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T H E S I S :

MASTER'S LIABILITY
FOR INJURIES TO SERVANTS
RESULTING FROM NEGLIGENCE OF CO-EMPLOYES.
(In New York).

PREPARED FOR DEGREE OF LL. M.

BY

JOHN H. SOUTHWORTH.

C O R N E L L U N I V E R S I T Y.

1894.

Master's Liability for Injuries to Servants
resulting from Negligence of Co-Employees. (IN New York)

The servant, upon entering the employ of his master, assumes all the risks and dangers incident to the business, and if injured, cannot recover damages from him. In general, if he work with dangerous tools he takes upon himself the chances of injury resulting from their dangerous character, and if he work among a crowd of other workmen he takes the risk of injury from their negligence.

However, the law has imposed upon the master several duties in regard to the safety of his employes. These duties are non-delegable, and if the master places the performance of them in the hands of one of his servants, he still is liable for any negligence of that servant in performing them. By these duties being imposed upon him it is not meant that the master is an insurer of the safety of his employes. They are imposed upon him for the safety of his employes, it is true, but he is bound to use only reasonable care in performing them.

Probst V. Delameter	100 N.Y. 266.
Burke V. Witherbee	98 N.Y. 562.
Devlin V. Smith	89 N.Y. 470.
Slater V. Jewett	85 N.Y. 61.

The duties imposed upon the master for the safety of his employes may be divided into four heads, viz:

1. Furnishing a safe place to work.
2. Furnishing safe machinery, tools and appliances, and keeping the same in repair.
3. Selection and retention of sufficient and competent fellow servants.
4. Establishment of reasonable rules and regulations.

If a co-servant performs any one of these duties he is, as to that particular act, a vice principal, and stands in the place of the master. This, in New York, is the test by which we determine the liability of the master for injuries to his servants due to the negligence of co-servants.

The rules in themselves are easy enough to understand, but the difficulty arises when we attempt to apply them. It is my purpose to examine the later cases and bring them together, each under its own head, in order to show as nearly as possible what facts have been held to constitute "furnish-

ing a place to work"; "furnishing reasonable rules and regulations", etc.

Before taking up the heads in particular, I wish to speak of the case of *Crispin V. Babbitt* (81 N.Y. 576). This case squarely lays down the rule which has been upheld ever since, that the master's liability does not depend upon the grade or rank of the employe whose negligence causes the injury; but upon the character of the act, in the performance of which the injury arises. If the act is one pertaining to the duty the master owes to his servants, he is responsible for negligence in their performance. The converse of this rule is also true, that if the act of the servant is not one relating to the duty of the master, the master is not liable for his negligence.

The facts of the case are as follows: Babbitt was the business and financial man of the Company. The employees were at work pumping the water out of a dry dock preparatory to repairing a boat therein. The fly wheel of the engine had stopped on a dead center, and the plaintiff was engaged with others in lifting it off its center.

Babbitt carelessly let on the steam to assist them, and started the wheel, throwing the plaintiff off on to the gearing wheels and injuring him.

The court held by one majority, that Babbitt's act in

turning on the steam was the act of a fellow servant, and the Company was not liable for the damages.

I will now state the facts of the cases which have sustained the above mentioned rules.

I. Furnishing a safe place to work.

A very good case under this head is that of Davidson V. Cornell, (132 N.Y. 228). In that case the defendants were building an elevated railroad; they used for this work a steam engine and apparatus placed upon a platform on wheels, which was moved along as the work progressed. While platform was being moved forward, the girders on which it rested gave way, and the end of the platform fell to the ground. Plaintiff was at work on this platform, and injured by the fall. There was no lateral bracing placed between the girders before this traveler was moved over them, nor were the ends at the bottom bolted. Another force of workmen was supplied to follow the traveler, laterally brace them and straighten bent girders and finish bolting the ends, and the steadiness of its movement (the traveler) very likely was supposed would give safety to it until this was done.

