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of avoiding relitigation of issues, where he has been once afforded a fair tribunal in which to try them.

Certainly, however, there is something in the nature of the cases in which a formerly losing party was a defendant in the first suit, and the cases in which the formerly losing party is "hauled into court" with the issues already decided against him, that makes the courts wary of a liberal rule of estoppel by record. Up to this point, however, it seems that public policy in preserving peace, the desire for freedom from vexatious litigation, and the interest in the dignity of tribunals of justice hold sway in liberal courts where a formerly losing party tries to sue another on issues formerly decided against him in a court of competent jurisdiction.

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CONSTITUTIONAL LIMITS OF LEGISLATIVE PRESSURE TO INDUCE ACCEPTANCE OF ELECTIVE WORKMEN'S COMPENSATION ACTS

Workmen's Compensation Acts[1] are now widely adopted in recognition of the fact that the common law negligence action against an employer is entirely inadequate from both a social and economic point of view to meet the need for monetary compensation for the injuries befalling workmen in modern industry. These acts have been passed, therefore, to facilitate the legal procedure available to workingmen injured in the course of their employment by assuring them of a speedy and certain recovery for the injuries.[2]

Although the statutes of the several states vary in many important respects, the fundamental difference from a constitutional point of view is whether the act be optional or compulsory. The right of a legislature to impose liability upon the employer, independently of his negligence, is no longer open to question under either type of statute. The courts have held that the compulsory statutes, and *a fortiori* the optional statutes, do not impinge upon the due process or equal protection clauses of the Constitution.[3] Today, therefore, the legislative power

[1]Hereinafter referred to as "W. C. A."

[2]Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489 (1911).

[3]*Optional Statutes*: Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241 (1914); Shade v. Ash Grove Lime and Portland Cement Co., 93 Kan. 257, 144 Pac. 249 (1914); In re Opinion of Justices, 209 Mass. 607, 96 N. E. 308 (1911). See Note, L. R. A. 1916A, 409. *Compulsory Statutes*: Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398 (1915); State ex rel Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101 (1911), 37 L. R. A. (N. S.) 466 (1912).

to create absolute liability under a compulsory W. C. A. is settled,[4] and litigation is mainly concerned with problems growing out of optional or so-called "elective" statutes.

In every instance in which a state legislature has been content to adopt an elective statute, it has been found that its provisions were not sufficiently attractive to the employers within the jurisdiction to enlist their unanimous adherence. Methods of making the employers who took advantage of their statutory right to elect not to come under the compensation system, see the "desirability" of a change of mind became necessary to eradicate the evils that a W. C. A. is designed to eliminate. These methods have taken three forms: (1) Abolition of the employer's common law defenses of contributory negligence, voluntary assumption of risk, and the fellow servant rule; (2) Imposition of presumptions of negligence against the employer; (3) Creation of rules of evidence designed to facilitate the proof of the injured employee's case.

A. Abolition of Common Law Defenses

The first persuasive legislative device was that of the abolition of the common law defenses of contributory negligence, voluntary assumption of risk, and the fellow servant doctrine as to employers who refused to enlist. The power to abolish these defenses rests upon the principle that no person has any property right or vested interest in any rule of law, and that the legislature may change such rules if they deem it best for the good of the state.[5] It has been held that to do so as a means of compelling employers to accept the provisions of the act is not unreasonable coercion,[6] but merely a declaration of the public policy of the state.[7] Legislative action of this character has been uniformly upheld,[8] but standing alone has lacked the vigor of a compelling force. Resort to additional means became necessary.

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[4]This is true unless, of course, a peculiar state constitutional prohibition is contravened, it being settled that the Federal Constitution has no applicable measures.

[5]In re Opinion of Justices, 209 Mass. 607, 96 N. E. 308 (1911); Matheson v. Minneapolis St. Ry. Co., 126 Minn, 286, 148 N. W. 71 (1914); Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489 (1911).

[6]Hunter v. Colfax Consolidated Coal Co., 175 Iowa 245, 154 N. W. 1037 (1915); Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489 (1911).

[7]Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245 (1915).

[8]This method of coercion is well sanctioned as being constitutional. The cases are collected in Note, L. R. A. 1916A, 409, 413.

