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Liability of a Master to His Servant for Damages Suffered through the Negligence of Another Servant

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THESIS.

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LIABILITY OF A MASTER TO HIS SERVANT FOR DAMAGES
SUFFERED THROUGH THE NEGLIGENCE OF ANOTHER SERVANT.

by

FRANK CUMMINGS.

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CORNELL UNIVERSITY SCHOOL OF LAW, 1889.

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Law, like other sciences, has settled principles upon which its reasoning is founded. Unlike them, however, its deductions sometimes run counter to conflicting doctrines which modify their applications.

Public policy, and the necessities of business are the ~~most~~ prolific of these modifying principles. Therefore, no legal doctrine is settled, except ^{as} to transactions in a substantially settled industry: transactions to which those doctrines have been uniformly and consistently applied.

Law is the creature of social and commercial necessity: a the servant, not not the lord, of society and business. When a new industry is developed, old legal doctrines are applied. If they minister to its welfare, the law suffers no change; but, if they prove unwholesome and restrictive, the law must be so modified as not to conflict with the welfare of the business: for, if the industry be a boon to the public, it is valued more than the integrity of any legal doctrine. If courts do not make the necessary modifications, legislatures will.

Legal doctrines, therefore, conform to the necessities of the business whose transactions they are intended to regulate and remain unsettled as long as that business is undergoing rapid change.

The doctrine under consideration most frequently applies to the operations of private corporations. Rulings upon litigation arising out of their transactions have gone far to establish existing theories concerning a master's liability to the servant for the negligence of his fellows.

The business of these corporations, however, is of such recent origin that the doctrines applied to it are as changeable as criminal law on the frontier. Justice Miller, in *Liverpool Insurance Co. v. Massachusetts*, says "The subject of the powers, duties, rights, and liabilities of corporations, their essential nature and character, and their relations to the business transactions of the community, have undergone a change in this country within the last half century the importance of which can hardly be over estimated. They have entered so extensively into the business of our country, the most important business of which is carried on by them, as banking companies, railroad companies, express companies, telegraph companies, insurance companies etc.- and the demand for the use of corporate powers, in combining the capital and energy required to conduct these large operations, is so imperative that, both by statute and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized, and enlarged, as to constitute a branch of jurisprudence with a code of its own: due mainly to very re-

cent times. To attempt, therefore, to define a corporation, or to limit its powers by the rules which prevail^{ed} when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time."

A doctrine with reference to the liability of a corporation as master, settled by a decision of forty years standing, may, therefore, with due respect to the distinguished court pronouncing it, be questioned; for fully nine tenths of the corporate business, developed in many new phases and under various new conditions, has since arisen.

The immediate conduct of this business is necessarily intrusted to agents. Therefore the companies' liability for the contractual and tortious acts of its agents is a question of vital importance to the company, the agents, and the public.

There seems no difficulty in establishing the master's liability upon his agent's contracts made within the scope of his authority. Likewise, when strangers are injured by the negligence of the company's agents, acting for the furtherance of their master's interest and in the scope of their employment, the master is liable.

In both of these cases the courts have uniformly held the companies liable to outside parties, holding the agents act to be the act of the master. No distinction was at first made

between an injured party who was a stranger and one who was him self a servant. The distinction was first drawn in Priestly v. Fowler(3 Meeson and Wellsby): decided in the English court of Exchequer in 1837.

The plaintiff was engaged by the defendant as a butcher. The defendant sent another employee, who drove the delivery wagon, to accompany and deliver some goods to the plaintiff; and, by the negligence of the driver, said ^{driver} driver was thrown to the ground and injured. Thereupon he brought suit and obtained a verdict against his employer for damages. An appeal was then taken which resulted in a reversal of judgment.

Lord Abinger, delivering the opinion of the court, said "The mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may be reasonably expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master and may, if he sees fit, to decline any service in which he reasonably apprehends injury to himself; and, in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and the extent of it as the master. IN that sort of employment, especially, which is described in the

declaration in this case, the plaintiff must have known as well as the master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master to protect him against the misconduct of others who serve him: and which diligence and caution, while they protect the master, are a much better security against any injury which the servant may sustain by the negligence of others engaged under the same master than any recourse against his master for damages could possibly afford. "

It is questionable whether this decision is based more largely on the fact that the plaintiff was a co-servant of the driver, or that the plaintiff was himself negligent. Therefore the notion that this decision settled the English doctrine to the effect that a master is not liable to his servant for injuries sustained by him through the negligence of another employee, working in common with him for the furtherance of a common purpose, is questionable though is conceded.

The earliest American decision tending to establish the above rule was rendered by the Supreme Court of ^{South}~~North~~ Carolina in *Murry v. The South Carolina Rail Road Company*, (February 1841). The plaintiff was employed as fireman on a locomotive used and

employed by the defendants on their rail road. The injuries out of which this accident arose were received by the plaintiff, while engaged in the discharge of his duties as fireman, by reason of the engine on which he was employed being thrown from the track by the negligence of the engineer who refused of neglected to lessen the speed or stop the engine after his attention had been called to the obstacle on the track which occasioned the accident. The injured servant brought suit and recovered against the rail road company and the defendant moved for a new trial.