But the fact that it may have been rendered more so, and perhaps perfectly safe by taking a little more time

to brace and bolt the girders before attempting to pass the platform over them permitted the conclusion that failure to do so was negligence on the part of the defendants in the method adopted to proceed with the work.

In *Flood V. W.U. Tel. Co.* (131 N.Y. 603), a lineman was killed by falling from an arm of a telegraph pole which broke while he was seated at the outer end and pounding. There was no negligence in furnishing and putting up the arm, and a system of inspection ^{was} provided which was all that was practicable; the lineman had all the opportunity which inspector could have had to know its condition. HELD, that there was no negligence on part of the defendant, and could be no recovery.

In *Cullen V. Norton*, decedent employed by defendant as laborer in his quarry to drill rock for blasting purposes. After a blast it was found that the charge in one of the holes had not exploded. D., the foreman, examined it, and found the fuse unconsumed, but failed to remove it and set C. to work about thirty feet from it. The fuse caught fire, the charge exploded killing C. HELD, assuming D. to have been negligent, that it was the act of a fellow servant, it being merely one of the details of the business. No recovery

In *Hogan V. Smith*, (125 N.Y. 774), some longshoremen were engaged in loading a vessel with flour. They had built

a stool on the hatch, and by reason, not of any careless or negligent plan of construction, or from any inadequate supply of material, but solely from the way in which the longshoremen did the work, one of them fell into the hold and was killed. No recovery, and no negligence on part of the master.

In McGovern V. Central Vt. R.R., (123 N.Y. 280) the decedent was sent by Superintendent, who had entire control of the grain elevator, into a bin through a trap door at the bottom, to see why the grain had ceased to flow. It was obviously dangerous to send him in there, and not taking reasonable care to furnish a safe place to work. The grain fell and smothered McG. Plaintiff was nonsuited below. HELD, Error. Supt. stood in place of defendant, and it was question of fact for jury, whether defendant was negligent or the plaintiff guilty of Contributed negligence.

In Kranz V. Long Island R.R., (123 N.Y. 1), a trench was dug by others, and in it plaintiff intestate W., was to go for purpose of cleaning out water pipes. While engaged in the work the earth caved in on him and smothered him. HELD, defendant liable, for he owed W. the duty of providing a reasonably safe place in which to work.

In Filbert V. D. & H.C. Co., (121 N.Y. 207), plaintiff, while coupling cars fell into a pit in which there was a

revolving wheel and cable. It was ordinarily covered and safe, but planks had been temporarily removed by other employes for purpose of making some repairs, and though repeatedly instructed to cover pit when repairs were finished, they failed so to do. HELD, that his injuries were caused by act of fellow servants, and no recovery.

In *Frendenburgh V. N. Central R.R.*, (114 N.Y. 582), the plaintiff a switchman employed in defendant's yard, while engaged in coupling cars stepped into a cattle guard and was injured. The guard was near scales where defendant weighed its cars, and cars when pushed from scales passed over it; it had been there for several years and no accident. Plaintiff had been in defendant's employ three days. Accident happened in evening and plaintiff had a lantern. Ends of two cars were over guard. HELD, that location was at a place which imposed on defendant the care to make it reasonably safe. From the evidence the jury was warranted in finding that defendant had failed to perform its duty and was negligent, and also that plaintiff had no knowledge of the guard and not guilty of negligence in failing to observe it.

In *Anthony V. Lieret* (105 N.Y. 591), plaintiff an employe in lumber mill. There was a heavy trap door in floor of second story. Orders given never to open it from below. Plaintiff knew all about the trap and was passing over it

when it was suddenly raised from below and he fell through opening and was injured. The employe who opened the trap door had been instructed not to open it from below. HELD, no recovery, as injury caused by negligence of a co-employee.

