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Modern Law of the Liability of Employers for Injuries to Their Employees

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ON THE

MODERN LAW OF THE LIABILITY OF EMPLOYERS FOR INJURIES TO THEIR EMPLOYES

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I T R O D U C T I O N .

In no age in the history of the world has the inventive and progressive genius of man been so alert and its efforts so signally rewarded,as in the present. Peculiarly true are these words when applied to the latter half of the ninteenth century. The enormous investment of capital and the marvelous progress in the field of labor,has given rise to the use of mechanical appliances,which render the employment of persons engaged in their operation more hazardous than former methods. The construction and operation of railroads and the prosecution of gigantic manufacturing enterprises by corporations have done much to increase the perils of the laboring class.

The object of this paper is to examin,briefly,the law as it has been adapted to the new order of things,and especially as it relates to the liability of employers for injuries to their employes. We make no pretence of treating the subject in full and in all its detail. There are,certain general rules and principles of law which by years of recognition and application,have become the settled law,both in this and in other countries. Among them we would mention,those which treat of the duties of the master to his servant,and of the servant to his master. In this paper they will receive but a passing notice. They admit of

no argument and need only a general statement. There are, however, some modern phases of the law which we shall attempt to thoroughly investigate. Of these the subjects of who are vice-principles, fellow servants, the tests applied by the several states as to when a person is a fellow servant with another, and when a vice-principle, and the origin and growth of the doctrine of the non-liability of an employer for injuries to his employes caused by the negligence of co-employes, will receive no small attention.

We will also examine some of the most recent legislation in various states of the union, and in other countries bearing upon the subject with a view of drawing some conclusion if possible, as to whether or not the tendency of the times is to increase or diminish the employers liability.

I. H. H.

C O N T E N T S .

I

NON-LIABILITY AND LIABILITY OF EMPLOYERS.

THE MODERN LAW OF THE LIABILITY OF EMPLOYERS FOR INJURIES TO EMPLOYES.

I.

GENERAL STATEMENT OF RULES & PRINCIPLES

When one person enters into the employment of another, there is an immediate change as to their respective relations. A change as between themselves, that of employer and employe, and also as to their relations to third parties. These new relations arise purely from contract which is either expressed or implied. In this contract the parties can contemplate any service they choose and stipulate any conditions they like as long as such service or stipulation are not in themselves unlawful. There is one exception however, to this general proposition which should be borne in mind, and that is in no case can the employer relieve himself from liability to his employes for injuries received for his own criminal negligence, although so agreed by special contract at the time of hire. (1) The reason being that the law does not excuse him before the relations of employer and employe exists, so why should it excuse

(1) Little Rock R.R.Co. v. Eubanks 3 S.W. Rep. 808.

him when such relations do exist. Certainly it is only logical to conclude that where a person has placed himself under the direction and control of another, that that fact should tend to increase and not diminish the liability of the latter to use greater care and precaution to protect such person from danger and injury.

For the purposes of this paper we shall only deal with the relation as between the parties themselves and principally to determine the liability of the employer for injuries to those engaged in his employment.

Now when a person enters into the service of another he contracts that he is qualified to perform the duties of the position he has assumed, and that he takes upon himself the ordinary risks incident to that employment. He further agrees that he will obey the rules and regulations laid down by the employer, if any, and will at all times be free from negligence and warn the master of any defects or impending danger that may come to his knowledge. On the other hand, when one person takes another into his employment he thereby agrees to use reasonable care in furnishing that person with a safe place in which to work, safe tools, machinery, appliances and material, and to keep the same in repair and suitable condition, to engage only competent and skilled co-employes, if any, and if such employes are numerous to frame and promulgate such rules for their observance as will tend to the safety of all.

II

D U T I E S O F E M P L O Y E R S T O E M P L O Y E S .

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1. SAFE PLACE IN WHICH TO WORK.

The first important duty of the employer to his employes which we will discuss, is to furnish them with a safe place in which to work. In this respect the limit of his duty is only to the extent of ordinary care. The law does not go so far as to imply a warranty that the place should be absolutely free of all danger, neither does it go so far as to make the employer an insurer of the lives and limbs of those engaged in his employment. It does mean however, that the employer must take such care in providing for the safety and protection of his employes as a prudent man would take of himself. But this duty does not end here. He must see that the place is kept in safe condition and if there is any danger known to himself and not to his employes, he is bound to warn them of that danger and not until he has made known the danger so that they fully understand the peril to which they are subject is he relieved from that duty.

(A) What is ordinary care ? As the term ordinary care will be frequently used in connection with this paper, we think it well at the outset to try and define its meaning. We can per-

haps best accomplish this object by giving the language of a learned Judge who had occasion to make some comments in applying the term in an important case. (1)

"Ordinary care cannot be determined abstractly. It has relation to and must be measured by the work or thing done and the instrumentalitiyes used and their capacity for evil as well as for good. What would be ordinary care in one case may be gross negligence in another. We look to the work, its difficulties, dangerss and responsibilities and then say what would and should a reasonable and prudent man do in such an exigency."

In concluding this phase of our subject we would say that the true test as to the liability of the employer in failing to furnish a safe place in which to work, is, was he negligent in so failing to provide, and not was the place dangerous, although such danger may be of the greatest of importance in helping to determine the ordinary care required in that particular case.

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(1) Cayzer v. Taylor, 10 Gray 280.

