to say this, I think we shall discuss the due process of law under a separate subdivision. This question is as to whether or not we shall have a single liability, whether we can have a single liability.

MR. WIGMORE: That comes under classification.

MR. BROWNE: I don't know how I can differentiate, because I reached the ultimate conclusion that you cannot safely do it now.

THE CHAIRMAN: It would not be due process of law.

MR. BROWNE: It might fail to be due process of law, and it might also fail on other ground. It occurs to me to suggest that there was very much wisdom in the plan of the New York men, and the laws which were enacted by the New York Commission,— not possibly in the passage of that statute, the two statutes, but it was perfectly obvious that the New York statutes were passed in dual form simply to avoid the results of both hazardous and non-hazardous classes being possibly turned down together. In the New York statute there is a hazardous clause, there is a recital *eo nomine* as to which business is declared hazardous. That is the compulsory part, and that, of course, is founded on the police powers of the State.

MR. WIGMORE: Will Mr. Browne give us the benefit of his experience at Washington in respect to a case like the Matthews case and the Zernecke case being put on the same footing down there on account of absolute liability?

MR. BROWNE: Without offence to the Conference, I cannot prognosticate. I will say that, if we keep away from the need of the question being raised as to the validity of the statute, then

nothing injurious can happen. If, for instance, you proceed under the authority of the police power for hazardous callings, and classify them, and name them one by one, if a party defendant in a court, State or Federal, should say that a particular subject was not within the police power because it was not a hazardous employment, then the statute—but only to that extent—fails. I can see the wisdom in making a compulsory statute in respect to these hazardous employments. Either make a separate statute or make a provision in regard to hazardous employment so distinct from the other that there will not be need to drag down all the statute, because some court in some State or the Supreme Court of the United States may hold that some particular calling or trade is not lawfully within the compulsory provision. I am most anxious to see a statute which will certainly pass the test of the Federal Constitution, and will not be destroyed piecemeal, because, when that comes, you will have your weary road to travel over again. You will have to re-enact the statute in respect to all of the States if one State should hold it to be unconstitutional on any of these vital matters and the other States disagree. Then you will have a partial operation of the statute. Now it is the argument of the New York report, and it appeals to me as being perfectly a patent proposition, that there may be opposition to the statute on the theory that it lays the burden of cost on the manufacturer in the State of New York, if the other States don't adopt the statute.

Now there is another and, I think, a more serious thing, whether or not you can take away a man's right of contract, either the employer or the employee. The Supreme Court has said in a case made celebrated by comment upon it in the last few months, the baker case in New York,—it was a great case, and it yet remains a great case,—that there was nothing in the business of a baker hazardous within the limitations of the police powers; and held that a baker can contract work for a number of hours exceeding the limitation of the statute. Now I am a great believer in firmness of contract. We all must be, or we would not exist twenty-four hours. There would be a chaotic condition if the whole commercial world were not bound by its contracts. Now, if you put in the elective method, as expressed in the New York statute in respect to those employments which are not within the police power, and whether or not the State may also legislate on what we may call the arbitrary basis,—if you leave

in those remedies, there is no question of its constitutionality at all. Because if you leave the liberty of contract, there being no question of fraud in a particular case, then you have left the individual, both the employer and the employee, to exercise the contractual power. I am very hopeful that the result of this Conference will be to present a statute for uniform adoption which shall come in such a way that any provisions which may be of doubtful import—I speak of their validity—shall be so separated from the rest of the statute that, if they fall, they will not drag the rest of it down; and, second, that you take into serious consideration the wisdom of the New York Commission in submitting to the Legislature the adoption of the dual statute. I don't care what title you give them. The thing is not always known by the tag on it. It may not be an amendment of the Employers' Liability Act or it may be. Put in one statute the compulsory provision in respect to the hazardous employment, but do not go too far and bait the courts in respect to what are hazardous employments. And then put into the other the alternative process of procedure, leaving to the parties their common law remedy. By doing that, I believe both statutes will be good, and in regard to the provisions in respect to compensation we shall find that the New York law, the provisions of the statute in respect to compensation (perhaps giving the slightest change of verbiage, which would not change the legal effect), would be the same. I believe that, if we present that to Congress in that form, we should obviate and avoid constitutional objection. Congress once in a while does pass unconstitutional statutes. It passed the first Employers' Liability Act,—not in ignorance, either, because better lawyers than I am stood by the lawyers' table and urged their objections with respect to validity,—and it took several years to get from one body a new act to cure the evils. Amplify that process in forty-six different States, and you have the result. Brethren, I never went into anything in my life, corporation lawyer though I am, with a clearer judgment and stronger desire than in this matter in regard to this common law consideration, so as to get something so substantial to the workman that he will take it, and then the common law remedy will not be invoked. But, if you leave it to some man to come along afterwards and say that this act is unconstitutional, to have him raise the point and to have the court decide that it is unconstitutional, then it will be un-

constitutional for everybody, and we shall have our weary road to go over again.

I thank you very heartily for listening to me thus patiently.

THE CHAIRMAN: We should like to hear from Judge Holloway. We are discussing the question as to the advisability of making a single inclusive liability, meaning the repeal of the common law. We shall be glad to hear from you.

JUDGE HOLLOWAY: Mr. Chairman, I have given this subject practically no thought. To my mind there is a serious question, and, as I say, that arises without any consideration having been given to the subject on my part. The first question I asked was, What employment shall the act cover? And I was told it was intended to cover all. Now, if there is any virtue in this statute, at all, that will give it life, it is by virtue of the police powers. And do the police powers of the State go so far as to include a servant-girl whose employment does not involve any risk or hazard? That is to my mind preposterous. If it is possible to include every line of employment, why, the police power subject is a much broader one than I ever anticipated. In its present form, then, I say that I think it is impossible to do away with the common law and the statutory rights of action, and to make this an exclusive remedy. I have some doubt in my own mind whether, if this Conference had followed the procedure of the New York people, and undertaken to classify the risks that are exceptionally hazardous, and included them only, and had drawn up this plan repealing the common law and the statutory rights of action, that would be constitutional in Montana. I am not certain about that. It has occurred to me that it might conflict with the provisions of our constitution, which are very broad, the right of trial by jury, and the other provisions, which I do not recall just at this moment. But, as I say, I have given this no consideration whatever. The arguments made by Mr. Browne appeal to me very strongly, but I am not in a position to offer any suggestions beyond the one that he emphasized and the one that I have just referred to.

MR. SCHUTZ: Mr. Chairman, I want to say a word. My feeling, so far as my opinion on the subject of constitutionality is concerned, is that the elective feature is the only one that could possibly save it from unconstitutionality in Connecticut; and I do not quite agree with the last speaker, that we made a mistake in suggesting all forms of employment. I believe it should cover

all forms, but should be purely elective, leaving the present remedies with election. If we should find out that we are doing a certain amount of good, but still are planning something that is plainly unconstitutional or seems to be unconstitutional, in the great majority of States, then we are losing valuable time.

Mr. Boyd: Mr. Chairman, I think that Mr. Browne has touched the point in the way that appeals to me, and to my point of view, from what little I know about it. I do not think I could add anything to what he has said.

Mr. Sanborn: We have given this a great deal of consideration, and we have had some of the best lawyers in our State to work on the problem, and we are arriving at the conclusion that the only way to reach it is by the elective plan. That is the result of our investigation.

Mr. Wigmore: Do you mean elective for the employer and for the employee?

Mr. Sanborn: Both of them. We reached the conclusion that the great stumbling-block was in the employee; that we might make this compulsory to the employer, but, as for the employee, we found no way whatever to get over the obstacles in the way, and that is our experience.

Mr. Bailey: Mr. Chairman, Mr. Wigmore, I think, has narrowed the question down to two points, but I am disposed to narrow it down still further, because we are now discussing, to my mind, the question of the policy of the common law liability and the employers' liability, and I take that as covering all special statutes. Dean Wigmore says that, as a part of that question, we may consider the question of the liability of the employer for fault, or, as I say, regardless of fault. I am disposed to leave that question out for the present, and say that it comes down to this point: Can you take away from the workman his common law rights? I assume that we are going to have a proper saving clause, by which the rights of the workmen under existing contracts, and their rights as to existing causes of action, will be saved. That goes without saying. Now assume that, and I come here to this point: I think much has been suggested by Judge Sanborn, that the only safe way was not to do that, and to get around it by giving the workman an election. But I am free to say that I am weakening on that. I find in this opinion in New York by Judge Fowler that, without arguing it, he says that it is clear that you can take away common law rights. I

suppose beyond a doubt we may take away the rights given by the Employers' Liability Act that the Legislature gave. The Legislature can take away what the Legislature gave, and I suppose we may start with that as reasonably certain. We may attain what we desire, so far as those acts are concerned. We may repeal the Employers' Liability Act and kindred acts.

Now in the matter of repealing the common law rights and taking those away and substituting for them what we do substitute, I have in mind that the police power does do that. The police power takes away a man's property without any right of compensation. To illustrate, take the case of a building that needs to be torn down to stop a fire. That is an extreme case. There are a great many of those cases. The courts have gone very far. They have gone very far in Massachusetts in the case of diseased animals,—in going into the herd and taking them out and killing them without any right of compensation.

Now here we give the workman a new remedy in place of the old one. As I understand it, the courts say that in the first instance the Legislature deals with the question of public policy, and the police power is a question of public policy. If the Legislature gets so far that it is outrageous and unreasonable, as they call it, then, and then only, the courts interfere. So that really the Legislature declares public policy, and so long as they are not unreasonable in what they say. So it makes me think that you may possibly, and, I think, I might say probably, take away the common law remedy; that is, the common law right of action of the workman. I say that with a good deal of fear and trembling, but, as Professor Williston says, my mind is hospitable to that idea. I hope the analogies which I have suggested are good ones, and that the police powers in the Legislatures are broad enough to do that. I am inclined to think they are, and I do not believe that the courts, if they allow the Legislature to impose a liability upon the employer, regardless of fault,—I like that expression better than "without fault," regardless of fault, without going into the question of fault,—I think the court is likely to go the other step, and say that you may do the other thing and take away the common law liability. Because in the 183d United States, the case cited, as Professor Williston's brief suggested, the court might allow the Legislature to impose an absolute liability on the employer. And the reasoning on those cases, in the opinion of Mr. Justice Moody, which is quoted or referred

to by Mr. Williston, is merely the dictum in which the court took occasion to recognize the matter,—to recognize what is now in the air. If this thing had come up ten years ago, I suppose that almost everybody here would have considered it hopeless to have thought that the Legislature would or could pass an act which would impose a liability on an employer regardless of fault. But during the last ten years we have had many States repealing the fellow-servant doctrine, and the assumption of risk doctrine and contributory negligence doctrine, under the police power, I take it, and the courts allowing that. And we have this new doctrine in the air, that it is for the welfare of society that we have the compensation law. Mr. Justice Moody refers to that in that case. That being in the air, and it being a question of public policy, and there being a public opinion which we now know is increasing, and which already exists, it must be considered. It was shown down at Washington last winter, at a meeting held under the auspices of the Civic Federation, where some of us began to learn about Workmen's Compensation Act. The sentiment there was all one way, and that sentiment is increasing throughout the country. I have here an address delivered last summer in West Virginia, where members of the bar discussed the question. The question every day is being more widely discussed than ever before, and I think the courts will hesitate to say that what the Legislature does on the ground of public policy is unconstitutional. So that I am disposed to go further than Mr. Browne suggested. Mr. Browne says, separate the questions. But in the State House in Boston many of the speakers suggested that we must not be too timid in this matter. If the thing is right, it ought to come, and we ought to have faith in the courts that they will not prevent it.

Mr. Browne: I do insist that in my belief it is the safest thing to write a statute in manuscript, that you can find no suggestions on which to found an argument. In other words, put your statute in such a form that, when it is passed, it will stand. Then it will progress.

Mr. Wigmore: Take the illustration of land titles.

Mr. Browne: That is elective.

The Chairman: The courts uphold them.

Mr. Browne: That is not compulsory. Outside of the exercise of the police powers of the State, it does not extend to domestic servants or to a large variety of employment.

Mr. Schutz: May I ask a question? He says that he is slowly coming to the position that you can absolutely disregard liability. I want to ask him whether he has considered whether or not it would not greatly help if you left in the employer's personal negligence only. As a practical matter, it would not amount to much, because very little advantage would be taken of it. But, as a constitutional matter, it is worth consideration, and I would like to ask him whether he has considered that point.

Mr. Bailey: Just a little. I have thought about narrowing down the common law rights of the workman at common law. My idea was that we better do it by election, as has been suggested in Wisconsin. That is the way I framed the act. My mind is upon that proposition, that you can combine the two of them, the election and the diminution of the common law rights, so that they will be even less attractive than ever. In Massachusetts the fellow-servant doctrine cuts into the common law rights a great deal; and the assumption of risk, which I had some part in extending. There was a very interesting case, where a workman of the then West End Street Railway was working on a hay-cutter, and got hurt. I reviewed the law at that time, and the courts are extending it so that the law applies to a case of that sort. So that in Massachusetts it would be no great innovation for the Legislature to curtail the common law rights. But I have not thought of that enough to have any clear ideas.

Mr. Lowell: Mr. Chairman, I am one of the youngest lawyers here, so I speak with the very greatest confidence. It seems to me that there is a way of having only one liability, but I am frank to say that it is a way I don't believe in. It is the Wisconsin way. That is, you can give an election to both sides to take the old or the new scheme. Now I don't believe in that, because the result would be that many employers would be in it, perhaps, for one year, and then get out of it. Many employees will be out of it in one factory, and many in; and they will get out of it and get into it. So that you will have the result of people being in and out, and really you have no entire system. Now it seems to me vital for our law that it shall be an entire system. And the way which I think you can do this is this: The thing which is bothering me a great deal and which is the question which bothers New York, and the question which bothers my brother Browne, is this question of the hazardous risk. Now, as I understand the decisions of the United States Supreme Court, what they

are considering there is not, Can you cover all industries? but, Can you make a classification of industry? But the question has not come up to them, as I understand it, whether you can cover all employments, because, if you cover all employments, then you are not legislating against one rather than the other. So that the question of classification does not arise. There is no classification.

Now I am firmly of the opinion, as I said before, being the youngest man here, that you can pass a law covering everything that you want covered, because you make no classification; you cover every employment that there is. And the way you have got to do it is, I think, the way suggested by Dean Wigmore, and I shall merely restate it, with a little more attention to details. I think you have got to give to the workman the right to a jury trial at the common law. I do not think you have got to give him the right to jury trial under your new act, because you can give him the choice of a suit at common law, where he gets a jury trial, or a proceeding under the act, where he does not. Now I think that is constitutional, because you have not deprived him of his rights to a trial by jury. Then you come to the other side of it, to the employer's side of it. As I said before, I don't think that will be held bad by the Supreme Court of the United States, because it is not classification. Everybody is in. There is no classification about it. You cover everybody. Now have you got to give him a jury trial? I am frank to say, until I talked to Mr. Bailey, since reaching Chicago, that I thought you must. But I am not at all sure now but that perhaps you need not. My idea is that, even if you have got to, as a practical matter, it does not amount to anything, because the employer will never ask for it. So it seems to me that, even though you must put into your law a trial by jury for the employer, we are not thereby putting in any sort of weakness, because, as a practical matter, it will not be availed of.

Mr. Dickson: Is it not practically a law that would make it binding on one party without binding the other? My point is this: You say that you are sure that you cannot take the common law rights away from the employee, but you can from the employer. If you can, would you not have the position that the employee has a right,—has one end of the contract, and his employer has not got the other end? In other words, one is bound, and the other is loose.

Mr. Browne: What would you say to the proposition that

you are enacting laws which are partial? You have got, on the other hand, the class of employers and, on the other hand, the class of employees. Are you not denying equal protective laws to both parties?

MR. LOWELL: That is my idea, just what Mr. Dickson and Mr. Browne have said. My idea of what you ought to do, I think, Mr. Bailey has suggested in the scheme which he has worked out, and which is rather technical, so I won't go into it at length, because I think, if you have got to put in your jury trial on behalf of the employer, you are not interfering with the operation of the act, because they won't ask for it. If you have got to, all right. Now it has been suggested by Mr. Bailey that you haven't got to,—for this reason, and this is rather technical, and I only stay on it for just a minute. The system which we propose contains weekly payments over a long period of time; it contains provision for varying amount and time in these weekly payments, when the employee gets better or worse. If he gets better, the payments are smaller, and, if he gets worse, they are larger. Now at common law you haven't got machinery for doing that. If you sue at common law, you get a judgment which says that A shall pay to B two thousand dollars with interest, and that is all there is about it. You haven't got the machinery for saying that ten weeks from now A shall pay to B fifteen hundred dollars. This is Mr. Bailey's idea. In order to work out the new system, you must go into the equity side of the court, because you cannot ask it on the other side of the court. Now Mr. Bailey says that is constitutional. It is true that, perhaps, you are depriving a man of his right to trial by jury; but is it depriving him of property without due process of law? That is, as I understand it, the argument. And perhaps it is not, because it is in the power of the Legislature to suggest a remedial law of this kind, and a method of its enforcement in some detail. It cannot be enforced at common law. You may enforce it on the other side of the court, which does not have jury trial. I suggest that as something upon which I have not personally come to any conclusion, whether it is possible or not. But I say that you can get around it without giving to the employees the right of trial by jury under the new act. Only at common law you have to give to the employer the right of trial by jury. But that will not interfere with the operation of the act, because he will not want it.

Mr. Dickson: May I ask another question: Wherein do you differ from Mr. Browne? You are in favor of the elective method. Isn't that a fact?

Mr. Lowell: No, not the Wisconsin act. My proposition is to put through a law whereby everybody is under the law only as to the details of it. The employee has a right to claim trial by jury,—not under the whole thing, but under what remains of the old law. And that will save a tremendous number of lawsuits, because, if this thing works out, there will be probably a hundred lawsuits,—a hundred recoveries under the new act to five under the old. So you get a very much better situation. But you don't have to give him a jury trial under the new act; and, if you give the employer a jury trial under the new act, you don't hinder anything in his case, because he doesn't want it and will not ask for it.

Now the difference between Mr. Browne and myself, I think, is largely one which arises from our needs in Massachusetts. Mr. Browne suggested, if I got it correctly, that you ought to phrase your law so that, if it was not good for all employments, it would be good for hazardous employment. If that were the result of the law in Massachusetts, it would be of no benefit to us. So, as I say, we must have a law which covers everybody, and it is of no use to have a law which the court will say, "This is no good for factories, but is good for building," because then we have taken out of the operation of the law the very people we want to get in under it.

Mr. Browne: I think you misunderstood me somewhat. Let me say, in order to make myself clear, that, when I spoke about due process of law, I meant, of course, the guarantee of the constitution to a common law trial by jury, in all demands over twenty dollars. But in framing the statute we should go as far as it is wise under the police powers, making this compulsory, and making it plain under the common law, but not beyond that, to interfere with what the Supreme Court has declared is the freedom of contract both to employer and to employee. That is the rock on which this will founder, in my judgment, if that is not done.

Mr. Lowell: Perhaps we differ, as I think you and Dean Wigmore differ, inasmuch as you have a law which will impose liability for everything on the employer, carrying out the suggestion already made of a statute like the fire statute.

MR. BROWNE: We can try it, and find out when we are older.

MR. LOWELL: That is all we can do in any of these things.

JUDGE HOLLOWAY: If I understand Mr. Lowell, his proposition, to my mind, is very manifestly unfair, so that it would be useless to talk of enacting it in the Western States. As I understand him, if it is necessary to provide in this bill for trial by jury on the election of the employer as well as the employee, then this situation presents itself: The employee is killed outright. His personal representatives are anxious to come under this statute, and get three thousand dollars in a lump sum. The employer says, "No, I won't: I insist on my right to a trial by jury." He drags the employee through long processes of a trial, to recover what? Three thousand dollars,—the maximum. To my mind that is preposterous. If the employer wants a jury trial, and insists that he get it, I insist that he take it with all the burdens that is imposed on him to-day; and I think every laboring man in the United States, without a dissenting voice, would say the same thing if the employee is to be dragged through the courts. The employee goes into court. The utmost he can recover is three thousand dollars, and he has got to pay a lawyer and the court expenses out of that. He will recover his court expenses, we will admit that, but he must pay his lawyer. He is unable to employ the best lawyer. He has not the money. The best he can do is to arrange with a lawyer on the contingent fee basis. He gives his lawyer fifty per cent., and at the end of the lawsuit, after waiting three or four years for the tedious process of the court, for his case to get to the court of last resort, the family of the dead man gets the magnificent sum of fifteen hundred dollars! Why, it would be useless to talk of enacting such a statute as that in the Western States to-day.

MR. ROHR: Mr. Chairman, upon the topic before the house I know but little, but I may say, as one representing labor, we unanimously hope and pray that those who have to do with the legal propositions will never forget that human life should come before all other things; and, further, that whatever bill may be drawn up, will be forced to run the gauntlet of those attorneys who have in the past evinced an interest in the rights of labor.

MR. BENT: Mr. Chairman, I represent the Illinois Coal Operators' Association, as well as the Illinois Employers' Liability Commission. The result of our investigation into the situation in Illinois, I think, convinces all of the employers on

the Commission and the majority of the representatives of organized labor on the Commission that, if it were constitutionally possible to have a compulsory act eliminating altogether all alternatives, it would be for the best interests of all; if it is not possible to do that directly, that we should seek to make it unattractive to both sides to do anything else, under an elective act. The bill which we drafted, but did not submit to the Legislature, owing to the opposition on the part of the Chicago Federation of Labor, sought to accomplish that. While elective in form, we felt that the employers would all come under the act, certainly in the hazardous employments, and we felt that very soon the employees would do so. I think that the majority of the Commission felt disposed to take a chance on a simple compulsory act, hoping that on the broad basis of public policy the Supreme Court would uphold it. It is entirely possible that the Commission will reconstruct the act as a voluntary body, and will take up that question in the near future. I think it is likely that the Commission will proceed with the work, and recommend something to the Legislature this winter. I believe I represent others when I say that we feel very strongly that the act should be compulsory in form to the exclusion of everything else. And, if that is not possible, it should be framed so that it is the only thing resorted to. I believe I have had in mind the altruistic side of this thing, and that the views I hold fit in with the interests of labor, although I represented the employers. All through the State, in our public hearings, organized labor said to us, "Give us a certain amount, and give it to us without delay; give it to us without friction, without the claim agent, without the ambulance-chaser, and without uncertainty." But, when we came to the Chicago Federation of Labor, they asked to perpetuate these evils, and simply to destroy the employers' defences. I am in sympathy with the gentleman who is opposed to the plan which gives the employee the election, but I do not think it is either wise or fair to have an act that gives to the employees an election after the accident. It will entail the expense of double insurance by the employer. If it is true that eighty or ninety per cent. of all the cases would come under the Compensation Act, yet the residue would be those where there would be clear liability, and the large majority of the employers would have to insure against greatly increased costs under the Compensation Act, and also against an occasional large verdict. I do

not think that is fair. I do not think it is in the public interest. I do not think that labor needs it. If we make the scale of compensation reasonable on the start, in the future compensation can be increased. I think the employee and the employer should both have that much protection against uncertainty.

MR. BROWNE: I want to ask Mr. Bent, if there was but one liability, a single liability under a compensatory act, what would be done with the operator in the mine who failed to make provision for the safety of the mine, and avoid just such accidents as happened down here in Illinois three years ago or more?

MR. BENT: Mr. Chairman, in my judgment the cost of general compensation will be so very great in the coal mining industry of the West that self-interest will bring about, steadily and speedily, protection against loss of life in every possible way. I act in several relations. I am president of a coal mining company in Illinois, I am secretary of our association, and I am secretary of our Mutual Employers' Liability Company, which has been doing business extensively in Indiana and Illinois for five years, so that I speak with some information. And we find from careful investigation that the cost of compensation such as is proposed would be about two hundred and fifty per cent. of the present cost, and we find that the benefit to the employees would be from eight hundred to twelve hundred per cent. on account of the great saving in waste. So that I am satisfied there would be no danger of such carelessness as occurred in some cases in the past, under this act. And I agree with you that the thing to be sought, the preventing of all this loss of life, that there would be a good deal done in that way. And general compensation will be as complete a corrective as the liability under the common law.

MR. LOWELL: Mr. Bent, what, in a general way, was the form of your proposed law?

MR. BENT: Our proposed act provided that the scale of compensation was about the same—

MR. LOWELL: I mean the constitutional part of it. Did you say that the employers and the employees might elect to take it?

MR. BENT: To make the law compulsory in form, but elective in fact; that regardless of negligence the employer shall pay compensation according to the scale set forth in the act; and reserving to both the employer and the employee their common law remedies, including trial by jury; providing, however, as

to the employer, if he refuses to pay the compensation according to the scale provided in the act and the employee has an action of common law, he shall not escape liability by reason of either the fellow-servant rule or the assumption of risk rule.

MR. LOWELL: That is all I wanted to know.

MR. WIGMORE: Under this system the employee makes the claim first.

MR. BENT: The employer shall elect within a certain number of days, and the employee, when he obtains employment, elects whether to be under the Compensation Act or not. And the employer by the same way then passes into the final state.

I will add, Mr. Chairman, that we very much prefer a single bill dealing with the present defences and general compensation, for two reasons: The Legislature may pass one act and not pass the other, and disturb the agreement reached. Or the Supreme Court may uphold one act, and not the other. So that we run, then, into the single act.

MR. NEILL: Mr. Chairman, may I suggest one consideration here that I do not think has been touched upon yet? There seems to me to be very grave doubt in the minds of the gentlemen learned in the law as to whether this would be constitutional or not. Now one proposition, and, in fact, the fundamental reason for this group being here, is an attempt to secure uniform legislation. Now suppose you pass a law, and in one State it is declared constitutional, and another State entirely wipes it out. Haven't you brought about the very thing you are now trying to avoid? Won't you have extremely inequitable conditions between competing interests in different States? There should be a law that will be constitutional and that will work in every State alike.

Just one more point. We are considering this question from the employers' standpoint and from the standpoint of the employee. Now suppose a majority of men are one or the other. Now you have got to consider the common sense and the justice of the public which looks on. It is a fair-minded public, irrespective of its relations to employer and employee. If you take away certain rights from the employee, I do not think the public will stand it, without making it an even break and taking something away from the employer. This movement is having a good deal of progress at this time, and we must not turn the public against it by attempting to take away the rights of the

employer and not take corresponding rights away from the employee.

Now there are certainly some features which ought to be considered. We see that there are about twenty per cent. of the accident cases under the present law in which a damage suit will lie; that is, from negligence on account of the employer or on the part of some one who represents him. On the other hand, as Mr. Alexander pointed out, there are thirty per cent. of the cases in which there is plainly negligence on the part of the employee. I was told yesterday, by a gentleman who had gone over twenty thousand cases, that in those twenty thousand cases he found that twenty per cent. of them were due to negligence on the part of the employee, and in those cases the man injured would have no standing whatever to recover under the common law, which holds a man liable for his own negligence. Now, if you are going to make the employer responsible not only for the sixty per cent. of cases in which nobody is responsible, but make him liable for those twenty per cent. of cases in which the employee is plainly liable, wouldn't it be fair on that ground that, if you take away one right, you should take away an equal right from the other side? If you have got to leave a right with the ten, fifteen, or twenty per cent. of cases where a man is liable to a claim under the present law, a law which may secure to him heavy damages, you must balance that with the fact, taking the wage-earners as a body, that you have given to the workmen a right where they had no right. If you want to penalize an employer for negligence, is it necessary to make that a sort of profit to the man who is injured, and his family? Cannot that be made by statute, requiring him to do whatever is right and necessary in the interests of protection? It seems to me, as long as you penalize him by leaving him subject to a trial by jury,—that is, he does not know what the penalty is going to be,—you are putting a premium on litigation, and you are putting a premium on employees bringing suit to try to get something and possibly get nothing. And the way to meet that objection would be to let the State require what seems to be right and necessary in that way.

Mr. Lowell: Mr. Chairman, we all insist on hearing from the chairman.

The Chairman: Gentlemen, the time is up, and I don't want to discuss this at length. I promised to send you some documents.

