Liability of Employer for Negligence Affecting His Employee

Charles Bliven Mason

Cornell Law School

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Thesis

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Charles Bliven Mason,

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Part I -- Origin and development of the general rule.

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In and about the year 1840, South Carolina, Massachusetts and England, almost contemporaneously, in three well adjudicated states, adopted the rule of the masters non-liability for the injuries done to a servant, resulting from the act of a fellow servant.

The doctrine first originated in South Carolina in the case of Murray vs. R. R. 1 McMullen Law 385, and almost at the same time Farwell vs. R. R. 4 Metcalf 56 was decided by the highest court of Massachusetts. In 1850 England adopted the view taken by Massachusetts in the case of Hutchinson vs. R. R. 5 Exch. 343, and held strictly in conformity with it up to 1880. Many writers on the subject however, have said that England was the first to enunciate this doctrine, having done so in 1837 in the case of Priestly vs. Fowler 3 Mc & W. 1.

Justice Field of the United States Supreme Court is authority for saying that Priestly vs. Fowler, which is often cited as the first case declaring the doctrine, did not directly involve the question as to the liability of a master to his servant for the negligence of a fellow servant.

The Massachusetts case although of a later date than the South Carolina decision, has attained the dignity of the leading case upon the subject.
The reporter in his note of the Murray case in 36 Am. Dec. 268, speaking of the Massachusetts decision says: -

"The learning, ability and reputation of Chief Justice Shaw, and the surpassing strength and force of his deductions in that case, together with the circumstance that it was a very early one involving the principle, have rather overshadowed the opinion of Judge Evans in the South Carolina case."

Whatever might have been the rule before 1837; in what form it might have come up; whether a co-employee could recover of the master for injuries committed by a fellow servant, or whether he entered into the service, not relying on the duty of the master to be careful in his selection of co-employees, implements, etc., but trusting in his own powers to take care of himself, cannot be ascertained with certainty. It might have been that the master guaranteed the safety of an employee, as then more labor was performed "by hand", and thus each employee was more often acting independently of each other and not undergoing as much risk as if acting together. Very likely these injuries occurred so seldom that the master made a peaceful settlement of the injured servants claim, rather than enter the whirl and strife of a litigation. Or, the person entering the employment may have had enough confidence in himself to avoid the dangers; and because of the simplicity of the implements and the fewness of
the co-servants, this might easily be presumed. The unknown state of the law on this subject before 1837 is shown by a passage used by Lord Alinger in the opinion of Priestly vs. Fowler:- "It is admitted that there is not precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles and in doing so we are at liberty to look at the consequences of a decision the one way or the other."

Since then, the judges from time to time have given utterance to a theory that the act of a fellow servant is a risk incident to the business which he undertakes to run without complaint; but it may be said that this is the barest of fiction, and why a servant is supposed to assume that his fellow servant will be negligent and his master not, it is difficult to see, except perhaps that they are working in immediate contact with each other, thus having a better opportunity of ascertaining their respective faults and to guard against them; while a master does not as a general thing in his work, associate with his servants.

Because the servant has the better means of observing the conduct of a co-servant, public policy requires that the servant shall be taught that he cannot look to the treasures of his master as a remuneration for the injuries occasioned by such co-servant; and the natural consequence of
such a rule tends to make such employee more careful and observant of the conduct and competency of his co-employees than it would if he knew he could be reimbursed by the master for any injuries he might sustain. He would also be more careful of his own life, the general safety of all being thus promoted. Still it is true to human nature that when a person finds himself in a situation where he knows that his life or limb may be endangered, no matter what pecuniary recompense he may get if he sustains such injury, his natural instinct of self preservation will prompt him to exercise care to protect himself; and it might be said with great propriety, that if the master was to be liable in every case, it would make him more careful in the selection of servants.

