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LIABILITY OF MASTER TO SERVANT
1876

Francis Wharton

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LIABILITY

OF

MASTER TO SERVANT.

By FRANCIS WHARTON, LL. D.

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MASTER'S LIABILITY TO SERVANT.[1]

The law of master and servant has been recently the subject of careful and protracted examination by a committee of the English House of Commons. A master, such is the way in which the law is stated, is not liable to his servants for such injuries received by the latter as are incidental to the service; and the reason ordinarily advanced for this conclusion is that, as servants contract with their master to take the risks of their service, they cannot recover from their master damages which they have virtually agreed to release. It is not surprising that the public mind of England, whose population is largely made up of operatives in mills and other enterprises in which defective machinery is productive of terrible risks, should have been agitated by the reason for the proposition, if not by the proposition itself. Of the myriads affected by this proposition (exempting masters, as it on its face does, from a large portion of their liabilities), probably not more than one out of a thousand has any idea of entering into any contract of the character imputed. Over the "fellow-servant" who inflicts the injury the injured servant has in very few cases such a power of supervision as should bring with it responsibility. Hence it was that political economists and politicians, as well as lawyers, heard with much satisfaction that a committee was appointed by the House of Commons, on Mr. Lowe's motion, Mr. Lowe himself being chairman, to report whether the condition of the law in this relation required any legislation.

The result is not very satisfactory. From Mr. Lowe, indeed, we have a very able paper, deploring the law as it now stands. "The law," so he says, "is that the plate-layer

[1] The writer reserves the right of republishing extracts from the within.

on a railway is the fellow-servant of the station-master; that the servants of a contractor are the fellow-servants of the workmen of the person for whom the contractor is at work; in fact, that every person employed by a master is the fellow-servant of every other person." That this relationship of fellow-service existed, and that the parties entering into it, whatever it may have been, agreed that they should not sue the master for their common negligence, is a pure fiction, as Mr. Lowe argues, of the judges. "The contract," he says, "which the judges have assumed to be entered into by every operative, involving, as it does, the cession of most important rights without any consideration, is utterly unknown to the person to be bound by it, and was, to its fullest extent, unknown to the judges themselves." The conclusion Mr. Lowe styles "an extraordinary stretch of judicial legislation," which is to be regarded "with the utmost jealousy and dissatisfaction," altering the common law, "not in any abstruse or remote point, but in a matter which most nearly concerns the interests of hundreds of thousands of her majesty's subjects." From these strong expressions, however, a majority of the committee dissent, citing with apparent approval Chief Baron Pollock's statement that the rule in Priestly v. Fowler introduced no new law, and maintaining that, when the offending servant is really a fellow-servant of the person injured, then the master should not be held liable. The following important qualification of the law, however, was recommended by the committee as a body:

"12. Your committee are of opinion that in cases such as these—that is, where the actual employers cannot personally discharge the duties of masters, or where they deliberately abdicate their functions and delegate them to agents—the acts or defaults of the agents, who thus discharge the duties and fulfil the functions of masters, should be considered as the personal acts or defaults of the principals and employers, and should impose the same liability on such principals and employers as they would have been subject to had they been acting personally in the conduct of their business, notwithstanding that such agents are technically in

the employment of the principals. The fact of such a delegation of authority would have to be established in each case, but this would not be a matter of difficulty.

"13. Your committee are further of opinion that the doctrine of common employment has been carried too far, when workmen employed by a contractor, and workmen employed by a person or company who has employed such contractor, are considered as being in the same common employment. Such cases do not come within the limits of the policy on which the law has been justified in paragraph 9 of this report."

As it is likely that the report of which we have given an abstract will lead to further legislative action in this country as well as in England, the following observations may not be now out of place.

The case of an operative, or other servant, who is injured when in his master's employ, and who sues his master for redress, may assume one of the following aspects:

1. The injury may be attributable to *casus*, or one of those extraordinary natural incidents for which human agency is not responsible;

2. Or, it may be attributable exclusively to the interposition of a responsible third person;

3. Or, it may be attributable to the operative's own negligence;

4. Or, it may be attributable to the master's direct personal negligence;

5. Or, it may be attributable to his negligence in the use of defective machinery;

6. Or, it may be attributable to the negligence of fellow-servants of the sufferer.

The first three hypotheses we may throw out of consideration, as they preclude, in any view, recovery against the master. The fourth would sustain a recovery irrespective of all distinctions based on employment. The fifth and sixth may be considered together, for the reason that a servant, so far as concerns his relations to third parties, is considered as part of a machine worked by the master. He may,

so far as concerns his master, be a very wayward or perverse instrument. He may do injuries to third persons in direct contradiction of his master's orders. But, so far as he does these negligent injuries within the orbit of his employment, his master is as much liable for them as for injuries produced by defects in crank or wheel attributable to the master's personal negligence.

