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WELCH *v.* MAINE CENTRAL R. R.[1] SUPREME COURT OF MAINE. AUGUST 17, 1894.

The plaintiff was in the employ of another who was engaged by the owner upon the work of filling up and grading a piece of land situated on the side of defendant's railroad. The defendant had made an arrangemen with the owner of the land, by which the railroad company was to furnish him the dirt, with which to fill his land to the grade of the tracks and street. The dirt was loaded by the defendant's servants upon the dump-cars, owned and managed by the defendant, and conveyed from a point a short distance from the place to be graded. The business of dumping and the men, who were to engage in it, were under the direction of a conductor of the dumping train, who had also the authority to hire men, when, as he thought, his crew was insufficient for the work. This conductor requested the plaintiff employer's workmen, including the plaintiff, to assist in dumping the cars, and after the first day they did all the dumping. These facts were also known to the defendant's chief engineer, who had the entire charge of the work and made daily visits.

While so engaged the plaintiff attempted to dump a loaded car but because of its condition, of which he was ignorant, it tipped and fell upon him. This car had been disabled some hours before, and was improperly continued in the work, after having been set aside for repairs.

EMPLOYER'S LIABILITY FOR HIS SERVANTS' NEGLIGENT INJURY OF ONE WHO HAVING AN INTEREST IN THE OPERATION, ASSISTS IN IT.

In this case it was determined that "if one who has no interest in the work to be performed, a mere bystander, voluntarily assists the servants of another, either with or without the latter's request, he must do so at his own risk." And, also, "one who has an interest in the work

[1] Reported in 86 Me. 552.

to be performed, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants. In the former class of cases the master will not be responsible. In the latter he will be." Three of a court of eight justices dissented, and, as no further opinion is given, their dissent must be taken to have gone to the general proposition, or even a proposition less broad, but sufficient for the decision of the case.

It is thought, first, that the above is stated too broadly for the authorities cited, and, perhaps, exceeded the intention of the court.

Second, even the proposition limited to the requirements of the decision cannot be sustained on principle.

Third, while some of the authorities cited do support the decision, they cannot be considered as well reasoned, as will be shown; and one of the cases cited is really against it.

In the opinion of the court to which the Chief Justice and two associates dissented, it is said: "It is insisted in the defence that it was the duty of the railroad company to dump Jose's earth out of the cars, and that they had no authority to employ Jose's men to assist them, and that Jose's men were trespassers in attempting to do so, and that being trespassers the railroad company owed them no duty, and was under no obligation to protect them against the carelessness of its servants." They followed the language first quoted, and instructions to the same effect were sustained.

As will be seen when the cases in its support are given, they all relate to injuries by a consignee assisting the servants of a consignor. In these cases the "interest in the work" is really the ownership of the thing to be done; and the "work" is the limit of the business of the consignor and the beginning of that of the consignee. The considerations which would make the master liable for the negligence of a servant, injuring one receiving his own property, might be very different from those where one interested merely in the general success of the operation, assists in the business purely

that of the employer, by whose servants' negligence he is injured. It was not the purpose of the court to determine the extent of the rule but merely to distinguish the position of one "having an interest in the performance of the work" from a volunteer properly so called. But where most of the cases cited arose out of this relation, and the reason stated for the proposition was only applicable to this relation, this should be made clear in the statement of the proposition.

We have next to determine whether the more limited proposition applicable to the facts and reason of the case can be supported on principle. This is whether an employer is to be held liable to one who assists his servants in their work of delivery, because of his interest as consignee or servant of consignee, and is injured by the servant's negligence.

There is no more familiar and well settled rule than that of the employers liability for his servant's negligent injury of strangers to the employment. At the same time the artificial reasons given to support the rule must certainly have lead to confusion in practice. This error consists in attempting to trace the connection between the injurious act of the servant and some personal fault of the principal who is sought to be made liable. Just as no man personally acts at his peril or is liable for all the damage he may do, and on the other hand cannot limit his liability by a lawful intention, in that extension of his person and responsibility he is not liable for all acts of his agent or servant which are made possible by the employment, nor yet is his responsibility limited by his intention or reasonable expectation. The limitation of responsibility for personal acts and that in agency are to be determined by public policy. And this is the method for securing in largest measure the ends for which the law aims. Two at least of these ends may be stated, that is, freedom of individual action and also enterprise by means of agents and the so-called personal rights. It is not meant that the exact position of public policy can be stated or is to be discovered by any process in the particular case. All that is meant is that there is a support to the rules which prevents us from referring it to a single absolute principle which is either in itself necessary or

deduced from any such primary principle. There is therefore no *a priori* reason for the rule of the master's liability, but in certain positions public policy has placed the application of the rule beyond question. In most of the cases where the master is made liable the person injured is in the exercise of an independent right, that is, receives no profit from its being conducted and takes no part in it. This was doubtless one of the considerations which influenced the minds of the courts who established the rule of coservice. It was not merely an interest in the general success, but actual placing one's self in the position of danger for the purpose of the business in whose success the injured servant was interested: *Baugh* v. *R. R.*, 149 U. S. 368; *Moynihan* v. *Hills Co.*, 146 Mass. 586; *Hedley* v. *Steamship Co.* [1894], App. Cases, 222; *Wilson* v. *Merry*, 1 H. L. Se. 326; *N. Y. Lake E. & W. R. R. Co.* v. *Bell*, 112 Pa. 400.