Until Mr. Lowell, our friend from Massachusetts, suggested that he was the youngest man of this body, and was therefore entitled to be the most rash, I had hoped to have claimed that privilege for myself, because I shall have to be a little broader in my contentions than anybody else that has spoken; and I have no doubt whatever that there is no lawyer in this room who, if he will give as much study to this question as I have given it, and understands it better, will come to the conclusion that there is no difficulty in passing a law with a single liability, in repealing the common law, in repealing the liability statute, and making it constitutional both as the Federal and State constitutions.

In other words, we are operating under a general system of Federal government and State government. The Federal government in the Constitution has one clause that applies to this, as far as State action is concerned, or, rather, one amendment. The first ten amendments apply to the Federal government and not to the States. The Federal government is a government of delegated powers only. You must find something in the Constitution of the Federal government which by express provision or fair implication would limit you on this question before it could interfere. Now the fourteenth amendment does mean to limit the State. It does mean to limit the State so that they will pass a law that will give equal protection, that will give due process of law, and, as construed by the Supreme Court, will protect liberty of contract. The commerce clause of the Federal Constitution does not accord to Congress police powers. As to interstate commerce, it accords powers somewhat kindred, but the courts have held, and they have gone to the Federal Supreme Court, that it does not grant police powers to those States. Within the Territories the power is delegated under an entirely different clause, and in the District of Columbia and the forts and arsenals it is under a different clause. There they have police powers. The Federal Constitution does not pretend to give a right to the State to enforce such laws, but just simply to see that the States do their duty. The Federal Government, as such, has no common law. That has been the general theory of the Supreme Court. They have weakened a little on that in the last two or three years in one or two cases, to the effect that in interstate common matters there are matters which may be kindred to the State law. The Federal government has no right to legislate on this question as to employments strictly within the State,

if it has a right under the commerce clause to legislate with respect to interstate matters. Now what is the law? Except in one or two of the States which took their laws from the South, under Napoleon, such as Louisiana, we may say that our common law comes to us by adoption from the laws of England at the time of the Declaration of Independence, including the customs that run so long that the mind of man runneth not to the contrary. The statutes then in force in England, where the same were not contrary to our Constitution, were adopted finally. That body of common law, then, is State law, and not Federal law, and to say that that cannot be repealed must be to say that the State cannot repeal its own law. The Supreme Court has held in two decisions it can modify it and repeal the common law, and every State in the Union has modified and has repealed parts of it. That occurs every time it has enacted any change in the common law. And so it only becomes a question as to whether it can repeal the whole thing, as a system. The States have gone so far and the courts have gone so far in sustaining it that I cannot believe there is any question about it unless it be on the mere principle that some of the constitutions have no remedy for wrong, and the courts hold that to be not a particular remedy, but an adequate and sufficient remedy. And, if we believe the law should give adequate and sufficient remedy under the circumstances, I have no doubt the State courts will uphold it; and it won't be any business of the Federal court if you comply with the fourteenth amendment, which can easily be done, I think.

Now as to the statutory law of the different States. They have repealed them and added to them, have taken away; they have nullified any portion of them they wanted to on any subject. And the law ought to be broad enough with respect to both common law and the statutes, as it seems to me, to make a code on the question, what is known in jurisprudence as a system of law covering the subject. That is wholly essential in our State and in a great many other States, because the constitutional provision prohibits you covering more than one subject, and there would be danger in this unless you did it. Now there are a good many decisions in various States passing on such a code, such as in the probate matters. If the common law was adopted in one of the sovereign States by express enactment, why couldn't it repeal it by the same process? So that, so far as repealing the common law, that is a matter of State action and State con-

stitution, as it seems to me. But the Federal fourteenth amendment might possibly operate if a fellow didn't have any remedy whatever under the theory of the republican form of government. And the protection lies in the fifth amendment, that provides for due process of law, which applies only to Federal law, and not to the State.

Now, so far as the States themselves are concerned, the limitation in the Federal Constitution, as I view it, amounts to this: First, due process of law, which it is the duty of the State to provide, giving notice of the tribunal and fair opportunity to be heard. Not necessarily a jury trial, not necessarily an equitable cause, not necessarily any particular form of remedy, but notice of opportunity to be heard,—a tribunal with jurisdiction to make valid decisions. If you have that under the system you create, I see no objection from that standpoint.

From the standpoint of equal protection to the laws, I do not believe you can repeal this proposition as to one side and leave it as to the other. I do not think it should be done from the standpoint of the distribution of the liability under equal protection principle. Both the Federal courts and the State courts uphold the proposition that, if reasonable classifications are made, if you make a classification which is based on reasonable grounds or distinctions, the courts will sustain that under the equal protection clause. The decision of Judge Sanborn, a very eminent authority, as I view him, has been cited here. We know he has gone further in the 178th, as I view it. I do not mean Judge Sanborn in this room, but Judge Sanborn in the Eighth Circuit. But I think Judge Sanborn, with the 218th before him, would clarify his views on that question. So that the practical necessities for mathematical accuracies of classification would really be found in all our States, and not in the Federal government.

Now as to liberty of contract. It is the rule in our State, recognized in the rule of the Supreme Court of the United States, not only in the Lackmer case, cited by Mr. Browne, but in other cases, that the liberty secured by the fourteenth amendment is a property right, that it covers the question of the right of contract between employer and employee. While in Europe this summer, I had a letter from a man, a very able Federal judge, criticising that doctrine upon the theory of some articles in one or two law magazines, to the effect that the historical relations of that constitutional amendment were never intended to give

it that construction. But it has gotten into the Supreme Court of the United States, and it has been decided in that way. As it has gotten through the United States Supreme Court, and that court has decided it that way, for safety we must treat that subject as settled law, as I view it. That is, in the Lackmer case. And the other cases in the Federal Supreme Court have held very clearly that the Federal constitutional, and no other constitutional, provision was intended to require absolute liberty of contract in cases involving the police power. And there, it seems to me, rests the solution of this question. If your law is so drawn that the Legislature will, on a reasonable basis, be entitled to say that there is necessity for interference in this proposition, the court, if it sticks by its rule of following the Legislature on those questions where it is not arbitrary, but on a reasonable basis, will have to sustain the law. Now that cannot be easily done, but it can be done for practical purposes. I am not sure as to the form it should take, but this is sure, that about twenty-three foreign countries have passed laws bearing on this subject after having found that there were other systems more or less similar, and ours requires a change. Seven or eight States have commissions appointed, investigating this matter. We have met at Atlantic City, and discussed it at length. We have met again at Washington in January, where nineteen States were represented by delegates appointed by the Governors. It was considered at the National Civic Federation. We met again in Chicago, and here discussed it for two days on the 10th and 11th of June of this year, and it has been discussed again by the National Civic Federation once or twice; once in Washington in January, 1899, by the American Association on Labor Legislation. And in all these proceedings I have been present and taken substantially this position. So I could not go back on it unless for some very forcible reason. But however that may be, and while the data are not accurate now, it probably will be conceded that the injuries to workmen in the course of their employment in the United States every year reach an extent which in dollars and in the loss of life and limb and in the wreckage on society is in the aggregate as great as the total loss in the Civil War in the sixties in five years. Under those circumstances there certainly is reason to think that the present systems are inadequate. We all concede that. The very fact that they are inadequate is an argument for the production of this new system. And, from the

very fact that they are inadequate, they should be repealed, and there should be something else to take their place. A strong argument for the court to sustain a proposition for repeal is that, being insufficient, they should be repealed, and we can then adopt something that is sufficient in their stead, and in such a way that the employees could be within the law or in the code. Not, as my brother Browne suggested, if I understood him correctly, on the basis of the old law, which should be declared unconstitutional, but on the basis of a new code so enacted that, if the court should strike out one system, it would declare the new law void and leave the other standing. Then there would be no hindrance. There would be no law on the other side.

Now it seems to me the court should take all these things into consideration and rest on the principle of equitable construction of law to reach the purposes which the exigencies of the case demand, and should not shut their eyes to the fact that here is a great calamity, and that the Constitution was not intended to prevent it. Almost every decision that has been made under the police powers in the Federal courts and in the State courts that have gone outside of that principle of protecting the general welfare would be void, at least a large number of them. Now the Federal Constitution does put limitations on the police powers, as I view it, for the State. It puts limitations on it for the liberty of contract. There must be a dangerous situation, that the Legislature has the right to say is dangerous. It puts a limitation on to it as to the quality of laws,—the limitation that the laws shall be the same to all persons under the same circumstances, or as nearly as can be done. It puts no limitation on the due process of law, any more than it does on other subjects.

Now, when we face this proposition from the standpoint of the historical relations of the two constitutions, the fact that the State has a right to do anything which it has not been prohibited from doing, if it is within the powers of ordinary State legislation, it certainly would be within the Federal Constitution unless there is some specific provision like the equal protection clause or the liberty of contract clause which must be construed as interfering with it.

So it seems to me that, if we pass a law—the law which we have been advocating right along—which has simplicity and directness and rapidity and equality, and all that is similarly situated within a reasonable clause, we shall have no difficulty with the Federal Constitution.

Now as to the right of trial by jury. The Federal Constitution has, within the first ten amendments that apply only to the regulations of the Federal court, the provision of trial by jury. In our own State our court has construed that to mean a provision for securing the rights existing at the time the constitution was adopted, and not new rights created in the future. You might have the right of trial by jury under the Federal courts, but my solution of that problem would be that you fix an arbitration clause along the lines of the arbitration clause in fire insurance policies, which would require the submission to arbitration before the suit was brought on. My own opinion is that we can work on it in existing circumstances, because we have a law which requires liability in accordance with the precise words of the statute, and prohibits the enactment of any policy which is not in the exact words of the statute, and has another provision for arbitration; and that is upheld. We have also the provision for proving claims before the County Commissioners, and to appeal from their decision to the court. And that is upheld as being due process of law and perfectly valid, and is apparently in the line of the decisions in most States. But, so far as the Federal law is concerned, the Federal Constitution has the right of trial by jury. And, as far as the laws in all the States are concerned, it is at present advice my opinion that, if you follow the provisions in your law similar to the provisions which have been upheld in England and in the United States Supreme Court and the courts of a very large number of States, a liability would be conditioned on submission of the controversy to arbitration, and you could eliminate every constitutional objection in the way of trial by jury in all the constitutions. And I think the courts will hold that is a fair remedy under the circumstances.

Mr. Wigmore: Both parties, you mean?

The Chairman: Both parties. I would make the liability direct on the employers, provided the employees submitted it to arbitration. I would repeal every other law, so that the employer would not have the chance of defending under the constitution. I would put it up to the States or the Legislatures. I would oppose any election which would give either one an advantage over the other. I should strenuously oppose any law which would make any penalties on either side for the enforcement of this law. I think one of the main objects is to get rid of hard feelings, is to get out of that situation, so that there is

no chance for controversy and hard feeling on either side; and I believe the only way to do that is to remove the idea of penalty from either standpoint on both sides.

Now, if there are violations so bad that they ought to be prohibited, put a penalty on them. I think the State is competent to pass laws to protect and to punish both sides in that regard. But I think you ought to have a contribution from both sides in this proposition and make both sides feel responsible. But that has been ruled the other way, and I do not think I care to talk any further upon that.

MR. DICKSON: Assuming that all the legal talent has been heard, I should like to centralize the discussion and probably get some real action, and for that purpose I offer the following motion:—

I move you, sir, that it is the consensus of opinion at this Conference that the law should be compulsory in form, but elective in fact, providing in the first instance that the employer will pay the compensation according to the scale set forth in the act, but reserving to both employer and employee their common law remedies, including trial by jury, providing, however, as to the employer, that, if he refuses to pay the compensation according to the scale provided and forces the employee to his action at the common law, he shall not escape liability by either the fellow-servant rule, the assumption of the risk, or the contributory negligence of the employee, unless his negligence be greater than that of the employer, in which event the damages shall be apportioned according to the relative degree of negligence, and the burden of proof shall be upon the employer.

There is further which might be desirable.

THE CHAIRMAN: That is one of the Illinois plans.

MR. ROHR: I second that.

THE CHAIRMAN: You all know that some States have tried that. Illinois had a committee which reported such a law, and it failed of passage, and Massachusetts had it some years ago.

MR. BAILEY: I want to move an amendment to that. I do not think any of us here are ready to vote on that. We have heard different views expressed, and my amendment will be that the committee make a draft of an act, considering the points embodied in the motion, carefully, in framing the act, and that is as far as we ought to go.

MR. SCHUTZ: That is an entirely new thought to me. It

did not occur to me before. It appeals to me from this standpoint, that it puts the obligation on the employer to comply with the act, otherwise he would lose his personal defences, and it puts the obligation on the employee also to resort to the act, because, if he does not, he will have to take the common law with the safeguard in it.

MR. WRIGHT: We thought, when we drafted the alternative bill, the section of which has just been read, that we would meet pretty nearly with the approval of the employer and the employee. But, as is usually the case, we did not meet either one. In the work of collecting data, we found that we could nearer meet the wishes of both the employer and the employee by drafting a compulsory bill. And recently, at the State meeting of our labor organizations, they approved the course of drafting a compulsory bill. And that is the position we find ourselves in to-day.

THE CHAIRMAN: Let me ask you this question, if I may: From your observation and study of this question haven't you come to the conclusion that the matter of the elective scheme is simply about the second stage in the study of the question, and, when you get down to the bottom of it, one liability is all there is to it?

MR. WRIGHT: Yes, we found, as in a great many other matters, that we were going ahead a little too rapidly by trying to enact a compulsory bill. Subsequently we tried another plan by going a little further and striking out the features of the compulsory bill, but it left elements of uncertainty in the bill itself, and we found that a compulsory bill might not be constitutional. But I, for one, have come to the conclusion that the courts would just as readily uphold a real compulsory bill as they would a makeshift compulsory bill, and if we adopt a voluntary bill, voluntary for both sides to go into it, then it would be merely a makeshift and of little good.

THE CHAIRMAN: I suppose you came to the conclusion they would be more likely to uphold it. You are an attorney, aren't you?

MR. WRIGHT: No.

THE CHAIRMAN: I thought you were, from the manner in which you were talking.

The question now is, the simple question as to whether you would approve the motion of Mr. Dickson.

MR. WRIGHT: No, I don't agree with Mr. Dickson, simply

because, while the Illinois Commission has ceased to exist as a State Commission, on the part of the labor members, the Commission will continue as a voluntary commission, and we will take our compulsory bill and try to perfect it, and bring it before the Legislature next spring, and I believe that the labor organizations will get back of it, and unanimously ask to have it passed. And we shall ask the employers to appoint a voluntary commission on their part, and we hope to have a bill brought before the Legislature as an agreed measure. Whether we can agree on that or not, however, there will be a compulsory bill offered by the trade unions of this State.

There should be one liability. We will ask two things: to have a scale adopted, formulated, or indorsed by the Legislature as to the different accidents; and the value of a man after the different accidents have taken place.

MR. BROWNE: Fixing his economical loss?

MR. WRIGHT: Yes. And we will also try to incorporate in the same bill a repeal of certain of the laws as they exist at the present time.

MR. BAILEY: We started this morning to discuss, not the whole question, but the question of repealing the common law.

THE CHAIRMAN: I think, perhaps, I owe an apology, because, for one, I went outside that.

MR. BAILEY: Every one has gone over it, but I tried to keep somewhere near it. I do not suppose we will take any vote on the merits of the debate, although it is very important to have got an expression of opinion. I do not ask for any vote on that. Now we come to the motion which I know goes into another question than the one which was discussed; namely, the question of employers' liability, regardless of fault. I have a few more words to say on that point. My present suggestion is that we take a vote on Mr. Dickson's motion that we adopt the Illinois plan, the plan of the Illinois Commission. My mind is still open, and I am inclined to agree with Mr. Mercer.

A MEMBER: There are other subjects on which we are substantially agreed.

MR. BAILEY: Are we in favor of the elective system rather than the other? If we have the elective system, I think the committee, in drafting the act, will consider every one of those points, and may think that they are good ones. They may draft a separate act. I do not want to go on record as not in favor

of that, as against the compulsory system. I believe fully that it is very vital that the employers should be affected, willy nilly. It may be a new act should be drawn, separate from the other, something less drastic, so that the court may possibly leave one and adopt the other, approve one and deny the other. We shall not be doing the thing justice unless we carefully consider the possibility of a compulsory law, and I am not ready to give that up.

THE CHAIRMAN: I understood that you were raising again the question of whether or not there should be trial in the regular way or by a board of arbitrators.

MR. WRIGHT: No.

THE CHAIRMAN: And the other was whether there should be more than one liability.

MR. WRIGHT: Primarily, the object is to settle this particular question, whether it is a single liability or elective.

THE CHAIRMAN: That we voted on last night, in favor of the single liability.

Do you want to take the result of the Conference as it was and bring up the question as to whether or not there was anything discovered since then?

MR. WRIGHT: I cannot see that I have interjected anything new, except the fundamental question of whether it is a single liability or alternative.

THE CHAIRMAN: You want to review the whole question?

MR. WRIGHT: After having heard the arguments pro and con on the constitutional element.

MR. LOWELL: There is one point that is not touched on, on the question of election. I merely state it as a matter of opinion. We have had the elective system in Massachusetts for two or three years, whereby the employers and employees could agree. In the first place, it was only the employer who could suggest it, and then an amendment was made whereby a certain number of employees could suggest it and get a system whereby they could get out from under the law of Massachusetts. Now it has been on the statute book three years, and so little attention has been paid to it that, when Mr. Doten went up to the board which had charge of it, the member of the board there did not know to what he was referring, and said to him, "Oh, yes, I believe there was a law passed about that, but nobody has come into the office to ask about it."

THE CHAIRMAN: That has been my understanding of that situation in other places where it has been tried.

MR. WIGMORE: I would like to ask that we should vote on Mr. Dickson's proposition in the sense in which he has explained it, because it would affect the labors of the drafting committee. It strikes me that this Conference is entitled to insist that the drafting committee follow its instructions, having heard the constitutional discussion. We make now the decision of what we want the drafting committee to do, because the whole structure and future of the bill depends on that. I think we should vote on the proposition one way or another, which would necessarily divide us on the separate points on which we differ. We can vote on the proposition of exclusive liability for the employer and elective or optional choice of remedies for the employee. Then, if we vote that down, let us vote upon the next point, election for the employer and election for the employee; then, if we vote that down, let us vote as to compulsion for both of them, and then the drafting committee will have an expression of the views of this Conference on all those three subjects.

MR. BAILEY: I want to say I expected we would have the votes. We discussed the question of single liability, and we have discussed the question of liability regardless of fault. That is involved.

THE CHAIRMAN: That is involved here.

MR. BAILEY: The constitutionality of it we have discussed more or less, although it was not before us. I thought there was but one more word to be said about that aspect of it. We should vote separately on the question of repealing the common law and as to its constitutionality. And then we should have a vote on the constitutionality of the employers' liability regardless of fault. That is what we are here for to-day, the constitutionality.

THE CHAIRMAN: That is, as I understand this question, gentlemen. I don't think the motion is properly put. I think it ought to be upon the question you are discussing outside of the matter discussed last night, of single liability. If you make a motion to open that proposition, it will be in order. You have discussed it, and we are committed to that.

MR. WIGMORE: The first vote should be whether we instruct the drafting committee, in framing this bill, to frame the bill, on the basis of single liability for the employer and employee or the option to take that, or to keep the common law remedy.

THE CHAIRMAN: Are you willing that should be the first motion?

MR. DICKSON: I withdraw my motion.

THE CHAIRMAN: Shall it be understood that the vote on this shall be in place of that last night?

MR. WIGMORE: Permit me. In view of the constitutional doubts that may arise, I move that we hereby instruct the drafting committee to frame its bill so as to provide exclusive single unlimited liability under the Compensation Act for the employer, leaving the employee the option to choose that or his common law remedy.

THE CHAIRMAN: You mean unlimited as to the amount or time?

MR. WIGMORE: Unlimited as to fault.

The motion as put was seconded, and by rising vote was lost.

THE CHAIRMAN: I declare that lost.

MR. WIGMORE: I move the next question, that the drafting committee be instructed to include the elective retention of his common law liability by the employer and the corresponding retention by the employee; in other words, elective for both parties.

Motion was put and lost by a majority of one vote, eight for and nine against.

MR. WIGMORE: Then I move that the framing be on the basis of exclusive compensatory right and liability for both parties, with no election on the part of either.

MR. BROWNE: Apparently, we have lost the other motion by just one vote. Now I want to make this suggestion, based on actual experience elsewhere, in the Conference of Commissions on uniform State laws, that we threshed it out and threshed it out, and we did not come out with any view, unless there is a unanimous vote or practically unanimous.

THE CHAIRMAN: That was considered in another matter.

MR. BROWNE: Let me make the suggestion for what it is worth, that two drafts of bills be made. When the divorce congress came to this consideration, two drafts of bills were made, giving the right of divorce in a large number of cases,—I speak of the divorce absolute,—and the other making it limited except in the one case of the statutory offence. Now you may find out that to undertake to pass a uniform law, in some of the States one form can be secured and the other in another. These drafts were

merely alternative and in aid of the legislation itself. And would it not be wise to put it in such alternative phrasing that that particular section or sections may be alternative, and then it may pass in the respective Legislatures? In other words, if you cannot get the compulsory view, then have the elective system in a common form.

Mr. Bailey: Mr. Chairman, I believe that what I said before is worth while; namely, that it is wrong to tie the hands of the drafting committee absolutely, as this vote will do. I shall vote yes on that, but I do think that it would be wiser, and that it would be the sense of this meeting, to leave the drafting committee some chance to use their brains and their discretion upon it, because they might think that we should have, as Mr. Browne has suggested, a compulsory bill, and also something which has an element of election in it, so that we should have less chance to differ when we have all the light there is on the subject. I would rather vote on the sense of the present meeting that it should be compulsory, but I do not think the hands of the committee should be tied.

Mr. Bent: We have found out here how many favor a bill that is compulsory on the one side and elective on the other, and how many people favor a bill that is alternative on both sides, but we have not found out how many favor the bill of single liability. And, even if it is not final, we shall all know more when we know how many like the third plan.

Mr. Sanborn: I wish to call Mr. Lowell's attention to one serious difficulty in the suggestion he makes. We might pass an elective bill in Wisconsin, a purely elective bill, and I do not suppose there would be a man come under it. To my mind, the great need is to get uniformity. If Massachusetts will pass a compulsory law, if Illinois will pass a compulsory law, and if the other States do not fall in line, we shall not have uniformity. If we do have uniformity, we shall adjust ourselves all right. If the compulsory law is held constitutional in all the States, why, we will all come under the compulsory rule. If it is held unconstitutional, we will work out some basis that is right. But, so long as we keep our schedules that affect the liability uniform, we are putting the burden equally. Now, to my mind, the main thing is uniformity. I think the expressions here are all right in line that we should work this out on the compulsory plan.

The Chairman: That is what we would have to do in our State.

MR. LOWELL: May I say one word, being responsible as a member of the Massachusetts Commission for this gathering? What I had hoped to get out of this meeting is just exactly what we have got, and I am stuck on myself, we are all stuck on ourselves, for having got this gathering together.

THE CHAIRMAN: We are all stuck on you. [Laughter.]

MR. LOWELL: Now the important thing is to have the details of the bill uniform throughout the States, and we have got a very great measure of uniformity. Now that is the main thing which we have got. The question of whether it is compulsory and can be got through in Minnesota, or whether it is elective and can be got through in Wisconsin, or what is the form of it in Massachusetts, is a minor detail. Now we should not have this Conference bound necessarily unless there is unanimity, practical unanimity, on either one of those three alternatives or three choices. So that it seems to me that the expression here should be merely an expression of opinion, and that the drafting committee, unless it is fairly unanimous, should bring in an alternative as to the form of the bill.

THE CHAIRMAN: Then the vote is on the question of, first, Shall you advise this committee to draft a single liability bill?

The motion as put by the chairman was seconded, and carried by twelve votes for and ten against.

MR. DICKSON: Now I want to have a vote on my original motion, if I may, just an expression of opinion from this Conference.

THE CHAIRMAN: What is your motion? State it again.

MR. DICKSON: That it is the sense of this Conference that the law should be compulsory in form, but elective in fact, providing in the first instance that the employer shall pay the compensation according to the scale set forth in the act, but reserving to both employer and employee their common law remedies, including trial by jury, providing, however, as to the employer that, if he refuses to pay the compensation according to the scale provided and forces the employee to his action at the common law, he shall not escape liability by reason of either the fellow-servant rule, the assumption of the risk, or the contributory negligence of the employee, unless his negligence be greater than that of the employer, in which event the damages shall be apportioned according to the relative degree of negligence, and the burden of proof shall be on the employer.

THE CHAIRMAN: As I understand that motion, and I want to be straight on this, I understand you are injecting into it the element of contributory negligence?

MR. DICKSON: It is there.

THE CHAIRMAN: Which has been already passed on by us.

MR. DICKSON: For the purpose of securing a vote. This speaks in this rule that he shall not escape liability by reason of either the fellow-servant rule, the assumption of risk, or contributory negligence of the employee.

THE CHAIRMAN: If you repeal the common law, you will do away with that.

MR. WIGMORE: I think Mr. Dickson's proposition is substantially different from the other three, for this reason: it endeavors to obviate the objection Mr. Lowell finds in Massachusetts that, if you simply make it optional, that is, as regards employees and employers both, you have no club to make the employer go into it who does not want to go into it. The sentiment there proposed is one that is in the minds of a good many of us. So take the present common law and make it as hard as possible for an employer by taking away the fellow-servant rule and contributory negligence and the assumption of risk. If we are going to do anything, let us stop right there, and that would stiffen up the common law rule and make it very hard.

THE CHAIRMAN: This is expressing the opinion that, if we make up our minds, in drafting the bill, we can do it one way, submit one or the other form.

MR. LOWELL: May I ask whether the employee has a right to come in under this scheme or not? What I mean by that is, Is it possible for the employees to say, "I will come in under your common law with these defences waived"? If that is open to the employees, I don't believe in it.

MR. DICKSON: If the employee refuses to come in under the Compensation Act, he must take the common law as it stands, with the fellow-servant, the assumption of risk, and contributory negligence in it, which, we know, in practice knocks out probably eighty per cent. of the cases.

A MEMBER: The difficulty with that motion is that it gives one body of law to the employers and another body of law to the employees.

JUDGE HOLLOWAY: The motion Mr. Dickson has made embodies my idea when I came here, independently of any con-

stitutional question, and I did not give that any consideration whatever. To obviate the objection that Mr. Wigmore made, I had in my mind to coerce the employees, if you will pardon the expression. Judge Sanborn says this is a constitutional coercive measure. Now my theory was to coerce the employees. For instance, in Montana we have a section in the statute that leaves it to the jury entirely to fix the amount of recovery in case of death or of injury by wrongful act. In thirteen of the States, I believe, there has been a limitation of the amount of recovery to five thousand dollars. In two or three of the States it is ten thousand dollars, and possibly other States have other limitations. Our theory was in that section of our code to limit the amount that the employee is to get in case he went into the common law court. In other words, if he understands that, when he tries to work from under the Compensation Act, he must know that he must not only take the chances of a jury trial, but that the amount which he can recover when he divides with his attorney will not yield him any more than the Compensation Act, then he will come under the Compensation Act in preference to the other.

Mr. Wigmore: That's all right.

Judge Holloway: We compel him to go into a position under which he will be limited in the amount he can recover in case he elects to pursue his common law rights in preference to the other.

The Chairman: May I make the suggestion here? I am a member of that committee, and I would rather be relieved from action on it if we are going to make the elective clause vital. Now that is not any sore spot. I could not conscientiously, with my information on the subject, vote for such a thing, because I think it will leave practically all the evils of the old system and add the burdens of the new, and I could not conscientiously recommend any such law to the Legislature of Minnesota after the study I have given to it, because it is against my judgment. Now I do not mean to influence this vote at all by any such statements, but I think that it would be putting me in such a position that I could not work upon the law, because I do not believe you could make a valid one in that way, and I could not make out one that I would not be able to recommend to the Commission as being a valid law. I would hate to recommend one that I thought was not valid.

