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The Fellow Servant Rule in Admiralty Cases Involving Stevedores

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Dean Condon is dead. The University of Washington Law School was the interest nearest and dearest to his heart, and we students of that Law School cannot fail to mourn him.

But Dean Condon can never die. His memory is enshrined in the institution he founded, and as long as that endures, so long will be live.

The Washington Law Review owes its existence directly to him. It was he who enabled it to come into being. Those of us who are now or may in the future be members of its staff, pledge ourselves to building of it a memorial to our Dean, John T Condon.

THE FELLOW SERVANT RULE IN ADMIRALTY CASES INVOLVING STEVEDORES.—In view of the recent decision of the Supreme Court of Washington in the case of *Haverty v. International Stevedoring Co.*,[1] it becomes a matter of importance to ascertain just what the maritime law is in regard to the application of the fellow servant rule in cases where a stevedore has been injured as the result of the negligence of a fellow servant.

Before going into the main question, it will be better to advance the following:

First: A stevedore is engaged in a maritime service when at work upon a ship afloat in navigable water. *Atlantic Transport Co. v. Imbrovek.*[2]

[1] 34 Wash. Dec. 116, 235 Pac. 360 (1925).

[2] 234 U. S. 52, 58 L. Ed. 1208, 34 Sup. Ct. Rep. 733 (1914).

Second. The law applicable to such service is governed exclusively by the admiralty decisions of the Federal judiciary. *Southern Pacific Co. v. Jensen.*[3]

Third. By virtue of the Federal Constitution, the maritime law remains uniform throughout the United States. No State authority, either legislative or judicial, may change or modify it. *Chelentis v. Luckenbach S. S. Co.*[4]

Fourth The general maritime law is a part of the law of the United States and its interpretation is solely in the hands of the Federal judiciary In deciding maritime cases tried in State courts, the State Supreme Court must follow the Federal decisions. *Knickerbocker Ice Co. v. Stewart.*[5]

Before going into the facts of the *Haverty* case let us see what the maritime law is in regard to our question.

There are a large number of Federal cases involving injury to stevedores, engaged in maritime service upon navigable waters, and caused by the alleged negligence of a fellow servant. But most of them are decided, not by application or rejection of the fellow servant doctrine, but upon the ground that the injured party was not given a safe place in which to work nor supplied with safe appliances. When such a condition arises, the one in authority is treated, not as a fellow servant, but as a vice-principal, because this duty of the master is non-delegable and any negligence of the vice-principal is imputed to the master. *Atlantic Transport Co. v. Imbrovek, supra; O'Brien v. Luckenbach S. S. Co.;*[6] *Port of N Y Stevedoring Corp. v. Castagna;*[7] *The Kinghorn.*[8]

In *The Hoquiam,*[9] the libelant was working in the hold of the ship loading railroad ties. The District Court found that the injury occurred because of the negligence of the hatchtender, who was in authority over the libelant, and rendered judgment in favor of the injured stevedore. The Circuit Court of Appeals, after holding that the Jones Act,[10] (relieving "seamen" from the operation of the fellow servant rule under certain conditions), did not extend to stevedores, reversed the decree because the hatchtender and the libelant were fellow servants.

In *Western Fuel Co. v. Garcia,*[11] a stevedore working in the hold of a ship was killed by a load of coal being dumped upon him through the negligence of the hatchtender. Recovery was had in the trial court

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[3] 244 U. S. 205, 61 L. Ed. 1086, 37 Sup. Ct. Rep. 524 (1917).
[4] 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. Rep. 501 (1918).
[5] 253 U. S. 149, 64 L. Ed. 834, 40 Sup. Ct. Rep. 438 (1920).
[6] 293 Fed. 173 (1923).
[7] 280 Fed. 618 (1922).
[8] 297 Fed. 621 (1924).
[9] 165 C. C. A. 253, 253 Fed. 627 (1918).
[10] U. S. Comp. Stats. §8337a.
[11] 171 C. C. A. 565, 260 Fed. 839 (1919).

and on the first appeal the judgment was affirmed. Upon rehearing the case was reversed. The court said in part: "The error into which we then fell grew out of our not treating the deceased, the winchdriver and the hatchtender as fellow servants."

In *The Cedric*,[12] the libelant was struck on the back of the head as he was stooping to lift a case and pass it on. In dismissing the libel the court said. "If the gangwayman should have given warning to the libelant below that the draft was coming down, not doing so would be negligence of a fellow servant."

In *Cassil v. U S. Emergency Fleet Corp. et al.*,[13] the injury was caused by the negligent operation of the winch by the winchman. Here the court said in dismissing the libel. "There can be no doubt that for his injuries the appellant may bring a libel against his employer in admiralty for damages as for a maritime tort. Yet in such an action, in an admiralty court, the doctrine of fellow servant still obtains."

