JUDGMENTS

OF THE

SUPREME COURT OF THE S.A.R.,

IN THE CASES OF

LEWIS *v.* THE SALISBURY GOLD-MINING CO.

AND

ANDREW *v.* THE ROBINSON G.-M. CO.,

DELIVERED 1ST FEBRUARY, 1894.

REVISED BY THE CHIEF JUSTICE.

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OF THE

Supreme Court of the South African Republic.

LEWIS *vs.* THE SALISBURY GOLD-MINING CO.

A master is liable to his servant for injuries sustained by the latter through the negligence of a fellow servant, acting in a common employment. The exemption in favour of the master in such case, allowed by the common law of England and the United States, is unsound in principle and contrary to the Roman-Dutch Law.

KOTZÉ, C. J.—

This is an action for the recovery of £1,500, as and for damages sustained by the plaintiff. The summons sets forth that the plaintiff, while in the service of the defendant Company as a miner, and while being lowered down the shaft of defendant's mine, in a cage provided for that purpose, was seriously injured through the default of the engineman, who, without the exercise of proper care in letting the cage down the shaft, and in suddenly winding it up again, was the cause of the plaintiff being precipitated some 80 feet down the shaft, with the result that his right leg was broken and had to be amputated. The defendant Company pleaded by way of exception, or in bar of the action, that *ex facie* the summons the plaintiff was injured by his fellow servant in the course of their common employment, and that consequently no liability attached to the Company. The case was heard in the Circuit Court at Johannesburg before my brother De Korte, who sustained the exception, and from this ruling the plaintiff in the Court below now appeals to the Supreme Court. The point, which arises for decision in this matter, is of considerable importance, especially to the mining community of this country. There is, as far as I am aware, no decided case in our South African reports bearing on the present inquiry, and consequently we must have re-

course to the Roman-Dutch law. Failing authority in that System of jurisprudence, we must fall back on the Roman law, upon which that jurisprudence is based, and if that likewise be silent we must decide according to general principle. On behalf of the appellant it has been argued that by Roman-Dutch law a master is liable for the acts of his servant, committted in the course of the servant's employment, and that no exception exists, exempting the master from liability, where injury has been caused to a servant by his fellow servant, while carrying out a common employment, or discharging a common duty. It was very ably contended by Mr. Wessels, for the appellant, that the *onus*, of establishing the existence of the alleged exception in our law, rests with the respondent, and that in the absence of any approved authority to that effect, the learned Judge in the Court below was not justified in following the rule of the English common law, and so introducing a foreign legal principle unknown to our jurisprudence.

Grotius, in his *Introduction* (*bk.* 3, *ch.* 1, § 34) says, that a master is not bound by the act of his domestic servants, except where such has been expressly provided by statute, and, in Ch. 38. § 8, he adds that a master is only liable in general for the wrongs of his servant, to the extent of the latter's unpaid wages. Van der Keessel (Th. 478), in his commentary on this passage in Grotius, observes that masters, who have not been benefited thereby, are not as a rule bound by the delicts of their domestic or hired servants, committed in the discharge of their duty. They are, however, liable where, in a work requiring skill, the servants have shewn themselves unskilful. It seems to me that the rule is somewhat obscurely and too narrowly stated here, and that Chief Justice Schorer (*ad Grot.* 3, 1, 34) has approached nearer the truth when he says, "Grotius rightly remarks that masters are not liable for the acts of their servants to a greater extent than their wages. But the masters will be liable for the whole, when they have expressly entrusted some service to their management, and the servants have through their negligence therein caused any damage. (*Brunnemann ad Pand.* 39, 4, *l.* 1, *n.* 6.) And this is by no means unjust, because they could have selected more careful servants. Likewise by *Placaat* of the States of Holland, keepers of the downs are liable for their servants if they have laid poison in the downs, or have killed the dogs of anyone entitled to a free right of the chase. In a similar way bleachers are liable for the acts of their children and servants, whenever the latter do anything contrary to the laws with respect to bleaching (*Voet.* 9, *tit.* 4). But this in my opinion must be taken to refer to the negligent or careless act of the servant, inasmuch as the master could have employed more careful servants, but not if the act be