Three reasons are offered for the limitation which relieves the master from liability where one servant sues for the injuries received through the negligence of a fellow-servant in the common employment.

First, it is said that a servant, entering into a common employment with fellow-servants, contracts to bear injuries sustained through their negligence without having recourse to the employer. But, even if we concede that every employé is a person capable of binding himself by contract, what is the form that the supposed contract assumes? Do I, as a servant, contract to bear negligences "gross" as well as "slight?" Even as to this important distinction the authorities asserting a contract do not agree; some declaring that such contracts do not avail in cases of "gross" negligence, whatever that may be. Are negligences from whose consequences the master is sheltered simply the negligences of servants in the same workshop as myself, and are we to consider as "fellow-servants," in the sense before us, the 10,000 co-employés of one of our colossal corporations, one of whose servants I may happen to be? Here again the authorities give no decisive instruction. A contract is an agreement to do a particular thing. But here there is no particular thing contracted to be done. We may therefore adopt, in this connection, the following striking statements in Mr. Lowe's report:

"Lord Justice Bramwell remarks 'that the expression which has been used, that a servant contracts that he will make no claim against the master for injury done by the negligence of a fellow-servant, is an unfortunate one. The obvious difficulty in that mode of expressing it is that neither master nor servant ever think of such a matter when

they enter into the relation of master and servant.' Justice Brett says (question 1919): 'I say now that the law is that you cannot properly import any condition or stipulation into a contract, except one which in the minds of all reasonable men must have been in the contemplation and intention of both parties to the contract at the time it was made.' "

A second essential constituent of such a contract is that it should have been entered into with the master, who, when sued, undertakes to avail himself of its exemptions. It is easy to conceive of a contract of this class. If I go to A and A employs me as an operative, there being half a dozen workmen under his control in the shop where I take service, then there might be some show for saying that I make a contract with A that I will bear the risks of the negligence of B, C, and D, who form the fellow-workmen whom I at the time inspect. But there are certain lines of cases to which this exemption is applied in which the employer exempted is not the person with whom the operative contracts. The person whom I sue may not be the person with whom I took service; and this is the case with a conspicuous English authority, Wigget v. Fox, 11 Ex. 832; as to which Pollock, B., in 1877 (Swainson v. Northeastern Railway Company, 37 L. T. [N. S.] 104), remarked, "there was clearly no contract between the man who was killed and the contractors, Fox and Henderson." To a contract privity is essential; but A, an employer, is not privy to a contract of service made between B and C, and, if A is liable to C, it is not on such a contract. Another case of the same class is suggested by Pollock, B., in Swainson v. Northeastern Railway Company. "Take the case," he says, "of two persons, A and B, agreeing to work a mine together, each of them agreeing to contribute and pay the wages of five men. The ten men go down to work, and, in the course of their common occupation, one of A's five men is injured by the negligence of one of B's men. Could he recover against B?" And this the learned judge virtually denies; declaring at the same time that A and B are not in common "the masters of both sets of men." Here we have another

instance of an operative precluded from recovering from an employer with whom he has made no contract of service."

In Woodley v. Railway Company, 36 L. T. (N. S.) 419, which was determined by the English high court of appeal in February, 1877, the plaintiff was employed by a contractor engaged by the defendants in excavating a tunnel. Trains, run by the servants of the defendants, were constantly passing the spot, which was on a curve where there was no light. The plaintiff was injured by a train which approached rapidly without any notice of its approach, although guards had previously been stationed on the road for the purpose of giving notice. The jury found that the omission of this precaution was negligence on part of the defendants. The judge trying the case was not dissatisfied with the verdict, and judgment was entered upon it by the exchequer division. This judgment was reversed in the high court of appeal, though under circumstances which divest the judgment of authoritative weight. By Cockburn, C. J., it was conceded that negligence, under the verdict, was imputable to the defendants, but that the plaintiff, by continuing in the employment to which he knew this specific risk was attachable, could not recover. His opinion, however, starts with the remarkable assumption that the plaintiff was the servant of the defendants, though there is a cautious avoidance of any intimation that this was a contract of service in which the plaintiff undertook to bear risks in question: "*If*," so reads the judgment of Cockburn, C. J., "*the plaintiff, in doing the work on the railway, is to be looked upon as the servant of the company*, the decision of the exchequer division in his favor cannot, as it seems to me, be upheld. It could not be said that any deception was practised on the plaintiff as to the degree of danger to which he would be exposed. He must be taken to have been aware of the nature and character of the work, and its attendant risk, when he entered into the employ of the contractor for the job in question; or, at all events, he must have become fully aware of it as soon as he began to work. If he had been misled in supposing that precautionary measures, such as the dangerous nature of the