The attorney for the employer often contends that if the servant is allowed to recover of the master in such a case, it would paralyze many of the larger industries, and this argument is met by saying that such large industries as Rail Road and Steamboat Companies are liable to passengers, and their passengers as compared to their employees are as a thousand to one. If this liability to their passengers does not paralyze them, is there any reason to fear that they will be crushed out if it be extended to their employees, so comparatively few?
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Whatever may be the arguments pro & con, this rule that a master is not liable to an employee for injuries caused by a co-employee has been established on reasons of public policy, and in most cases where it has been applied, justice has been done. The marvelous progress of inventions of mechanical appliances, the use of which necessitates the employment therein very hazardous, and particularly the perils and dangers which attend the employees of a railroad, have contributed to make this principle a most important and useful one, which courts are often called upon to adopt in cases where relief is asked. In fact there does not appear to be any injustice in a case confining the liability to that of a servant personally guilty of the negligence, although a poor man. However, in England, some apparently hard cases, especially out of accidents on railroads, where while a passenger could sue the company for negligence, an engine driver's or guard's remedy was limited to the person actually guilty of the negligence, led to the attention of Parliament being called to the subject. So in 1877 a commission was appointed and they reported to Parliament that by reason of the number of corporations being represented by agents and the like, and the principal so hard to ascertain and so frequently escaping liability, that that body in 1880 passed what is known as the Employers Liability Act.
The limitations on this rule of the masters non-liability to a servant for the negligence of a fellow servant was first laid down in a general way in Priestly vs. Fowler, where the court said, "He (the master) 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."

In Farwell vs. R. R. 4 Metcalf 49, the court did not give any opinion as to what kind of co-employees, machinery and a place to work in should be furnished, but the following language was used: "Whether for instance, the employer would be responsible to an engineer for a loss arising from a defective or an ill constructed steam engine, etc., are questions on which we give no opinion," although the court intimated that this was a limitation on the general rule.

Evans, J. in the South Carolina case uses the following general language: "It is not intended to prejudge other questions which may arise between the company and its servants, nor do I mean to say that a case may not occur where the owner, whether an individual or company, will be liable for acts of one agent to another; but then it must be in such cases as where the owner employs unfit and improper persons as agents, by whose ignorance or folly another is in-
jured. Upon such a case it will be time enough to express an opinion when it arises."

Coon v. Utica & Syracuse R. R. 6 Barbour 236, was the first case in New York that expressly adopted the doctrine enunciated in Farwell vs. R. R., and the decision was affirmed in 5 N. Y. 492, although Judge Beardsley in a "semblable" in the case of Brown vs. Maxwell 6 Hill 594 decided in 1844, approves of the Massachusetts decision in these words,—

"That case appears to have been thoroughly examined and considered, and I entertain no doubt of its correctness," and ever since then New York decisions have proved no exception to the doctrine that the employer is not liable to one employee for injuries which he has sustained through the hands of a fellow servant.

This limitation may correctly said to have been imposed because of the growth of companies and corporations, and on reasons of public policy. If this exception did not exist in favor of employees they would be left at the mercy of every thoughtless and careless employer. The master would undertake no risks, and his only duty would be to see that his servant received the price stipulated in the agreement. This exception seems to have been an incident to the rule wherever expounded, and dates back, as I have already shown, to the case of Priestly vs. Fowler. The statements, that
the employer owes to the employee reasonable care in providing (a) a safe place to work, (b) safe machinery, tools and appliances, (c) competent and skillful co-employees, if any are needed, and (d) if the employees are numerous and are related in different employments, that reasonable rules and regulations be prescribed, were not all adopted in any one case, but one or more of them have from time to time in different decisions been pronounced. For not using reasonable care in performing any of these duties, the employer is liable to the employee for any damage resulting, unless the employee, knowing the defects as well as the employer, proceeds with his work, in which case he does so at his own risk.

