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SOCIAL INSURANCE.¹

By the common law of England and the United States, an employee who is injured in the course of his employment has only a right of action against his employer in tort for negligence. If he succeeds in proving negligence on the part of the employer, he recovers damages from the employer for the injury. As all liability in tort is governed by the fundamental principle that the proximate, not the remote, cause of the injury is to be considered, the employer is not liable in an action for negligence when the injury arises from the ordinary risks of the trade, or when the proximate cause of the injury is the negligence of the person injured or that of a fellow-employee who is not the personal agent of the employer.

When industrial organizations were small and compact and when employees were stationary in their residence and were in daily personal contact with their employers, this system worked well. It penalized the employer for his negligence, thus giving him an interest in being careful; and the relations between the employer and the employee were usually so friendly that claims for injuries were adjusted without litigation.

With the development of great industrial concerns, in which the employees are a shifting body who in many cases never see their employers, and who deal almost entirely with superintend-

¹The author attended the International Conference on Social Insurance, held at The Hague, in September, 1910, as a delegate on the part of the United States. [Ed.]

ents and heads of divisions, the common law system has become impracticable. Its weakness lies in the fact that the employee's right of action depends upon evidence which is often complicated so as to involve a great expense of time and money, and that success of the employee not only involves the employer in a large and uncertain expense both of litigation and damages, but also casts a reflection upon him as a careful and conscientious man. Such suits are frequently prosecuted by unscrupulous lawyers upon contingent fees, so that the injured person gets but a fraction of any damages which may be allowed him. In such suits bitter feeling is apt to be aroused on both sides. This bitterness tends to extend and to set the employees as a class against the employers.

This antagonism between employer and employee, which results from the application of the common law system under modern conditions, it has been attempted to cure by statutes taking away from the employer part or all of the defences which he would have in an action at common law. The Congress of the United States has passed laws relating to the District of Columbia, the territories and the insular countries, substantially taking away the defence of common-carrier employers where the injury was the result of the negligence of a fellow-servant and where it arose out of the ordinary risks of the trade. Congress has also passed an act substantially taking away these defences from common-carrier employers in suits brought by employees who are injured in the operations of interstate commerce.

In May last, the Legislature of the State of New York passed an act which greatly limited the right of the employer to interpose the defence that the injury of the employee was due to the risks of the trade or that it was due to the negligence of a fellow-employee. The same statute provided for a permissive arrangement whereby employers and employees might agree on a fixed scale of compensation for injuries occurring in the course of employment, still reserving to the employee, however, his common law right of action in case the injury was caused by failure of the employer to obey any public order or when the injury arose from the serious or wilful misconduct of the employer.

In June last, the Legislature of the State of New York passed another statute with regard to certain employments which it declared to be dangerous, prescribing a certain rate of compensation for injuries arising to employees in such employments. By this statute the right of the employer to interpose the defence that the injury arose from the risks of the trade or from the negligence of a fellow-employee of the injured workman was entirely taken away, and the employer was compelled to pay compensation at the rate fixed by the statute to all his workmen injured in whole or in part by failure of himself, or any of his employees or agents, to exercise due care or to comply with any law affecting the employment. By this statute, in addition, the employer, even though in no respect negligent, was charged with liability to pay the statutory rate of compensation to injured employees in every case where the injury sustained was in whole or in part due to "a necessary risk or danger of the employment or one inherent in the nature thereof." It was, indeed, provided that the employer should not be liable for any injury to a workman which was caused in whole or in part by "the serious and wilful misconduct of the workman;" but this provision seems merely to say that the injury must have been caused by an accident. An injury caused by the serious and wilful misconduct of the workman can, it would seem, hardly be called an accident. The effect of this statute is to place the employer, in the trades declared to be dangerous, substantially in the position of an insurer, at a fixed rate of compensation, of his employees against accidents arising in the course of the trade. The statute so enlarges the liability of the employers in the trades declared to be "dangerous" that it seems it would practically be not worth while for such an employer to attempt to make any defence if an accident occurred in his establishment, and that it would be his best policy to submit to the payment of the statutory compensation in every such case of accident, protecting himself by re-insurance in an accident insurance corporation.

Recently, as a result of investigation by private societies of employers and employees and by governmental commissions of many States and of the Federal Government, it has begun to be questioned whether statutes taking away or seriously limiting

the defences of employers in actions of negligence brought by their employees, and providing for specific compensation for workmen for accidents, leave the employer subject to a liability in tort, and whether such statutes do not create a new kind of liability which is governed by principles different from those which govern liability in tort.

