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We take great pleasure in announcing the election to our Editorial Board of the following: From the Class of 1905, Warren Francis Cressy, Hartford, Conn.; Isaac Stiles Hopkins, Jr., Athens, Ga.; Ira W. Jones, Allison, Iowa. From the Class of 1906, Seth Weaver Baldwin, Naugatuck, Conn.; Birdsey Erskine Case, New Haven, Conn.; Thomas Fitzgerald Porter, Jr., Natchitoches, La.; Matt Savage Walton, Lexington, Ky.

THE FELLOW SERVANT DOCTRINE IN THE FEDERAL COURTS.

Probably no department of American law is in greater confusion than that relating to the liability of the master for injuries to the servant. And while the rule is well established that the master will be exempt from liability arising from the negligence of fellow servants in the same line of employment, the courts have differed widely as to what constitutes a fellow servant within the scope of the doctrine. It has generally been held that the master will be liable where he has so far intrusted the management of his affairs to another as to make him practically the vice-principal, or *alter ego*, of himself and the courts of a few states have attempted to confine the relation of fellow servant to those employed in the particular distinct department where, as in railroad corporations, the different employments comprised are vast and diversified. But the majority of the courts have displayed a tendency to confine both limitations within very narrow bounds, and to make the real test whether the risk is one, which, under all the circumstances of the case,

the servant can fairly be presumed to have assumed. *Cooley on Torts*, 637. In all the American courts the subject is involved in such confusion that a logical arrangement of principles can only be hoped for after many years of adjudication.

In this connection the recent case of *Northern Pacific Railway Company v. Dixon*, 24 Sup. Ct. 683, is of interest in illustrating the diversity of view entertained by even so distinguished a tribunal as the Supreme Court of the United States. A brief statement of facts is necessary to the understanding of the case. Certain trains of the defendant were operated independently of the regular time table by direct telegraphic orders from the train despatcher. While a local operator was asleep one of these trains passed his station without his knowledge, and subsequently, in answer to the despatcher's inquiry, he reported that it had not passed. In consequence, the despatcher released a train going in the opposite direction, and in the ensuing collision the plaintiff's decedent, a fireman, was killed.

In the consideration of the case the majority of the Supreme Court allowed their decision to rest wholly upon whether the telegraph operator was, or was not, a fellow servant of the fireman. While admitting that both the vice-principal and department theories were, in limited form, recognized by the Federal courts (*Ross Case*, 112 U. S. 377), they denied its application to the case at bar. And having decided that the operator was a fellow servant, the court gave judgment for the defendant. "No reasonable amount of care and supervision," says the court, "which the master had taken beforehand, would have guarded against such unexpected and temporary act of negligence. Before an employer should be held responsible in damages it should appear that in some way, by the exercise of reasonable care and prudence, he could have avoided the injury." The decision that a telegraph operator is a fellow servant of those actively operating the trains settles a question which has been a mooted one in the Federal courts. The earlier decisions are in accordance with the present case. *Cincinnati N. O. & T. P. R. Co. v. Clark*, 6 C. C. A. 281; *Baltimore & O. R. Co. v Camp*, 13 C. C. A. 233. The later cases have, however, shown a tendency to place him in the position of vice-principal. *Hall v. Galveston H. & S. A. R. Co.*, 39 Fed. 18; *Frost v. Oregon Short Line & U. N. R. Co.*, 69 Fed. 936. The weight of authority in the state courts is distinctly in favor of the present position of the Supreme Court. *Baldwin on American Railroad Law*, 252.

Had the decision involved only this point it would have evoked little controversy, but Justice White, with whom concurred the Chief Justice and Justices Harlan and McKenna, repudiate in vigorous language the assumption that the decision can be based upon the grounds assumed by the majority. While admitting the position of the affirmative opinion. so far as it goes, they insist that the decision rests upon, "first, whether the train despatcher was a fellow servant of those operating the train; and, second, if he was not, can the corpora-

tion avoid liability because the error of the train despatcher was occasioned by the wrong of the operator." The court, in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 387, had previously decided that a train despatcher was a vice principal. Justice White reviews the previous decisions of the court as to the second point involved, and summarizes them briefly as follows: "Where the act is one done in the discharge of positive duty of the master, negligence in the performance of the act, however occasioned, is the act of the master and not the act of the fellow servant." This principle has been recognized by nearly all the state courts. *Sangamore Coal Min. Co. v. Wiggerhaus*, 122 Ill. 279; *Reid v. Burlington, C. R. & N. Ry. Co.*, 72 Iowa 166; *Atchinson, T. & S. F. R. Co. v. Napole*, 55 Kan. 401; *Lyttle v. Chicago & W. M. Ry. Co.*, 84 Mich. 289; *McGarry v. N. Y. & H. R. R. Co.*, 137 N. Y. 627.