In Panyzar V. Tilly Foster Iron Mining Co. (99 N.Y. 368) the plaintiff, while working in the pit of a mine, was injured by the fall of a mass of rock from an overhanging cliff not caused by negligence of any workman, and not a necessary part of the danger arising from the working of the mine itself. The superintendent and foreman had been warned of the danger before the plaintiff went to work at the place where he was injured, and they took no precautions to support the rock while the men were at work under it, although it was entirely practicable to do so. HELD, master failed to furnish a reasonably safe place to plaintiff to continue his work.

In Vosburgh V. Lake Shore & Mich S. R.R., (94 N.Y. 374), the railroad purchased a bridge which at the time was unsafe and dangerous by reason of defects in its original plan and construction, and such defects were obvious to the eye of a skilled inspector and could easily have been ascertained by proper examination. HELD, negligence for the Company to continue its use without such inspection and correction of de-

fects; that it was liable to an employee on one of its trains for injuries received by a fall of the bridge.

In *Sheehan v. N.Y.C. R.R. Co.*, (91 N.Y. 332), the Supt. of the road telegraphed conductor of train 337, "Wild cat to Cayuga regardless of train 50". Then later he telegraphed the operator at Cayuga "Hold No. 50 for orders." The operator told the conductor of train 50, "Hold No. 50 for 61." He neither exhibited or delivered any message, and said nothing else. No rule of defendant's required him to do either. Train 61 came in, and soon after train 50 started out, and a few minutes later collided with train 337. In an action by fireman of train 337 for damages, the jury found that sufficient precautions were not taken by defendant for safety of employees, and defendants were negligent. Judgment and costs for plaintiff.

In *Devlin v. Smith*, (89 N.Y. 470), the defendant, J.T., a painter contracted to paint the inside of a home. Having no experience or knowledge of building scaffolds, he made a contract with S., an experienced scafflod builder to erect necessary scaffolding, which was to be first class. Through negligence of J.S. the scaffold was defectively constructed, and while D. was working thereon it gave way, killing D. In action for damages it did not appear that J.T. knew or had reason for knowing of the defect. HELD, J.S. was not the

agent or servant of J.T., but an independent contractor for whose acts the latter not liable. Not negligence in J.T. to rely on judgment of J.S. as to sufficiency of the scaffold and he not liable.

S E C O N D H E A D.

Furnishing safe Machinery, Tools,
and Appliances, and keeping the same in Repair.

In Bailey V. R.W. & O. R.R. (139 N.Y. 302), a brakeman, while in the employ of the defendant, the railroad corporation, was injured by reason of a defective brake. The plaintiff, in the performance of his duty, attempted to set the brake upon the car, and swayed upon the wheel in the usual manner, when the rod came out and he was thrown from the car and injured by the moving train. On examination after the injury, it was found that the pin in the bottom of the brake-rod, designed to hold the rod in place, was gone. The absence of the pin could not have been seen by one working the brake, but an inspection of the brake from under the car would have disclosed its absence. Rule 99 of the Company provides that conductors will be personally responsible for examining the cars in their train at every convenient point, and especially at water stations, and, with the help of the men, must know that all cars are in a safe condition and no wheels or brakes

broken. The jury found, that the failure to discover the defect at Norwood was in consequence of the omission to properly inspect the car at that point. Judgment for plaintiff.

In *Carlson V. The Phoenix Bridge Company* (132 N.Y.273) the plaintiff, while in the performance of his duty, was injured by the fall of an iron girder, caused by the breaking of an iron hook used in raising it. The hook was one of a number made for such use from a bar of iron purchased of reputable dealers, and of the best grade in the market. All of the other hooks had been used for the same purpose and none proved weak except the one in question, and this one during the three months prior to the accident had been in use lifting girders similar to the one which fell, and there was nothing in the external appearance to indicate weakness. The break resulted from a hidden defect in the iron, and could not have been discovered by external examination. HELD, Plaintiff not entitled to recover.