B. Imposition of Negligence Presumptions

In legal effect there is no difference between saying that for accidental injuries received by a workman is the course of his employment, and employer shall be (1) "absolutely liable," or (2) "conclusively presumed to be negligent."[9] A legislature could, therefore, without contravening the due process or equal protection clauses of the Fourteenth Amendment, phrase an act so as to provide for a "conclusive presumption of negligence against an employer" in proceedings under its W. C. A. Under an elective act, however, as against an employer who did *not* enlist, the action of an injured employee would still be based upon negligence. To make the liabilities of both types of employers as equal as possible under an elective act, the legislature might do away with the necessity, or at least ease the burden, of the employee's proving negligence against a non-complying employer. To effectuate this purpose an absolute liability or conclusive presumption of negligence might be imposed upon the non-complying employer; or merely a prima facie or rebuttable presumption of negligence might be used to be inferred from the fact of the injury itself. By this means, the fact that the workman was injured in the course of his employment would create either a conclusive or prima facie presumption that such injury was caused by the negligence of his employer. Such an enactment brings into issue the extent of the power of a legislature to tamper with the precepts of logic, and by fiat to declare that upon proof of one fact another shall be inferred. Many cases have dealt with this legislative right, and it is now well established that a state has the general power to prescribe the evidence which shall be received and the effect that shall be given to it in her courts. The state may exert this power by providing that proof of one particular fact shall be prima facie evidence of another. The only qualification upon this right is that the enactment be not an arbitrary mandate or one that discriminates between different persons in substantially the same situation; if this demand has been met, the legislation will not create a denial of due process or equal protection of the laws.[10] As was said in the leading case on statutory

[9]This would not be true had not the employer been already denied the common law defenses of contributory negligence, voluntary assumption of risk, and the fellow servant rule.

[10]The leading case affirming this right is the United States Supreme Court decision in Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. ed. 78 (1910). A Mississippi law provided that in all actions against railroads for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such company should be prima facie evidence of the want of reasonable skill and care on the part of the servants of such company.

presumptions, *Mobile J. & K. R. R. v. Turnipseed,* it is "... only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."[11]

Under the principles laid down in the *Turnipseed* case, prima facie presumptions have been upheld from one instance in which the fact of recklessness was inferred from the fact of driving an auto ten m.p.h. through a city street,[12] to one in which violations of the city's garbage ordinance were inferred in certain instances from the use of the city's water supply.[13] A multitude of rebuttable inferences possessing varying degrees of rationality have been sustained in attacks upon both civil[14]

This was upheld by the Court, which said: "The statute does not, therefore, deny the equal protection of the law or otherwise fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference. That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So also it must not under the guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed." 219 U. S. 35, 43, 31 S. Ct. 136, 138, 55 L. ed. 78 (1910).

[11]219 U. S. 35, 43, 31 S. Ct. 136, 138, 55 L. ed. 78 (1910).

[12]Morrison v. Flowers, 308 Ill. 189, 139 N. E. 10 (1923). A motor vehicle act provided that if the rate of speed through town on a public highway exceeded ten miles per hour, such rate of speed should be prima facie evidence that the person operating such motor vehicle was running at a rate of speed greater than was reasonable and proper. This Illinois statute survived an attack based on the Fourteenth Amendment.

[13]State v. Spiller, 146 Wash. 180, 262 Pac. 128 (1927). Under a city ordinance, it was made mandatory that all who had garbage to dispose of should do so by means of a certain type of garbage can prescribed. If the householder did not possess such a can, the fact that he was using city water raised the prima facie presumption that he was creating garbage, and, therefore, violating the statute. This statutory presumption was held not to be a violation of due process of law.

[14]Cunningham v. Chicago & A. R. Co., 215 S. W. 5 (Mo. 1919) (delay by carrier creates presumption that the carrier was negligent); People v. Polthemus, 367 Ill. 185, 10 N. E. (2d) 966 (1937) (presumption that transfer was made in contemplation of death); Goldstein v. Maloney, 62 Fla. 198, 57 So. 342 (1911) (presumption that a sale was fraudulent); Ferry v. Ramsey, 277 U. S. 88, 48 S. Ct. 443, 72 L. ed. 796 (1928) (insolvency at time of deposit is prima facie presumption that officer knew of insolvency and assented to the deposit); Commonwealth v. Kroger, 276 Ky. 20, 122 S. W. (2d) 1006 (1938) (prima facie inference that a traffic violation was committeed by or with the car owner's consent). Contra: Tipton v. Estill Ice Co., 279 Ky. 793, 132 S. W. (2d) 347 (1939) (mere failure to secure an operator's permit not prima facie evidence that the driver involved in the accident was negligent).

and criminal[15] statutes, under the due process and the equal protection clauses of the Federal Constitution.

Similarly, though less frequently, conclusive presumptions have been enacted and have been upheld by the courts. In *Packard v. O'Neil*[16] an Idaho statute created an absolute legal presumption of negligence for personal injuries and property damage against a man who drove a car while under the influence of intoxicating liquor. The court held that this presumption was created not as a principle of evidence, but as a measure to insure and regulate safety upon the highways. The legislature had thought that there might be difficulty in establishing lack of due care, and that this would leave room for so much question that the conclusive presumption of negligence ought to prevail.