wilful,* in which case the master is not liable to make compensation, but can escape liability by leaving the servant to undergo the punishment, for everyone must suffer for his own wrong." Brunnemann, in the passage referred to by Schorer, says, *Et ex.* § *Familiæ* 5, *colligitur etiam pro liberis, pro servis mihi servientibus me obligari, si in officio, quod eis a me commissum, delinquant.* Van Leeuwen in his Commentaries (*Bk.* 4, ch. 39, § 2), Voet (9, 4, § 10), Pothier (*Obligat.* § 121, § 456), and other writers likewise lay down the general principle of a master's responsibility for the negligence of his servants, acting within the scope of their employment; but do not discuss the position of the master, where one servant causes injury to another servant engaged in the same common employment. The Roman lawyers, too, appear not to have treated this precise point, for the probable reason that in their day the state of society, owing to the existence of slavery, was different to our own, although we can trace the germs of the modern doctrine of the master's liability to the Pandects (44, 7, 5, §§5 and 6). We must consequently decide the question upon general principle; for although the argument, that the *onus* of establishing the exception in favour of exempting the master from liability (in the case of injury sustained by a fellow servant) rested on the defendant in the Court below, is fairly entitled to weight, still, on the other hand, it may be urged that the silence of the Roman-Dutch text writers cannot be taken as conclusive on the point. Mr. Justice de Korte apparently followed the English common law, and it will be advisable to refer to some of the leading English decisions and to consider the grounds on which the exception rests. Before doing so, however, it seems to me necessary to consider the general rule upon which this exception has been engrafted by the case law of England and America.

It is said by Mr. Beven in his very full and able treatise on *Negligence* (Bk. 1, pt. 3, ch. 4) that there is no general rule, that makes one man liable for the negligence of another. The rule is the other way, *culpa tenet suos auctores tantum*, and the liability of a master to third persons, for the wrongful acts of his servants, is itself an exception to this rule. In this view he is supported by Lord Bramwell and Lord Justice Brett, in their evidence given before the Parliamentary Committee in 1877 on employers' liability for injuries to their servants (Q. 1100, Q. 1931). But be this as it may, it is clear from the authorities that, since the time of Charles II. (*Michael* v. *Allestree.* 2. *Levinz.)*, or, as has been suggested (on the authority of *Noy's Maxims*, c. 44) from the time of Charles I., the master's liability to strangers for the negli-

* Cf. Leon ad § 1403 of the Dutch Code, n. 16.

gent acts of his servants was recognised in English law. The ground of his liability has been generally rested on the maxims *qui facit per alium facit per se*, and *respondeat superior*. But this is only partially true. "The doctrine *qui facit per alium facit per se* certainly applies, where the servant does what his master has ordered him to do. If, therefore, the master has ordered his servant to drive untrained horses in a crowded street, then *qui facit per alium facit per se*—it is the same as if he did it himself. If a master saw that his coachman was drunk, and sent him out to drive his carriage, I should say 'you are liable for that, for he is doing the very thing under the circumstances which you told him to do.' But the case supposed always, and in which the master is made liable, is where the servant is doing, not what his master wished him to do, but exactly what his master would tell him not to do, if he had any opportunity; and to my mind the maxim then does not properly apply." (Per Brett, L.J., Q. 1920.) So, in the same way, the maxim *respondeat superior* simply expresses in succinct form the fact of the master's liability, and does not assign any reason for it. Professor Pollock, in his *Essays on Jurisprudence*, *No.* 5, has very skilfully argued out the true reason for the rule, and his remarks may aptly be summed up in the language of Chief Justice Shaw in Farwell's case, to which I will have occasion to refer more fully later on. "This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them, as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it." It is therefore not surprising that this principle of a master's liability for the acts of his servants within the scope of their service—a development of the Roman law doctrine (Dig. 44, 7, *l.* 5, §§ 5, 6), is recognized not merely in Great Britain and America, but also in the Jurisprudence of most civilized countries, including our own State. Its general recognition is its best claim to being founded in sound policy and justice, although Lord Bramwell and Lord Justice Brett incline to the contrary opinion.

