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Cover Page Footnote

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THE FELLOW SERVANT RULE IN NEW YORK[1]

ARON STEUER†

THE fellow servant rule is the museum piece of the regulations and provisions which have governed the determination of personal injury cases in New York. Its origin is unique, its history is replete with odd controversies and its present influence is almost directly contrary to the purposes it was introduced to perform. Put baldly, the rule is one of defense in an action for injuries by an employee against his employer and it provides that if injuries or death[2] are occasioned by the negligence of a fellow servant of the plaintiff there can be no recovery.

In New York the rule has no background, no origin of analogy or logical extension from any existing precept. It was not born into our law, it was adopted, full grown, from the law of Massachusetts[3] where it had established itself. It is more than a coincidence that the period of the spread of the rule is the period of the early development of the railroads. The latter were the advocates of the rule and it may well be that it had an important effect in preventing serious financial injury at a time when the carriers could ill afford it. The rule was by no means confined to the railroads but extends to every form of employment including domestic service.[4]

An examination of the extent of the rule as limited by the holdings is in order. Recovery is barred if the injury is due to the negligence of any other employee of the defendant regardless of whether the offending employee is hired in an altogether different capacity,[5] or is engaged in a different enterprise,[6] or does a kind of work entirely different from the services performed by the plaintiff.[7] Conversely it may be noted that the rule does not apply where the negligent employee is hired by another even though that other is a subcontractor of plaintiff's em-

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† Justice, New York Supreme Court.

1. This is the third of a series of studies in personal injury cases in New York. The first *The Conception of Duty* appeared in (1932) 18 CORN. L. Q. 51; the second *The Action for Wrongful Death* appeared in (1935) 12 N. Y. U. L. Q. REV. 388.

2. Sherman v. The Rochester & Syracuse R.R., 17 N. Y. 153 (1858), *aff'g* 15 Barb. 574 (1853).

3. Coon v. Syracuse & Utica R.R., 5 N. Y. 492 (1851).

4. Erjauschek v. Kramer, 141 App. Div. 545, 126 N. Y. Supp. 289 (1st Dep't 1910).

5. Belt v. DuBois' Sons Co., 97 App. Div. 392, 89 N. Y. Supp. 1072 (2d Dep't 1904).

6. Wright v. New York Central R.R., 28 Barb. 80 (N. Y. 1858), *rev'd*, 25 N. Y. 562 (1862); Rich v. Pennsylvania R.R. Co., 112 App. Div. 818, 98 N. Y. Supp. 678 (4th Dep't 1906); Miller v. American Sugar Refining Co., 138 App. Div. 512, 23 N. Y. Supp. 30 (2d Dep't 1910).

7. Pickett v. Atlas Steamship Co. Ltd., 12 Daly 441 (N. Y. 1884).

ployer[8] or is a licensee working on his property.[9] The test of employment used is the right of hiring and discharging.[10] The respective positions as regards authority between the plaintiff and the negligent employee does not alter the situation.[11] Even if the injury results from the direct orders of a foreman which are improperly given,[12] or from the negligent directions of one charged with transmitting them, there can be no recovery.[13] The rule applies to all times while the plaintiff is at work, and, if he is allowed to travel to and from work on company trains, it applies to injuries received on these trips.[14] The same is true of employees who walk to and from work on the company property [15]

The mere reading of these rules shows that an employee faced a veritable *impasse* in a suit against his employer. If there was negligence other than his own for which the employer could be responsible it must have in the nature of things been that of a fellow employee.[16] There are two possible exceptions to this—the employer must provide a safe place to work, which includes safe materials to work with, and he must use due care to employ skillful workmen.[17] But these requirements, while sensible if applied to an individual employer, are subject to logical infirmities when applied to a corporation. A corporation hires employees and provides and maintains equipment through employees. For the negligence of these employees it is not responsible for they must *a fortiori* be fellow servants of the injured. Of course, if the hiring is done by the board of directors as a corporate act, that would probably not be an act of a fellow employee, but employees so hired are seldom the provokers of negligent injuries. It is not surprising to note that a lack of sufficient workers was held to be the negligence of the employee charged with the duty of hiring.[18] As regards the other branch—equipment and a place to work—conclusions were reached only after some difficulty. If the place is safe in itself, and only becomes dangerous through the carelessness of fellow employees, the results were not actionable.[19] And this was adhered to even if the negligence was a failure

8. Young v. New York Central R.R., 30 Barb. 229 (N. Y. 1859).

9. Smith v. New York & Harlem R.R., 6 Duerr. 225 (1856), *aff'd*, 19 N. Y. 127 (1859).

10. Murray v. Dwight, 15 App. Div. 241, 44 N. Y. Supp. 234 (3rd Dep't 1897), *aff'd*, 161 N. Y. 301 (1900).

11. Gabrielson v. Waydell, 135 N. Y. 1 (1892).

12. Keenan *et al.* v. N. Y. L. E. & W. R.R., 145 N. Y. 190 (1895).

13. Dana v. New York Central & H. R. R.R., 23 Hun 473 (4th Dep't 1881).

14. Russell v. The Hudson River R.R., 17 N. Y. 134 (1858), *rev'g*, 5 Duerr. 39 (1855); Vicks v. New York Central & H. R. R.R., 95 N. Y. 267 (1884).

