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RECENT EUROPEAN LEGISLATION WITH REGARD TO COMPENSATION FOR INDUSTRIAL ACCIDENTS.[1]

Most European countries have, during the last twenty-five years, found it necessary or expedient to make provision for loss or destruction of earning power in consequence of accident in the case of certain classes of "workmen" by establishing some system of compensation to the persons injured, or, in case of fatal accidents, to their dependants. The class of accidents for which compensation is provided may be called "industrial accidents". Their general characteristic is that they are accidents occasioned by and arising out of the occupation in which the injury is received.

1. In this Article, frequent reference is made to a Memorandum prepared by myself (Blue Book, Cd. 2458), which forms Vol. III of the proceedings of a Departmental Committee on Workmen's Compensation appointed by the Home Secretary in November 1903 "to enquire and report (a) what amendments in the law relating to conpensation for injuries to workmen, are necessary or desirable: and (b) to what classes of employments not now included in the Workmen's Compensation Acts, those Acts can properly be extended with or without modification." The report of the Committee was issued in August 1904 (Blue Book, Cd. 2208), and is referred to in the notes of this article as "Report". In preparing the Memorandum, I made free use of the Fourth Special Report of the United States Commissioner of Labour on Compulsory Insurance in Germany (Washington Government Printing Office 1895), and of the Seventeenth Annual Report of the Bureau of Labor Statistics of the State of New York (Albany, J. B. Lyon, State Printer, 1900). These two Reports were, at the date at which they were respectively published, far the most exhaustive and complete treatises on the Legislation in Germany and other European countries on the subject in question.

In some cases, the scope of Legislation has been further extended. Compensation has been provided for loss of earning power by sickness and by old age or invalidity. Except so far as the questions arising in reference to the last mentioned subjects are connected with the scheme of compensation for accidents, I do not propose to deal with them in this article.

Every country which has adopted special legislation for compensation for industrial accidents has apparently done so, in the first instance, because of the proved insufficiency of the ordinary or common[2] law to meet the requirements of the new conditions of industrial life brought about by the development of machinery worked by steam or other newly discovered power. The common law provided a remedy only when there was proof that the accident had been caused by the negligence or default of the employer or of someone for whom the employer was responsible. Some difference, however, existed between the common law prevailing in different countries as to the grounds and extent of the responsibility of an employer for injuries so caused. In the States of Germany this liability was usually based upon the real or supposed negligence of the employer in the choice of the subordinate (*culpa in eligendo*). Other countries, notably France[3] and England, attained a wider generalisation. The employer was liable for injuries caused by the negligence or wrongful omission of his employee acting within the scope of his employment. But, whatever was the principle on which the common-law liability of the employer was based, it was universally proved to be inadequate to afford the workman or his dependants reasonable protection against the consequences of industrial accidents. In the United Kingdom, and apparently, though in a less degree in the United States of America,[4] the remedies of the workman were still further curtailed by the discovery made by the courts of law[5] of the doctrine that the employer was not liable to a workman for injuries resulting from the negligence of a fellow servant.

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2. It is convenient to use the word "common" as meaning law which is not based on special legislation.

3. Pothier; Obligations No. 453, Code Civil Act. 1384.

4. See Memorandum on laws in the United States relating to Employer's Liability prepared by S. A. Weber for the St. Louis Exposition on "Labor Legislation in the United States." Bulletin of the Bureau of Labor No. 54, printed in the Appendix III of Memorandum above referred to.

5. *Priestly v. Fowler*, M. & W. (1837). *The Bartonshill Coal Company v. Reid*, McQ., 266, (1859).