2. SAFE TOOLS, MACHINERY AND APPLIANCES.

An employer is bound to furnish safe tools, machinery, appliances and material for the use of his employes, and keep the same in repair and safe condition.

(A) But in selecting and providing tools, machinery, &c., he is not bound to procure the latest and best improved of its kind. Nor is he obliged at any time to change his old machinery or appliances for the sake of replacing them with a new invention, although such invention does away in whole or in part with the danger of injury to those operating it. The matter of selecting tools, machinery, &c., is always left with the employer himself and he can provide such as he pleases provided always they are reasonably safe. (1) There is no implied warranty in a contract of service that the tools, machinery, or material furnished by the employer, shall be absolutely safe and fit for service, nor that the employe shall not be exposed to extraordinary risks. He does not guarantee the soundness of the machinery nor insure the employes against accident, but in all these cases he must use ordinary care.

(B) For this reason he is bound to inspect the machinery and appliances in his use, either in person or by substitute, and see that they are in safe condition for the performance of the work required of them without exposing the operator to any unnecessary danger of injury. If he neglects this precaution he

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(1) Cregan v. Marston, 10 N.Y. Supp. 681.
Clarrian v.Western Union Co.3 So.Rep.625.

does it at his hazard.

(C) So if by inspection or otherwise certain defects are known to the employer and not to his employes it is his duty to at once acquaint them of such defects and warn them of any danger. (1) This rule applies in particular where new and unusual machinery is introduced or changes made in the old involving unexpected or unsual danger. So it was held where it appeared that a "fan" of a carding machine was designed to be run only in one direction, but was running inthe wrong direction and with no guard, so as to be dangerous, that the plaintiff who had no notice of the danger, and was thereby injured, was entitled to recover damages from his employer. (2) In general it can be said, that the duty of the employer to warn his employes of danger, regardless of the rule that the latter take upon themselves the usual risks incident to the employment, is, that if there exists any facts known to the employer that render the employment unusually hazardous he is bound to disclose those facts, and if he fails to doso, and by reason of such unusual hazard, the employe is injured the employer is chargeable with negligence, and responsible for the injury. (3)

But the fact that an employe has been notified of the defective condition of an appliance or a machine with which he

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(1) Cregan v. Marston, 10 N.Y.Supp. 681.
(2) White v. Worsted Co., 11 N.E. Rep. 75 (Mass.)
(3) Sizer v. Syracuse, 7 Lansings Rep. 67 (N.Y.)

works, does not necessarily charge him with contributary negligence or assumption of the risk by continuing to use such appliance. The employers duty goes farther, he must explain to such employe so that he understands, or ought in the exercise of ordinary prudence to understand, the risk to which the defect or danger exposes him. (1)

(D) When the defect or danger is obvious and the employe has as good an opportunity to see or discover it as the employer then the latter is excused from giving notice. (2) This rule also applies where the defect is latent. So it was held in an action against a Rail Road Co. for personal injuries to an employe by reason of the breaking of a defective drawhead, where the evidence leaves it just as probable as not that the defect may have been a latent defect which no inspection would have revealed, a judgment for the plaintiff cannot be sustained. (3)

But in some states it is held that the employe has a right to assume that instruments and appliances furnished by his employer are safe and sound (4) and he is under no obligation to inspect them before putting them into use in order to discover latent defects. (5)

(9) It is a well recognized rule of law that where the employer has been notified of some defect or imperfection of the

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(1) Wuotilla v. Duluth Lumber Co., 33 N.W.Rep. 551.(Minn.)
(2) Hickey v. Taaffe, 105 N.Y. 26.
(3) Band v. Smith, 101 N.Y. 661.
(4) Grannis v. Chicago St. P.R.R.Co.,46 N.W.Rep. 1067.
(5) Banks v. Wabash R.R.Co., 40 Mo. App. 458.

tools, machinery or appliances which are in his use, that he must be allowed a reasonable time in which to remedy such defects without being negligent and liable for any accident that may happen immediately after such notice. What is a reasonable time, depends upon the particular case and the circumstances surrounding it. But it has been held that where an employe continues in a dangerous service in consequence of the employer's assurance that the danger would be removed, precludes the assumption that the employe by remaining assumes the risk, and a recovery can be had for an injury caused by the defect after the lapse of a reasonable time for its correction. (1)

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(1) New Jersey & N.Y.R.R.Co., v. Young, 47 Fed. Rep. 723.

3. SKILLED AND COMPETENT SERVANTS.

(A) The third important duty which the employer owes to his employes, that we will mention, is that he will secure only skilled and competent fellow employes to work with them. But in this as in other respects he is obliged to use only ordinary care. The reason for the performance of this third duty by the employer to his employes, we find in an English case (1) where the Courts used the following language: "The servant when he engages to run the risk of the service includes those arising from the negligence of fellow servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care."

(B) The general rule is that notice or knowledge of incompetency is necessary to charge the employer after he has used reasonable care in their selection. For when a suitable person has once been employed there is not the same reason for exercising such a high degree of diligence. Good character and proper qualifications once possessed may be presumed to continue and there is no reason why the employer must not rely upon that presumption as to those personal qualities until he has had notice of a change or knowledge of such fact as would put a reasonable man upon inquiry. (2) But when once the employer has

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(1) Hutchinson v. Railway Co., 5 Exch. 343.
(2) Chapman v. Erie R.R.Co., 55 N.Y. 579.

notice of the incompetency of a person in his employ, or such knowledge as would arouse suspicion and inquiry in a prudent man, then it is his duty to discharge such incompetent person, at once and to retain him in the employment is as much of a breach of duty and a ground for liability as the original employment of an incompetent person.

