YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS

Published monthly during the Academic year, by students of the Yale Law School.
P. O. Address, Box 893, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscrition notice to that effect should be sent; otherwise it is assumed that a continuation of the subscrition is desired.

LIABILITY OF MASTER FOR INJURIES SUSTAINED BY REASON OF A BREACH OF A DUTY IMPOSED BY STATUTE.

It is a well settled rule of the common law that a servant upon entering his employment assumes the risk arising from all obvious and apparent causes. The master is under an obligation to furnish reasonable and safe materials and place in which to work. But if he fails to do so and the servant continues in his employment, knowing of such failure or under such circumstances that he ought to have known and thereby receives an injury, he cannot hold the master liable, for by continuing in the employment he assumes this very risk. This is the common law rule both in this country and in England.

Many of the United States have statutes imposing upon employers of labor new and special duties. Many of these statutes apply to factories and mills and require the owners thereof to take some specific measure to guard against injuries resulting from the use of machinery. There have been many persons injured by reason of a failure to comply with these statutes and many cases have come before the courts in which a person sustaining such injury seeks to hold the master liable. The defense of the master is invariably the doctrine of assumed risk. This presents a question of absorbing interest and upon which the courts are in hopeless con-

flict. Some holding that the defense is good and others holding that it is not.

There seems, upon a careful examination of the cases, to be three doctrines in this country. The first is that statutes imposing specific duties upon the employer do not change the common law rule relating to obvious risk and that the master is not liable to the servant for injuries sustained as a result of the master's breach of such duty. This doctrine is supported by the Federal courts and by some of the most respected of the state courts; among them being Alabama, Colorado, Massachusetts, Michigan and New York.

A statute of Missouri required employers to guard all gearings, cogs, etc. A master allowed a pair of cogwheels to remain unguarded and as a result an employee was injured. The United States Circuit Court held that the servant could not recover from the master because by remaining in the employment she had assumed the risk arising from the master's breach of his statutory duty. *St. Louis Cordage Co., v. Miller,* 126 Fed. 495. The same court has very recently affirmed this doctrine. A statute of Colorado required all railroad companies to securely block all frogs and switch rails. A railroad company failed to comply with statute and an employee while coupling cars caught his foot between the rails and was thrown under the cars and severely injured. He brought an action for damages against the company. The company defended on the ground of assumption of risk. The court held that the said statute did not deprive the railroad company of the right to defend on this ground. *Denver & R. G. R. Co., v. Norgate,* 141 Fed. 247. This case expressly overrules *Narramore v. Ry. Co.,* 96 Fed. 298, which held that the statute deprived the master of the defense in question. Judge Carland in a very able opinion points out that the decision in the Narramore case was based upon a wrong construction of the English cases and upon the idea that an assumption of risk is a term of the contract of employment. Judge Carland denies that it is a matter of contract. In his opinion it is a part of the law governing the relation of master and servant and is independent of the will of either. "It is a principle of the common law, and must be repealed, if at all, by the lawmaking power . . . and depends in no manner for its existence upon the agreement of the parties." *Denver & R. G. R. Co. v. Norgate, supra.*

The Factory Act of New York requires employers to guard

exposed gearings. A young woman was injured while operating a machine which was not guarded as required by the statute. The court held that she had assumed the risk and therefore could not recover. They held the statute to be penal in its nature and not in any way affecting the rights of the servant. *Knisely v. Pratt,* 148 N. Y. 372. The statute does not abrogate the common law rule that if the servant knows of the unguarded condition and appreciates the risk he cannot call upon his employer for indemnity. *McRickard v. Flint,* 114 N. Y. 222; *Goodridge v. Washington Mills Co.,* 160 Mass. 234. The servant cannot recover for an injury resulting from an open and obvious defect caused by the master's failure to perform a statutory duty. *O'Malley v. S. Boston Gaslight Co.,* 158 Mass. 135; *Spiva v. Mining Co.,* 88 Mo. 68.

The second doctrine is that, if the statute is a mere affirmation of the common law, the rule remains the same; but if it sets up a definite standard and requires specific measures to be taken by the master, the doctrine of assumption of risk does not apply and the master is liable. This doctrine is supported by the courts of Illinois, Indiana, Tennesee and Wisconsin.

