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Constitutional Law--Due Process--Liability Without Fault

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The conclusion to be drawn from these observations is that, when comprehensive standards are laid down by the legislature by which the board is to be bound and mere details are left to the administrative body or officer, the power delegated is purely administrative. Where the standards are unrestricted or omitted the power becomes legislative. Between these two extremes we have a "twilight zone" within which each case must be determined on its own facts.

It would seem that the delegation in the present case is a mere reiteration of what the legislature has done many times before and clearly within constitutional bounds.

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CONSTITUTIONAL LAW — DUE PROCESS — LIABILITY WITHOUT FAULT. — *P* was injured while working for *D*, who had not subscribed to the workmen's compensation fund. *P* sued *D* for the damages incurred under an amended section of the act[1] which imposed an enforceable liability upon a non-casual, nonsubscribing employer for injuries suffered in the course of and resulting from employment, though not caused by the wrongful act, neglect or default of the employer. *Held,* one judge dissenting, that the statute is unconstitutional as violative of the due process clauses of the state and federal constitutions. *Prager v. W. R. Chapman & Sons Co.*[2]

Though the constitutionality of workmen's compensation acts is now generally conceded,[3] at their inception the declaration that an employer, even under the act, should be responsible for injuries to his workmen whether or not the employer was at fault met with instant and vigorous opposition. While it was held that the com-

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[1] W. VA. CODE (Michie, 1937) c. 23, art. 2, § 8. ". . . employers . . . shall be liable to their employees . . . for all damages suffered by reason of accidental personal injuries or accidental death sustained in the course of and resulting from their employment, and in any action by any such employee or personal representative thereof, such defendant shall not avail himself of the following common law defenses: The defense of the fellow-servant rule; the defense of the assumption of risk; or the defense of contributory negligence; and further, shall not avail himself of any defense that the negligence in question was that of someone whose duties are prescribed by statute, provided no action shall lie, and no recovery shall be had, against casual employers . . . without allegation and proof that such accidental personal injuries . . . were caused by the wrongful act, neglect or default of the employer. . . ."

[2] 9 S. E. (2d) 880 (W. Va. 1940).

[3] De Francesco v. Piney Mining Co., 76 W. Va. 756, 86 S. E. 777 (1915); 1 SCHNEIDER, WORKMEN'S COMPENSATION LAW (2d ed. 1932) § 4.

mon-law defenses of the fellow-servant rule, contributory negligence and assumption of risk were within the legislative power and could be abolished, the courts still clung tenaciously to the belief that no man could be made liable without fault, and any attempt so to abrogate this doctrine was viewed as an infringement of the due process or equal protection clauses of both the federal and state constitutions.[4]

The doctrine, though, of liability without fault was not unknown to the common law, and it is not now a stranger to modern legal philosophy.[5] Absolute liability for any damage was formerly placed upon the keeper not only of wild animals, but of domestic animals, and upon the possessor of fire.[6] While modern cases have in some instances repudiated this doctrine,[7] others have extended it,[8] some even going so far as to achieve statutory approval of the conception of liability without fault. States can and have imposed absolute liability on municipalities for damage to property resulting from mob violence,[9] on owners of motor vehicles for injuries resulting from negligent operation by the person who used it with the owners' consent,[10] on owners of stock for depredations com-

[4] Ives v. South Buffalo Ry., 210 N. Y. 271, 94 N. E. 431 (1911); Kentucky State Journal Co. v. Workmen's Compensation Board, 161 Ky. 562, 170 S. W. 437 (1914).

[5] HOLMES, THE COMMON LAW (1881); ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) § 251.

[6] HARPER ON TORTS (1933) §§ 156, 166, 195. Pertinent in this connection is the case of Rylands v. Fletcher, L. R. 1 Ex. 265 (1866). There the defendant constructed a large reservoir on the site of an abandoned mine shaft. The reservoir broke, and flooded *P's* mine. "We think that the true rule of law is, that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." (P. 279)

[7] Watts v. Norfolk & W. R. R., 39 W. Va. 196, 19 S. E. 521 (1894); Veith v. Hope Salt & Coal Co., 51 W. Va. 96, 41 S. E. 187 (1902); Vaughan v. Miller Bros. "101" Ranch Wild West Show, 109 W. Va. 170, 153 S. E. 289 (1930).

[8] Wilson v. Phoenix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035 (1895); Sullivan v. Dunham, 161 N. Y. 290, 55 N. E. 923 (1900); Aggleson v. Kendall, 92 W. Va. 138, 114 S. E. 454 (1922); Ambrose v. Young, 100 W. Va. 452, 130 S. E. 810 (1925).

[9] Chicago v. Sturges, 222 U. S. 313, 32 S. Ct. 92, 56 L. Ed. 215 (1911). West Virginia by statute [W. VA. CODE (Michie, 1937) c. 61, art. 6, § 12] imposes liability on any county in which a person charged with a crime is taken from the officer and lynched. Whether or not by this statute absolute liability has been imposed, and whether or not such absolute liability would be held constitutional has apparently not yet been decided. *Cf.* Mullins v. County Court of Greenbrier County, 112 W. Va. 593, 166 S. E. 116 (1932); Meadows v. City of Logan, 1 S. E. (2d) 394 (W. Va. 1939).