JUDGE HOLLOWAY: It does not seem to me the suggestion made by Mr. Browne is wise. It may be that in Illinois they can pass this compulsory measure, and in Minnesota, but that we cannot do it. I think the section in the bill—and I think you are broad enough to take part in the formation of it—there should be a section in the bill that will make it uniform in those States where they are forced to adopt an elective principle in preference to no bill at all.

THE CHAIRMAN: You have had two experiences in Illinois. There was the Commission in 1905, with Professor Henderson and Dean Kinley on that Commission, two of the ablest men that ever were engaged on the subject. On the advice of their attorney that they could not pass a compulsory law, they recommended one of those schemes that this would be, and it was lost in the Legislature. You had a second commission in Illinois having recommended such a scheme, and they would like to go back on it,—I mean, as far as labor is concerned. And you have the experience of Massachusetts, that they passed a law which was not used, which did not have the coercive features in it. And you have the weight of the judgment of the gentlemen from Wisconsin.

MR. DICKSON: May I say that after you take a vote on this, regardless of the results, I should like to have the privilege of requesting the committee to prepare a bill based on both ideas.

MR. LOWELL: That's the way.

THE CHAIRMAN: That is what I want to know. That is what I wanted to suggest.

MR. WRIGHT: Though I favor the compulsory bill, I would rather have a bill as we drafted it than no bill at all. The bill by Professor Henderson provided a maximum of fifteen hundred dollars, and the employee paid the larger portion of it himself. It was entirely inadequate. While it was valuable in bringing about discussion, I would rather have the bill as we drafted it in our reports than no bill at all. If we were strong enough to go ahead and get a compulsory bill, I would prefer that, but, if we cannot get anything else, I would prefer the kind of a bill in our report and advocate that.

MR. BENT: Mr. Wright represents the employees, and, as far as I know their views, I share their views absolutely. We like the plan of the Illinois Commission. It provides a plan for compensation.

MR. BOYD: I want to call attention to one fact that appears from this discussion: from what source did all this idea of compensation trickle down from? Here we have had an agitation which has been agitated for a few years, I think, in England. But it came from one man's mind, and that was Bismarck. On what ground was he able to make it a law,—on what principle was he able to put it through the Reichstag and make it a law? When he tried to put through accident insurance, it was carried only by a small majority. Yet he drove it through. It was on the sole ground of the police powers, or the poor law,—that it is a national necessity, a necessity of the people. And it has been pointed out here, without going into detail, that eighty per cent. of accidents, five hundred and thirty-six thousand accidents, have no compensation at all. You are furnishing a new right, a new remedy. And, as has been pointed out by Mr. Bailey, it is in the nature of an equitable right. And for that reason it should be obligatory on both parties. It comes back to that. And for the same reason it is a national necessity, and for the same reason that a compulsory educational scheme is required for children from six years to fourteen years of age to go to school, regardless of whether their parents want them to go or not, so this is a national necessity for the general benefit of society. And on the same principle it is necessary to protect society against injury to industry, against having forced on it the burden of such a large number of injured people. And that is generally the principle of the police power or the poor law.

MR. BAILEY: I shall vote on this proposition with the understanding that it means that the committee are going to be asked to frame something both ways.

THE CHAIRMAN: Is that the understanding, that the committee will be instructed to frame a bill both ways?

MR. DICKSON: Yes.

A MEMBER: May I make the amendment that the committee have pretty wide discretion as to preparing something both ways?

THE CHAIRMAN: If these gentlemen come to draft this law in the light of the ideas that have come to them, they will have to have at least a little discussion and they will have to have a little discretion to do the best they can with it.

The motion was seconded and put to the meeting, and carried unanimously.

Mr. Dickson: I move that the drafting committee be requested to draw up two provisions, one based on the exclusive liability, that is, repealing the common law liability so far as it shall affect this question, and the other based on the elective idea.

The Chairman: The motion is that the drafting committee draw up two provisions, one with the exclusive remedy, which means the repeal of the common law, and the other for the elective scheme, which shall carry with it sufficient limitations on both parties as to induce them to come in.

The motion was seconded and put to the meeting, and carried unanimously.

Miscellaneous Business.

Mr. Lowell: Apparently, we have transacted all the business which is before this Conference, and of the Conference, and I want to simply say from the Massachusetts Commission, as being the originator of this meeting, that one of the principal reasons to my mind why we have done as well as we have done, and we all admit that we have done extremely well, is on account of our chairman, Mr. Mercer. I wish to offer a motion which I will ask you to accede to and not let him put it, that every one who is in favor of a sincere vote of thanks to our chairman will signify the same by rising.

The motion was seconded and put to the meeting by Mr. Lowell, and carried unanimously by a rising vote.

Mr. Rohr: Mr. Chairman, I would like to make a motion to the effect that all of those in favor of extending the thanks of this Conference to the Massachusetts delegation for originating the idea of holding this Commission will express the same by a rising vote.

The motion was seconded and put to the meeting, and carried unanimously by a rising vote.

The Chairman: Gentlemen, on behalf of the Chair, I simply want to say that this is an unexpected honor, both as to the chairmanship and as to the vote. If I have done anything to contribute to this meeting, the exceptional honor you have conferred on me in presiding over it is sufficient recompense, and I assure you that I have derived considerable benefit personally from this Conference. I tried to bring this about last summer, but found there was not quite enough enthusiasm on the matter where it would be accepted. But we have got to a time when we must put our ideas in shape.

I thank you for the honor you have conferred upon me in being chairman of this Conference.

MR. BENT: We passed a very definite vote in regard to the publication of the proceedings of these meetings yesterday. In passing that vote, we failed to take into consideration the suggestion that was made that these proceedings would be extremely valuable in the libraries. Now it seems to me that we ought not to limit the secretary of this Conference in determining the exact number to be printed, but we should leave some leeway for the opportunity of supplying copies at a reasonable price to all those libraries and institutions of learning and other bodies desiring the publication. I would therefore move you, Mr. Chairman, that we amend that part of the motion regarding the number and making it flexible; that is, a sufficient number in addition to the one thousand that are to be distributed to the several Commissions, that they be struck off within the discretion of the secretary for other purposes.

MR. ROHR: I second the motion.

THE CHAIRMAN: Before that is put, I think the two gentlemen from Illinois were not present at the end of the meeting, and I think it might be well to explain what we did. We voted on the question of the distribution of expenses amongst the States that are connected with this Conference, and the stenographer's expenses, and the expenses of this Conference, and the expense of the thousand copies, and the suggestion was made, in view of the experiences of other proceedings, there would be a good many others that would want these proceedings. I simply want to make this suggestion, that the secretary put the price high enough to cover the cost, as far as he can, of these proceedings. At the Atlantic City Conference we voted the price of fifty cents for this book before it went in print, and we found that, in fact, after we did get through revising it, it cost us more like a dollar apiece, and our Commission has lost on them every time we published one. Now I think the motion should carry, but I think there should be plenty of discretion left to the secretary to get that in shape, and I think he ought to have power to cause a letter to be sent out to the Governors of every State and Labor Department, and every insurance commissioner, and every Attorney-General of each State, the bigger libraries in the country, and all of those insurance companies doing a large amount of business, and all the larger employers that have voluntary schemes of their own,

and all the Bar Associations of each State, asking them, before the type is taken down, how many copies they want for themselves, and state what the price would be. Now my idea in that is this: that there is scarcely a State in the Union, we will say, from which in the last eighteen months application has not been made by some Bar Association, or by some Attorney-General, or by some Labor Department or some insurance company, for copy of the Atlantic City proceedings, and we are getting very near to the point where we must stop.

MR. SAUNDERS: Mr. Chairman, the figure has been stated at a thousand copies. I think you should say a hundred copies for each Commission. I don't know whether there are eight or ten or eleven Commissions to share in the expense.

MR. ROHR: As regards that, I would not be surprised if the legislators of the States we come from wished to have individual copies and would demand a copy. I presume they will. I would not like to be limited to one hundred copies. I want five hundred, and let's have them, if we can pay for them.

MR. SAUNDERS: There would be a hundred copies to each Commission, anyway.

MR. ALEXANDER: I move you as an amendment that we request the Labor Department of the government to publish the proceedings of this Conference and such other documents which have a direct bearing on the subjects under discussion as may be selected by a committee to be appointed by the chairman.

MR. SAUNDERS: We shall still send out the hundred copies for each Commission in the mean time?

THE CHAIRMAN: Yes.

MR. DOTEN: I think there should be a saving clause, that, providing the government does not do this, we should keep this matter standing in type. We can do that in monotype or linotype at not much expense, so that we can publish them at another time.

MR. ALEXANDER: I think the government will do that.

THE CHAIRMAN: I assume that will be done, but I think that saving clause is not a bad idea.

JUDGE HOLLOWAY: This motion is merely to supplement the action that we have already taken, that we leave it discretionary with the secretary?

THE CHAIRMAN: That is a good suggestion. Our States may want to publish these things. I understand the motion to be

in this position, that this motion is to be a supplement and not a substitute for the other motion to the effect that the Chair be requested to appoint a committee, the number left unlimited, to select documents that should be published by the Labor Department, and that, if it does not publish them or if it does, we reserve to the secretary the right to publish such of them as we want to, and in such number as we wish.

The motion was seconded, and carried unanimously.

THE CHAIRMAN: I think we should pass a hearty vote of thanks to Commissioner Neill. I would move a hearty vote of thanks by a rising vote.

The motion was seconded, and carried unanimously by a rising vote.

MR. SCHUTZ: As these proceedings are going out, I wish to say that I personally represent no one here. Some one from Connecticut might inquire why I was here, and it seems to me that there should be properly put as a preface to this report that we are simply voting as individuals representing ourselves, and not in any sense representing a particular commission or state.

THE CHAIRMAN: That is the understanding throughout the record.

A MEMBER: That should be in it.

MR. BENT: In behalf of the Illinois Commission I wish to express a feeling of appreciation and a sense of the high honor you have shown to this State and to Chicago by your presence here.

The meeting then stood adjourned.

Advisory Conference, Saturday, November 12, 1910, 2.30 P.M.

A Conference was held with the drafting committee, which was attended by the lawyer members of the Commissions.

THE CHAIRMAN: I want to bring out one or two matters for informal discussion. At the threshold of this proposition in the gathering of these different employments, suppose that we should come to the conclusion that we cannot, on account of the liberty of contract, cover any employment that is not hazardous, at least to the extent that is covered by this act. I should like to have any suggestions that may occur to you as to how you would define hazardous employments.

MR. BAILEY: I have an idea or two on that which I would like to bring out briefly, because we did not go into that very thoroughly in the previous discussion. Professor Williston was somewhat impressed by Judge Sanborn's reasoning. He was troubled a good deal more than I was about the need of a pretty exact classification. If you are going to pick out a list of industries, as they did in New York, and as they did in England to begin with, he was impressed with the idea that you must still further classify it by picking out the dangerous positions in that list. That is to say, taking the railroads, being careful not to include those employees on the railroad that were not subjected to hazards.

MR. LOWELL: Allow me to interrupt a moment. The Mellor case is quoted.

MR. BAILEY: That is the 218th. To tell the truth, I am not sure that Mr. Williston read that.

THE CHAIRMAN: That was against the Atchison, Topeka & Santa Fé Railroad, I believe.

MR. BAILEY: I think Mr. Lowell has a scheme for including all employments, and I have another one. How near we are together, I do not know. But it did seem to me desirable, if it could be done safely, to get rid of the list such as the New York people had made, and I noticed in the New York act that provides the list they also confined it to those portions of the employment selected that had an inherent risk. They said "necessary and inherent." I think the word "necessary," perhaps, is too

strong. I rather like the word "inherent." Perhaps that is the better word and sufficiently covers it, and, if you take all employments, as we propose to do, perhaps you ought to confine it to the inherent risks of the employment or business, if you keep it as broad as was suggested. My own feeling is that there are strong reasons for saying, as they did in the New York acts, that they should be confined to industrial occupations. That would cut out domestic servants, and perhaps the committee will go further and make it broader. If you do confine it to risks and dangers inherent in the nature of the business, that brings you to a considerable extent under the New York law, and you will get the benefit of whatever decision is finally made under the New York statutes. You may pick out a section here and there as possibly useful, and then in the definitions I followed the New York idea of confining it to the industrial and business occupations, and, as to definitions, I would say that you do not ordinarily like to get a matter of the utmost importance in the definition, although oftentimes you find them there.

I want to hear what Mr. Lowell's solution is for the troubles that arise from classification. If you are going to have a classification, you are not going to accomplish much, unless you do confine it to the inherent risk.

Mr. Lowell: I will answer that very briefly. I think that all of the cases which have come up to the Supreme Court of the United States are based upon the proposition of classification. In fact, they all have, as a matter of fact,—they have been cases of that kind. They classify mines as a certain kind of a risk. They classify railroads as a certain kind of risk, and classify in other ways. It comes up to the Supreme Court of the United States under the Fourteenth Amendment, and the question arises, Is the classification a proper one? Can you select a mine, can you select a railroad, and impose on those industries something that you do not impose on anything else? My idea is that, when you have a law covering everything, we do not classify at all, and therefore it is not a question of unequal protection or anything else. You do away entirely with the troubles under all of these decisions. For instance, the classification which is made in Massachusetts, leaving out domestic servants and agricultural laborers under the Employers' Liability Act,—that has been held a good classification. But, if you include domestic servants and agricultural laborers, then there is not any classification at

all. It is not a question of whether you can hit a railroad or hit a mine. There is no question of that kind at all in it, because this thing is equal for everybody. So, I think, you get entirely around the idea that troubles New York.

THE CHAIRMAN: Personally, I quite agree with that. Unless it be called classification to classify everything, or group everything, on the basis of the number of accidents they have. That gets over the objection as to distinctions, I think, and, I believe, can be done. If a man has an occupation, or a concern has an occupation, which creates an accident that results in a broken leg, an accident arising out of the course of the employment and due to it, to that person it is just as disastrous as it would be to each of twenty other men that might have their legs broken in some employment that would be called more hazardous. If you are going to have one system of law, or code, you will remove many of the difficulties if you can adopt a code system by dispensing with your common law for every negligent action which you can,—everything arising out of the course of employment; and then the question of liability is directly in proportion to the accident that each fellow has. Every person who is injured directly has the right to get exactly the same compensation as any other person; and it does not impose any burden on a fellow running a slightly dangerous occupation different from those of a more hazardous occupation, except as to the exact relative positions they occupy towards the employee.

JUDGE HOLLOWAY: To my mind, the objection that Mr. Lowell is trying to obviate is not the objection that will arise. What kind of a provision are you going to put in your draft of the bill here as to employers and employees contracting or waiving liability under the statute? Are you going to forbid it?

THE CHAIRMAN: Suppose we draft a bill on both bases, each way?

JUDGE HOLLOWAY: In the bill you are drafting here, are you going to have a provision against contracting out between the employer and the employees, or waiving liability under this act?

MR. LOWELL: We voted to have it.

JUDGE HOLLOWAY: If you don't, it will be almost worthless, because the employers would coerce their men to sign any sort of a contract.

THE CHAIRMAN: I would make that so they could not contract out of the essential provisions of this law.

MR. BAILEY: Except under the provisions.

THE CHAIRMAN: Then they must put in all the provisions of the law.

JUDGE HOLLOWAY: I assume you must have that, in order to make it of any value at all. If you do have that provision in there against contracting out, upon what theory can you say to me that you cannot make a contract with a farm laborer by which he waives the advantages of this particular statute? For instance, in Montana to-day, by express statutory enactment, a common carrier may, by special contract, relieve himself from liability for everything except gross negligence.

MR. BAILEY: By giving a better rate.

JUDGE HOLLOWAY: Of course, primarily, that is the consideration that moves. But by what authority would you say, as I say, to the farmer that he cannot contract with his farm laborer? My opinion has always been that the only theory on which you could justify such interference as to freedom of contract would be on the basis of the police powers, and that does not reach the question of farmers or domestic servants or anything of that kind. My judgment on the question of freedom of contract will be that it will be bound to be a serious obstacle,—rather more so than the question of unfair classification.

THE CHAIRMAN: I think that is so, too. But I think that, if you classify it so it stands on the basis of the risk, you will have every accident due to the course of employment under, the police power would extend to those accidents, and only to that extent. I do not think it will result in the farmer not being able to contract with the laborer about work; but if you followed this law that will be drafted for the purpose of remedy, as against a contract, anything against it will be against the policy of the State, as declared by the Legislature, as a reasonable basis.

Now, if that basis is only that they should pay for an accident arising in the course of employment, how can any court say there was no basis for that liability?

MR. BAILEY: I want to ask Mr. Lowell a question: Assume that we are going to have language which will make a class which includes all employees—

MR. LOWELL: I object to the word "class."

MR. BAILEY: That is the broadest term. We are talking of employees.

MR. LOWELL: There is no class to it. You are placing everybody in it in a service of any kind.

Mr. Bailey: That is a class. Now assume—and we will take it in that broad way—that the compensation shall be due or paid for injuries which result from a danger or risk inherent in the nature of the business, the same as they do in New York, whether it is dangerous or not.

Mr. Lowell: That seems to me to be a bad feature of the New York bill. In every case you have got to prove it is an inherent risk. That means you must have litigation in every case. If it is an inherent risk in the business, you cover it. The decision ought to be that everything which was incident to the employment is a risk and is an inherent risk. Now why put in those words? They do not have any effect except to give the parties a chance to litigate. The employer will always say that it was not an inherent risk, and it is opening up litigation in every single instance which happens, and litigation which is entirely unnecessary. If you say that, if an accident arises in the course of the business, or whatever the phrase is, then the employer shall be liable for it, you cover everything, and it does not do any good to say that it is an inherent risk.

Mr. Browne: I think you are perfectly right. I spoke of the New York law merely as an illustration in the discussion. In the New York law there are a number of ambiguous questions, open for judicial construction. I think, if you are going to define hazardous employments, I should name them absolutely, one by one, and let each tub stand on its own bottom, as far as the courts may or may not say it is in fact hazardous.

I want to make this suggestion as to the different classes. I understand in England one class includes domestics and all that sort of employment. You may meet with opposition which will be annoying. For instance, I was talking with my host last night on Prairie Avenue, and he had some information on the subject himself. He carries quite a large retinue of servants on a broad accident policy. He gave me one or two instances where an accident occurred. For instance, one of the servant-girls fell down an area way to the garage and twisted her leg badly. That was compensated for simply on the basis of the medical attendance. But yet that is a painful thing. That is a good deal like the opposition which comes to the tariff law. Whenever you put up a rate on things that the lady of the house, the housewife has to pay, you will find that that is more harmful than anything else. So, if you make it apply to all employments

in that way, you will give rise to friction which in this new scheme would be better avoided.

MR. LOWELL: For the purpose of this draft, we are bound to put in all employment. But, when you get back to the separate States, you may or may not find it necessary to take some out. It may be in Massachusetts that they would not stand for domestic servants and agricultural laborers. Then, in order to get it through, you might have to exempt those two.

THE CHAIRMAN: You would have to modify the draft.

MR. LOWELL: That is the purpose of this committee They must all go in.

A MEMBER: Of course, that knocks out the theory of the no-class feature.

MR. LOWELL: That special thing has been passed on by the Massachusetts court and held valid. That is a different classification which the Massachusetts court has held for years to be all right. For eighteen years our Employers' Liability Act has excepted domestic servants and agricultural laborers. I do not know that it has ever been decided in so many words that it is all right, but we had a case recently in which the fellow who was injured was an agricultural laborer, and the court assumed, without passing on that point, that it was all right, and we have been acting under it now for over twenty years.

MR. BROWNE: It has been decided by silence.

MR. LOWELL: I rather think by silence.

MR. BAILEY: I don't want to talk too much, but I am very much interested in what Mr. Lowell says, and I am inclined to his view of the subject, because I assume fully that you cannot get away from what he says,—that these words "risks or dangers inherent in the nature of the business or employment" will prove very, very troublesome. What he says is absolutely true, that you don't want them, unless you have got to confine this to something dangerous, somehow, in order to get it under the police power. And that is why I speak about that. The language which was used in New York to take out domestic servants was rather clever. It says that a workman does not include a person who is employed otherwise than for the purposes of the employer's trade or business. Now I suppose housekeeping, unless it is a boarding-house, is not a trade or business, and it would leave out that.

MR. BROWNE: It is a trade or business because it is licensed, I presume, in every State.

MR. BAILEY: That is a boarding-house?

MR. BROWNE: A boarding-house.

MR. BAILEY: Yes, but I say an ordinary household is not a trade or business: therefore, an ordinary domestic servant would not come under the act.

MR. BROWNE: Domestic servants employed in a boarding-house would.

MR. BAILEY: Yes, that limits the class of employees to those employees who are engaged by a man who is carrying on a trade or business. I am not at all disposed to say that this ought to go in, unless you have got to put it in on the ground of expediency. We are on a practical matter. The evils which we are seeking to meet are in trades and businesses and more especially in those that are dangerous. But, if you want to make it broad enough to include everybody, we have got to tell the housekeepers that it will only cost you a dollar a year for insurance to take care of a house-servant, and then they won't feel so badly, or tell them something of that kind: I think it is not over two dollars a year that they must pay for insurance.

THE CHAIRMAN: I won't take up much time, but I want to say this, that I think that suggestion you raise there about the house-servant, for instance, may find an obstacle something like this. Suppose you and I are living in a couple of apartment houses, adjoining each other. You have a servant-girl doing eaxctly the same kind of work in the kitchen that mine would be, and I would be keeping a boarding-house next door. And they both fall down the same pair of steps, both carrying a pail of water, and receive the same injury. Mine could recover, and yours could not. We would get into trouble on the equality proposition. Now, while we had this at the very heat of discussion in Minnesota, I went to call on Judge Purdy in Washington, when he was on the Federal Bench there, and he said to me: "Why, Mercer, my servant-girl fell on the driveway here the day before yesterday, and broke her leg. If I had that law, I would rather have it than to be in the position where she might sue me at the common law. As it is, I took and sent her to the hospital."

MR. BROWNE: So would I rather have it than the common law.

THE CHAIRMAN: "I sent her to the hospital, without legal obligation, as far as I know. When she gets out, she may sue me, and I will be to the expense of defending. If I could pay for insurance for that servant-girl, so she would get the benefit of

the wages she would draw during the time she was laid up from the fall, that might be better."

MR. BROWNE: That is often done now. There is no law against that.

THE CHAIRMAN: That's right.

MR. SCHUTZ: May I ask in that connection: That risk would have to be in the ordinary course of events assumed by the employer's liability until we have State insurance, and the basis of that insurance—the cost of that insurance would have to include a great variety of risks, so that the chances are that the cost of that insurance would be a good deal larger than it is now, would it not?

THE CHAIRMAN: I think so. There is a class of policies called "non-hazardous occupations" where the risks are very low. I don't know but they have two classes. We are discussing this just now, but we shall dispose of this question when we come to define what a dangerous occupation is. Isn't that true, Mr. Lowell? Don't they classify some as hazardous, some extra-hazardous, and some as non-hazardous?

MR. LOWELL: Yes, I believe they do. But, if you include domestic servants, what will happen will be this: you will have a very low rate on the people who work inside the house and a proportionately high rate on the chauffeur, who works outside.

THE CHAIRMAN: You ought to have.

MR. BROWNE: You tax luxuries.

THE CHAIRMAN: Yes, and he is more likely to get hurt.

MR. BAILEY: Now, Mr. Chairman, my time is short, and I want to refer to one other topic, and that is about the lien. The workman should have the benefit of insurance. It ought to be done as well as possible, and the language in Massachusetts in the law introduced there states that the workman shall be subrogated to the rights of the employer. I think there may be some objection to that, and I worked out this language:—

"If any employer becomes liable under this act to pay compensation to any workman, and he is entitled to any sum from insurance by reason of his liability to such workman, such workman shall have a lien upon the sum due from the insurer, which lien shall attach from the time such workman first makes his claim upon the employer for compensation, and gives notice to the insurer, and, in case several workmen shall have claims for compensation, they shall have priority according to the date

of their notices respectively." Now there is no patent on that language, but something of that sort you might like to put in your bill.

THE CHAIRMAN: Personally, I think that that is quite an important matter to cover. But I want to make this suggestion, however, that has not been brought out in discussion. I have found it in one or two liability policies where I have been defending companies in negligent cases. A good many of these companies have a provision in their policy to the effect that, if any employer himself becomes bankrupt, it shall only be required to pay what the employer pays. In other words, if a man running a manufacturing plant has an accident and there is a judgment recovered and he goes into a receivership, and he only pays ten per cent. of the claims, they call on the liability company to pay that, because it only pays to them what has been actually paid out. Now I think that is a matter that ought to be considered by our committee when it comes to draft that proposition.

MR. SANBORN: Is there any objection to making the insuring company directly responsible to the employee?

MR. LOWELL: I have considered this special point carefully, because it is very familiar to me. All of the companies I know anything about have the provision which Mr. Mercer has stated. It is what they call an indemnity policy. The insured employer cannot recover against the insurance company unless he has paid out something. Now, in a case of bankruptcy where the employer has not anything to pay out, he has not paid out anything. Therefore, the company owes him nothing. And, of course, if we merely subrogate the employee to his employer's rights, he owes the employee nothing. That has been held in Massachusetts in the case of *Bain* v. *Atkins*, that, where an employer is insolvent, the employee has no lien and cannot get any lien on the trustee in the bankruptcy. Mr. Bailey's suggestion does not cover that.

MR. BAILEY: That is right.

MR. LOWELL: I had a talk with Professor Williston on this subject of bankruptcy and as to what you would do with the insurance in case of bankruptcy. His idea, as he developed it to me, was this. He said, "You cannot say that the employee shall have a right on the insurance policy, because that is interfering with the obligations of the contract."

He said, "All you can do is to provide a kind of law or pro-

vision that no insurance policy hereafter issued in this Commonwealth, or, rather, that every insurance policy hereafter issued in this Commonwealth shall contain a clause that, in event of bankruptcy, money shall go to the employee or something of that sort."

And you will find in here, which is our act, a very rough draft of that idea. So that you want to consider, in framing your act, that it is a little bit more difficult to do that than it seems at the first blush. You must consider the provision which merely gives a lien on the employer's rights. Now, if the employer has no right, as has been decided in Massachusetts, or the employee cannot get at it, as has been decided in Massachusetts, it is a lien that is of no good. And, of course, you don't need it, if the man is solvent.

MR. BAILEY: Can you couple them together in any way? Professor Williston had a little trouble about making the workmen's right arise only in the event of bankruptcy. That seemed to trouble him. And the right of the Legislature to prescribe forms of policies is well recognized. Whether there are any limits to it or not, I don't know.

THE CHAIRMAN: Our court says not.

MR. BAILEY: It says there is no limit?

THE CHAIRMAN: Our Legislature has said you cannot have any other form of fire policy, and the court has settled that provision is under police powers.

MR. LOWELL: Here is a rough draft which wants to be changed somewhat. Number 7 covers that. This is merely a general form. You must do it under the State power to say that there shall be such and such a thing.

MR. BAILEY: I gather there might be trouble for the State to legislate on a subject that really relates to bankruptcy, which is prohibited absolutely to the States, being a matter which Congress has dealt with.

THE CHAIRMAN: I don't want to fill up this record, but I can tell the gentlemen all I know about it. Suppose we make our law so that there shall be absolute liability, and provide that, if that liability is insured sufficient to cover both liabilities, to cover the contract between the people, the employer shall be relieved of the payment. That could be carried out as it is done in some countries. Then suppose there is a provision in that law broad enough that the employer, if he does insure, must insure to cover that risk and reach that under the police powers as to the

form of the insurance and the nature of the insurance, that will dispense with your objection, and will leave it in the position so that the company will pay enough premium to cover the whole proposition as an equitable matter. Some of the head officers of insurance companies have told me that they are perfectly willing to act under the law which is at all reasonable and will make their rates accordingly. They would like to have it uniform and in such condition that it might be done with the least expense, and, of course, they want to make all the profit they can. "Make a law, and we will fix the rate accordingly," they say. That is one of the places where a man needs protection the worst, and I think we can look after that proposition through the State police powers and prevent the question arising.