The fundamental difficulty, with which almost every European legislature has found it necessary to cope, was, that in order to recover compensation from his employer, the workman was obliged to prove that the accident was due to the actual negligence either of the employer himself or of someone for whom he was responsible. It was stated in preamble of the first measure proposed by the German Government in 1881 for the purpose of introducing the principle of compulsory insurance against industrial accidents, that "To burden the person injured with the requirement of furnishing proof of negligence on the part of the employer or his agents, transforms the beneficence of the law for the working man into an illusion in the majority of cases."[6] The earlier attempts to mitigate the hardships arising from the difficulties of the proof of negligence, mainly took the form of a provision for shifting the burden of proof from the injured person to the employer. As far back as 1838, in the very infancy of railways, a law was passed by the Prussian Legislature casting on the owners of the railway the duty of making compensation for all injuries to persons or goods happening in the course of transportation, unless the owners could prove that the injury was due to the fault of the injured person, or was the result of inevitable accident. The same principle was adopted and extended after the establishment of the German Empire, by a law enacted in 1871. Austria passed a similar law in 1869. Proposals to the same effect were made in Italy and in France about the same period;[7] but though much discussion on the subject took place in the Legislatures of these countries, no law was enacted modifying the common law as embodied in the Code Napoleon. The English Parliament contented itself with modifying by the Employers' Liability Act of 1880, the doctrine of Common Employment. This Act cannot be said to have proved satisfactory or successful, and in 1893, Mr. Asquith, then Home Secretary, introduced a bill proposing to abolish the doctrine of "Common Employment", and to make certain other amendments in the law. But the necessity of proof of negligence by or on behalf of the injured person or his representatives remained unaffected by this proposal. The bill was dropped owing to a disagreement between the two Houses of Parliament.

The key-note of the new legislation generally felt to be required was struck by the preamble of the measure proposed by

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6. Memorandum Blue Book. Cd. 2458; page 2.
7. *Ib.*, pages, 9, 10.

the German Government in 1881. The main point was to relieve the workman who was injured by accident, or his representatives, in case of his death, from the uncertainties and expense of the litigation involved by the requirement of the proof of negligence on the part of the employer or his subordinate. The method of affording this relief adopted by the German Legislature was to establish an elaborate system of compulsory insurance. The industrial history of various States composing the Empire, afforded a basis for the organization set up by the legislation of 1883–1887. The mediaeval guilds and craftsmen, which, in other countries, had little more than associations surviving for purposes which, however beneficial, were not connected with the regulation of the industries whose names they bore, in Germany still retained their connection with and powers of regulation over their respective industries. Amongst other characteristics, these associations to some extent supplied the place of benefit societies for the members of the industry.

The existence and vitality of these organisations afforded a basis for the construction of Prince Bismark's great scheme for compulsory insurance of all workmen in the industries to be brought within the new legislation against sickness, industrial accidents, old age and invalidity. The ancient guilds became "Trade Associations" (Berufsgenossenschaften). Every employer in each industry brought within the new legislation must belong to the appropriate Trade Association. New Trade Associations might be formed with the consent of the Council of State. Thus sixty-six industrial, and forty-eight agricultural associations were formed. There were also a large number of State and Provincial Associations for state and provincial employees.

Each association is an organised unit. Every employer in any of the industries covered by the law is obliged to make a contribution to the insurance fund of the appropriate association, the amount being fixed by a tariff. There is a "Danger Tariff" under which the employer's contribution is liable to be increased in direct proportion to the number of accidents occuring in his establishment. The Executive Committee of the association determines all questions relating to the liability of the association to pay compensation—the amount of the compensation; the persons entitled and similar matters. These decisions are subject to appeal to one of the Arbitration Boards, consisting of representatives both of Employers and Workmen, established by the law relating to Old Age and Invalidity (1889).[8]

8. Memorandum page 6.

Very careful and elaborate machinery is established for securing the solvency of the insurance funds of these associations. Provision is made for the dissolution of an Insolvent Trade Association, in which event, all its obligations are taken over by the State. The German workman, therefore, whose employment falls within the law, has the advantage of what is in effect a State guarantee for the payment of any compensation for injury by accident which may be due to him.

The scheme, of which a brief sketch has been given above, was carried out by a series of laws passed between the years 1883-1889. First came the law providing for compulsory insurance of workmen against loss of earning-power by sickness. The discussion of this law, though an integral part of the German Scheme, does not fall within the scope of the present article. The "Fundamental" law (1884) applying to certain specified industries or class of employment, provided for the compulsory insurance against loss of wages by industrial accidents. Then, in 1885, came the "Extension" law, extending the benefits of the law of 1884 to include transportation by land or water. In 1886, similar provision was made in the case of agriculture and forestry. In 1887, employment in various kinds of construction, not previously covered, was brought in; and, lastly by the "Marine" law of 1887, the law was made applicable with various modifications, to navigation on the high seas. The whole scheme was completed by the passing of the Old Age and Invalidity Law of 1889. In 1900 the Accident Laws were consolidated and re-enacted with amendments.