The master's exemption has been extended to the case, where the general servant of another is hired or loaned to him for a special work, and works with his servants. Here the ultimate purpose of the general servant is to facilitate his first master's business, and his engaging in the business of the second is only subsidiary to that end. But, in law, its ultimate purpose is disregarded; coming into the position of a servant and under its peculiar risks and not in the exercise of independent rights, he is refused redress against the master for the servant's negligence: *Donovan* v. *Laing* [1893], 1 Q. B. 629; *Johnson* v. *Lindsay* [1891], A. C. 371; *Hasty* v. *Sears*, 157 Mass. 123; *Killen* v. *Faxcon*, 125 Mass. 485. In this case the question is whether the interest of the consignee in the delivery should be held sufficient to confer upon him the rights of a stranger on his own business, or place him in the position of one without such interest, a pure volunteer, or that of a special servant. It is to be admitted that the fact of interest seems to put the person in somewhat a better position than a mere volunteer. Yet such a person is not exercising an independent right, and is to be placed in no better position than a special servant, unless it is held that every servant intrusted with delivery has the authority to permit the assist-

ance of the consignees, and that, further, this would place the consignee assisting in the position of a stranger. Delivery is doubtless a matter of intention so far as passing title is concerned; but whether the manner of it will charge the consignor or consignee depends upon the one to whose servants the direction of the delivery is made. Thus in *Union Steamship Co.* v. *Claridge* [1894], App. Cases, 185, where a steamship company retained control over its servants who assisted the servants of the stevedores in discharging a ship of the defendants, they were held liable for the negligence of a watchman, who injured one of the servants of the stevedores. It is doubtless that the master should not be made liable to those who force themselves into his business, to say that the servants have authority to permit, is to beg the question.

It is impossible to derive any assistance in answering this question from the rule of the carrier's liability for his servant's negligent injury of trespassers. In some cases, he is said to be liable for no negligence; in some cases, only where the injury is wilful, while, in other cases, he is liable for negligence somewhat greater than that necessary to make him liable for an injury to a passenger. The rule, with regard to the negligent injury by servants of a carrier of passengers, has been made peculiar by the public nature of the business and by the quasi-surety position in regard to passengers. Much of the language used in holding the carrier liable for the servant's negligent or wilful injury of trespassers is applicable only to a personal liability of those at fault.

We will now review a few of the authorities. The facts of *Degg* v. *Midland Ry. Co.*, 1 H. & N. 773, is thus stated by BRAMWELL, B.: "The defendants were possessed of a railway and carriages and engines; their servants were at work on the railway in their service with those carriages and engines; the deceased voluntarily assisted some of them in their work; others of the defendant's servants were negligent about their work, and by reason thereof the deceased was killed; the defendant's servants were persons competent to do the work; the defendants did not authorize the negligence." It was held that no action could be maintained because the deceased could

place himself in any better position by his voluntary act than if he had actually been a servant. The court also said: The law for reasons of supposed convenience more than on principle makes a master liable in certain cases for the acts of his servants, not only in cases in the nature of contract, which depend on different considerations, but in cases independent of contract, such as negligent driving in the public streets, when damage is thereby done. This is a responsibility the law has put on them; there is a duty on them to take care that their servants do no damage to others by negligence in their work for their master, or compensate the sufferer where such damage is done. The public interest may require this for the public benefit; but why should a wrong doer have power to create such a responsibility and such a duty?

Four years afterwards the same rule was applied in *Potter* v. *Faulkner*, 1 Bert & Smith, 800. In this case the plaintiff was waiting with a "lorry" to receive a load of cotton for his master from the defendant's warehouse, and at the request of the defendant's carter, assisted in lowering a bale of cotton into the lorry of another and was injured by the negligence of the defendant's porters. The plaintiff was held to have put himself in the position of a fellow servant, and the master was not held liable. In this case the ultimate purpose of the plaintiff was to facilitate his master's business, yet this does not seem to have received any attention.

In 1887 a somewhat similar case, *O'Sullivan* v. *O'Connor*, occurred in Ireland, 22 T. R. I. 467. The plaintiff after purchasing some felt of the defendant with the permission of the servant, went into the loft where it was stored, to inspect the article purchased. The loft was open at one end and the plaintiff was acquainted with its construction. While unrolling the felt, and walking backwards, the plaintiff fell from the loft and was injured. It was held that in assisting the servant he was "a mere volunteer, a mere licensee." Here his interest in the purchase did not entitle him to assist the servant and impose any greater liability on the employer with regard to his premises.

