WORKMEN'S COMPENSATION: SOME SUGGESTED REFORMS.

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Impending legislation relating to Workmen's Compensation makes this a suitable time for one to suggest some necessary reforms in the existing law. A Departmental Committee appointed by the Government is, I understand, about to publish its Report, and it is possible that some of its recommendations may include those which I am about to suggest. The whole field of Workmen's Compensation law is so wide that it would be impossible for me in the short time at my disposal to cover it. I shall, therefore, content myself with dealing with two matters which require attention with a view to making more complete the administration of this branch of the law. They relate to measures having for their object—

(1) Guarantees that a workman shall in all cases receive compensation which may be awarded to him. This is supplemental to the existing law; and

(2) The bringing up to date of the law having regard to the change in the status of our country from being part of the late United Kingdom to being one of the nations associated in the British Commonwealth of Nations.

As introductory to the first of these suggestions let me sketch briefly the history of that branch of the law relating to employer and workman which led up to the incorporation in it of the idea of Workmen's Compensation.

At common law a workman injured in the course of his work or the dependents of a workman fatally injured in the course of his work had no greater right of action than any

other person so injured or killed; that meant that the dependents of a workman so fatally injured had no legal remedy at all.

The Fatal Accidents Act, 1846, however, gave the dependents of a workman killed in the course of his work a right of action only in such cases as those in which the deceased would have been able to maintain an action had the accident not proved fatal. To the defendant were available all the common law defences already in existence, which included a denial of negligence; the plea of common employment, namely, that the action arose as a result of the negligence or incompetence of a fellow-workman; the plea of *volenti non fit injuria,* which meant that a workman undertook the risks of the employment and could not hold the employer liable for damages flowing therefrom; and the defence of contributory negligence, which meant that the damage resulted from negligence on the part of the workman. These defences, it was considered, resulted in a denial of justice to workmen in certain cases, and the Employers' Liability Act, 1880, was passed to remove difficulties connected with the doctrine of common employment, into which it is unnecessary to go here. It is evident that even under these statutes the principle upon which a workman could recover damages from his employer was that based upon negligence on the part of the employer and not based on any actual right vested in the workman as such.

A new principle was, however, introduced into the law by the Workman's Compensation Act, 1897, by imposing on employers the liability to pay compensation to a workman personally injured by accident arising out of and in the course of his employment, but this Act only applied to certain of the more dangerous employments, *e.g.,* railways, factories, mines, quarries, engineering work, and certain buildings over 30 feet in the course of erection or repair. By the Workman's Compensation Act of 1900 this principle was extended to include agricultural labourers, and this principle was further extended to all employments, with a few exceptions, by the Workman's Compensation Act of 1906. This statute enacted that if in any employment personal injury by accident arising out of and in the course of the employment was caused to a workman, his employer should be liable to pay compensation in accordance with the First Schedule to the Act. The method of assessment of compensation set out in the First Schedule provided that where death resulted from the injury the workman's dependents should receive a sum equal to his earnings in the employment of the same employer during the three years next pre-

ceding the injury or £250, whichever sum was the larger, but in no case more than £300; and that schedule also provided that where total or partial incapacity resulted from the injury the workman should receive a weekly payment during incapacity not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he had been so long employed, but if not then for any less period during which he had been in the employment of the same employer such weekly payment not to exceed one pound.

It is to be noted that this statute declared that a workman was to be entitled to compensation for injuries sustained in the course of his employment regardless of his employer's negligence, and that such compensation should be based upon the workman's earnings. The statute, however, gave no adequate security for payment of a sum so awarded as compensation, and this is the point with which I wish to deal in this part of my address.

That statute gave the workman certain inadequate guarantees, namely—

(1) Priority of payment where the person liable to pay compensation awarded goes into bankruptcy or into liquidation. This would give him security to the extent of the assets of his employer, but would not cover all cases in which the assets would not be sufficient to meet the amount of the compensation.

(2) A mortgage on the reserve funds of insurance companies.

