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MISREPRESENTATION TO SECURE EMPLOYMENT

By MAURICE H. MERRILL*

On October 1, 1923, Joe Rock applied to the Minneapolis, St. Paul and Sault Ste. Marie Railway for employment as a switchman. The railway required him to submit to a physical examination which disclosed that he had been operated upon for ulcer of the stomach and for appendicitis and that he was then afflicted with hernia. Because of this discovery his application was rejected. Rock, determined to secure employment, made another application a few days later. In this he represented that his name was John Rock and that he had not before sought employment. An obliging friend took the examination in his name, passed with flying colors, and Rock secured the coveted job. He performed the duties thereof, apparently to the railway's satisfaction since we hear of no complaint about his services, until December 24, 1924, when, while rightfully in the yards and in the performance of his duties, he was injured by, as found by a jury, the railway's negligence. His physical condition in no way contributed to the accident. A verdict in his favor for $15,000 was affirmed by the Illinois appellate court of the first district.[1] On certiorari the Supreme Court of the United States recently reversed the case[2] upon the sole ground that Rock's deception prevented him from acquiring the status of an "employee" as that term is used in the Federal Employers' Liability Act which imposes liability upon common carriers by railroad for injuries or death sustained by employees engaged in interstate or foreign commerce as a result of negligence on the part of the common carriers or their "officers, agents, or employees."[3]

The result reached, relieving the railway of the liability under which it would otherwise rest, solely because of the deception by which employment was secured, is in direct conflict with the vast

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[1]Rock v. Minneapolis, St. P. & S. S. M. Ry., (1928) 247 Ill. App. 600.

[2]Minneapolis, St. P. & S. S. M. Ry. v. Rock, (1929) 279 U. S. 410, 49 Sup. Ct. 363, 73 L. Ed. 766, discussed in 14 MINNESOTA LAW REVIEW 98.

[3]45 U. S. C. A. sec. 11, Mason's U. S. Code, title 45, sec. 11.

majority of state decisions involving employer's liability at common law.[4] Likewise it conflicts with the state decisions under the federal act[5] and overrules at least one decision of a federal appellate court.[6] That a decision is opposed to the numerical weight of authority or that it mars the symmetry of the logical structure of the law as developed from the analysis of decided cases is not, of course, an insuperable objection to it, but at least it casts a doubt upon its proper place in the fabric of the law. In this state of the authorities, therefore, it seems proper to examine the problem raised by the *Rock Case* from the standpoint of general contract principles, from the language of the Employers' Liability Act and from the standpoint of policy, in order to determine its correctness.

Mr. Justice Butler, who speaks for the Court, puts the decision flatly upon the ground that Rock's deceitful conduct destroyed his title to the status of employee.[7] If by this he means to set forth the general proposition that employment secured by misrepresentation is

[4]St. Louis & S. F. R. R. v. Brantley, (1910) 168 Ala. 579, 53 So. 305; Denver & R. G. R. R. v. Reiter, (1910) 47 Colo. 417, 107 Pac. 1100; McDermott v. Iowa Falls & S. C. Ry., (Iowa 1891) 47 N. W. 1037; Lupher v. Atchison, T. & S. F. Ry., (1910) 81 Kan. 585, 106 Pac. 284; Matlock v. Williamsville, G. & St. L. Ry., (1906) 188 Mo. 495, 95 S. W. 849; Hewett v. Woman's Hospital Aid Association, (1906) 73 N. H. 556, 64 Atl. 190; Hart v. New York Central & H. R. R. R., (1912) 205 N. Y. 317, 98 N. E. 493; Lake Shore & M. S. Ry. v. Baldwin, (1899) 19 Ohio C. C. 338, 10 Ohio C. D. 333; Galveston, H. & S. A. Ry. v. Harris, (1908) 48 Tex. Civ. App. 434, 107 S. W. 108; Contra, Norfolk & W. Ry. v. Bondurant's Adm'r, (1908) 107 Va. 515, 59 S. E. 1091.

[5]Louisville & N. R. R. v. Lewis, (1927) 218 Ky. 197, 291, S. W. 401; Kansas City, M. & O. Ry. v. Estes, (Tex. Civ. App. 1918) 203 S. W. 115; Baker v. Beattie, (Tex. Civ. App. 1920) 222 S. W. 658.