In *Cregan V. Marston* (126 N.Y. 568), C., plaintiff^{de} intestate, was killed by the breaking of a rope, called a fall, attached to a derrick used in hoisting buckets of coal. In an action for damages it appeared that defendants kept on hand an adequate supply of these falls of the best and most approved

kind. The fall in use was in full view of the employees, and they were able to know how long it had been in use, and whether prudence required it to be changed. New falls were kept under cover locked up, but were supplied when called for. Applications for falls were usually made by engineer, but any other employees were at liberty to make such application. Engineer examined the fall a day or two before the accident, and deemed it safe. The court^{below} charged that it was the duty of the master to watch the rope used by his servants, that the engineer was his agent, and any negligence on his part was that of the master. HELD, error.

In Kern V. Decastro Sugar Refining Co., (125 N.Y. 50), in an action for damages for injuries to an employee received from the breaking of an elevator, it appeared that elevator was used for carrying goods only. No person allowed to ride upon it. A bucket with wheels was run on rails on the platform of the elevator, where the wheels rested in small notches. The bucket slipped from its place on the rail and wedged the platform against the walls of the elevator so as to stop it. This had occurred before. The difficulty could have been removed by the engineer without danger to anyone, by reversing the movement of the cable. Instead, however, he released the platform letting it fall the length of the slack, putting a sudden

strain upon one of the cables, breaking it and the wheel over which it passed. One piece of the wheel fell into the cellar but another, deflected by some obstacle, struck the plaintiff who was at work on the third floor. The approximate cause of the injury was the negligent act of the engineer. Court said, "We are of opinion that plaintiff ought not to have recovered." Judgment reversed and new trial granted.

In *Arnold V. The D. & H. C. R.R.* (125 N.Y. 15), plaintiff was a brakeman whose duty was to remove disabled and defective cars from trains and place them upon a track known as the cripple track for repairs. In attempting to couple two cars, the one of which had a broken drawhead, in order that the latter might be placed on side track, plaintiff was injured. The defect might easily have been seen. HELD, action for damages to plaintiff not maintainable, who took the necessary risk of his employment. Had no right to assume that couplings were perfect.

In *Hart V. Naumburgh*, (123 N.Y. 641), in an action to recover damages for injuries to plaintiff, an employee of defendants, while riding upon a freight elevator in defendant's building, it appeared that the elevator was of most approved pattern for its purpose, carefully inspected by defendant and

the regular inspector of the manufacturer. Had been in operation for six years and no previous accident had happened. Thoroughly inspected three months before the accident and in perfect condition. Accident caused by suspending chains being longer than necessary, and when platform was at its lowest point a turn and a half in the chain still remained upon each drum, and shaft continued to revolve until the chains became slack. When elevator started the chains, being somewhat out of place, were wound irregularly around the drum. This irregular winding caused one of them to slip over on to the shaft, tipping up the side of the elevator, letting the plaintiff fall to the bottom of the elevator well-hole and severely injuring him. HELD, that the evidence did not justify the finding of negligence on the part of the defendant.

In *McCarragher V. Rogers*, (120 N.Y. 526), plaintiff, thirteen years of age, employed in factory. The table on which he was obliged to sit to work was, by some irregular operation of the machinery to which it was attached, thrown out of place, so as to bring his foot in contact with the machinery and he was injured. The machinery in use eight years, and twice, before plaintiff went there, table had been displaced in similar manner and one person injured. The last accident, three months before, was brought to defendant's notice. There

was evidence tending to prove that guard might have been placed near the table without inconvenience in operating the machinery. Judgment for the plaintiff.

In *Goodrich V. N.Y.C. R.R.*, (116 N.Y. 398), plaintiff, a brakeman while engaged in coupling car received from another road to cars on defendants track, was injured. In an action to recover damages, it appeared that the accident resulted from the fact that the bumper of said car was out of order, so that it hung lower than the one of the car to which it was being coupled. HELD, that the defendant was chargeable with negligence.

