

1946

# Rights of Employee and Employer against a Tortious Third Party under Workmen's Compensation Acts

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### Recommended Citation

L. Lloyd Evans, *Rights of Employee and Employer against a Tortious Third Party under Workmen's Compensation Acts*, 7 Mont. L. Rev. (1946).

Available at: <https://scholarship.law.umt.edu/mlr/vol7/iss1/2>

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ly, the parents of a deceased child, though not actually dependent upon the deceased at the time of the injury, are allowed compensation.<sup>3</sup> Thus the harsh result of denying a non-dependent parent any recovery for the death of a minor is avoided, and substituted therefor is certain relief under the Act. This is in keeping with the theory of Workmen's Compensation Acts, to afford a humanitarian, speedy and economical method by which compensation might be made, allowing the industry to which the employee contributed his labor to bear the expense which eventually is borne by the community at large by reason of the cost thereof being added to the cost of goods or services supplied.

It is hoped that the Legislature will give serious attention to this subject in the not too distant future.

Albert C. Angstman.

time of his death, to a total minimum award of one thousand dollars. . . ."

<sup>3</sup>Double v. Iowa-Nebraska Coal Co. (1924) 198 Iowa 1351, 201 N. W. 97; Pierce's Case, note 6, *supra*.

### **RIGHTS OF EMPLOYEE AND EMPLOYER AGAINST A TORTIOUS THIRD PARTY UNDER WORKMEN'S COMPENSATION ACTS**

The Workmen's Compensation Laws and court decisions of 47<sup>1</sup> states recognize the right of an injured employee to recover damages against a negligent third party, not under the act, who has caused the injury.<sup>2</sup> These "third party liability" statutes, as they are called, may be classified into five major categories:<sup>3</sup>

1. Those denying compensation altogether, thus leaving the employee to his remedy against the third party.<sup>4</sup>
2. Those allowing the employee to recover compensation only but requiring the employer to prosecute the suit

<sup>1</sup>Mississippi remains the only state not having adopted some form of Workmen's Compensation Act.

<sup>2</sup>New Hampshire, Ohio, and West Virginia have no third party liability statutes in their acts, but their courts nevertheless recognize this right.

<sup>3</sup>See DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION, p. 607.

<sup>4</sup>Wyoming, §124-109, Wyo. Rev. Stats., 1931, Suppl. of 1940. It is to be observed, however, that when the employee is injured by a negligent third party while engaged in an extra-hazardous occupation, he is permitted by this statute the dual remedy characteristic of the group in Note 8, *infra*.

against the third party, any excess over the amount of compensation being paid to the employee.<sup>5</sup>

3. Those requiring the employee to elect between compensation or the third party suit. Under this type of statute, the employee's election to sue the third party releases the employer, while an election to take compensation subrogates the employer to the cause of action against the third party.<sup>6</sup>
4. Those similar to No. 3 except that if the employee elects to sue, the employer remains liable for any deficiency up to the amount of what would have been due under the compensation statute.<sup>7</sup>
5. Those where the employee may simultaneously accept compensation and sue the third party, but the employer is almost universally subrogated to the extent of compensation liability out of the third party recovery.<sup>8</sup>

<sup>5</sup>Missouri §3309, Rev. Stats. of Mo., 1929; and North Carolina, §8081(r), 8081(r), No. Car. Code of 1939. The latter state allows the employee to sue if the employer fails to act within six months.

<sup>6</sup>Massachusetts, §15, Chp. 152, Gen'l. Laws of Mass.; Florida, §39, Chp. 17481, LAWS OF FLORIDA, 1935; Idaho, §43-1004, Idaho Code Anno., 1932; Maine, §24, Chp. 55, Rev. Stats. of Maine, 1930; North Dakota, §396a20, Suppl. to Comp. Laws of N. D., 1913-25; Texas, §6a, Art. 8307, Vernon's Texas Civil Stats. (1941). Vermont §6511, Public Laws of Vt., 1933; Kansas, §44-504, Genl. Stats. of Kansas, 1935; Michigan, §8454, Comp. Laws of Mich. 1929; Delaware, §6108, Rev. Code of Dela., 1935; South Carolina, p. 1237, ACTS OF SOUTH CAROLINA, 1936; Maryland, §72, Art. 101, Anno. Code of Md., (1939); Utah, §42-1-53, Rev. Stats. of Utah, 1933; Virginia, §1887 (12), Va. Code of 1930; Oregon, §49-1814, Ore. Code Anno., 1935. By the Oregon statute, however, if the employee is engaged in extra-hazardous employment when injured by the third party, the insurer remains liable for any deficiency as of those states grouped in Note 7, *infra*.