There may be said to be at present two prevailing opinions. The first is, that the statutes in question do not create a new liability but only regulate the old liability. The other is that a new liability is created, but that the liability is one to which the employer may properly be subjected by regulations under the general police power.

A third opinion may, it seems, be held; but at present the few suggestions which have been made along this line seem never to have been seriously taken up and considered. This opinion is, that a new liability is created by the statutes under consideration, and that this liability arises from the exercise of the taxing power.

That the taxing power is, in one sense, included within the general police powers of the States is well settled. This is clearly brought out in the case of *Noble State Bank v. Haskell*, decided by the Supreme Court of the United States on January 3, 1911, in which a statute imposing an assessment on State Banks of the State to establish a guarantee fund to secure depositors in all such banks was held to be a valid exercise of the police power of the State. Nevertheless, it is equally well settled that taxation is a peculiar form of legislation to which some special principles are applied.

The conclusion to be drawn from the decisions relating to taxation seems to be this: That any statute is to be classified as a taxing statute which directly requires the payment of money by a person as a contribution to a public benefit. Under such a classification, a statute which imputes liability to a person and thereby compels payment of money by him, either without reference to any wrong-doing on his part or by imputing wrong-doing where none in fact exists, is either void as a confiscation of property, or is an exercise of the power of taxation. If done without reference to any public benefit it is a confiscation; if done

for the purpose of accomplishing a public benefit and if the public benefit is of sufficient consequence in proportion to the amount of money compelled to be paid, it is taxation.

It will perhaps be said that this view is inconsistent with the decision of the Supreme Court of the United States in *Missouri Pacific Railway Company v. Mackey*, 127 U. S. 205, and in later cases following that decision. In that case the question arose whether a State statute rendering railroad corporations of the State liable to injured employees when the injury occurred by the negligence of any of the agents or employees of the company, was constitutional. The court thus stated the point at issue: "The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors." The question whether "the imputed liability" was a tax was not raised. The court held the "imputed liability" to have been properly imposed upon the company because of "the hazardous character of the business," because the statute "met a particular necessity," because the persons affected were corporations, and because all under the same circumstances were treated alike. The statute was clearly sustained on the ground of the public benefit which it was expected would accrue from imposing this "imputed liability" upon railroad corporations.

The "imputed liability" which is imposed upon employers by employers' liability and workmen's compensation statutes is a contingent liability which falls upon them at unexpected times and in unexpected amounts. They must, in the long run, distribute the imputed liability by insurance and meet it by charging higher prices or rates. The same result in the protection of the public can be obtained by the State taxing all the persons who are made subject to the imputed liability so as to create an insurance fund, and paying all such "imputed liabilities" out of the fund.

Every "imputed liability" is, therefore, it would seem, essentially an assessment or tax, and the Supreme Court of the United States, in sustaining State statutes "imputing liability" in cases where there seems reasonably to be some public benefit arising from the imputation of the liability, have not ignored the distinction between taxation and other forms of legislation, but

have left the way open to distinguish between them in any case where such a distinction may be material.

Statutes which "impute liability" where there is no wrongdoing on the part of the person against whom the liability is "imputed" are, it would seem, the most dangerous manifestations of the taxing power. Statutes which are openly taxing statutes state on their face the public objects for which the citizen is compelled to pay. Statutes which "impute liability" do not, as a general rule, state the public objects for which the citizen is compelled to pay. Statutes "imputing liability" are thus frequently taxing statutes in a concealed form, and the courts, in sustaining them, are obliged to judge for themselves what the public purposes are for which the money is compelled to be paid. Everything which the Supreme Court of the United States said with regard to the power to tax, in the case of *Loan Association v. Topeka*, 20 Wall. 655, may be said, with redoubled emphasis, with respect to statutes which "impute liability." The court in that case said:

"The power to tax is the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. * * * The power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not taxation. It is a decree under legislative form. * * *

"There can be no lawful tax which is not laid for a public purpose."

A fortiori, there can, it would seem, be no "imputed liability" which is not imputed for a public purpose.

Every statute which takes away or seriously limits the defences which an employer would have in an action for negligence brought by his employee, "imputes liability" to the employer to the extent that it makes it impossible for him to show that he

was not a wrong-doer. If the effect of the statute is to make him liable to compensate his employees for all accidents occurring in the course of the employment, regardless of his negligence, the liability is on principle, it would seem, in no way to be differentiated from a tax.