Now there is another point that I think is very difficult for our Commission to handle, according to my view of it, and I want to discuss personally, and I think Judge Sanborn will agree with me. If not, I hope he will say so, if he considers that it is not necessary to discuss it. That is the point of what you are going to say with respect to whether this accident or injury occurs in the course of business, or how you will describe it. If you say "liability for any accident," that opens up a difficulty. For in Nebraska "accident" means one thing, and in Washington it means another thing, and in the House of Lords in England it means another. In some cases it means without any fault on the part of the man who is injured.

JUDGE HOLLOWAY: I should very much regret using the word, "accident." Personal injury is the subject of our discussion.

MR. LOWELL: Let me say that in this draft I left out the word "accident."

MR. BAILEY: And I have done the same.

JUDGE HOLLOWAY: Personal injury is the subject under discussion.

THE CHAIRMAN: I want to offer a few suggestions on it. I want to take that just a little bit further. We have discussed, if I am not mistaken here, the question of bodily injuries, and I am not quite sure but that we have left personal accident. Anyway, we have discussed it here. So that it includes anything that would be considered an occupational disease or anything of that sort. At the present time there are cases arising in different parts of the country, especially in certain kinds of manufacturing

where there are poisonous substances that create very bad injuries. They put out eyes or they create blood poisoning, or they eat off fingers, perhaps. I would like to have your views, if Judge Sanborn feels the same way about it, about what we would do about that proposition.

Mr. Lowell: Mr. Chairman, may I say right here that the Supreme Court of Massachusetts has very recently indeed held —it has not yet got into the regular report—that an injury under our Employers' Liability Act does cover industrial diseases? This was the case of a man employed in a stable, who got glanders, and the court held that that was covered by "injury," and it cited a leading case in England in the House of Lords. So that it seems to me that in Massachusetts, at any rate, we have got to put in some words saying that this shall not cover industrial diseases. But you have got to be very careful about your phraseology.

Now I understand the English law under the Act of 1897 (before the Act of 1906 mentioned industrial diseases) covered diseases which could be held to have been received at a specific moment of time. For instance, the leading case is the anthrax case. The medical evidence is that you get anthrax from a bacillus which comes at a specific time. That is covered. On the other hand, in a case in England, which was perhaps lead poisoning or something of that kind, they said it was not covered, because it gradually came on, and there was not any specified moment of time when the accident,—they had the word "accident,"—when the accident produced it. So that, if you can guess what the Massachusetts law will be, having followed the decision of the House of Lords, they would probably follow the others in the Court of Appeals. So that in our law now, unless we put in words of exemption, it would cover industrial diseases which could be shown to arise at a certain specific time. Now, if we do not want to cover them, we shall have to be very careful how to frame our act in Massachusetts. If we do want to cover them, we need not say anything about it.

The Chairman: Conceding that would be the rule of construction, isn't it a fact that you are liable to get a different construction in some of the other States, and isn't it advisable, if we used the words "personal injuries" or whatever we used, to define that language? Your definition could include what you wanted it to include in that way.

MR. LOWELL: Mr. Chairman, personally, I hate definitions, and I would like to get along with as few as possible in the act. It would seem to me, if it was possible to so frame the act that you could put it into the first clause, it would better be done that way rather than giving it a definition in a separate definition clause. But that is a mere matter of detail. I think there should be something put in, certainly for Massachusetts, to bring out the proposition, if you don't want it to cover industrial diseases.

THE CHAIRMAN: I have had some considerable doubt about the proper expression to use in my own mind. I don't know how you think about it, Judge Sanborn, in Wisconsin.

MR. SANBORN: That is the trouble. We want to exclude occupational diseases.

THE CHAIRMAN: And there is another question which arises, co-ordinate with that. If you want to exclude occupational diseases and do not describe it as an "accident" and get rid of the point that Mr. Lowell has made, how about providing that notice be given in a certain time to the employer, or the secretary of the board of arbitration, or whoever has that duty to receive the notice? Are you not going to make an elastic provision for notice, so that in case the bacilli do not ripen within the time that the notice has ordinarily specified,—you must have it elastic enough to specify that. That is one of the things that has bothered me.

MR. BAILEY: I do not believe that you should go any further than Judge Sanborn suggests at the present time. Industrial diseases will come in a few years later. But, to start with, I think we ought to define personal injuries so as not to include diseases. They have come very close. There was a case of aneurism in England. A man had a monkey-wrench in his hand, and gave a jerk and burst a blood-vessel. The court held that to be a personal injury from which he could recover; that it was not a disease, although disease had something to do with it. Industrial diseases, like lead poisoning and such things, should come later. We have got to get the act adopted. If you load it down too much, you will get into trouble.

MR. LOWELL: Mr. Chairman, there is the point that Mr. Bailey has raised. If you put in a phrase, any ordinary phrase, allowing recovery for personal injury, the court will probably hold, as they did in England, that it makes no difference what condition a man is in at the time he received the injury, the employer is liable. You will remember the case where somebody on an Atlantic liner got together a crew of stokers. In the

crew was a fellow who was not at all fitted for the job, and was emaciated and in a shocking physical condition. The first time he went into the stoke-room he got what they call a heat stroke, and died, and the court held that was an injury arising out of accident, and that the employer was liable. Now there is the situation. Do you want to cover that? It really is not an accident in the course of business. That is the whole thing, as I understand it. The theory of it is to put on the employer the results, the natural and necessary results, of his business. Now that is not. Because, if that man had been sound physically, he never would have died, so that, when you are drafting your act, you want to consider, Shall we cover the case of a man who receives an injury which a man in sound physical condition would not have sustained? There are a great many of those cases in England. There is the case of a man who ruptured himself by the quick turn of a valve. It was in evidence there that a man in any kind of physical shape would not have been ruptured. The court held it was an accident arising out of employment, and the employer was liable.

MR. BAILEY: I agree with Mr. Lowell. You should use some wording in describing personal injuries that does not include industrial diseases or whatever the language is you use.

MR. LOWELL: What do you say about the other point of the accident to the fellow in bad shape? Would you cover it or not? I don't want to get into too many refinements, if you can help it. That is my feeling about it. You must sacrifice something for simplicity. That depends a good deal on the question of policy. When you get your law in operation on these questions, and when they require the person to take a physical examination to see if he is in bad condition and anything of that sort, it may come up to us in a very serious way.

THE CHAIRMAN: It will come right up.

MR. SCHUTZ: I simply throw out the suggestion that the codification committee consider whether it is not possible, at least so far as possible, to exclude the word "liability." If we can say, where personal injury happens, the employee be entitled to receive compensation, that the employee be entitled to receive it from the employer rather than that the employer be liable to pay. The whole matter is educational at this stage.

THE CHAIRMAN: I think we agree to cut out the word "liability."

MR. SANBORN: Yes.

THE CHAIRMAN: And then you have this question, when it comes to compensation, Are you going to compensate a man, technically speaking, when he hurts himself by his own wrong?

MR. SCHUTZ: I do not think the word "compensation" has the meaning in the public mind that the word "liability" has.

THE CHAIRMAN: That is my own opinion.

MR. LOWELL: This leads me to a thing that is rather fundamental. I got at it through a talk with Professor Williston, and that was the question of bankruptcy, which I will only touch on for a moment. He says that the only way to get a good act under the United States law of bankruptcy is to so frame the bill, so frame the whole thing, that the compensation shall come under it as a debt of a State. That is to say, the thing in my mind stands in this way: As I understand the Supreme Court of the United States decisions, they are pretty liberal on the question of imposing liability on a man, but very much the other way on the question of interfering with contracts. Now, if you get your law in any kind of a form where it looks as if it were a contract between two parties, why, they are going to say in the Supreme Court at Washington, "Why, you cannot interfere with contract that way." But, if you put it more on the ground of liability, then they are more likely to uphold the law.

MR. BAILEY: Do you think the theory of liability will help that, or the theory of simply imposing a duty?

MR. LOWELL: I suppose liability is a breach of duty. So that is the same thing.

MR. BAILEY: It is a question of language that you are talking about.

THE CHAIRMAN: Yes.

MR. BAILEY: I say liable to pay compensation in some cases, and shall be entitled to receive compensation, and entitled to receive weekly payments.

MR. SCHUTZ: I have no objection to "entitled to receive." I have objections to "liable to pay." I think we should keep the distinctions between employer's liability and workman's compensation, which is not a definite thing in the public mind.

MR. LOWELL: The trouble with that is that, if you get a single bill covering the whole thing, you have got both together.

MR. BAILEY: And you may distinguish in that case by calling what you get at common law or under the Employers' Liability Act damages. That is what the courts use now. The workman

sues for damages in an action of tort. Under the Compensation Act call what the workman gets compensation. That seems to me to be clear.

THE CHAIRMAN: I used the expression "that employers shall be liable to pay compensation," but I am not sure that the words "liable to" should not be stricken out, and simply say "the employer shall pay compensation," or "shall pay" and leave out the word "compensation." But, probably, "compensation" ought to be there.

MR. BAILEY: That wants to be there.

MR. SCHUTZ: That is simply a suggestion that the committee may bear in mind. I think it will be helpful if that can be dealt with in the new phraseology.

THE CHAIRMAN: I have asked these gentlemen, Judge Sanborn, about various matters in drafting this bill. If there are any questions that trouble you on these sections, I wish you would have them brought out. I wish you would ask about them.

MR. SANBORN: All right. I was not here when you fixed your compensation. Did you take into consideration the means of arriving at a limit?

MR. LOWELL: I think not.

THE CHAIRMAN: I had that in mind and I mentioned it, but the majority voted against it.

MR. LOWELL: I did not think it was concluded.

THE CHAIRMAN: I do not think it is. I suggested it in argument, but nobody thought enough of it to make a motion.

MR. SANBORN: The International Harvester Company and the Rock Island Road make a separate class of cases and fix compensation.

JUDGE HOLLOWAY: And they do in Montana, in the gold mines.

MR. LOWELL: May I suggest there, Judge Sanborn, that in the case of losing an arm, if you say it is twelve hundred dollars or any specific amount, you are going to get into trouble, as it seems to me, as in a case like this: There was a man who was hurt. I have forgotten what employment he was in. He was a common laborer in a factory,—not a common laborer, but a laborer in a factory,—and received, we will say, twelve dollars a week. He lost his left hand. He was a bright man, and the employer wanted to help him. He got him into the clerical department, and within six months he was earning fourteen dollars a week. Now the practical situation is this: if you give a man who afterwards is

able to earn a higher wage or the same wage in a different employment the same amount which you give to the laborer who is able to earn but a very few dollars, wouldn't it be unfair, wouldn't it be unfair to the laborer, to give the other man just as much as he gets, although the other man is really better off in this world's goods than he was before? That is the trouble which we have found in discussing this thing in Massachusetts about any specified amount for a specified injury. For instance, a violinist who loses his right hand is gone. That is the end of him. But, if I lose my right hand, it would not interfere with my business.

Mr. Browne: Was that covered in the New York law by the provision which measured up the difference between what he earned in his former occupation and what he earned in his maimed condition?

Mr. Sanborn: The general compensation law does that.

Mr. Lowell: But won't you override that if you get in specified injuries?

Mr. Browne: I understand that. I am with you on that suggestion.

Mr. Lowell: That is really my trouble in framing this act. We all say: "Let us have this thing specified, so that you won't have to go to the court. If a man loses three fingers, he shall receive five hundred dollars; if he loses four, it is worth six hundred dollars; if he loses an arm, it is worth twelve hundred dollars"; but, in bringing it down to actual cases, you come to a situation like this, where sometimes you are giving a man a larger amount of money than you are giving to his neighbor, where he really is not vitally injured at all. That is the great difficulty. I believe, in Belgium or some other country, they have got it reduced down to a system whereby you know right off what there is to pay, which is very pretty from the point of view of the certainty of the act, but you get cases of great injustice under it.

Mr. Schutz: All of the foreign acts, as I view them, are practically less expensive than our present system, are they not, Mr. Lowell?

Mr. Lowell: Mr. Mercer knows more about that.

Mr. Schutz: They are all limited to a man who earns not over seven hundred dollars a year, which is not the limit of a man's earnings at the present time.

Mr. Browne: You limited that by the action.

Mr. Schutz: If I earned three thousand dollars, I would be entitled to get a percentage of my earnings.

THE CHAIRMAN: In order to bring out suggestions, I will say that I have spent a good many sleepless nights over the question, and I approached the question from an entirely different theory from what has been approved here. I do not mean to say entirely different, but along a little different line. I am satisfied that we would have serious kind of difficulty along the line suggested by Mr. Lowell, if we paid five hundred dollars for one finger or two fingers and seven hundred and fifty dollars for another accident. I think also that, if we leave the question open as to how long the period of disability or partial disability shall continue, we will have to delay for a time where it strikes a man who has lost an eye or an arm or a leg, and all that kind of thing, on account of the question of when he is going to be able to go back to work or he is wholly disqualified,—we will have serious trouble along that line. Therefore, it seems to me better to allow the compensation to be based on the wage scale, or the present basis of the earning capacity, in so far as it keeps the man out of that particular employment. If his body is maimed or disfigured, or he receives injuries that make a nervous condition that absolutely incapacitates him for anything, say there is disfigurement or actual pain, or pain to a great extent, there would be an additional percentage under those circumstances. Then that ordinary liability would stop when the man gets well and gets out of the hospital and no more can be done, let that limit stop. Now take this situation: Have a man working at some trade, and he loses both hands. At the end of a few weeks he is physically well, or a few months at the outside, except that he has simply lost those members, and he cannot use them. Now, if you grant compensation to continue during the period he is in the hospital on the basis that you do of injuries, whether he gets well or not, you have a fair basis from that standpoint. If you give him additional compensation for the loss of those limbs and arrange for the period of suffering, and give him some compensation for the disfigurement, I am frank to say that meets my own mind better than anything else that I can think of. I will be glad to have any suggestions about that.

MR. BAILEY: The English act, as I recall it, does not give the employer any credit where a man is able to go to work at some other employment, say as a book-keeper or something else, as Mr. Lowell suggested the other night, with the same employer

or some other employer. That does not reduce the compensation. But to my mind that is not quite right, it is not quite fair. If he can work for the same employer in the counting-room, or the employer can help him to employment of a different sort where he will earn as much as he did before, then the damages he should receive should be reduced, and that is a fair way to treat it. I have nothing to say about how the problem of the man who has lost both hands should be handled. I an afraid you will get into trouble if you treat that any different from anything else. I am afraid you will.

THE CHAIRMAN: I have not concluded that in my own mind. That is what the law should cover. That is my suggestion.

MR. BAILEY: I want to say a few words about jury trial and about the scheme I have put into this bill here for a tribunal that should be erected to carry this thing out. I think the committee is entirely agreed that you want speed and you want unanimity, and you want impartiality and you want reasonable capability. I have been a little troubled with the suggestion from Wisconsin and from Mr. Lowell, that this arbitration committee, with one member permanent and the other members perhaps not so permanent. That might be subject to objection when you have got a continuing state of things. You have got a thing that is going to last a good while and will need readjustment from time to time, and it needs an official, whatever you may call him, something like a referee in bankruptcy, who is there as long as the case lasts, who knows what has happened already, and who can decide the different points as they come up, the same as a judge sitting in a court of equity does, or a referee in bankruptcy does. If you are going to have an arbitration committee, you must make the two men selected in the beginning by the parties,—you must make them permanent, to deal with the thing as it comes up later on.

MR. LOWELL: May I interrupt by saying that, after the first liability has been settled under our provision here for a State board,—in the first place, I don't know if Judge Sanborn is familiar with our proposed idea, and I do not think you can visit the sins of Massachusetts on Wisconsin, because I don't think they agreed to it? Our idea in each case is to have two temporary arbitrators with a chairman who shall be a member of the permanent State board, and they are to determine the thing in the first place. Our provision says that, if there is a question comes

up for reducing the amount of the weekly payment, that shall go to the State board.

THE CHAIRMAN: That is the recommendation made yesterday, but I believed Judge Sanborn was here at the time that that came up.

MR. SANBORN: No.

MR. BAILEY: That to my mind is a good feature, and it also is to my mind a good feature that they had in Wisconsin, they called them "examiners,"—they had examiners who could be sent about. I don't care what you call them, but you must have quite a few of those people in a place where there are large industries, and they must be of a flexible number, sufficient to do all the business. But, whatever you call them, provide for the permanent idea, and don't get them too expensive or too cumbersome. I would almost be ready to think that one commissioner, if you call him a commissioner, or one referee, if you call him a referee, would do if you give him large powers and make him impartial, and let him keep records of what he has done. By that I simply mean enough to know what he has done.

THE CHAIRMAN: I want to make a suggestion in reference to jury trials, and I wish you would give your opinions on it, if you have any. I found in Norway, when I was over there, that the director of the State Department of Insurance in Norway is a civil engineer. He had charge of building the biggest railroad down here on the canal between us and South America at one time. He was a man of experience. They have a board of appeals there, consisting of two doctors, two technical or scientific men, who are engineers, I think, at least one scientific man, and then they have a lawyer and, I believe, two business men and two labor representatives to sit with them on their board of appeals. Now it occurred to me, since I have said anything on this subject in writing, that it might be possible to have a permanent board of arbitrators, and let them exercise the right of sending an expert, a doctor or a machinist, or any other experts they want, to examine any place they need, and for them to come back and give their evidence before the parties.

MR. SANBORN: I would rather have them employed than members of the commission.

THE CHAIRMAN: It struck me that it worked very well in Norway.

MR. BAILEY: Now a word on the right of jury trial, which of

course is important. I want the committee to look at these Massachusetts cases which Professor Williston has cited, and the few lines which he has put in his opinion. Professor Williston is always very concise and does not waste any words, and he has stated the point very concisely.

If the matter is on the equity side of the court, you have not got to have any jury, either for the plaintiff or for the defendant. I am using those words for briefness. The ordinary rule is that, if a remedy is offered to a party plaintiff and he sees fit to come under it, he takes it as it is, and his mouth is shut to say that he requests a jury. And the court in Massachusetts, after long and exhaustive opinion and a review of all the cases in Massachusetts and outside of Massachusetts, found that equitable relief at the time that the constitution was adopted was not coupled with a right to a jury, and that there was not any right of jury given, any absolute right of jury which a man was entitled to. And we can go outside of the cases which are cited there, and in the later Massachusetts cases which followed that, and find a great many illustrations of where the Legislature has created by statute equitable rights, and put the remedy into an equity court.

I think that is worth talking about. I hope that will be considered, because I do think it is important, if possible, to eliminate any jury trial from this for anybody.

Mr. Lowell: Let me ask you, Mr. Bailey, if I may: let me state what I understand your position to be, in order that I may see if I properly understand you, because it is a matter which seems to me to be of the utmost importance, and, if we can do it, I think we have got a scheme which is going to be a mighty good scheme. I understand you to say that this is not depriving a defendant of property without due process of law, because you are giving him a regular legal right on the equity side, and there is nothing in that part of the constitution which requires a jury trial. Now I understand you to say that you are not depriving the defendant of his trial by jury, because you are giving him the kind of law which is necessary for the law which you propose,—a kind of law which from the adoption of the constitution, which is the time it goes back to, was not tried by a common law court.

Mr. Bailey: That is stating it very briefly.

The Chairman: Now I want to ask a question. Have you considered this proposition: Conceding that as a right which

was not a right of trial by jury at the time of the adoption of the constitution, isn't there just as much right now for saying that this right did not exist at all at that time? We have no right that does not come under the constitution on either side of the court, and by it. And it is wrong to get into this position where the Supreme Court of Massachusetts and the Supreme Court of the United States, and the Supreme Courts of the other States will say, as far as the decisions are invoked in the administration of it, though it might come after the judgment, or in the case of minors, or something of that sort, that a court of equity might have powers in order to carry out the trust for the State and for the benefit of its citizens under those circumstances. But won't you meet with the rule that those courts substantially all adopt,—that it doesn't make any difference what you call the remedy, it doesn't make any difference in which court you intend to place it, if the substance of the right is an equitable right, the court will so hold; and, if the substance of it is a law right, the court will so hold, and put it in the place where it belongs accordingly. That is the rule in the Federal courts.

Mr. Bailey: We all agree to that, but as to what is equitable, and what belongs there, opinion is very wide. In Massachusetts you have not got to have the element of trust. You haven't got that. But I won't undertake to define. The equity court is given power by the Legislature to act and give relief where the law court is short. For instance, a man carries in his pocket habitually five hundred dollars in money, and he is owing people and is bragging about it. You cannot trouble him because you cannot attach. You commence the poor debtor's process of law, and he won't have it in his pocket then. The Legislature of Massachusetts has said you may bring your suit or your book account, or your promissory note or whatever the claim is, if it is a legal claim, and you may get out an injunction upon him from parting with that money. You may get a mandatory injunction, compelling him to turn it over to the clerk of the court. The law court simply gives judgment, execution, and attachment. So I say that, if for any reason the common law remedies are insufficient, the Legislature may give a remedy on the equity side of the court, and, if it is put there, then the defendant loses his absolute right to trial by jury on the book account or on the promissory note.

The English law requires you to get a judgment, which gives

you a right to trial by jury. Equitable trustee process has been going on for thirty or forty years in Massachusetts, and, as Mr. Browne says, nobody has raised the constitutional question.

MR. BROWNE: It rests on one of the great elements, of equity jurisprudence all the way through.

THE CHAIRMAN: Is there any other point?

MR. BAILEY: I believe the principle is broad enough to cover that, if the relief you are going to give is more than you can give by judgment and execution, you are not acting arbitrarily, when you give the equity court power to deal with it and send the parties there for relief. Then they are properly there, the same as they are properly there in bankruptcy cases and referee cases. And, if I am right about the Massachusetts cases, they are cut off from jury trials. And I am pretty clear that those cases do take away the absolute right of trial by jury in all equity cases.

THE CHAIRMAN: I want to add that early in the stage of investigation of this matter I saw that point. I did not go into it very deeply, because the very answers to the questions I have indicated here led me to think that possibly there was not anything to it.

MR. BAILEY: That may be the final outcome.

JUDGE HOLLOWAY: The discussion by Mr. Bailey has repeatedly raised in my mind what I consider the serious side of this matter. It is not what you call the thing that determines its character, by any means. You can say it is equitable, but, if the courts finally determine it is not, of course you cannot deprive a man of his jury trial. It has to be of such a character that the courts are compelled to say that it is clearly of equitable cognizance, otherwise the general rule and the guaranty to a man of his right of trial by jury must be held good. In our State we have repeatedly held that in a matter of strictly equitable cognizance neither party is entitled to trial by jury. For instance, in contest cases, cases arising out of the settlement of public lands for agriculture and other purposes. For instance, two men go to work and lay claim upon some piece of public land for mining claims, and they overlap. A, over here, applies for a patent to his entire claim, and B goes into court and opposes and adverses him on the ground that he is overlapping and seeking to include part of his claim. Now, under the Federal statute, B goes into the Land Office and files his petition there, and, if it is allowed, in thirty days he must go into a court

of competent jurisdiction and bring an action to determine his rights to the ground in dispute. We have repeatedly held that neither party is entitled to a jury trial, although it determines the rights in the matter, the rights to the patent to the land in dispute. The courts hold that it is so far in equitable cognizance that it should be treated as a case in equity, although really it arises under a judgment.

MR. BROWNE: And the court has affirmed that.

MR. LOWELL: What is there equitable about it?

MR. HOLLOWAY: It does not try the title, it determines who is entitled to the patent. It leaves it open as a public conveyance. We have said that the form of action is entirely immaterial where it is brought to quiet title, and, under the statutes that we have, this rule is intended to carry out the idea of the Federal statutes. It doesn't make any difference whether you bring a statutory action in Montana or whether you bring an ordinary action to acquire title. The form of action is immaterial. The purpose to be served is to determine which of the two parties is entitled to the land in controversy.

MR. BROWNE: Let me suggest this: that perhaps you can simulate it to an accounting in equity, because here the facts are ascertained as to the amount due, and the money award is made accordingly.

MR. BAILEY: It is something you cannot get any proper relief from except by decree.

THE CHAIRMAN: Isn't it a plain legal proposition? Unless you get to a decision of the amount, until you get a judgment, have you got any right for any equitable interference on the part of anybody?

MR. HOLLOWAY: What judgment would you get?

THE CHAIRMAN: You would get the award.

MR. BAILEY: That is not a judgment. Professor Williston suggests this: that, if equity, *bona fide*, has a right to take hold of any part of a situation, then equity will be able to do justice and deal with all kinds of legal matters which are *bona fide* properly connected with it.

MR. BROWNE: The original jurisdiction includes everything, including the amount of damages.

THE CHAIRMAN: There must be other grounds than the mere awarding of damages for money. I have been very much benefited by the discussion this afternoon, gentlemen. It has helped me, and I thank you.

MR. SANBORN: I want to ask one little detail on the compensation you have got there, three hundred weeks, or about six years. You have a provision in there, of course, that the arbitrators may order a lump sum. What is your idea? There is a strong tendency to order the lump sum, so that it can be put out at interest, so it would be a little more. Should not that be equalized?

THE CHAIRMAN: I think it should be, personally. I don't know how others feel.

MR. BAILEY: They generally discount it, at rather a low percentage in England. I forget what it is in New York, but it is three and one-half per cent. in England, I think. I am not sure.

MR. LOWELL: That would differ in different States.

MR. BAILEY: Of course, it would vary.

THE CHAIRMAN: If you are going to have that provision put so low, it would not be any inducement on the part of the people to pay it; and won't you practically defeat the object of having that clause in?

MR. LOWELL: Massachusetts would like to defeat it. They don't believe in the lump sum.

THE CHAIRMAN: But how would you do it? Would you compute it back and carry it on year after year, or would you make it the largest sum, counting the legal rate of interest?

MR. SANBORN: I would be in favor of putting it in the other way.

MR. SCHUTZ: I want to thank you, gentlemen, all for your kind courtesy in allowing me to participate in this discussion.

MR. LOWELL: We thank you for having come here.

There is a minor matter which Mr. Bailey suggested, and that was this, which is incorporated in the second section of this act here. The English law has the phrase that "an employer shall not be liable to pay compensation under this act for any injury which does not incapacitate the employee for a period of at least two weeks from earning full wages at the occupation at which he was employed." Now that has brought in technicality. Although the man can earn as much at some other occupation, he has the right to recovery. They get around it by some complicated rule over there. Now I have a suggestion in this, that when you get to the word "wages" you stop, so that it shall read, "An employer shall not be liable to pay compensation under this act for any injury which does not inca-

pacitate the employee for at least two weeks from earning full wages."

THE CHAIRMAN: I think that brings up a question that might be a question of policy of considerable importance, if I understand the proposition. I know that there is an idea that a man who is injured in an occupation so that he cannot work any longer at that occupation, and goes out and gets into another occupation in which he does equally as well, or perhaps better, he is not entitled to any compensation. Personally, I think I had in mind that perhaps that theory was wrong, because it has the tendency to prevent a man from development; and that, if that man has ingenuity enough to change his occupation, or to do something else in which he may exercise that ingenuity in his original employment, or makes a change which increases his value to himself, it does not seem to me quite fair to cut off his relief because he is able to go out after the accident and do better than he was doing before the accident.

MR. LOWELL: This is the idea that I should have against that, Mr. Chairman: I think we have all got to face the fact, the hard, cold fact, that we cannot, as a matter of fact, get a law which is anywhere near as complete as we would like to have it. In Massachusetts we are faced—and in every other State we are faced—with the situation that you have got to have just as little as you possibly can have, and yet have a decent law. Here is the point, it seems to me: you must sacrifice justice to expediency.

MR. BROWNE: Sacrifice one for the general good.

THE CHAIRMAN: There is another question. And that is a constitutional question, and perhaps there is nothing to it. That is, as to equality for all people. You take two people working side by side, and they are hurt in the same way, in the same accident, with exactly the same loss. They are earning the same wages. One of them is able, after he gets out, to get employment where he earns more money, and the other one is not able to get that employment. Won't you cut off something under those circumstances from one that you don't cut off from the other? Don't you have to differentiate?