Judge Evans, delivering the opinion of the court, recognized the doctrine of agency as admitted in the leading case of *McMannis v. Crickett* and followed by all cases on that subject since--namely *viz*, That the master is liable for damages caused by the act of his servant who is acting in good faith within the scope of his authority for the furtherance of his masters interest. E

To exempt the rail road company from liability, the court must harmonize this case with the above doctrine of find some legal reason for setting it aside.

The court, by the following quotation from the opinion, admits that if the injury had been done to a stranger the company would have been liable. " There is no question," says the court, " that, in general, the principal is liable for the acts

of the agent, performed in the execution of his agency, or in and about the business of his principal. Thus the owner of a rail road would be liable to passengers for injuries sustained by the negligence of any of its servants, superior or subordinate, because it is implied in the undertaking to carry, not only that the road and cars are good but that the servants employed are competent and will perform their duty. So, also, if one employ an agent to execute any work whereby an injury may result to a stranger the law requires it to be done with care, and if a stranger sustain an injury his principal is liable, as decided in O'Connell v. Strong (Dudley, 265). "But", the court adds, "in this case the employee is neither a stranger nor a passenger."

Therefore, there being no precedent for holding the master liable to a servant for acts of another servant, the court granted the motion: adding that, since the servant is not liable to the master for the acts of another servant, the master should, therefore, be held not liable to the ~~to the~~ servant for the acts of another servant.

The court denied that the engineer was in this case the representative of the company in doing the wrongful act which injured the plaintiff. It also maintained that, had the injured man been a stranger, the engineer's act would have been the act of the company and would have bound it as such.

. What renders one and the same act of the engineer the act of the company when a stranger is thereby injured and that of a mere co-employee when a servant is injured does not appear from the reasoning, but it was acted upon as a mere arbitrary rule.

This decision is farther based upon an interpretation of the servants contract. The court imports into it a stipulation by the servant to stand the ordinary risks of the employment. It farther uses this question, "Since the servant contracts to take the ordinary risks of the service, why ~~not~~ the extraordinary ones as well?"

This interpretation of the contract is answered in the following terms by Justice O'Neill in a dissenting opinion. He says " I admit here, ince for all, that the plaintiff, like any other servant, took, as a consequence of his contract, the usual and ordinary risks of his employment.

What is meant by this? No more than that he could not claim for an injury against which the ordinary prudence of his employers, their agents, or himself, could ^{not} provide. When ever negligence is made out as the cause of injury, it does not result from the ordinary risks of the employment."

Little, therefore, seems to come of the servants implied contract to assume the ordinary risks of his employment; for no reason could import the negligence of reckless and irresponsible

sible men into the reasonable, ordinary risks of an orderly, well-conducted business, done in a quasi-public capacity, exclusively by hired agents, and upon the safety of which the well fare of the traveling and business public depends.

It was strongly urged by a minority of this bench that the reasoning if the court failed to sustain its position; but, since this decision, the conclusion has obtained substantial recognition by the courts of this country and England.

Stated briefly, it is as follows. "A master or employer is not responsible to his servants for injuries, suffered by them in consequence of the negligence, carelessness, or misconduct of his other servants engaged in the same general employment; unless the employer has himself been at fault either in negligently furnishing unsafe appliances for his employees, retaining such appliances after their unsafe condition is known to him, employing fellow-servants known to him as unsafe, or negligently and willfully retaining such servants after their true character is known to him."

Although the case just criticised laid down the above rule, yet it was not placed upon a solid foundation of legal reasoning till Justice Shaw pronounced the opinion in *Farwell v. The Boston and Wooster Rail Road Company* (38. Am. Dec. 339, decided by the Supreme Court of Mass. in March 1842).

The plaintiff, an engineer in the employ of the defendant,

was injured through the negligence of a switch tender. He sued and obtained a verdict against the company who brought the case to the Supreme Court upon appeal.

Chief Justice Shaw, delivering the opinion of the court, said " The rule (of *McManus v. Crickett*, 1 East, 106) is founded on the great principle of social duty that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not and another sustains damage thereby, he shall answer for it. If done by a servant in course of his employment, and acting within the scope of his authority, it is considered, in contemplation of the law, so far the act of the master that the latter shall be answerable civiliter.

The court thus recognizes that the decision must satisfy the doctrine of agency. The learned judge then proceeds to place the doctrine relating to co-servants upon the sound basis of public policy. He imports into the servant's contract an implied agreement to watch over the conduct of the servant employed with him in a common task, to restrain him if he be negligent, to report him to headquarters if he persist in negligence, to leave the employment if he prove an unsafe co-laborer and is not discharged, or to pay the penalty of taking his own risks if accident occur.