<sup>7</sup>New York, §29, Chp. 66, Cahill's Consol. Laws of N. Y., 1930; Arizona, §56-949, Ariz. Code Anno., 1939; Colorado, §366, Ch. 97, Colo. Stats. Anno., 1935; Nevada, §2687, Nev. Comp. Laws, 1929; Washington, §7675, Vol. 8, Remington's Rev. Stats. of Wash., (1932). Oklahoma, §13368, Okla., Stats., 1931.

<sup>8</sup>Montana, R. C. M., 1935, §2839; Ch. 230, §1, LAWS OF MONTANA 1943; Alabama, §7587, Code of Ala. 1923; California, Act 4749, §29, Codes and Genl. Laws of Calif., Consol. Suppl. 1925-27; Arkansas, Work. Comp. Law, §40, Ark. Stat. Suppl. 1944; Connecticut, §5231, Genl. Stats. of Conn., Rev. of 1930; Georgia, §3154(2) (d) Ga. Code, 1926; Illinois, Ch. 48, §166, Ill. Anno. Stats., Perm. Ed. (1941); Indiana, §40-2229, Burns Ind. Stats. Anno. 1933; Kentucky, §4890, Carroll's Ky. Stats. 1930; Iowa §1382, Code of Ia. 1931; New Mexico, §156-124, N. M. Stats. Anno. 1929; Louisiana, §4397, La. Genl. Stats. 1939; Wisconsin, §102.29, Wis. Stats. 1939; Minnesota, §4272-5, Mason's Minn. Stats. 1927; South Dakota, §64.0301, S. D. Code of 1939; Nebraska, §48-118, Comp. Stats. of Nebr. 1929; Pennsylvania, §671, Purdon's Penn. Stats. Anno. 1931; Rhode Island, Ch. 300, Art. III, §20, Genl. Laws of R. I. 1938; Tennessee, §6865, Code of Tenn. 1932.

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Montana is one of the 20 states adhering to the liberal policy of the fifth group, which is the subject matter of this article. This group itself, however, may be subdivided into three types:

1. That which gives the employer a lien on the net recovery up to full subrogation of the amount paid as compensation under the Workmen's Compensation Act.<sup>9</sup>
2. That which makes full subrogation possible, but where the employer and the employee share the recovery on a percentage basis (any excess over the compensation from the employer's percentage going to the employee also).<sup>10</sup>
3. That which allows only partial subrogation, although the employer is allowed a first lien to that extent.

Montana is the lone representative of this last sub-category, as evidenced by reference to Section 2839, R. C. M. 1935.<sup>11</sup>

<sup>9</sup>All states in Note 8 except Wisconsin, Arkansas, and Montana.

<sup>10</sup>Wisconsin and Arkansas.

<sup>11</sup>§2839 reads in full:

"Where both the employer and employee have elected to come under this act, the provisions of this act shall be exclusive, and such election shall be held to be a surrender by such employer and such employee, as between themselves, of their right to any other method, form or kind of compensation, or determination thereof, or to any other compensation, or kind of determination thereof, or cause of action, action at law, suit in equity, or statutory or common-law right or remedy, or proceeding whatever, for or on account of any personal injury to or death of such employee, except as such rights may be hereinafter specifically granted; and such election shall bind the employee himself, and in case of death shall bind his personal representative, and all persons having any right or claim to compensation for his injury or death, as well as the employer, and those conducting his business during liquidation, bankruptcy, or insolvency. Provided, that whenever such employee shall receive an injury while performing the duties of his employment and such injury or injuries, so received by such employee, are caused by the act or omission of some persons or corporations other than his employer, and where the cause of such injury has no direct connection with his regular employment, and does not arise out of or necessarily follow as an incident thereof, then such employee, or in case of his death his heirs or personal representatives, shall, in addition to the right to receive compensation under the workmen's compensation act, have a right to prosecute any cause of action he may have for damages against such persons or corporations, causing such injury. In the event said employee shall prosecute an action for damages for or on account of such injuries so received, he shall not be deprived of his right to receive compensation but such compensation shall be received by him in addition to and independent of his right to bring action for such damages, provided, that in the event said employee, or in case of his death, his personal representative, shall bring such action, then the employer or insurance carrier paying such compensation shall be subrogated only to the extent of either