In *Barnes V. N.Y. L.E. & W. R.R. Co.*, (113 N.Y. 251), plaintiff^{de}intestate was brakeman on freight train. A car loaded with lumber at a way station was to be attached to the train. Car before loaded in perfect condition. By negligence of the person who loaded the car the lumber was placed against the brake-rod so that it was impossible to use the brake. B., as car approached the train, attempted to stop the car by use of the brake, but was unable to turn it. At that instant the lumber car and train came together with violence and shot the lumber back, and Barnes was caught between it and the car behind, receiving injuries from which he died. HELD, that the defendant, having provided safe car and a system and

competent men for its inspection, was not liable for injuries resulting to a ~~employee~~ for their neglect of this duty.

In *Stringham V. Hilton* (111 N.Y. 188), plaintiff was engaged in moving grain from grain elevator when engineer gave an upward movement which continued until striking against a beam. The rope by which it was suspended broke, and the platform fell to the ground, carrying the plaintiff and inflicting injuries. The elevator and engine were of a kind commonly in use. Elevator entirely under direction of the engineer. Manufacturer testified that he had hundreds of elevators then running similarly constructed. This elevator had been in use two years. It was operated by an engine placed by the side of the elevator, rigged with a double wire rope which led directly from the elevator to the drum. The rope was marked with white paint to indicate the different floors. HELD, plaintiff not entitled to recover. It was the act of a coservant done within the range of a common employment.

In *Weber V. Piper* (109 N.Y. 496), plaintiff was injured while using a circular saw in defendant's factory. The accident caused by dullness of the saw. Defendants furnished duplicate saws so that when one needed to be sharpened it could be replaced by the other. Was the duty of M., also a servant, to change sharpen and reset says when necessary. The morning

of the accident, plaintiff notified him that his saw was dull, and asked for another. M. replied that he had no time then to sharpen it, and directed him to go on with his work.

HELD, no negligence on defendant's part was shown. Their duty was performed when they furnished suitable saws, and means and conveniences for keeping them sharp and properly set. Dullness of the saw was neglect of M., a fellow servant.

In Lilly V. N.Y.C. R.R., (107 N.Y. 566), plaintiff, a brakeman, attempted to get upon a car at the same time that an engine was approaching from the opposite direction for the purpose of coupling on to it. Car had no step, plaintiff obliged to take hold of brake-rod and put his foot on one of the bumpers. Engine came so rapidly that the car coupler could not make the coupling. The force of the shock threw the plaintiff from the car. He was pushed along by the brake-beam for about two hundred feet, and then the car passed over him, causing the injury. The brake was out of order so that it could not hold the car, of which defect the defendant had notice. Customary, when cars were standing on a track to have their brakes set for the purpose of preventing their being removed far, and if this brake had been in proper condition and set tight the car would not have moved more than five or ten feet. HELD, that conceding what plaintiff was knocked off through ne-

gligence of coemployees, yet that under the circumstances it might have been found that he could have extricated himself without injury if the brakes had been in proper condition, and that the defect was the approximate cause of the injury. Case should have been submitted to the jury, and non-suit was error.

In *Bushby V. N.Y.L.E. & W. R.R.*, (107 N.Y. 374), defendant delivered to L. at a station a platform car with knowledge that it was to be used in the transportation of lumber over its road. Stakes were not furnished. L. put a stake in each of the sockets and loaded the car with lumber under the direction of the defendant's station agent. In going around a curve at a high rate of speed one of the stakes broke, the lumber and plaintiff, who was upon it at the time in discharge of his duties, were thrown off and the plaintiff injured. Stake made of soft, poor wood which was apparent on inspection. Defendant had no rules as to inspection of such cars. HELD, that the stakes were necessary appliances forming a part of the car, and defendant was negligent. Defendant's custom of allowing shippers to supply stakes no defence. It had delegated to shippers a duty it should have performed itself, and was liable.

