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EMPLOYEE'S ACTION AGAINST EMPLOYER.

[From the Southern Law Review.]

The subject of the employee's action against his employer, for injuries received in the course of the employment, presents some very perplexing problems, upon which few courts entirely agree, and in whose solution some tribunals have adopted the reasoning of others, reluctantly, upon the confessed ground of authority rather than upon principle or conviction.

The actual adjudications are often more satisfactory in their results than the reasoning upon which they are based. The chief difficulty generally seems to be the assignment of a sufficient reason for exempting the employer from liability, for it has been commonly assumed that he would be liable but for some special exemption. The earliest and most confident method was to assume a contract on the part of the employee exempting the employer from liability, having first assumed that the employer would be liable but for such a contract. This mode of reasoning is well exhibited in the language of Lord Abinger in *Priestly* v. *Fowler*.* The opinion goes a good way beyond the facts of the case, and illustrates the legal methods against which Bentham's vigorous protest has as yet made little headway.

Dr. Wharton, in an interesting pamphlet,† which gives an account of the recent parliamentary investigation of the subject, objects to our assuming such an exemption in the contract of service; but, unless we quite misunderstand him, he offers as a substitute a contract of "co-adventure." It can make little difference by what name we call the contract. If we start with the assumption that on principle the employer should be liable, and then seek an exemption in the fact of the relation, it cannot matter whether we call the contract, out of which the relation and the consequent exemption spring, by one name or another. The mere fact that the parties to any given relation are, in some senses, "co-adventurers," will not constitute a defence to any legal liability, unless the co-adventure amount to a partnership; and we do not think this can be claimed.

Judge Cooley, in a recent work,* intimates that this theory of a contract for the exemption might hardly satisfy him, were it not supplemented by considerations of public policy. After referring to the assumed contract by the employee to bear the risks of the business, he says: "Whether this reason would be sufficient for all cases, if it were a matter of indifference to the general public whether the servant should have redress or not, may be matter of doubt; but it is supplemented by another, which considers the case from the standpoint of public interest. That reason is this: that the opposite doctrine would be unwise, not only because it would subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business, but also because 'it would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master, to protect him against the misconduct or negligence of others who serve him'" (p. 541). And Judge Cooley would apply this argument to all employees alike. "The negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants, and not those of another class. Nor on grounds of public policy could the distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public, who, in their dealings with the employer, may be subjected to risks. Sound policy seems to require that the law should make it for the interest of the servant that he should take care, not only that he be not himself negligent, but also that any negligence of others in the same employment may be properly guarded against,

* 3 Mee. & W. 1. See also *Hutchinson* v. *Railway Co.*, 5 Exch. 351.

† Monograph on Liability of Master to Servant, by Francis Wharton, LL.D., 1878.

* Cooley on Torts, chap. 18.