This statute's unprecedented<sup>12</sup> liberality in permitting only limited subrogation was greatly extended (prior to its amendment in 1943)<sup>13</sup> by the Montana Supreme Court in the case of *Hardware Mutual Casualty Co. vs. Butler*<sup>14</sup> by its construction of the following provision:

“ . . . the employer or insurance carrier paying such compensation shall be subrogated to the extent of  $\frac{1}{2}$  of the gross amount received by such employee as compensation under the workmen's compensation laws. . . ” if such action is brought by the employee within six months.<sup>15</sup>

The court held that “gross amount received” meant that money actually received by the employee as compensation to the date of settlement of the action,<sup>16</sup> and not the amount of compensation “receivable” or “payable” under the award.”

one-half ( $\frac{1}{2}$ ) of the gross amount received by such employee as compensation under the workmen's compensation law, or one-half ( $\frac{1}{2}$ ) of the amount recovered and paid to such employee in settlement of, or by judgment in said action, whichever is the lesser amount. All expense of prosecuting such action shall be borne by the employee, or if the employee shall fail to bring such action or make settlement of his cause of action within six (6) months from the time such injury is received, the employer or insurance carrier who pays such compensation thereafter bring such action and thus become entitled to all of the amount received from the prosecution of such action up to the amount paid the employee under the Workmen's Compensation Act, and all over that amount shall be paid to the employee. In the event have been fully determined at the time of such employee shall receive settlement of his action, prosecuted as aforesaid, then the industrial accident board shall determine what proportion of such settlement the insurance carrier would be entitled to receive under its rights of subrogation and such finding of the board shall be conclusive. Such employer or insurance carrier shall have a lien on such cause of action for one-half ( $\frac{1}{2}$ ) of the amount paid to such employee as compensation under the Workmen's Compensation Act or one-half ( $\frac{1}{2}$ ) of the amount recovered and paid to such employee in settlement of, or by judgment in said action, whichever is the lesser amount, which shall be a first lien thereon.”

<sup>12</sup>Some doubt may be cast on the use of this word by reference to §3154(2) (d), Georgia Code, prior to its amendment in 1922, when it appears that the employee was permitted to recover both compensation and damages from a negligent third party without subrogation to the employer.

<sup>13</sup>See Notes 8 and 11.

<sup>14</sup>(1944) ....Mont..... 148 P. (2d)563.

<sup>15</sup>By the wording of §2839, if the employee fails to sue within the six months, then the employer is subrogated to the cause of action and from any recovery resulting is entitled to reimbursement “. . . up to the amount paid the employee under the Workmen's Compensation Act. . . ”

<sup>16</sup>In the principal case, as subsequently appears, the plaintiff settled out of court. If the case had gone to judgment, presumably the court would have held that the employer was subrogated to the amount of compensation actually received by the employee at the date of commencement of the action.

<sup>17</sup>The meaning of “amount received” and “amount paid” have long been

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In the principal case, Butler while in course of employment for the employer, was fatally injured when struck by an automobile driven by the defendant third party. Plaintiff wife of deceased recovered as compensation to be paid under the act \$8,000, payable in installments. Before six months had expired, and after having received \$798 as compensation under the act, plaintiff settled with the third party's insurer for \$2750. The Industrial Accident Board, insurer under the compensation act, contended that it was entitled to the entire amount, since  $\frac{1}{2}$  the compensation to be paid under the act was \$4,000. In the Montana Supreme Court decision, this contention was also maintained by Justice Morris in his dissent. But the majority of the court upheld the plaintiff's argument that the Board was entitled only to  $\frac{1}{2}$  the actual compensation received to the date of settlement, or \$399.<sup>12</sup>

In 1943, the controversial provision was amended to read:

" . . . the employer or insurance carrier paying such compensation shall be subrogated *only* to the extent of *either* one-half ( $\frac{1}{2}$ ) of the gross amount received by such employee as compensation under the workmen's compensation

in controversy, with holdings both with and against the principal case. Probably the correct test, set out in Realty Associates Securities Corp. vs. O'Connor, (1935) 295 U. S. 295; 79 L. Ed. 1446, is that the term "must have a sensible construction according to the facts." See also Hamburg vs. Cundill, (1928) 247 N. Y. 119, 159 N. E. 882.