In considering what dangers the servant is presumed to risk on entering the employment, the court in R. R. vs. Frost 17 Wallace 553 said, "But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the persons placed over him, whether they were fellow servants in the same common service or not. Such a doctrine would be subversive of just ideas of the obligations arising out of the contract of service, and withdraw all pro-
tection from the subordinate employees of railroad corporations. These corporations instead of being required to conduct their business so as not to endanger life, would so far as this class of persons were concerned, be relieved from all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason, and cannot receive our sanction." That is, an employee takes upon himself the usual risks of the employment, as where he is engaged around machinery, which on account of no negligence of the employer, breaks and he is injured, and, as previously stated, he assumes the risks of injuries received from his fellow workmen. But where the service is dangerous to a degree beyond what manifestly appears, and the servant is ignorant of such fact, or because of his age or want of judgment, does not comprehend the extent of the manifest risks, it is the duty of the master to warn, and some courts have said, explain the dangers to such servant. A peculiar case is that of Baxter vs. Roberts 44 Cala. 187, where a man employed a carpenter to build a house for him on a lot, the title to which was in dispute, without advising him of such contested ownership and of the forcible resistance with which he would meet, and the carpenter was unexpectedly attacked and injured by the parties claiming adversely, and the employer was held liable to the carpenter in damages. In Sul-
livan vs. India M'f'g Co. 113 Mass. 396, the plaintiff was 14 years of age, and employed around dangerous machinery, his duty being to remove certain pails. He was told to, "Do as the other boy did," and this was held to be sufficient instruction to exempt the company. But Devins, J. goes on to say, - "It may frequently happen that the dangers of a particular form, or mode of doing work, are great and apparent to persons of capacity and knowledge of the subject, and yet a party from youth, inexperience, ignorance or general want of capacity, may fail to appreciate them. It would be a breach of duty on the part of a master to expose a servant of this character, even with his own consent, to such dangers, unless with instructions or cautions sufficient to enable him to comprehend them, and to do his work safely with proper care on his own part." Infancy is prima facie a want of capacity but of course a boy of 19 is presumed to have more reason than one of 15, and on these and other facts the question is left to the jury.

Turning now to the four specific duties which are required of the master. (a) That the place furnished for working be safe. - This place must be kept in a reasonable safe condition, and of course what is a reasonable safe condition will depend a great deal on the nature of the business. An employer is not absolutely bound to see that the
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place to work in is safe, but he must use due diligence.

This is the doctrine laid down in the Troxis case 68 Ill. 545 and almost every state in the Union. For if he was required to do this, as Judge Finch says in Butler vs. Townsend 126 N. Y. 105, "He would almost become an insurer." The servant must see patent defects, though if the defects are obvious but the danger not apparent, the duty of the master is to find out whether there is any danger, and if he does not he will be liable. It is the duty of the master to warn and point out to the servant all extraneous dangers and latent defects. But in all the suits of the servant against his master, the latter is presumed to have discharged his duty, and the burden of proof is on the plaintiff. Butler vs. Townsend was a case where a scaffold was constructed by contractors, and it fell injuring the plaintiff. He sued the defendant for not furnishing a safe place to work. Finch, J claims it was not a place in which the work was to be performed, but an appliance or instrumentality through which the work was to be done, and in the course of the opinion says: "The staging in the present case was as much an appliance or instrumentality as if it had been a ladder, on some round of which the workman was required to stand in order to do his work, and we shall at least avoid possible confusion if we confine our attention to the exact duty which the master vio-
lated, if he violated any."

