EMPLOYERS' LIABILITY FOR PERSONAL INJURIES TO THEIR EMPLOYEES

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TO

THEIR EMPLOYEES.

PREPARED AND WRITTEN FOR, AND UNDER THE DIRECTION OF,
THE MASSACHUSETTS BUREAU OF STATISTICS OF LABOR,
FOR ITS FOURTEENTH ANNUAL REPORT,

BY

Gershom
CHARLES G. FALL

OF THE SUFFOLK BAR.

A gift to my Alma Mater. My [illegible] only, return for her many favors
C. G. F.

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1883.

INTRODUCTION.

These pages were written for the Commonwealth of Massachusetts, in accordance with a resolution of the Legislature directing an investigation of the law relating to the liability of employers for personal injuries received by their employees while in the discharge of their duties, and a consideration of what changes, if any, are needed in the existing laws relative to such liability; and they are published in this form with the consent of the department of the State Government for which they were prepared. An attempt has been made to state briefly the condition of the law, its origin and growth, and the reasons which support it; to show what is the law of other States and countries, and where it may be found; to analyze the judicial reasons given in support of the doctrine of common employment, as it is called, and suggest some reasons in favor of a change of the law.

C. G. F.

Boston, March, 1883.

EMPLOYERS' LIABILITY FOR PERSONAL INJURIES TO THEIR EMPLOYEES.

The legislature at its last session directed an investigation of the subject of the liability of employers to workmen for injuries received while in the discharge of their duty, and a consideration of what changes, if any, are needed in the existing laws relative to such liability. A careful investigation of the law and facts which bear upon the subject has been made, and it has been fully considered in its various phases, with especial care, for the first time, so far as known, in this country. It is a subject which, in all its varied relationships, is by no means easy of comprehension. It is fruitful of embarrassments, and hedged about with difficulties, but at the same time of no inconsiderable consequence to the welfare of the community. During the nine years ending with 1881 there were, according to the "Railroad Gazette," 2,372 persons killed, and 9,387 injured, in the United States, on the railroads alone; and of these, 1,266 were killed and 1,478 injured on the railroads of this Commonwealth. A large majority of both the killed and injured were employees. Of those killed in this Commonwealth, 358 were of this class, while of those injured there were 653. During the year 1881 alone, 72 employees were killed and 128 injured in this Commonwealth. When one single branch of employment causes such an annual sacrifice as this, it seems to be time to consider whether something cannot be done to prevent it.

The subject can be easily stated and plainly illustrated. It can be embodied in the simple question: Ought employees to have the same right to recover damages for personal

injuries that all others have? Should the rule of law which forbids employees from recovering damages from their employers for injuries caused by the negligence of fellow employees and without their own contributory negligence be changed? Should they be allowed, for similar injuries from the same cause, the same right to damages from their employers that the rest of the world has? If, by way of illustration, an accident should occur on a railroad train, should the brakeman have the same right to sue for damages that a passenger has? If the brakeman's arm should be broken through the carelessness of a switchman or a gate-tender, should he possess the same right that a passenger would have for a similar injury? His injury would be the same, his sufferings would be as great. He would, no doubt, be quite as much in need of relief. Nor has he been more negligent, for both were unconscious victims.

To take another illustration. Suppose two persons had been injured in a mill or manufactory through the bursting of the boiler. One was a spinner or a shoe-cutter, the other was, perhaps, a boy who had come in to sell apples and candies. Ought the spinner or the shoe-cutter to have the same right to damages as the apple-boy? They, to be sure, were in the employ of the corporation, and were injured by the carelessness of a fellow-workman in the same employ. But the engineer who neglected his duties, and caused the accident, was as unknown to them as he was to the apple-boy. Not one of them, perhaps, had ever seen the engineer. They knew nothing of his habits or his knowledge of his business; much less could they tell whether he was careful or careless, skilled or unskilled, temperate or a drunkard. Ought they all to have alike the same right to recover damages from the owners of the mill or manufactory; or ought the apple-boy to have a right of action while the spinner and the shoe-cutter have none? Ought the boy to be paid — as well as money can pay — for his broken leg, while the spinner and the shoe-cutter can receive nothing by way of compensation? Ought they to be told, when they apply at the company's office, that nothing can be done for them, and the law affords them no redress, because they and

the engineer were fellow-laborers for the same employer? These are the questions which the resolution directs the Bureau to consider, collect facts concerning, and upon which to report.

Contributory Negligence.

A majority of the injuries to employees as well as to others occur through their own carelessness, and where it is not entirely due to their own carelessness it is often due to it in part. The law of some of the States allows damages to be recovered where, of the two, the person injured is more careful than the person causing the injury. But the law of this Commonwealth is so strict as to demand that the person injured shall be in the exercise of due and reasonable care, and says that when he is in the least careless, and is not in the exercise of such care, he shall not recover damages. He is then said to have consented or contributed in some way to the accident by his own lack of ordinary care. And ordinary care is defined to be such care as men of ordinary sense, prudence and capacity would take under like circumstances. The law expects a man to have his wits always about him, and declares him guilty of contributory negligence whenever, by the exercise of ordinary care, he might have prevented the injury. And it makes men who are sitting in the calm atmosphere of a court room judges of whether at the time of the accident he did what a reasonably prudent man ought to have done under the exigencies of the moment. It will not allow a man to take the risk of an injury and compel some one else to pay for the consequences. He must have been prudent and careful while the one who caused the injury was reckless and careless. And this rule of law is applied by the courts with great strictness. The application puts out of consideration, in discussing this subject, all cases where the acts of the employees have in any way contributed to the injury.

Respondeat Superior.

There is a well-known principle of law which makes every man liable for his own wrong-doing or breaches of contract whenever they have caused actual or legal damage. It is

founded in natural justice, and is as well recognized and as indisputable as Kepler's Law of Areas, or the axiom of geometry that a straight line is the shortest distance between two points. And not only is every man liable for his own torts and breaches of contract, but he is liable for those of his duly authorized agent, so long as the agent acts within the scope of his authority. He is liable, to quote the words of a celebrated authority, "for the torts, negligences and other malfeasances, or misfeasances, and omissions of duty of his servant, in the course of his employment, although the principal did not authorize it, or justify or participate in, or, indeed, know of such misconduct, or even if he forbade the acts or disapproved them." It is because he has acted through and by the hand of another. The agent has been another self, who has done the bidding of his master and been guided by his mind. The complications of life are so many and so varied, the operations of business are so complex and manifold, that most of the acts of many men are done by others for them. Corporations especially are only impersonalities, and all their acts are done by agents. But these acts are none the less the acts of their principals, none the less directed by them; and the principals are none the less responsible for them. Every hand in a cotton factory that spins a thread or tends a loom under the direction of the superintendent, is the superintendent's hand. Every hand that on a railroad drives a spike or moves a lever or a switch, according to his general orders, is the superintendent's hand. Every arm that in a quarry or a coal mine holds a drill or strikes a blow, is the arm of the superintendent, so long as it obeys his will. And the superintendent is but the mouthpiece of the corporation, or his principals. Were it otherwise, any one, by employing some one else to do his bidding, could escape the consequences of his own acts. When they were to his advantage he would reap the profits; when they were to his disadvantage he could disclaim them and escape the losses.

There are many acts which can be done better by the hand of another than by the hand of their author. A vast majority of the acts done and labor performed in the mechanic arts, and in general business, are better done by agents. How