The New York statute relating to workmen's compensation for accident in dangerous trades, is, it would seem, a clear case of "imputed liability." It seems probably to be the case that the risk of the employees in the trades declared by that statute to be "dangerous" is less than in many other trades. If so, it seems probable that, in enacting legislation on this subject, the States will soon find it impracticable to base their statutes upon the dangerous nature of the occupations, and that we may soon expect to see statutes which provide for workmen's compensation for industrial accidents applicable to all trades and employments and to all persons and corporations engaged therein.

The question then is, whether the statutes which practically compel employers to compensate their workmen for all accidents arising in the course of employment are based upon a sufficient public benefit. This involves an examination of the relation of workmen's compensation for accident to what is called "social insurance," or, to use the expression now established throughout the continent of Europe, "the social assurances."

The "social assurances," as the term is now used in Europe, comprise all kinds of plans, involving any degree of governmental compulsion, by which employees are compensated for or insured against accidents of labor, against sickness and against invalidism, whereby laborers are insured against involuntary employment, whereby pensions or insurance funds are provided for aged laborers, and even whereby medical service is provided to prevent and cure diseases of laborers and to promote industrial hygiene. In all the countries of Europe, workmen's compensation for accidents has proved to be the forerunner of the whole system of social insurance.

The question arises, why the expression "social insurance" or "the social assurances" has been adopted. At first sight it seems difficult to attach a definite meaning to the word "social" in this connection. The word has, however, been selected with

great care and deliberation. The German system of workmen's compensation for accidents through joint contributions made by the employer, the employee and the State, went into effect in 1884. By 1889, the system had so developed throughout Europe that conferences of experts on the subject began to be held. Such conferences have been continued at intervals of two or three years ever since that time, and there has existed for several years a permanent organization in Europe composed of experts on this subject, having its headquarters in Paris and having branches in all parts of the civilized world. The organization in Paris calls itself "The Permanent International Committee of the Social Assurances." In September last this association held an international conference at the Hague, which was patronized by the Netherlands Government. To this international conference twenty nations sent official delegates, the United States being represented by five official delegates, headed by the Commissioner of Labor. At the international conference of this association held at Rome in 1908 the expression "the social assurances" was definitely adopted by the association to express its purpose and objects. Before that time the association had used as expressing the objects of its study the terms "accidents of labor," "workmen's insurance," and "accidents of labor and the social assurances." The adoption, in 1908, of the expression "the social assurances" evidently signified a general agreement that the subject of workmen's compensation for accidents of labor was a necessary and essential part of a general scheme of social insurance, and that it could not logically be considered separately.

It will be noticed that all these various forms of compensation, pensions and aid which are included under the term "social insurance" have the characteristic in common that they aim to benefit society at large as well as certain individuals. The individuals to whom the money is paid and for whose benefit contributions are compelled by the State are those who are active producers, or who will be active producers if tided over an emergency, or who have been active producers. The individual is aided, not as an individual, but as a producing unit of society. Insurance permits the diffusion of payments or losses, which would otherwise fall directly upon individuals, so that they are

scattered among society at large. Under the German plan, where the employer, the employee and the State all contribute to an insurance fund to protect the employee against the consequences of accident, sickness, invalidism, etc., the burden is, in a very true sense, distributed among society at large. Social insurance, therefore, seems to be insurance accomplished through taxation for the benefit of individuals who are productive social units or who may be or who have been such, and who are protected from the consequences of extreme poverty in order that they may continue to be active producers or may become active producers, and may be free from the deadening apprehension of extreme poverty in old age which so powerfully works against the efficiency of industrial workers.

Social insurance may be, and is in fact, used to describe the action by society, partly through the compulsory method of taxation and partly through the voluntary method of association, and by means of insurance and re-insurance, to prevent those wage-earning producers from falling into extreme poverty who are necessarily so poorly paid that they live always on the verge, and are in daily danger of falling into the abyss with their wives, children and dependents. Extreme poverty breeds disease of body, mind and soul, and by it society itself deteriorates. The deterioration of wage-earning producers is a double injury to society, because it not only tends to produce and disseminate disease, but also withdraws from production workers who might be efficient productive units. Social insurance is thus the insurance of society by society, or collective self-preservation.

It may be objected that the program of social insurance is unending, and that social insurance is, therefore, but a concealed form of compulsory re-distribution of wealth.

As respects the first objection, it is the fact that by the Continental European system, the social assurances are so adjusted that they apply only to deserving persons who are or have been active producers and who, if relieved from destitution occurring without their fault and from the fear of such destitution, will continue to be efficient producers after misfortune or will work more efficiently until misfortune occurs.