(3) Special guarantees for seamen where the debtor resides abroad.

It is evident that these provisions would not provide security in every case, and the workman is placed to some extent in the position of a person who is run down and injured by an uninsured motorist. Since the Workman's Compensation Act of 1906 there were passed—

The Workmen's Compensation (Anglo-French Convention) Act, 1909;

The Workmen's Compensation (War Addition) Act, 1917;

The Workmen's Compensation (Silicosis) Act, 1918;

The Workmen's Compensation (Illegal Employment) Act, 1918;

The Workmen's Compensation (War Addition) Amendment Act, 1919;

but none of these affect the principles embodied in the Act of 1906.

This was the code in force in Ireland at the date of the Treaty of 6th December, 1921, and it is still in force in Saorstat Eireann. Great Britain and Northern Ireland have since passed measures bringing this branch of their law up to date, and the Government of Saorstat Eireann realised that the Acts inherited from British law were designed for highly organised industrial communities such as are to be found in Great Britain and might not necessarily be suitable for continuance in Saorstat Eireann, where the main industry is agriculture and such other industries as we have are comparatively small and few in number. The Government, therefore, appointed the Departmental Committee which I have mentioned, its terms of reference being as follows :—" To inquire into the present system of the payment of compensation to workmen for injuries sustained in the course of employment, and to consider and report whether any amendments of the law or administration are desirable."

Although this Commission has completed its inquiries and is about to issue its Report, I labour under the difficulty that the Report has not yet become public property. I do not propose, however, to examine the whole of this branch of the law, which, no doubt, has been adequately examined by the Committee, and I shall content myself with making suggestions upon the two lines which I have already indicated.

Guarantees.

It seems clear that statutes declaring a right to compensation and providing the mode of assessment and award should also provide complete guarantees for the payment of any sum so awarded. The absence of such complete guarantees from the Workmen's Compensation Acts is therefore a defect which requires attention. It may be said that there are not sufficient statistics as to the number and gravity of cases in which awards made have remained unpaid to warrant the passing of special legislation, but it is surely a conclusive answer to say that the existence of one such case would be sufficient to justify an amendment of the law, and that the present provides an opportunity of doing it. The question is how is it to be done? There are various methods.

One method is that already adopted in the British code, namely, to give priority of payment to the workman out of the employer's assets, but, as already mentioned, this may prove ineffective for the reasons already stated.

Another method is to establish a legal mortgage on the property of the employer proportionate to the amount of the

workman's claim and coincident with the creation of it. This implies that the assets of the employer are of such a kind as to allow of the creation of a mortgage upon them. Even if such a mortgage had been created there would still arise questions as to priority as between the workman's mortgage and others which might lead to litigation, expense and delay. A further objection is that such mortgages would adversely affect the mobility of the employer's assets and might prejudice his credit and thereby his business.

A third method is that of substituting for the employer some fund which shall be always solvent enough to pay any claim by a workman. Such a fund might be created by the State or might be held by insurance companies, and is, in fact, an insurance against the insolvency of any employer who fails to execute his obligation to pay compensation to a workman entitled. This seems to me to be the most effective method, and it has been embodied already in various systems in different countries. Once the advisability of creating such an insurance fund is admitted, the further question arises as to whether such insurance should be optional or compulsory. Both have been tried. A system of voluntary insurance backed by special security funds maintained by contribution levies which, in the case of insured employers, are collected by insurance companies and in the case of uninsured employers, other than the State, are collected by the registration authorities, is in force in France, Belgium, Spain, Bolivia and the Argentine. Where under this system an employer or his insurer fails to meet his obligation a National Pension Fund becomes liable for payment on the employer's behalf, after which recourse can be had by this Fund to the insurance company or employer for the amount so paid. The chief objection to this course is that its optional character is a roundabout and possibly expensive way of doing what could be done directly and more cheaply by compulsion.