This holding really places upon employees the duty of mutual supervision under the penalty of standing their own risks should they fail to exercise it; and thus, by making all responsible for the carefulness of each, insures a more careful body of servants and promotes the safety and welfare of people and property committed to their care.

This is analogous to the Frank Pledge of William the Conqueror whereby he made a community pay the penalty of a crime committed by one of its members, and thus made it the keeper of its own peace and order whether it would or no.

The following further quotation justifies this position.

"But this (doctrine of *McManus V. Crickett*) does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and servant respectively intend to assume and bear, may be regulated by express or implied contract between them and which, in contemplation of law, must be presumed to be thus regulated."

This further quotation also tends to place the doctrine upon public policy."

"In considering the rights and obligations arising out of particular relations, it is competent for courts to regard considerations of policy and general convenience and draw from

them such rules as will, in their practical application, best promote the safety of all concerned. This is the basis upon which implied promises are raised."

"They (passenger carriers) are held to strict responsibility for care, vigilance, and skill, on the part of themselves and all persons employed by them; and they are paid accordingly. The rule is founded upon the expediency of throwing the risk upon those who can best guard against it."

"When several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by resort to the common employer for indemnity in case of loss by negligence by each other."

As the servants in this case were so placed as to have an opportunity to exercise a supervising eye and restraining care over each other, this case settled the doctrine beyond a doubt. The learned justice went farther however and, relying on the theory of a fiction of law in the contract, laid down a rule

so sweeping and comprehensive as to work injustice in many cases where it has been loosely followed and to contradict even the consideration of policy upon which the rule is based. He holds, substantially, that all who are not employers are co-workers and that the master is exempt from responsibility for an injury to any servant by the negligence of another servant: that a servant is a servant, and you can't make any thing else out of him; although, in rare instances, negligence may be traced through him to the master.

This decision thus recognizes two independent grounds, one of public policy and the other, one of implied agreement imported by the court into the contract of service.

Some courts claim that this is a mere matter of interpretation of the contract itself: the courts conviction of the fair intendment of the contracting parties. The majority, however, hold it to be a fiction of law; an implied contract running collateral to the original agreement.

The application of the doctrine that a servant engages with reference to both the ordinary and extraordinary risks of the employment, including even the negligence of irresponsible agents, works a hardship in many instances which Justice Shaw contemplated when he placed the following caution at the close of his opinion.

"In coming to the conclusion that the plaintiff in the

present case is not entitled to recover, considering it as in some measure a nice question, we would caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be modified and varied by circumstances not appearing in the present case."

MODIFICATIONS OF THE GENERAL RULE.

The frequent necessity for the modification of this rule as applied to particular cases, and the toning down of its harshness by liberal interpretations, has given most perplexing problems to the courts. The increasing increment of cases arising for its application as corporate business multiplies and expands, and the numerous instances which have developed in which the strict rule would work oppression, have demanded its frequent modification and, sometimes, even its reformation by the courts, and, in some instances its partial abrogation by statute.

The frequent difference of judicial opinion concerning who are fellow servants within this rule, whether there are servants without as well as within it, whether the master is liable to his servant when he has entirely withdrawn his discretion and bestowed it upon a superior employee whose will is thus made to take the place of the master's will, all these have furnished occasion for a labyrinth of decisions to suit the justice and circumstances of particular cases through which it is quite

impossible for any legal light to penetrate so as to develop from the chaotic mass a settled, harmonious, and consistent general doctrine.

One distinct line of cases places the liability of the master solely upon his exercise-or neglect- of reasonable care; and, if he has shown this, to the best of his knowledge and ability, in selecting safe appliances and ordinarily skillful, sober, and safe co-servants, the courts exempt him from liability for any damage suffered by a servant in consequence of the negligence of another employee (independently of any other consideration); unless it appear that the servant was a notoriously unsafe co-workman; and that that fact was for sometime known to the defendant, or was so bald that he was guilty of gross negligence in not discovering it and providing against the danger.

Here, again, a net work of cases, presenting a plexus of holdings to suit various facts and circumstances, bars the way. What constitutes a dangerous servant whose habits the master should know? to what agents may such facts be known and thereby charge the master with knowledge? What amount of care must the master use in selecting the servant? May he delegate that duty to another servant and be held for that servant's neglect? How far may the injured servant have trusted the masters ~~or~~ overseer's discretion and not pay the penalty of such confidence by losing his legal remedy? These and many other as perplexing

questions trip and tangle the courts.

Another line of cases holds that the true doctrine is based on the purpose of the courts to compell servants to watch over and restrain the careless conduct of one another, to report such misconduct to headquarters, ^{and} to avoid a persistantly ~~careless~~ ^{Careless conduct} in order that servants may be made supervisors of each others conduct and thereby a higher, safer, more sober and careful line of servants may be secured to the public whose property and personal safety so largely falls within their hands.