service rendered reasonably necessary, would be taken, he had a right to throw up his engagement, and to decline to go on with the work; and such would have been his proper course. But, with a full knowledge of the danger, he continued in the employment, and had been working in the tunnel for a fortnight when the accident happened. A man who enters upon a necessarily dangerous employment with his eyes open, takes it with its accompanying risks. On the other hand, if the danger is concealed from him, and an accident happens before he becomes aware of it; or, if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, and, from the want of such precautions, an accident happens to him before he has become aware of their absence, he may hold the employer liable. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance. He must be taken to waive his right to call upon the employer to do what is necessary for his protection, or, in the alternative, to quit the service. If he continues to take the benefit of the employment, he must take it subject to its disadvantages. He cannot put on the employer terms to which he has now full notice that the employer never intended to bind himself. It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it, with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work, without doing all in their power to obviate the danger, are highly reprehensible, as I

certainly think the company were in the present instance. The workman, who depends on his employment for the bread of himself and his family, is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But, looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it, or continues in it, with a knowledge of its risks, he must trust to himself to keep clear of injury. But it may be said the plaintiff was not in the service of the defendants at all; he was on their premises, not only in lawful business, but, it may be said, by their invitation, as he was working under a contractor employed by them to do the work in question; he sustained the injury complained of through what the jury have found to have been negligence on the part of the company; he is, therefore, entitled to damages. But this reasoning appears to me to be fallacious. That which would be negligence in a company, with reference to the state of their premises or the manner of conducting their business, so as to give a right to compensation for an injury resulting therefrom to a stranger lawfully resorting to their premises in ignorance of the existence of the danger, will give no such right to one who, being aware of the danger, voluntarily encounters it, and fails to take the extra care necessary for avoiding it. The same observation arises as before. With full knowledge of the manner in which the traffic was carried on, and of the danger attendant on it, the plaintiff thought proper to remain in the employment. No doubt he thought that, by the exercise of extra vigilance and care on his part, the danger might be avoided; by a want of particular care in depositing one of his tools he exposed himself to the danger, and, unfortunately, suffered from it. He cannot, I think, make the company liable for injury arising from danger to which he voluntarily exposed himself. The contractor, the immediate employer of the plaintiff, undertook to execute work which he knew would be attended with danger in the service under which it was to be executed. The plaintiff, as his servant, did the same. They are in a very different position from that in which they would have stood had they been at work

on the defendants' premises in ignorance of the danger. The conclusion, therefore, at which I have arrived—I must say, with much regret, as I think the conduct of the defendants open to great reprehension—is that the judgment of the exchequer division is wrong and must be reversed."

Mellor, J., voted for reversal, giving, first, the reason that, notwithstanding the verdict of the jury, there was no evidence fixing negligence on the defendants; but sliding from this to the same assumption as was made by Cockburn, C. J., that the plaintiff was the defendants' servant; and that in the particular case, if the plaintiff saw any peculiar danger in his position, "he ought either to have stipulated with his master, *or the company*" (but, if the company was not his master, how could he be supposed to have a contract with the company?), "to provide some additional means or precautions against such possible danger." * * * With Mellor, J., Grove, J., agreed. On the other hand, Mellish, L. J., and Baggalay, J., dissented, on the ground (1) that the plaintiff had made no contract of service with the defendant; and (2) that, the plaintiff being on the defendants' premises with the latter's invitation, "there was a duty imposed by law on the company either to avert the danger, or to give the plaintiff reasonable notice of it so that he might protect himself." The idea of a contract in such a case as the present was emphatically repelled. "The servant of the contractor," said Mellish, L. J., "enters into no such contract with the railway company at all, and his contract with his own master is *res inter alias acta*, and, in my opinion, is altogether immaterial." "The plaintiff," added Baggalay, J. A., "cannot be regarded as the servant of the company; he was the servant of the contractor." We have, therefore, on surveying the entire history of this remarkable case, the exchequer division denying the relationship of master and servant between the plaintiff and the defendants, and, in the court of appeals, this denial maintained by Mellish, L. J., and Baggalay, J. A. On the other hand, while Mellor, J., and Grove, J., assert the relationship (if Grove, J., is to be viewed as assenting to this part of the opinion of Mellor, J.), it is propounded

only hypothetically by Cockburn, C. J. And the whole argument of Cockburn, C. J., as given above, goes to show that he rests his conclusion, not upon any supposed contract between the plaintiff and the defendants, but upon the position that he who intelligently and voluntarily undertakes a risk cannot recover from others damages he sustains from the risk he undertakes. In fact, under the state of facts just developed, it is absurd to speak of the relationship of master and of servant existing between the plaintiff and the defendants. The defendants would not have been liable to third parties for the plaintiff's negligence, for it would have been promptly ruled that in such case the offending party was the servant of an independent contractor, and that an employer is not liable for the negligences of a contractor's servants. And, if a suit had been brought by the plaintiff against the defendants for wages, a nonsuit would have been summarily entered, as no contract between the plaintiff and the defendants could have been proved. The plaintiff, therefore, in Woodley v. Railway Company, ought not to have been precluded from recovering from the defendants on the ground that he was the defendants' servant. If the judgment of the court of appeals was right, it was right, not because the plaintiff was the defendants' servant, or because he made any contract of any kind with the defendants, but because, on the grounds to be hereafter stated, he was not entitled to recover damages for injuries to which he intelligently and voluntarily exposed himself.