In many instances, however, legislatures have gone even further, extending the class of injuries for which a defendant is absolutely liable.[17] Thus, railroads have been made absolutely liable for property damage caused by sparks emitted from their engines,[18] and automobile owners have been held to an absolute liability for injuries caused by the negligence of operators driving with their consent.[19]

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[15]Hawes v. Georgia, 258 U. S. 1, 42 S. Ct. 204, 66 L. ed. 431 (1922) (prima facie evidence that the person in actual possession had knowledge of a still on the premises); Yee Hem v. U. S., 268 U. S. 178, 45 S. Ct. 470, 69 L. ed. 904 (1925) (opium presumed to have been imported illegally); Bandini Petroleum Co. v. Superior Court of Los Angeles County, 284 U. S. 8, 52 S. Ct. 103, 76 L. ed. 136 (1931) (the blowing, release, or escape of natural gas into the air prima facie evidence of unreasonable waste); Cockrill v. California, 268 U. S. 258, 45 S. Ct. 490, 69 L. ed. 944 (1925) (presumption that a conveyance was made with intent to avoid escheat); People v. Fitzgerald, 14 Cal. App. (2d) 180, 58 P. (2d) 718 (1936), cert. denied, 299 U. S. 593, 57 S. Ct. 115, 81 L. ed. 437 (1937) (possessor of dynamite made prima facie guilty of a felony); State v. Nossaman, 107 Kan. 715, 193 Pac. 347 (1920) (possession of cigarettes prima facie evidence of the selling or keeping for sale); State v. Elkin, 177 La. 427, 148 So. 668 (1933) (failure to pay worthless check in ten days prima facie evidence of intent to defraud); State v. Fitzpatrick, 141 Wash. 638, 251 Pac. 875 (1927) (possession of burglary tools prima facie evidence of the intent to use the same to commit crime). Contra: McFarland v. American Sugar Co., 244 U. S. 79, 39 S. Ct. 498, 60 L. ed. 899 (1916) (presumption of being a party to a monopoly or a combination in restraint of trade or commerce held invalid); Stafford v. City of Valdosta, 49 Ga. App. 243, 174 S. E. 810 (1934) (purchase of intoxicating liquors within the city limits not to be presumed from mere possession).

[16]45 Idaho 427, 262 Pac. 881 (1927).

[17]In cases other than those involving W. C. A. controversies, this is going much further because the common law defenses are still available to the defendant under a conclusive presumption of negligence, while under liability without fault they are immaterial.

[18]St. Louis & S. F. Ry. v. Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 L. ed. 611 (1897).

[19]Hodge Drive-It-Yourself Co. v. City of Cincinnati, 284 U. S. 335, 52 S. Ct. 144, 76 L. ed. 323 (1932). See also Jones v. Brim, 165 U. S. 180, 184, 17 S. Ct. 282, 284,

A review of the numerous cases in which statutory presumptions have been upheld establishes the power of a legislature to declare that upon proof of one fact another shall be inferred. With the view of persuading non-complying employers to enlist under a W. C. A., legislatures have, in several instances, declared that the fact of the workman's being injured in the course of his employment shall be prima facie evidence that such injury was caused by the negligence of the employer. In *Lykes Bro. S. S. Co. v. Esteves*,[20] a federal court considered a provision in the Puerto Rican W. C. A., creating a prima facie presumption of negligence against an employer who had elected not to come within the act, and the constitutionality of the provision was upheld under a due process attack. The court reasoned that it was not dealing with liability for negligence generally, but with a W. C. A. confined entirely to industrial injuries, *in which a jurisdiction if it wished could impose absolute liability*. It was observed that the employer could preclude resort by the employee to such action by securing accident compensation in accordance with the act, and the presumption was sanctioned as a constitutional means of coercion.

In *Hawkins v. Bleakly*[21] a statute with a presumption to substantially the same effect was upheld under an equal protection attack. It was held not to be arbitrary as it treated all employers alike and all employees alike. The fact that it served as a "strong inducement" to the employer to come within the W. C. A. was again held not to be unconstitutional coercion.

In the light of such precedent, it is surprising that the Pennsylvania court in the decision of *Rich Hill Coal Co. v. Bashore*[22] reached the opposite conclusion. There, the wording of the act creating the prima

41 L. ed. 677 (1897). Where an owner or tender of sheep, cows, etc., drove them over a public highway constructed on a hillside, he was held to be absolutely liable for all damages they did to the banks, etc. The Court held that "The statute, being general in its application, embracing all persons under substantially like circumstances, and not being an arbitrary exercise of power does not deny to the defendant the equal protection of the laws." And "So, also, as the statute clearly specifies the condition under which the presumption of neglect arises, and provides for the ascertainment of liability by judicial proceedings . . .", that it was not a taking of property without due process of law. In the opinion the Court observed that the legislature had said, in effect, that such a passage was so likely, if great caution was not observed, to result in damage to the road, that where this damage followed such a driving, there ought to be no controversy over the existence or non-existence of negligence, but that there should be an absolute legal presumption to that effect resulting from the fact of having driven the herd.

[20] 89 F. (2d) 528 (C. C. A. 5th, 1937).

[21] 243 U. S. 210, 37 S. Ct. 255, 61 L. ed. 678 (1917).