(b) That the machinery, tools and appliances furnished to work with be safe. — This is confined to those furnished by the master, for if an employee furnish his own tools which are defective, and a co-employee is injured from the use of them, the master will not be liable. About the same can be said under this head as under (a), that the master does not guarantee their safety but must not be negligent in his selection of them. That is, he is bound to use reasonable care, but is not required to adopt the latest improvements in machinery. This point was well brought out in the case of Smith vs. R. R. 69 Mo. 32. In Hayden vs. M'l'g Co. 39 Conn. 548, the court explains the doctrine in these words: "Every manufacturer has a right to choose the machinery to be used in his business, and to conduct that business in a manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select his appliances and run his mill with old machinery or new, just as he may ride in an old or new carriage, navigate an old or new vessel or occupy an old or new house, as he pleases. The employee having knowledge of the circumstances, and entering his service for the stipulated reward, cannot complain of the peculiar taste or habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service." In
Smith vs. R. R. 19 N. Y. 127, one company for whom Smith ran as an engineer, was allowed to use the tracks of another. A switchman by the use of an old fashioned switch threw the train on which the plaintiff was running, off the track and he was injured thereby. It was shown that if an improved switch had been used, the accident would not have happened, and the court decided that the R. R. Co. should have used this improved switch; but it was decided not on the ground that it was a duty owing to the company's employees, but to their passengers, for Smith was considered more as a passenger and not a co-employee of the switch tender. The court in Slater vs. R. R. 3 Hun 340, points out the distinction in these words: "But the passenger has the right to demand exemption from risks on account of the negligence of the servant, and therefore may demand such suitable mechanical appliances as shall suffice to make good his exemption. But the servant undertakes his employment relying upon the fact that the appliances are safe is carefully used; and he knows that the careful use depends upon himself and his fellow servants who may be assigned to operate and guard them. In consideration of his wages he takes the risk that his fellows will do their duty as he agrees to do his." As it is the master's duty to see that the tools and machinery to work with be safe, and the servant entering the employment knowing
the defects in such machinery, to thereby assume the risk; yet if the servant complain of these defects to the master and he promises to remedy them, the servant is not negligent in continuing in the service, and can recover of the master for any injury he may subsequently sustain thereby. It was claimed in Clark vs. Holmes & H. & N. 937-945, that the servant was not necessarily negligent, for one knowing all the facts might still be utterly ignorant of the risks. This doctrine first laid down in England, was in 1872 adopted by Massachusetts and New York in the cases of Huddleston vs. M'f'g Co. 106 Mass. 282; and Lanning vs. R. K. 49 N. Y. 521; in 1873 by Minnesota in Leclair vs. H. R. 20 Minn. 9; in 1877 by Colorado, R. R. vs. Ogden 3 Col. 499; and in 1879 by the Supreme Court of the United States in Hough vs. R. R. 100 U. S. 213.

In an article delivered before the New York State Bar Association in 1882, the writer explains how the rule is right, though the logic on which it is based is wrong, quoting the words of Oliver Wendell Holmes, Jr. as found in his "Common Law" page 1. "The life of the Law is not logic; it is experience." The same writer says that in rendering these decisions, "The real point in the minds of the judges, however imperfectly uttered, was not the knowledge or ignorance of the risk, but the complaint of the servant, the.
promise of the master. The opinions all point to the conclusion that the feeling in the judges' minds was that a great wrong had been committed by the master in not fulfilling his promise, and that he should be held responsible." This view is clearly carried out by reading the language of the court in the case previously referred to, as for instance that of Gordon, J. in 76 Pa. St. 389. - "The servant does not stand on the same footing with the master; his primary duty is obedience, and if when in the discharge of his duty, he is damaged through the negligence of his master it is but meet that he should be recompensed." But some courts put a restriction on this rule by saying that if the danger was so great and apparent that no sensible man would continue in the employment, no matter whether the master has promised to repair, the servant cannot recover for any injury received therefrom. In Scotland, the promise to repair does not relieve if it was negligence for the servant to remain.

(c) The co-employees, if any, be competent and skillful. - It all depends as to who is competent and who is skillful by the kind of employment engaged in. The master is only bound to use due care in the selection of these, for it would be gross negligence for an employer to put a common laborer in to run the engine to a factory, or any similar act where one employee is put at work which he is wholly unfit to
perform. It may happen that the fellow laborers are competent and skillful when a superintendent is over them, but if he absents himself, these same fellow workmen may become wholly unfit to perform the work they are undertaking. Such a case was that of McAlligot vs. Randolph 22 Atlantic Rep. (Conn.) 1094.