A statute of Illinois provided that all cages used in mine shafts should be covered. A man working in a mine and knowing that the cage was uncovered was injured as a result. The court allowed him to recover and said that his right of recovery in no way depended upon his use of reasonable care and that it could not be precluded by his contributory negligence. *Cotlett v. Young,* 143 Ill. 74. See also *Coal Co. v. Hoodlet,* 129 Ind. 327. In *Boyd v. Brazil Coal Co.,* 25 Ind. App. 157, the court said: "We believe, however, that the maxim *volenti non fit injuria* or doctrine of assumption does not apply to a statutory duty imposed upon the master, and the continuing of statutory duty imposed upon the master with knowledge of such breach of duty will not prevent a recovery for an injury suffered by reason of such breach." The doctrine of the courts of Tennessee is announced in the case of *R. R. v. Smith,* 6 Heisk. 174. The decision is to the effect that where an accident occurs by reason of a noncompliance with the statute, the right of action in favor of the injured party is absolute, and that his contributory negligence is no bar.

The third doctrine is that a sharp distinction must be drawn between assumption and contributory negligence. The cases supporting this doctrine hold that a man may continue in his employment knowing of his master's breach of his statutory duty and if injured he may recover, provided only that he, the employee, was

using reasonable care. Contributory negligence is an absolute defense. *Grand v. R. R. Co.,* 83 Mich. 564.

The first doctrine seems to us to be the soundest and most reasonable. The proposition that the servant cannot assume, is unsound and untenable. There is absolutely no reason why he may not assume the obvious risk of a particular business as well under a statute as at common law. No rule of public policy forbids him, with good and sufficient reason, to accept employment subject to the rule of assumed risk. No statute can take away from a man the right to manage his own affairs, provided that in doing so he respects the rights of others. The question whether a plaintiff can recover for a breach of a statutory duty, notwithstanding an assumption of risk or contributory negligence on his part, is one upon which, as we have seen, there is a great conflict of opinion but we think the clear weight of authority is against such recovery. It is well settled that a statute does not change the common law unless such an intention plainly appears. If the employee with full knowledge undertakes to accomplish the task assigned to him, at the place and in the manner proposed, he ought not to be heard to complain when the conditions and methods are precisely as he expected them to be and to which he has assented. *Martin v. R. R. Co.,* 118 Iowa 148. In such a case it is immaterial that the danger might have been guarded against by the employer, even if the failure is in violation of the statute. The responsibilities which by common law the servant must assume and exercise are not affected by the statute unless the statute provides so expressly. *Powell v. Ashland,* 98 Wis. 35.

The following are the leading English cases upon this question. 18 Q. B. D. 685; 18 Q. B. D. 647; 21 Q. B. D. 220; 21 Q. B. D. 371; 7 Ex. 130.

LABOR LEGISLATION AND LIBERTY OF CONTRACT.

The case of *People v. Marcus,* 97 N. Y. Supp. 322, recently decided by the Appellate Division of the Supreme Court of New York, limits the extent to which labor legislation may be carried and presents this interesting and much mooted question from a new standpoint.

In that state it had been provided by statute (*Penal Code,* Sec. 171A) that any employer of labor who should coerce or compel anyone to refrain from joining any labor organization as a condition of such person securing employment, should be deemed

guilty of a misdemeanor. The defendant in the present case, having been tried and convicted for violation of this act, moved in arrest of judgment on the ground that the statute contravened the fourteenth amendment of the Federal Constitution and also the State Constitution, in that it restrained the freedom of contract for a purpose neither intended nor appropriate to protect the public health nor promote the general welfare. The motion having been denied, an appeal was taken.

It is a fundamental principle that a man in the exercise of his civil rights "must be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice." *Cooley, Torts,* 328. But by the exercise of a doctrine of comparatively modern origin, this right may be limited by the state in the exercise of its police power when it becomes necessary for the protection of the public health, morals or welfare, although the extent to which legislation on these grounds has been sought has been restrained by many recent and noted cases. *Sochner v. New York,* 198 U. S. 45; *Wright v. Hart,* 182 N. Y. 330.