As respects the second objection, the system is not based

on the assumption that there is a right to an equal distribution of all property. Inequality of wealth is recognized as a permanent fact of society, and the impost necessary to accomplish the results desired is so arranged, on the principles of insurance, that its incidence is or may be shifted by re-insurance so as to fall upon society at large. The philosophical basis of social insurance is not, therefore, the equalizing of property, but the equalizing of the opportunity to live and to earn.

In the opinion of a recent American writer—Professor Henry Rogers Seager, of Columbia University, in his book on "Social Insurance",—social insurance is only a part of a still wider scheme of social reform. He says:

"The program of social reform * * * consists in protecting wage-earning families which have developed standards of living from losing them, and in helping wage-earning families without standards to gain them. The first end is to be accomplished by making obligatory for wage-earners exposed to industrial accidents, illness, premature death, unemployment, and old age, adequate plans of insurance against these evils. The second, by withdrawing from competitive industry the lowest grade of workers, the tramps and casuals, and giving them the benefit of industrial training in graded farm and industrial colonies, from which they shall be graduated only as they prove their ability to be independent and self supporting."

It seems, however, that social insurance is capable of being considered separately from the other part of the scheme of social reform to which Professor Seager refers, and that the two parts of the scheme stand upon entirely different grounds.

If social insurance be a process by which society insures itself against deterioration, and the ultimate purpose is to preserve society by preserving the wage-earner from undeserved misfortune, and if workmen's compensation for industrial accident is but a form of social insurance, it necessarily follows that the money payments required from employers by statutes providing compensation to workmen for industrial accidents are payments required for a public benefit, and that such statutes, if otherwise complying with the principles of taxation, may properly be regarded as an exercise of the taxing power of the State.

It would appear therefore, that the Congress of the United

States and the State Legislatures, in enacting laws on the subject of workmen's compensation for industrial accidents, are really entering upon the whole scheme of social insurance, and that such statutes are to be sustained, if at all, as an exercise of the power of taxation, and must therefore be framed so as to comply with the established principles of taxation.

In all legislation in this country heretofore adopted or proposed, so far as the writer is aware, the Employers' Liability Act of Great Britain has been taken as the general model. The principle of that act is that all employers are made liable to compensate persons injured in their employ at a rate fixed by statute. The result is that all employers must insure themselves in accident insurance companies so as to protect themselves against this contingent liability. In view of the tendency of employees to change their residences and their places of employment, it is considered impossible to make an effective arrangement whereby they may contribute to an insurance fund such as the German Government provides. Moreover, the German system is objected to as paternal and as interfering with the liberty of the employer. Out of the situation as it exists in England and in other countries where the British system has been adopted, there have arisen gigantic accident insurance corporations, some of them doing business internationally. The contingent liability against which these companies insure is so great and so uncertain that they must of necessity charge large fees, and it is a question whether this form of re-insurance is not very expensive.

In the countries of Europe various modifications of the German system exist. Some permit the employer to relieve himself of liability by re-insurance in certain specified corporations; others provide an insurance organization under State control in which the employers may re-insure and thus be relieved of liability. It is evident that various modifications are possible between the German and the British systems.

In Great Britain and the countries of Europe, where there is no Supreme Court to determine upon the constitutionality of statutes, it is unnecessary to define the exact nature of a governmental power which is exercised in a particular statute. In this country, where all legislative power is limited by the provisions

of written constitutions it is necessary that we draw close distinctions in determining questions of constitutionality. But the fact that we live under written constitutions does not exempt us from the operation of economic laws, and written constitutions must be interpreted in the light of economic facts. If it could be shown that the cases in which the Supreme Court of the United States has had occasion to consider the constitutionality of employers' liability laws have established doctrines inconsistent with the general scheme of social insurance, it would be necessary for that court to reconsider such doctrines in view of the present tendencies toward the establishment of such a system. The Court has ruled upon employers' liability statutes in the following cases: *Missouri Pacific Railroad Co. v. Mackey*, 127 U. S. 205; *Chicago, Kansas and Western Railroad Co. v. Pontius*, 157 U. S. 209; *Tullis v. Lake Erie and Western Railroad*, 175 U. S. 348; *Employers' Liability Cases*, 207 U. S. 463, and *El Paso and Northeastern Railway Co. v. Gutierrez*, 215 U. S. 87. In none of these cases, however, was the question raised whether the liability imposed by the statutes was an exercise of the power of taxation, nor were the statutes presented to the court as steps in a program of social insurance. The statutes which have come before the court have been held to be constitutional in every case except where objections were raised growing out of the power of the United States to regulate commerce between the States, and there is nothing to prevent the court from making such rulings upon the subject as it may deem necessary in view of the present economic conditions.