Having now stated the general rule of the English and American common law, and the reason for its existence, I come next to the exception engrafted upon that rule, viz., that the master, although liable to third parties, is not liable to his servant or workman, for an injury sustained through the negligence of a fellow servant or workman, in the exercise of their common service, or employment. The master is of course bound to use due care in the selection of his servants, and to furnish proper tackle and machinery. If he neglect either of these duties he will be liable. So will

he be liable, where the servant injured was not engaged in a common employment with the fellow servant causing the injury, but engaged in an altogether distinct department of duty. (*Per Lord Chelmsford, L. C. Barton's Hill Coal Co. vs. McGuire*, 4, *Jur. N.S.*, 773.) For instance, if a man's coachman were to drive over his gamekeeper, the master would be just as responsible as if the coachman had driven over a stanger. (*Per Lord Cranworth, L.C., Barton's Hill Coal Co. vs. Reid*, 4, *Jur. N.S.*, 771.) Much objection has from time to time been taken to the expression *common employment* (L.Q. Review, vol. 1, p. 221), and Mr. Joseph Brown, Q.C., has gone the length of saying that it is an expression incapable of definition. (Parlm. Com., 1876, Q. 502.) To give a precise definition, which will be applicable to every case that may occur, may be next to impossible; but that is no objection to the use of the terms in the absence of something better. As well might we object to the words *actual fraud*, or *material misrepresentation*, because of the difficulty, if not danger, of giving an exact definition thereof. The difficulty suggested has arisen, not so much from the use of the expression *common employment*, as from its most unreasonable application and extension by different Judges to wholly distinct departments of duty, and to persons in entirely different grades of service, under a common master or employer. This will sufficiently appear from an examination of the decided cases. The mere fact of the servant injured and the servant injuring being fellow servants—*i. e.*, having the same master, is not enough to exempt the master from liability. It must be shewn (as we have seen) that the service, which each servant performed, was in some way connected, or that they were employed on what the law considers the same work or department of duty. This for practical purposes is well enough expressed by the words *common employment*, which are used in several of the decisions, and by the House of Lords in the Barton's Hill colliery cases; but the incongruous and unsatisfactory application of the terms by the various courts led to the most unjust results. For instance, *common employment* has been held to include the engine driver of a train and the switchman on a railway; the manager of a lucifer factory with a boy engaged therein; a carpenter employed in mending the roof of a railway station and some porters shifting an engine; a railway labourer and an inspector; a miner and the manager of the pit. When this unreasonable judicial construction had reached its height by the decision of the House of Lords in *Wilson* vs. *Merry*. (*L.R.*, 1, *Sc. App.*) it was indeed time for the Legislature to step in and rectify this judge-made law. It has been well observed "that in *Wilson* vs. *Merry* the House of Lords threw away a great opportunity of improving the law."

(L. Q. Review, vol. 1, 283.) Hence the appointment of a Parliamentary Committee in 1876-77 and the subsequent passing of the Employers' Liability Act.