In every instance, without exception, where the Federal courts have allowed recovery for injury to a stevedore, the case has been decided squarely on the ground that *from the very beginning* a safe place was not provided for the injured party to work in or safe appliances were not furnished for him to work with—and this being a non-delegable duty of the master, there remained no bar to a recovery. But it is the problem of deciding just when this duty has been fulfilled by the master that has led to some confusion.

The cases seem to indicate clearly that the master's duty is one of provision—he must provide a safe place, safe appliances and competent fellow servants (it is presumed that competent fellow servants have been furnished to carry out details of operation. *Wabash Ry. Co. v. McDaniels*[14]). The servant's duty, however, is one of operation—to carry out the details of his work along with his fellow servants in such a careful manner that he will not cause injury to them. *Hermann v. Port Blakely Mill Co.*;[15] *Gulf Transit Co. v. Grande*;[16] *The Hoquiam, supra, Western Fuel Co. v. Garcia*;[17] *The Cedric*.[18]

In the *Haverty* case, the plaintiff, a stevedore, was working in the hold when he was injured by being struck by a descending load while stooping over to lift a bale of wool and pass it on. The accident occurred through the failure of the hatchtender to give the usual warning that a load was about to descend. After stating that the ruling in *The Hoquiam*, (that stevedores are not "seamen" and so not relieved of the operation of the fellow servant rule under the Jones Act, *supra*), was binding upon the State court, Chief Justice

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[12] 299 Fed. 815 (1922).
[13] 289 Fed. 774 (1923).
[14] 107 U. S. 454, 27 L. Ed. 605, 2 Sup. Ct. Rep. 932 (1882).
[15] 71 Fed. 853 (1896).
[16] 138 C. C. A. 243, 222 Fed. 817 (1915).
[17] 167 C. C. A. 145, 255 Fed. 817 (1919).
[18] 299 Fed. 815 (1922).

Tolman said. "It therefore becomes necessary to inquire whether the hatchtender was a fellow servant of the respondent (the injured stevedore) under the maritime law"

The court then quotes an elaborate history of the fellow servant doctrine from RULING CASE LAW[19] which ably traces the origin and development, including the exceptions that exist. The last exception mentioned deals with the "absolute" or "non-delegable" duties of the employer. The reference does not, however, attempt to specify these particular duties. In affirming the judgment for the plaintiff, our Supreme Court decided the hatchtender was a vice-principal under the "non-delegable" duty theory The question now arises as to whether the court gave its own interpretation of the maritime law or followed the Federal decisions in similar cases.

In *Hermann v. Port Blakely Mill Co., supra,* the libelant was injured when the man whose duty it was to warn those below, failed to give the signal. The court there said.

"The rule (requiring the master to furnish a safe place to work) itself is well settled. The question here is whether the negligence of the person on the wharf, whose duty it was to give the warning signal, and who failed to do so was a breach of the master's duty to furnish libelant a reasonably safe place to work in, or whether it was the negligence of a fellow servant, not engaged in the performance of a positive duty required in the master. It is important to observe in this connection that libelant was not injured by reason of any defect or inherent danger in the premises or place where he was engaged in working, which the master knew or should have known, and which the libelant did not know; but he was injured solely by reason of the fact that the person whose duty it was to give the warning signal omitted to do so.

"Having selected a competent person, the master has done all that the law requires of him, and any negligence of such employee is the act of a fellow servant, for which the master is, by general law, exempt from liability. This view of the case is confirmed by inquiring into the danger which existed and its cause. The only fact that rendered the place unsafe was the failure to give the signal."

The same rule was laid down in *Gulf Transit Co. v. Grant, supra,* and in *Kreigh v. Westinghouse*[20] the U S. Supreme Court remarked.

"But while this duty (of furnishing a safe place and safe appliances) is imposed on the master, and he cannot delegate it to another and escape liability on his part, nevertheless, the master is not held responsible for injuries resulting from the place becoming unsafe through the negligence of the workmen in the manner of carrying on the work, where he, the master, has discharged his primary duty of providing a reasonably safe place and appliance for his employees to

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[19] 18 R. C. L. 730-31.
[20] 214 U. S. 249, 256, 53 L. Ed. 984, 29 Sup. Ct. Rep. 619 (1908).

carry on the work, nor is he obliged to keep the place safe at every moment, so far as such safety depends upon the due performance of the work by the servant and his fellow workmen."