It has been frequently adjudicated under the federal and New York constitutions that an employer has a right to refuse to employ union men or an employee has a right to refuse to work with non-union men. Hence the agreements which the New York Statute declares to be criminal were such as in the absence of this provision the parties had a constitutional right to make. It was sought by the state to sustain this legislation on the theory that such agreements would have a tendency to disturb the public peace and order. But as is forcefully pointed out in the opinion of the court delivered by Justice Laughlin, it is not competent for a legislature to restrict one's constitutional rights upon the theory that in the exercise of the same, others will become so incensed as to violate the law and create a public disorder. "It is the duty of the state and nation to protect every citizen in the exercise of his constitutional rights and so long as the state and nation last, inability or unwillingness to perform that duty may not be assigned as a justification for a law making the exercise of one's constitutional rights a crime. . . . It follows that the object sought to be accomplished by the Legislature under this penal statute is one which must be left to peaceful agitation and public sentiment and individual freedom of action." Accordingly, the act was held to be unconstitutional, the judgment of conviction reversed and the defendant discharged.

Whether in its application to domestic corporations such a provision of the Penal Code would be sustained under the power of the Legislature to alter, amend or repeal corporate charters, is a question not passed upon by the court but it seems reasonable to suppose that the provision would be good under such conditions and circumstances.

Many of the leading cases pertaining to this general subject are reviewed and briefly digested in the opinion. The decision is interesting in view of the growing importance and prevalence of this character of legislation.

DIVORCE: SCOPE OF FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION.

The decision of the Supreme Court of the United States in the case of *Haddock v. Haddock,* handed down April 16, 1906, puts an end to a much mooted question by holding that a divorce granted to a plaintiff lawfully domiciled within a state as against a defendant domiciled in another state, who has been served by publication or letter only, is not required to be recognized as valid outside of the state in which it was granted under the Full Faith and Credit Clause of the Federal Constitution. It is admitted that by reason of the inherent power which every state possesses to determine and regulate the marital relations of its own citizens, that where its courts conformably to the laws of the state have acted concerning the dissolution of the marriage tie, as to a citizen of that state, such action is binding in that state as to such citizen *Maynard v. Hill* 125 U. S. 190. Such judgments, however, as against a defendent domiciled in another state are always open to question as to whether there was jurisdiction over such defendant. It is an elementary principle that no court can lawfully adjudge rights of persons or property in the absence of jurisdiction; and it is firmly settled that a judgment of a court of another state is binding on another state only so far as the court rendering it had jurisdiction. It is not protected by the Constitution and laws of the United States from attack for want of jurisdiction. If rendered without jurisdiction, it is not a judgment but a more arbitrary prescription without force as a judicial proceeding in another *forum. Bank v. Wiley* 195 U. S. 259.

There are two cases in which divorces are always entitled to *extra* territorial efficacy. 1, Where both husband and wife are domiciled in the state rendering the divorce, *Cheever v. Wilson* 9 Wall, 108. 2, Where the husband is domiciled in a state which is

also the domicile of matrimony, the courts of such state having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom, and treat the wife as having her domicile in the state of the matrimonial domicile for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause, *Atherton v. Atherton* 181 U. S. 155. With the exception of the above cases, however, it is well settled, that no state can exercise jurisdiction and authority over persons, or property without its territory. Its laws and the judgments of its tribunals can have no *extra* territorial operation. The state may determine the status of its own citizen toward the citizen of another state but as to the latter it affects nothing and is void, unless personal service is made on him or he appears in the proceedings. Its judgments cannot push their effect over the borders of another state, to the subversion of its laws and defeat of its policy; nor seek across its borders the person of one of its citizens, and fix upon him a status against his will and without his consent. *People v. Baker* 76 N. Y. 78; *Lynde v. Lynde* 162 N. Y. 405; *Winston v. Winston* 165 N. Y. 553; *Cummington v. Belchertown* 149 Mass. 223; *Flower v. Flower* 42 N. J. E. 152.

In a few other states an exactly opposite view is taken, and it is held that a state cannot be deprived, directly or indirectly, of its sovereign power to regulate the status of its own domiciled citizens, by the fact that the citizens of other states, as related to them, are interested in that status, and in such a manner has a right, under the general law, judicially to deal with and dissolve the marriage relation, binding both parties by its decree, by virtue of its inherent power over its own citizens. The general law does not deprive a state of its proper jurisdiction over the condition of its own citizens, because non-residents, foreigners, or domiciled inhabitants of other states, have not or will not become, and cannot be made to become, personally subject to the jurisdiction of its courts; but upon most familiar principles its courts may and can act conclusively in such a matter upon the rights and interests of such persons, giving them such notice, actual or constructive as the nature of the case admits of, the purpose of such notice being to give to persons outside the jurisdiction the chance to appear in the proceedings, *Gould v. Crow* 57 Mo. 200; *Antony v. Rice* 110 Mo. 233; *Ditson v. Ditson* 4 R. I. 87.