In concluding our remarks upon this phase of the subject we may say that the main point in an action against an employer by an employe to recover damages for injuries caused by the negligence or incompetency of a co-employe depends upon the negligence of the employer in employing or retaining such person. For that reason it becomes necessary in each particular case to inquire what the particular duty of the employer was to the injured employe in relation to the employment of other persons to engage in the same business, and what degree of care and diligence in that respect he was required to exercise.

4. ESTABLISHMENT OF RULES AND REGULATIONS.

The fourth and last duty which the employer owes to his employes, of which we will treat, is that in case such employes are numerous he must frame and promulgate such rules and regulations pertaining to their government as will tend to make the employment reasonably safe to all. It is not necessary that personal notice of such rules should be given to all. In case of railway corporations such a task would be as impossible as it would be unreasonable. The duty of the employer in the respect of giving notice to his employes is performed when he provides beforehand and makes known to them rules explicit and efficient, which, if obeyed and followed by all concerned, will bring personal notice to every one entitled to it. (1)

Neither is the employer bound to make rules to provide against some unknown and unforeseen danger. So it has been held in New York (2) that a railway company is not liable to an employe for injuries received, on the ground of its failure to make regulations which might have prevented the accident causing such injury, when the accident was occasioned by circumstances which could not have been reasonably anticipated, and where a compliance with the general body of rules and the exercise of ordinary care and prudence by the employes would have avoided it.

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(1) Slater v. Jewitt, 85 N.Y. 62
(2) Berrigan v. N.Y. L.E.R.R.Co., 131 N.Y.,582.

III

D U T I E S O F E M P L O Y E S T O E M P L O Y E R S .

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1. DUTY TO BE FREE FROM NEGLIGENCE.

As a result of our examination of the duties of the employer to those engaged in his employment, we find that the price of his immunity from liability is vigilence, so now we find on th side of the employe, the first important question to be settled when he seeks damages for an injury, is, was he free from negligence. The law imposes upon every person the duty to use ordinary care for his own protection and security against accident, and he who does not use such care, and injury results is deemed guilty of contributary negligence, which in itself is a full and complete bar to recovery.

In some states, however, the question of the liability of the defendant in case of contributary negligence or fault by the plaintiff is determined by comparison; the doctrine being termed the doctrine of comparative negligence. The principle is that the plaintiff is considered entitled to recover if the defendants negligence exceeds his own, and that the defendant is not liable if the plaintiff's negligence is equal to or exceed his own.

In New York and in many other states the Courts will at once dismiss a case upon the appearance of contributary negligence

2. DUTY TO OBEY RULES AND REGULATIONS.

An employe cannot recover from his employer damages for an injury which was the direct result of his own disobedience of orders. (1) This is a well settled rule of law and admits of no argument. It is but right and just that where an employer has framed certain rules or regulations forbidding some dangerous practice, that they should be obeyed, and he who disobeys them and receives injury thereby, is barred from recovery. The following short quotations are taken from cases that arose in various parts of the union, as will be observed.

"Where an employer engaged in receiving freight lowered through a hatchway into the hold of a vessel, stands under the open hatchway when forbidden to do so, cannot recover from his employers if he is injured by freight falling through the opening upon him." (2)

"Where a railroad company by rule forbids its brakemen from going between freight cars to couple them and provides that coubpling must be done by means of a stick, the company is not liable for the death of a brakeman where such death was the result of disobedience of such rule. (3)

Plaintiff's testator, a brakeman, was charged with the inspection of certain cars and whose duty it was to see that they were in good order and if found defective, to send them to

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(1) Knight v. Cooper, 14 S.E.Rep. 999.(West Va.)
(2) Mc Carthy v. Lehigh Va. Transp. Co., 51 N.W.Rep. 480.
(3) Russell v. Richmond R.R.Co., 47 Fed. Rep. 204.

the repair shop and not to use them. In disregard of such orders he used a disabled car and was injured. Held that he could not recover. (1)

Where an employer in a factory, in violation of the rules of his employer attempted to use a freight elevator for his own convenience in going from one floor of the factory to another, and fell down the elevator shaft, the employer is not liable though the elevator shaft was not provided with automatic doors as required by law. (2) The same rule is also laid down in the following cases.

Mc Elligott v. Randolph, 22 At. Rep., 1094. (Conn.)

Hannah v. Conn. R.R.Co., 28 N.E.Rep. 682.

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(1) Shields v. N.Y. Cen. & H.R.R.Co. 133 N.Y., 557.
(2) Guenther v. Lockhart, 16 N.W. Supp. 717.

3. MUST GIVE NOTICE TO EMPLOYER.

As we found it one of the duties of the employer to warn his employes of known defects and dangers, so now we find that it one of the duties of the employes to give notice to the employer of any defects or dangers that may be known to him, and if he fails so to do, then he is held to have assumed the risk, and if injury results he cannot recover. This duty to give notice to the employer is of no small importance in case of the incompetency of a co-employe.