[22] 334 Pa. 449, 7 A. (2d) 302 (1939).

facie presumption against the non-complying employer was unusually cautious, expressly providing for the right of the employer to introduce testimony showing the injury to have arisen from another cause, and making the final determination a question of fact for the jury.[23] This provision was held to be in violation of the Fourteenth Amendment under both the due process and equal protection clauses.[24] In failing to recognize a "manifest connection between the fact proved and the fact presumed," the decision not only ignored the fact that the courts have not applied the highest degree of logic in the inferential step,[25] but completely turned its back on two rulings of federal courts to the contrary.[26] Such a decision stands in need of support, for it is thought that the somewhat limited authority on the issue goes to support state legislatures in creating a prima facie presumption of negligence against an employer in an action by his employee for injuries received in the course of employment.

On the question of the power of a legislature to create a conclusive presumption in this regard, however, even less case authority is available. In 1923, a legislative effort to make a non-complying employer liable without fault was sustained[27] by the North Dakota Supreme Court in *Fahler v. City of Minot.*[28] In 1940, however, the West Virginia Supreme Court of Appeals, in the decision of *Prager v. W. H. Chapman & Sons Co.*,[29] held that it violated the principle of due pro-

[23]Section 210, 1 (a) of 77 Penn. Stat. § 42.

[24]The court also held the act invalid as contravening the Pennsylvania Bill of Rights which declares that no person can "be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land." Pa. Const. Bill of Rights Art. I, § 9.

[25]State v. Nossaman, 107 Kan. 715, 193 Pac. 347 (1920) (rational connection between the possession of cigarettes and the sale of them or the keeping of them for free distribution); Commonwealth v. Kroger, 276 Ky. 38, 122 S. W. (2d) 1006 (1938) (violation of a traffic law had a rational connection with the inferred fact that same was committed with the car owner's authority or permission); State v. Spiller, 146 Wash. 180, 262 Pac. 128 (1927) (use of the city's water made prima facie evidence in certain situations of the violation of a garbage disposal ordinance).

[26]Hawkins v. Bleakly, 243 U. S. 10, 37 S. Ct. 255, 61 L. ed. 678 (1917); Lykes Bros. S. S. Co. v. Esteves, 89 F. (2d) 528 (C. C. A. 5th, 1937). See notes 20 and 21, supra.

[27]The North Dakota legislature had provided that a non-complying employer could be sued by a complying employee either before the administrative tribunal or at his option before the courts of law. If he chose the latter he was held to have the benefit of the conclusive presumption of negligence the same as if he were before the tribunal. Laws of 1919, Ch. 162, § 11.

[28]49 N. D. 960, 194 N. W. 695 (1923).

[29]9 S. E. (2d) 880 (W. Va. 1940), noted (1940) 2 Wash. and Lee L. Rev. 170.

cess of law for the legislature to make non-complying employers liable regardless of fault. The court believed the act to be unconstitutional because the W. C. A. was not compulsory and had not, therefore, sought to impose liability upon all employers. It was observed that the provision might have been intended to compel all employers to become subscribers to the W. C. A., but that this fact did not make the act effective, because if the legislature had that purpose in mind, there was open to it a plain, simple, and direct way in the passage of a compulsory W. C. A.[30]

The reasoning of this conclusion is not in line with precedent. It must be remembered that conclusive presumptions applying to other situations have been upheld,[31] and that the provisions of the Fourteenth Amendment are not contravened by legislation of this type if a rational basis exists for the rule enacted.[32] The true idea of due process of law is that the processes of government shall not be exerted or imposed in an arbitrary or capricious manner at the whim of some judge or executive, but rather in accordance with the letter and spirit of certain prescribed rules or well established usages.[33] Thus, unless there is a substantial invasion in a highhanded manner so as to represent unguided or arbitrary action, the courts of the United States are reluctant to interfere on the ground that a state has violated the due process clause; and therefore, unless outstanding, matters of state procedure, in particular, are not subject to these attacks.[34]

Upon an attack under the equal protection clause, also, there is a

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[30]Borgnis v. Falk Co., 147 Wis. 327, 138 N. W. 209, 37 L. R. A. (N. S.) 489 (1911).

[31]Jones v. Brim, 165 U. S. 180, 17 S. Ct. 282, 41 L. ed. 677 (1897); Packard v. O'Neil, 45 Idaho 127, 262 Pac. 881 (1927).

[32]Mobile, J. & K. C. R. R. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. ed. 78 (1910).

[33]Bank of Columbia v. Okley, 4 Wheat. 235, 1 L. ed. 878 (U. S. 1819); Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. ed. 97 (1908); Arizona Employers' Liability Cases, 250 U. S. 400, 39 S. Ct. 553, 63 L. ed. 1058 (1918); see Truax v. Corrigan, 257 U. S. 312, 329-30, 42 S. Ct. 124, 128, 66 L. ed. 254 (1921), 27 A. L. R. 375, 384 (1923), where the Court said: "It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles."