MR. SANBORN: Isn't there a rule of law? Suppose they are both injured, isn't that the rule, one is able to get out and earn wages, and the other one is not.

THE CHAIRMAN: I don't think that would apply to a case

where the fellows were both crippled, and both crippled in the same way. It is simply a question of the one using ingenuity the other one would not use. I believe, if that was brought up in that way, it would make trouble. I am familiar with the rule you are referring to.

MR. SANBORN: That is the rule in my State on the general question of damages.

MR. BROWNE: You would want to regard the accident, then, as a blessing in disguise.

THE CHAIRMAN: You would want to counter-claim. I don't think that rule applies.

MR. SANBORN: In several cases in our State it has applied.

MR. LOWELL: Isn't that really the whole idea of compensation? That is, you compensate him because he had lost something. If he has not lost anything, what is there to compensate?

MR. BROWNE: You are turning it from damages to compensation. And now, gentlemen, before I go, I must thank you for allowing me to be present. This discussion has been of great profit to me.

MR. HOLLOWAY: It has been of great profit to me, too.

THE CHAIRMAN: We might as well all adjourn now.

Conference adjourned.

APPENDIX A.

SUPREME COURT—SPECIAL TERM.

ERIE COUNTY.

September, 1910.

EARL IVES, *plaintiff*,

v.

THE SOUTH BUFFALO RAILWAY COMPANY, *defendant.*

Demurrer to defendant's answer.

THOMAS C. BURKE for plaintiff.
CHARLES B. SEARS for defendant.

POUND, J. The answer challenges the constitutionality of chapter 674, Laws 1910, entitled "An act to amend the Labor Law in relation to workmen's compensation in certain dangerous employments." This chapter applies only to workmen engaged in manual or mechanical labor in certain employments declared by the act to be dangerous by reason of inherent, necessary or substantially unavoidable risks to life or limb, in which it is deemed necessary to establish a new system of compensation for accidents to workmen (Sec. 215).

Among such employments is included: "6. The operation on steam railroads or 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 roadbeds over which such locomotives, engines, trains, motors or cars are operated" (Sec. 215).

Plaintiff brings himself squarely under the provisions of this act by alleging facts that establish, as admitted by the answer, that, while employed by defendant as a switchman, he was injured in the prosecution of his work, without negligence on the part of the defendant, and "without serious or willful misconduct" on his part, but solely by reason of a necessary risk or danger of his employment, or one inherent in the nature thereof (Sec. 217).

Prior to the enactment of the statute above cited he would have been without remedy. By virtue of its provisions he is entitled to recover according to a fixed scale of compensation without establishing that the employer is at fault in any way (Sec. 219a).

The plaintiff demurs to the answer on the ground that it is insufficient in law on its face.

This act is based on the Workmen's Compensation Act of England, and its enactment is due to the fact that the common law affords no available remedy for injuries occasioned by industrial accidents not attributable to the negligence of the employer.

Defendant maintains that, under our system of constitutional government, the incorporation into our law of the English law of workmen's compensation is beyond the powers of the Legislature. First, because the act in question deprives the defendant of liberty and property without due process of law, and denies it the equal protection of the laws in contravention of the Fourteenth Amendment of the United States Constitution, and article 1, section 6, of the Constitution of this State. Second, because it violates the right of trial by jury guaranteed by article 1, section 2, of the Constitution of this State. Third, because it limits the amount recoverable in actions to recover damages for injuries resulting in death in contravention of article 1, section 18, of the Constitution of this State.

It has well been said by Mr. Justice Brown of the Supreme Court of the United States, writing the opinion of the Court in *Holden* v. *Hardy* (169 U. S., 366, at p. 387), that "while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land."

It is well established that statutes applicable solely to railroads do not deny to railroads the equal protection of the laws. A classification of "dangerous employments" for the purposes of the act must be upheld (*Missouri R'y* v. *Mackay*, 127 U. S. 205).

But the act is attacked chiefly because it imposes liability without fault. Our jurisprudence offers examples of legal liability without fault, and the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in marine law is another. Other examples are offered in the common law liability of the husband for the torts of the wife, or liability of the master for the acts of his servant (*The Osceola*, 189 U. S. 158; *Chicago, R. I. & P. R'y* v. *Zernecke*, 183 U. S. 582).

In the case last cited a statute making railroad companies liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury arose through the criminal negligence of the person injured, was upheld, primarily on the ground that the railroad company being a domestic corporation of Nebraska accepted with its incorporation the liability so imposed by the laws of the State and could not complain of it. But the court, in its opinion, cites with

approval the opinion of the Supreme Court of Nebraska. That court said: "The legislation is justifiable under the police power of the State, so it has been held. It was enacted to make railroad companies insurers of the safe transportation of their passengers as they were of baggage and freight; and no good reason is suggested why a railroad company should be released from liability for injuries received by a passenger while being transported over its line while the corporation must respond for any damages to his baggage or freight."

The Legislature may alter or repeal the common law. It may create new offences, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against whom the common law gives no remedy (*Bertholf* v. *O'Reilly*, 74 N. Y. 504).

It would seem to follow that it might make those who employ workmen in dangerous callings insurers to some extent of the safety of such workmen. The common law imposed upon the employee entire responsibility for injuries arising out of the necessary risks or dangers of the employment. The statute before us merely shifts such liability upon the employer. That the Legislature has the power to deal with the question of employers' liability on a basis other than fault 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 in holding that such action is not within the constitutional powers of the Legislature.

I have examined the authorities cited by the learned counsel for the defendant. They merely point out the shifting character of the border line between statutes which are upheld by the court as being a legitimate exercise of the legislative power to pass all manner of necessary and wholesome acts for the protection and well-being of the public, although such acts may interfere with personal liberty and the right to do what one will with his own, and statutes which are held by the courts to interfere without warrant with the privilege of pursuing an ordinary trade or calling, and therefore to be unconstitutional and void.

In the case of *Lochner* v. *New York* (189 U. S. 45) the prevailing and dissenting opinions contain a full discussion of the principles underlying the decision of such cases. The court held in that case that there is no reasonable ground on the score of health for interfering with the liberty of the person or the right of free contract by determining hours of labor in the occupation of a baker. The same court had already held in *Holden* v. *Hardy* (supra) that there was reasonable ground on the score of health for interfering with the liberty of the person and the right of free contract in determining hours of labor in the occupation of workingmen in smelters. In the former case the public good did not, in the judgment of the court, require the restrictive legislation; in the latter case it did.

In the latter case Mr. Justice Brown says that, "This court has not failed to recognize the fact that the law is to some extent a progressive

science. . . . Classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection."

As to the objection to the statute that it limits the amount recoverable in death cases, it is enough to say that it is for the plaintiff to make the claim of unconstitutionality in this regard, as it is the plaintiff alone who is prejudiced thereby, and it does not lie in the mouth of the defendant to raise this objection to the statute.

Demurrer overruled, with costs, and judgment absolute for the plaintiff directed on the pleadings, with costs.

APPENDIX B.

OPINION OF SAMUEL WILLISTON, LL.D.

Constitutionality of Workmen's Compensation Acts.

Various forms of compensation acts for workmen have been suggested. They may be classified under three headings:—

1. The assumption by the state of the burden of compensating workmen and their families for accidents.

2. Compulsory insurance against accidents at the expense either of the workman or of his employer, or at the joint expense of both.

3. Such a change in the rules of common law liability, or addition to them, as will render the employer liable for accidents to his employees irrespective of the negligence or freedom from it of either.

The first of these classes need not have extended consideration. Presumably no attempt to throw the whole burden of industrial accidents upon the state would as yet meet with popular approval even assuming its constitutionality. In my opinion, however, such legislation would be unconstitutional in that it discriminates in favor of accidents caused to workmen in the course of their employment as against other accidents whether suffered by workmen not in the immediate course of their employment or suffered by persons in the course of their employment who are working on their own account and not as employees.

The second kind of workmen's compensation law to which I have alluded, that of compulsory insurance, seems to me unconstitutional. The case of

Lochner v. *New York*, 198 U. S. 45,

and the authorities therein cited, show how completely the Supreme Court of the United States has recognized freedom of contract as a right of property guaranteed by the Fourteenth Amendment. It is not necessary to agree with the decision of the case itself or to assume that it would be followed on its precise facts, to be forced to conclude that any such large interference with freedom of contract as compelling all workmen or all employers to insure, would be unconstitutional. It is of course true that the liberty of contract, like other rights of property, is not absolute but subject to the control of the police power of the State. The limits of the police power are confessedly vague but, in my opinion, it is clear that such legislation as is here considered would go far beyond them. Perhaps as favorable a case as any in support of such legislation is

Opinion of Justices, 163 Mass. 590,

in which a statute requiring weekly payment of wages to workmen was

upheld. But even so mild an invasion of the right to contract as is involved in that statute has in many states been held unconstitutional. See the decisions cited in the opinion above cited.

The attempt to enlarge the limits fixed by the common law for liability for an injury suffered by an employee, may be made either by singling out certain especially hazardous employments and providing that in such employments the master shall be absolutely liable for injuries to his servants, or by taking all kinds of employments and providing broadly that all masters are liable for accidents to their servants. The first method may seem in some respects safer though less ambitious, for the police power of the state certainly justifies special legislation as to hazardous employments. There are many instances of special burdens thrown by legislation on those conducting particular employments where special circumstances make the burden necessary for the public good. But certainly the greatest care would be needed in selecting for enactment any particular kinds of employments as "extra hazardous"; for while reasonable classification is permitted and may be made without violation of the Fourteenth Amendment, arbitrary selection cannot be justified by calling it classification. It is necessary, moreover, that no person who does not properly belong to the class covered by the legislative enactment be included in it and, further, what would be very difficult in such legislation as is here under consideration, that all who are in a situation indistinguishable from that of the persons included in the legislation must themselves be brought within its scope. The matter is elaborately discussed with full citation of authorities in an opinion in the Circuit Court of Appeals for the Eighth Circuit written by Judge Sanborn in *Chicago, M. & St. P. Ry. Co.* v. *Westby*, 178 Fed. Rep. 619 (April 12, 1910). In this decision a statute of South Dakota exempting employees of common carriers from the Common Law rules as to fellow servants and as to contributory negligence was held unconstitutional in that it discriminated in favor of employees of carriers as against employees in other lines of work where the service might be practically identical.

The difficulty of any classification of employments which will not be open to the objections cogently set forth in the above decision is such that it seems wiser to attempt to bring all employments within the scope of the new rule, if it is at all possible to do so.

It seems that this Circuit Court of Appeals and some State Courts are somewhat more stringent in applying well recognized rules against arbitrary selection as compared with classification than the Supreme Court of the United States. Thus in *McLean* v. *Arkansas*, 211 U. S. 539, a provision in regard to mines employing only ten men was upheld, and in *Welch* v. *Swasey*, 214 U. S. 91, the Massachusetts Statute limiting the height of buildings within a small specified area in Boston was also held constitutional, yet it is evident that though the distinction between

the large mines and small ones is clear, and the distinction between the specified area in Boston and other places somewhat remote from it is clear enough, the precise point at which the Legislature will draw the line must, in the nature of the case, be somewhat arbitrary. See also the recent decision of *Louisville Etc. R. Co.* v. *Melton*, 30 Supr. Ct. Rep. 676. It is at least clear, however, that only with great care could a classification of employments be made which would not be open to the objections urged in 178 Federal Reporter. It is possible that a statute might endeavor to throw on the court the work of selection by making an enactment applicable to employments of more than common danger, but such a statute, even if constitutional, seems objectionable on account of its indefinite character which would require prolonged and constant litigation to make it applicable to particular facts. If a satisfactory selection can be made by the legislature or if a statute in the general form referred to above be regarded as satisfactory, there still remains the question whether it would be constitutional to make the employer liable irrespective of fault of any kind on his part. I cannot see that this question is materially different when asked in regard to selected employments than when asked in regard to all employments and I, therefore, regard the discussion which follows in regard to all employments as sufficiently covering the matter. The question whether all employers can be made liable for accidents to their employees may be perhaps best approached by considering steps which have already been taken or at least have been judicially discussed.

It seems safe to say then, first, that the fellow servant doctrine might be abolished. This has been done in Colorado, and as to particular employments in several other states, statutes of the latter class have been held constitutional by the United States Supreme Court, *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *Louisville Etc. R. Co.* v. *Melton*, 30 Supr. Ct. Rep. 676 and cases cited.

Second. The doctrine of assumption of risk by the employee may probably be constitutionally abolished. See *Schlemmer* v. *Buffalo Etc. Ry. Co.*, 205 United States 1.

Three. The whole doctrine of contributory negligence could probably also be abolished, ibid. See, however, Employees' Liability Cases, 207 U. S. 463, 215 United States . . . *Hoxie* v. *N. Y., N. H. & H. R.R. Co.*, 82 Conn. 352.

Still further, I believe it to be possible for the legislature to authorize the employers to enter into fair contracts with their employees by means of which the employees contract to surrender common law rights to recover for injuries, receiving, instead, an absolute right to recover certain amounts for accidents, however caused. Such contracts have been commonly made by railroad companies, and have in some instances at least been upheld. They have been forbidden by statutes in some states, but where the employee is not required to surrender his common law

rights until after the injury such an agreement seems clearly good at common law. *Hamilton* v. *St. Louis Etc. R.R. Co.*, 118 Fed. Rep. 92.

I see no reason why a statute could not authorize, if it were desirable, a fair contract to surrender his common law rights made by the employee when entering into his employment. If such a contract is now against public policy it is because the master is in such a position of advantage that the contract is not likely to be fair.

In three of four methods of procedure just alluded to, the master is held liable because of some fault of his own, and in the fourth method he is made liable for accidental injuries by the terms of his express contract. If he can constitutionally be made liable for purely accidental injury without his assent, it must be because entering into any business where workmen are employed is an assumption by the master of the chance of injury to his workmen owing to risks inherent in the nature of the employment. In no case, I feel satisfied, can an employer constitutionally be made liable for other risks than those which are naturally incidental to the business in which he is engaged. Whether he can be held liable for such injuries where the only ground of liability consists in his going into the business in which he is engaged, must certainly be regarded as doubtful. As going some distance in that direction, however, see *Chicago Etc. R. Co.* v. *Zernecke*, 183 U. S. 582. So, the reasoning of Mr. Justice Moody in 210 U. S. at page 295, though involving a question of construction rather than one of constitutionality, is certainly favorable to the theory that an employer may be regarded as assuming certain risks by virtue of his becoming such, and many people, lawyers and others, are undoubtedly hospitable to such reasoning at the present time. I am, myself, hospitable to it, but as a lawyer I must admit on the authorities as they stand at present, the question can only be regarded as a somewhat dubious one.

If a law can be framed which is constitutional in its main purpose, some subsidiary questions may arise, chief among them being the possibility of avoiding trial by jury. In my opinion this can be done. A person may undoubtedly waive his right to a jury trial and by giving the workman alternative rights either at common law or under a compensation law, but compelling him to elect after the injury which he will have, it would seem that the procedure under the compensation law need not include jury trial so far as he is concerned. But the employer also has a constitutional right to jury trial, though he may not care to insist upon it. If, however, the procedure under the compensation statute requires forms of relief which common law courts cannot give, it would seem constitutional to give the remedy to a court having equity powers and not having a jury. The right to pay the compensation in instalments and to diminish and increase it may be given by the statute and such relief cannot be secured by a common law judgment. There is no doubt that new equitable rights

may be created by statutes. For instance, in many states bills in equity by way of attachment or trustee process are allowed, and under these statutes cases of purely legal aspect are tried in equity, the only ground of equity jurisdiction being the necessity of equitable aid to seize property to secure the plaintiff's judgment. Other instances might be added. There is no doubt also that in regard to equitable rights, the parties have no constitutional right to trial by jury.

Parker v. *Simpson*, 180 Mass. 334.
Lascelles v. *Clark*, 204 Mass. 364.

It seems possible also to affect any insurance which the master may have against accident with a lien in favor of the injured employee. I have difficulty in seeing how such a lien can be made to arise on the bankruptcy or insolvency of the employer, but if the lien created arises as soon as the employee notifies the insurance company of the accident, I see no difficulty.

More Detailed Opinion in Regard to the Possibility of excluding the Right of Trial by Jury in a Workman's Compensation Law.

There is nothing in the Federal Constitution which requires trial by jury in civil cases. It is under the provisions of the State Constitutions that such questions will arise, and as the language of the State Constitutions is various, an exhaustive opinion should be based on examination of the Constitution and decisions of each State. I am unable to go into the matter with this degree of exhaustiveness, but I submit some considerations and authorities.

The Texas Constitution at least requires that the decision of issues of fact even in equitable cases of action be determined by jury trial. Under such a Constitution it is perfectly clear that there is no escape from the jury in case of workmen's compensation.

More commonly, however, Constitutions provide in various forms of words that trial by jury shall be retained or shall not be impaired. Under such constitutional provisions it has been held that a new statutory right, at any rate if it were necessary or convenient so to provide, might be enforced by means of a procedure which excluded juries.

In the State Tax Law Cases, 54 Mich. 367, Mr. Justice Cooley said:—

> "This case is a proceeding in equity instituted by the State to enforce against a parcel of land a lien which it claims for taxes, and it is a different proceeding altogether from any which was known to our jurisprudence in 1850. It is a new proceeding, and therefore if jury trial cannot be had in it, that method of trial is not cut off, but is simply not given. There is nothing in the Constitution

> which renders it necessary to provide for jury trial in new cases. The constitutional provision is, 'The right of trial by jury shall remain,' by which we are to understand merely that it is retained for the cases in which it existed before."

This case was cited and followed in *Ball* v. *Ridge Copper Co.*, 118 Mich. 7, where it was held that the Constitution was not violated by a provision authorizing the court to put the purchaser under a tax deed in possession by means of a writ of assistance.

In *Parmalee* v. *Price*, 208 Ill. 545, the Illinois Constitution was construed as guaranteeing—

> "The right to a trial by jury practically as that right existed at the common law. It does not give the right of jury trial in any class of cases in which that right did not exist at common law."

The statute under consideration permitted a creditor of a corporation to proceed in equity to collect his claim against a stockholder without reducing to judgment his claim against the corporation, and the statute was held constitutional though no trial by jury was permitted. The court said at page 558:—

> "Where a new class of cases is directed by the Legislature to be tried in chancery, and it appears when tested by the general principles of equity that they are of an equitable nature and can be more appropriately tried in a court of equity than a court of law, the chancellor will have the right, as in other cases in chancery, to determine all questions of fact without submitting them to a jury (*Ward* v. *Farwell*, 97 Ill. 593; *Chicago Mutual Life Indemnity Ass.* v. *Hunt*, 127 id. 257). The constitutional provision in question 'introduced no new rule of law, but merely preserved the right already existing. It does not apply to suits in equity, or to any statutory proceeding to be had in courts of equity.'" *Keith* v. *Henkleman*, 173 Ill. 137.

So in *Hathorne* v. *Panama Park Co.*, 44 Fla. 194, the first section of the head-note reads:—

> "The provision of the Constitution that the 'right of trial by jury shall be secured to all and remain inviolate forever' guarantees such right only in those cases where at the time of the adoption of the Constitution the law gave that right; and not in those cases where the right and the remedy with it, are thereafter created by statute, nor where the cause was already the subject of equity jurisdiction."

The statute involved in the case was one providing for the enforcement of mechanics' liens by bill in equity.

So in *Harrigan* v. *Gilchrist*, 121 Wis. 127, 281, the court dealt in the

same way with a statutory action of a creditor against a corporation, saying:—

> "A statutory action may or may not be an action at law according as the statutory incidents conform to one or the other from a common law point. *Willer* v. *Bergenthal*, 50 Wis. 474, 7 N. W. 352; *Bentley* v. *Davidson*, 74 Wis. 420, 43 N. W. 139. The only right of trial by jury guaranteed by the Constitution is the right as enjoyed at the time the Constitution was adopted. There is no such right as regards a statutory action unless such action is coupled with statutory incidents indicating that it is strictly legal in character, or the remedy of trial by jury is expressly given by the statute."

I believe the extracts from these decisions represent the construction which would generally be given to the provisions in State Constitutions relating to jury trial.

If the Workmen's Compensation Law imposes liability upon the master, irrespective of any fault on his part, it is certainly a very different kind of liability from anything which the common law imposes. Moreover, the provision suggested for increasing, diminishing, or altogether taking away instalment payments decreed as compensation is peculiarly appropriate for a court of equity. The right to give equitable jurisdiction in such a case is clearer where the law still leaves the workman as an alternative right his common law right of action for negligence.

I am, therefore, of opinion that such a law as I have suggested; namely, where the employer is made liable, irrespective of any fault on his part, where the compensation is payable in instalments which are subject to change, and where the old common law rules of liability are still preserved, may in most States constitutionally dispense with trial by jury.

The provision relating to jury trial in the Massachusetts Constitution is, however, peculiar in its wording and may require a different construction. Article 15 of the declaration of rights secures the right of trial by jury in all controversies concerning property and in all suits between two or more persons except in cases in which theretofore it had been otherwise used and practised. It will be observed that this language in terms provides that a jury shall be had except where there had been previous practice to the contrary. Whereas in the State Constitutions alluded to above the provision was in effect that a jury trial must be retained in cases where it formerly had been customary. This difference is important, and the Massachusetts decisions seem to show that the Massachusetts court insists upon the difference, and that in any new proceeding unknown to the common law the right of trial by jury must be preserved. This is expressly so stated in *Hubbard* v. *Lamburn*,

189 Mass. 296, 299, where it was held that a claimant in trustee process was entitled to trial by jury; so in *Powers* v. *Raymond*, 137 Mass. 483, a bill by a creditor to reach and apply assets conveyed in fraud of creditors by the debtor, it was held that the parties had the right under the Constitution to have issues to a jury framed covering the material facts at issue.

It will be observed that the question presented in this case was in substance identical with that presented in the case above referred to in *Parmalee* v. *Price*, 208 Ill. 544, where the Illinois court held no jury was necessary.

It is no answer to the Massachusetts decisions above cited to refer to provisions in the Massachusetts statutes providing for proceedings in equity to enforce new statutory rights. In some cases such statutory proceedings are for the enforcement of a public right, and this is not a suit between two or more persons within the meaning of the Constitution. *Attorney-General* v. *Sullivan*, 163 Mass. 446, 451. Wherever this explanation of the statutes is not possible, it can only be said that, though the statute may not say so, by virtue of the Constitution issues of fact for the jury must be framed by the court of equity to which jurisdiction is given, as was held in the case of *Powers* v. *Raymond*, supra. I see nothing in the case of *Lascelles* v. *Clark*, 204 Mass. 362, to indicate a disposition on the part of the court to change the construction of the constitution previously established. See further *Parker* v. *Simpson*, 180 Mass. 334.

Though the right to have issues of fact by a jury is therefore unavoidable in Massachusetts, it seems entirely possible to give jurisdiction to a tribunal having equity powers, if each party is given the right to have issues of fact framed for jury trial. See Brown's Case, 173 Mass. 498, 501.

APPENDIX C.

DEPARTMENT ON COMPENSATION
INDUSTRIAL ACCIDENTS AND THEIR PREVENTION
THE NATIONAL CIVIC FEDERATION

NOVEMBER 10, 1910.

Mr. MAGNUS W. ALEXANDER,
Conference of Compensation Commissions,
Hotel La Salle,
Chicago, Ill.

My dear Sir,—If you can, consistently, will you be kind enough to present, as a member of our Department on Compensation for Industrial Accidents, the following communication to the joint meeting of the official workmen's compensation commissions meeting in Chicago, November 10 and 11?

Our Department is composed of six hundred employers, representative labor men, attorneys who have given special consideration to the subject, insurance experts, economists, State officials, members of State compensation commissions, and others concerned. Practical men, representing all interests, are working together in this Department of the Federation to help solve the problem how to lessen the hardships from the hazards of industry.

The three natural divisions of the work have been assigned to the following committees:—

1. The Legal Committee, which is drafting a tentative compensation plan for uniform State legislation, as a substitute for the present liability laws, with P. Tecumseh Sherman as Chairman.

2. The Committee on Statistics and Cost of substituting the compensation principle for the present liability laws, with Sylvester C. Dunham as Chairman.

3. The Committee on Improvement of State Factory Inspection, it being equally important to prevent as to compensate for accidents. Mr. Louis B. Schram is Chairman of this committee.

Our Legal Committee is now considering a formulate bill.

Any plan adopted naturally must conform to State constitutions and court decisions. Therefore, the committee will soon submit its plan to the Commissioners on Uniform State Laws in the forty-six States and Territories and to the Committee on Compensation appointed by the American Bar Association, as well as to the Executive Committee of the various State bar associations, to obtain their opinions upon its constitutionality in their respective States.

The Federation's Legal Compensation Committee hopes to receive the advice sought from the commissioners and members of the bar before reporting its plan finally to the Federation's Compensation Department at its next meeting.

As six of the State Legislatures meet in January, 1911, and as only eight States have official commissions, the Federation is addressing letters to all Governors and Governors-elect in the remaining States, asking them to urge the creation of such commissions in their messages to their respective legislatures. This effort will be seconded by our State members, who will follow up the matter with their Governors.

Many of the members of the Federal and of the State commissions are members of our Compensation Department. A meeting of that Department, to pass upon our proposed measure, will be held on December 22, 1910. Allow me to express the hope that the participants of this joint meeting of the workmen's compensation commissions may be able to attend that meeting, whether you are able at this time to complete a bill or not, and at our meeting give us the benefit of your advice; for it goes without saying that the Federation and its voluntary committees will not urge a measure that will conflict with a uniform bill agreed upon and drafted by the official commissions. It will be our policy to use what influence we can in States where there are official commissions to secure the passage of such a measure as all agree upon for uniformity.

Due notice will be given your members of the exact time and place for the next meeting of our Department.

Very truly yours,

(Signed) AUGUST BELMONT,
Chairman.

APPENDIX D.

The following acts were drafted after the close of the Conference by a committee, consisting of H. V. Mercer, of Minnesota, John H. Wigmore, of Illinois, and A. W. Sanborn, of Wisconsin, who were appointed by the Conference to draft two acts, one compulsory, the other elective. These acts have not been submitted to the other members of the Conference, and therefore reflect only the views of the members of the committee on the several points where they are not in accordance with the votes of the Conference. The Notes following were also prepared by the committee, and will serve to explain the reasons for any divergence of the acts from the votes of the Conference.

CONFERENCE UNIFORM DRAFT OF AN EMPLOYEES' COMPENSATION CODE.

(*Form* 1: *Making the Compensation System Mandatory.*)

PREAMBLE.

1. RIGHTS AND LIABILITIES DEFINED.
2. AMOUNTS OF COMPENSATION ALLOWED.
3. MODE OF CLAIMING COMPENSATION.
4. LEGAL EFFECT OF SETTLEMENTS AND CLAIMS.
5. BOARD OF ARBITRATION; JURISDICTION AND POWERS.
6. PROCEDURE AND AWARDS UNDER ARBITRATION.
7. INSURANCE.
8. RIGHTS AND LIABILITIES OF THIRD PERSONS.
9. WORDS AND PHRASES DEFINED.
10. TIME OF CODE'S TAKING EFFECT.

CONFERENCE UNIFORM DRAFT OF AN EMPLOYEES' COMPENSATION CODE.

(For meaning of Code, see Committee Note on "Title.")

PREAMBLE.

(See Committee Note on "Preamble.")