<sup>12</sup>A separate controversy arose in the principal case over the question whether the term "expenses" included attorney's fees. The provision of §2893 contested read: "All expense of prosecuting such action shall be borne by the employee. . ." The court held that expenses did not in this case include such fees; that all parties benefiting by the attorney's efforts should share in the expense as an equitable principle; also that general statute §8993, R. C. M., providing for an attorney's lien on his client's cause of action, precluded a contra holding. No third party liability statute of any other state seems to have wording similar to this, and uniformly in those states it appears that costs and attorney's fees are first subtracted from the gross recovery. Sears vs. Inhabitants of Town of Nahaut, (1913) 215 Mass. 234, 102 N. E. 491, passing on the general question involved, held that the purpose of "expenses shall be borne by the employee" is to protect the employer in needless and fruitless litigation, but not "to evade or defeat a reasonable and just claim for compensation due an attorney" who has successfully recovered and in which the defendant shares. Similar holdings appear in Haymor vs. Morris, (1942), 37 N. Y. S. (2d) 884; Conway vs. Skidmore, (1935) 48 Wyo. 73, 41 P. (2d) 1049; Delaware L. & W. Ry. Co. vs. Fengler, (1942) 288 N. Y. 141, 42 N. E. (2d) 6; and Aetna Life Ins. Co. vs. Bowling Green Gaslight Co. (1912) 150 Ky. 732, 150 S. W. 994. These cases are thought to express the correct view.

Of course, by virtue of the express provision of §2893 quoted above, the employee must, in Montana, bear the expenses of the action other than attorney's fees.

law, or one-half ( $\frac{1}{2}$ ) of the amount received and paid to such employee in settlement of, or by judgment in said action, whichever is the lesser amount."

It is thus apparent that the amendment leaves unchanged the wording carried over from the original provision, which, it is submitted, is likely fore-doomed to the construction given it by the Court in the Butler case. The only change has been that of an alternative. It is true that this alternative would give the employer a more just recompense were it not for the qualifying phrase "whichever is the lesser amount." Manifestly, rare instances would occur when a common law recovery against a third person would amount to less than the typical awards of compensation actually received within six months. And it is also clear, because of this phrase, that when the alternative does operate, the employer is due to receive less than he would under the unamended statute.

Assuming that Section 2839 as amended should be subjected to the construction given it in the Butler case, analysis together with corresponding statutes of other states reveals singular contrasts.

Let us assume that the injured employee is suing within six months, and that he has contracted with his attorney for a 25% contingent fee; that costs of court are 5%, and that the employee has actually received \$720.00 (\$30 per week for six months) from his employer.

Now, under a generous recovery of \$50,000, in Montana the attorney will take \$12,500. Since the \$720 received as compensation from the employer is less than the third party recovery, the employer will take  $\frac{1}{2}$  of that amount, or \$360. This leaves \$37,140. Minus costs, being 5% of \$50,000, or \$2500, the employee's net recovery is \$34,640.

Under an intermediate recovery of \$15,000, the attorney takes \$3750, leaving \$11,250. The employer takes his constant \$360, which, subtracted with costs of \$750, leaves the employee \$10,140.

Under a modest recovery of \$2000, attorney's fees take \$500, the employer takes \$360, and, after subtracting costs of \$100, the employee still comes through with \$1040.

Even when the third party recovery is less than the amount received as compensation under the act, the employee is fairly certain to come out of the fray with a share smaller only by the costs of court—as, for instance, assuming a recovery of \$500. Under the holding of the Butler case, the fee of plaintiff's attorney in the sum of \$125 would have to be de-

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ducted first, leaving \$375. Of this amount, the employer would take one-half, or \$187.50, leaving a residue of \$162.50 for the employee and \$25 as costs of court.

As previously indicated, Montana has no rival in this degree of generosity toward the injured employee. Of the 20 states granting simultaneous third party recovery, only Wisconsin and Arkansas join Montana in guaranteeing the employee a percentage of such recovery. But even those states pay at least lip service to the employer's full subrogation. Wisconsin's plan provides for the following distribution: first, reasonable costs of collection are subtracted from the third party recovery; second, one-third of the remainder goes to the injured employee; third, the employer takes up to the full amount of his liability from the remainder; fourth, any remainder goes to the employee.