The employer is bound to use due care both in procuring and retaining suitable persons in his employment and must use such care at all times in determining whether they remain skilled and competent, yet if an employe knows that a co-employe is incompetent, unskilled, habitually careless and negligent, and fails to notify the employer of these facts, but continues in the service he must be held to have assumed the risks and hazards arising therefrom. (1)

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(1) Hatt v. Nay, 10 N.W.Rep., 807.

IV

D O C T R I N E O F N O N-L I A B I L I T Y O F E M P L O YER

1. ITS ORIGIN AND GROWTH.

It is a well settled principle of law both in this and in other countries, that an employe cannot maintain an action against his employer to recover damages for injuries sustained through the negligence or carelessness of a co-employe or fellow-servant.

(A) The origin of this doctrine, as far as our research has enabled us to discover, is to be found in the case of Priestley v. Fowler, (1) which arose in England in 1837. Although this case does not directly involve the question of negligence of fellow-servants, and therefore cannot be said to have in itself established the doctrine, yet it was the corner stone, so to speak, on which that structure was to be reared, and being the first case to be found, that deals with the question at hand whatsoever, we consider it of no small importance.

The statement of the facts in the case are as follows: The plaintiff was a butcher in the employment of the defendant and was sent on a journey to deliver goods, and while riding in a van conducted by another employe was injured by being thrown to the ground through the breaking down of the van.

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(1) Priestley v. Fowler, 3 Mees. & W. 1.

The evidence showed that the van was out of repair and overloaded at the time of the accident. On these grounds the plaintiff brought an action against his employer to recover damages for the injury. It was held that the action would not lie, and in rendering his opinion Lord Abinger C. B. said:

"It is admitted that there is no precedent for the present action by a servant against his master. We are therefore to decide the question upon general principals, and in doing so are at liberty to look at the consequences of a decision the one way or the other.

If the master be liable to the servant in this action the principle of the liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principle, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servants, he is responsible for the negligence of his coachman, or his harness-maker. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage owing to the negligence of the coach maker, or for a defect in the harness arising from the negligence of the harness maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principles should not, if applied in this

class of cases extend to many others. The master, for example, would be liable to the servant for the negligence of the chamber-maid, for putting him in a damp bed; for that of the upholster for sending in a crazy bedstead whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in not supplying the family with good wholesome meat; of the builder for a defect in the foundation of a house whereby it fell and injured both master and servant by the ruins.

The inconsistency not to say the absurdity of these consequences afford a sufficient argument against the application of this principal to the present case. But in truth the mere relation of the master and the servant, never can imply an obligation on the part of the master to take more care of his servant than he may reasonable be expected to do of himself. He is, no doubt, bound to provide for the safety of his servants in the course of their 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 thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be increased, if not in all, he is just as liable to be acquainted with the probability and extent of it, as the master."

(B) The first case, however, in which the employers liability to an employe who was injured through the negligence of a co-employe was the direct issue, and the employer's exemption, declare, arose in South Carolina in 1841, (1) in that case plaintiff was engaged as a fireman on a locomotive used by defendants upon their rail road. While thus engaged in the discharge of his duties, the engine was thrown from the track through the negligence and carelessness of the engineer, resulting in the injury complained of. Two opinions were written holding that the plaintiff could not recover. One opinion by Judge Evans and the other by Chancellor Johnson, Judge Richardson, Earl, Butler, Harper and Dunkin, concurring.

Judge Evans said: "In the consideration of the question involved in the case, I shall assume that the verdict establish the fact that the plaintiffs injury was the result of the negligence of the engineer and that the question arises whether the railroad company is liable to one servant for an injury arising through the negligence of another servant." ----- "It was urged in the argument, that if the engineer had been the owner of the road he would have been liable. Of this I apprehend there would be no doubt, but then his liability would have arisen, not from his being the owner, but because the injury arose from his own act. Thatvhe is now liable, seems to me to admit of no doubt. But if by no means follows as a consequence that be-

(1) Murray v. S.C.R.R.Co., 36 Am. Dec. 268.

cause he is liable, those who employed him are liable also. With the plaintiff, the defendant contracted to pay higher for his services. Is it incident to that contract that the company should guarantee him against the negligence of his co-servants? It is admitted that he takes upon himself the ordinary risk of his vocation; why not the extraordinary risks? Neither are within his contract, and I can see no reason for adding this to the already known and acknowledged liability of a carrier, without a single case or precedent to sustain it. The engineer no more represented the company that the plaintiff. Each in his several department represents his principle. The regular movement of the train of cars to its destination is the result of the ordinary performance by each of his several duties. If the fireman neglects his part the engine stands still for want of steam; if the engineer neglects his, everything runs to riot and disaster. It seems to me it is on the part of the several agents a joint undertaking, where each one stipulates for the performance of his several parts. They are not liable to the company for the conduct of each other, nor is the company liable to one for the misconduct of another; and as a general rule, I would say, that where there was no fault in the owner he would not be liable only for wages to his servants."

Chancellor Johnson in his opinion concurs with Judge Evans and among other things says: " The foundation of all legal liability is in the omission to do some act which the

law commands, the commission of some act which the law prohibits or the violation of some contract, by which the party is injured. There is no law regulating the duties of the ownerscof a steam car, and the persons employed by them to conduct it. The liability, if any, attaches, must therefore arise out of contract. What was the contract between these parties? The plaintiff in consideratin that defendant would pay him so much money, undertook to perform the services af fireman on the train. That is all that expressed. Is there anything more implied? Assuming that the injury done was in consequence of the negligence of the engineer, the defendant would not be liable unless they undertook to answer for his diligence and skill. Is that implied? I think not. The law never implies an obligation in relation to a matter about which the parties are or may with proper diligence be equally informed."