In *Ellis V. N.Y.L.E. & W. R.R.*, (95 N.Y. 546) E. was a brakeman on freight train and was in caboose when, seeing a collision was imminent between it and another train following, stepped out of the front door of the car on to the platform of the next car. Cars furnished with buffers, but they so overlapped each other as to be useless, and when trains collided, E. was caught between the ends of the two cars and killed. HELD, that it was a duty the defendant owed its employees to provide cars with buffers appropriately placed.

In *Kain V. Smith*, (89 N.Y. 375), plaintiff employed as carpenter by defendant was directed to assist in loading car wheels. They were in pairs connected by an axle standing on a track and were loaded by a implement called a jigger, one end of which was placed upon the tracks and the other upon the platform of the car. One side of the jigger was worn so as to make it shorter than the other. The hooks were worn so as not to hold firmly to the car, and cross-bars were worn and loose. Wheels were run along the track so as to give them a headway before striking the jigger. As last pair was being loaded one end of the jigger slipped, wheels fell striking and injuring the plaintiff. Plaintiff had never loaded car-wheels or seen them loaded before, and did not know what a jigger was. Defendant's master mechanic had, prior to the accident, been

notified that jigger was defective. In action for damages, HELD, that non-suit was error. Evidence tended to show that plaintiff furnished an imperfect implement, and injury occasioned thereby. Question of evidence and contributory negligence should have been submitted to the jury.

In *Murphy V. B. & A. R.R.*, (88 N.Y. 146), an engine was sent to shop for repairs. It went first to boiler makers, who repaired the boiler, then to machinists who put used parts in repair, and then to mechanics who set the safety-valve. By negligence of the boiler men boiler exploded when M. was setting the safety-valve, and killed him. By the rules known to all employees, when a locomotive was sent to the shops for repairs a thorough examination was required to be made. All workmen were competent. HELD, M.'s death was caused by negligence of co-servants. Master not liable.

In *Cone V. D.L. & W. R.R.*, (81 N.Y. 206), an employee of the railroad was injured by the sudden starting of a locomotive, caused by this being defective and out of repair, of which defects corporation had notice. HELD, No defence that the engineer could have so managed the engine as to have prevented the accident.

In *Fuller V. Jewett* (80 N.Y. 46), an engine had been

sent to the shops for repairs, and by negligence of the workmen it was not put in safe condition, although foreman gave orders for general overhauling. Engine was again placed upon the road, but after this frequently reported by the engineer to be out of order. The boiler blew up, killing the engineer.

HELD, the master was liable.

This case is similar to Murphy V. B. & A. R.R. cited above, but is distinguished by the fact that in this case the workmen are held to be furnishing safe machinery with which the engineer is to work, while in the case before, they are held not to be furnishing safe machinery.

T H I R D H E A D.

Selection and Retention

of sufficient and competent fellow Servants.

First, Competent Servants.

In Lanning V. N.Y.C. R.R. (49 N.Y. 521), defendant employed competent agent whose duty it was to employ men. The agent hired W. as foreman, who was competent at that time of employment, but subsequently acquired habits of intoxication, which at times rendered him incompetent. This was known to the plaintiff. W., while intoxicated, directed two incompetent men to erect scaffold on which plaintiff was directed to work. Defendant had furnished sufficient and proper materials Scaffold fell while plaintiff at work upon it, and he was injured. HELD, first, defendant was chargeable with the negligence of his agent in retaining W. Second, it is a question of fact for the jury whether the fact of the plaintiff's remaining in the employ, with knowledge of the incompetency of W. was contributory evidence.

In *Breman V. Gordon*, (118 N.Y. 489), it appeared that plaintiff, a porter of the defendant who had no previous experience or knowledge, was selected to run the elevator, a fellow servant being assigned to instruct him. While left in the elevator without his instructor an accident happened. Court below charged, "If the jury find that the plaintiff was put under instruction of a competent instructor, and that the instructor was as well acquainted as the defendant with the nature and character of the service which he undertook to perform, he cannot recover." HELD, error. Judgment reversed and new trial.