Tested under the same hypothetical facts as the Montana statute before, the following results seem to obtain in Wisconsin:

**\$50,000 Recovery:**

Costs: (5% of \$50,000).....	}	.....\$15,000.00
Attorney's fees: (25%) .....		
Employee: ( $\frac{1}{3}$ of \$35,000) .....		11,666.66
Employer: (Amount of liability for compensation) .....		8,000.00
Employee: (Remainder) .....		15,333.34
		<hr/>
		\$50,000.00

**\$15,000 Recovery:**

Costs .....	}	.....\$ 4,500.00
Attorney's fees .....		
Employee .....		3,500.00
Employer (All up to \$8,000).....		7,000.00
		<hr/>
		\$15,000.00

**\$2000 Recovery:**

Costs .....	}	.....\$ 600.00
Attorney's fees .....		
Employee .....		466.66
Employer .....		933.34
		<hr/>
		\$ 2,000.00

The third type of statute, of which Illinois is typical, yields these results under our assumed recoveries. Illinois differs from Wisconsin, as previously noted, in that the injured employee is not guaranteed a percentage of the third party recovery if he accepts compensation from the employer.

\$50,000 Recovery:

Costs .....	}	.....\$15,000.00
Attorney's fees .....		
Employer .....		8,000.00
Employee .....		27,000.00
		<hr/>
		\$50,000.00

\$15,000 Recovery:

Costs .....	}	.....\$ 4,500.00
Attorney's fees .....		
Employer .....		8,000.00
Employee .....		2,500.00
		<hr/>
		\$15,000.00

\$2000 Recovery:

Costs .....	}	.....\$ 600.00
Attorney's fees .....		
Employer .....		1,400.00
Employee .....		000.00
		<hr/>
		\$ 2,000.00

Thus, on recapitulation, it appears that under a \$50,000 third party recovery, the employee will receive \$34,640 in Montana, but \$27,000 in Wisconsin or Illinois. The employer will receive \$360 in Montana, but his full \$8,000 were he in either of the other two states. Under a \$15,000 recovery, the employee takes \$10,140 in Montana, \$3500 in Wisconsin, or \$2500 in Illinois. The employer receives his \$360 in Montana, but recovers \$7000 in Wisconsin, and \$8000 in Illinois. Under a \$2000 recovery, the employee has \$1040 in Montana, \$466.66 in Wisconsin, but he receives nothing in Illinois, while the employer still receives his \$360 in Montana, \$933.34 in Wisconsin, and \$1400 in Illinois.

Which statute is preferable? It is believed that this can best be determined with reference to the objects of the Work-

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men's Compensation laws. Authorities list the following as the principal objectives:<sup>19</sup>

1. Immediate medical or hospital service for the injured employee, and a prompt commencement of compensation payments.
2. Full payment of compensation in accordance with the terms of the act.
3. To standardize and define the liability of the employer, allowing fullest possible reimbursement when to do so will not defeat other purposes of the act.
4. To return the injured employee to work as soon as possible.<sup>20</sup>

Undoubtedly, all three statutes satisfy the first two requirements. On the third objective, however, differences arise. Mr. Dodd, an eminent writer on Workmen's Compensation, maintains that "the employer should in all cases be reimbursed, so far as such reimbursement is possible, from damages collected from the third party."<sup>21</sup> The Illinois statute seems highly satisfactory on this point, for the employer is the first to be compensated from the recovery after reasonable expenses have been deducted. Wisconsin, too, allows full reimbursement to the employer, but the recovery must be one third greater in order to satisfy the employee's prior lien of that amount. Montana's statute, in its construction most favorable to the employer, would allow only 50% reimbursement.

Bearing in mind that liability under the Workmen's Compensation laws is placed on the employer without reference to fault, it seems clear that in theory, at least, he should be reimbursed in full when the size of the third party recovery permits. However, intervening practical factors seem to recommend a modification of this theory: first, even though the employee may be entitled to a sizeable recovery, he usually is discouraged from prosecuting the action aggressively since the employer takes first such a large share; second, there is a

<sup>19</sup>*op. cit.* Note 3.