(C) But the most important case upon this question, arose in Massachusets in 1842, (1)one year later than the South Caroline case. The opinion was written by Chief Judge Shaw of the Supreme Court of that State and has been approved in most of the states of the Union and indorsed and followed by many of the English Courts.

In this case a switchman carelessly left a switch open, thereby throwing a train from the track, and injuring the engin-

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(1) Farwell v. Boston R.R.Co., 4 Metc. 49. 38 Am. Dec. 339.

eer, who thereupon brought an action against the company to recover damages. It was shown that the switchman was a careful and trustworthy servant. The Court held that no recovery could be had. Judge Shaw in his opinion says; "This is an action of new impression in our courts and involves a prinpiple of great importance. It presents a case where two persons are in the service and employment of one company whose business it is to construct and maintain a rail road, and employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose, that of the safe and rapid transmission of the trains; and they are paid for their respective services to the nature of their respective duties, and the labor and skill required for their proper performance. The question is whether for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. The general rule resulting from consideration as well of justice as of policy, is that he who engages in the employment of another for the performance of special duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such service, and we are not aware of any principle which except the perils arising

from the carelessness and negligence of those who are in the same employment. They are perils which the servant is as likely to know and against which he can as effectually guard, as the master. They are perils incidental to the service and which can be as distinctly foreseen and provided for in the rate of compensation as any other.------- Where several persons are employed in the conduct of one common enterprise or undertaking and the safety of each to a great extent depends on the care and skill with which each shall perform his appointed duty, each is an observer of the conduct of the other, can give notice of any misconduct incompetency or neglect of duty, and leave the service if the common employer will not take such precaution 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 a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light it is the ordinary case of one sustaining an injury in the course of his employment, in which he must bear the loss himself, or seek his remedy, if he has any, against the actual wrong-doer.

In applying these principles to the present case, it appears that the plaintiff was employed as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a mechanic.

It was a voluntary undertaking on his part with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under the circumstances the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell unless plaintiff has a remedy against the person actually in default."

3. DELEGATION OF MASTER'S DUTIES TO OTHERS.

(A) From a previous examination of the subject we found that the employer was liable to his employes where the injury was the direct result of his own negligence, and that this principle was based upon morality and public policy. The employer can delegate the performance of the duties he owes to his employe to another person or persons, which is always done the case case of corporations, but he can never relieve himself of liability by such delegation. Any person to whom such duties have been delegated, namely: the furnishing a safe place in which to work, safe tools, machinery and appliances, the hiring and discharging of employes, &c., stands in the place of the employer and is called a vice-principle. Any negligence of the vice principle is the negligence of the principle, for which he is responsible. Some authorities hold that there is no exception to this rule, which is, if the employer has exercised reasonable care in the selection of those, to whom he delegates the duties he owes to those engaged in his employment, then he is excused from liability for their negligence. (1) But we believe that the New York doctrine (2) is the better and prevailing one, which is: "That acts which the master, as such, is bound to perform for the safety and protection of his employes cannot be delegated

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(1) Clark v. Holmes, 7 H.& N. 937;
(2) Fuller v. Jewitt, 80 N.Y. 46; Kein v. Smith 80 N.Y. 458; 73 N. Y. 38; 79 N. Y. 240.

so as to exonerate the former from liability to a servant who is injured by theomission to perform the act or duty, or by its negligent performance, whether the nonfeasance or misfeasance is that of a superior officer, agent or servant to whom the doing of the act or the performance of the duty has been committed. In either case, in respect to such acts or duty, the servant who undertakes or omits to perform it, is the representative of the master, and not a mere co-servant with the one who sustained the injury."

This has been declared to be the law in a large number of States:

> Holden v. Fitchburg R.R.Co., 129 Mass.'268; Drymala v. Thompson 26 Minn.40; Widgwood v. Chicago &c.,R.R.Co.41 Wis.478; Shenny v.Anderson Mills,66 Me.,420;Mullan v. Phil,S.Co.,78 Pa.St.25; Chicago R.R.Co.v.Sweet,45 Ill. 197; Lewis v. Louis.R.R.Co.59 Mo.495; Kansas &c.R.R.Co. v.Little,19 Kan.269; Berea Stone Co. v.Kraft,31,Ohio St. 287.

We have now made a somewhat carefull examination of the origin and growth of the doctrin of the nom-liability of an employer for injuries to his employes through the negligence of co-employes. We now come to treat of its application,and in so doing we will meet with no small confusion and difficulty. It is safe to say that the courts of this and other countries recognize and approve the wisdom and legality of the doctrin; it is only when the doctrin is to be applied to special cases that courts divide and text-writers disagree. There are three great tests in the United States to determin when an employe is a

vice-principal and when a co-employe to other employes with whome he is association. They are generaly known as theCommon Employment test,the Grade or Rank test, and the New York or Modern test We will now take them up in their order,as given above,and this can best be done by examining some of the leading cases which lay down and affirm the rules applicable to each.