WHEREAS our modern industrial conditions have outgrown the common law and statutory remedies hitherto given to employees for injuries incident to their employments, and the injuries now annually received by thousands of workmen not only burden the community by converting industry into idleness, plenty into poverty, but also give

rise to speculative and unscrupulous litigation which is a disgrace to our system of justice; and

WHEREAS most of the European nations have already corrected, and the United States Government and many of our States are now seeking to correct, this deplorable condition by a system of assured compensation which will tend to prevent accidents, to support the families, and to safeguard the general welfare of the State, and will provide simplicity, certainty, and uniformity of obligation, and simplicity, rapidity, and certainty of remedy; and

WHEREAS Commissions appointed by many of our States have investigated this subject, both at home and abroad, to determine what the facts demand and the constitutions allow, and numerous conferences have been held between the commissioners of those States, many of whom were appointed to represent employers, employees, or bar associations, with representatives of the Federal Government and private institutions interested in the subject, including a committee of the National Conference on Uniform State Laws, at which conferences various theories and provisions of bills have been discussed, with a view to making them applicable to the situation within the Constitution; and

WHEREAS it has been the satisfactory experience of more than twenty foreign countries and seems to be the unanimous view of those well informed on the subject that a code, changing the basis of compensation for an employee from that of negligence or fault of the employer to that of a risk of the industry or that of industrial insurance, should replace the present inadequate system; and

WHEREAS at the last of such conferences a committee was appointed and empowered to formulate such a code to protect adequately the general welfare under the police power of the State, which draft this Legislature has herein followed as consistently as possible with our interests in this State,—

NOW, THEREFORE, BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF that:—

1. RIGHTS AND LIABILITIES DEFINED.

(For Section 1, see Committee Note and Conference Proceedings, p. 210.)

Section 1. *Rights and Remedies Granted and Amended.* The right to compensation and the remedy therefor, herein granted, shall be in lieu of all rights and remedies now existing, either at common law or by statute, either upon the theory of negligence or otherwise, for the injuries covered by this Code; and no other compensation, right of action, damages, or liability, shall hereafter be allowed to either the injured or dependants for such injuries, so long as this Code shall remain in force, unless, and to the extent only that, this Code shall be specifically amended.

(For Section 2, see Committee Note 2 and Conference Proceedings, pp. 31, 277.)

Section 2. *Dangerous Employment Defined.* Every employment in which there occurs hereafter to any of the employees personal injuries arising out of and in the course of such employment is for the purpose of this Code hereby declared a dangerous employment, and consequently subject to the provisions of this Code and entitled to all the benefits thereof.

(For Section 3, see Committee Note 3 and Conference Proceedings, pp. 38, 146.)

Section 3. *Compensation, Conditions of the Right to.* Every employer engaged in such dangerous employment shall be subject to the provisions of this Code, and shall pay compensation, according to the conditions herein named and the schedule of rates contained in Section 4 hereof, to every such employee so injured in his employment, or, in case of death caused by such injuries, to the dependants as hereinafter defined and apportioned, for all personal injuries received by such employee arising out of and in the course of such employment and disabling such employee from regular services in such employment, and not purposely self-inflicted to obtain compensation; but on the condition that, in case of dispute between the parties as to the injury or any of the matters herein named relating thereto, the controversy shall be brought before and determined by the Board of Arbitration as hereinafter provided.

2. Amounts of Compensation Allowed.

(For Section 4, see Conference Proceedings, pp. 99, 302.)

Section 4. *Compensation for Waiting Period.* No compensation shall be allowed for the first two weeks after injury received, except that covered by Sections 5 and 6, nor in any case unless the employer has actual knowledge of the injury or is notified within the period specified in Section 14.

(For Section 5, see Committee Note 5 and Conference Proceedings, p. 135.)

Section 5. *Compensation for Medical Expenses.* During the first two weeks after the injury the employer shall furnish reasonable medical and hospital services and medicines, when needed, not to exceed one hundred dollars in value, unless the employee refuses to allow them to be furnished by the employer.

(For Section 6, see Conference Proceedings, p. 135.)

Section 6. *Compensation for Funeral Expenses.* In case the injury causes death within the period of years, the reasonable funeral expenses not to exceed one hundred dollars shall be paid by the employer.

(For Section 7, see Conference Proceedings, pp. 57, 70, 101, 106, 174, and Committee Notes 7–9.)

Section 7. *Compensation upon Death.* In case the injury causes death within the period of years, the compensation shall be in the amounts and to the persons following:—

Par. *a. No Dependants.* If there be no dependants, then the medical, hospital, and funeral expenses, as above provided in Sections 5 and 6.

Par. *b. Dependants.* If there are wholly dependent persons at the time of death, then a payment of per cent. of the first dollars of the weekly wage and per cent. of the balance of such wage, to be made at the intervals when such wage was payable, and to continue for the remainder of the period between the death and the end of the years after the occurrence of the injury, but in no case to continue longer than years after the injury or to amount to more than thousand dollars on account of the compensation for the injury to that person.

Par. *c. Partial Dependants.* If the deceased leave only persons partially dependent, they shall receive only that proportion of the benefits provided for those wholly dependent which the amount of the wage contributed by the deceased to such partial dependants at the time of injury bore to the total wage of the deceased.

Par. *d. Who are Dependants.* The entire compensation granted by this Code in case of death shall be paid to one of the following persons, if dependent, who shall be entitled to receive such payments after the due date in the order in which they are named:—

(1) Husband or wife, as the case may be. (2) Guardian of children. (3) Father. (4) Mother. (5) Sister. (6) Brother.

Payment to a person subsequent in right shall be lawful, and shall discharge all claim therefor if the person having the prior right has not claimed the payment prior to the time when the same is in fact made.

Par. *e. Application of Payments.* The person to whom the payment is made shall apply the same to the use of the several beneficiaries according to their respective claims upon the decedent for support. In case any payee or employer is not certain as to the person to whom payment or distribution should be made, and in case any beneficiary is not satisfied with the distribution thereof, application may be made to the Board of Arbitrators to designate the person to whom payment shall be made, and the apportionment thereof among the beneficiaries and payment and distribution shall thereafter be made in accordance with the decision of the Board. If the matter be in dispute or incapable of prompt determination, the Board may order the money to be paid over to it, to be held for the proper dependants.

(For Section 8, see Conference Proceedings, pp. 51, 70, and Committee Notes 7–9.)

Section 8. *Compensation upon Total Disability.* In case of temporary or permanent total disability of the employee from the time the payment period begins until the end of the year period or during any portion thereof, the compensation shall be per cent. of the first dollars per week and per cent. of the balance of such wage during such disability; payment to be made at the intervals when such wage was payable, but in no case to continue longer than years from the injury or amount to more than thousand dollars for that injury, and not to include the time when the rule for payment upon death would operate.

(For Section 9, see Conference Proceedings, p. 70, and Committee Notes 7–9.)

Section 9. *Compensation for Partial Disability.* In case of temporary or permanent partial disability the employee shall receive per cent. of the decrease of his earnings during the continuance thereof, but not to continue more than years in time from the injury or to amount to more than thousand dollars for that injury, and not to include the time when the rules for payment upon death or total disability would operate.

(For Section 10, see Conference Proceedings, p. 56, and Committee Note 10.)

Section 10. *Payment in Lump Sum.*

Par. *a.* The amounts payable periodically under the foregoing sections may be commuted to one or more lump-sum payments by the Board of Arbitration at any time after one year if special circumstances be found which, in the judgment of the Board, require the same.

Par. *b.* The Board of Arbitration may at any time by award allow any employer or any insurer of such employer to compromise and settle any award by the transfer of property on the settlement of an annuity or other form of benefits, provided that the same be in the interests of justice.

Section 11. *Wages Defined.*

Par. *a. Regular Employee.* When the employee is employed at the time of the injury in a regular capacity at a fixed and reasonable wage which remains unaltered substantially throughout the year either in his own case or in the case of persons engaged in the like employment, the wage taken as the basis of compensation under the foregoing sections shall be the wage he is actually receiving.

Par. *b. Other than Regular Employees.* Where the employee is at the time of the injury employed other than as above, the wage so taken shall

be an average or fair wage which the particular employee ought to receive on a reasonable basis, considering the rate he has been getting, his ability and willingness to work, the nature of the service he was performing, and all of the other circumstances of the case.

(For Section 12, see Conference Proceedings, p. 126, and Committee Note 12.)

Section 12. *Conditions varying Compensation.*

Par. *a.* If the employer shall clearly establish that the injuries, death, or disability, was due in whole or in part to the employee's previous injuries, sickness, disease, physical ailments or deficiencies, age, or infirmity, then and to that extent only the compensation herein allowed shall be correspondingly reduced; and, if the employee or a beneficiary under this Code shall clearly establish that the injured was a minor of such age and experience when injured that under natural conditions he would be expected to increase in wage, this fact may be considered in arriving at his reasonable wage, to conform to the spirit of this Code.

Par. *b.* The compensation awarded shall never be vested except subject to such changes as the provisions of this Code allow.

3. Mode of Claiming Compensation.

Section 13. *Employer's Actual Knowledge.* If it be found as a fact by the Board in its award that the employer had actual knowledge of the occurrence of the injury, the notice provided for under Section 14 shall not be essential.

(For Section 14, see Committee Note 15.)

Section 14. *Time of Notice.*

Par. *a.* Unless the employer shall have actual knowledge of the occurrence of the injury, or unless the employee or some one on his behalf, or some of the dependants or some one on their behalf or some other person, shall give notice thereof to the employer within fourteen days of the occurrence of the injury, then no compensation shall be due until such notice is given or knowledge obtained.

Par. *b.* If the notice is given or the knowledge obtained within thirty days, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation unless the employer shall show that he was prejudiced by such want, defect, or inaccuracy, and then only to the extent of such prejudice.

Par. *c.* If the notice is given or the knowledge obtained within ninety days, and if the employee or other beneficiary shall show that his failure to give prior notice was due to his mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation, or deceit of another person, or to any other reasonable cause or excuse, then compen-

sation may be allowed, unless and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice.

Par. *d.* Unless knowledge be obtained or notice given within ninety days of the injury, no compensation shall be allowed.

Section 15. *Service of Notice.* The notice may be served personally upon the employer, or upon any agent of the employer, upon whom a summons may be served in a civil action, or by sending it through the mail to the employer at the last-known residence or business place thereof within the State, and may be in substantially the following form:—

"Notice to Employer of Personal Injury Received.

You are hereby notified that a personal injury was received by (name) , who was in your employ at (place) , at the job of (kind of work) , on or about the day of 19 , and that compensation will be claimed therefor.

(Signed) "

(For Section 16, see Committee Note 16.)

Section 16. *Joint Medical Examination.*

Par. *a.* After an injury the employee, if so requested by his employer, must submit himself for examination at some reasonable time to a physician selected by the employer authorized to practise under the laws of the State.

Par. *b.* If the employee requests, he shall be entitled to have a physician of his own selection present at some reasonable time to participate in some examination.

Par. *c.* Unless there has been a reasonable opportunity thereafter for such physician selected by the employee to participate in the examination in the presence of the physician selected by the employer, the physician selected by the employer shall not be permitted afterwards to give evidence of the condition of the employee in a dispute as to the injury.

Par. *d.* Except as provided herein in this Code, there shall be no other disqualification or privilege preventing the testimony of a physician who actually makes an examination.

Section 17. *Medical Examination by Neutral Physician.* The Board of Arbitrators shall have the power to employ a neutral physician of good standing and ability, whose duty it shall be, at the expense of the county, to make such examination or examinations as the Board may request on its own behalf or on the petition of either or both the employer and employee or dependants.

Section 18. *Testimony by Board Physician.* If the employer or the employee has a physician make such an examination and no reasonable opportunity is given to the other party to have his physician make examination, then, in case of a dispute as to the injury, the physician of the party making such examination shall not give evidence before the Board unless a neutral physician of the Board of Arbitration either has examined or then does examine the injured employee and gives testimony regarding the injuries.

Section 19. *Refusal of Medical Examination.* If the employee shall refuse examination by a physician selected by the employer, either with or without the presence of a physician of his own selection, and shall refuse an examination by the physician of the Board of Arbitrators, he shall have no right to compensation during the period from such refusal until he or some one on his behalf notifies the employer or Board of Arbitrators that he is willing to have such examination.

Section 19 *a. Certificate of Physician.* A physician making an examination may give to the employer and to the workman a certificate as to the condition of the workman, and such certificate shall be competent evidence of that condition if his testimony would have been admissible.

4. Legal Effect of Settlements and Claims.

(For Section 20, see Committee Note, p. 20.)

Section 20. *Settlements.*

Par. *a.* All settlements and releases made, in which the employee is given the full benefit of this Code, shall be binding upon all parties, except that no settlement or release in which the payments shall run longer than ninety days from the injury, and no lump-sum settlement whatever, shall be binding upon the employee unless and until the same be approved by the Board of Arbitration.

Par. *b.* The Board may at any time require from the employer a copy or report of any settlement or release or class of settlements or releases made with him.

(For Section 21, see Conference Proceedings, p. 284.)

Section 21. *Preference or Lien.* The right of compensation granted by this Code shall have the same preference against the assets of the employer as is allowed by law for a claim for unpaid wages for labor.

Section 22. *Exempt and not Assignable.* Claims or payments due under this Code shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution, or attachment.

5. Board of Arbitration; Jurisdiction and Awards.

(For Section 23, see Conference Proceedings, pp. 180, 295, and Committee Note 23.)

Section 23. *Submission to Arbitration as a Condition Precedent to Claim for Compensation.*

Par. *a.* As a condition precedent to recover upon a claim for compensation, in case of a dispute over or failure to agree upon a claim for compensation or of a failure or refusal of the employer to pay a claim for compensation, the employee or the dependants or others entitled to the benefits hereof, as the case may be, shall submit the claim for compensation hereunder, both as to the fact and nature of the injuries and the amount of compensation therefor, to a Board of Arbitrators as hereinafter specified, in substantial compliance with this Code, and shall be and remain bound by the award and such modifications thereof as shall be made under the provisions of this Code.

Par. *b.* If the employer, or any other interested person, appeal in any proceeding herein to contest the merits thereof, or to get or accept or carry out the benefits of the provisions of this Code, such person shall be deemed to have appeared generally and joined in a submission of such matter to the decision of the Board and the conditions of this Code.

Par. *c.* The Board shall acquire jurisdiction of the employer and all other persons interested in said proceeding by the service of the notice upon them according to Sections 30, 31, and 32 of this Code, or by their general appearance.

Par. *d.* When the Board obtains jurisdiction of any party or matter, then it shall retain the same so long as may be necessary to carry out the purposes of this Code, provided that, while any portion of said matter be before the District Court or Supreme Court for determination, the jurisdiction of this Board for that matter shall be suspended.

Par. *e.* No employee or dependant or other person interested in such compensation shall be entitled to commence or maintain any action at law or suit in equity for such compensation until the amount thereof shall have been determined as herein provided, and then only for the amount so awarded, and according to the terms and conditions of the award and the benefits of this Code.

(For Section 24, see Committee Note 24.)

Section 24. *Appointment of Board of Arbitration.*

Par. *a.* There is hereby created a Board of Arbitration for each county in this State, consisting of three competent members, who shall be appointed by the District Court for their respective districts, and hold their offices subject to the will and discretion of the District Court by which they were appointed.

Par. *b*. The court may, from time to time, appoint additional boards to act for such length of time as it deems necessary for the expeditious despatch of the business of the district.

Section 25. *Organization of Board.*

Par. *a*. No person shall sit as an arbitrator in any case where he is related to either party by marriage or blood within the second degree, or who has any personal interest in the matter in dispute: *provided*, that objection to any arbitrator must be made in writing and filed with the Board before hearing; and, if the matter be not otherwise disposed of, it shall be heard and determined by the District Court on motion, and its determination thereof shall be final.

Par. *b*. The court may fill all vacancies, whether temporary or permanent, occurring at any time in the Board.

Par. *c*. During a vacancy the remaining two members shall exercise all the power and authority of the Board until such vacancy is filled.

Par. *d*. The Board shall organize by choosing one of its members as chairman.

Par. *e*. A majority of the Board shall be a quorum for the hearing and decision of any matter, and the decision of any two thereof shall be the decision of the Board. In case the Board shall be equally divided as to any matter, the same shall be tried *de novo* before a full Board of three members.

Par. *f*. The District Court shall have the same power to punish for contempt of the Board that it has for a similar contempt of its own power.

Section 26. *Clerks and Assistants.* The District Court may appoint a clerk of the Board and employ experts, and such other clerical help as it may deem necessary, who may or may not be of the regular county officers.

(For Section 27, see Committee Note 27.)

Section 27. *Salaries and Expenses.*

Par. *a*. All salaries and expenses, including the fees of witnesses within thirty miles, authorized by this Code, shall be audited and paid out of the general funds, the same as District Court expenses.

Par. *b*. The compensation of the Board shall be fixed by the court, and shall be paid in the same manner as other county employees.

Par. *c*. The compensation of clerks and other assistants shall be fixed by the Board, subject to the approval of the District Court.

Section 28. *Jurisdiction.*

Par. *a*. The Board of Arbitration shall have jurisdiction throughout their respective counties to arbitrate all controversies arising within the counties and permitted by or growing out of this Code, and to make awards consistent herewith.

Par. *b*. The Boards shall also have jurisdiction to arbitrate any such

controversies arising within the State outside of their counties, if all parties interested therein shall consent thereto in writing.

Par. *c*. Any matter of arbitration commenced in one county may be transferred to another county to be heard by the arbitrators of the County in which the injury occurred or by the arbitrators in the county to which it is transferred, if all parties consent thereto in writing.

(For Section 29, see Committee Note 29.)

Section 29. *General Powers.*

Par. *a*. The Board, with approval of the District Court, may make rules of practice and procedure not inconsistent with this Code, but so far as possible uniform throughout the State.

Par. *b*. The Board may fix the amount of compensation which any attorney or other agent of an employee or dependant shall be entitled to receive for services out of the sum awarded as compensation.

Par. *c*. There is hereby granted to the Board of Arbitration, and to all the persons vested herein with rights, powers, or obligations, such further powers as may be necessary and proper to carry out the purposes of this Code and are not inconsistent with the fundamental laws.

6. Procedure and Awards under Arbitration.

(For Section 30, see Committee Note 30.)

Section 30. *Request to Board.*

Par. *a*. Any person in interest desiring a determination by said Board of any necessary matter may bring it before the Board by a written and signed request, filed with the clerk of the Board.

Par. *b*. The Board of its own motion by notice made and served as provided in Sections 31 and 32 hereof may bring any of the parties before it for the purpose of determining whether any matter growing out of any such personal injuries is proceeding according to the spirit of this Code.

Par. *c*. The request shall be in such form as may be prescribed by the Board, with the approval of the District Court, and shall furnish so far as possible the data for service of notice.

Section 31. *Notice.* Upon the filing of such petition, on request, the clerk shall issue under the name of the Board a notice to all of the interested parties so far as known to him, and cause the same to be served in the method prescribed in this Code for the service of notice of injuries to the employer.

Section 32. *Contents of Notice.* The notice shall cover the following things:—

(*a*) The request made, giving the name or names of the person or persons making the same.

(*b*) The general nature of the matter to be investigated, sufficiently describing the same to enable the parties to prepare for hearing.

(*c*) A summons to appear at a time and place for the hearing and a notice that otherwise he will be awarded in default.

(*d*) A notice that such other and further relief may be claimed and awarded as will do justice in the premises.

Section 33. *Time of Hearing.* The time for a hearing upon the merits of a claim for compensation shall not be less than ten days, and upon other matters not less than five days, after notice given, unless as to such other matters the Board shall shorten the time by order to show cause.

(For Section 34, see Committee Note 34.)

Section 34. *Pleadings.* No formal or written pleadings shall be required in the hearing of any controversy arising under this Code.

Section 35. *Rules of Evidence.* The Board shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided; but may make the investigation in such manner as in their judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this Code.

Section 36. *Power of Inspection, Subpœna, and Oath.* The Board shall have the power:—

Par. *a.* To inspect or cause to be inspected the premises where the injury occurred.

Par. *b.* To require any books or papers, tools, or other movable chattels to be produced or inspected.

Par. *c.* To require any employee claiming compensation to be physically examined by a physician appointed by the Board.

Par. *d.* To issue subpœnas to compel the attendance of witnesses or parties, and the production of books, papers, records, or chattels.

Par. *e.* To administer oaths.

Section 37. *Continuance, Rehearings, Interim Awards, etc.*

Par. *a.* With a view to carrying out the provisions of this Code which require or authorize payments to continue by instalments during the period of disability or dependency, the Board may retain jurisdiction, and continue from time to time the proceedings upon any claim, and may hold such interim hearings and make such interim awards and such modifications of prior awards, as may be necessary until the claim can be finally disposed of by a final award.

Par. *b.* In case of failure to serve notice or to reach all the parties, or in case it appear that a default should be removed, or any other matter done in the interest of fairness, the Board may take such action thereon as will promote justice and tend to carry out the spirit of this Code.

Section 38. *Records.* The clerk shall keep a record of the proceedings of the Board, showing separately each case by the Board considered, including the nature of the injury, the names of the parties and their agents or attorneys if any appearing therein, the names of the witnesses who testified before the Board, with such exhibits as can reasonably be kept, or copies or photographs thereof, furnished by the parties, and the award, and such other records as may from time to time be directed by the Board.

Section 39. *Award to be Conclusive.* The findings and awards made hereunder shall be conclusive, unless and till reopened or set aside by either the Board or the court.

Section 40. *Form of Award.* The Board shall make its awards in writing in such terms as it shall decide to be consistent with the facts and the spirit and powers of this Code and in the following form:—

1. Title of the claim.

2. We find in the above case that (employee's name) on (date) , received injuries arising in and growing out of the course of the employment of (employer's name) at (place) , while working at the job of (kind of work) , and was receiving as wages the sum of $ per , payable .

3. That the injuries appear now to be and are as follows:—

4. That for (temporary, etc.) disability it is hereby found and awarded that the said employer shall pay compensation in the amount of $ in all, payable to the following persons (names) during (length of period) .

5. (If the injuries are for any other cause or convenience requires it), this proceeding is hereby adjourned to the day of for further consideration.

6. (Amount of compensation, if any, allowed to attorney or other agent.)

7. (Any further or different material matters that conform to the facts.)

Section 41. *Application for Judgment on Award.* Either party to any controversy before the Board, when an interim or final award is rendered and the payment thereof has been refused, may present a certified copy thereof to the District Court of the county, and upon five days' notice in writing to the other party apply for judgment thereon.

Section 42. *Judgment on Award.* The District Court shall thereupon render a judgment in accordance therewith, unless such award is vacated as herein provided. Such judgment shall have the same effect as though duly rendered in an action tried and determined by said court, and shall with like effect be entered and docketed; but no exe-

cution shall be issued thereon for more than is then due, and the judgment shall not be a lien on realty except for due payments.

Section 43. *Vacating the Award.* Any party aggrieved by any award may, within twenty days after the filing thereof and before judgment thereon, apply to the District Court of the county, upon five days' notice to the other party, for an order vacating such award and granting a new hearing; but such order may be made only on a showing of fraud or gross error of the arbitrators or of want of jurisdiction; and then, if the application is granted, the claim shall be recommitted for arbitration.

7. Insurance.

(For Section 44, see Conference Proceedings, p. 192.)

Section 44. *Insurance Authorized.* An employer who is responsible for compensation as provided in this Code may, for the purpose of meeting payments, place the industrial risk in insurance by any method or methods, otherwise lawful, which may by him be selected. But such methods of insurance shall in every case be subject to the following conditions respectively applicable.

(For Section 45, see Committee Note 45.)

Section 45. *Insurance by Corporation for Profit or by Mutual Association.* If the employer is insured by any person or private corporation doing an insurance business for profit or by any association or corporation formed of employers or employees, or by employers and employees to insure each other and operating by the mutual assessment of losses or otherwise, then

Par. *a.* In so far as policies are issued on such risks, they shall provide a schedule of compensation for injuries identical with the schedule set forth in Sections 4 to 13 of this Code or a schedule duly approved pursuant to law as including the substantial equivalent to that of this Code.

Par. *b.* It must contain a clause to the effect that notice and knowledge of the accident on the part of the employer shall be deemed notice and knowledge on the part of the insurer; that jurisdiction of the employer for arbitration and other purposes shall be jurisdiction of the insurer; and that the insurer shall in all things be bound by, and subject to, the awards rendered against such employer upon the risk so insured.

Par. *c.* It must provide that the employee shall have an equitable lien upon any amount which shall become owing on account of such policy to the employer from the insurer, which amount, in case of the legal incapacity of the employer to receive the said amount and pay it over to the employee or dependants, will be by the said insurer paid direct to said employee or dependants, thereby discharging all of the obligations

under the policy to the employer and all of the obligations of the employer and the insurer to the employee.

Par. *d.* The company must have and maintain sufficient reserve within this State or subject to the risks therein to discharge all the risks so insured by it, and secure all the payments as they become due.

(For Section 46, see Committee Note 46.)

Section 46. *Self-insurance.* If the employer is insured by means of self-insurance, that is, by an account representing a part of his own assets and carrying the risk or a specific part of it on a plan for periodical sums paid or credited into the account, or by a fund granted or set aside separately by him in trust for the purpose, then:—

Par. *a.* The compensation schedule of such insurance accountor fund may, in all payments, be substituted for the schedule described in this Code, provided it is duly approved pursuant to law as substantially equivalent to that of this Code in the benefits thereby secured to the employee.

Par. *b.* The fact that the employees, under such a plan, contribute to the account or fund either with or without other or greater benefits or risks, such as sickness, other accidents, old age, or death, shall not prevent the plan from being deemed a substantial equivalent, provided the employees in the other features of the plan receive a proportionate increase of benefit and are represented in the management of the account or fund.

Par. *c.* The schedule so substituted shall be filed and posted in a principal workshop of the employer.

Par. *d.* The account or fund so credited shall be subject to an equitable lien, and, in case of insolvency, to a preference claim similar to that given by law to unpaid wages of labor, to the amount of any compensation claims accrued and unpaid.

(For Section 47, see Committee Note 47 and Conference Proceedings, pp. 177, 192.)

Section 47. *Transfer of Liability to Insurer.* If the employer desires both to place the risk in insurance and to transfer to the insurer the primary liability of making payments to the employee, he may do so in any of the following modes:—

Par. *a.* He may cause it to be insured by any *private insurance incorporation* duly authorized by the State to insure the risks under this Code.

Par. *b.* He may cause it to be insured by any *corporation in the nature of a mutual association of employers* duly authorized by the State to insure the risks under this code.

Par. *c.* He may cause it to be insured by any *corporation in the nature*

of a mutual association of employees duly authorized by the State to insure the risks under this code.

Par. *d.* He may cause it to be insured by any *corporation in the nature of a mutual association of employers and employees* duly authorized by the State to insure risks under this code.

In such case the responsibility and duty to make compensation shall be subject to the conditions of the following sections:—

(For Section 48, see Committee Note 48.)

Section 48. *Same: Compensation Schedule.* Such insuring corporation, association, or fund, hereinafter termed the insurer, shall provide a schedule of compensation for injuries identical with the schedule set forth in Sections 4–13 of this Code, or a schedule duly approved pursuant to law as including the substantial equivalent to that of this Code in the benefits thereby secured to the employee, and shall keep and maintain sufficient reserve to be able to discharge all the risks so insured by it, and secure all the payments as they accrue.

Section 49. *Same: Contract Recorded.* Such insurance of the liability shall be made by a writing, executed by the employer and the insurer, acknowledged in the manner provided for deeds of realty, countersigned by the Insurance Commissioner, and filed in his office. The insurer shall therein expressly assume the liability to make to the employee or other beneficiaries all payments that may become due under this Code to such classes of employees and their beneficiaries as may be therein described, and the employer shall expressly assume to pay the premiums of insurance as agreed upon.

A copy shall also be posted in a principal workshop of the employer.

Section 50. *Same: Effect of Contract.* Upon the execution, filing, and approval of such writing, the employer's primary liability under this chapter shall be deemed to be suspended as to him, and to be transferred to the insurer, to the following extent:—

Par. *a.* The insurer shall be the party primarily liable in law to the employee for all payments that may become due under this chapter.

Par. *b.* The employee's notice of injury may be served upon the employer as agent for the insurer; and any employer failing to transmit to the insurer a copy thereof shall remain liable for compensation to the employee so giving notice. But the insurer shall be served with all notices, orders, and other documents required by this Code to be served by the Board of Arbitration upon the employer.

Par. *c.* The insurer's property shall be subject to the same preference claim described in Section 21 of this Code, but the preference claim on the employer's property shall also remain as provided in the said Section 21.

Par. *d.* The insurer shall be the party competent to give and receive all receipts and releases and to do all other acts necessary or proper to

settle claims arising under this Code. But copies of such documents must on demand be furnished the employer.