Swainson v. Northeastern Railway Company, which has just been incidentally noticed, and which was decided a few months after Woodley v. Railway Company, is a case of so much interest that it deserves the minute examination given to it by an English contemporary. (London *Law Times*, June 23, 1877.) "The Great Northern Railway Company," so is the case condensed in the *Law Times*, "and the Northeastern Railway Company have both a station at Wellington street, Leeds, and the two stations abut upon each other. There are two lines of rails belonging to each company, and ingress and egress from the stations is regulated by signals and points,

which are worked by signal-men, whose duty it is to regulate the traffic of both stations in common. The plaintiff's husband was one of these signal-men, and he had held his appointment four years. He was engaged and paid by the Great Northern Company, and he wore their uniform, and he was not told at the time of his being engaged that he was to be a joint servant. He was, however, as between the two companies, one of what was called the 'joint station staff,' all of whom were engaged and paid by the Great Northern Company, the cost of the salaries of the staff being treated by the companies as a joint charge, and being borne equally between them; and when he received his wages at the end of each week he signed a pay-sheet which was headed 'Great Northern Railway, Traffic Department, Pay-bill, Joint Station Staff.' It was, moreover, his duty to attend to the Northeastern as well as to the Great Northern trains, as to points and signals, whenever any engines or trucks had to be transferred from the rails of one company to those of the other; and he was engaged in the discharge of that duty when he was killed by the negligence of an engine-driver in the service of the defendants, under the following circumstances: On the 7th of May, 1875, Swainson was standing on the six-foot space between the Great Northern and the Northeastern departure lines, when a Northeastern engine came towards the station on the Great Northern arrival rails, with some Great Northern coal trucks. Swainson signaled to the driver to go on to the Northeastern departure line, and he did so, proceeding along the line until he had passed some points; but he then reversed his engine and backed out again, having a van before the engine which obscured his view of the line, and, according to evidence given on the plaintiff's behalf, without sounding his whistle, although it was unsafe, as also stated in that evidence, to back out with a van before the engine. Swainson, when the engine and van were thus backed out, was looking in the other direction, watching a train which was coming from the south, and, failing to observe them, he was knocked down by a step of the van and killed."

Upon these facts the *Law Times* justly remarks: "But were there, in reality—we may be pardoned for asking—such circumstances in this case as to make the deceased man a servant of the Northeastern as well as of the Great Northern Railway Company? He was engaged and paid by the Great Northern Company, and he wore that company's uniform. In those respects, therefore, he had not anything to do with the Northeastern Company. Nor was he even informed, at the time of his being engaged, that he was to be a joint servant of the two companies. These facts were not disputed, be it remembered, on the defendants' behalf; and, this being so, what is the answer which thus far immediately presents itself to the mind if the question 'to whom did he undertake' be applied to the case? And it is a question which—as the learned judges themselves pointed out in their judgment—inevitably arises when it is averred that a particular person was a servant, and that he had undertaken the risk of the negligent acts of his fellow-servants. Surely that answer is not that he had 'undertaken' to the Northeastern Company! And if that be so, then where else in the circumstances of the case is the 'undertaking' or the contract of service with that company to be found? It can hardly be said that it is to be found in the fact that, as to points and signals, it was his duty to attend to the traffic of the Northeastern as well as to the traffic of the Great Northern Company, for that duty arose from arrangement made solely by the latter company, who were his actual employers with the former company, and which would seem to have been, at the most, a letting out of his services on hire for their own advantage. As little would it seem to arise from the signing of the pay-sheet headed with the words already mentioned, for the name of the Great Northern Company alone appeared there, and it was the station, and not the staff of servants employed at it, which was spoken of on that bill as joint."