[6]Payne v. Daugherty, (C.C.A. 8th Cir. 1922) 283 Fed. 353. Contra, Stafford v. Baltimore & Ohio R. R., (D.C. W.Va. 1917) 262 Fed. 807.

[7]"Respondent's position as employee is essential to his right to recover under the act. He in fact performed the work of a switchman for petitioner, but he was not of right its employee, within the meaning of the act. He obtained and held his place through fraudulent means. While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and physical condition to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contempory facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public policy." Minneapolis, St. P. & S. S. M. Ry. v. Rock, (1929) 279 U. S. 410, 414, 49 Sup. Ct. 363, 365, 73 L. Ed. 766, 770.

utterly without legal effect and the deceiver but a stranger to his putative employer, it is submitted that the authorities do not sustain any such statement. That fraud vitiates all transactions is a favorite judicial catchword. But in most instances the vitiation takes the form, not of utter invalidity, but of susceptibility to annulment. The injured party may rescind. Until he does so the transaction survives in full life and vigor. In common legal parlance, it is voidable, not void.[8] Thus the innocent party, electing not to rescind, may recover the agreed price of a sale induced by fraud,[9] and the acceptance of benefits under such a contract is an election not to rescind which definitely frees it from the danger of attack.[10] The fraudulent vendee acquires title which, if transferred to a bona fide purchaser, will defeat rescission attempted thereafter,[11] and until rescission the fraudulent vendee's title enables him to keep the property as against a subsequent purchaser from the defrauded vendor.[12]

This general principle that the fraudulent transaction stands until avoided is recognized in employment cases. While it is agreed that misrepresentation in securing employment will afford grounds for discharge[13] and that the employer may recover for any loss sustained because of the misrepresentation,[14] nevertheless until rescission the employment subsists. The employee is entitled to compensation, at the contract rate if the contract is separable,[15] otherwise on the basis of quantum meruit.[16]

As a matter of orthodox theory, then, the existence of the relationship of employer and employee is not affected by the fact that the employment was obtained by misrepresentation. Until the employer exercises his privilege of revocation, that relationship

[8]See 3 Williston, Contracts, sec. 2443; 13 C. J. 394.

[9]Schwartz v. McCloskey, (1893) 156 Pa. 258, 27 Atl. 300.

[10]Skinner v. Scott, (1911) 29 Okla. 364, 118 Pac. 394.

[11]Rowley v. Bigelow, (1832) 12 Pick. (Mass.) 307.

[12]Brown v. Pierce, (1867) 97 Mass. 46.

[13]Jones v. Vestry of Trinity Parish, (C.C.N.C. 1883) 19 Fed. 59; Anstee v. Ober, (1887) 26 Mo. App. 665; Mexican Amole Soap Co. v. Clarke, (1897) 72 Ill. App. 655; Hughes v. Toledo Scale & Cash Reg. Co., (1905) 112 Mo. App. 91, 86 S. W. 815; Rightor v. Ward, (1915) 87 Wash. 621, 152 Pac. 336.

[14]Jones v. Vestry of Trinity Parish, (C.C.N.C. 1883) 19 Fed. 59; see Lake Shore & M. S. Ry. v. Baldwin, (1899) 19 Ohio C. C. 338, 344, 10 Ohio C. D. 333, 336.

[15]Mexican Amole Soap Co. v. Clarke, (1897) 72 Ill. App. 655; Parks v. Tolman, (1905) 113 Mo. App. 14, 87 S. W. 576; see Lake Shore & M. S. Ry. v. Baldwin, (1899) 19 Ohio C. C. 338, 344, 10 Ohio C. D. 333, 336. Cf. Rightor v. Ward, (1915) 87 Wash. 621, 152 Pac. 336.

[16]See Anstee v. Ober, (1887) 26 Mo. App. 665, 672.

exists. And the rights and duties arising therefrom, including the employer's liability for injuries received in the course of the employment, likewise exist. It is upon this reasoning that the courts which hold that the misrepresentation does not bar recovery justify their decisions.[17] The same reasoning has been employed in determining the existence of the relationship as a prerequisite to liability under the workmen's compensation acts.[18]

Of course it is not held that the misrepresentation is utterly without significance. The qualification that recovery would be barred if the concealed fact contributed to the injury is commonly made.[19] And if the misrepresentation is by a minor to the effect that he is of full age, it is clear that the employer, relying thereon, is justified in treating him as an adult so that negligence cannot be predicated of a failure to give warning or to exercise care such as would be required by ordinary prudence toward an infant.[20] The same is true of misstatements as to prior experience in the work.[21] But liability normally arising from the master-servant relationship is not defeated because the relationship's formation was induced by misstatements. This seems in thorough harmony with the orthodox theory as to the effect of fraud in the inception of any legal relationship.