(d) That if the co-employees are numerous, and different employments related, the master should prescribe suitable rules and regulations. This duty imposed upon the employer is more modern than any of those previously mentioned, and is a result of the vast number of men employed in large corporations, who cannot all be under the supervision of one man, but who nevertheless must all work in the same manner, not hindering each other by trying to accomplish an object each in his own way. This prevents one set of employees from conflicting with another and exposing both to injury, but rather each man knows his risks and duty, thus tending to make the employment less hazardous and all working for the same end. Wright vs. R. R. 35 N. Y. 565 and Haskin vs. R. R 65 B. B. L. 134 are two of the earliest New York decisions on the subject, and in which state the rule is now firmly established.

All jurisdictions substantially agree as to the previously enunciated and explained duties and liabilities of
the employer. But here the courts begin to diverge in their holdings on the subject in inquiring whether the person caus-
ing the injury was a fellow workman or a vice-principal.

This difficulty in determining who are vice-principals and who are not, is a result of the modern corporation system. This has given rise to the different "tests" existing in the different jurisdictions, and these are practically divided into what are known as the United States, the New York and the Illinois doctrines.

In view of the growth and development of business enterprises, necessitating their division into separate de-

partments, some courts have established what is called "The separate department distinction," and maintain that it is not enough to constitute fellow servants that they were perform-
ing parts of a common undertaking, not bringing them together but it is essential either that they were actually co-operating at the time of the injury, in the particular business in hand, or that their usual duties should bring them into hab-
itual association, so that they can exercise an influence one upon the other for their mutual protection. So holds Illin-

ois, Kentucky, Georgia, Virginia and a few other states.

But other jurisdictions say it is sufficient if they are in the employment of the same master, engaged in the same common enterprise, and both employed to perform duties
tending to accomplish the same general purpose. So hold New York, Texas, Massachusetts, North Carolina, Michigan, Minnesota, Pennsylvania, Indiana, Rhode Island, Maryland and a few others.

The United States doctrine as first laid down in the Ross case 113 U. S. 397, the foundation for the rule, and is known as the "foreman" test. It is explained in the following quotation: "Relation of fellow servants should not be deemed to exist between two employees where the function of one is to exercise supervision and control over some work undertaken by the master which requires supervision, and over subordinate servants engaged in that work, and where the other is not vested by the master with any such power of direction or management." It is styled "The rule of humanity and justice," still it has not as large a following as those of either the New York or Illinois decisions.

There are other courts, the Supreme Court of Ohio being the leading one, which hold that where the injured servant is subordinate to him whose negligence caused the injury they are not fellow servants, and the master is liable. This is known as the "grade" test, and the jurisdictions which follow it are few, and the adoption of the doctrine is not on the increase but rather on the decline, for even the Ohio courts are, to a certain extent, looking upon the test with disfavor.
In discussing these tests, I shall say nothing further of those applied in Illinois and Ohio, but will pass directly to an examination of the New York and United States doctrines.