The judges hearing the case, Barons Pollock and Huddleston, held that, while the evidence did not support the hypothesis of a contract between the deceased and the

Northeastern Railway Company, there was "a common employment in a common service," in which the deceased was engaged with the person by whose negligence he was injured.[1]

[1] The following extract from the judgment of Pollock, B., deserves study: "Up to a certain point this is clear that, wherever the person injured, and he by whose negligent act the injury is occasioned, are engaged in a common employment in the service of the same master, no action will lie against the master if he be innocent of any personal negligence. The negligence of a fellow-servant is taken to be one of the risks which a servant, as between himself and his master, undertakes when he enters into the service. This is thoroughly established by the cases of Priestley v. Fowler, 3 M. & W., 17 L. J. (N. S.) 42, Ex.; Hutchinson v. The York, Newcastle & Berwick Ry. Co., 5 Ex. 343, 19 L. J. 296, Ex., and other cases. In Wiggett v. Fox, 11 Ex. 832, 25 L. J. 185, Ex., the rule was held to apply where Wiggett, the person injured, was the servant of Moss, a piece-worker or sub-contractor, and he by whose negligence the injury was occasioned was in the immediate employ of the defendants; but in that case it is to be observed that, although Wiggett was engaged by the piece-worker, it was a part of the arrangement between the latter and the defendant that the workmen should be paid their weekly wages by the defendant; so that, as was said by Martin, B., in the course of the argument, Moss was not a sub-contractor in the sense that an action would lie against him by a stranger. In Wilson v. Merry, in the House of Lords, 19 L. T. Rep. (N. S.) 30, L. Rep. 1 Scotch App. 326, it was held that the master was protected, although the fellow-servant whose negligence caused the injury was a manager. So in Morgan v. The Vale of Neath Railway Company, 18 L. T. Rep. (N. S.) 564, 5 B. & S. 570, 736, L. Rep. 1 Q. B. 149; and Lavell v. Howell, 34 L. T. Rep. (N. S.) 183, 45 L. J. 387, C. P., L. Rep. 1 C P. D. 161, where the work in which the two servants were engaged was wholly dissimilar. In all these cases there was, not only a common employment (that is, an employment with a common object), but also common service (that is, service under one master). *Dicta* are, no doubt, however, to be found in some of the cases which tend to suggest that the principle ought to be applied to cases in which the element of common service may be wanting. There is great difficulty in so holding, because, when it is said that the servant undertakes the risk of the negligent acts of his fellow-servant, the question arises, 'Undertakes to whom?' and the proposition must, we think, be limited by confining the undertaking to the master of the servant who is supposed to give it. It cannot, we think, reasonably be extended to strangers, or those who, though having some interest in a joint operation, are not, in some sort, the masters of the person injured. It is not, however, necessary in the view we take of this case to pursue this further. Before dismissing the cases, however, it is right to notice two—namely, Voss v. The Lancashire & Yorkshire Railway Company, 2 H. & N. 728, 27 L. J. 249, Ex.; and Warburton v. The Great Western Railway Company, 15 L. T.

In two recent American cases we find the non-liability of the employer for an employé's negligence maintained on facts which give no just support to the hypothesis of a contract between the employer and the injured operative.

Rep. (N. S.) 361, 36 L. J. 9 Ex., L. Rep. 2 Ex. 30—which were cited by Mr. Waddy, in favor of the plaintiffs, as governing the present case. In the former of these cases a man named Voss, a blacksmith in the employment of the East Lancashire Railway Company, was working at one of their engines, which was on their siding at the Liverpool station, when an engine belonging to the defendants, and driven by one of their drivers, pushed some wagons into the siding, and so Voss was killed. The station where the deceased man was working at the time of the accident was in the joint occupation of the defendants and the East Lancashire Railway Company; but the deceased was the servant of the latter company, and not of the defendants, and, upon this ground, the court held the defendants were liable. In Warburton v. The Great Western Railway Company (*ubi sup.*), the facts, as stated in the judgment of the court, were as follows: The plaintiff was a servant in the employ of the London & Northwestern Railway Company, and was at work in the Victoria station at Manchester, when an engine-driver in the employ of the defendants, the Great Western Railway Company, having entered the station, shunted a train belonging to the defendants from one part of the station to another, and, in so doing, was guilty of the negligence complained of. The station was the property of the London & Northwestern Railway Company, and was used in common by the plaintiff's employers and the defendants, and other companies. By an arrangement between these companies the defendants' engine-driver ought to have awaited a signal from an officer of the London & Northwestern Railway Company before he shunted the train into the siding; but, without doing so, and without any signal at all, he shunted the train, and negligently caused the injury in question to the plaintiff. Upon these facts the court say: 'We are of opinion that, inasmuch as the injury sustained by the plaintiff was occasioned by the servant of the defendants, not in the course of any common employment, or operation under the same master, but by negligence in the discharge of his ordinary duty to the defendants alone, this case is distinguishable from all which have been decided in relation to the above doctrine of exemption, and that therefore this action is maintainable.' Both these cases were, no doubt, properly decided upon the ground that in each of them it could be correctly affirmed that the servant who did the injury was in the employ of the defendants, and doing their work, and not what was common to that in which the plaintiff was employed. In the present case the circumstances material to the legal position of the parties, and the rights flowing therefrom, are very different. The deceased man, Swainson, though engaged by the Great Northern Company, and wearing their uniform, was one of a joint staff, and for four years had received his weekly wages as such, and he was, therefore, practically in the service of two companies, who, *quoad* his service and employment, were