An exception to the general rule that transactions induced by fraud are voidable rather than void is said to exist where the defrauded person is led to believe that he is doing something else than that which he actually does. In this case it is said that the transaction is void *ab initio*.[22] Deception as to the person of the other contracting party is said to afford an example of this sort of

[17]See Lupher v. Atchison, T. & S. F. Ry., (1910) 81 Kan. 585, 587, 106 Pac. 284, 285; Hart v. New York Cent. & H. R. R. R., (1912) 205 N. Y. 317, 322, 98 N. E. 493, 495; Lake Shore & M. S. Ry. v. Baldwin, (1899) 19 Ohio C. C. 338, 342, 10 Ohio C. D. 333, 335; Galveston, H. & S. A. Ry. v. Harris, (1908) 48 Tex. Civ. App. 434, 436, 107 S. W. 108, 110; Baker v. Beattie, (Tex. Civ. App. 1920) 222 S. W. 658, 659; Payne v. Daugherty, (C.C.A. 8th Cir. 1922) 283 Fed. 353, 354.

[18]Kenny v. Union Ry., (1915) 166 App. Div. 497, 152 N. Y. S. 117. Cf. Havey v. Erie R. R., (1915) 87 N. J. L. 444, 95 Atl. 124.

[19]See St. Louis & S. F. R. R. v. Brantley, (1910) 168 Ala. 579, 588, 53 So. 305, 307; McDermott v. Iowa Falls & S. C. Ry., (Iowa 1891) 47 N. W. 1037, 1039; Lupher v. Atchison, T. & S. F. Ry., (1910) 81 Kan. 585, 589, 106 Pac. 284, 286; Galveston, H. & S. A. Ry. v. Harris, (1908) 48 Tex. Civ. App. 434, 437, 107 S. W. 108, 110; Louisville & N. R. R. v. Lewis, (1927) 218 Ky. 197, 205, 291 S. W. 401, 404.

[20]Denver & R. G. R. R. v. Reiter, (1910) 47 Colo. 417, 107 Pac. 1100.

[21]Stanley v. Chicago & W. M. Ry., (1894) 101 Mich. 202, 59 N. W. 393; see Williams v. Illinois Cent. R. R., (1905) 114 La. 14, 37 So. 992, 993.

[22]See 3 Williston, Contracts 2648.

situation[23] and in at least two cases compensation for services rendered has been denied one who secured employment by correspondence representing himself to be another person.[24] But the line of distinction here is drawn very sharply between error as to the identity of the person with whom one is contracting and error as to the name or other characteristic of one with whom the contract is made in person and whose identity therefore is known. If A writes to B ordering goods in the name of C, the contract is void; if he comes to B in person and there makes the contract, representing his name to be C, the contract is voidable only.[25] The situation presented by the *Rock Case* is of the second type rather than of the first. There is no question that the railroad knows whom it is hiring; its sole objection is that there has been a misrepresentation as to age, physical condition or other characteristic. or, in the *Rock Case* itself, as to identity with the person taking the physical examination. It may be urged that this is an error as to the identity of the person hired and that the *Rock Case* therefore properly belongs in the first classification. But it is no more such an error than when Weary Willie Penniless comes to the wholesale house and procures delivery of a large order of goods on the representation that he is Marshall Field. As we have seen, the sale is good and title passes to Weary Willie because the vendor intends to deal with that person, subject to being avoided on account of the misrepresentation as to Weary Willie's place in the economic order and the label by which society designates him. So here "title" to the job passes to Joe Rock, subject to recall because of the deceit practiced upon the employer.

It seems unquestionable therefore that as a matter of common law principles relating to the status of master and servant Mr. Justice Butler's conclusion that Joe Rock never became the railway's employee cannot be sustained. Does the Employers' Liability Act use the term in any such specialized or restricted sense as would make attainment of the employee status conditional upon exercise of the utmost good faith in applying for a job? Nothing in the terminology of the act suggests such a restriction. It speaks solely of injury to persons "employed by such carrier" and of

[23]See 3 Williston Contracts 2649.