[34]Matson v. Dept. of Labor and Industries of Washington, 284 U. S. 151, 52 S. Ct. 69, 76 L. ed. 214 (1934).

presumption in favor of the classification[35] made by the legislature,[36] and of legitimate grounds for distinction.[37] The one who assails a classification under the equal protection clause must, therefore, carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.[38]

Upon these principles, accompanied by a recognition of the fact that a legislature if it wishes may impose an absolute liability under a compulsory statute, the decision of the North Dakota court[39] allowing liability without fault is to be preferred. The best reason that can be given in support of this conclusion is that which underlies the very public purpose justifying a compulsory W. C. A.—i.e., the realization that there is a pecuniary loss resulting from these industrial injuries which the employee should not bear. The primary if not the legally termed "proximate cause" of these injuries is the employment itself, and in this adventure both the employer and the employee are engaged. Compensation acts provide for reimbursement to the employee because it is on him that the first brunt of the loss falls. They further require that payment shall be made by the employer because he takes the gross receipts of the common enterprise, and can, by reason of his control, make the proper adjustments to distribute the loss.[40] This is certainly a public policy of great worth.[41]

There is one obvious objection to a conclusive presumption in these cases, however, that remains yet to be treated. It is one thing to hold an employer liable for damages occurring without fault when the damages are more or less limited by a prescribed scale (as under a W. C. A.), and quite another to hold him liable for all the damages a jury might assess. The latter allows the legislature to subject the non-com-

[35]By classification is meant the fact that the legislature made the terms of the act applicable only to a certain group or kind of cases rather than giving it universal application.

[36]Borden's Farm Products Co., Inc. v. Baldwin, 293 U. S. 194, 55 S. Ct. 187, 79 L. ed. 281 (1934); N. L. R. B. v. Jones and Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893 (1937).

[37]People v. Monterey Fish Products Co., 195 Cal. 548, 234 Pac. 398 (1925).

[38]Lindsey v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. ed. 369 (1911).

[39]Fahler v. City of Minot, 49 N. D. 960, 194 N. W. 695 (1923).

[40]By insurance, by increasing selling prices, and by reducing wages. (But the latter action is obviously not possible since the advent of large scale union contracts).

[41]New York Central R. Co. v. White, 243 U. S. 188, 37 S. Ct. 247, 61 L. ed. 662 (1917); Arizona Employers' Liability Cases, 250 U. S. 400, 39 S. Ct. 553, 63 L. ed. 1058 (1918).

plying employer to a jury assessment after stripping him of his common law defenses. A question of whether such an employer has been afforded the equal protection of the law is, therefore, appropriately raised. In *Fahler v. City of Minot*[42] the court met this objection by saying that where the employer did not come within the statute, the claim of the injured employee was necessarily subject to the hazard of the employer's financial responsibility and the delay and inconvenience of a suit through the regular legal channels rather than the simplified procedure before a Workmen's Compensation Bureau. This seems a fair exchange, and with this objection also erased, there can be no further logical basis for a Fourteenth Amendment attack upon a conclusive presumption of this type. Any remaining discriminations must be accepted. The whole basis upon which a W. C. A. is conceived is that there is an adequate distinction between the employer class and the employee class.[43]

Finally, all the employer has to do if he finds the role of a non-complier too burdensome is to subscribe to the act, the power to adopt these means of coercion being recognized.[44]

C. Liberalization of Rules of Admissibility of Evidence

Under an elective statute, when a workman is suing a non-complying employer, there are several things that he must prove if he would take advantage of the statutes abolishing the common law defenses of his employer. In such a case, the workman must prove that the injury

[42]49 N. D. 960, 194 N. W. 695 (1923).

[43]This may be admitted, but still the question asked whether there is any adequate basis of distinction between an employer who elects to come within the act and one who does not? It seems that the courts have long recognized this distinction when they have denied the common law defenses to the latter class. In Fahler v. City of Minot, 49 N. D. 960, 194 N. W. 695 (1923), the court answered this question further by pointing out that the employee was forced to submit to the inconvience of a law suit and the danger that his employer would be insolvent.

[44]Hawkins v. Bleakly, 243 U. S. 210, 37 S. Ct. 255, 61 L. ed. 678 (1917); Lykes Bros. S. S. Co. v. Esteves, 89 F. (2d) 528 (C. C. A. 5th, 1937). In Ferry v. Ramsey, 277 U. S. 88, 94, 48 S. Ct. 443, 444, 72 L. ed. 796 (1928), a Kansas act provided that the fact that a banking institution was insolvent or in a failing condition at the time of the reception of a deposit should be prima facie evidence that the director or officer had knowledge and had assented to such deposit. The Court held that the legislature might have made the director personally liable to the depositors in every case if it had wished, and thereby have made one taking the position assume the risk. The Court said: "The statute in short imposed a liability that was less than might have been imposed, and that being so, the thing to be considered is the result reached, not the possibly inartificial or clumsy way or reaching it." See also Lykes Bros. S. S. Co. v. Esteves, 89 F. (2d) 528 (C. C. A. 5th, 1937).

was the result of his employer's negligence; that it was sustained "in the course of his employment"—i.e., occurred while he was on his job; that is was sustained "out of the course of his employment"—i.e., occurred as a consequence of his employment;[45] and that it resulted in certain damages to him. To facilitate the proof of these issues by the workman, a legislature might make evidence which was prohibited at common law admissible in the proof of these points.