In Mills v. Railroad Company, 2 McArthur, 314, the plaintiff was employed by the Washington & Alexandria Railroad Company to carry the flag before the trains running on that road within certain limits. The Orange Railroad Company had the right of way, by contract, over the track of the Washington & Alexandria road; the plaintiff's duty being to flag all the trains coming over the latter's road. He was employed, when the accident occurred, in flagging a train of the Orange road, by which he was run down. It was argued that he did not keep a proper look-out, and hence was precluded from recovery. The court, however, in ruling that he had no case, rested on the assumption that he was a servant of the Orange road. But what kind of service was this? He made no contract with the Orange Company. He could not have sued that company for wages, nor would that company have been responsible for his negligence. The decision was right, supposing the plaintiff was hurt because he kept no look-out, but the reason was wrong. See, also, Rawch v. Lloyd, 31 Pa. St. 358.

In Johnson v. Boston, 118 Mass. 114, the evidence showed that the defendant, the city of Boston, was engaged, at the time of the accident which was the subject of suit, in building a sewer in Warren street. The work of excavating and blasting was undertaken by a person named Tinker, who worked through a gang of men of which the plaintiff was one. The plaintiff was injured, so it was claimed, through

partners. But further than this, as was said by Lord Colonsay, in Wilson v. Merry, *ubi sup.*: 'We must look to the functions the party discharges, and his position in the organism of the force employed, and of which he forms a constituent part.' Referring, then, to the duties of Swainson, and the very acts on which he was engaged at the time of his death, the evidence shows that they were not performed by him as servant of, or for the benefit of, one company only, but were essentially necessary for the common business of both—namely, the interchange of the traffic between the two stations. The case therefore falls within, and is governed by, the principle that where there is common employment in common service the master is not liable, and our decision must be for the defendants, for whom judgment must be entered.

"Huddleston, B., concurred.

"Judgment for the defendants."

the negligence of the foreman of the sewer department of the city. Was the plaintiff a fellow-servant with the foreman? Could the plaintiff be supposed to have made a contract of service with the defendant? Now, we may well understand how the plaintiff and the foreman could be regarded co-adventurers, and how the one could be precluded from recovering for damage sustained through the other's negligence. But it is difficult to see how the plaintiff could have been held to have made a contract of service with defendant. There was a contract of service, but it was with Tinker alone. Tinker fixed the plaintiff's wages, and determined the place of the plaintiff's work. In neither of the cases above specified is the person who sets up the contract the person by whom the contract was made.

Passing, however, from this examination of the recent authorities, we proceed to notice that a third essential to a contract of service is that the servant should be a competent contracting party, and should actually enter into the contract. But are servants, against whom this privilege of the master is set up, always competent to contract? Might not a child employed in a factory, when injured by a fellow-workman, be barred by the rule before us? Has it not repeatedly been held that a child cannot recover from a master for negligences in the latter's apparatus or service? Is there a single case, in which this result is reached, in which the negligence of fellow servants is not more or less involved? A volunteer, also, who lends a hand to give a single turn to a single windlass, finds himself as much barred, when he sues the master by this limitation, as if he had been a trusted servant for years. To a contract by a servant, however, it is necessary that there should be a servant competent to contract. But the exception before us is sustained in cases in which the operative is not a servant, and in cases in which, if a servant, he is not *capax negotii*.

A fourth essential to a contract is that it should be lawful. But, by the consent of the great body of our American courts, contracts to relieve a party from the consequences of his negligence are unlawful, as against the policy of the law.

Therefore, even should we assume a contract of this class to be entered into between an employer and an employé, we must hold such a contract to be invalid.

It is clear, therefore, that in sustaining this exception we must cast aside the ground of an implied contract between the operative and the employer. We may proceed, therefore, to the second ground—namely, that the operative ought not to recover because he has an opportunity of watching and reporting on his associates—and enquire how far this ground sustains the limitation before us.

Does the operative in one case out of a hundred of those that come before the courts have the opportunity to inspect his associates? Is he not, by the laws of all difficult and important industries, so tied to his post that he has no time for such observations? Even supposing that he has time, has he the means or capacity? He is in another part of the same building; or, he is in a different building; or, while he is driving a locomotive, his fellow-operative, by whose negligence he is to be injured, is turning a distant switch the wrong way; or, while he is waiting to couple, his fellow-operative neglects to put on the brakes; or, while he is busy cleaning the deck of a great steamer, his fellow-operative is so negligently managing the boiler that it bursts. Even if my fellow-servant stands by my side, I may be incapable, from my ignorance of his specialty, of criticising him; or, his superiority in experience may be such as to make me distrust my capacity for criticism. It is absurd to speak of the sufferer, in such cases as these, inspecting and reporting on the offender's misconduct. And it is still more absurd to make such a supposition when the offender is the sufferer's superior, or when the subaltern knows that if he reports the negligences of his superiors he will soon be without superiors to report. We have, therefore, to reject the idea that the exemption before us rests upon the fact that the sufferer, in cases of this class, had the opportunity, before the injury, of observing and reporting on the conduct of the person by whom he is to be injured.