Like in many other branches of legal learning, New York has, on this subject, laid down a doctrine that is abreast of the times and followed by a majority of the states. In the leading case of Crispin vs. Baltitt 81 N. Y. 516, Rapello, J. thus clearly lays down the rule: "The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employee 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." This test was first applied in the case of Flike vs. R. R. 53 N. Y. 549, where the railroad company was held liable for the negligence of the head conductor, this officer standing in the place of the corporation. Chief Justice Church delivered the opinion, three of the judges however dissenting. In Malone vs. Hathway 64 N. Y. 5, a limitation was placed on the Flike case, but the judge tried to distinguish the two. This is now conceded as bad law. Here the defendants were brewers, and Malone was employed by them as a laborer. A Mr. Bagley, a competent carpenter, was employed by the defendants
to look to the safety of certain vats. Malone was under one of these when it gave way and he was killed. His widow brought suit, claiming Bagley was vice-principal, but the court said - no. They remarked that it made no difference of the rule exempting the master for acts of co-servants that the one receiving the injury was inferior in grade and subject to the orders of the one by whose negligence the injury is caused, if both were engaged in the same general business, accomplishing one and the same general purpose. But the court seemed to fail to appreciate the fact that this duty of keeping the building in a safe and proper condition was one devolving upon the master. This duty was delegated to Bagley, and to this extent he stood in the shoes of the defendant. Justice Church who wrote the opinion in the Flike case dissented, as did also Kappello. The modern test re-appeared and was firmly established in the well known case of Crispin vs. Rabbitt 81 N. Y. 516. Kappello, J. delivered the opinion Chief J. Andrews, Folger and Miller J J. concurred, and Earl Danforth and Finch, J. J. dissented. The rule itself is plain, but the application of it to particular statements of fact is the cause of the many seemingly conflicting decisions. But from an examination of the cases I find their holdings consistent with each other, and you might say harmonious. Let us look for a few moments at some of the different facts
existing, to which the rule has been applied. The following were held to be fellow servants: A laborer and an engineer of a railroad (Sale vs. D. & H. C. Co. 14 N. Y. Supp. 630). A telegraph operator in not using a code of signals and an engineer (Monaghan vs. R. R. 45 Hun 113). A train dispatcher in not using rules. A fireman of a train (Hawkins vs. R. R. 35 Hun 51). A car repairer and an assistant yard master (Corcoran vs. R. R. 156 N. Y. 673). Employees helping load a car and a switchman (Ford vs. R. R. 117 N. Y. 638). An engineer in a factory and employee working three floors above (Kern vs. R. R. 125 N. Y. 50). The following, although foremen, were regarded as fellow servants, where the master furnished suitable implements, etc., he was not liable for the injuries due to the carelessness of a co-servant who at the time was acting as his foreman and boss: (Neulauer vs. R. R. 101 N. Y. 607) The foreman of a "gang" is a fellow servant with the laborers, (Hansen vs. Trustees 27 Weekly Digest 186, Kinny vs. Steamship Co. 23 J. & S. 558, Culligan vs. Jones 14 St. Rep. 186, Hoach vs. Jackson 14 St. Rep. 553) Where defendant employed a foreman and a superintendent, and though the latter did not have the sole charge of the business to the exclusion of the foreman, and it did not appear that such foreman had power to employ men, etc., it was held he was a fellow servant in a case where his negligence caused
the injury, (Conboy vs. Donaldson Daily Register 26 Jan. 1884)
The foreman of a quarry "gang" and a laborer were held to be fellow servants, (Scott vs. Sweeney 34 Hun 392). In Hussy vs. Conger 112 N. Y. 614. where a superintendent removed the hatches from the hold of a ship whereby the plaintiff was injured by a board being carelessly dropped through one of them the court said,- "It is not however, every act of a superintendent for which a master is liable, for, notwithstanding his general supervisory powers, he is still a servant, and in respect to such work as properly belongs to a servant to do, is while performing it discharging the duty of a servant, for whose negligence and carelessness the master is not responsible to co-servants." A superintendent of a construction company and a laborer under him were deemed fellow servants, (Riley vs. O'Brien 53 Hun 147). This case repudiates the "grade" test as do the cases of Hofwangle vs. R. R. 55 N. Y. 608 and McCosker vs. R. R. 84 N. Y. 77. A captain of a state vessel and a workman under him were considered in the same employment and accomplishing the same end, (Loughlin vs. State 105 N. Y. 159). The opinion expressly states that it is in conflict with the Ross case. A "boss" engaged in assisting in the performance of a particular branch of the work as well as in directing others, was deemed to be a fellow servant with the person injured, (Jenkins vs. Iron Co. 10 N. Y
In Cullen vs. Norton 126 N. Y. 1, where defendant's foreman failed to have a blast removed which had been previously tried and did not explode, but subsequently did go off, killing the plaintiff intestate, the court held these men were fellow servants. They based their decision on the fact that the case was the "Ordinary one of choosing a method a time and a place for continuing the work in the quarry, and this involved questions of judgment and discretion committed in this instance to the foreman," and further saying that the accident was caused by the negligent act of this foreman, who actually was a fellow servant, in the very course of the work. There were two dissenting judges. In the case of Gabrielson vs. Waydell 135 N. Y. 1, a captain beat and injured a sick seaman because he would not go to work, the court holding that no captain was ever authorized to beat a seaman, and that the plaintiff could not recover of the defendant company for such beating, as the captain and seaman were fellow servants. Maynard, J. delivered a lengthy dissenting opinion, Finch and O'Brien concurring with him. This has been followed by Geoghegan vs. Atlas Steamship Co. 23 Supp. 1116.