It seems to me that, having regard to the difficulties presented by the various systems of optional insurance with or without a special guarantee fund, that compulsory insurance is the best way of providing the workman with such guarantees as will ensure the complete and effective working out of the principle of workmen's compensation. For this purpose it is desirable to consider briefly the systems of compulsory insurance adopted by other countries. They fall into two classes, namely, those in which the employer is compelled to effect his insurance with a specified insurer and those in which he is not.

(*a*) In Australia (Victoria), Chili, Finland, Natal, the Netherlands and Sweden the system in operation is one of com-

pulsory insurance, with liberty to choose the insurer. Under this system insurance may be effected with private companies, with industrial associations, or with the National Accidents Insurance Fund, a body upon which certain obligations and privileges are imposed. The employers are also entitled to create an insurance fund for their own undertakings subject to certain conditions and guarantees, while all employers who have pension or compensation funds can claim exemption from insurance. The owner of every new undertaking must at the outset effect an insurance in accordance with this law, giving particulars of the number of workers employed, the number of hours worked and the wages paid.

(*b*) In certain other countries there are systems in operation of compulsory insurance with a specified insurer. They are—

(1) In Germany, Austria, Esthonia, Chechoslovakia, Hungary, Japan, Kingdom of the Serbs, Latvia, Luxemburg, Poland, Roumania, the insurance system is administered by one or more employers' associations. The mutual trade associations comprise the heads of undertakings in a similar industry in a given district. They ensure the payment of accident compensation to the workmen employed by their members, and the compensation is paid through the Post Office, which is indemnified by the associations.

(2) In Australia (Queensland), Bulgaria, Canada (Alberta, British Columbia, Manitoba, Novo Scotia, Ontario), Italy (agricultural accidents and accidents to persons employed by the central or local government), Norway, Russia, Switzerland, the compulsory insurance system is administered by a central organisation and not an occupational body.

Without full statistics as to the administration of the Workman's Compensation code in the Saorstat Eireann, having special regard to the agricultural industry and other peculiar needs of our country, I do not feel in a position to make a definite recommendation as to which system should be adopted here. Subject to this, however, I think that a beginning might be made by including in the now contemplated legislation provision for compulsory insurance, with free choice of insurer, such as has been adopted in certain of the countries mentioned above. This would be better than the existing law here, which provides a loophole by means of which an unscrupulous or careless employer may leave his business and finances in such a condition that his workmen may not be able to recover any compensation awarded to them. If this system of compulsory insurance, with free choice of insurer, proved after

some little experience unsuitable to Saorstat Eireann the law could be easily further amended so as to apply it to the industrial conditions of Saorstat Eireann in accordance with that experience. A further reason for taking some legislative step on the lines I have indicated is provided by the stress laid on this aspect of workmen's compensation law by the International Labour Organisation of the League of Nations. Article 11 of a draft Convention adopted on the 10th June, 1925, by that organisation for ratification by its members in accordance with the provisions of Part XIII. of the Treaty of Versailles and of the corresponding parts of the other Treaties of Peace, provides—

"The national laws or regulations shall make such provision as, having regard to national circumstances, is deemed most suitable for insuring in all circumstances, in the event of the insolvency of the employer or insurer, the payment of compensation to workmen who suffer personal injury due to industrial accidents, or in case of death to their dependents."

Another draft Convention adopted by the same organisation on the 5th of June, 1925, for ratification by its members deals with equality of treatment for national and foreign workers as regards workmen's compensation for accidents, and by Article 3 provides—"The members which ratify this Convention and which do not already possess a system, whether by insurance or otherwise, of workmen's compensation for industrial accidents, agree to institute such a system within a period of three years from the date of their ratification." Apart altogether from international obligations of this kind, it is evident that the enactment of some form of compulsory insurance is necessary for the completion of the Workmen's Compensation code from a scientific point of view and also for the purpose of its full administration in so far as it represents a system of social reform.

International Status.