Their theory is that the rule was framed in the nature of a penalty for the public good and that employees have ample opportunity to protect the public, if compelled to do so, and, at the same time, to guard their own safety. They object strenuously to the doctrine that an employee contracts to run all the risks of the employment arising from both the negligence of irresponsible servants and from accident. They urge that to enforce this rule in cases where the injured party had no opportunity to observe the conduct of the negligent party, to exercise a restraining influence over him, or to foresee and avoid danger, would convert a rule, intended for the general welfare, into an engine of oppression: an arbitrary conclusion drawn from precedent without investigating its fundamental reasons and a contradiction of the considerations of policy upon which it was founded.

This view seems to commend itself to reason and sound business principles, and the courts might come to a uniform and consistent line of holdings on this basis which would preserve the stability of the general rule and give litigants a fair assurance under all jurisdictions.

This, happily, is the tendency of courts at present: especially those untrameled courts of new states whose actions are not circumscribed by bare and riveted precedent: courts which base their decision upon reason rather than holding. The United States Courts sustain this position and it is established by the opinions of eminent judges in Mich., Penn., Ind., Ill., Ky., Tenn., Ga., Cal., and the incoming state of Washington: an approach ^{to it} is established in Ohio, and Iowa, Kansas, and some other states have settled it by statute.

When a servant, not himself at fault, is injured by the negligence of one in the same business acting in good faith for the interests of his master, this construction of the rule holds the master: providing the negligent servant is in a distinct branch of the business and there is no opportunity of mutual oversight, and no means are afforded one to avoid the dangers arising from the negligence of the other.

A fair conclusion from this confirms the theory that these are employees, not fellow servants within the rule. but difficulties beset and complications buffet us at every turn. The ingenuity of courts has been strained to determine what

constitutes distinct branches of a business. No test has been found which may be employed to meet the circumstances of all cases.

WHO ARE CO-EMPLOYEES WITHIN THE RULE.

One line of cases holds that a master mechanic, a surveyor, a workman in a repair shop, and a bridge carpenter are not co-employees in the same sense with the servants running the railroad companies trains; another, that a train hand on a freight is not a co-employee with one in a similar position on an express; one, that a track foreman is not a co-servant with the shovelers; and another, that the conductor is not a co-employee with the train boy whom he ordered to do duty as a brakeman.

Another line of cases hold the above as co-servants with in the rule and refuses to suspend its operation unless the employees derive their contracts from two masters and their pay from distinct sources.

Foster v. Minn. etc. R.R. Co. (14 Minn. 360) lays down the following generally accepted rule. "Servants in the employment of the same master, under the same general control, and engaged in promoting the same common object are co-employees".

Here the courts again split and travel towards various points of the compass in determining what servants are engaged in promoting one common object. One holds that they must labor

together, and declares car-roofers, injured by the negligence of train-men, to be without the rule. Another, holds all servants of the same master, as such, to be within the rule. Another, takes an intermediate position and applies other tests: one testing by the character of the servant's act; and another, by his relative rank.

The Ohio cases make the Mass. rule read thus." Servants in the employment of the same master, under the same general control, and engaged in promoting the same common object, WHERE NO CONTROL IS GIVEN TO ONE OVER THE OTHER, are fellow servants. This makes servants, in different branches of the business co-employees; but overseers and foremen, ~~are~~ not co-servants with workmen under their control. This was held in Whalan V. Mad River etc. R.R.Co. (8 Ohio 249); as the result of Little Miami R.R.Co. V/v. Stevens (20 OHIO 415.), and Cleveland etc. R.R.Co. v. Keary. (3 Ohio 201); and is settled law in Ohio.

Another line, led by the Farwell case in Mass. and Murry v. South Carolina^{R.} Co. in S.C., holds that the same consideration of public policy which exempt the master in one case extend to all cases without regard to the relative grades of employment. They also, hold that all employees contract to stand the risks incident to the employment, and that the negligence of all employees in the same business is one of those risks ?

The statement of these cases and the analysis of their holding have been sufficiently entered upon in the early part of this paper. The New York Courts, with the exception of two important modifications engrafted on to the general rule, have substantially followed their holdings. Never the less, they claim to have discarded the reasoning in precedent cases and to have settled the rule on strict common law principles.

The consideration of the second line of cases to which this paper refers naturally follows the examination of

THE NEW YORK DOCTRINE.

This doctrine is settled by three distinct, collateral lines of holdings apparently not tresspassing upon one another's grounds. One line settles the doctrine concerning employes in distinct branches of the masters service; one, as to the master's liability for lack of reasonable care in not performing certain duties which the courts hold him bound to perform toward the injured servant; and one, settling the rule for determining when a servant is a vice principal and binds his principal by his negligent act.

The first line of cases begins with *Coon v. The Syracuse and Utica R.R.Co.* In the first of *Selden*.

This action was brought by a track walker who was injured while on duty by a state^k train passing at an unusual hour and negligently running at night with out lights. This brought the

question squarely before the courts; and, although the plaintiff was in a distinct branch of the service, they held him a co-employee of the train men.

Two judges wrote opinions which were no more than citation and approval of the Farwell, Murry, and Priestly cases.