In his dissent, Justice White insists that, if the present rule is adhered to, a person injured can recover neither under the broad department and vice-principal theories, for these have been narrowed by the court, nor where the act complained of is done by a vice-principal under the present theory, and the act is one done in pursuance of a positive duty imposed upon the principal, the result being that the party is remediless. "It introduces into the doctrine of fellow servant," says the learned justice, "as hitherto applied in these decisions, a contradiction which will render it impossible in the future to test the application of the rule of fellow servant by any consistent principle." This would seem to be too strong a statement of the case. The rule, as established by the decision, seems to be, that the railroad company will not be liable where the negligence, though flowing through the vice-principal, was not primarily his, but that of a fellow servant of the person injured. Had the negligence been on the part of the vice-principal it can hardly be doubted that the defendant would have been found liable.

BAGGAGE DISTINGUISHED FROM MERCHANDISE.

The case, *Saleeby v. C. R. R. of N. J.*, 90 N. Y. Supp. 1042, brings up the question, still an open one, "What constitutes baggage as distinguished from merchandise?"

This question has never been an easy one to answer. To give the answer in the form of a definition of the word "baggage" is a difficult matter. Under a given set of circumstances where suit is brought against a railroad corporation for loss of a trunk, to say, in endeavoring to determine exactly the plaintiff's right, that his claim must be limited to baggage, removes the difficulty but one short step. We must then face the question, "What is baggage?"

The rule on this subject can be stated only in general terms, and it is for the jury to decide under the facts of each case what articles come within the rule. *Mauritz v. N. Y., etc., R. R.*, 23 Fed. 765. There may be cases, of course, where the articles sought to be recovered for as baggage are clearly not such, as

where a valise containing nothing but samples of mechandise was lost, the samples being the property of the principal whose agent the plaintiff was. *Humphreys v. Perry*, 148 U. S. 627; *Story, Bailments*, 9th Ed., Sec. 565. Also where $11,250 was sought to be recovered as baggage. *Orange County Bank v. Brown*, 9 Wend. 85. Similarly there may be cases on the other extreme, where the articles lost are palpably articles of every-day necessity, such as one is bound to carry on a journey for personal convenience and comfort. Between these two extremes there is much room for doubt and hence a vast field for litigation. The test of baggage generally adopted and followed in this country is the English test contained in Lord Cockburn's definition in *Macrow v. G. W., etc., R. R.*, 6 Q. B. 622. According to this definition substantially everything which a passenger takes with him on a journey for his personal use or convenience befitting his station in life either with reference to the immediate necessities of the journey or to its ultimate purpose is baggage.

The first requirement then is that the article sought to be recovered for as baggage must be carried for the passenger's personal use or convenience as opposed to his business use or convenience. So while on the one hand a catalogue, prepared by the plaintiff for his own use, at his own expense, and which was his own property, has been held to be baggage (*Staub v. Kendrick*, 121 Ind. 226), and while novels carried for diversion and entertainment have been held to be baggage (*M. C. R. R. Co. v. Kennedy*, 41 Miss. 678), still, on the other hand, printed matter, in the shape of memoranda, and other papers relating exclusively to the business of a principal, carried by his agent, the plaintiff, have been held not to be such. *Yazoo & M. V. R. Co. v. G. H. Ins. Co.*, 37 So. 500.

The second requirement of Lord Cockburn's test is that the articles carried and sought to be recovered for as baggage must be for the use and convenience of the plaintiff according to his station in life. In *Isaacson v. N. Y. C. & H. R. R. Co.*, 94 N. Y. 278, Chief Justice Earl said: "It is agreed on all sides that it is not easy to draw a well-defined line between what is and what is not baggage. That which to one traveler would be indispensable, to another would be unnecessary. One's general habits must be taken in mind by the carrier when a passenger is taken for conveyance. And so, if certain articles are reasonably indispensable to the passenger, although they would be unnecessary for others, the articles may be recovered for as baggage, if lost." In the last part of his definition, Lord Cockburn said that the articles carried might be such as were proper, considering either the immediate necessities of the journey or its ultimate object. It was so held in *Macrow v. Western, etc., R. R., supra.* In many of the states, this has been declared to be the law only in part, the right of the passenger being limited in some jurisdictions to the baggage or articles required during the journey, and the railroad being

released from liability for other articles unless they were accepted by the railroad as baggage. *Wilson v. R. R. Co.*, 56 Me. 62; *K. C., P. & G. R. Co. v. State*, 65 Ark. 363; *R. R. Co. v. Swift*, 12 Wall. 252. In *Saleeby v. R. R.*, *supra*, articles from their nature to be classified as merchandise were held to be baggage through their having been accepted as such by the railroad with knowledge of their character.