In *Coppins V. N.Y.C. R.R.*, (122 N.Y. 557), a switchman was employed by the defendant at a station, and required by their rules to see that switches connecting with passenger tracks were locked and closed previous to the time of the passage of each train, and to be present until the trains passed. Said switchman was habitually absent from his post and neglected his duties, and evidence tended to show that this was with the knowledge of the defendant's superintendent. A train upon which plaintiff was employed was derailed because of misplaced switch due to said switchman's negligence and plaintiff was injured. HELD, that the defendant was liable.

Second, Sufficient Number of Servants.

In *Flike v. B. & A. R.R.*, (53 N.Y. 549), the train dispatcher sent out a heavy train with only two brakemen on it, when three were required. The train broke in two, and in consequence of the want of necessary brakemen the rear part ran back and collided with another train which had been dispatched five minutes later, killing the fireman thereof. The defendant was held liable.

In *Besel v. N.Y.C. R.R.*, (70 N.Y. 171), B., a car repairer, was at work under a car on the repair track. Other cars on same track were being drawn away when a coupling pin broke and cars thus disconnected ran back, struck the car remaining and B. was run over and killed. There were not the usual number of brakemen on top of the moving cars and none on the detached cars. Claim was not that sufficient number of men not employed, but that they were not on the detached cars. Accident happened in Company's yards, work was irregular and could not be arranged with nicety and exactness as upon regular trains. HELD, head brakeman and yard masters were co-employees of B., and defendant not liable for their negligence if any. But as to the duty of having sufficient employees the court said: "The duty.....that it will furnish proper machinery, etc.

and employ competent and skillful fellow servants, and shall use reasonable care to that end. This duty necessarily implies that a sufficient number of workmen shall be engaged."

The case *Potter V. N.Y.C.* (136 N.Y. 77), is almost exactly similar to the one just cited. The court said: "It is not claimed that defendant failed to employ sufficient and competent servants.....nor is it claimed that proper regulations had not been established.....We think the master's duty was fully discharged in this case when these things had been done, and that the failure of the brakeman to be at his post was negligence of a co-servant of the intestate, for which the master is not responsible."

IV. Establishment of reasonable Rules and Regulations.

In *Morgan V. Hudson River Co.*, (133 N.Y. 666), plaintiff was in employ of defendant, who was owner of kilns for roasting ore. Plaintiff engaged in loading car with ore. Some of it fell on track and had to be removed before car could be run down the slight incline and taken away. Defendant provided shovels, pick-axes and rakes, and both superintendent and foreman had given instructions that men in removing the ore should use the rakes, ect. Car blocked by pieces of wood. Plaintiff crawled under car and removed ore with hands. He spoke to two workmen on another car just behind and above him and told them to look out for his safety. In some way their car got started and ran into car under which plaintiff was, injuring him. It also seems that some one removed the blocks under his car. In an action for damages the court said: "There was nothing in the nature of the business that made it necessary for defendant to make and publish rules.....The failure to adopt rules is not proof of negligence, unless it appears from the nature of the busi-

ness in which the servant was engaged that the master in the exercise of reasonable care, should have foreseen and anticipated the necessity of such precautions." Judgment (for plaintiff below) reversed and new trial.

In Berrigan V. N.Y.L.E. & W. R.R., (131 N.Y. 582), B., coupling cars, received injuries from which he died. Train made up at night on a sliding. A freight train came in from west and stopped, engineer took locomotive on to east end of sliding, and with a brakeman backed down to take out three cars. In making coupling the tender struck these cars with such force as to drive them against the caboose, and that in turn against the cars ahead, between which the plaintiff intestate was working. Only claim is failure to make and promulgate suitable rules and regulations. Claims that rule should have required red flag by day and red light by night, at rear of train, to show that they were coupling cars there. They had body of rules embracing every case that was supposed to need regulation. Plaintiff intestate made coupling alone without coupling stick or lamp. "Accident resulted from an omission to use precautions." No proof of rules for such case promulgated by other railroads. The injury one of incidents of business. Judgment reversed and new trial.