[10] Hodge Drive-it-Yourself Co. v. Cincinnati, 284 U. S. 335, 52 S. Ct. 144, 76 L. Ed. 323 (1932).

mitted,[11] on corporations and stockholders for the acts of the officers,[12] and on railroads for the damage to property injured or destroyed by fire communicated directly or indirectly by its engines.[13] These are all indicative of the modern belief in the validity of the imposition of liability without fault whenever it is a reasonable means for promoting a legitimate governmental policy.

The development of the workmen's compensation acts first saw an acceptance of the elective acts which deprived a nonsubscriber of his common-law defenses,[14] and also made the subscriber liable without fault. Though these acts were first upheld upon contractual principles, they were later justified on the basis of the police power of the state.[15] More hesitancy was evidenced in sustaining compulsory acts, but these too were soon recognized as being within the regulatory powers of the legislature.[16] Our court has recognized that a nonsubscriber may be deprived of his common-law defenses,[17] but has refused to take the next step — the imposition of liability without fault.

The basis for such a refusal may be predicated upon the belief that such liability can be imposed only by administrative ruling and not by judicial decision. While administration of such acts by the courts is neither efficient nor desirable,[18] several states have adhered to this system,[19] but others who have tried it have found it unworkable.[20] Furthermore, under compulsory acts, it has been held that a defaulter may be sued at law or under the act, which-

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[11] W. VA. CODE (Michie, 1937) c. 19, art. 18, § 2. Haigh v. Bell, 41 W. Va. 19, 23 S. E. 666 (1895).

[12] N. Y. Central R. R. v. United States, 212 U. S. 481, 29 Ct. 304, 53 L. Ed. 613 (1909).

[13] St. Louis & San Francisco Ry. v. Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 L. Ed. 611 (1897).

[14] Hawkins v. Bleakly, 243 U. S. 210, 37 S. Ct. 255, 61 L. Ed. 678 (1916); Bell v. Toluca Coal Co., 272 Ill. 576, 112 N. E. 311 (1916); Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 35 S. Ct. 167, 59 L. Ed. 364 (1914); Dooley v. Sullivan, 218 Mass. 597, 106 N. E. 604 (1914); Note (1911) 24 HARV. L. REV. 647 (1911).

[15] Ocean Accident & Guarantee Corp. v. Industrial Comm., 32 Ariz. 275, 257 Pac. 644 (1927).

[16] State v. Watland, 51 N. D. 710, 201 N. W. 680 (1924); Mountain Timber Co. v. Washington, 243 U. S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917); Arizona Employers' Liability Cases, 250 U. S. 400, 39 S. Ct. 553, 63 L. Ed. 1058 (1918).

[17] De Francesco v. Piney Mining Co., 76 W. Va. 756, 86 S. E. 777 (1915); Watts v. Ohio Valley Electric Ry., 78 W. Va. 144, 88 S. E. 659 (1916).

[18] DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936) c. IV.

[19] DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION lists the following: Wyoming, New Hampshire, New Mexico, Alabama, Tennessee and Louisiana.

[20] DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION lists the following: New Jersey, Minnesota, Kansas and Nebraska.

ever the injured employee desires.[21] If he decides to sue at *law*, it has been held constitutional to hold the employer *liable without fault* for the injury sustained.[22] The express ground of decision of the principal case would thus seem to be at variance with these cases as to the right to provide for judicially imposed liability without fault for nonsubscribing employers as an incident to a coordinated compensation system.

If recognition is once accorded to the fact that it is within the limits of the due process clauses to deprive a subscribing or nonsubscribing employer of his common-law defenses, to make a subscriber liable without fault under both the compulsory and elective acts, at law or before the administrative body or officer and to impose a compulsory act upon all employers, it would seem no great departure to take the further step and impose absolute liability upon a nonsubscribing employer. It is not a matter of punishing the employer, since he is not engaging in blameworthy conduct — but he is creating hazards, necessary though they may be to society. Notions of fairness cannot require that the risk should fall on the employee, and it is submitted, that since the employer can readily escape liability by electing to accept the provisions of the compensation act, it is neither arbitrary, nor counter to any conception of fairness to impose upon a nonsubscriber absolute liability.[23]

A. A. A.

CONTEMPT — POWER OF CHANCERY TO PUNISH. — An attorney for the special receiver of the defendant coal company filed an answer to an order by the court directing him to pay a certain sum to the receiver, averring that he had paid the sum. The receiver's receipt showed such a payment. On examination it was found that the answer had been drafted in anticipation of a payment which had never been made. Both the attorney and the receiver were found guilty of contempt of court. The question was

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

[22] Fahler v. City of Minot, 49 N. D. 960, 194 N. W. 695 (1923); State of North Dakota v. Watland, 51 N. D. 710, 201 N. W. 680 (1924).

[23] "... we cannot assent to the proposition that the rights of life, liberty, and property guaranteed by the Fourteenth Amendment prevent the States from modifying that rule of the common law which requires or permits the workingman to take the chances in such a lottery." Arizona Employers' Liability Cases, 250 U. S. 400, 423-424, 39 S. Ct. 553, 63 L. Ed. 1058 (1918). "The common law system of rights and remedies as it existed at the time of the adoption of the Fourteenth Amendment to the federal Constitution did not thereby acquire a perpetual guarantee against change by legislative processes." ROTTSCHAEFER, CONSTITUTIONAL LAW 547 (1939).