In 1883 proposals were made in the Austrian legislature for a scheme of accident insurance. They were the subject of prolonged Parliamentary discussion and investigation by Committees. These inquiries resulted in the passing of a law in 1887 adopting the principle of compulsory insurance of workmen by their employers against industrial accidents. This law, with some important differences, was framed on the model of the German legislation. Austria, however, did not adopt the method of insurance by means of Trade Associations. Seven Insurance Institutions were established in different centres, in one of which, all workmen and administrative officials within a certain limit of salary, engaged in the employments to which the law applied within the territorial limits covered by the operations of the association, were compulsorily insured. The cost of insurance was thrown upon the employers, who, however, were entitled to deduct 10 per cent from the wages of their workmen as a contri-

bution to the cost. Each Insurance Institution is governed by a Board of Directors, one-third of whom are nominated by the Government, one-third by the Employers, and one-third by the Workmen. All are under the control of the Minister of the Interior who has power to fix the amount to be set aside annually as a reserve fund. These institutions are, in fact, state institutions with special powers for the maintainance of sufficient security. These powers, after the compensation system had been at work for about ten years, it was found necessary to call into operation, by largely increasing the contributions to the insurance funds, in order to prevent the insolvency of some of the institutions.

The next countries to adopt and embody in their law the ideas to which effect had been given in Germany and Austria, were Norway and Finland. Norway began to take the question into consideration in 1885, and in 1894 a law was enacted compelling employers in specified industries to insure their workmen against industrial accidents in a Government Insurance Office. Amending laws were passed in 1897 and 1899. The Norwegian law closely resembled the Austrian.

Finland seems to have been the first country to adopt the method of imposing on the employer a personal liability to pay compensation directly to workmen for injury by accident. But this liability was accompanied by a further obligation to insure the workman against accidents causing death or permanent injury. If this obligation was fulfilled, the employer was to that extent freed from personal liability. The insurance must be with one of the societies recognised by the law.

The next step in the history of European legislation was the enactment by the Parliament of the United Kingdom of the Workman's Compensation Act 1897. All the countries above mentioned, not excepting Finland, had adopted the principle of compelling employers in the industries affected by the law to insure their workmen against industrial accidents. The Act of 1897 recognised no such principle. It neither compelled, nor in any way facilitated, insurance against industrial accidents. It threw upon the employer the whole burden of the payment of the statutory compensation leaving him to protect himslf as best he might. To the extent provided for by the act, the employer was liable just as if he had been guilty of personal negligence.

It resulted from the adoption of this principle that the workman had no other security for the payment of the compensation due to him than the personal solvency of the employer, with the

exception that when the employer was insured and became bankrupt or insolvent the injured workman was given a first charge on the money due to the employer from the Insurance Company, in respect of the particular accident. No provision was made to secure the solvency of Insurance Companies doing business of this character. The framers of this Act of 1897 trusted, not wholly without justification, that the operation of the Act would be to induce employers to protect themselves against liability by insuring—not their workmen as in the other countries—but themselves, against the liability imposed by the act. This insurance was, in practice, effected either with the ordinary Insurance Societies, or with the associations of employers engaged in the same industry. The formation and working of these associations is described in the Report of the Departmental Committee.[9] They are purely voluntary bodies, consisting of a combination of a number of employers engaged in a particular industry—for example, coal-mining—for mutual insurance against the liabilities imposed by the Workmen's Compensation Act.

It has been already seen that the laws of the countries above enumerated were the result of anxious and prolonged enquiries and discussions. The same is true, in the main, of the Continental legislation subsequent to the Act of 1897. Though, under the stimulus of the example set by England and the other countries above referred to, laws providing for compensation for industrial accidents were passed by Denmark, Italy and France, in 1898, followed by Spain in 1900, by Holland, Greece and Sweden in 1901, and by Russia and Belgium in 1904, in the great majority —if not in all of these cases—the question had been under consideration ever since the great experiment initiated by Germany in 1883. In the United Kingdom, there had been scarcely any consideration—certainly no detailed investigation or examination of the proposal of a general scheme of compensation for industrial accidents prior to the introduction of the bill which subsequently became law in 1907. It is true that upon the second reading of Mr. Asquith's Bill in 1893 Mr. Chamberlain moved, "That no amendment of the Law relating to Employers' Liability will be final or satisfactory which does not provide compensation to workmen for all injuries sustained in the ordinary course of their employment, and not caused by their own acts or default." The debate on this amendment, and a subsequent discussion on the same subject in the Grand Committee of the House of Com-

9. Report, paragraphs 67–69.

mons, was almost the sole preparation either of the public or of Parliament for the startling proposals of the Bill of 1897.