The second matter with which I desire to deal arises out of the changed international status of our country. It has been found, as I shall show, that an amendment in the law is necessary to adjust the Workmen's Compensation code to the conditions resulting from the change in status of our country from being a part of the former United Kingdom to being Saorstat Eireann, one of the nations associated in the British Commonwealth of Nations. For a time it was thought that this particular amendment would be unnecessary on the assumption that the "Constituent Act" of Dáil Eireann and the Irish Free

State Constitution Act, 1922 (Session 2) of the British Parliament together constituted reciprocal legislation which had the effect of re-enacting the law and practice of the Workmen's Compensation Acts as they applied before the Treaty of 6th December, 1921, throughout the whole United Kingdom. This view was submitted to our Supreme Court by the Attorney-General, Mr. Costello, K.C., in the course of his able and comprehensive argument in the case of *Rex (Alexander) v. the Circuit Judge of Cork* (1925, 2 I.R., 180), but it was not acceded to. The Court there held that express reciprocal legislation founded on Convention or Agreement is necessary to give effective jurisdiction to the Courts in Saorstat Eireann in cases of that kind, to which I shall refer more particularly.

This constitutional matter arose, as sometimes happens, out of simple facts. A sailor, not a citizen of Saorstat Eireann, on a British ship registered at London and there owned, was washed overboard and drowned while outside the territorial jurisdiction of Saorstat Eireann, and his mother, who resided within that jurisdiction, thereupon lodged, as dependent, a request for arbitration under the Workmen's Compensation Acts by the Circuit Judge of Cork. The chief question in the case was whether the Circuit Judge for Cork had jurisdiction to hear and entertain arbitration proceedings on the application of a person resident in Cork against employers resident in England in respect of a fatal injury to a workman who was not a citizen of Saorstat Eireann upon a British ship while outside the jurisdiction of Saorstat Eireann.

This legal question involved the consideration not only of the Workmen's Compensation Acts but also of the Treaty and Statutes governing the relations between Saorstat Eireann and Britain and the statutes under which our new Circuit Court is constituted. The Second Schedule of the Workmen's Compensation Act of 1906 provides that in the absence of agreement questions as to liability to pay compensation should be settled by the Judge of the County Court (which has since been superseded), and where the parties reside in different districts the matter should be settled by the Judge of the County Court of the district prescribed by the Rules of Court. In the case of a matter arising out of an accident at sea it provides that any matter which under the Act or Rules is to be done in the County Court might be done in the County Court in which the ship should be when the matter is to be done, or in the division comprising the port of registry of the ship, or in the division in which the workman or the dependents of the workman on whose behalf the matter is to be done, or some or one of them

resides or reside. The Chief Justice delivered an exhaustive judgment, in the course of which he reviewed the statutory steps which have led to the present position. He pointed out that the Workmen's Compensation Act of 1906 was an enactment of the Parliament of the then United Kingdom for Ireland and Great Britain as a single constitutional unit though with separate judiciaries, each such judiciary having its separate territorial jurisdiction. This constitutional unity was severed, and by the Treaty of 1921 made between Ireland and Great Britain it was agreed that Ireland should have the same constitutional status as the four great Dominions in the British Commonwealth of Nations, and that, subject to the other provisions of the Treaty, her position in relation to the Imperial Parliament and Government and otherwise should be that of the Dominion of Canada. The Constitution which was thereupon enacted by Dáil Eireann was recognised by the British Parliament by the Statute called the Irish Free State Constitution Act, 1922 (Session 2). Article 73 of the Constitution provided—"Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas."

Article 64 of the Constitution provided—"The judicial power of the Irish Free State shall be exercised and justice administered in the public Courts established by the Oireachtas by judges appointed in manner hereinafter provided."

The Courts of Justice Act, 1924 (No. 10 of 1924) set up the Courts contemplated by the Constitution. By order of the Executive Council made under the powers contained in that Act the Circuit Court was brought into operation.