This question came up successively, on facts involving the same principle, and with similar results founded upon substantially the same citations, in *Sherman v. The Rochester and Syracuse R.R.Co.* (17 N.Y.), in *Bolt v. The Central R.R.Co.* (18 N.Y.), in *Ross v. Central R.R.Co.* (5 Hun), and in *Vick v. Central R.R.Co.* (95 N.Y.),

The last case was based mainly on the Ross case, but also relied upon the entire line of decisions. Therefore the Murry and Farwell cases contain the sum total of the New York doctrine upon this important question.

The facts of the Vick case were these.---- George Vick resided in Rochester, and was employed as foreman of the tin-shops of the rail road company at Buffalo. He was paid by the hour for his time while in the shops; and, as a part of the contract of employment, was daily carried free of charge on the defendants trains between his home in Rochester and the shops at Buffalo. Negligent train men run another train into the one on which Vick was riding and injured him. He brought suit

and recovered against the company for his injuries.

The court of Appeals, reversing the trial court and General Term, held that the plaintiff could not recover, on the ground that he was in the company's service while thus traveling on its trains. This being established, the mere citations of the other cases settled the question.

Nothing could be more distinct than the employment of Vick and that of the conductor who caused the injury. A single treasury from which they drew their pay was the only thing common to the ^ustations.

This firmly establishes the doctrine, in New York, that all servants, performing their duties toward the master, are co-employees without the slightest regard to the relation of their duties. Even an attorney of a rail road, traveling free of charge on its train to reach his field of duty for the company, could not recover for injuries sustained from the negligence of a section boss; for he is a co-employee laboring with him for a common purpose.

The second line of New York cases begins with *Wright v. Central R.R. Co.* (25 N.Y.).

One Upton, whose business was to employ and discharge engineers for the company, ordered an engineer, who was skillful but new to the road, to take a sick engineer's place and run an express train from Suspension Bridge to Rochester in the night.

Adams, the engineer, protested that he was incompetent to take the train over the road in the night till he became better acquainted with it. Never the less, he proceeded to carry out the order; and, a collision occurred through his inability to determine whether a certain train, which he was to meet at one of the stations, was side-tracked, standing, or in motion. The collision injured a brakeman who brought suit against the company for damages.

The Court of Appeals held that the accident was not the result of any lack of skill in the engineer which was known to the company, and laid down the following principles.

1. "The master is liable to the servant for injury occurring through his own misconduct and negligence, and this may consist in the employment of unfit or incompetent co-agents and co-servants or in providing implements, machinery, or facilities for the use of the servant in the accomplishment ^{of his work}, which are improper or unsafe for the purposes ~~is~~ of their application."

2. "The master does not undertake with his servant for the skill or competency of his employees; nor for the continued sufficiency or safety of the materials or implements furnished for the work, or for the convenience of the laborer, but is only bound to exercise reasonable care in the selection and employment of the co-servants, and in the original selection of the material appliances; and, in the case of material or implements

becoming defective or insufficient, from subsequent causes, he is only answerable for injuries arising therefrom in those instances in which he personally knew, or ought to have known of the defect or insufficiency."

The question again arose in Lanning v. The Central R.R. Co (49 N.Y.). this made the important addition of the following principle." If the master delegates to the agent the duty of employing workmen, of originally selecting physical appliances for the conduct of the business, the master is responsible to any servant who suffers injury from the negligence of that agent in the performing of that duty."

It appears that the Plaintiff Lanning was employed as carpenter for the Central Rail Road Company. His work required the building of a staging and the defendant's foreman, while intoxicated, ordered the staging to be built in an unskillful manner and left in an unsafe condition. It fell and injured the plaintiff who brought suit and recovered against the company.

The Court of Appeals affirmed the judgment and laid down the principle as above stated.

The principle of the last two cases was followed in Flike etc. v. Boston & Albany R.R. Co. (53 N.Y.) and remain unchanged.

The line of demarkation between the second and third

lines of New York decisions is less emphatic than between the first and second, but it is none the less distinct. The third line of decisions swings away from the long line of precedents binding the others and formulates a clear cut rule by which to determine, in any case, whether a servant is a co-employee or a vice-principal.

Two cases (*Crispen v. Babbitt*, 81 N.Y.); and *Shehen v. N.Y. Cent. and H.R.R.R.Co.*, 91 N.Y.) contain the entire theory upon which this formula is based.

In the former case one John Babbitt, the nephew of B.T. Babbitt and financial manager of the latter's foundry in Whitesborough N.Y., ordered a workman to turn the fly wheel of an engine beyond the dead point. While the servant was turning the wheel Babbitt let the steam onto the engine. The fly-wheel caught and severely injured the workman who brought suit and recovered against the master B.T. Babbitt.