It cannot be denied that the Act of 1897 is open to objection on two grounds. The first is that it is apparently a violation of principle to impose a personal liability upon an employer in the absence of any negligence or breach of duty, either on the part of the employer himself, or on the part of anyone for whom he is responsible. The second is that no provision, except as above stated, is made for securing the payment of compensation due to the workman or his dependants in the event of the insolvency of the employer. In answer to critcisms on these grounds it may be said that, after all, placing the employer under a personal liability is only a roundabout way of compelling him to insure, and thus, indirectly, to provide a fund for the payment of the compensation. In this respect, the scheme of the English Act differs materially from any law previously, or indeed subsequently, passed in any other European country. Continental legislation generally aims at giving the workman the security of a fund whose sufficiency is provided for by law, and in many cases guaranteed by the State. At the same time, those laws which impose a personal liability on the employer usually[10] exempt him from personal liability when, and so long as, he fulfills the obligation or adopts the precaution of adequately insuring his workmen.

Although the Act of 1897 may be fairly open to the criticism that it appears, on its face, to impose an abnormal liability on the employer, without providing sufficient security for the workman, it was felt, when the proposal was brought forward in 1897, that in most well-organised industrial establishments, a moral obligation was recognised to make some provision for losses sustained by workmen or their dependants in consequence of industrial accidents; and that what the act, in effect, did, was to annex to every contract of employment in the industries within its scope, an obligation to provide the statutory measure of compensation. This view was generally accepted both by employers and employed in the large industries which were mainly effected by the act as a reasonable solution of a difficult question.

The action taken by the Parliament of the United Kingdom in 1897 had a marked effect upon the legislatures of most of the European countries which had not yet adopted special measures for a similar purpose. Denmark[11] had been considering the

10. France appears to be to some extent an exception.

11. Memorandum, page 9.

question of Workmen's Insurance against industrial accidents ever since 1885. At the close of the year 1897, the Danish Legislature passed a law following the English Act imposing a personal liability on the employer to compensate the workman for injury by industrial accident, but, at the same time, enabling the employer to relieve himself of the personal liability by insuring the workman in an association approved by the Minister of the Interior. There is no compulsion on the employer to insure.

In Italy,[12] the question whether the remedy for the unsatisfactory state of the law lay in the direction of the extension of the liability of the employer for negligence, or in the adoption of a system of compulsory insurance, had been in controversy between the Senate and the House of Deputies for some years. In March 1898, a compromise was adopted. An obligation was imposed upon employers to insure their workmen in the institution called the "National Bank for the Insurance of Workmen against Accidents"—a government establishment—but an option was given to the employer to insure in other societies approved by government, or to escape liability to compulsory insurance altogether, by setting up under certain conditions prescribed by law, a fund providing adequately for the statutory compensation.

The French law of 1898[13] appears to resemble the English Act of 1897 in casting the heavy burden of personal liability upon the employer, as regards accidents causing death or permanent injury. As regards accidents causing temporary injury, the employer may escape personal liability by insurance of his workmen in approved institutions.[14] Where the accident results in death or permanent disablement, payment of the compensation is guaranteed by an Institution called "*La Caisse Nationale des retraites pour la vieillesse.*" The guarantee fund is provided out of a business tax, "*Contribution des Patentes,*" and a small tax on mines. It appears that not only is the employer personally liable to pay or to refund to the *Caisse* the amount of compensation due, but is also subject to a contribution to the maintenance of the guarantee fund above mentioned. The burden on the French employer appears to be very heavy. This was pointed out in evidence given before the Departmental Committee by the Ocean

12. Memorandum, page 9.

13. Memorandum, pages 10 and 11: and see the laws of April 9th, 1898, and March 22nd, 1902 (consolidated). Memorandum, pages 45, 48.