The first English case, which is generally supposed to have introduced the exception I am considering, is *Priestley* vs. *Fowler* (3 M. and W., 1,) decided in 1837. Up to that date, according to Lord Abinger, C.B., who delivered the judgment of the Court, there existed no precedent for an action by a servant against a master for injury sustained under the following circumstances :—The plaintiff, a servant of the defendant, was by him directed to go with a van belonging to the defendant, in which were certain goods carried for hire and driven by another of his servants. The declaration set forth that while in pursuance of such direction the plaintiff was being conveyed by the said van (it being the duty of the defendant to use due care that the van should be in a proper state of repair and should not be overloaded and that the plaintiff should be safely carried thereby), the van gave way and broke down, whereby the plaintiff's thigh was injured. The Court held the action not maintainable, presumably on the ground that the plaintiff had ample opportunity of judging of the overloaded and unsafe state of the van, and ought, therefore, fairly to be presumed as having with his eyes open taken that risk upon himself. For, as put by Lord Abinger, "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself." The judgment itself has been variously explained by subsequent Judges, but I venture to think this is the true interpretation of it, and that thus understood, the decision may be justified on the ground of *volenti non fit injuria*. It is at any rate no *direct* authority for the non-liability of the master, where injury has been caused by one fellow servant to another in the course of a common employment; although in subsequent cases the Courts have asserted that it is. The reasoning of Lord Abinger in *Priestley* vs. *Fowler* has, however, not without reason, been adversely criticised before the Parliamentary Committee (Q. 282-3, Q. 1999). The first actual decision, establishing the exception in favour of the master, was pronounced by the Supreme Court of South Carolina, in 1841 (*McKenzie* vs. *Goldie*). There the fireman of a railway engine was injured by the engine-driver. The Court seems to have held that both were engaged for the attainment of a common object, and hence the Company was not liable to one of them for the conduct of the other. (*J. Guthrie Smith on the Law of Damages, 2nd ed., p.* 339-40). The next case is also an American decision—*Farwell* vs. *The Boston Railway Co.*, which occurred in 1842. There an engine-driver was injured by the fault of a pointsman, and Chief

Justice Shaw of the Supreme Court of Massachusetts, in a judgment, which has since become historic, and is the fountain head of all the later decisions (*L. Q. Review, vol.* 1, 220), ruled that the Company, that is the employer, was not liable, because the engine-driver must be taken to have impliedly contracted that he would run all the ordinary risks of the service; of which carelessness on the part of a fellow workman, engaged on the same service, was one. At length the Court of Exchequer in England, in the year 1850, in two cases which were decided on the same day (*Hutchinson* vs. *York Newcastle and Berwick Railway Co.*, and *Wigmore* vs. *Jay*, 5 *Ex. S.CC.* 14, *Jur.* 837), laid down the law as previously enunciated by Shaw, C. J., in Farwell's case. In Hutchinson's case, a servant in the employ of a railway company, while proceeding in the discharge of his duty in a train belonging to the Company, was killed by a collision between it and another train belonging to the same Company. The Court, curiously enough, thought the case undistinguishable from that of *Priestley* vs. *Fowler*. The servant injured, and the servant causing the injury, although in different trains, were considered to be fellow servants engaged in a common service. Alderson, B., in delivering the judgment of the Court, said, "The principle is that a servant, when he engages to serve a master, undertakes as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both." The subject first engaged the attention of the House of Lords in 1856, in what are known as the Barton's Hill Colliery Cases (4 *Jur. N. S.* 367, 372). In the case of *Reid*, at page 769, Lord Cranworth, L. C., after considering the liability of a master for the negligence of his servants to strangers, and resting that liability on the maxims, *qui facit per alium facit per se*, and *respondeat superior, i. e.*, the negligence of the servant is the negligence of the master, proceeds as follows: "But do the same principles apply to the case of a workman injured by the want of care of a fellow workman, engaged together in the same work? I think not. When the workman contracts to do work of any particular sort, he knows, or ought to know, to what risks he is exposing himself; he knows, if such be the nature of the risk, that want of care on the part of a fellow workman may be injurious or fatal to him, and that against such want of care his employer cannot by any possibility protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame; he knows that the blame was wholly that of the servant; he cannot say that the master need not have engaged in the work at all, for he was party to its being under-