Abel V. D. & H.C.Co., (128 N.Y. 662). The Company never published or made a rule for protection of car repair-

ers. At Mechanicville, when accident happened, it was left to Cowen, (repairers' foreman) and Donnelley, (switchmen's foreman) to regulate in their discretion. Cowen told his men to work under protection of red flag, and told Donnelley that his men worked under protection of a red flag. "But it is essential to efficiency of the rule that it should designate the person authorized to remove the flag." This shown to be done by N.Y.C. & H.R.R.R. Flag was removed by some one. Engine backed down against it, and Abel caught between cars in attempting to escape. "We think upon the present case the same question of fact is presented as before viz: whether defendant had either directly or through his subordinate officers so regulated the conduct of the business as to afford a reasonable protection to repair-men against accidents like the one in question." Judgment (for plaintiff) affirmed.

In *Corcoran V. D.L. & W. R.R.*, (126 N.Y. 673), plaintiff injured while repairing car by negligence of yardmaster, (fellow servant) in letting cars in upon track No. 3. Plaintiff put up red flag on his car as required by Company's rules, and they provided amply by rules for protection of the repairers. The rules required men repairing cars to be protected by a flag when under or between cars. Required red

flag by day and red light at night. All employes to exercise great care, and in case of a doubt adopt the safe course
No recovery.

In McGovern V. Central Vt. R.R., (123 N.Y. 280), the facts of which are given above at page 6 it was held that the fact that the defendant had omitted to make rules and regulations prescribing the conditions under which servants should be permitted to enter the bins at the bottom was a proper question for the jury on question of defendant's negligence.

In Anthony V. Leeret, (105 N.Y. 591), plaintiff worked in a lumber mill. Lumber planed on first floor and passed to second through a trap door in floor above. Orders had been issued to every one and to person who opened it, not to open from below. Trap in perfect repair. As plaintiff was passing along passage way above with arms full of blocks, the trap was suddenly thrown open from below, and he was thrown upon the floor, hurting his head. HELD, no recovery. It was negligence of fellow servant. The trap had a perfect right to be there, and defendants had given proper instructions as to opening it from below.

In Slater V. Jewett, (85 N.Y. 61), an engineer was killed in a collision caused by negligence of conductor. It was the custom when trains were behind time to move them by

telegraphic orders. Order sent directing where train which collided should meet the other. Operator gave it to conductor. Rules of Company regarding these messages were sufficient and proper. Conductor failed to show it to engineer and collision resulted. HELD, negligence of fellow servant. Rules O K.

In any of the cases above if the servant was guilty of contributory negligence or had knowledge of the defect and had continued in the employ without objection, his right to recovery would have been defeated.

White V. Whiteman Co.	131 N.Y. 631.
Moeller V. Brewster	131 N.Y. 606.
Arnold V. D. & H. C. R.R.	125 N.Y. 15.
Williams V. D.L. & W. R.R.	116 N.Y. 628.

There is another case I wish to speak of, and this is where the servants are under the employ of different masters. Here, if one is injured by the negligence of any of the other master's servants, the master of the servant causing the injury is liable, whether the case is within the above rules or not. This is well illustrated by the two following cases.

In Sandford V. Standard Oil Co. (118 N.Y. 571), the plaintiff was an employe of a firm of stevedores, who had engaged to load a ship. The defendant owned dock, storehouse and steam engine and apparatus for loading. G. was in em-

ploy of the defendant, and by his negligence plaintiff was injured. HELD, defendant liable.

In Sullivan V. Tiogo R.R., (112 N.Y. 643), S. was employed as ashman by the Erie R.R. at Elmira. Defendant had permission to use its tracks and turntables, and in such use an engineer of defendant negligently ran over S., causing the injury. The engine while in the yard was subject to the Erie rules. HELD, they were not fellow servants. Judgment for plaintiff.