14. Articles 5 and 6, Memorandum, page 46.

Guarantee and Accident Company,[15] who do a large business in the way of insuring French employers against their liabilities under the law. It appears that the question as to the extent of this liability has recently been raised in the French Senate, and is now under consideration.[16]

A Spanish law of Jan. 30th 1908, adopts the principle of personal liability of the employer for industrial accidents, but permits him to escape personal liability on effecting an adequate insurance with an approved company.

Holland (Jan. 2nd, 1901) adopted the principle of compulsory insurance of workmen by their employers in the "State Insurance Office," but the employer is given the option of undertaking the payment of the compensation himself, or of transferring the liability for the payment, to another insurance office, on the deposit of adequate security with the State Office.

Greece (Feb. 21st, 1901) enacted a law, casting on the employer the liability of providing the compensation for the first three months. After this period, the liability is divided between the employer and a fund provided out of certain taxes effecting the industries protected by the law.

Sweden, after many years' consideration of the subject, in July, 1901, adopted a law imposing personal liability on the employer, but giving him the right to insure against it in "The Royal Insurance Institute."

Russia, on Jan. 1st, 1904, also followed the system of imposing personal liability on the employer, with power of relief by insurance in approved societies.

Finally, Belgium in April, 1904, also adopted the principle of personal liability. Employers may escape this liability by contracting with an approved society for payment of the indemnity, or with the "National Savings and Pension Fund." If no such insurance is effected, the employer is bound to coutribute to a special insurance fund formed for the purpose of guaranteeing workmen against the inability of employers to pay the statutory compensation for industrial accidents.

The operation of the Act of the Parliament of the United Kingdom of 1897 was confined, as has been already stated, to employment in certain specified industries. The intention of

15. Report, Appendix page 166: "We reckon that the liability in France in any given trade, is about five times as much as in England. That is to say, an employer who in England would have to pay 10 shillings, per cent would in France have to pay 50 shillings per cent on his wages."

16. *The Times*, January 11, 1908.

Parliament was, apparently, to select the industries employment in which involved the greatest amount of danger to the workman. These might be presumed to be the industries sufficiently dangerous to have already been made subject, in some form, to regulation by statute. These are the industries subject to Railway Regulation Acts, Mines Regulation Acts, Factory Acts, and the Notice of Accidents Act. The industries, in this way, brought under the provisions of the act, with some strange anomalies, corresponded somewhat closely with the class of industries affected by the German law of 1884. Other countries followed, more or less closely, the German precedent.

In most of the Continental laws,[17] express provision was made to confine the operation of the law as much as possible to dangerous employments, and in some, attempts were made to exempt the employers who employed no more than a small fixed number of persons from liability to pay compensation for industrial accidents.

In dealing with the principal reproach which had been brought against the Act of 1897, that it tended to the encouragement of litigation, the Departmental Committee of 1903 came to the conclusion that the amount of actual litigation occasioned by that act had been "very small" when compared with the number of cases settled by agreement.[18] This result they attributed to the fact that the act operated chiefly in the great organised industries, and that, owing to the good understanding and mutual confidence which usually prevails in these industries between the officials of the Employers' Association on the one hand, and of the Trades Unions, on the other, the vast majority of claims for accidental injuries had been settled without expense or litigation. Where, however, the injured workman had no society or organisation to assist him, but was obliged to have recourse to professional assistance, the evils of litigation had been felt much more acutely. This had been especially the case in Scotland, where much complaint had been made of the oppressive working of the act.

The Parliament of the United Kingdom, by the Workman's Compensation Act, 1906, took the bold course of extending the provisions of the Act of 1897, with many amendments, to "any person employed, who has entered into, or works under a con-

17. See Germany, memorandum, page 15; Austria, page 16; France, page 17; Belgium, page 19; Norway, page 17; Italy, page 17; Belgium, page 17.

18. Report, paragraph 45.

tract of service or apprenticeship with an employer, whether by way of manual labor, clerical work or otherwise."[19] This provision took the place of the limitation in the Act of 1897 of the application of the act to the specific employments therein mentioned. The liability now attaches to all contracts "of service," except when the workman is employed "otherwise than by way of manual labor" and his remuneration exceeds £250 a year; or is a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business; or a member of a police force; or an out-worker (subsequently defined); or a member of the employer's family, dwelling in his house.[19]

What is meant by "Contract of Service," by what tests a contract of service can be distinguished from a contract for the performance of work otherwise than under a contract of service; what is meant by "manual labor," or by "employment of a casual nature"—are amongst the questions which it may be expected will before long arise for the consideration of the courts of law.