Par. *e*. The insurer shall have a preference claim on the employer's property for all sums due as premium under the contract of insurance.

Par. *f*. In the case of the failure of any insurer, by reason of lack of assets, to make any payment adjudicated to be due under this Code, the employer's liability to make the payments to the employee shall revive, and be in full force as if it had not been suspended and transferred. The employer shall thereafter be the party respondent for all purposes of notices, payments, orders, and other acts in all claims of compensation for injuries incurred after the insurer's failure to make payment. The court shall order an equitable adjustment of the assets of the insurer for the discharge of claims accrued before said failure to make payment.

Par. *g*. The insurer's property shall be subject to the same preference claim described in Section 21 of this Code, but the preference claim on the employer's property shall also remain as provided in the said Section 21.

8. Third Persons' Rights and Liabilities.

Section 51. *Independent Contractors.*

Par. *a*. If the injury to the employee was received on or in or about the premises on which a person has undertaken to execute work, and if such person has as principal made a contract with an independent contractor or sub-contractor, whom he has not required to fully insure the risks created by this Code, to do part of such principal's work, and if such employee was a person employed by any such independent contractor or by any sub-contractor in any series of further sub-contracts covering any part of work comprised in such independent contractor's contract with the principal, then the employee shall, for the purpose of this Code, be deemed to be an employee of such principal. Such principal shall be liable to pay to any employee employed in the execution of the work any compensation under this Code which he would have been liable to pay if that employee had been immediately employed by him.

Par. *b*. Where compensation is claimed from or proceedings taken against the principal hereunder, then in the application of this Code references to the principal employer shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the wage of the employee under the contractor by whom he is immediately employed.

Section 52. *Indemnity to Principal.* When such principal employer is liable to pay such compensation, he shall be entitled to be indemnified

by any person who would have been liable to pay compensation or damages to the employee independently of this and the preceding section.

Section 53. *Employee's Right Preserved.* Nothing in the next two preceding sections shall be construed as preventing an employee from recovering compensation under this Code from the contractor or subcontractor instead of the principal employer.

9. Words and Phrases Defined.

Section 54. *Words and Phrases.*

Par. *a.* The term "employer," as used herein, shall include every person actually employing another to perform a service such as comes within this Code; and shall mean any person or corporation, or copartnership, or association, or group of persons, associations, or corporations, and their successors or legal representatives after death, and shall include State, County, Village, Town, City, School District, and other public employers.

Par. *b.* The term "employees" shall include all persons employed to work in a dangerous employment.

Par. *c.* The term "dependant" shall mean a person receiving and using for necessary support a part of the employee's wage or of the proceeds obtained by the employee with such wage.

10. Time of Code's Taking Effect.

Section 55. *Intervening Period.* Until this Code shall take effect, no right of any employee or dependant to recover against the employer or any other person for injuries shall be in any way affected hereby; and the Code shall not apply to injuries incurred before that date.

Section 56. *Time of taking Effect.* This code shall take effect on the first day of , 19 .

CONFERENCE UNIFORM DRAFT OF AN EMPLOYEES' COMPENSATION CODE.

(*Form* 2: *Making Compensation System Elective.*)

CONTENTS.

PREAMBLE.

(Same Preamble as in Form 1.)

NOW, THEREFORE, BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF that:—

CHAPTER I.

RIGHTS AND REMEDIES DECLARED, GRANTED, AND CODIFIED.

(For Section 1, see Committee Note 1, Form 2.)

Section 1. *Rights and Remedies Codified.* An employee, for an injury incurred in the course of his employment, shall be entitled to compensation or damages as provided in this Code, and not otherwise.

(For Section 2, see Committee Note 1, Form 2.)

Section 2. *Right to Compensation Granted.* He shall have a right to compensation in such amount, on such conditions, and by such remedy as is now granted and provided in Chapter II. of this Code.

(For Section 3, see Committee Note 1, Form 2, and Conference Proceedings, pp. 210, 234, 269.)

Section 3. *Right to Damages Confirmed and Amended.* He shall have and maintain the same right to damages as he now has (*a*) by the rules of common law now in force and (*b*) by any statutory rule now in force: provided (1) that no claim of any employee hereafter arising and maintainable under this right shall be subject to be defeated on the ground (*a*) that the employee's injury was caused in any respect by a fellow-servant's act or omission or (*b*) that the employee assumed the risks inherent in the employment or those arising from the failure of the employer to provide safe premises and suitable appliances; which said two grounds of defence as hitherto existing are hereby abolished; and provided (2) that in any claim arising out of the death of an employee the amount recovered shall not exceed three thousand dollars; and provided (3) that no contract of an attorney-at-law for any contingent interest in any recovery, under this right, shall be a lien on the employee's claim, cause of action, or judgment, except only in such amount and on such terms as the trial court shall on motion and showing order.

(For Section 4, see Committee Note 4, Form 2, and Conference Proceedings, pp. 210, 234, 277.)

Section 4. *Employee's Election.*

Par. *a.* The employee shall not be entitled to hold and exercise both of the foregoing rights named in Section 2 and Section 3, but must elect which right he will exercise.

Par. *b.* Such election may be in writing, signed by the employee, and delivered to the employer upon entering the employment or at any time thereafter and before injury.

Par. *c.* A failure to make such election in writing shall be conclusively deemed an election to abandon his right under Section 3.

(For Section 5, see Committee Note 5, Form 2, and Conference Proceedings, pp. 210, 234, 277.)

Section 5. *Employer's Election.*

Par. *a.* The employer shall not be subject to liability under both of the rights accorded to the employee named in Section 2 and Section 3 above, and may elect, at any time before injury occurred, which liability he will be subjected to.

Par. *b.* If the employee makes election in writing to maintain his right under either Section 2 or Section 3 above, the employer may, by himself or his agent, make election by countersigning such writing.

Par. *c.* If the employee fails to make such election in writing, the employer may notify his election by notice posted in the place of em-

ployment or printed or written on a paper delivered to the employee, or otherwise as shall be found sufficient by the court.

Par. *d.* A failure to countersign or to notify, as above provided, shall be conclusively deemed an acceptance of his liability to the employee's right named in Section 2, if the employee has so elected.

(For Section 6, see Committee Note 6, Form 2.)

Section 6. *Injuries before Election Rejected.* In case an injury occurs after one of the parties has signified his election to come under Section 3 above, but before the other party has had opportunity to reject the same, the provisions of Section 2 shall apply.

(For Section 7, see Committee Note 7, Form 2.)

Section 7. *Interim Rights not Affected.* Until this law shall be in effect, no right of any employee to recover against the employer or other person for injuries shall be in any way affected; and this law shall not apply to injuries incurred before that date.

(For Section 8, see Committee Note 8, Form 2.)

Section 8. *Employee's Representatives.* The term "employee," as used in Sections 1, 2, 3, and 7, above, includes his legal representatives and next of kin after death, in so far as they may have or receive any right to damages or compensation arising out of the employee's death.

Chapter II.

COMPENSATION SYSTEM.

Sections 1–53.

(This Chapter II. incorporates identically the provisions of the other Draft entitled "Form 1," making Compensation System Mandatory.

The section numbers remain the same, being separate series for each of the two chapters.)

NOTES. FORM 1.

"EMPLOYEES' COMPENSATION CODE."

NOTE ON TITLE.

The term "Code" is used to mean "system of law," to avoid the constitutional objections frequently urged in States, that the "title" is insufficient, and covers more than one subject.

In *Johnson* v. *Harrison*, 47 Minn. 575, the court sustained the Probate Code against such objections, using this definition:—

> "The word 'Code' as now generally used, and as obviously used in this title, means 'a system of law,' . . . 'a systematic and complete body of law.'"

In a valuable decision with many illustrations of what may be done in the general language of a *code*, the Supreme Court of Georgia, in *Central of Georgia Ry. Co.* v. *State*, 31 S. E. 531, 104 Ga. 831, 42 L. R. A. 518, said:—

> "There is quite a difference between a code of laws for a state and a compilation in revised form of its statutes. The code is broader in its scope, and more comprehensive in its purposes. Its general object is to embody as near as practicable all the law of a state, from whatever source derived. When properly adopted by the lawmaking power of a state, it has the same effect as one general act of the legislature containing all the provisions embraced in the volume that is thus adopted. It is more than evidentiary of the law. It is the law itself."

NOTES ON PREAMBLE.

(*a*) Like the preamble to the Federal Constitution (8 Fed. Stat. An. 84), this preamble originated with the committee of draft. It had been pointed out in the Conference that the court may not examine the debates before the Legislature or before Congress, to ascertain the meaning of plain provisions, or the necessity for the legislation.

U. S. v. *U. P. Ry. Co.*, 91 U. S. p. 72.

In the above case it is said:—

> "In construing an Act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The Act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts may, with propriety, in construing a statute, recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."

(*b*) It was further suggested that the reports of commissions, formal applications and arguments of other interested persons and bodies, and the common knowledge of the subject showing the necessity of the law are proper

subjects for the court to examine to ascertain whether the conditions warranted the legislation under the police power.

This was done:—

(1) To show the necessity for regulating grain commission merchants in Minnesota.

State ex rel. Beek v. *Wagener*, 77 Minn. 483–496.

(2) To determine the notice for legislation in Kansas, intended to regulate the oil business.

State ex rel. Coleman, Atty.-Gen. v. *Kelly*, 70 L. R. A. 450.

(3) To determine the necessity for the Contract Labor Law, in the *U. S. Church of Holy Trinity* v. *U. S.*, 143 U. S. 457.

(4) To show the great dangers to employees prompting the Safety Appliance Act to prevent injuries to workmen.

Johnson v. *So. Pac. Ry. Co.*, 196 U. S. 1.

(*c*) It is evident from cases cited under one of the sections below that it is for the legislature, first, to determine that legislation of this sort is necessary to protect the general welfare: if that determination be based upon reasonable necessity as distinguished from arbitrary action, the courts must uphold the power.

(*d*) Preambles are not without precedent in the States.

Chapter 37, Gen. Laws of Minn. 1902.

(*e*) The object of this preamble is to express some of the necessities for and the deliberation upon, this legislation. It is not meant to enlarge the powers or restrict the limitations of the Code.

See *Jacobson* v. *Massachusetts*, 197 U. S. 22.

In the above case the defendant had been arrested for refusing to be vaccinated pursuant to a small-pox regulation in the city of Cambridge based on a law of Massachusetts. Among other things the court held:—

1. That resort to the preamble of the Federal Constitution could not be had to vitiate the State statute.

2. That a State Legislature in enacting a statute for police protection had a right to choose the medical theory which was most prevalent and in accord with common belief as to vaccination, and was not compelled to commit a matter involving public health and safety to the final decision of a court or jury.

3. With respect to the preamble it said:—

> "Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments."

This preamble can, and ought to be, used by the courts as indicating the actual necessities, general purposes, and careful preparation for this legislation.

NOTES ON SECTION 1.

Rights and Remedies Granted and Amended.

It is within the power of the State Legislature to modify, declare, or repeal the common law. Every legislative act touching the common law has tended to one of these results.

(*a*) As illustrating what has been done between employers and employees with respect to personal injuries in the use of this power, see the following cases:—

Snead v. *Central of Georgia R. Co.*, 151 Fed. 608.
Howard v. *Ill. Cent. Ry. Co.*, 207 U. S. 461.

These two cases relate to the Federal act declared void because it covered "intra-state" as well as "inter-state" commerce.

Holden v. *Hardy*, 169 U. S. 366.
Smith v. *Alabama*, 124 U. S. 465.
Martin v. *Pittsburg, etc., R. Co.*, 203 U. S. 284.

In the last case the court had under consideration the statute of Pennsylvania limiting the recovery of damages by other persons from railroads to the same rights which employees had. It was claimed that this repealed much of the common law, took away vested rights, and was consequently invalid, but the court said,—

> "Such a contention in reason must rest upon the proposition that the State of Pennsylvania was without power to legislate on the subject,—a proposition which we have adversely disposed of."

In the Smith case, *supra*, the court recognized the same principle in another rule, which as to this subject is general:—

> "There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes."

In *Holden* v. *Hardy*, 169 U. S. 366, the court, after discussing stock objections on constitutional questions and referring to the historical fact that the common law system has been and must ever continue to be one of growth, that the Constitution of the United States must be interpreted with that in view, said,—

> "It is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and particularly, to the new relations between employers and employees, as they arise."

The Supreme Court of the United States having disposed of the opposition to the theory that the common law cannot be repealed, the States having always acted on the theory that it can be modified or repealed in any particular respect, and the Supreme Court being committed to the well known doctrine that as to this subject the Federal Government has no common law, but administers the common law of the particular State, there is no doubt of the power to repeal such law.

(*b*) It needs no argument to show that the Legislature may repeal or modify any statute or any set of statutes within the State. An illustration of how States have by general enactments imposed, created, and may create, repeal, or modify, many laws under the title of "Code," may be found from the cases cited under "title," *supra*, and particularly in that from Georgia.

(*c*) The common law and statutes of the several States need no repeal for subjects outside of employer and employee. The Code, as here drawn, is intended to furnish the exclusive rule governing this class of cases, and by implication repeals any other law on the subject. To accomplish this form of repeal, however, there must be, and we think there is, unmistakable intent to make the act a substitute for the old law and to make it contain all the law on this subject. This is sufficient to operate as a repeal.

District of Columbia v. *Hutton*, 143 U. S. 27.
Brownell v. *Holmes*, 165 Mass. 169, 42 N. E. 553.
Nickel v. *City of St. Paul*, 80 Minn. 415.

Cases cited Vol. 26 Am. & Eng. Encyc. Law (2d ed.), 731–732.

(*d*) The repeal and grant being applicable to all classes of employment where injuries occur, directly in proportion to the accidents that do occur are within the police power and reasonable as to classification.

Holden v. *Hardy*, supra.
Louisville & Nashville R. Co. v. *Melton*, 218 U. S. (decision May 31, 1910).

This section is also intended to be broad enough to dispose of liabilities of a civil nature as between employer and employee for actions based upon violations of penal statutes now or hereafter in force. In short, it is the object to make this the exclusive remedy of a civil nature for personal injuries received that come within the provisions of this act, so far as the rights of the employee are concerned; but this would not prevent the employer from having a right of action against a third party who had caused him a legal wrong.

(*e*) As the common law rights and remedies are repealed, there ought not to remain common law defences to Code proceedings. We think this would be clear, but, as we have added to this section for certainty, we clear the defences in Section 3. Personal injury self-inflicted is made an affirmative defence.

NOTES ON SECTION 2.

Dangerous Employment Defined.

(*a*) The question of whether an employment is dangerous to the extent that it needs control under the police power is first for the Legislature.

In the case of *Mayor, Alderman, et al. of New York* v. *Miln*, 11 Peters, 102, L. Ed. 660–662–664, there is an elaborate opinion on the police power. In February, 1824, the Legislature of New York passed an act providing that the master of every vessel arriving in New York from a foreign port or from a port of any of the States other than New York was required under certain penalties within a certain time to report in writing, containing the names, ages, and last local settlement of every person who should have been on board

the vessel during the voyage, and that, if any of the passengers should have gone on board any other vessel and landed at any other place with a view to proceed to New York, the same should be stated in the report. The corporation of the city of New York instituted an action under this law for debt against the master of the ship "Emily" to recover the penalties imposed by this act, etc. The defendant demurred to the declaration, and the judges of the Circuit Court, being divided in opinion as to whether or not this act regulated trade and commerce between New York and foreign ports and was therefore unconstitutional and void, certified the case to the Supreme Court of the United States. The Supreme Court reached the conclusion that it was not a regulation of commerce, but of police.

With respect to the difficulties of defining the police power the court continues:—

> "We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive."

In *Holden* v. *Hardy*, 169 U. S. 366, the court said:—

> "We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employees, and there are reasonable grounds for believing that such determination is supported by the facts. The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class."

In speaking of the fact that progress may be made under our Constitution in the change of laws as well as conditions, it said,—

> "Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that, from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and particularly, to the new relation between employers and employees, as they arise."

As to the basis for legislative action within the police power, it said,—

> "These employments when too long pursued the legislature has judged be detrimental to the health of the employees, and so long as there are

reasonable grounds for believing that this is so, its decisions upon this subject cannot be reviewed by the federal courts."

Lochner v. *New York*, 198 U. S. 45, although holding the particular statute as to the regulation of employer and employee void because that employment was not dangerous, admits the rule to be as follows:—

> "If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the 14th Amendment. . . .
>
> This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state, it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? and that question must be answered by the court."

In *Muller* v. *Oregon*, 208 U. S. 412, in sustaining a law of Oregon limiting hours of labor for women as being within the police power, it is said:—

> "The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a wide-spread belief that woman's physical structure, and the function she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a wide-spread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of a general knowledge.
>
> It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the 14th Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the 14th Amendment, restrict in many respects the individual's power of contract."

And in *Knox* v. *Lee*, 12 Wallace, 457, in speaking again for that great court as to the Legal Tender Cases, Mr. Justice Strong said,—

> "It is not to be denied that acts may be adapted to the exercise of lawful power and appropriate to it in seasons of exigency which would be inappropriate at other times."

(*b*) In legislating against the dangers of an employment and allowing recovery for injuries on account thereof, fault is not necessarily the basis of the liability when the legislature provides otherwise.

See Freund, Police Power, Sec. 634.

Atchison, etc., Ry. Co. v. *Matthews*, 174 U. S. 96.

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

Jones v. *Brim*, 165 U. S. 180.

Article by John H. Wigmore, entitled "Responsibility for Tortious Acts," *Harvard Law Review*, VII.

Persault v. *O'Reilly*, 74 N. Y.

In the Zernecke case the Supreme Court said:—

> "Our jurisprudence affords examples of legal liability without fault, and the deprivation 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 torts of the wife—the liability of a master for the acts of his servants."

In *McLean* v. *Denver & Rio Grande R. Co.*, 203 U. S. 39, with respect to certain fees fixed by the Legislature, the court said:—

> "The exercise of the police power may and should have reference to the peculiar situation and needs of the community. . . . . The law being otherwise valid, the amount of inspection fee is not a judicial question; it rests with the legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law."

In *State* v. *Smith*, 58 Minn. 35, it is said,—

> "It has never been questioned that the police power of the state extends to regulating the use of dangerous machinery, with a view to protecting, not only others, but those who are employed to use it."

For fuller discussion see article by H. V. Mercer, report of Atlantic City Conference, pages 54 to 216.

(*c*) It is not necessary that the police power be confined to public or *quasi*-public institutions or persons. For relations otherwise private may become public under public necessity if the Legislature decides that the public needs protection.

State v. *Wagener*, 77 Minn. 483.
Harbison v. *Knoxville Iron Co.*, 183 U. S. 13.

In the former of these cases it was held that a State had the power to control commission merchants engaged in buying and selling grain because public protection necessitated it. In the Harbison case it was held that a statute of Tennessee requiring lumber companies to redeem, at reasonable times, merchandise time checks paid for services to their men, was justified in the interests of public safety and within the police power. This power must be exercised in the ordinary way, and not by putting the State into business with a hope of regulating by competition.

Rippe v. *Becker*, 56 Minn. 100.

(*d*) Whether this definition be construed only as such or as a classification, it is the only one of practical use, because:—

1. It classifies all employments as dangerous directly and exactly on their injury basis.

2. It covers all employments and employees upon the basis of actual as distinguished from supposed dangers.

3. It tends to prevent hazards in all employments and gives all warning to protect themselves.

4. It classifies risks in accordance with the good or bad showing of the particular employment as well as that general industry.

(*e*) It is the safest because there can be no question of constitutional inequality in either the classification of the employees of a particular industry or between different industries.

C., M. & St. P. Ry. Co. v. *Wesbey*, 178 Fed. 619, 8 C. C. A.
Louisville & Nashville R. Co. v. *Melton*, U. S. Sup. Co-op. Adv. Sheets, July 1, 1910, p. 626 (218 U. S.).

(*f*) "Arising in and growing out of the course of employment" comes from the British act and has received much judicial comment. The injuries may arise *in* the course of employment and not grow *out* of such employment, as illustrated by an English decision in a case where a boy was hurt, while at work in his employment, by a piece of iron thrown by another boy not connected with the employment. Another case where the accident was caused by a fellow-workman while they were engaged in "horse-play" was also held not to "arise out of" the course of employment. (See Knowles, Workmen Comp., pp. 16–20.) It does not arise *in* the course of employment either before the employment has commenced or after it has terminated. *Id.*

NOTES ON SECTION 3.

Inequality of Employer and Emmloyee.

(*a*) The courts recognize that in dangerous employment the employer and the employee do not stand upon equality as to their right to contract. That is one of the fundamental grounds of interference in such matters as this.

In the case of *Harbison* v. *Knoxville Iron Co.*, 53 S. W. 955, the Supreme Court of Tennessee said:—

> "The Legislature, as it thought, found the employee at a disadvantage in this respect, and by this enactment undertook to place him and the employer more nearly upon an equality. This alone commends the act, and entitled it to a place on the statute book as a valid police regulation."

The Supreme Court of the United States approved this opinion in *Knoxville* v. *Harbison*, 183 U. S. 13.

In respect to the length of hours dangerous labor may be required, it was said by the Supreme Court of the United States in *Holden* v. *Hardy*, 169 U. S. 366,—

> "The Legislature has also recognized the fact, which the experience of Legislatures in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, but that their interests are, to a certain extent, conflicting."

Then in the case of *Narramore* v. *Cleveland, etc., Ry. Co.*, 96 Fed. 298, a case involving the rights of railway employees to have switches blocked, while Judge Taft was sitting on the Circuit Court of Appeals, he used this language:

> "The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it

would entirely defeat this purpose thus to permit the servant 'to contract the master out' of the statute."

An employee cannot successfully say to a railway president, "Run your business carefully or I will quit."

THE RIGHT TO SUE AND THE FINALITY OF AMOUNT MAY BE CONDITIONAL AS PROVIDED IN THIS SECTION.

(*b*) There is no more discrimination between the rights of the employer and the employee in this matter than the situation demands, according to the rule above stated. In all actions the party that is aggrieved has the burden of bringing and substantiating his action. In cases where a right is given absolutely, the remedy follows in the courts as a matter of law; but in cases where the right is settled with, or conditioned upon, the remedy in such way as to show that the right would not be given if it were not for the remedy, the courts uphold it as a valid condition to compel parties to submit their claims to arbitration or to agree that arbitration shall be a condition precedent to a cause of action. An arbitration clause is contained in the Minnesota Standard Fire Policy, as in many others, and has been upheld by the courts. The police power allows it, even as a condition to bringing suit in a regular court. But a law leaving the general question of liability to be determined and simply providing a reasonable method of estimating and ascertaining the amount of the loss as a condition of the liability is unquestionably valid.

Schuffer v. *Rockford Insurance Co.*, 77 Minn. 291.
Viney v. *Bignold*, L. R. 20 Q. B. D. 172.
Collins v. *Locke*, 4 App. Cas. 674.
Scott v. *Avery*, 5 H. L. Cas. 811.
Pres't, etc., D. & H. Canal Co. v. *Pa. Coal Co.*, 50 N. Y. 250.
Wolff v. *Liverpool L. & G. Ins. Co.*, 50 N. J. L. 453.
Hall v. *Norwalk Fire Ins. Co.*, 57 Conn. 105.
Reed v. *Washington Ins. Co.*, 138 Mass. 572.
Hamilton v. *The Liverpool & London & Globe Ins. Co.*, 136 U. S. 242, 34 L. Ed. 419.

In the Wolff case, *supra*, it is said:—

"It is clear, beyond all possibility of controversy, that the agreement between the assured and the company, that if they could not agree on the amount of the loss, that the sum recoverable should, if an arbitration were requested, be the amount found by the award. Such an agreement is both legal and reasonable, and it is not perceived that any authority exists which holds a contrary doctrine."

In *Reed* v. *Washington Ins. Co.*, 138 Mass. 572, the court said,—

"There is no doubt that an appraisal of value, or an award of the amount of damages, can be made a condition precedent to a right of action."

The Supreme Court of the United States in the Hamilton case, *supra*, said,—

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and

simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country."

EVEN FIRE INSURANCE COMES WITHIN POLICE POWER.

(*c*) The State may control the sort of contracts that are made for fire insurance and, of course, may also control them for insurance of risks for men in dangerous employment, under the police power.

Wild Rice L. Co. v. *Royal Ins. Co.*, 99 Minn. 190.
State v. *Beardsley*, 88 Minn. 20.
Schrepfer v. *Rockford Ins. Co.*, 77 Minn. 291.

In *State* v. *Smith*, 58 Minn. 35, the court said,—

"It has never been questioned that the police power of the state extends to regulating the use of dangerous machinery with a view to protecting, not only others, but those who are employed to use it."

In *Atchison, etc., Ry. Co.* v. *Matthews*, 174 U. S. 96, in upholding a Kansas fire statute under the police power, the court said,—

"But neither the amendment,—broad and comprehensive as it is,—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."

LIBERTY OF CONTRACT NOT ABSOLUTE IN DANGEROUS EMPLOYMENT.

(*d*) Liberty of contract is supposed to be a property right, as construed by the courts.

In *Adair* v. *U. S.*, 208 U. S. 161, Mr. Justice Harlan requotes from *Lochner* v. *New York*, 198 U. S. 45, as follows:—

"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution."

Later on the court says:—

"Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this Amendment, unless there are circumstances which exclude the right."

Adair v. *U. S.*, 208 U. S. 161.

In *Gray* v. *Building Trades Council*, 91 Minn. 171 (182), our court said,—

"A person's occupation or calling, by means of which he earns a livelihood and endeavors to better his condition, and to provide for and support himself and those dependent upon him, is property within the meaning of the law, and entitled to protection as such; and as conducted by the merchant, by the capitalist, by the contractor or laborer, is, aside from the goods, chattels, money, or effects employed and used in connection therewith, property in every sense of the word."

BUT THE LIBERTY OF EMPLOYER AND EMPLOYEE TO CONTRACT IS NOT ABSOLUTE WHEN APPLIED TO DANGEROUS EMPLOYMENT.

Holden v. *Hardy*, 169 U. S. 366.
Atchison, etc., Ry. Co. v. *Matthews*, 174 U. S. 96.
Johnson v. *Southern Pacific Ry. Co.*, 196 U. S. 1.
Knoxville Iron Co. v. *Harbison*, 183 U. S. 13.
Muller v. *Oregon*, 208 U. S. 412 (L. Ed. 551–555).
Chicago, R. I., etc., Ry. Co. v. *Zernecke*, 183 U. S. 582.

In *Holden* v. *Hardy*, 169 U. S. 366, the court said,—

"This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police power."

In *Atchison, etc., Ry. Co.* v. *Matthews*, 174 U. S. 96,—

"But neither the amendment, broad and comprehensive as it is,—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."

In *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, the court said,—

"But it is also true that, inasmuch as the right to contract is not absolute 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 limitations, extend over corporations outside of and regardless of the power to amend charters."

In *Lochner* v. *New York*, 198 U. S. 45, it said,—

"The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection."

Upon this theory the court made the holding in *Muller* v. *Oregon*, as follows:—

"Yet, it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the Fourteenth Amendment restrict in many respects the individual's power of contract."

ALL PROPERTY HELD SUBJECT TO POLICE POWER.

(*e*) The right of property is always held subject to the necessities of the general welfare and especially under our constitutional system based on the contract theory.

See *Holden v. Hardy*, supra.

Indeed in *Beer Company* v. *Massachusetts*, 97 U. S. 25, the court said:—

"If the public safety or the public morals required the discontinuance of any manufacture or traffic the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state."

INTERSTATE COMMERCE SUBJECT TO THIS POWER.

(*f*) To the extent that the general welfare needs protection within the State, it is at liberty to act even on interstate commerce, for the State's police power as to that was not delegated to Congress.

McLean v. *Denver & R. G. R.R. Co.*, 203 U. S. 38–47.
Mayor, Alderman, et al. of New York v. *Miln*, 11 Peters, 102.
Howard v. *Ill. Cent. R.R. Co.*, 207 U. S. 463.

THE STATE MAY REGULATE EMPLOYEES OF THE PUBLIC.