In the only instance in which this has been attempted the statute was declared void in the Pennsylvania case of *Rich Hill Coal Co. v. Bashore.*[46] To supplement a provision creating a presumption of negligence, the Pennsylvania legislature passed a further enactment that anything the injured employee said to anybody within twelve hours after the injury would be adjudged "competent evidence" in any action brought to recover damages for personal injuries against a non-complying employer. This was the construction put upon the following statute by the highest court of the state:

> "When an employee sustains an injury in the course of his employment, declarations, remarks, and utterances, made by the injured employee within twelve hours after the injury was sustained shall be admissible as competent evidence." [47]

The court held this provision to deny to the non-complying employer the equal protection of the laws under the Fourteenth Amendment.[48] In reaching this conclusion the court regarded the act as having the effect of creating a conclusive presumption of negligence and therefore to be invalid for the same reason that a direct attempt to create that result would have been.[49] If this were the only ground for

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[45]See Harper, Law of Torts (1933) § 212.

[46]334 Pa. 449, 7 A. (2d) 302 (1939).

[47]Section 201.1 (b) of 77 Penn. Stat. § 42—this provision being applicable only in respect to employers who had elected not to come within the scope of the act.

[48]The court found two other grounds of unconstitutionality: (1) the act contravened the principle that the rules of evidence must be uniform and impartial, (2) it was "special legislation" and therefore invalid under a provision of the Pennsylvania Constitution that the legislature "shall not pass any local or special law . . . regulating the . . . rules of evidence in, any judicial proceeding or inquiry before courts. . . ." Pa. Const. Art III, § 7.

[49]While recognizing the logical distinction between making a fact conclusive proof of a fact in issue and making an unsworn utterance of an injured employee "competent evidence," the court thought that the "practical effect" of the latter was to make a finding of the employer's fault almost inevitable from the mere fact of the employee's injury. The basis of this reasoning was that in most injuries of this type the only witness was the employee himself and thus the rule would make the employer's right of rebuttal practically valueless. This would put the employer in the same position as if the legislature had made the mere fact of the injury conclusive proof of the employer's fault.

holding the act invalid, the decision of the court would be very doubtful, for it has been seen that the right to create conclusive presumptions in workmen's compensation cases has been affirmed by other courts.

The court, however, found several other faults. The employee might use these statements even though he survived the injury and was able to appear on the witness stand.[50] The employee might make willfully false statements within the twelve hour period[51] to third persons. Such remarks could be testified to by these third persons, who would not in testifying stand in danger of being prosecuted for perjury, which danger would face the workman if he were to testify falsely himself. Thus, the employee could absent himself from the jurisdiction,[52] and establish his case by these witnesses. Cross examination of such witnesses upon this hearing would not be effective,[53] because their knowledge would be limited in most instances to the content of the employee's own statements. The declarations made would, furthermore, not have to relate to the injury, but could be prejudicial remarks on irrelevant matters.[54] The court held these ex parte declarations to be unacceptable as evidence for four reasons: (1) they did not have to be made under oath; (2) they were not part of the res gestae; (3) they did not need to be made under the solemnity of impending death; (4) they were not subject to cross examination.

The statute does seem to present an imposing array of irregularities, and there is no doubt that as a general rule of evidence, it would be open to serious objections. It must be remembered, however, that it is

[50]A witness is not allowed to testify as to an unsworn statement made by himself upon a former occasion. A declaration of a witness out of court inconsistent with his testimony is not admissible to prove the truth of the facts stated, but only for purposes of impeachment. Spear v. United Railroads of San Francisco, 16 Cal. App. 637, 117 Pac. 956 (1911); Backes v. Movsovich, 82 N. J. L. 44, 81 Atl. 497 (1911); Southwestern T. & T. Co. v. Thompson, 157 S. W. 1185 (Tex. Civ. App. 1913).

[51]Which the court observed was ample time for the designing of testimony.

[52]"Hearsay evidence does not become admissible by reason of the fact that the declarant has left the jurisdiction or is sick or cannot be examined or compelled to testify or is incompetent as a witness." 22 C. J. 217.

[53]The court held cross-examination to be more than a privilege—that it was a right.