[24]Morgan Munitions Supply Co. v. Studebaker Corp., (1919) 226 N. Y. 94, 123 N. E. 146; J. P. Colt Co. v. Grubbs, (1924) 204 Ky. 189, 263 S. W. 749.

[25]See 3 Williston, Contracts, sec. 2696.

"employees" without qualification as to the manner in which they secured employment. Its purpose was to remove or to modify the application of certain of the common law defenses to actions by railway workers for personal injuries and to create a right of recovery for the benefit of wife, husband or child in the event of fatal injury. It was enacted during the period of public resentment against the obvious injustice of the common law rules governing recovery, based upon the philosophy of a rural civilization, when applied to the industrial accidents of a machine age, that marked the first two decades of the present century. That resentment bore fruit throughout the country in the abolition or modification by statutory enactment of the doctrines of contributory negligence, assumption of risk and fellow servant, and in the enactment of workmen's compensation laws. In it there was no thought of creating new tests for the existence of the master-servant relationship. The end in view was to liberalize the conditions under which the injured employee or his surviving dependents might secure compensation for injuries properly chargeable to the employment, The Federal Employers' Liability Act—the very name is significant—was part and parcel of this movement and in the light of the purposes of that movement it should be judged. The Supreme Court has recognized this in saying that:

"We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee."[26]

The statement was reiterated, accompanied by the remark that it hardly needed repetition, in *Hull v. Philadelphia & Reading Railway*.[27] It is true that in these instances the application of the test of the "conventional relation of employer and employee" operated to defeat recovery by claimants who could not satisfy it, but surely the test should be equally effective when its operation will draw the claimant within the charmed circle. It is submitted, therefore, that the Act itself can furnish no justification for the injection into its terms of a new definition of the words "employer" and "employee:"

So far as reasoning based upon logical legal theorizing as applied to the creation of the master-servant status is concerned, we

[26]See Robinson v. Baltimore & Ohio R. R., (1915) 237 U. S. 84, 94, 35 Sup. Ct. 491, 494, 59 L. Ed. 849, 853.

[27](1920) 252 U. S. 475, 479, 40 Sup. Ct. 358, 359, 64 L. Ed. 670, 672.

see that there seems no justification for denying recovery to Rock. But we are told by high authority that experience and not logic is the life of the law[28] and surely no one who follows its development needs to learn that lesson twice. The law is no symmetrical tree, set in an open glade with all its branches developing in perfect order and grace; rather it is a struggling, tenacious growth, rooted in stony soil, exposed to the buffeting and veering winds of human needs and hemmed in by the rocky walls of human selfishness. Its branches must adapt themselves alike to wind and to rocky contour. What may seem the logical direction of development may prove impracticable. Before the *Rock Case* is condemned as "wrong in principle" therefore, attention should be given to the possible existence of considerations of expediency which might justify what seems otherwise a plain departure from established legal doctrine. The objectives of such considerations of expediency might be (a) punishment of Rock's dishonest conduct, (b) protection of the railroad against such conduct by discouraging its practice, (c) protection of the public against the employment of the physically unfit. If there are others, they do not occur to me nor do they make their appearance in the few opinions which can be vouched in favor of the *Rock Case.*

Of these objections, the first, if not the dominant factor, yet appears to play a strong role in Mr. Justice Butler's opinion. The tone of moral condemnation is apparent throughout. The opening sentence dealing with the merits of the case condemns the unfortunate Rock as "an impostor,"[29] and the terms "cheat," "fraud," "deception," "continuing wrong" occur repeatedly in characterization of his conduct. Nor is this wholly unjustified. Rock's conduct *was* reprehensible and none of the harsh language used concerning it goes beyond the strictest legal description thereof. And yet from the ethical standpoint not all of the circumstances point to Rock's eternal condemnation. The man without a job and without invested capital stands in a most precarious position in this land of abounding prosperity. Rock apparently was no beggar, no racketeer, no highwayman, no bootlegger. His desire was to earn the living that he sought from society by useful work rather than to eke out the existence of a parasite or to embark up-

[28]See Holmes, The Common Law 1.