On what, then, are we to sustain this conclusion? The

answer is, on the general principle that a party cannot recover for injuries he incurs in risks, themselves legitimate, to which he intelligently submits himself. This principle has nothing distinctively to do with the relations of master and servant. It is common to all suits for negligence, based on duty, as distinguished from contract. For instance, a plaintiff cannot recover for damages incurred by him—

(1) When, on crossing a railway, he strikes against a car negligently left on the road—he being previously advised of the position of the car; or,

(2) When he stumbles on an obstacle left negligently on a highway, he knowing of such obstacle previously; or,

(3) When, after being advised of the danger of attempting to rescue property at a fire, he attempts the rescue.

(4) So we may assume the case of a farmer who puts a tank of inflammable oil close to the fence of a railway over which a hundred locomotives pass daily; the oil takes fire, and the farmer's barn is consumed. He cannot recover from the railroad company for negligently igniting the oil by its cinders. He knew, or ought to have known, that, in the long run, cinders would be negligently dropped; and, if he took the risk of putting inflammable substances in a place where they would be ignited by the cinders, he must bear the consequences.

(5) A green-house, to assume another case, is built in the close vicinity of a barracks where there is constant artillery practice, of which the owner of the green-house knew when he selected its site. Through negligence occur, from time to time, explosions unusually severe. Through the concussion of one of these explosions the glass of the green-house was broken. The owner cannot recover, as he intelligently exposed himself to the risk.

(6) A party of seamen undertake a whaling voyage on shares, and appoint their own officers. During the voyage A is injured by B's negligence. But A cannot recover from C damages for injuries which were exclusively attributable to B, even though C were master of the ship.

Does it make any difference whether or no the party

injured, in either of the cases mentioned above, is a servant suing a master? Or, to take the converse, is there any case in which the servant is precluded from recovering from the master, in which a person not a servant, but a mere stranger, would not be precluded, under similar circumstances, from recovery? If so, we may throw aside all that belongs distinctively to the law of master and servant, and hold to the following propositions as sufficient for the settlement, not merely of the present line of questions, but of all cases in which one person is injured by dangerous agencies belonging to others:

1. A person having control of dangerous agencies must so restrain them that they will not injure other persons; and, to prevent such injury, he must use the diligence common to good business men in the specialty. This imposes on him the following duties:

2. He must notify persons visiting the place where such agencies are operating of their peculiar danger; and, if such persons are children, having business with him, whom he permits to visit the place, he must provide guards in proportion to their peculiar risks.

3. Against mere trespassers whose presence he has no reason to expect, and for whose protection he is under no duty to provide, he need take no precautions on his own premises beyond those which forbid a person owning property which may be visited by others from putting on it, not for any business purpose, but for punitive purposes of his own, man-traps, spring-guns, or other instruments likely to be fatal to life.

To operatives injured by defective machinery, or by the negligence of other operatives, in a great industrial undertaking, these rules are eminently applicable. If I intelligently enter into a business which has certain risks, I assume these risks, and cannot recover from another person damages arising from them. So far as concerns defects in machinery, this principle holds good in all cases in which these defects could not have been avoided by the party sued, except by the exercise of a diligence beyond that used among good

business men under the circumstances. The difficulty arises when the injury arises from the negligence of one who is a co-operative with the party injured. But if we cast aside, as we have been compelled to do in the preceding argument, the idea that there is in such cases a contract between employer and employé to the effect that the latter is to bear certain risks, then we may regard the employer and his various employés as co-adventurers in carrying on a common enterprise. If so, supposing A, B, C, and D to constitute these common adventurers; A, the employer, is not liable to D for the negligence of B and C, while he is liable for his own negligence, or for the negligence of any person who acts as his specific representative. Did we not hold to this distinction, there are few cases in which a servant injured by defects in machinery could be precluded from recovering from the master. For it would be absurd to say that the master shall not be liable for defects in his machinery not imputable to his own negligence, but shall be liable, on the principle of *respondeat superior*, for his servant's negligences to a fellow-servant. For how can his machinery work without being started; and, if it is not started by *casus*, or by third parties, or by himself, or by the injured party, must it not have been started by the injured party's fellow-servants? But, if the master is not liable to the injured servant for the defects of machinery when negligently started by the sufferer's fellow-servants, then the master's non-liability extends to the negligence of such fellow-servants. We are therefore reduced to the following dilemma: either the master must be held liable to an injured servant in all cases not imputable to *casus* or the intermeddling of strangers, which is absurd; or the master must be relieved from liability in cases where the sufferer is hurt by machinery negligently worked by fellow-servants, in whose appointment, management, and retention no negligence is imputable to the master. The latter alternative we must accept; and it brings us back to the conclusion that the master's non-liability in such cases rests, not on contract, nor on the assumed fact

that the suffering servant had the prior opportunity of watching and correcting the offending servant, but on the principle that a party who voluntarily and intelligently exposes himself to certain risks, such risks being the incidents to a lawful business, cannot recover if he is hurt by the exposure. *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.* L. 203, de R. J. 50, 17.