3. SOME MODERN TESTS AND RULES.

1. The common employment test originated in Massachusets and was applied in the celebrated Farwell case. In that case Chief Judge Shaw said: "Whe the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be, to be in the same or different department? In a blacksmith shop, persons working in the same building, at different fires, may be quite independent of each other though only a few feet distant. In a rope walk several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together." (1)

This test was applied in an important English case which came before the Courts in 1858.(2) In that case the parties injured were minors employed to work in a coal pit and the party whose negligence caused the injury was employed

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(1) Farwell v. Boston &c. R.R.Co., 4 Metc. 49; 38 Am. D. 339.
(2) Bartonshill Coal Co. v. Mc Quire, 3 Macq. H.L. Cas. 300.

to attend to the engine by which they were let down into the mine and brought out, and the coal was raised which they had dug, and it was held that they were engaged in a common work, that of getting coal from the pit. In discussing the question of common employment the Court said: "The miners could not perform their part unless they were lowered to their work; nor could the end of their common labor be attained unless the coal which they got was raised to the pit's mouth; and of course, at the close of their days labor the workmen must be lifted out of the mine.------- It is necessary, however, in each particular case to ascertain whether servants are fellow laborers in the same work, because although a servant may be taken to have engaged to encounter all risks which are incident to the service which he has undertaken, yet he cannt be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty and injury committed by one servant upon another, by carelessness or negligence in the course of his particular work, is not within the exemption and the masters liability attaches in that case in the same manner as if the injured servants were in no such relation to him."

In another English case Lord Broughan said: "To bring the case within the exemption there must be this most material qualification; that the two servants must be men in

the same common employment, and engaged in the same common work under that common employment."

(3) The grade or rank test. In the celebrated case of the Chicago M. & St. Paul R.R.Co. v. Ross, 112 U. S. 377; the Supreme Court of the United States held.

1. That the conductor of a rail road train who commands its movements, directs when it shall start, at what stations it shall stop, and at what speed it shall run, and has the general management of it, and control over the persons engaged upon it, represents the company, and for injuries resulting from his negligent acts, the company is responsible.

2. The engineer is in that particular the conductor's subordinate and for the formers negligence, by which the latter is injured the company is responsible.

The case originally arose in the State of Minnesota, Judge Field wrote the opinion and after reviewing the history of the doctrine of the employers exemption as it had been applied in the various Courts in this country and in England, said: "There is in our judgment, a clear distinction to be made in their relation to their common principle between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agent of the corporation clothed with the control and management of a distinct department in which their duty is entirely that of directing and superintendence.

A conductor having the entire control and management of a rail way train occupies a very different position from the brakeman, the porters, and other subordinates employed. He is, in fact, and should be treated as, the personal representative of the corporation, for whose negligence he is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilence on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one rail way corporation must apply to all, and many corporations operate every day several trains over hundreds of miles at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which rail roads are operated that, subject to the general rules and orders of the directors of the company, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop and for what length of time, and everything essential to its successful movements, and all persons employed on it are subordinate to his orders. In no proper sense of the term is he a fellow servant with the firemen, the brakeman, the porters, and the engineer. The latter

are fellow servants in the running of the train under his direction, who, as to them and the train stands in the place of and represents the corporation."

This rule or test recognizes a distinction, as is apparent from the above, in their relation to their common employer, between servants exercising no supervision over others engaged with them, and those who do exercise some control and supervision, and have the management of a distinct department of the employment. This limitation is based upon the theory of the presumed presence of the principle in reference to the acts of servants or agents. It deals altogether with the station or position which the two employes occupy, and overlooks the character of the act out of which the negligent performance or non-performance the injury arose.

This is known also as the superior servant limitation and has been adopted in several of the states, notably in Ohio, Kentucky, Tennessee, Iowa, Nebraska, Missouri and North Carolina.

3. The New York or Modern doctrine. The modern doctrine or test, and we believe the only true criterian of who are fellow servants, is to be found in the case of Crispin v. Babbitt, (1) which was decided in New York, in 1880, and has since been adopted in other jurisdictions and is still rapidly spreading.

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(1) Crispin v. Babbitt, 81 N. Y., 516.

In this case the plaintiff was working as a laborer in the iron works of the defendant at Whitesboro, Oneida County, at the time of the accident. He had assisted to draw a boat into a dry dock connected with the works; after which the water in the boat was to be pumped out, this was to be done by means of a pump operated by an engine. While plaintiff with others was engaged in lifting the fly wheel of the engine off its center, one John L. Babbitt carelessly let on the steam and started the wheel, throwing the plaintiff on the gearing wheels, and thus occasioning the injury complained of. B.T. Babbitt, the defendant lived in New York City and visited the works about once a month for a day or two. The evidence tended to show that John L. Babbitt had general charge of the works. The opinion of the Court of Appeals was written by Judge Rapallo and among other things he says: "The liability of the master does not depend upon the grade or rank of the employe whose negligence caused the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects is, in the management of the machinery, a fellow servant of the other operators. On the same principle, however low the grade or rank of the employe, the master is liable for injuries caused by him to other servants, if they result from the omission of some duty of the master, which he has confided to such inferior employe. The liability of the master is thus made to depend upon the character of the act

in the performance of which the injury arose, without regard to the rank of the employe performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows: If the act is one which pertains only to the duty of one operative the employe performing it is a mere servant, and the master is not liable to a fellow servant for its improper performance."