taken. Principle, therefore, seems to me opposed to the doctrine that responsibility of a master, for ill consequence of his servant's carelessness, is applicable to a demand made by a fellow workman in respect of evil resulting from the carelessness of a fellow workman when engaged in a common work." Lord Cranworth at the end of his judgment refers with approval to the decision of Shaw, C. J., in Farwell's case, who, as already observed, likewise puts the master's exemption from liability upon the doctrine of an *implied contract* between the master and servant. In *McGuire's* case, at page 772, Lord Chelmsford, L. C., with the concurrence of Lord Brougham, adopts the view taken by Lord Cranworth in the case of *Reid*. More recently in 1868, the same question engaged the attention of the House of Lords in *Wilson* vs. *Merry* (L. R. 1, Sc. App.) In that case Lord Cairns, L. C., thus delivered himself. "But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen can not technically be described as fellow workmen. As was said in the case of *Turrant* vs. *Webb*, negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants."

Such is the English case-law on the subject. Ought it to be applied in the present case? The answer to this must depend on the further question, whether the non-liability of a master to his servant in the case of injury sustained through the negligence of a fellow servant is sound in principle or not? With great respect for the eminent men to whom I have referred, I cannot admit the soundness of the view propounded by them. Their reasoning does not carry conviction to the mind. If we refer to Voet (9, 4, 10,) to Schorer and Pothier, we find that they place the responsibility of the master to third parties, or strangers, for the torts of his servants upon the same ground as do the English lawyers. *Quoad* strangers the negligence of the servant, acting in his master's business, is the negligence of the master; but when it is a servant, engaged about the same employment or the same common object as his fellow servant, who is injured by the negligence of the latter, then, according to the English Judges, it is not the negligence of the master, and the rule

respondeat superior, we are told, has no application. Why not? Because it is said there is an *implied* contract on the part of the servant that he takes upon himself the risk of injury through the negligence of his fellow servant, and he must be held to have tacitly agreed that, in the event of such injury, he shall have no claim upon the master, who does not warrant the competency of his servants. Now the master does not necessarily warrant the competency of his servants to strangers, and yet he is liable for the result of his servant's negligence to them. In the reason for this plain common sense rule the element of warranty has no place—the rule rests on other grounds. Hence to assert, as Lord Cairns does, that because a master does not warrant the competency of his servants, therefore he is not liable to a servant for injury caused by the negligence of a fellow servant, is neither logical nor convincing. But, says Lord Cranworth, the workman knows to what risks he is exposing himself—he knows that want of care on the part of a fellow workman may be injurious or fatal to him, and that against that risk his master cannot by any possibility protect him, and consequently the workman, or servant, must be understood to have taken that risk upon himself. It may be conceded that if, from the nature of the employment, there is a certain amount of well-known risk incident to, or connected with, the carrying out of such employment—*e. g.*, the bursting of a boiler in an engine house, or of a lamp in a mine, or an explosion in a gunpowder factory, and so on, where no one is apparently to blame—the servant or workman may fairly be supposed to have agreed to undertake that risk. But this does not, or need not, include the risk of the boiler, or lamp, bursting, or the explosion occurring through the negligence of a fellow workman. If the master is bound to protect strangers against the negligence of his servants, because he is considered able to do so by the selection of proper servants, why should he not be under the same obligation when a fellow servant is injured by such negligence? What justification can there be in principle for exempting the master from liability in the latter case? I will quote one illustration, "Supposing a bricklayer or a plasterer negligently lets drop a pail full of stuff from a scaffold over a public footway, and hits a stranger and a fellow workman who are sitting at dinner together underneath, I cannot find any reason why the employer should be liable for the injury to the one, and not for the injury to the other, whereas, as the law stands, he is liable to the stranger, and he is not liable to the workman, even though the workman, who is injured, is really engaged in a totally different and quite independent part of the work from the work upon which the negligent workman was employed, and could not by any possibility