In the *Haverty* case there was no contention that the master had failed to provide safe appliances. Nor was there any evidence or contention that the place provided was unsafe up to the time of the injury. The thing that made it unsafe at all was the fact that the hatchtender failed to give a warning signal. In deciding this "duty to give a warning signal" was a non-delegable duty of the master's, the court cited only three Federal cases. In the first of these, *Alaska Pacific S. S. Co. v. Egan*,[21] the master was held liable for having furnished an unsafe appliance. In the second, *Pacific American Fishery Co. v. Hoof*[22] the master was held liable for having provided an unsafe ladder. In the third, *The Kinghorn, supra,* the master was held liable for having furnished an unsafe appliance. The court admitted there had not been a single case cited that "avowedly adopted the vice-principal modification" but stated the three above cases "seemed to have applied it" As a matter of fact the Federal courts have refused to adopt it as a part of the maritime law

Mr. Frederick Cunningham, in an article in the HARVARD LAW REVIEW[23] written in 1904 and entitled "The Extension of the Fellow Servant Doctrine to the Admiralty", deplored the fact that the fellow servant rule was being applied in maritime cases and was of the opinion that the first opportunity the U. S. Supreme Court had, they would promptly rule it out. But later, in *The Osceola*,[24] it was held that all members of the crew, without regard to rank, except perhaps the master, were as between themselves fellow servants and therefore could not recover for injuries sustained through the negligence of each other beyond the expense of maintenance and cure. Apparently this decision removed any previous doubt that might have existed as to the fellow servant rule being recognized in the Admiralty, for Congress then passed the Jones Act which abolished the fellow servant rule by providing "seamen having command shall not be held to be fellow servants with those under their authority" Then the case of *Atlantic Transport Co. v. Imbrovek, supra,* definitely settled that a stevedore, while working on a ship afloat, is engaged in the performance of a maritime service. Following this, *The Hoquiam, supra,* decided that the Jones Act related only to seamen and did not apply to stevedores. It would certainly seem to follow then, that until Congress sees fit to pass another act, relieving stevedores from the operation of the fellow servant rule, the rule should remain as to stevedores just the same as it was to seamen before the Jones Act.

Summing up then, with all due respect to our Supreme Court, it

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[21] 121 C. C. A. 225, 202 Fed. 867 (1913).
[22] 291 Fed. 306 (1923).
[23] 18 HARV. L. R. 294.
[24] 189 U. S. 158, 47 L. Ed. 760, 23 Sup. Ct. Rep. 483 (1903).

would seem that under the authorities, assuming that a safe place to work in and safe appliances to work with, are furnished by the master, a stevedore cannot recover for an injury caused by the negligence of a fellow servant, even though the negligence which causes the injury is the failure of one of his co-workers to give a warning signal that is customary in that business.

Fred R. Boynton.

WHEN MAY AN ULTRA VIRES CONTRACT BE ENFORCED IN WASHINGTON?—Under the early common law, an *ultra vires* contract of a private corporation was absolutely void, on the theory that there being no power to make such a contract, legally there was no contract. It is at the present time well established in practically all jurisdictions that neither an action at law nor in equity can be maintained either by or against a corporation on an *ultra vires* contract which remains *executory* as to both parties or has been only partially performed, even though unanimously ratified by the board and stock holders.[1] It is also well settled that where such a contract has been fully performed by both parties, the courts will leave them where they have placed themselves, both being deemed *in pari delicto*.[2]

But on the question of the enforceability of a contract which has been fully or substantially performed by one party but remains executory as to the other, there is a direct conflict of authority The United States Supreme Court and other federal courts, England, and a few of the states adhere strictly to the early rule that an *ultra vires* contract is void *per se* for lack of power to make the same, and consequently that no rights can be acquired thereunder, by performance, estoppel, or otherwise.[3] This is, as a matter of technical theory, the most logical rule, although not necessarily the most just. Such courts, however, frequently seek to prevent an injustice by allowing a recovery by the party who has performed, for the reasonable value of the benefits actually conferred upon the other in money, property, or services, not upon the express contract but in disaffirmance of the contract, upon the theory of a *quasi* contract implied by law to avoid unjust enrichment of the defendant.

A greater number of the State courts follow the "state rule" that an *ultra vires* contract is not strictly void but merely voidable, that

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[1] 3 FLETCHER CYC. CORP. 2594, §1530; 14a C. J. 317 7 R. C. L. 675.

[2] 3 FLETCHER CYC. CORP. 2655, §1585; 14a C. J. 319.

[3] *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55, 11 Sup. Ct. 478 (1890) *Pittsburgh, Cincinnati and St. Louis Ry. Co. v. Keokuk and Hamilton Bridge Co.*, 131 U. S. 371, 33 L. Ed. 157, 9 Sup. Ct. Rep. 770 (1889) *Louisville, New Albany & Chicago Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081, 19 Sup. Ct. Rep. 817 (1899). The following states adhere more or less closely to the federal rule: Alabama, Illinois, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Ohio, Tennessee and Vermont. See also 3 FLETCHER CYC. CORP. 2600, §1539· 14a C. J. 319· 7 R. C. L. 678.

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