In the last few pages we have made a careful examination of the doctrine of the non-liability of employers for injuries to their employes through the negligence of co-employes, its origin and growth, and the various tests in the several states by which it is determined whether they are or are not entitled to the exemption. We now come to the most important part of our subject, viz:

4. Statutary Enactments. For many years there seems to have been little or no legislation in any of the States upon this subject. Consequently what law we do find in the early development and application of the doctrine in this country is judge made and judge applied law. There also arose in the early history and development of this branch of the law a sentiment in many of the states that the doctrine as applied by the courts was altogether too broad, and was being carried into fields where its rigid enforcement was many times defeated the very object of its existence, besides producing great hardship

and injustice. The protest has been against the indiscriminate application of the doctrine excusing great corporations carrying on enterprises of extremely hazardous characters upon the same grounds that a master of a small and comparatively safe business employing but a few servants, and devoting his personal supervision to all the management and details of the same, is excused. This protest is made principly against its free application in the case of rail road corporations. Let us glance at the facts and see if there are grounds sufficient to sustain this position.

By recent statistics we learn that there are now in operation in the United States about two hundred thousand miles of rail road, requiring the employment of over a million persons. That in the year 1892, according to the inter-state commerce commission, 2600 railroad employes were killed, and 26000 injured in rail road accidents alone. This makes a larger percentage of killed and injured to the number employed, than in any other known employment, which proves that this million of employes are engaged in an exceedingly dangerous service. Yet it must be remembered that it is against this very class of employes that the doctrine originated and is now most frequently and rigidly enforced. While it is true that no one need engage in such service except he so chooses, and can make allowance for the perils by the compensation to be received, yet many believe that corporations would use more care to lessen

the perils and dangers of their employes, if this exemption for damages for injuries to their servants was not so freely applied.

That this rule of the non-liability of the employer when applied to rail road corporations is generally deemed to be harsh and unjust, we find illustrated by the fact, that scarcely had the doctrine been declared in the Massachusets case (Farwell v. Boston R.R.Co.) when the State of Georgia passed an act declaring that such exemption should not apply to railroad corporations in that state. But Georgis was not alone in this attack against the doctrine. Other states followed suit until at the present time some ten or twelve of the states of the Union have similar acts upon their statute books, and the subject is being vigorously agitated in several of the states where the common law rule still prevails.

We would also call attention to the following fact as bearing upon the argument just made, and in our mind of no small signifigance, namely: That one of the most complete and comprehensive acts passed in the United States is in force in Massachusets, the state <u>first</u> to recognize and apply the doctrine of exemption. Let us examine some of these acts.

(A) The Massachusets act.

> It is entitled, An Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by employes in their service.

It was passed in 1887, and section 1 reads as follows:

Section 1. Where, after the passage of this Act, personal injury is caused to an employe who is himself in the exercise of due care and diligence at the time:-
1. By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer, or of any person in the service of the employer which arose from or had not been discovered or remidied owing to the negligence of the employer, or of any person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition: or
2. By reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole duty or principle duty is that of superintendence.
3. By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine or train upon a railroad, the employe or in case the injury results in death the legal representatives of such employe shall have the same right of compensation and remedies against the employers as if the employe had not been an employe of or in the service of the employer, nor engaged in its work.

Section 3. Limits the amount receivable in case of personal injury not to exceed four thousand dollars, and in case of death, not less than five thundred and not more than five thousand dollars, to be assessed with reference to the degree of negligence of the employer or the person for whose negligence he is made liable.

Section 5, debarrs the employe from recovery where he did not give notice of known defects withint a reasonable time.

Section 7 and the last, states that the act shall not apply to injuries caused to domestic servants or farm laborers, by other fellow employes.

(B) The Georgia Act.

By the following sections of an Act passed by the

legislature of Georgia, it is clear that a recovery is allowed if the damage was caused by another employe and was not caused by the fault or negligence of the employe hurt.

The Act was passed in 1855, and in 1873 incorporated into their Code.

S. 2083. Rail road corporations are common carriers and liable as such. As such companies have necessarily many employes who cannot possibly control those who should exercise care and diligence in the running of trains, such company shall be liable to such employes, as to passengers for injuries arising from the want of such care and diligence.

S. 3036. If the person injured is himself an employe and the damage wascaused by another employe, and without fault or negligence on the part of the person injured, his employment by the company shall not be a bar to the recovery.

(C) The Iowa Act.

The following act was passed by the legislature of Iowa in 1862 and reads as follows: "

Every corporation operating a rail road shall be liable for all damages sustained by any person including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employes, when such wrongs are in any manner connected with the use and operation of any rail road on or about which they shall be employed; and no contract which restricts such liability shall be legal and binding.

(D) The Kansas Act.

In 1874 the Following Act passed the legislature of Kansas:

Every rail road company organized or doing business in this state, shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents, or by any misconduct of its engineers or other employes to any person sustaining such damages.

(E) Similar Acts in other States.

Similar acts to those given above have been passed in other states. Some confining their application to rail road corporations and others so broad as to cover most of the dangerous occupations. In Rhode Island they have an act that not only applies to rail roads but embrances all common carriers. It was enacted in 1882.

It will be seen from an examination of the foregoing acts that the servant who seeks to recover under these statutes must be from negligence, but that in this respect he is held only to the exercise of ordinary care, such as a man of ordinary judgment and prudence would exercise under like circumstances, and that in most of the states the acts especially invalidate any contract relieving the liability imposed upon the employers.