The Act of 1906 has, as regards the application of its provisions to all "contracts of service," gone far beyond the legislation of any other European country. None of the laws above referred to, whether enacted before or after the passing of the English Act of 1897, have attempted to extend the law to employment generally, but have confined the special right to compensation to specifically named employments. Great difficulty appears to have arisen in France on the question of the kinds of employment which fall, or do not fall, within the law. Whether these difficulties will result in an extension of the French law, similar to that which has been made by the law of the United Kingdom, is a question apparently much discussed.[20]

Great uncertainty is felt as regards the scope of our own Act of 1906. The litigation which will probably be necessary before anything approaching to certainty as to what employment is, or is not, included in a "contract of service," cannot be regarded without apprehension.

No attempt is made in the Act of 1906, to distinguish between large and small employers. All the provisions originally introduced into the bill for this purpose were not without expressions of regret on the part of the government,[21] struck out in com-

19. Section 13.

20. See Memorandum, page 17, and M. George Paulet's paper, quoted *ib.*

21. See the Home Secretary's speech on the third reading of the Bill. Hansard Vol. 167, page 695.

mittee. Under the act, if a "contract of service" is entered into by a man of slender resources, for the employment of another of the same class, there appears to be little or no security that the workman will get his compensation, in the event of an accident. It would be difficult to get such employers to go to the trouble or expense of insuring, and they certainly will not be able to bear, out of their own pockets, the responsibility thrown upon them by the act. This difficulty was fully foreseen and discussed in the debates in Parliament, but it remains without any provision having been made to meet it.

In the course of the debates in Parliament upon the Bill of 1906, attention was frequently called to the desirability of substituting some system of insurance for the present system of personal liability. The difficulty of taking any practical step in this direction is very great, and it is to be feared that that difficulty is increased rather than diminished by the vast extension of the principle of personal liability effected by the Act of 1906.

In Germany, taking the scheme of Industrial Assurance as a whole, comprising insurance against sickness, insurance against industrial accidents, and insurance against old age and invalidity, it has been calculated by competent authority[22] that in the year 1901, 45.20 per cent of the total contributions to the insurance funds were paid by the employers; 37.64 per cent by the employees; 6.43 per cent by the State, the balance, 10.73 per cent being derived from interest on invested funds.

In this country, before any such calculation could be made, the contributions of the workmen to benefit clubs, trades union and other, would have to be taken into account. Just as one of the effects of the Act of 1897 was to destroy the benefit clubs which were supported by the joint contributions of employers and workmen,[23] so the adoption of a system of insurance on the German model would probably lead to the supercession of the relief given by the Workmen's Benefit Clubs by the provision made by law. If any such scheme of legislation is adopted it would seem that, in some form or another, the workman should, instead of contributing to the benefit clubs as at present, contribute to the insurance fund. It must always be borne in mind that if the burden is not adjusted fairly by law, if it presses unduly on the employer, it is the workman who is bound to suffer in the long run. If a point is reached at which the industry cannot

22. Memorandum, page 40.
23. Report, paragraphs 56–58.

profitably be carried on, the workman must suffer either by diminution of wages or by loss of employment.

What is the part which the State should take in a comprehensive system of insurance? At present the contribution of the State in this country, consists in furnishing gratuitously the judicial and administrative machinery for working the Compensation Act. The claimant for compensation, unlike any other litigant, pays no fees. But if the precedent set by continental legislation is to be followed, it seems that the proper function of the State is to organise, either by State Institutions, or by State supervision, a safe and satisfactory system of insurance. It is difficult to see how the small employer is to be induced to insure, unless he can do so with the same ease, economy and security as he can invest his savings or buy an annuity in a Post Office Savings Bank. Much as we may dread the State entering the field of competition with private enterprise, it is a grave question whether the Acts of 1897 and 1906 have not made some steps in that direction inevitable. Possibly, following the German precedent, similar problems lie before us in dealing with loss of earning-power by sickness and old age.

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