LIABILITIES ARISING OUT OF CONTRACTS BETWEEN LABOR UNIONS AND EMPLOYERS.

With the growth of antagonism between labor and capital, and between union and non-union labor, the courts have been increasingly called upon to pass upon the validity of contracts between labor unions and employers. Where the employers have bound themselves to discharge non-union laborers and hire none but union men, the question has generally arisen as a collateral issue in suits brought by the discharged non-union men against the union men who procured their discharge. But few cases are recorded wherein the validity of these contracts has been tested as between the parties themselves. Such was, however, the question in *Jacobs v. Cohen*, 90 N. Y. Supp. 854. The defendants, Cohen & Sons, were sued by Jacobs, president of a labor union, on a promissory note given by them. The consideration was a contract by which the defendants bound themselves to hire none but members of the plaintiff's union who were in good standing and who produced a pass card from the union, and agreed to discharge any person whenever the plaintiff should notify them that such person was not in good standing. The defense was lack of consideration, maintaining that the contract relied upon was unlawful as against public policy.

In *Curran v. Galen*, 152 N. Y. 33, cited by the defense, the plaintiff sought damages from the defendants for having joined in a conspiracy to take away his means of earning a livelihood and prevent him from obtaining employment. The defendants set up a contract to justify their action in causing the plaintiff to be discharged. The judge in his decision said: "Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen is to hamper or to restrict that freedom, and, through contracts or agreements with employers, to coerce other workingmen to become members of the organization, and to come under its rules and conditions, under the penalty of the loss of their positions and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our institutions " It was also held that the fact that the contract was entered into for the purpose of preventing friction between the workingmen's organization and the employer would not legalize a plan of compelling workingmen not in affiliation with the organization to join it at the peril of being deprived of their employment.

In *Nat. Protective Ass'n v. Cumming*, 170 N. Y. 315, it was decided that a labor union may refuse to permit its members to work with fellow servants who are members of a rival organization and may notify the employer that a strike will be ordered unless such servants are discharged, when its action is based upon a proper motive. Such would be a purpose to secure only the employment of efficient and approved workmen, or to secure an exclusive preference of employment to members of the union on their own terms and conditions. If under such circumstances the employees objected to are discharged, neither they nor the organization of which they are members have a right of action against the former union or its members. From the above case it would be inferred that a contract might not be enforced, but that if the employer saw fit to carry it out he could not be enjoined nor could any right of action arise therefrom.

The above conclusion is upheld by a decision rendered in the Appellate Division of the New York Supreme Court in December, 1904, *Mills v. U. S. Printing Co.*, 91 N. Y. Supp. 185, where it was held that an employer could not be enjoined from discharging non-union men in compliance with an agreement to that effect with a union. The theory underlying this proposition is that the employer has the legal right to discharge his men unless hired for a definite period, whenever he sees fit, no matter what his motive for so doing may be. This theory is followed in England, though the rule there is couched in much stronger and more comprehensive language. "No action for conspiracy lies against persons who act in concert to damage another, and do damage him, but who at the same time merely exercise their own rights and who infringe no right of other people." *Mogul Steamship Co. v. McGregor*, 23 Q. B. 598; *Allen v. Flood*, L. R. 1898, A. C. 1; *Quinn v. Leathem*, L. R. 1901, A. C. 495.

In *Jacobs v. Cohen, supra*, two of the five judges dissented, Bartlett, J., stating that he could see no reason why a man should not be allowed to contract to hire only a certain class of workingmen if he thought it was to his best interest. If by restricting his right to hire he could procure what he considered a better class of workingmen and other similar advantages, especially when no malicious motive is shown, there seems to be no sound reason why such a contract should not be held valid, provided its object is primarily the betterment of the contracting parties. *Beach on Monopolies and Ind. Trusts*, Sec. 113. The mere act of discharging non-union employees under agreement with a labor union is not an actionable wrong, as shown by the cases cited. No case has been found holding that the voluntary carrying out of such a contract was in any way unlawful; hence there seems to be no reason why the parties could not bind themselves by contract to do that which they might do of their own volition.