In Quinn vs. Fish 26 Supp. 10, defendant provided a safe ladder for the use of his servants, but by insecurely fastening it in its place, it fell and injured plaintiff. Held that the insecure fastening of it was the negligence of a fellow servant, the defendant was not liable for the
Since writing this thesis the case of Mahoney v. Vacuum Oil Co. has been reported in 76 Hun, 579. This again lays down the New York rule in clear terms and gives a good review of the cases. The plaintiff was engaged in lowering a tank into a hole prepared for its reception. The bottom of the tank protruded over this hole in the floor and in order to lower this tank a rope had to be put through the base of it. To do this a plank was laid across the hole under the direction of a foreman who with plaintiff and others were working upon it when it gave way. Plaintiff now sues the defendant for the injuries he sustained, claiming first, that it was not a safe place to work, and secondly, that the foreman Patterson stood in the shoes of the oil company. The court as to the first claim said that the plank was the instrumentality through which the work was done, the place being the second story of the building and that was safe, citing the case of Butler v. Townsend, 126 N. Y. 105. As to the second claim Bradley J., said, "The relation of the foreman to the other workmen was that of co-employee except as to such acts performed by him as were embraced in the duties of the defendant".
The text on the page discusses the concept of a master being liable for the actions of their servants. It references cases where the master was held liable for the negligence of their employees. The text cites cases such as Corcoran vs. Holbrook, and Hewey vs. Brady, as well as Healy vs. Ryan, where a foreman was held liable for not making repairs called to his attention. It also mentions the case of Hurry vs. Usher, where a servant of the defendant was injured by the falling of a platform caused by the negligence of a servant. The text concludes with a discussion of the duty of preventing the grain accumulating and the knowledge the superintendent had of the condition of the grain in the bin.
he said and did was the speech and act of the corporation."
A conductor who could let a brakeman ride or not, as he saw fit while ascending a mountain, and such brakeman while so riding was killed, the negligence of allowing him to do so was held to be that of a person who stood in the shoes of the company. — Woodman vs. R. R. 5 Miscel. Rept's. 537. Where the deceased was assigned to his fatal place of labor by defendant's foreman who was intrusted with the management of the mill, such negligence, if it was negligence, was held in Freeman vs. Glenns Falls Mills 39 State Reporter 621, to be assignable to the master. The cases which hold that train dispatchers represent the company, and others holding that they are fellow servants with the injured employee, are distinguishable on the ground that in the first instance there are no established rules or signals of the company and he must necessarily use his own judgment and discretion. Such a case was that of McClesney vs. Panama R. R. reported in 74 Hun 150. But in Hankins vs. K. R. 55 Hun 51 and cases there cited, the decision holding they were fellow servants was based upon the fact that there were adequate rules for the guidance of the train dispatcher, and if he went outside of these, and injury resulted, it was his negligence as a co-employee and not as vice-principal.
As I have previously stated, the New York rule is in laid down, perfectly clear terms, but application of it to different combinations of fact as they arise, is where the courts experience the difficulty. New statements of fact will from time to time be brought before the courts of this state, which although they may approach the border line, yet I think the rule here laid down can safely and fairly dispose of them.

The rule in Massachusetts before the passage of the Employers Liability Act was substantially the same as that of New York. The younger jurisdictions of the west are fast falling in line, and even the United States courts since the decision in the Brough case have shown a tendency to adopt the New York rule.