If it be agreed that such of the "employers' liability" and "workmen's compensation" statutes as abolish or seriously limit the defences which the employer would have in a common law action for negligence are manifestations of the taxing powers of Congress and the State Legislatures, it is necessary to consider what sort of a tax it is which is imposed by these statutes. It would seem to be a tax of a composite kind. It resembles in some respects an excise, because it is imposed on industry and taken out of the earnings of business. It resembles somewhat an assessment whereby an owner of property is obliged to pay towards a public benefit to the extent that he receives a private benefit. The tax is indirect, as distinguished from direct, because it is capable of being

shifted by the person on whom it is imposed, so that it will fall upon the public or upon society at large.

It may be claimed that the amounts which are compelled to be paid to workmen as compensation for accidents cannot be regarded as taxes because they are not collected by public taxing officers and not paid into the public treasury. They are, however, paid into the treasury of the court and paid out by order of the court under authority of statute. Undoubtedly this is a new method. If, however, it should be considered that this method of exercising the power of taxation is not consistent with our constitutional law, the difficulty can be met by the taxation of all employers of labor, or of all employers and employees, or of the public generally, to establish an insurance fund controlled by the State.

Regarding the subject of workmen's compensation for accidents as falling within the domain of taxation, there would appear to be some reason for placing the control of the subject in the Federal Government, and such action would not, it would seem, necessarily be unconstitutional. The taxing power of Congress is plenary. The requirement of Article I, Section 8 of the Constitution that "all duties, imposts and excises shall be uniform throughout the United States," is merely a statement of the economic axiom that all duties, imposts and excises must be uniform wherever free trade is desired. The effect of a workmen's compensation statute passed by one of the States of the Union is economically the same in preventing free trade within the Union, as if that State had imposed an excise tax upon the industry or industries specified in the statute to the extent of the liability imposed by the statute. The industry is burdened exactly as it would be if an excise tax was imposed. If the tax is not so great but that it can be shifted to the consumer of the commodity produced by the industry, at the higher price which the consumer must pay, the employer will be relatively in the same position. If, however, the industry is obliged to meet competition of industries in other States where no such burden is imposed, the consumer will not pay the extra price, and the industries of these other States will, by the natural course of competition, drive the burdened industry to the wall.

The vast extent of this country, however, gives pause to those who venture to think of Federal control of social insurance; but if the postal savings banks shall prove a success, it may be that some combination of a national savings and insurance plan, with local administration, might be practicable.

At all events, it seems clear that the problem is simplified if we regard workmen's compensation for accidents as a necessary and essential part of a general scheme of social insurance, and if we recognize at the outset that the power which the Congress and the State Legislatures are exercising when they are attempting to provide workmen's compensation is the taxing power and not the general police power.

The "International Congress on Industrial Insurance" which President Taft in his last message recommended to be invited to be held in the United States in 1913 will be organized by the association having its headquarters in Paris to which reference has been made, and which is called the "Permanent International Committee of the Social Assurances." The object of this congress will be to discuss the whole program of "the social assurances," as that expression is now understood in Europe, and workmen's compensation for industrial accidents will be regarded by the congress as one phase of social insurance. It is to be hoped that in the meantime those who are engaged in preparing legislative projects for extension of employers' liability and for workmen's compensation, will examine the subject in the light of European experience and theory. If social insurance is necessarily involved in workmen's compensation, and if social insurance is a matter of such great public benefit as the Europeans evidently believe it to be, it is, it would seem, a subject which can be provided for without violation of our constitutional principles, by taxing, for social insurance purposes, the employers, the employees, or the public.

The sole limitation upon the power of taxation, wherever it is exercised, as respects the range of its objects, is that which is expressed in the Constitution of the United States,—that it must be for the common defence or the general welfare. The ideas of the world at large change from age to age as to what is necessary for the common defence or for the general welfare. Ironclads and airships, undreamed of in one age, are regarded

as essentials to the common defence in the next. Productive efficiency of persons able to labor, not dreamed of in one age, may be regarded as essential to the general welfare in the next. On the ground of providing for the common defence, the soldier and sailor are supported altogether, in time of peace, so as to be prepared in case of war. The temporary support of productive laborers to tide them over emergencies arising without their fault may reasonably be regarded as essential in the interests of the general welfare. The subject is one which deserves the fullest consideration from every standpoint, and it is most desirable that legislation should not be adopted until there is an agreement upon fundamental principles.

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