[29]See Minneapolis, St. P. & S. S. M. Ry. v. Rock, (1929) 279 U. S. 410, 412, 49 Sup. Ct. 363, 364, 73 L. Ed. 766, 768, discussed in 14 Minnesota Law Review 98.

on the malevolent career of a cancerous excrescence upon the body politic. Surely the man whose instinct for labor is so strong as to lead him to lie in order to get a job is not the worst example of humanity as we know it today. And aside from any discussion of the moralities, it is elementary learning that it is not the office of the civil law to punish reprehensible conduct. In our legal philosophy it is deemed best to leave punitive measures to the field of criminal justice, unless some other end than mere punishment will be accomplished thereby. Moral indignation alone therefore will not suffice to justify the doctrine of the *Rock Case*.

The second possible objection is the protection of the employer against the results of a relationship he has sought to avoid. In the instant case the purpose of the requirements which brought on Rock's downfall was laudable enough. Aside from the consideration of safeguarding the public from railroad accidents resulting from the defaults of physically unfit workmen, there is merit in the contention that the employer is entitled to protect himself from the risks which are entailed by employment of the maimed, the halt and the blind. In modern industry the crippled or chronically ailing workman does represent an undesirable factor. Not only may he injure himself; the catastrophe which he brings on may involve the employer in liability to other workmen or to the public or in serious property loss. Surely the employer may impose such conditions on those seeking to work for him as will guard against this danger. This view does not appear to receive consideration in the *Rock Case,* but it is stressed rather prominently in the one state case which can be cited in its support.[30] It also appears in the *Rock Case's* precursor in the lower federal judicial arena.[31] Closely allied to this is the feeling that, after all, since the employment would not have occurred had not the representation been made, the employee is really to blame for the position in which he now finds himself. Had he not lied he would not have secured the job; ergo, he would not have been injured. He brought on his own misfortune; let him bear its burdens.[32] The

[30]Norfolk & Western Ry. v. Bondurant's Adm'r, (1908) 107 Va. 515, 59 S. E. 1091; Mr. Justice Butler does not cite the case in his opinion.

[31]Stafford v. Baltimore & Ohio R. R., (D.C. W.Va. 1917) 262 Fed. 807, 811.

[32]"Had he not committed the fraud on the company he would not have been injured." Stafford v. Baltimore & Ohio R. R. (D.C. W. Va. 1917) 262 Fed. 807, 811; see also Norfolk & Western Ry. v. Bondurant's Adm'r, (1908) 107 Va. 515, 525, 59 S. E. 1091, 1095.

citation of *Great Northern Railway v. Wiles*[33] as authority in the *Rock* opinion indicates that this view found favor with Mr. Justice Butler.

But does not the employer receive adequate protection in other ways? If the injury in fact results from the existence of the condition concerning which misrepresentation is made, the common statement of the rule which imposes liability indicates that the employer is relieved.[34] While no cases have been found which specifically turn upon that proposition, it receives such general assent as to leave no substantial doubt that it will be given effect in a proper instance. The related principle, that where the employer's fault is essential to liability such fault cannot be predicated upon a failure to observe precautions which would become essential only if the concealed facts were known to exist, has received judicial application.[35] Loss resulting from the deception in other ways doubtless might be set off, or recovered for in an action against the employee.[36] This seems to afford ample protection against any liability which the employer may by his inquiries seek to avoid. Where the injury received does not arise out of the concealment there seems no such argument for barring recovery. The injured man has been accepted as an employee; he has performed his work to the master's satisfaction, at least sufficiently so to remain in the employment; the master has known of his presence in the character of an employee and should have adopted with reference to him those precautions which the law prescribes. To deny recovery in the event of injury, solely because of the misrepresentation, is giving the employer a wholly unexpected relief which he in no manner deserves. The claim for this relief seems most adequately answered in the language of Gantt, J., in *Matlock v. Williamsville, Greenville & St. Louis Railway*:

"All that the misrepresentation of the deceased led defendant to do was to employ him as a servant. It is not asserted that the boy in any way did not faithfully perform his contractual duties. No breach of his contract is involved in this case. . . . Conceding

[33](1916) 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 830. This case involves an evasion of the contributory negligence provisions of the Employers' Liability Act by holding that the death of a rear brakeman who failed to leave the caboose to protect his train, stalled by the railroad's negligence, was solely caused by his own want of care.

[34]See cases cited supra note 19.

[35]See cases cited supra notes 20, 21.