Passing now to the United States rule, or as it is sometimes called, the "foreman" test. The Chicago R. R. vs. Ross 118 U. S. 377 is the case which gave rise to this doctrine. The decision did not attempt to lay down a rule for all cases as to what is a common employment and what is not, but simply gave one for the particular facts in issue. Ross was an engineer on defendant's railroad. His train and a gravel train collided and he was injured. A conductor was placed over Ross whose business it was to show him all telegrams received pertaining to the starting of the train and the stopping of it. This conductor received such a tele-
gram but failed to show it to Ross, having fallen asleep in a caboose. Ross not knowing of the receipt of the telegram went on with the train and the collision occurred with the result as stated. This conductor was held to stand in the shoes of the railroad company, and his neglect was deemed to be the neglect of the company. The court speaking of the conductor of this train says, "This view of his relation to the corporation seems to us a reasonable and just one, and it will ensure 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 vigilance on their part and prompt and unhesitating obedience to his orders." This case was thought to express the United States rule, and the federal and state decisions which followed the doctrine, considered the case as authority on the subject. But in the Spring of 1893 the case of Baltimore R. R. vs. Baugh 149 U.S. 368 was decided, explaining the Ross case, and limiting to a certain extent, the doctrine therein announced. Baugh was employed as fireman on a locomotive of the defendant, and while so employed was injured through the negligence of the engineer in charge thereof, the rules of the company making the engineer to act as conductor in the absence of this officer; but the court held them to be fellow servants, saying that "The regulations of a company cannot make the conductor
a fellow servant with his subordinates, and thus over-rule the law announced in the Ross case. Neither can it by call-
ing some one else a conductor, bring a case within the scope of the rule there laid down." (The court shows the different circumstances under which a person in charge of a separate and distinct department is treated as acting in the stead of the master, especially where the master is a corporation.) "But this is a very different proposition from that which af-

firms that each separate piece of work in one of these branch-
es of service is a distinct department, and gives to the in-
dividual having control of that piece of work the position of vice-principal or representative of the master. Even the conclusion announced in the Ross case was not reached by a unanimous court, four of its members being of the opinion that it was carrying the thought of a distinct department too far to hold it applicable to the management of a single train." Among the late decisions found in the current re-
ports the following still adhere to the doctrine of the Ross case:

McGill vs. R. R. 33 Pac. Rep. 821 (Ariz.)
R. R. vs. Thomas 17 S. E. " 884 (Va.)
R. R. vs. Harry 23 S. W. " 1097 (Ark.)
R. R. vs. Spence 23 S. W. " 214 (Tenn.)
R. R. vs. Callaghan 56 Fed. " 988 (Col.)
Mase vs. R. R. 57 " " 285 (Kinn.)

But the following look to the Hough case as authority:
Harley vs. R. R. 57 Fed. Rep. 144 (Tenn.)
R. R. vs. Clark 57 " " 125 (Tenn.)
R. R. vs. Rodgers 57 " " 378 (Texas)
Millsaps vs. R. R. 13 So. " 696 (Miss.)
Little Rock vs. Kosley 56 Fed. 1009 (Ark.)
R. R. vs. Smith 59 Fed. " 993 (Wash.)

The fine distinction which the court in the Baugh case draws between that and the Ross decision, leads me to believe that if the same statement of fact as was found in the Ross case was to come before the United States Supreme Court for the first time, that the decision would be contrary to that as now standing in 112 of the U. S. reports. The late decision of R. R. vs. Smith 59 Fed. 993 follows the Baugh case, holding that a conductor was a co-employee of the engineer, as he did not have the exclusive control of the train thus distinguishing it from the Ross case. The court also reviews with much nicety the Baugh and Ross cases, and tends to show that the United States decisions are beginning to lien towards the New York doctrine.

This ends my discussion of the subject. Well knowing the broad area which it covers, I have attempted but to swim over its surface, not caring to dive for the treasures which lie hidden beneath. A swimmer who glides along the surface, gathering pearls from the shallows and shoals, must be content with this and not loose his precious burden or exhaust his strength by diving for hidden treasures which lie in unfathomable depths.

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Charles Warren