If we adopt this conclusion, we certainly relieve ourselves from the cardinal objection to the law as it now stands. For, if I am only precluded from recovering from my employer in those cases of injuries from fellow-employés which are among the incidents of joint service, then I am not precluded from recovering from him in cases where the service was not joint. If I am injured by a person performing any of the master's duties, therefore I may, adopting the reasoning heretofore given, recover damages from the master himself. If I am permitted so to recover, then we will relieve the law as it exists in England, and in several of the United States, from a provision which gives the great capitalist undue advantages over the small. On this point Mr. Lowe, in the report above given, makes the following telling remarks:

"By declaring that managers are fellow-servants with the laboring men in a mine, a factory, or a workshop, the law has offered a premium on the delegation of all power from the master to his subordinates, since he is relieved by such a delegation from the liability which he had while he managed his own affairs. But to whom is that liability transferred? To inferior agents who are liable, but whom, by reason of their position in life, it is not worth while to sue. Thus, by a change effected entirely for the benefit and convenience of the owner, the workman is deprived of an indemnity which the law gives him, because the law never contemplated the vast industrial undertakings which now exist; and the courts of law, by an imaginary contract, have restricted the claim for compensation to fellow-servants who are unable to pay. This seems to be a case for the application of the maxim, *sic utere tuo ut alienum non lædas;* if the master, for his own

convenience, withdraws himself from the management of his own business, the workman ought not to suffer by the loss of a defendant whose position is a guarantee that he is able to satisfy their just demands, and by the substitution of one who is not, any more than the creditors of the master ought to be deprived of their remedy against him because the debts were incurred by his agents."

In other words, if I am employed in a factory whose proprietor superintends its machinery, then, as the law now stands, he, and the capital he represents, is liable to me for the defective working of the machinery he superintends, if the defect be traceable to his negligence. If, on the other hand, this same superintendent is but the foreman of others, then, negligent as he may have been, these others, who represent the capital invested, and who are, therefore, pecuniarily responsible, are not liable to me, the party injuring me being assumed to be, not my employer, but my fellow-servant. The capitalist, therefore, when superintending his own work, is liable; when not so superintending, is not liable for the negligence of employés. The small capitalist who works in his own factory is thus under a burden, from which the great capitalist who operates through agents is relieved. The decisions, therefore, discriminate in favor of the great capitalist as against the small capitalist, and they tend to give to wealth, when monopolizing various branches of industry, and withdrawing itself from any practical acquaintance with its working of any particular branch, privileges which are denied to the proprietors of small and distinct enterprises which they operate themselves. But it is not for the good of the community that this discrimination should be made. The wealth of the state, if centred in a few capitalists, each with his multitudes of subordinates, is productive of far less public happiness, comfort, and security than it would be if divided among a series of independent men of business, each conducting under his own eyes the specialty with which he is most familiar. If there is to be any discrimination as between the great and the small

proprietor, it should not be against the small proprietor who superintends his own work.[2]

The conclusions I draw are as follows:

(1) Employer and employés, when uniting in a particular work, are co-adventurers in such work; and no one of these co-adventurers can recover, if there be no concealment of the rates or personal negligence, from another co-adventurer damages for injuries which were incidental to the work. For such injuries the employé can no more recover from the employer than can the employer from the employé.

(2) Co-adventure, however, in this sense, is not convertible with co-service. There are many co-services, under a common master, which are not co-adventures. A clerk making entries in the books of Adams' Express Company in Boston is not a co-adventurer with a driver of the same company in New Orleans. The co-adventure must consist in fellowship in a specific line of work.

(3) Even as to such specific line of work, any co-adventurer may make himself individually bound by undertaking a particular duty. Thus, if he negligently furnishes defective machinery, he is personally liable for the injuries thereby produced to one of his co-adventurers. And this is not because he is master. For such a breach of duty the servant (if the master be personally hurt thereby) is as much liable to the master as is the master, *mutatis mutandis*, to the servant.

(4) One co-adventurer is not liable to a second for the negligence of the third, although the first be the employer of the third, unless the third be at the time acting as the master's substitute in a matter the master agreed personally to undertake, or unless the master, to whom was committed the power of appointment, exercised this power negligently.

FRANCIS WHARTON.

[2] A thoughtful review of some of the authorities above given will be found in the July number of the *American Law Review*.

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