(*g*) Of course, these constitutional provisions do not prohibit the State from passing a law which would allow its own servants to collect from it.

Aitkin v. *Kansas*, 191 U. S. 206.

(*h*) Actual fault is not necessary to fix a basis of compensation. See authorities under Section 2, *supra*.

(*i*) The greatest two curses of the present jury system for this class of cases are the determination of:—

1. Fault or counter-fault.
2. Amount to be awarded, maintained, or defeated after expensive litigation.

This law places the duty, and, except for attempt to self-inflict injuries to obtain compensation, leaves no question of fault for trial. The compensation is based on disability and measured by wage scale,—more simple, certain, quick remedy than a jury could give.

(*j*) The suggestion has been made that in the insurance cases the provisions for award rest upon contract. The point is that under the police power the State may prescribe the form of contract and prohibit all others.

Wild Rice Lbr. Co. v. *Royal Ins. Co.*, 99 Minn. 190.

It is well settled, at least in some States, that because of the police power the State may require fire insurance companies to make prescribed forms of policies containing clauses for arbitration. It may prohibit any other contract than that so prescribed. This covers the principle.

We apply it to dangerous employments under the police power. There can be no doubt of the right of the State to employ the principle by requiring such contracts. The reason for requiring the contracts by fire insurance companies is the convenience of all. The reason for not requiring them in the case of employer and employee is, again, the convenience of all.

The formal execution so required gives no consent, except to do business under the law. So here the formal execution is unnecessary. The fact that business is done places them under the law and gives as much consent.

There are institutions that will be subject to this law which necessarily employ and discharge enough men daily to create enough expense in the formal execution of policy contracts to greatly burden the employer and seriously decrease the cost benefits to the employee. Without reason and against economy the burden should not be imposed. See

State v. *Beardsley*, 88 Minn. 20.
Scherpfer v. *Rockford Ins. Co.*, 77 Minn. 291.
Article by H. V. Mercer, Atlantic City Report, p. 195.

NOTES ON SECTIONS 4–6.

2. Amounts of Compensation Allowed.

(*a*) A waiting period long enough that the employee may feel its effects and the employer have opportunity to investigate has proven necessary in other countries to prevent malingering.

(*b*) Some have suggested that a constitutional danger might follow such attempt here. We do not consider the objection weighty, but it can easily be avoided by adopting this simple rule of allowing compensation, as here granted. It does not go to the injured for his own use, but is more liberal than a wage scale for this period could ordinarily be. Besides, it protects the employer, the employee, and the State by the quickest and best treatment.

(*c*) The blank in section (*b*) should be filled with the number of years of the compensation period as fixed by Section 7.

(*d*) It is to the employer's interest to provide good medical attendants.

NOTES ON SECTION 7.

Compensation on Death.

We do not feel that the Conference vote on this subject can be safely carried out on certain points. In effect, it was as follows:—

5. Amount and duration of compensation?

a. Temporary disability?

Fifty per cent. of the impairment of wages: maximum of $10 per week, minimum of $5 per week; or, if wages less than $5, then full wages; (or 66⅔ per cent. of wages up to $7.50 of wages per week, then 50 per cent. of balance until compensation amounts to the maximum of $10 per week). Payments not to extend beyond period of 300 weeks.

b. Permanent disability?

Same as temporary disability.

c. Partial permanent disability?

Fifty per cent. of impairment of wages. Maximum of $10 per week. Payments not to extend beyond period of 300 weeks.

d. Death?

(1) Total dependants.

If orphans, 50 per cent. of wages of deceased.

If widow alone, 25 per cent. of wages.

Ifwidow and one child, 40 per cent. of wages.

If widow and two children, 45 per cent. of wages.

If widow and three children, 50 per cent. of wages.

If widow and four children, 55 per cent. of wages.

If widow and five children or more, 60 per cent. of wages.

If widow, father or mother, 50 per cent. of wages.

Children under sixteen years of age only to be included and only during period they are under sixteen years of age.

Maximum of $10 per week, minimum of $5 per week, or, if full wages less than $5, their full wages; (or, 66⅔ per cent. of wages up to $7.50 of wages per week, then 50 per cent. of balance until compensation amounts to $10 per week, maximum). Payments not to extend beyond period of 300 weeks.

(2) Partial dependants?

Fifty per cent. of the portion of the wages contributed by the deceased to the partial dependants.

(1) In the first place we have inserted *no maximum for the weekly benefit* receivable. It involves an inequality of treatment, if the percentage of wages is to form the basis of compensation. One motion at the Conference, which received a majority vote, limited the maximum benefit to $10 per week, thus undertaking to follow some of the European laws. We have discarded this limitation for safety of the law. We see no reason why this is not the mere equitable as well as the safer method. Inheritance of a cause of action for injuries causing death is a matter of State grant. If granted or prohibited to some of this class, it ought to be to others. We place this provision upon the basis of the pecuniary value which the dependant had in the life of the deceased, and this is common in statutes allowing death by wrongful act. We have therefore named no limitation for the maximum, nor have we embodied the detailed inequalities of percentage based on the size of families. The omission of the maximum weekly benefit may make a *five-year* period desirable instead of a *six-year* period, as voted.

(2) The shortening of the period in some cases by the limit as to *maximum total amount* is also questionable as to equality. There is such a maximum in death cases now in most States, it is true, but there is a distinction made by some between limitations for death and for other claims.

The limit can be maintained under this law if uniform and fair, but there is danger in first declaring that the basis is a *percentage* of the wage and then placing a uniform *amount* as the limit. This would mean an arbitrary cutting off at a certain amount, and would only mean greater percentages in some cases than in others.

We can provide perfect equality by declaring that all may have an equal percentage of wages during disability, not to exceed an equal number of years. This is fair to the employee and not unfair to the employer. We therefore recommend that the final clause of par. *b*, fixing a maximum amount, be omitted.

(3) The Conference voted to exclude from the benefits of the system *alien dependants non-resident* in the United States. The members of the Committee are agreed that this is unsound both in principle and in policy. Under the above draft, alien dependants non-resident in the United States will receive their proportion.

NOTES ON SECTION 10.

Payment in Lump Sum.

Par. *a*. Payment in lump sum is not desired. It is only permitted in the interest of justice. It may be sometimes needed to wind up a business to protect a mortgage on a home or to meet some other emergency.

Par. *b*. There might be a case where property could be transferred to save sacrifice, and it would be equally good under the circumstances as the claim. Annuities might become desirable. This section, too, was intended to meet special conditions.

NOTES ON SECTION 11.

Wages Defined.

(*a*) Too much refinement of this definition would make it complex and more difficult than under the present system. If the wage is regular, this is simple.

(*b*) When the wage is not regular, the basis here prescribed is equitable to all and will enable a finding with a much more definite basis than we now have for damages in personal injury cases.

NOTES ON SECTION 12.

Conditions Varying Compensation.

Par. *a*. The matter of varying compensation so as to prevent employers from discriminating against those mentioned here has been a fundamental deficiency of the European laws. Some laws have undertaken to solve it by allowing such persons to contract themselves out of the law in order to get employment. This is unjust to them, for they of all persons need the system. Yet it is unjust to compel the employer to discriminate against them because of their increased dangers or to pay for injuries which but for such deficiencies would not create so much disability. These sub-sections are believed to be just and fair to all and calculated to prevent discrimination. A man who has reached his full life expectancy or a cripple would hereafter not be employed without the safeguard of some such clause.

Par. *b*. The apprentice system is more rarely used here than abroad, but this does not alter the fact that the young do receive injuries.

Par. *c*. A right may as well vest with as without conditions if the vesting is coupled with the conditions.

NOTES ON SECTIONS 13–15.

3. Mode of Claiming Compensation.

It is of the essence of self-protection against fraud and against the failure to give proper treatment in honest cases that reasonably prompt knowledge of the injury be had. The failure to get evidence quickly is important where the time and ability of service are such important factors. The want of medical attention in slight injuries often causes infection which an employer's foresight would prevent, but which an employee's indifference might make hazardous. This has been the experience in European systems. The separate paragraphs in Section 14 are believed to be in the interests of justice to all. We are unable to conceive a case under them where justice cannot be done as nearly as a system could hope to accomplish.

NOTES ON SECTIONS 16–19 *a*.

Mode of Claiming Compensation.

Probably no point in the European systems has been the subject of greater objections or more abuse than the doctor question.

Section 16. (*a*) The objection is there chronic with the employees that the employers' or insurers' physician sometimes abuses the privileges by urging a too quick ending of disability and by being prejudiced in their testimony. The employer and the insurer are equally emphatic that the employees' physicians more often abuse the privilege of claiming disability and giving evidence. These objections seem to be fairly well founded in some cases, but greatly exaggerated in others by both sides.

(*b*) The employer can hire the physician cheaper, and his financial motive is for good treatment. He is more likely to be in a position to get good physicians and quick treatment. The employee may prefer his own physician. Under this clause no great advantage can be taken. So long as the act is administered by human beings, there will be extreme cases on each side. Neither ought to be placed at great disadvantage on the physician's evidence.

Section 19. The Board and the parties should always have the testimony of a neutral physician, if needed, in the fair determination of the case. We hope this will secure the opportunity.

NOTES ON SECTIONS 20–22.

4. Legal Effect of Settlements.

Section 20. The prevention of overreaching settlements is the justification. They are sometimes made under the old system.

Section 21. The claim becomes fixed and determined, but is not collectible in advance. If a settlement be not made, it ought to have a preference over other general creditors for the same reasons as labor claims.

Section 22. The exemption is in accord with the object of exemptions and the spirit of this Code.

NOTES ON SECTIONS 23–43.

Board of Arbitration, Awards, etc.

Section 23.

a. See authorities under Preamble and Sections "I.," "II.," and "III."

b. See Standard Form Fire Policies of your State.

c. *This is a reasonable method of determining matters based upon new rights given since the constitution.*

See *Board of Co. Com.* v. *Morrison*, 22 Minn. 178.
Minor v. *Happersett*, 21 Wall. 162.
Article by H. V. Mercer, Atlantic City Conference Report.

d. Irrespective of this, it is a reasonable method of determining claims.

In the case of *State ex rel. Barber Asphalt Paving Co.* v. *District Court of St. Louis County*, 90 Minn. 457, Duluth had a charter provision allowing appeals

to be taken to the court in such cases by the tax-payer. The respective quotation will show the views taken by the court, 90 Minn. 461–464:—

> "We have no doubt that the provision of the charter requiring the presentation of all claims to the city council for adjustment and allowance was an appropriate subject for charter supervision, and from that it would seem to follow logically that it was also proper to continue the subject, and provide the manner in which the determination of the city council allowing or disallowing a claim might be removed to the district court for judicial investigation and determination; and we hold without further remark that it was within the power of the framers to embody in the charter the provisions under consideration.
>
> It is contended that the provisions of the charter are invalid, because they do not constitute due process of law. . . . The statute is a very serviceable one, and provides an orderly method of settling claims and demands against counties without the necessity of the formal commencement of an action in court; and the provision allowing the appeal at the instance of tax payers was intended as a safeguard, and to assist in the protection of a public fund
>
> Every person is entitled to a certain remedy in the law for the redress of all injuries or wrongs he may receive in his person, property, or character. But he is not entitled to any particular remedy. Due process of law means an orderly procedure adapted to the nature of the case, in which the citizen has an opportunity to be heard to defend, enforce, and protect his rights; and, where such opportunity is granted by law, the citizen cannot complain of the procedure to which he is required to conform. . . . In a case like that under consideration, where a claim is made against a city or county, the presentation of the claim to the administrative officers for their action is the initiation of proceedings to enforce its payment. By the presentation claimant adopts that method of enforcing his rights. He is bound to follow up his claim, and pursue the remedy pointed out by the charter or statutes for its enforcement, and is afforded ample opportunity for a complete investigation and hearing upon the merits of his claim. And, though notice of appeal is required to be served upon him, he is apprised by the law of the manner of taking such appeal; and, unless he wholly abandons his claim after its allowance by the city, he will have actual knowledge that it has been taken. This answers every purpose, and is 'due process of law.' . . .
>
> The administrative officers, the board of county commissioners, or the city council, in passing upon and allowing or disallowing the claims, act quasi judicially."

In speaking of a decision of the United States Land Department, in *Lampson* v. *Coffin*, 102 Minn. 493–500, our court said,—

> "That was the only tribunal qualified or with jurisdiction to determine the existence of the facts essential to the alleged right, and its conclusion therein precludes further inquiry by the court."

In *Murray* v. *Hoboken, etc., Co.*, 18 How. 280 (L. ed. 372), the Supreme Court also said,—

> "It is true, also, that even in a suit between private persons to try a question of private rights, the action of an executive power upon a matter committed to its determination by the constitutional laws is conclusive."

e. The authority for this may be found in the insurance cases following as well as the foregoing cases:—

Wild Rice L. Co. v. *Royal Ins. Co.*, 99 Minn. 190–193–195.
State v. *Beardsley*, 88 Minn. 20–25.

Schuffer v. *Rockford Ins. Co.*, 77 Minn. 291.
Viney v. *Bignold*, L. R. 20 Q. B. D. 172.
Collins v. *Locke*, 4 App. Cas. 674.
Scott v. *Avery*, 5 H. L. Cas. 811.
Pres't, etc., D. & H. Canal Co. v. *Pa. Coal Co.*, 50 N. Y. 250.
Wolff v. *Liverpool L. & G. Ins. Co.*, 50 N. J. L. 453.

f. We think the appointment of the arbitrators in this scheme something that should be left to the court because it is in aid of the work of the court and really a part of the judicial department; that the court should have the power to appoint and remove at will for the interests and good of the service. This, we think, is permissible.

In re Appointment of Reviser, 124 N. W. 670 (Wis.).
State ex rel. v. *Frill*, 100 Minn. 499.

g. The appointment and salaries are like the examiner and referee under the Torrens system in Minnesota. They are analogous to referees of one kind in the Minnesota statute.

The effect of the award is like that of common law arbitrators. Minnesota allows the Boards of Trade and Chambers of Commerce to have similar boards of award with like effect as to actions between members.

The entry of judgment may be as on a common law award.

Irrespective of all these things and of all conditions precedent, the right is coupled with a reasonable remedy to adjust the amount of the right and, if the injured prefers, to sue on that award after establishing the amount according to the Code that grants it, then he may sue in a regular court, but he gains nothing thereby, and consequently is deprived of nothing if he stays by the regular course.

h. The Federal Constitution does not control mere forms of procedure in, or regulate the practice of, the State courts.

In *Maxwell* v. *Dow*, 176 U. S. 581 (L. ed. 597), the court said:—

> "A state cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the state courts, affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings. . . .
>
> Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only determined whether it is in conflict with the supreme law of the land. . . . That is to say, with the constitution and laws of the United States made in pursuance thereof. . . or with any treaty made under the authority of the United States."

Maxwell v. *Dow*, 176 U. S. 581 (L. ed. 597).

In a recent case, in speaking of procedure, the court said:—

> "It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practised by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the 17th Century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment."

And:—

Twining v. *New Jersey*, 211 U. S. 78.

"'That (said Mr. Justice Matthews, in the same case, p. 529) would be to deny every quality of the law but its age, to render it incapable of progress or improvement.'"

Twining v. *New Jersey*, 211 U. S. 78.

The opinion then requotes from *Louisville & Nashville R.R. Co.* v. *Schmidt*, 177 U. S. 230 (L. ed.):—

"It is no longer open to contention that the due process of the law clause of the 14th Amendment to the constitution of the United States does not control mere forms of procedure in the state courts, or regulate practice therein."

Further on in the opinion it said:—

"Due process requires that the court which assumes to determine the rights of the parties shall have jurisdiction and that there shall be notice and opportunity for hearing given the parties . . . subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law."

NOTE ON SECTION 44.

Insurance Authorized.

The Conference debates show that the compensation system provided in this Code was regarded as essentially a system of industrial risk compensation on an insurance basis. Under this Code the employer will naturally insure even if he has not done so already. The Committee, therefore, were bound to recognize this in drafting suitable provisions. These provisions aim, in the first place, to check some of the current abuses growing out of the relations of the liability insurers in the hitherto existing practice in personal injury litigation, and, in the second place, to facilitate and encourage in every way the proper adjustment of insurance systems to the compensation provisions of this Code. The ensuing provisions make no further attempt to control the methods of insurance.

NOTE ON SECTION 45.

Insurers for Profit, etc.

Under the practice hitherto existing in personal injury litigation the insurer, for profit, and particularly his claim agents, are apt to take a purely mercenary attitude in their relation both to the injured employee and to the employer. The provisions of this section attempt to eliminate some of the most notable of these abuses by requiring the insurance policy to conform to the general purpose of this Code. The Code cannot be carried out to its best intent unless the employer is relieved from the pressure of an insurance contract inimical to the spirit of the Code.

NOTE ON SECTION 46.

Self-insurance.

Par. *a*. The committee felt it necessary to make draft provisions, which would make possible an easy and immediate adoption of the Code's compensation system by those enlightened employers who had already organized an industrial insurance system of their own. Representatives of such employments were among the members of the Conference, and were hearty advocates of the Code's compensation system. The example of such employers in coming quickly, under the Code, would be a valuable encouragement to others. Their existing systems should therefore be provided for as effectively as possible in this Code. The definition of their systems in the first sentence of Section 47 is believed by the Committee to be adequate for the purpose.

Par. *b*. The only alteration of the Code necessary or proper to enable such self-insurance systems to adjust themselves to it is in the compensation schedule. Par. *a* provides for this. The mode of making payments by private settlement can continue hitherto under the respective private systems, except, however, for lump-sum payments, under Section 20. That section will require these private systems to obtain the approval of the Board of Arbitration for all lump-sum settlements, and will therefore tend to compel instalment payments. The committee expressly desires to produce this consequence. The Conference was emphatic and unanimous in favoring the instalment payment in contrast to the lump sum. The private systems should be altered accordingly.

Par. *c*. These self-insurance systems commonly include a contribution by the employees. In such cases two features are needed. (1) A proportionate increase of benefits over the Code's schedule. The Conference debates, in which the plan of requiring employees to contribute was voted down by a large majority (Proceedings, pp. 145–174), showed that most who would, in theory, have favored such contribution would have favored a proportionate increase of the Code's compensation rates. The committee, therefore, included a provision to that effect. (2) Employee's representation. In the Conference debates it was generally recognized that one of the arguments in favor of the employees' contribution was that it would make the employees' representation in the management of the insurance system an appropriate feature of it, and that this feature would be valuable as tending to create a better understanding between all parties and to induce caution and conservatism by the employees' representatives in the administration of the benefits. In view of this the committee deemed it wise to include such in this section, such a provision for employees' representation. This feature is already found in some of the self-insurance systems.

NOTES ON SECTIONS 47–50.

Transfer of Liability to the Insurer.

The Conference having voted, nearly unanimously, that a system of compulsory State insurance would be a desirable mode of covering the industrial risk, the committee expected to insert a clause to carry out this vote. But, since the constitutional question is a serious one and since at present no such State insurance exists in this country (except in a partial form under the Montana Act of 1909), the majority of the committee preferred to leave clause for optional insertion only, so that it will be in no way an essential part of the section, and may remain a dead letter until such a system becomes an actuality in some State. In view of the Conference vote and of its striking significance the committee recommend that the clause be put forward as an educative feature.

By pars. *a–e* the transfer of liability to the insurer is permitted in all cases where the insurer is private insurer for profit or a mutual association of an employer's or a trust fund. It thus includes the insurer who is a corporation doing business for profit. This is perhaps questionable, because the Conference recognized fully in its debates the personal and human interest which the employer takes in the employee's efficiency and welfare, over and above his mere liability to pay compensation, and recognized, on the contrary, the purely commercial motives, which are apt to dominate the ordinary insurance company and especially its claim agents. To place these claim agents in direct touch with the injured employee, by permitting such a company to assume primary liability, would tend to perpetuate the mercenary and unscrupulous methods now in vogue in many places and to defeat the purposes of the act. The majority of the committee, however, decided to include such corporations in this section. The mutual insurance associations of employers, however, are not likely to exhibit those abuses in their practice, nor, of course, in the trust fund of the employer himself.

The general purpose of this and the ensuing three sections is to relieve the administration of the system from the necessity of having three parties throughout every proceeding, which would virtually be the case if the insurer were liable, directly, to the employer only, and the employer to the employee. Such complication seems an unnecessary burden. These provisions will tend to encourage the employer to develop his insurance system. Moreover, a specific additional purpose is to encourage employers to develop the system of mutual trades insurance, as in Germany and in New England in the Mill Mutual Association. Since the industrial risk will vary widely with the different industries, the trades-insurance mutuals form the most scientific, practical, and economical method of distributing the risk of a particular industry. This bill will help to develop those associations.

NOTES. FORM 2. (ELECTIVE FORM.)

NOTE ON SECTION 1.

Rights and Remedies Codified.

A disadvantage experienced under the original English acts was the difficulty and confusion caused by a new statute, which merely amended a few rules and left to the courts to announce after a long interval the precise relations of the new law to the old law. To avoid this disadvantage as far as possible, the committee adopted the plan of restating at the outset of this statute the entire legal situation. This statute confirms and amends existing rights and adds new rights, but the complete view of its effect may be got by perusing the first few sections and observing what existing rights are confirmed by reference. The first section declares therefore that the whole legal situation is hereafter to be ascertainable from the ensuing sections of the Code.

NOTE ON SECTION 2.

Right of Compensation Granted.

The first care of the statute should be to grant the new right of compensation. It is a new right, because it is based on the principle of industrial risk, and not on that of tortious fault, and it is a grant because it is something given by the Legislature, additionally, to existing rights. This grant is named first in order to emphasize that it exists and is vested in the employee, along with his other existing rights, before he is called upon to make any election. In other words, he is not offered one thing after he has given up another thing, but is given something positively and absolutely; and only after he is in possession of the new thing need he elect which one he will keep. This is important from the constitutional point of view.

NOTE ON SECTION 3.

Right of Damages Confirmed and Amended.

After granting the employee the new right, the Legislature expressly confirms his hitherto existing rights. He is now in possession of both. But at the same time the hitherto existing rights are amended. These amendments carry out the votes of the Conference. After debating the constitutional questions, the Conference voted that the committee, in preparing an elective statute, should, nevertheless, so amend the common law damages right within permissible limits as to remove some of the burdens, intricacies, and abuses of litigation, and at the same time make the compensation system (Chapter II.) relatively more attractive for both employer and employee to elect for the future. These three amendments were (1) the abolition of a part of the employer's defences; (2) the reduction of the maximum amounts recoverable by the employee; and (3) the judicial control of speculative litigation in the interest of both parties.

Par. (1). The defences herein abolished by proviso (1) are two,—the fellow-servant rule and the rule for assumption of risk; *i.e.*, two out of the four essential limitations to the employee's right. The other two are left untouched; namely, employee's contributory negligence as a defence and employer's fault as a part of the affirmative case of the employee. The Conference did not expressly instruct the committee how many or which of these four should be abolished. But the committee believed that two of the four would be a fair amount. And the committee selected the above two for the following reasons: first, these two seemed free from all constitutional objection (see Professor Williston's opinion, Appendix A); secondly, these are the two which have been most criticised as judicial legislation, creating discriminations against an employee as such: in other words, with these two abolished, the employee is placed in precisely the same status, in personal injury litigation, as a person not employed; for the remaining two elements—namely, plaintiff's contributory negligence and defendant's negligence or wilfulness—are identical with those which apply to all personal injury litigation, and thus the removal of the above two defences merely puts the employee on the same footing as any other plaintiff.

(*a*) As to the wording of the fellow-servant amendment, no particular difficulty seems to attend the wording.

(*b*) As to the assumption of risk, the committee had some hesitation and difference of opinion as to the wording. The terms here chosen are desired to make plain that the statute does not aim to abolish the element of employer's fault as the basis of an employee's personal injury claim. That much he must prove, as hitherto, but, having proved it, he is not hereafter to be defeated by the plea that he has been entering or continuing in the employment, and assumed the risk of being injured by that fault of the employer. Practically, such fault (of which the risk might have been deemed to be assumed) is coextensive with a failure of the employer to provide safe and suitable premises or appliances. The assumption to be negatived may therefore be explicitly stated in those terms. Furthermore, of course, the assumption of risks inherent in the employment (and therefore not due to employer's fault) is for safety's sake, also negatived, although such a danger could not of itself have made the employer liable. It is believed that the phrasing, as a whole, will make unmistakable (so far as possible in a short statute) the precise extent of the rules intended to be abolished, and will thus reduce to a minimum the necessity for judicial interpretation of the clause. An accurate summary of the mass of detailed decisions applying those rules is of course impracticable in a statute.

Par. (2). The decrease in the maximum amount of damages serves as the corresponding feature intended to make the compensation system more attractive to the employee, to elect the present personal injury litigation with its deplorable uncertainties of strife. The amendment was restricted to death claims, because the committee find that in one or more States it might be unconstitutional to limit the maximum value recoverable by a living person. Causes of action arising out of death are wholly the creation of statutes within the past seventy years, and hence are unquestionably within legislative control. Moreover, no objection based on class legislation (*i.e.*, different maximum for an employee's death from the maximum for other

deaths) need be apprehended, because several States have long possessed statutes fixing different maxima for miners and other classes; and the original statutes in some States were restricted to railroads.

Par. (3). The judicial sanction of attorney's liens for contingent fees (Proviso 3) is a measure universally demanded, to alleviate some of the extortions practised on employers. The Conference expressly voted to provide for this.

NOTE ON SECTION 4.

Employee's Election.

The Conference voted that the committee should prepare one draft giving to the employee an election of rights, and not making the compensation system mandatory. This was to meet the views of those who would hesitate to raise here a constitutional question by mandatory substitution of the compensation system. The committee point out that the election is not called for until after the employee is in possession of both his old and his new rights. This avoids all constitutional doubts.

The mode of making election is intended to be made as simple as possible, consistently with certainty in ascertaining the parties' status. The presumption in favor of an election of the compensation system was the plain implication from the Conference debates.

The time of election must be before injury received. This differs from the drafts hitherto prepared by other Commissions, which have proposed leaving the time of election until after injury received. Such also has been the view of some representatives of labor, both within and without the Conference. But the committee emphatically prefer the provision as drafted; and for two vital reasons, expressed in the Conference debates. First, an election not made till after injury received leaves in full sway the whole nauseous system of an ambulance-chasing, speculative, litigious, gambling, and unscrupulous claim agents, merely injecting another element to the gamble; and the Conference unanimously reprehended that system. Secondly, the intelligent and well-meaning employer, who would naturally desire to insure his industry against the added burdens of the new compensation unless he knows beforehand the extent of that burden, cannot insure intelligently and economically. He is liable to be operating under the new system without being relieved from the strife and expense of the old system. It is fair and necessary that the status of employees and employer should be capable of ascertainment as the industry now stands on the whole at a given time, without waiting until specific injuries from time to time occur and numerous and casual specific elections fix the status of individual employees. The enlightened interests of all parties, therefore, require that the election should be made before injury received.

NOTE ON SECTION 5.

Employer's Election.

Some members of the Conference expressed the belief that an election by the employer need not, as a constitutional question, be provided for. By those who accept that view this section may be omitted. For this reason the committee were careful to make this section quite separable from the remainder of this chapter, so that its omission will affect no other provision. In this respect the committee felt obliged to avoid following one or two drafts by other Commissions, in which the provisions for employer's and employee's election were so mingled that the omission of the provision for employer's election (by those who so desired) would have required a redrafting, and thus might endanger the consistency of the remainder provisions.

The employer's election, like the employee's, is presumed to be in favor of the compensation system, if he does not explicitly elect the other system. His mode of explicit election is made as simple and practical as possible.

NOTE ON SECTION 6.

Injuries before Election Rejected.

This section aims to provide for cases—probably not uncommon on railroads—where an interval of time may elapse between the employee's election and the employer's receipt of it, and where therefore an injury may be incurred in the interval.

NOTE ON SECTION 8.

Time of Taking Effect.

This section prevents the Code from applying to any injuries and causes of action existing before the time of the Code's taking effect. The language is broad enough to save any other possible consequences not intended by the Legislature.