A third view of the subject taken in some states, is that divorces rendered in one state should be recognized as valid in others on the ground of comity. The courts holding this view proceed upon the ground that the preservation of good morals and a proper regard of social relations make it desirable that such a decree should be considered valid not only where it is pronounced, but in every other jurisdiction, provided the grounds upon which it is based are recognized in such jurisdictions as justifying the decree, *Thompson v. State* 28 Ala. 12; *Harding v. Allen* 9 Me. 140; *Felt v. Felt* 59 N. Y. E. 606; *Shafer v. Bushnell* 24 Wis. 372. In view of the fact that harmony among the different states in regard to divorce laws is essential to the preservation of good morals, this third view of the subject would seem to commend itself as the most reasonable, for it would certainly be a most inconsistent position to assert the right of one state to dissolve a marriage for a given cause and then decline to give effect to a judgment of a sister state in a strictly analogous case. Brown, Harlan, Brewer, Holmes; four justices dissenting.

CONTRACT OF COMMON CARRIER LIMITING ITS LIABILITY FOR LOST BAGGAGE DOES NOT APPLY TO HAND LUGGAGE.

The recent case of *Holmes v. North German Lloyd Steamship Co.* 77 N. E. 21, decides that where a steamship company sells a ticket, limiting its liability for loss of the holder's baggage; and where hand baggage is delivered to the company's baggage master, at his direction and on his statement that it would be sent to the passenger's room, the company is liable for the full value in case of loss, notwithstanding such limitation.

A common carrier may, by special contract, limit his common-law liability; but he cannot stipulate for exemptions from the consequences of his own negligence or that of his servants. *New Jersey Steam Nav. Co. v. Merchants Bank,* 6 How. 344. In *Railroad v. Lockwood,* 17 Wall 357, it was held that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. In *Gibbons v. Paynton,* 4 Burrows, 2298, Lord Mansfield said: "A common carrier, in respect of the premium he is to receive runs the risque of the goods, and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risque. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of

more guards or other methods of security; and, therefore he ought, in reason and justice, to have a greater reward."

In the case before us four of the judges concurred in the rendition of the judgment against the company. Three of the judges dissented. The court held that the provisions of the passage ticket did not apply to luggage intended to be taken by the passenger to her stateroom for use during the voyage, but only to such as might be delivered to the defendant to remain in its possession until the termination of the voyage. As to baggage of a passenger delivered to its exclusive possession, the carrier assumes the full liability of a common carrier and is an insurer. *Powell v. Myers,* 26 Wend, 591. Where baggage remains partly in custody of the passenger the rule is different. It has been held that a company is not liable for the theft of an overcoat taken from a seat in a car, except in case of negligence. *Carpenter v. N. Y., N. H. & H. R. R. Co.,* 124 N. Y. 53. When property is stolen from the stateroom in which the passenger deposits his baggage for his use during the voyage the company is liable. *Adams v. N. J. Steamboat Co.,* 150 N. Y. 163. The court further decided that the language of the ticket, which is to be construed against the carrier, supports the view that it was not intended to include baggage taken by the passenger into his cabin for use during the voyage. It provided that if the value of the passenger's effects exceeded $100, freight at a certain rate should be paid thereon. Certainly it could not have been expected that the personal effects of the passenger taken into his cabin or stateroom, the use of which changed from day to day, or, during the same day, should be paid for as freight.

A strong dissenting opinion was written. The contentions of the minority of the court were as follows: The contract was comprehensive enough to include all kinds of property, and had there been any intention to make any exceptions it would have so stated. It made no difference whether the custody was for the whole of the voyage or part. The moment the defendant became responsible for them at all, the liability, necessarily was measured by the value theretofore agreed upon, if not then otherwise declared. It is just to hold the shipper to his agreement, fairly made, as to the value, even where loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. *Hart v. Penn. R. R. Co.,* 112 U. S. 331.