The recent case of *Wischam* v. *Richards*, 136 Pa. 109

[1890], is against the decision in the principal case. The defendant had contracted to deliver to one B. a large fly-wheel, ten feet in diameter and weighing five thousand pounds. The wheel was brought to B.'s place of business for delivery in two sections, and was in charge of three of defendant's men. B., the consignee, made some suggestions as to proper support for the derrick and rigging which belonged to the defendant and was in their charge. The consignor then left and was absent thereafter. At the request of the defendant's man, the foreman of B. called a workman in the employ of B. to assist in the work of delivery. The plaintiff responded and by the negligence of a servant of the defendant was injured. The court said that the case was a close one, highly exceptional in its facts, and apparently without precedent. The plaintiff was held to be in the position of a fellow servant and therefore had no right to recover. As to the suggestion that the plaintiff assisted only at the discretion of his superior, which determined the mind of the lower court in removing him from the class of volunteers, the court said: "As I regard the matter, the cases teach us that it is not because the associated servant is a volunteer, that he is denied redress for the negligence of a fellow servant, but because it is the well established law of the relation between the servants whom he joins, and their master, that their is no such liability on the part of the master. Hence by joining them in their common service, he becomes, as to the master, one of them with the same rights and duties as to the master, but with no higher rights as against him. Certainly, without his consent he cannot reasonably be subjected to a greater obligation, by the act of one of his servants in engaging the service of another, than he is under to that servant." The court is not so sound in distinguishing the case at hand from that in which a consignee assists the servants of the consignor in the delivery of his own article. It is not clear why there should be any distinction; the servant's business is certainly that of his master so far as to entitle him to take part in the delivery.

The position of a mere volunteer is well settled: See also *Church* v. *Chicago, M. & St. P. Ry. Co.*, 52 N. W. R. 647;

Flower v. *R. R. Co.*, 69 Pa. St. 210; *Files* v. *B. & N. R. Co.*, 31 N. E. 311; *Sherman* v. *R. R. Co.*, 72 Mo. 62; *Sparks* v. *Ry. Co.*, 82 Ga. 156. On the other hand, the position of the court in distinguishing one who has an interest as consignee in the performance of the work, assisting the servants of the consignor, is sustained by some of the cases.

In *Holmes* v. *N. E. Ry. Co.*, 4 L. R. Ex. 254 [1869], the defendants had a siding at their station, on which cars were shunted, and from which consignees received coal. There was but one porter at the station; and it was customary for the consignees or their servants to assist in the operation of unloading and, for the purpose, to pass along a flagged way. The plaintiff, a consignee of coal, went to the station, and, not being able to give it to him in the usual manner, he was permitted to take what he needed, and, while descending on the flagged way, was injured. It was held that the habitual use of this method of delivery imposed on the defendant the duty to keep this way in condition, and that the plaintiff was not a mere licensee. This case is to be distinguished, because the mode was habitual, and the assisting was mere receiving. But the case, which does support the principal case, is *Wright* v. *L. & N. W. R. R.*, L. R., 10 Q. B. 298; 1 Q. B. D. 252. In this case the plaintiff sent a heifer by defendants railway to to their station. On arrival, there being only two porters available for shunting the car containing the animal to the siding from which alone the plaintiff could receive it, in order to save delay the plaintiff assisted in shunting the car. While so doing, he was injured by the negligent running of another train on this siding by the defendant's servants. In this case there was also a practice of allowing persons to assist in getting their cattle cars shunted; and the station master was standing by, and made no objection to the plaintiff's assisting. The plaintiff was allowed to recover. MELLISH, L. J., put his decision on the ground that it was the plaintiff's property, the practice at the station, and the assent of the station master. CLEASBY, B., said, "according to an usual practice, he assisted in the delivery of his own goods, on his own behalf not as a servant of the company." If there had been no such general practice

and the plaintiff had assisted at the invitation of those engaged in the work, the decision might have been different.

In *Evarts* v. *St. Paul, M. & M. Ry. Co.*, 57 N. W. 459, the rule of volunteers was limited. If, after discovering that the volunteer has placed himself in a position of danger, the servants fail to use reasonable care to avert the damage, the master will be liable. The court said: "We fail to see why a volunteer should have any less rights than a mere trespasser. Because a man is a trespasser or a volunteer, he is not, therefore, an outlaw, so as to permit others to wilfully or recklessly do him an injury. It is no doubt the law, as repeatedly held, that if a person volunteers to assist the servants of another, the master as such owes him no duty; that he assumes all the ordinary risks of the situation; that he cannot recover from the master for an injury caused by a defect in the instrumentalities used, or by mere negligence of the servants." Such a distinction makes the rule valueless and unmeaning. Neither the trespasser nor the volunteer is an outlaw, and, if the master or the servants with his authority injured such a one, the master might well be made to answer. But the question is whether this should be the case where the injury is beyond the authority.

It certainly seems hard to hold that where a passenger on a street railway car assists in backing the car on the track, and is carelessly run against and injured by other servants of the railroad, he should be without recovery. (In *Street Ry. Co.* v. *Bolton*, 43 Ohio St. 224, such a person was allowed to recover.) But this is only because the person was where he had a right to be independently, and his assisting did not bring him into any peculiar dangers: See also *Eason* v. *Ry. Co.*, 68 Texas, 577. H. A. C.