The Legal Fiction of Equality.

"There are no classes in America. I hate the name!" Judge George Gray, quoted in the "Outlook" of July 4, 1903.

IN order to a true understanding of that much misunderstood assertion of the Declaration of Independence, that all men are born free and equal, the economic significance of the American Revolution must be borne in mind. The chain of revolutions, of which that in America formed a highly characteristic link, whereby the bourgeoisie broke the power of the noblesse, was everywhere marked by an insistence on the worth and sacred liberty of the individual, untrammeled by any advantage arising to others from birth into a heritage of descendable class privilege. As hereditary privilege was the essence of the aristocratic status, its denial by the militant bourgeoisie was a matter of course. This, then, is all that was meant by the assertion of freedom and equality, namely, the repudiation of the legally recognized prestige of birth; and it would have saved much misconception if the principle had been expressed in negative form.

There is something very attractive, even to us moderns, in the aspect of the young, idealistic, revolutionary bourgeoisie, flushed with its victory over ancient and hallowed wrong, declaring that all men are *born* (note the word) equal, and proceeding to embody this rejection of inheritable ascendency in its constitutions, customs and laws. But from this to the doctrine that all men shall remain forever after birth equal before the law, is evidently a step in advance; yet one which, in the then condition of American society, seemed but the necessary corollary of the first, or, perhaps, but another phase of the principle itself. For at that time, if we exclude the professional class which has never been inspired by a distinct economic interest, and the slaves who were not recognized as human, but one class existed in America —the middle class. Modern manufacture, with its splitting of the middle class into capitalists and wage-workers, was as yet unknown. The business of the country was agriculture; and the effect of unoccupied land in preventing the formation of a distinct class of wage laborers has already been pointed out in this magazine.* No injustice, therefore, resulted from the extension of the principle so as to exclude from legal cognizance not only the accident of birth, but all the accidents and vicissitudes of life as well.

How the principle, as thus broadened, has been preserved and consecrated in our jurisprudence, with the hearty approval of

*"The Economic Organization of Society," INTERNATIONAL SOCIALIST REVIEW for July 1, 1903, p. 12.

bourgeois sentiment, through the application of the maxim *stare decisis*, or how necessary to an orderly system of laws conformity to precedent is, it is not the present purpose to discuss. It is enough that at the present day, while at least four major classes (speaking from an economic standpoint) appear in American society, with the germs and buddings of still further divisions, the courts still uniformly refuse, in deference to this legal fiction of equality, to see the facts before their eyes.

A distinction of class differs from that of caste in that the latter is hereditary and can never be escaped by the individual, while the former depends upon any incident or feature common to a group, which may be very transitory, so that the membership of a class may shift continuously. The basis of economic class distinction is the manner of securing a livelihood. Of the four classes referred to, naming them in the order of their prestige and political importance, the capitalists derive their living, without labor, from the three sources of rent, interest and profit, the latter usually assuming the concrete form of dividends. In practice, however, many capitalists still perform certain labor of oversight and direction in their businesses, thus occupying a position midway between the capitalistic and middle classes. The professional class differs from the capitalistic in that its income is derived from actual labor, while it differs from the wage-workers both in the quality of its services, its scale of living, which approximates the capitalistic, and in having for its employer the public at large. The middle class covers those whose living is derived from labor for the public performed with their own capital, and includes farmers owning and working their own farms, small storekeepers, the cross-roads blacksmith who owns his own shop, etc., etc., This class is oldest of all except the professional, and furnishes, in our modern life, constant accessions to all the others, becoming, through this depletion, a disappearing class. Remembering the days of its past glory, it is politically reactionary, and the political interests of the smaller capitalists sometimes lead to their affiliation with it. Lastly come the wage-workers, laborers working with the capital of others, the subjects of capitalistic exploitation, it being their unremunerated toil which enables the capitalists to live without toil. It is a peculiar characteristic of this class, and one which the reader is asked to treasure in mind during the remainder of this article, that it lives from hand to mouth, the wage of one day barely sufficing for the necessities of the next as determined by its scale of living, so that any cessation of employment spells deprivation of the means of life. Nor are the members of this class enabled to practice to any considerable extent the bourgeois virtue of saving, and even where they have done so, their scanty hordes are quickly exhausted when drawn on for subsistence. Continuous employment, therefore, becomes for them the *sine*

qua non of continued existence, and this sinister dependence constitutes the fetters of that status frequently referred to as wage slavery.