The Court of Appeals, after a strong contest, evidenced by a powerful dissenting opinion delivered by Judge Earl and concurred in by Judges Finch and Danforth, held the master not liable. All conceded that John Babbitt was the vice-principal; and that his acts, AS SUCH, bound the master; but the majority of the court held him not a vice-principal in the performance of the acts of a mere employee. Hence, the formula, --- The duties, NOT THE STATION, of an employee determine whether he is the

alter ego of the master. If the master, even, performs duties belonging to the servant, he thereby becomes a mere co-employee for the time and is exempted from liability for his own negligence resulting in damages to his servant; although he would be liable should he order another servant to perform the same act, in a similar manner, in his presence.

Shehen v. N.Y.C. & H.R.R.R. Co. reinforces this rule by the converse of the same proposition.

The plaintiff's intestate was a fireman on a west bound Wild-cat train on the Auburn branch of defendant's rail road. A regular train was running east toward Cayuga as the west bound train approached Auburn. A general rule of the company required wild-cat trains to progress from station to station by special orders from the train dispatcher. An order was sent to the wild-cat train at Auburn to proceed to Cayuga and there meet the east bound train. This order was properly delivered and the train proceeded toward Cayuga. At the same time the dispatcher sent an order to the operator at Cayuga directing him to hold the east bound train for further orders.

The duty of the operator was to execute this order by delivering it to the conductor and engineer; which he, through forgetfulness, failed to do. In a moment the train was beyond his reach and a collision resulted which caused the death of the plaintiff's intestate. An action was brought against the e-

company for the killing of the fireman.

The court of Appeals held the company liable on the following grounds.

1, The company were under a duty of furnishing to their employees a code of rules sufficient for their safety in the running of trains--which, was, in this case, done.

2. The company was under just as positive a duty to furnish its employees with sufficient and timely notice of any deviation from the regular rules whereby they were thrown into danger--which was, in this case, not done.

3. In carrying out this special order to deviate from the time table, the operator at Cayuga would have done, NOT THE SERVANTS DUTY TOWARD THE MASTER BUT THE MASTERS DUTY TOWARD THE SERVANT; AND, AS HE FAILED TO CARRY IT OUT, HIS MASTER THEREBY FAILED TO DO AN IMPERATIVE DUTY WHICH HE ATTEMPTED, THROUGH HIM, TO PERFORM.

THE OPERATOR WAS THE ALTER EGO, IN THIS CASE, OF THE MASTER.

This corollary follows from the holding---if the master authorizes a servant of any grade to perform any duty which he owes to his employees, that servant stands in the masters place; and, if his negligent performance or that duty injures another servant, his master is liable. THUS A WATER BOY MAY BECOME A VICE-PRINCIPAL OF THE MOST POWERFUL RAIL ROAD COMPANY.

The holdings cited in this paper have established the duties of the master toward his servants to be substantially.

1. To furnish, to the best of his knowledge and ability, proper servants, safe machinery and appliances, and an ample code of regulations for the safe conduct of his business.

2. To use reasonable care in keeping the machinery and appliances in a safe condition and in seeing to it, to the best of his knowledge and ability, that the co-servants remain sober, skillful, and safe.

3. To notify the employees when they are put in danger by unsafe appliances, machinery, or premises.

4. To warn the servants of any change in the regulations whereby they are thrown into danger.

5. To furnish a servant a safe place to work.

Damages to one employee through the negligence of another which do not, in some particular, involve the necessary breach of some one or more of the above duties of the master, are, pretty generally, in New York, held to have been the result of risks incident to the employment which the servant is held to have contracted to stand.

The New York courts claim to have rejected all precedent and to have decided this doctrine on common law principles. Stated in a nut-shell, it is this.

You sue a master ---for what---negligence. The courts say

"Very well, prove your case and we'll hold him." Now, if, in trying to prove your case, you fail to establish a breach of any of the masters duties, he is not negligent; and the court will say "The one you have sued for negligence is not negligent; you have put your finger on another man: you hav'nt proved the case stated in your complaint, and you must fail in your action.

But if you establish a breach of one of those duties; either by the master or by any one whom he has directed to perform it; and that you were injured thereby; you have established HIS NEGLIGENCE and you can recover.

Again, if you only establish the negligence of the master or vice-principal IN PERFORMING THE SERVANTS DUTIES TO THE MASTER, and that you were thereby injured, you have failed to show the masters negligence; for no breach of his duties has occurred: Your action must, therefore, fail.

But it is possible to hang logical weights on this masterly reasoning. Some may say "Why is the negligence of an employe in a distinct branch of the service one of the risks incident to the servants employment? The answer is " Because the law makes it so." Then why does the law make it so? "Because, from the nature of the case, it is one of the risks.

Again, -- If the negligence of a servant is one of the risk necessarily incident to the employment, why is not the negli-

gence of the master an incident risk: upon what do you base any logical distinction? the answer is the same. "Because the law makes the masters negligence not one of the risks." Then why does ^{not} the law make it so? "Because it is not one of the risks."

Again,--Why are the masters duties toward the servant those which the courts have enumerated? "Because the courts have declared them to be the duties." Why did the courts so declare them? Because they are the masters duties." Why is'nt the master compelled to warrant the safety of his machinery, appliances, and employees? "Because the law does not make that one of his duties." Why does not the law make it one of his duties? "Because it is not one of them."