(F) Are such Acts Constitutional?

For sometime after the passage of these acts it was contended by many that such acts were unconstitutional as they were especially directed against rail road corporations, but the Supreme Court of the United States in 1888, in examining the validity of the Kansas Act (1) declared that they do not deprive a rail road company of its property without due process of law, do not deny to it the equal protection of the law, and are not in conflict with the fourteenth amendment to the constitution of the United States. Judge Field who wrote the

(1) Missouri Pac. R.R.Co. v. Macksey, 127 U.S. 205.

opinion in that case said: "The only question for our examination, as to the law of 1874 is presented to us in this case, is whether it is in conflict with clauses of the fourteenth amendment. The supposed hardship and injustice consists in imputing liability to the company where no personal wrong or negligence is chargeable to it, or its directors. But the same hardship and injustice, if there be any, exists when the company without any wrong or negligence on its part is charged with injuries to passengers, whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will relieve it from liability if the passenger injured be himself from negligence. The law of 1874 extends this doctrine, and fixes a like liability upon rail road corporations where injuries are subsequently suffered by employes, though it may be the negligent or incompetency of a fellow servant in the same general employment, and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt. The objection that the law of 1874 deprives the rail road companies of the equal protection of the law, is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessary within the constitutional inhibition; but nothing can be further

from the fact. The greater part of all legislation is special either in the object sought to be attained by it, or in the extent of its application.-------- But the hazardous character of the business of operating a rail road would seem to fall for a special legislation with respect to rail road corporation, having for its object the protection of their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes and no objection therefore can be made to the legislation on the ground of its making an unjust discrimination. It meets a practical necessity, and all rail road corporations are without discrimination made subject to the same legislation. As said by the Court below, it is simply a question of legislative discretion whether the same liability shall be applied to carriers by canal and stage coaches, and to persons and corporations using steam in manufacturies."

(G) The English Employers Liability Act.

England has a Truck Act, and employers and workman Act, a Factory Act and the Employers Liability Act. (1) The latter was passed in 1880, and is the most important as dealing with the subject at hand.

The Act provides five cases in which an employer is made liable for the result of personal injury caused to his workman, to the same extent that he would have been liable if

(1)(43 & 44 Vict. C. 42)

the injured person had not been a workman in his employ. The five cases may be summarized as follows:

Where the injury is caused.

1. By defects in the condition of the ways, works, machinery or plant of the employer.

2. By the negligence of a superintendent or a person having superintendence entrusted to him in the service of the employer.

3. By improper orders given by a person superior to the workman injured, to whose orders such workman was bound to conform.

4. By obedience to improper rules or bylaws of the employer, or to the improper instructions given by any person delegated with the employers authority.

5. By the negligence of any person in the service of the employer who has the charge or control of any signal points, locomotive engine or train upon a rail road.

But the employe cannot recover if he is guilty of contributory negligence, if the fellow servant by whom he receives his injuries was at the time acting outside the scope of his duties, or if he knew of the danger and did not warn the employer or some superior of such danger, or knowing of the danger voluntarily incurs it.

C O N C L U S I O N .

We have now finished a hasty and therefore very incomplete examination of the law of the liability of employers for injuries to their employes brought about by the negligence of co-employes. But before taking our leave of the subject we cannot refrain from adding that there are two features connected with this topic which has attracted our notice more than all others, namely : First, the conflict of decisions and opinions among the learned judges of the State Courts, and also the conflict between the State Courts and the United States Courts upon some points connected with our subject. Second, the great amount of Judicial Legislation to be found concerning this question. As the latter does not properly come within our province we pass it by with this slight notice. As to the former we have made only a faint effort at harmonization. A careful examination of the authorities will show, we think, that nearly all of the holdings in recent cases, as to who are fellow servants and who vice-principles, can be grouped under the three heads or tests given before, namely: The Massachusets or common employment test; the United States or grade and rank test, and the New York or the nature of the act t st.

While it is impossible at this writing to speak with any certainty as to what the trend of judicial decisions will

be in the future, until several important cases that are now before the Supreme Court of the United States have been determined, yet we do not hesitate in saying, that without doubt the tendency of the American Courts is at the present, and will be in the future, to be governed more and more by the principles of right and justice which each case shall present, than by practices and precedence of the past that have long since become inapplicable to the condition of affairs as they exist to-day.

Capital or labor can never enjoy perfect success in their respective fields as long as they are unfriendly with each other; but such unfriendly relations will continue to exist between them as long as one is being supported at the expense of the other. In the union of capital and labor for the same common purpose, production and profit, there should also be a sharing in the incidents as well as in the profits. If labor is asked to engage in some hazardous undertaking in which capital is to profit as well as labor, if successful, the results of failure or accident should be borne by both in proportion to their respective interests. Neither should labor insist upon capitals bearing burdens that are unjust and inequitable.

In all these respects we believe that the New York test is by far the most satisfactory and just of all the others. The nature of the act determines where the responsibility shall rest. If the negligence pertains to some duty which the em-

ployer owes to his servants, then the employer is liable for any of the results arising from its non or improper performance; but if the act of negligence was in relation to some duty of an operative, the employe performing it is a mere servant and it becomes one of the risks incident to the employment which all persons take upon entering into the service.

Ira M. Myers,

TABLE OF CASES CITED.

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