employee is entitled to the application of the rule *Sic utere tuo ut alienum non lædas*, as a stranger in the premises. And it is a breach of the employer's duty to him to permit an unsafe condition of the machinery, to his hazard.

But when the employee is sufficiently informed of the actual condition and danger,—and for this purpose the means and opportunity of information will generally be equivalent to actual knowledge,—the employer is under no obligation to him to improve that condition or to lessen the danger. It may be well enough, as a colloquial expression, to say that in such a case the employee "takes the risks which are incident to the employment under these conditions." He incurs them, certainly; but if by the expression it is meant that he *contracts* to bear them, and to relieve the employer from some liability which would otherwise rest upon him in regard to them, the expression seems to be improper and confusing. The employee incurs whatever risks to himself are incident to the conditions of the business agreed upon, but he does not need to make a contract for this purpose. The risks are there, and by entering the business he incurs them *ipso facto*; but he has no claim for damages against the employer, unless the latter is in some way to blame for the injury. It is not necessary to stipulate not to sue, when one has no cause of action.

We may recapitulate the objections to this theory of a contract for exemption, as they appear to us. It requires us to assume a contract to avoid an assumed liability. We think there is in fact no such primary liability. We think there is in fact no such contract for exemption. And if there were such primary liability and such contract for exemption, we think the contract would be void as against public policy and without consideration. The legal view of the case seems to us to be, that the servant does not show sufficient facts to constitute a cause of action, for one necessary fact to support such an action is the violation of some duty owed by defendant; and it does not appear, in such a case, that there has been any duty violated.

Another class of cases will be found, where the employee is injured by machinery, etc., which has become defective by use, the defect being known to both employer and employee. The employer owes the employee a general duty to maintain the machinery, etc., in as good condition as he found it at the outset; it becomes impaired by use, and is more dangerous. It is a breach of his original duty under the contract, for the employer to permit the machinery to remain in this more dangerous condition; yet, if the servant continues to use it in this condition, he cannot recover. Why? Some authorities say, because he contracts to take the risk. We have already stated the objections to this theory, as they appear to us.

Another ground has been suggested, viz., contributory negligence. It is in one sense contributory negligence in a servant, under any circumstances, to put his hand to a machine which he knows to be unsafe: but this is equally negligent, and contributes equally to the injury, where he has complained to his employer, and has been promised an amendment of the defect. The mere complaint and promise do not lessen the danger until the promise has been performed. Yet it is generally agreed that for a reasonable time after such complaint and promise the employee may continue to use the dangerous machine, and if he is injured by it he may recover.

The whole ground of these distinctions seems to be covered by a glance at the employer's duty.

We start with the natural and reasonable duty of the employer to maintain his machinery in as safe a condition as the servant finds it at the outset. This is the basis of their understanding. The employer violates his duty in this regard by permitting a deterioration in the condition of the machinery to go unheeded. But if the servant has knowledge of it, and makes no complaint, he assents to the modification of the employer's original duty in this regard. He waives its performance. *Volenti non fit injuria.* One cannot stand by and acquiesce in his own injury, with a view to recovering damages for it. On the other hand, if he complain to the employer, it is a protest against the breach, and a notice that he will not waive the performance of his duty. If, after such protest, the breach is still left unmended, the employee may decline to continue his work under these more hazardous conditions; and if discharged, he may recover for wrongful