These are only arbitrary rules: They are not conclusions from principles or deductions from legal premises. They are assumptions upon which legal reasoning had been based. Therefore, if any tribunal refuses to accept them, all the reasoning based upon them fails.

Courts of last resort in several states refuse to accept them. They differ concerning the risks incident to the employment and the duties which the master owes his servant. They hold the negligence of a co-servant in a distinct branch of the business not an incident risk which the employee assumes by his contract; and that the master has not performed all of

his duties toward his servants by placing a seemingly fit, but really reckless, foreman over them or a seemingly fit, but really dissipated and unsafe, servant among them.

Three out of seven judges of the New York court are in sympathy with this more liberal view. To confirm this belief, note the dissenting opinion of Judge Earl in *Crispen V. Babbit* Concerning the proposition that the middle man is a vice-principal when doing masters work and a co-servant when doing servants work he says. "The middle man thus occupies a dual position: that of co-servant as to all matters within the scope of his employment and the discharge of such matters as are not personal to, or absolute upon the master, and as a vice-principal as to all matters where he abuses his authority, or is charged with the discharge of duties which the master himself should have discharged, or which rest upon the master as absolute duties.

I have made a thorough examination of the cases reported in this country and in England, and I think I may safely affirm that there is no case in which the question was raised where this dual relation has been recognized and the rule thus laid down."

Speaking of the grounds of the Mass. holding he says "As ~~the~~ the masters responsibility has been extended by the doctrine of respondeat superior from considerations of PUBLIC POLICY,

so that doctrine has been limited by similar considerations in respect to the masters responsibility to his servants. THE LIMITATION HAS NO FOUNDATION IN ABSTRACT OR NATURAL JUSTICE, AND ALL ATTEMPTS TO PLACE IT ON ANY OTHER FOUNDATION THAN THAT OF PUBLIC POLICY WILL PROVE UNSATISFACTORY WHEN BROUGHT TO THE TEST OF CAREFULL AND LOGICAL ANALYSIS."

Referring to the better protection of servants when made to rely upon their own vigilance rather than that of a master, he says "To enforce the supposed public policy, a fiction has been invented by which the servant is said to assume all the risks of the service which include the negligence of co-servants in the same common employment. If this fiction were literally applied, if it were held that every servant entering into the service of a master assumed all the risks incident to such service, the master would not be responsible to the servant for his own negligence, as that would be as much an incident to the service as the negligence of a co-servant.

Referring to a superintendent he says "It is not too much for a master to be responsible for his negligence. He is generally a person selected with care, of superior judgment and skill, and is, more generally than other servants, able to respond to his master for his own negligence. I can perceive no reason founded on public policy, as there is none founded any principle of natural justice, for limiting the doctrine of

respondeat superior in its application to the relations between the master and such an agent. The master should be responsible for all his negligence while engaged in the service; because he stands in his place representing him as his alter ego; and I can perceive no reason founded upon public policy and expediency for enforcing that doctrine in such a case in favor of strangers, which does not exist for enforcing it in favor of the other servants of the common master."

This shows the minority of this court to be in sympathy with an approach to the rule laid down by the English statute. (1880) A line of holdings, settled in seven states establishes an approach to this rule. The examination of a typical case and a citation of others is all the work that limited space allows in this important field.

In *Gillenwater v. Madison & Co. R.R. Co.* (5 Ind. 339) The plaintiff Gillenwater was employed as a bridge carpenter by the defendant, but was directed to proceed on the defendant's cars to a station a short distance from the bridge to assist in loading timbers. The cars were thrown from the track by the negligence of the train men and Gillenwater was injured.

Referring to the *Farwell* case, "the courts say," "Between the switch tender and the engineer of the company the connection was close and immediate. The object to be accomplished by both was the same. Their duties necessarily connected them-

selves together as parts of a whole. The passing of the cars in a given direction was the instant result flowing from their joint action.

Not so with the plaintiff in this case. His business as carpenter, as applied to the erection of a rail road bridge, did not even remotely link him with the careless management of that particular train---Though in some ^{sense} a servant of the company, he was not a co-servant of the engineer and conductor, within the meaning of the Farewell case. He clearly belonged to a distinct department of duty.

If the bridge-builder of the company be regarded as a co-servant of the engineer within the meaning of the Priestly and Farwell cases, the principle becomes alike vicious and absurd, by the very extent of its application. Every person in the service of the company is brought within its range. Even the position of the legal adviser of the rail road is included. He to, is in some measure the company's servant. He derives his compensation and authority from the same source as the engineer, conductor, and bridge-builder. Like them, though in a fainter degree, he contributes to the ultimate objects of the company. Had he been on the train by the side of Gillenwater, and injured by the same negligence, in a suit against the company he too would have been dismissed by the same argument. He would have been told that the action was one of new impression,

that he contracted with reference to the risks of employment, and reserved a compensation in fees with an eye to these risks. He would, therefore, be denied redress because he was a quasi-coservant of the careless engineer. It would be difficult to imagine upon what principles, either of justice or public policy, such ruling could be supported. For the basis of implied contract and increased compensation, with reference to such risks, on the part of the conductor and legal advisor, is wholly visionary.