[54]This construction seems not only unnecessary, but to be unrepresentative of the usual treatment of a court passing on the constitutionality of a statute. A court will, if possible, put a construction upon a statute that will make it possible to hold the act constitutional. If the court had construed the act so that the only remarks available would have been remarks relevant to the issue—that is, have made the rule of "relevancy, competency, and materiality" paramount to the implications of the legislative enactment—it could have avoided this objection, at least.

confined to cases of a particular type, and will serve only as an aid on certain particular issues in suits of that type. It might be well, therefore, to analyze the act as it would apply to the several proofs that a workman must establish in a suit against a non-complying employer.[55] It will be noticed that the act opens with the words "when a workman is injured in the course of his employment." It is a possible construction that the legislature intended that before the rule of evidence under review is to be available to the employee, he must first establish that he was injured "in the course of his employment"— which term in Pennsylvania also embraces the requirements of the usual "out of the course of employment" phrase.[56] Under such an interpretation, evidence of the type made admissible by the statute could not be used by the employee to show that he was injured in or out of the course of his employment.[57] Perhaps a more common construction would be that the evidence is to be admissible on any issue in the case, including whether the injury happened in or out of the course of the employment. Under this interpretation, the act would be open to serious objection, as it would be a threat to extend an employer's liability to all cases in which his employee was injured, whether on the job or not. As a means of avoiding an unnecessary invalidation of the statute, the court might well have adopted the former construction, even though it may not be the most obvious meaning of the words used by the legislature.

As to this "radical" rule of evidence being available to prove damages received, it is hard to see how the act in any way prejudices the

[55]As set out, supra, these points are: (1) that the injury was caused by the employer's negligence; (2) that it was sustained in the course of the employment; (3) that it was sustained out of the course of the employment; (4) and that it resulted in certain damages to the employee.

[56]Pennsylvania is a state that has eliminated the customary "out of the course of the employment" requisite. Thus the term "in the course of the employment" is usually deemed to embrace both concepts. For a discussion of this point and the general distinction between "in the course of" and "out of the course of", see Harper, Law of Torts (1933) § 212.

[57]On the issue of whether the injury was "accidential" or not as it is customarily used in a W. C. A. an interesting point is raised. When a W. C. A. requires that an injury be accidental it means that it shall not be caused by the attempt of the workman to commit suicide or wilfully to inflict injury upon himself or another person. This, however, only applies to suits against workers under the W. C. A. As to suits against non-complying employers, which suits are common law actions, such an issue would not come up because it would ordinarily arise under the defense of contributory negligence, and this defense has been taken from non-complying employers. It will be noticed that the Pennsylvania act read "When injury results. . . ." It did not require it to be an accidental injury as it would have had to be under the W. C. A.

employer. Statements of general pain and suffering constitute a recognized exception to the hearsay rule and are thus admissible without the aid of a statute.[58] It is difficult to conceive of any other kinds of statements that the employee might make within twelve hours after his injury that could be used effectively to establish damages that did not in fact exist. Of course very abusive statements about the employer might be introduced to incite the jury's general prejudice against him, but still the employer would have available the usual sources of objective proof regarding the extent of the employee's injuries. If the award of the jury exceeded to any substantial extent the injuries received, the verdict could be set aside upon this ground.

The mere fact that the evidence is admissible, moreover, does not mean that it will be credible. If the plaintiff is in court, cross-examination is available to disprove the truth of his statements; and if he is not at the trial, it is likely that his very absence would raise serious doubts in the jurors' minds as to the validity of the evidence. If an injured workman with designs on undeserved economic gain remarked within the period that he had received everything from a fractured skull to a lacerated little toe, that he anticipated a nervous breakdown and life long ill-health as a result, he might absent himself from the jurisdiction and use these remarks to establish his damages. However, he could hardly remove the attending doctors, the ambulance drivers, and the hospital nurses from the jurisdiction and destroy doctors' and hospital records as well. It is for these reasons that the rule of evidence seems harmless as far as any chance of increasing the amount of damages is concerned.

This leaves only one other matter in which the rule of evidence may be thought to facilitate the proof: the question of the negligence of the employer. But it has been seen that a legislature has the right to create a W. C. A. that imposes absolute liability,[59] as well as an act that creates an absolute presumption of negligence against a non-complying employer.[60] This, then, is a return to the old issue of whether the legislature can do indirectly what it has the right to do directly. That is, if the legislature has the power to create an absolute presumption of negligence against a non-complying employer, can it not create a rule that operates to enable the presentation of merely a strong case of negligence

[58]See Wigmore, Evidence (1940) § 1718.

[59]State ex rel Davis-Smith Co. v. Clausen, 65 Wash. 156, 177 Pac. 1101 (1911), 37 L. R. A. (N. S.) 466 (1912).

[60]Fahler v. City of Minot, 49 N. D. 960, 194 N. W. 695 (1923).

against a non-complying employer? The thing to be considered is the result reached, not the possibly artificial or clumsy way of reaching it.[61]

When the operation of the particular rule of evidence under review is analyzed, it is difficult to see upon what ground the Pennsylvania court could have held it to be violative of the principles of the equal protection clause. The theory of workmen's compensation is based upon the assumption that there is a sufficient basis of distinction between employer and employee. The cases upholding the denying of common law defenses and the imposing of the presumptions of negligence established the view that there is a valid basis of distinction between enlisted and unenlisted employers.

The court said, however, that this rule of evidence was denied to the defendant employer, and considered that the legislature was thereby opening the door of "loose hearsay testimony" for the benefit of one party, while keeping it closed to the other. It is doubtful whether there are any evils implicit in this situation. True, the rule relates to remarks made by the employee only, and not to remarks made by the employer, but the justification for this discrimination rests upon the very nature of the relief being afforded as well as the nature of the employment relationship which has long been recognized as the basis of a W. C. A.