Evidently it must be pleasing to capitalists, in their legal conflicts with members of other classes, to have any class advantage accruing to them ignored by the courts, and that there is such advantage will be readily conceded by those of their opponents who have felt the embarrassment of the unequal contest. It is in suits between capitalists and wage earners, however, that the discrepancy in position is most manifest. The employee comes into legal conflict with the employer chiefly, if not almost wholly, in two varieties of actions—those for personal injuries, and strike litigation. As to the latter, the law involved is still in too nebulous a state to permit of instructive generalization. It is in actions brought by the employee for personal injuries occasioned by the employers' negligence, the law of which has been developed contemporaneously with the capitalistic system itself, that we may particularly note the malign influence of the legal fiction of equality. When the wage-worker is maimed or killed through his master's negligence, and his labor power thus impaired or cut off altogether, with a corresponding reduction in or termination of ability to earn a livelihod, his claim, or that of his family, against his master for reimbursement, might seem to the uninitiated layman peculiarly meritorious. It shall be our business to notice some of the judge-made rules of law indicative of the attitude of the courts thereto. And first, as to the measure of care required of the master.

In his work on *Master's Liability,* Mr. Bailey, after summarizing the duties of the master as those of furnishing reasonably safe appliances, a reasonably safe place to work, and the employment of a sufficient number of competent associates, adds (p. 3), "In the performance of these duties, the master is bound to the exercise of reasonable and ordinary care, and such only." Later he quotes (p. 24) with approval from the Supreme Court of Pennsylvania: *"Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business."

Passing by the principle, which is itself a luminous comment on the spirit of capitalism, that human life and limb are the subjects of only ordinary care, let us scrutinize the "unbending test" of that care, "the ordinary usage of the business." There is no question of the rule. It has been iterated and reiterated until a criticism of it seems almost pathetic in its futility. And yet whose province is it to fix "the ordinary usage of the business"? That of the employers. Any attempt of the workers to do so is

*Titus v. Railroad Co., 136 Pa. 618; 20 Atl. 517.

quickly resented as an unwarranted impertinence. The master erects his factory with a minimum allotment of space, air and light. He places cogs and belts and rollers where he will, and the workers are then invited to enter. Now, the only possible justification for this "unbending test" of negligence, is that they may refuse to do so. In other words, that the wage-earners may reject undesirable or hazardous employment, thus forcing a voice in the establishment of "the ordinary usage of the business." But as we have seen this is precisely what they cannot do. Enter they must, constrained by the imperious necessity which binds them in their status. Only when some single employer has exceeded the average disregard of human safety, may some of the more temerous refuse to work for him.

Thus the employers as a class establish the customary conditions of employment, sanctify by usage its dangers and discomforts and so fix the standards of their own liability. They are made judges of their own cause; and what any particular employer is held for, is not negligence, but *more than average* negligence. Then too, as the employer has no property interest in the bodies of his employees, unless he is actuated by motives of humanity or unless better conditions or safer appliances will also increase the output, there is no incentive for improvement. A need do no more than B, nor B than A. Old abuses of employment may continue eternally, carefully safeguarded by this rule of law. By this rule the courts have resigned their function of arbitrators between the parties, and contentedly accept the measure of responsibility prearranged by the defendant himself. That this is the practical effect of the rule is evidenced by the legislative effort to supply, as by factory and mine inspection laws, an impartial tribunal; or, as in the case of the act of Congress requiring safety brakes on cars used in interstate traffic, a measure of reliability in the law itself. It is, however, due to the United States Supreme Court to say that, latterly, some doubt as to the justice of the rule seems to have occured to that eminent tribunal. It says:* "Ordinary care on the part of a railroad company implies, as between it and its employees, not simply that degree of diligence which is customary among those intrusted with the management of railroad property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from negligence on the part of the employer, is fairly commensurated with the perils and dangers likely to be encountered." But Mr. Bailey believes (p. 11) that the court afterwards receded from this, one would think fairly tenable, position.