But when it is held that the legal advisor, the carpenter, and all such quasi-servants of the company are not co-servants within the meaning of the Farwell case, because their several duties belong to different departments; a result is attained, clear, just, and of easy application.

Had Gillenwater received the injury from the negligence of a fellow carpenter in the same employment, while erecting the bridge, or loading the timbers, a question would then have been presented within the range of the Farwell case."

This doctrine was maintained in Penn. by *O'Donnell v. Allegany etc. R.R.Co.* (59 Penn. St.): also a bridge carpenter case, the Ill. court sustained it in *Chicago etc. R.R.Co. v. Moranda* (93 Ill.), Tenn. courts carry the doctrine to the extreme of the Ill. courts in *East Tenn. R.R.Co. v. DeArmond*, Kentucky courts make the master liable for gross negligence of

a co-servantⁱⁿ ~~the~~ Louisville R.R.Co. v. Collins (2 Duval 114), Judge Cooly sustains it in Chicago & N.W.R.R.CO. v. Bayfield (37 Mich.), and this is followed in 17 Wall. 553.

Judge Cooly reasons that since, between a master and a stranger ^{an} ~~an~~ ~~overser's~~ act is the act of the master, upon what legal grounds is it not the act of the principal as between the master and another servant.

STATEMENT OF THE DIFFERENT RULES.

From the wilderness of precedents, legal principles, and statutes, we have evolved five distinct doctrines which, for convenience, may be designated as follows.

1. The Massachusetts rule, -- exempting the master from the consequent damages to one servant from the negligence of another in the same business: without^o regard to their relative rank or the distinct character of their duties.

2. The Ohio rule, -- so modifying the above rule as to make the master liable for damages to a servant arising from the negligence of one whom the master has placed in authority over him.

3. The New York rule, -- making the character of the act govern entirely. It holds one doing masters duties toward the servant to be a vice-principal and one doing servants duties toward the master to be a co-employee. This makes a servant's

character oscillating. He may be alternately the one or the other as he passes from duty to duty.

4. The public policy doctrine.

This holds that the servants contract to stand the risks of the employment is a fiction of law imported into the agreement as an implied contract: that this is founded in public policy: that, by compelling servants laboring together to guard one another's conduct at their peril, safer servants will be furnished where people's lives and property are committed to their care: that the reason upon which this implied contract is based fails where the grades of service are entirely distinct: that, where this reason fails, the courts are not justified in assuming such a contract to have been intended.

5. The statutory doctrine.

Statutes in England and several of the United States reach a result justified by ~~by~~ the fourth doctrine.

The third, fourth, and fifth rules arose from the desire of legislatures and courts to ~~break~~ away from the hardships of a rule which has grown oppressive in many instances as business has extended its application.

CONFLICTS OF DOCTRINES.

These theories, could they be so construed as to stand together and reach similar results, ^{and ~~will~~ ^{are} satisfactory} But the courts are in a discontented discord and desire uniformity: even if it must come

through the medium of healing statutes.

Judge Thompson in his work on negligence, in illustrating one of these principles, concludes that a master mechanic of a rail road is not a co-employee with the fireman (Vol.2 Page 1032); and, in illustrating another one (vol.2 Page 1035), is forced to conclude that a master mechanic of a rail road is a co-employee with the locomotive engineer.

A flagman; who negligently allows a train to pass him and be wrecked on a bridge in process of repair; binds his master in New York, for injuries thereby resulting to the trainmen; but the injured party is remediless in Massachusetts.

A train boy in the employ of the D.L.& W.R.R. is injured at Binghamton by the negligence of the conductor. Since the master is a resident of Pennsylvania, he may bring an action and recover against the master in the United States Court. (17 Wall.553), or bring it in the state courts and be non-suited on the same cause of action.

CONCLUSION.

To comprehend all phases of this subject in a limited paper is impossible. Solid food has already been consumed to a surfeit; but the supply seems to multiply with the consumption, and to exhaust it would require an indefinitely elastic and devouring capacity. A critical discussion of holdings on all the finer shades of distinction would require a volume instead

of this limited paper.

But the time has not yet arrived for a treatise on the subject in hand. The growing necessities of undeveloped branches of industry will continue to drive courts and legislatures together on the important features of these yet undeveloped doctrines. Time and business will solve these as they have solved all other questions, when legal reasoning, from different but equally legitimate grounds, has failed to produce a harmonious result. The crucible of the coming half-century will bring forth a purity and solidity of doctrine which no legal deductions can now evolve. Then some master at the bar will write the promised treatise. A place awaits it beside the productions of Pomeroy, Story, and Pollock; and it will stand among the towering monuments in the literature of modern American law.

Frank Cummings.