<sup>20</sup>Concerning the fourth requirement, much speculation arises. It might be argued that in Illinois where there is less hope for a substantial recovery from the third party, that the employee will be less inclined to play up his injuries for the sympathy of the jury than he would in Wisconsin. But probably in either jurisdiction the employee will be equally tempted to struggle along on his compensation to gamble on the contingency, no matter how nebulous, of a large common law recovery. This condition would seem to exist in any case when a third party action is allowed.

See DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION, pp. 614-16.  
<sup>21</sup>*id.* p. 615.

strong tendency for the employer, who is ordinarily the aggressor even though he may be suing jointly with, or in the name of the employee, to settle for the amount of compensation payable. It is sometimes argued that an employee injured by a third party in receiving compensation should be no better off than any other employee with identical injuries sustained in another manner, and that any recovery over and above compensation should go into a separate compensation fund. But this view perhaps overlooks the practical difficulties of a stranger to the employee or his estate trying to recover damages for injuries sustained by a person who is not to receive the benefit of the recovery. Further, much is to be said for the argument that such cause of action against a third person is a personal matter, as in the case of insurance, over which the injured person should have control, subject only to the employer's lien for compensation. In any event, the third party should not be allowed to profit by his injurious wrong. If it be agreed that the employee should be unfettered in pushing his claim against the tortious third party, then it would appear that these obstacles incident to the Illinois type of plan must be circumvented. It was on this theory of giving added incentive to the employee to prosecute aggressively, that Wisconsin, the recognized leader among the states in labor benefit legislation, adopted the plan of guaranteeing the employee one-third of the third party recovery. Even more, this plan induces the employer to an aggressive prosecution in the hope that his  $\frac{2}{3}$  portion will defray compensation liability, and thus eliminate the tendency to settle for less. Even though, as Dodd points out, this plan tends to "penalize the employer by preventing full third party reimbursement in a large number of cases,"<sup>22</sup> it probably compromises the difficulties better than any other. The Montana plan, by allowing the employee exclusive control of the cause of action if acted on within six months, which carries with it an absolute gift of compensation payable to him, gives the employee a driving incentive, to be sure, but robs the employer almost entirely of his.

In conclusion, it is respectfully submitted that the wiser solution to this problem is the repeal of Section 2839 *in toto* and the adoption of a plan in the nature of that of Wisconsin. If not that, then certainly, when a set of facts similar to the Butler case next arises before the Montana Supreme Court, that body should strive to find that "amount received" and "amount paid" as appear in Section 2839 were intended to

<sup>22</sup>*id.* p. 614.

mean "amount receivable" and "amount payable" as compensation under the Act.  
L. Lloyd Evans.

## Book Review

### THE ANATOMY OF PEACE

By Emery Reves. Fifth Edition  
Harper & Brothers, New York and London, 1945.  
pp. 0 - 275 \$2.00

The lawyer should be more than ordinarily interested in Emery Reves' recent essay, "The Anatomy of Peace," for at least two reasons: 1. The praise the author heaps on law, at least the "legal order" as a civilizing agency should appeal to his professional pride; 2. The extensive list of responsible signatures appearing under an open letter to the public recently, urging everyone to read it and discuss it should challenge his interest as a citizen. Its extremely controversial character is attested to by two articles dealing with it carried in the American Bar Association Journal in very recent issues.

Most students of the subject have long recognized the evil effects flowing from nationalism run rampant, in the international area, however beneficial it may have been in earlier times. Reves brings to this subject both the creative thinking of a scientist (most of the time) and the zeal of a reformer, to give us an almost overwhelming argument in support of a "universal government." Briefly, he develops his thesis as follows.

At all times peace in the political realm has been accomplished *only* by bringing larger and larger groups of persons and of land areas under the rule of a single authoritative source of law. The peace resulting from this integration of conflicting groups has lasted only so long as the resulting hegemony did not come into extensive contact with some other hegemony. As soon as this happened, conflict again developed. Not only was this true of such countries as the British Isles, different portions of Europe and of the Western Hemisphere, but it was true in ancient times as well. At one time, developing large areas into nations resolved many conflicts. Now, however, because of continuous development in technology, there is constant contact and consequent friction between all nations in the world. This results in an anxiety in each nation to be "secure" from every other one. The very anxiety for security guarantees further wars.

In the economic realm nationalism engenders war in at