[36]See Lake Shore & M. S. Ry. v. Baldwin, (1899) 19 Ohio C. C. 338, 344, 10 Ohio C. D. 333, 336.

that defendant would not have employed plaintiff's son if he had not misrepresented his age, and that it acted upon his representation and employed him and put him to work as an adult, still this will not meet the contention of defendant . . . , because defendant can only assert that, relying upon the minor's misrepresentation, it proceeded to do some act which was lawful for it to do, not that it proceeded to kill the boy, as it would have no right to kill a man servant negligently."[37]

The misrepresentation should afford no loophole by which the employer may evade his responsibilities to one whom he thought to be, and who actually was, his employee.

The third suggested justification for the *Rock* decision is the protection of the public. Mr. Justice Butler puts it quite persuasively in his opinion.

"The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. . . . . Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examinations. Respondent's physical condition was an adequate cause for the rejection of his application. The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest, because calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes sought to be advanced by the act."[38]

This argument, it will be noted, applies particularly to those employments in which the misrepresented facts may bear upon the safety of the public, or, at least, of the deceiver's fellow workmen. It has, therefore, a more limited scope than the other two. On the other hand, within its field it is of a more convincing nature. It does not rest upon the idea of punishment; and the public, unlike the employer, is not adequately protected by giving the latter a defense against liability for injuries suffered by the employee due to the concealed fact. The employee may not be injured and in

[37]See Matlock v. Williamsville, G. & St. L. Ry., (1906) 188 Mo. 495, 500, 95 S. W. 849, 850.

[38]See Minneapolis, St. P. & S. S. M. Ry. v. Rock, (1929) 279 U. S. 410, 413, 49 Sup. Ct. 363, 365, 73 L. Ed. 766, 769. Again Mr. Justice Butler says: "As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public policy." 279 U. S. 410, 415, 49 Sup. Ct. 363, 365, 73 L. Ed. 766, 770.

any event the public have no lot or part in the employer's immunity from judgment. *If* the denial of recovery under all circumstances will tend to prevent the dangers arising to them from evasion of rules governing employment, it may be justified.

But will it have that effect? Of course, it will not do so in the cases which actually come before the court. If the man is injured, and the deception has come to light, no future evils are to be feared. If the employee is not so seriously injured as to preclude further work on his part, the uncovering of the misrepresentation will prevent any further danger. On the other hand, if the employee's incompetency already has resulted in harm to others, no denial of compensation to him can remedy that. Hence whatever protection is to be secured for the public from this rule must come from its effect in deterring persons from obtaining jobs by misrepresentation. The argument must rest upon the theory that, if the applicant realizes that he cannot hope for compensation in the event of injury, he will not seek the place. This, it is submitted, rests upon a misconception of the attitude which the deceiver brings to his application. He seeks the position not because he hopes to collect money for personal injuries but because he wants the wage attached to it. He does not expect to get hurt. If he did, he would seek some other work. His concern is to gain a place on the payroll and it is to that end that the deception is practiced. The deterrent effect of meditation over what will happen in case of injury is practically nil.

Not only, therefore, is the rule adopted in the *Rock Case* out of harmony with the general principles of law governing the master-servant relationship and with the current of prior decisions in similar cases; it is also out of harmony with the accepted judicial rationale of the employer-employee relationship under the Employers' Liability Act and it fails to promote any purposes of expediency which might justify the departure from logical harmony with the course of decision elsewhere. In spite of Mr. Justice Butler's declaration to that effect,[39] the purpose of the Employers' Liability Act was not to dragoon the railroads into selecting operatives who are physically and mentally fit. There

[39]"The carriers owe a duty . . . to take care to employ only those who are careful and competent . . . and to exclude the unfit from their service. The enforcement of the act is calculated to stimulate them to proper performance of that duty." See Minneapolis, St. P. & S. S. M. Ry. v. Rock, (1929) 279 U. S. 410, 414, 49 Sup. Ct. 363, 365, 73 L. Ed. 766, 769.

are other considerations of self interest which may be relied upon to secure that. The end in view was rather to place upon the industry the duty of caring for the human sacrifices to the demands of the machine age in a manner more satisfactory to modern thought than that provided by the rules of the common law. Employees, injured by the employers' negligence, come under the protection of its terms. Rock answers to that description, and it seems a perversion of the purpose of the Act to place him beyond the pale merely because he lied to get his job. It seems clear that the doctrine should not be extended beyond cases arising under the Employers' Liability Act. Is it too much to hope that the Court may yet overrule the decision in cases arising under that statute? If it is, then Congress should overturn it by express and unmistakable provision.