But when even by these low standards, the master's negligence in a given instance has been proven, the injured servant's case

*Wabash Ry. Co. v. McDaniels, 107, U. S. 454; 2 Sup. Ct. 932.

is by no means won. Defenses peculiar to this class of actions still remain open to the former, among the most favorite being the doctrine of "assumed risk." Mr. Bailey's explanation of this doctrine (Master's Liability, p. 145) is so naive an expression of capitalistic sentiment, as to merit quotation at length:

"It is to be observed that persons and companies, and especially corporations, whose interests are large and business complex in character, and who necessarily have to intrust the management and performance of their business to officers, agents, and servants, do not always adopt such a method of conducting their business as to meet the requirements of duty as measured by the standard herein before stated and discussed. There are many classes of business, such as the operation of large factories and the management and operation of railroads, which are attended with great risks and perils, and the utmost, or even ordinary prudence, is not exercised, either in the manner of constructing their structures, providing machinery and appliances, or in their operation. If the strict rule of duty in these respects was always required, then it would be that many, if not most, of the enterprises of such character, which add so much to the convenience and material prosperity of the people, would have to be abandoned. Therefore it has come to be well settled that the master may conduct his business in his own way, although another method might be less hazardous; and the servant takes the risk of the more hazardous method, as well, if he knows the danger attending the business in the manner in which it is carried on. Hence, if the servant knowing the hazards of his employment as the business is conducted, is injured while employed in such business, he cannot maintain an action against the employer because he may be able to show there was a safer mode in which the business might have been carried on, and that, had it been conducted in that manner, he would not have been injured. Therefore the liability of a master to respond to his servant in damages for an injury received in the scope of his employment does not necessarily follow upon proof made that such injury was the result of the failure of the master to fully observe his duty as such, when measured by the standard of duty required, and governed by the principles stated in the preceding chapters, for the very plain reason that he may not owe his servant such duty or to such a degree. Such standard is that which is required and must be observed where the servant has no knowledge, actual or presumed, of the master's peculiar method of business, the situation of his premises, the character of his machinery," etc., etc.

Later Mr. Bailey (p. 170) thus formulates the rule: "The servant assumes the hazard of dangerous methods, as well as the use of defective tools or machinery, when, after employment, he learns of the defects, but voluntarily continues in the employment

*American Rolling Mill Co. v. Hullinger, 67 N. E. 986.

without objection." The Supreme Court of Indiana, in a very late case* in which it frustrated, by reasoning unique in judicial annals, a bungling legislative attempt to get rid of the doctrine, thus carefully defines it: "Notwithstanding the duties the master owes the servant * * * , yet, if it appears that the latter had assumed the risk, there is no liability for negligence. This is but an application of the maxim *'Volenti non fit injuria'* (One who consents cannot be injured) which states a principle of very broad application in the law. The master may not have performed the duty required of him, but if the servant knows that such duty has not been performed, and appreciates the extent of the risk he thereby runs, or should have known and appreciated the same, he ordinarily assumes the risk, and this absolves the master from liability for his resulting injury."

That the servant is himself duly careful, that he has justifiably forgotten the defect or danger, that he is threatened with discharge if he does not accept the hazard prepared for him, have alike been held not to relieve him from assuming the risk of his master's admitted negligence. If he calls the master's attention to the defect or danger, and *secures a promise to repair or obviate it at a definite time,* this promise may, if he continues at work in reliance thereon, relieve him from assuming the risk, provided the danger is not too great, until it becomes apparent that the master does not intend to fulfill the promise, when the risk is again assumed.

In all the cases where the doctrine of assumed risk is applied, it is frankly and explicitly placed on the ground that the wage worker is the equal in all respects of the capitalist, that he occupies an equally advantageous position and enjoys the same independence of action, that he is at liberty to contract for such employment as he pleases, and to abandon it at will. Hence is exacted the price of this flattering liberty, that by accepting any given employment he assumes all dangers his master has culpably placed in his pathway, of which he knows or should know; and if the danger arises after employment, his continuance therein is visited by the same consequence. That all this is in full accord with the legal fiction of equality, and is likewise at profoundest variance with the facts, needs no argument to show. The judges who thus lightly remit the wage earner to a forfeiture of his employment, with the alternative of inability to recover for injuries incurred therein, have, as members of a different economic class, never known the worry of a "lost job," the bitter anxiety of being "out of work," or the humiliation of looking for employment. Judicial obliviousness to the shackles of economic necessity binding the laborer to his task, here works, probably, the cruelest injustice ever perpetrated by the courts upon the helpless in the name of liberty.