15. Boldt v. The New York Central R.R., 18 N. Y. 432 (1858).

16. Karl v. Maillard, 3 Bosw. 591 (N. Y. 1858).

17. Perkins v. New York Central R.R., 24 N. Y. 196, 220 (1862). See dissenting opinion of Smith, J.

18. Flike v. Boston & Albany R.R., 53 N. Y. 549 (1873).

19. Hale v. Wayside Knitting Co., 59 App. Div. 395, 69 N. Y. Supp. 404 (3rd Dep't 1901).

to inspect the premises to discover defects.[20] On the matter of equipment, the ultimate determination was quite contrary to the previous conclusions. A workman given poor tools was not required to overcome the defect, even though he might have done so with the use of reasonable skill; and if such a one injured a fellow employee, the common employer was responsible.[21] And it was later determined (in a case involving equipment) that the duty to inspect is not delegable and the employer is responsible for its failure, even though this may actually result from an employee's negligence.[22]

The fellow servant rule has been extensively rationalized. When the origin of the rule is understood it must be seen that the defense amounts to a legal axiom,[23] and there is neither possibility of explanation nor necessity for it. Yet it has been attempted not without some nicety of understanding. It has been argued that the relationship of the three persons involved (employer, negligent employee, injured employee) is one which creates no obligation of *respondeat superior*. Comparison was made to the situation where the recipient of charity is injured by the donor's employee and it was pointed out that in both situations it was the relationship which relieved the defendant rather than any public policy.[24] This is an explanation of the rule which, had it been intended by the early court which introduced the rule, would have been a better reason, or at least a more logical one than that which in fact prompted adoption of the rule. Another reason for the rule was advanced only to be shown lacking when subjected to the test of general application. It was claimed that the injured employee was familiar with the habits and activities of his associate employees and hence assumed the risk of their conduct. When the rule was applied to employers having departments of widely divergent activity, whose employees had no association or knowledge of each other, and an employee in one branch was unable to recover for the negligence of one in another branch who was an actual stranger in fact and in method of work, this reason was seen not to be the true cause of the rule.[25]

20. Warner v. Erie Railway Co., 39 N. Y. 468 (1868); Faulkner v. Erie Ry., 49 Barb. 324 (N. Y. 1867).

21. Cone v. Delaware L. & W. R.R., 81 N. Y. 206 (1880), *aff'g*, 15 Hun 172 (1878).

22. McKnight v. Brooklyn Heights Ry., 23 Misc. 527, 51 N. Y. Supp. 738 (Sup. Ct. 1898).

23. The rule has been so treated, or at least its existence has been used, as a premise from which to argue other propositions. See dissenting opinion of Allen, J., in Smith v. New York Central R.R., 24 N. Y. 222, 240 (1862), where it was argued that the recognition of the rule shows that there is no public policy which prevents a person from contracting against the effects of his own negligence.

24. Wallace v. John A. Casey Co., 132 App. Div. 35, 116 N. Y. Supp. 394 (2nd Dep't 1909).

25. Ross. v. New York Central & H. R. R.R., 5 Hun 488 (4th Dep't 1875), *aff'd*, 74 N. Y. 617 (1878).

The enactment of the Employers Liability Act was a death blow to the fellow servant rule. The exclusion of the rule as a defense by the Workmen's Compensation Act virtually concluded the active history of the rule in New York. Thereafter its importance lay in the propositions it had fostered and left as a heritage to the solution of cases dealing with injury. An examination of these will reveal the startling fact that without exception they have inured to the benefit of the injured employee, or at least against the employer. By virtue of the decisions that railroad employees riding free to and from work were then engaged in their employer's business, the same was for a time held in Workmen's Compensation cases and the employees injured under these circumstances could recover under that statute.[26] The employer is, by virtue of the same decisions, liable to third persons for his employee's acts after the latter's working hours if he is still on the employer's premises and subject to his general direction.[27] Other examples can be cited. It is interesting to note that a rule affecting admissibility of evidence formulated in one of the early fellow servant cases has been applied since, where appropriate in negligence actions, and in every recorded instance that has been discovered it has operated to defeat the contentions of the defendant.[28]

To evaluate the fellow servant rule is impossible. It did harm or good depending on one's attitude to the right of recovery in personal injury actions. It has neither more nor less logic to support it than the doctrine of *respondeat superior,* to which it is an exception with no particular reason for the existence of the exception. Whether the fellow servant rule fitted in with the pattern of our law is again a question directed to individual attitude, very nearly resembling a question of taste and so not subject to discussion. Even in the absence of a philosophy regarding the rule its history may prove of interest.

26. Kowalek v. N. Y. Consolidated R.R. Co., 190 App. Div. 160, 179 N. Y. Supp. 637 (3rd Dep't 1919), *rev'd,* 229 N. Y. 489 (1920).

27. McKeon v. Manze, 157 N. Y. Supp. 623 (Sup. Ct. 1916).

28. Downs v. New York Central R.R., 47 N. Y. 83 (1871), *aff'd,* 56 N. Y. 664 (1874); Pardo v. Sender Brothers Trucking Co., Inc., 144 Misc. 68, 257 N. Y. Supp. 798 (Sup. Ct. 1932); Hodas v. Davis, 203 App. Div. 297, 196 N. Y. Supp. 801 (3rd Dep't 1922) (though here the admission of the evidence was held immaterial error and the defendant's victory was not disturbed).