Article 75 of the Constitution provided that until Courts should be established in accordance with the Constitution, the Courts then existing, including County Courts, should for the time being continue to exercise the same jurisdiction as theretofore. It was held by the Court of Appeal under the old regime in *Rex (Armstrong) v. the County Court Judge of Wicklow* (1924, 2 I.R., 139) that the effect of Articles 73 and 75 was to preserve the position of British shipowners in relation to claims under the Workmen's Compensation Act, 1906, by seamen and their dependents so long as the County Courts continued in existence.

By Section 51 of the Courts of Justice Act, 1924, there was transferred to the Circuit Court thereby created all the

jurisdiction then vested in or capable of being exercised by the County Court Judges and Recorders, and in *Lynch v. Limerick County Council* (1925, 2 I.R., 61) it was decided that this section has the effect of transferring to the Circuit Court the jurisdiction of the County Court Judge as arbitrator under the Workmen's Compensation Act, 1906. Lynch's case also decided that an appeal now lies from the Circuit Court to two Judges of the High Court and from them to the Supreme Court in such cases.

In Armstrong's case it became important to determine whether the two sovereign legislatures in existence after the Treaty had, by the equivalent of reciprocal legislation, given the Circuit Court the same jurisdiction as the old County Courts had to hear and determine arbitration proceedings at the instance of the dependents within our jurisdiction of a workman, not a citizen of Saorstat Eireann, fatally injured on a British ship outside the jurisdiction of Saorstat Eireann. The Chief Justice resolved this question by his judgment. He said: "If specific legislation of such a kind were passed (without reciprocal enactment by the Parliament within whose territorial sovereignty were the attempted persons to be bound) it would *prima facie* offend against the conventions of international law by impinging upon the inclusive sovereignty and jurisdiction of another State within its own limits; but I reserve until the occasion arises (if it ever should) consideration of the question whether this Court could, or should, interfere with the attempt to administer such a law or pronounce upon its validity. We are not, however, in the present case considering specific legislation of this kind expressly dealing with the matter in controversy. We are considering an enactment in general terms—Article 73 of the Constitution—and we are asked to hold that it has the effect of such specific enactment with reciprocal legislation to be implied from the facts and circumstances. The whole case in fact hinges on the true construction of Article 73. Now, in the first place, it is to be remembered that the 'Constituent Act' was in the first instance drawn up and enacted by Dáil Eireann. The task in hand was the passing of a constitution as an instrument of government of the people of the Saorstat. There is nothing in it to indicate an intention to impose obligations on persons outside its own sovereignty. Indeed, this is admitted, for the argument is that the Act in question was imposed only on the people of the Saorstat by Article 73, and that it fell upon the people of Britain by implied reciprocal enactment of the British Parliament in the Irish Free State Constitution Act of 1922 (Session 2)."

The Chief Justice then expressed his agreement with the Master of the Rolls in Armstrong's case when he says that the laws which are in force in the Saorstat, and to the extent to which they are in force in the Saorstat, are to continue of full force and effect in the Saorstat to the extent to which they are not repealed or amended by the Oireachtas, but the Chief Justice adds that the British reciprocal enactment merely implements the Treaty, and it does not operate to extend the Constitution of the Saorstat so as to impose legislation enacted under it on British nationals. He adds : " In my opinion, therefore, the contention that there has been reciprocal legislation by the conjoint effect of the ' Constituent Act ' of Dàil Eireann and of the Irish Free State Constitution Act of 1922 (Session 2), of the British Parliament re-enacting the law and practice of the Workmen's Compensation Act as it was before the Treaty throughout the area of the former United Kingdom cannot stand. . . . In my opinion there must be express reciprocal legislation founded on Convention or Agreement to give effective jurisdiction in such a case as the present "; and he held that the Circuit Court had no jurisdiction to entertain the application for arbitration in Alexander's case.

The need for this reciprocal legislation still exists.

The International Labour Organisation of the League of Nations adopted on the 5th June, 1925, a draft Convention for ratification by its members providing for equality of treatment for national and foreign workers as regards workmen's compensation for accident. On both grounds I suggest that provision should be made in the contemplated Bill for such reciprocal legislation.