Another defense, of peculiar inequality, made in this class of actions is known as the "fellow servant doctrine."

It is a principle so old that its origin is lost in the mists of antiquity, that the master is responsible for an injury caused by the negligence of the servant while acting within the scope of his employment. This principle, known as the doctrine of *respondeat superior,* had an unquestioned place and uniform application both in English and American law till 1837, when the case of *Priestly v. Fowler* (3 Mees. & W. 1) was decided in England. In that case a servant sued his master for a broken thigh caused by the overloading and breaking of the master's van. The court in refusing him relief, said: "If the master be held liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. * * * If the owner of the carriage is responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coachmaker, or his harness-maker, or his coachman. * * * The master, for example, would be liable to the servant for the negligence of the chamber-maid, for putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen; of the butcher in supplying the family with meat of a quality injurious to health; of the builder for a defect in the foundation of the house, whereby it fell and injured both the master and the servant by the ruins. The inconvenience, not to say the absurdity, of these consequences, afford a sufficient argument against the application of this principle (the doctrine of *respondeat superior*) to the present case." Thus an immemorial principle, so far as it would have protected the wage-earner, was disposed of by ridicule rather than argument, and that ridicule not only of a poor quality, but showing a very stupid failure to distinguish between a fellow servant and one from whom the master purchased goods.

Four years later, the Court of Errors of South Carolina* reached the same conclusion, basing it upon a wholly fanciful and fictitious "joint undertaking" by all the servants to work for their master.

A year later the Supreme Court of Massachusetts† announced the fellow servant rule, placing it squarely on the basis of assumed risk, and in 1850, the English courts‡ did the same, saying, "The principle is, that a servant when he engages to serve a master undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of negligence upon the part of a fellow servant when he is acting in the discharge of his duty as a servant of him who is the common master of both." The Massachusetts case has become the leading one on the subject in the United States, and the fellow servant doctrine may fairly be taken to be, in the view of the courts, but

a phase or special application of the doctrine of assumed risk, already discussed.

The rule itself is thus formulated by Mr. McKinney in his work on *Fellow Servants, p.* 18: Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service."

The extreme harshness and hardship of this rule when practically applied, has led some courts, notably that of Ohio, to distinguish between fellow servants and "vice-principals," and other courts to require that, if the rule is to operate, the servants shall be personally associated. It is now very generally modified by statute far enough to exclude railroad employees from its scope.

In conclusion, therefore, we may say that there are classes in America, and that the judicial pharisaism which refuses to recognize the fact has wrought cruel deception and bitter injustice. Flattered by meretricious assurances of equality, the workingman has exerted himself to preserve the existing order of things, while his sole asset, his ability to labor, has been made the plaything of judicial subserviency to capitalism. But does the working-man feel aggrieved by this attitude of the courts toward him? (he may not, for his patience is one of the most curious social phenomena of our time)—the remedy lies with himself. This same doctrine of equality which has been thus adroitly used to his undoing, has placed in his hands the ballot, the law making power, before even which courts must bow. Not one of the judicial doctrines here criticised but may be abrogated by half a dozen lines of properly drafted legislation. No constitutional sanction hedges them about, no vested right can be worked in their defense. All that is needed is that the wage earner shall cease to vote for candidates of old parties which are but the political expression of various capitalistic and middle-class interests, and cast an intelligent ballot in his own behalf. No workingman can doubt that a socialist legislature or socialist court would sweep away this entire fabric of subtle injustice with the rapidity of an avenging besom. Does he want to be rid of it? That is the only question.

Clarence Meily.

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*Murray v. South Carolina R. Coo., 1 McMullan 385; 36 Am. Dec. 268.
†Farwell v. Boston & Worcester R. Corp., 4 Metc. 49.
‡Hutchinson v. Nork, New Castle & Berwick R. Co., 5 Exch. 343; 19 L. J. Exch. 296.