The rules of hearsay have been meddled with before by the legislatures. It is a well-known rule of common law evidence that what is hearsay does not cease to be so because the person who made the remark may have died.[62] In situations like this, however, statutory changes in two states have admitted the statements of decedents as exceptions to the hearsay rule.[63] Although involved in numerous cases, these statutes have apparently never been questioned under the Fourteenth Amendment.[64] Moreover, cases have held that the admission of incompetent evidence is not a denial of due process of law.[65] Statutes making a writing or memorandum of any kind, whether made in the regular course of business or not, admissible evidence may be found, and have been held not to violate the principles of due process

[61]Ferry v. Ramsey, 277 U. S. 88, 48 S. Ct. 443, 72 L. ed. (1928), see note 44, supra.

[62]Updike v. Mace, 194 Fed. 1001 (S. D. N. Y. 1912); Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35 (1903); Griffin v. Train, 90 App. Div. 16, 85 N. Y. Supp. 686 (1904).

[63]See Wood v. Connecticut Savings Bank, 87 Conn. 341, 87 Atl. 983 (1913); Crosby v. Mutual Benefit Life Ins. Co., 221 Mass. 461, 109 N. E. 365 (1915).

[64]See cases collected in 22 C. J. 216.

[65]State v. Owens, 124 S. C. 220, 117 S. E. 536 (1922); State v. Thorson, 202 Wis. 31, 231 N. W. 155 (1930).

of law.[66] This is an analgous situation to the rule under discussion, and the chances for fraud and deceit are as great in the memorandum cases as in the oral remark cases. When it is considered that the memorandum statutes are statutes of general application and the statute under review is one confined only to a particular type of action which is created to effectuate a great public purpose, it seems that the Pennsylvania court became unduly alarmed about the efficacy of this rule of evidence as an agency for the forces of evil.[67]

A look into the way the common law rules of evidence have been relaxed with an increasing degree of liberality in administrative proceedings before workmen's compensation boards further strengthens the argument against the Pennsylvania decision. Many statutes provide that the commission shall not be bound by the common law or statutory rules of evidence. In at least two states great liberality exists in that the courts may not reverse a finding because of any informality in the manner of taking evidence.[68] Thus, either as a result of express statutory command or by construction of statutes relaxing the rules of evidence, hearsay may be admitted and considered by the commissions in several states.[69] When it is seen that employers who have accepted a W. C. A. are subjected to these relaxed rules of evidence in a proceeding before a commission, is it such a discrimination to subject a non-complying employer to the same "ordeal" before a court of law?[70] As long as a rule of evidence is available only in aid of finding of an employer's negligence, it should not be considered objectionable in the constitutional sense. Should it be so drawn as to facilitate proof

[66]Gile v. Hudnutt, 279 Mich. 358, 272 N. W. 706 (1937) upheld a Michigan act of this type. See also Johnson v. Lutz, 253 N. Y. 124, 170 N. E. 517 (1930).

[67]Conversely, legislative attemps in the opposite direction, in the way of excluding testimony admissible at common law, have been made. In the recent case of Kirsch v. Posimal, 294 N. W. 865 (Wis. 1940), a statute provided that no statement made by an injured person within seventy-two hours after receiving an accident or injury should be received in evidence in an action for damages for personal injuries unless the same should be admissible as part of the res gestae. The constitutionality of this statute has not been questioned under either due process or equal protection clauses.

[68]Cal. Labor Code (Deering, 1937) § 5709; Mont. Rev. Ann. (Choate, Supp. 1935) § 2938.

[69]Ocean Accident and Guarantee Corp. v. Industrial Comm., 34 Ariz. 175, 269 Pac. 1127 (1938); Baker v. Industrial Comm., 44 Ohio App. 539, 186 N. E. 10 (1933); see Note, (1939) 24 Iowa L. Rev. 576.

[70]The point is arguable, however, that such a relaxation of rules might be permitted before commissioners experienced in the evaluation of testimony, but that a jury might not be equally fortified against the deceptions of hearsay testimony.

on other issues, such as that the workman was injured in the course of his employment, then its constitutionality might be questioned.

Conclusion

It should be remembered that workmen's compensation legislation, made to equalize the liabilities of the two types of employers and to persuade the non-complying employer to enlist under the act, is not dealing with injured plaintiffs in general, but only with plaintiffs who are employees injured in the course of their employment by the negligence of their employer. These are pieces of legislation with great public purpose behind them. The object of all these acts is to create a liability against the employer for a certain class of injuries regardless of his fault. If an employer chooses not to come within the W C. A., an attempt to aid a workman in proving the employer negligent is in order. Abolition of common law defenses, imposition of presumptions of negligence and regulations of the admissibility of evidence are proper if exercised in this direction, and in this direction only. They are not, furthermore, to be considered as unconstitutional means of coercion when their only efficacy is in the carrying out of this purpose.

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