know anything about the likelihood of his being injured through that man" (Parlm. Com. 1876, Q. 630). If the servant or workman must be held to have taken the risk of injury, resulting from the negligence of a fellow servant, upon himself, and so exempting the master from responsibility, then he should equally be held as having, by the undertaking of the risk, freed the fellow servant, guilty of the negligence, from the consequences thereof. But such is not the case. The servant guilty of the negligence is throughout admitted to be always liable to the servant injured thereby. Chief Baron Pollock indeed, in *Southcote* vs. *Stanley* (1, H. & N.) was bold enough to assert that one servant cannot maintain an action against another for negligence producing injury while engaged in their common employment. It is, however, obvious that the actual wrongdoer, or the party guilty of negligence, must always be liable. The dictum of the learned Chief Baron has never been adopted in England, and the authorities are all the other way. So, likewise, the American case of *Albro* vs. *Jaquith* (1855), which sanctioned the dictum referred to, has been expressly overruled. *(Vid. Beven on Negligence, bk.* 1, *p*t. 3, *ch.* 4, *infin;* 2. *Espinasse Nisi Prius, edit.* 1812, *p.* 107; *cf. Voet & Schorer, ubi cit. Leon ad art.* 1403 *of the Dutch Code, N.* 3 *and* 7. *Dalloz, Jur. Gen.,* § 630, *vol.* 39.) To seek to justify the introduction of this exception to the general rule of a master's liability for the acts of his servants, by referring it to a so-called *implied* contract, is a purely arbitrary proceeding, and contrary to all sound principle. "The master (says Chief Justice Shaw) is not exempt from liability because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the *implied* contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied." *(Farwell's case, L. Q. Review, vol.* 1, *p.* 221.*)* With all deference, I must observe that this is a pure *petitio principii*—a begging of the whole question. It is a mere assumption to say that because of the *implied* contract the master is not bound to indemnify his servant against the negligence of his fellow servant. So, the statement of the learned Chief Justice that the master is not liable in tort, *because* the person suffering does not stand towards him in the relation of a stranger, amounts to a bare assertion and no more. With equal right and justice, it may be said that the master is liable to the servant for the acts of his fellow servants engaged in the same common service, because

of an implied contract between them to that effect. It seems that this latter idea has actually been advanced by some continental lawyers. Thus, in a note by Professor Pollock to a very able article, subsequently incorporated in his book *on Torts*, we read: "M. Sainctelette of Brussels, and M. Sauzet, of Lyons, differ from the current view of French speaking lawyers, and agree with Shaw, C. J., and our Courts, in referring the whole matter to the contract between the master and servant; but they arrive at the widely different result of holding the master bound, as an *implied term of the contract*, to insure the servant against all accidents in the course of the service, and not due to the servant's own fault or *vis major*." (L. Q. Review, vol. 1, 221.) After I had formed the view of the unreasonableness of the exception, and the undesirability of recognising it in our jurisprudence, which merely gives the general rule, and had acted on such view in the case of *Jones* vs. *Barnett & Co.* (*), decided by me in the Circuit Court at Johannesburg in May last, I have been able to procure a copy of the Report of the Evidence taken by the House of Commons Committee on Employers' Liability in 1876-77. It is satisfactory to find, from a perusal of that report, that the conclusion, at which I had arrived, is also shared by some English lawyers of no mean repute. Mr. Ilbert, Mr. Wright, and Lord Justice Brett, have given it as their opinion that the grounds advanced for the existence of the exception are untenable, and that the exception should be entirely abolished. I will quote a few passages. "It is an exception from a more general rule; it is an anomaly; it is what Roman lawyers would call an *inelegantia*, and as such it should show cause for its existence. It is peculiar to English law, and to the law of the United States, which, in this respect, is borrowed from, and based on the English law. It was introduced into the English law quite recently, and without due discussion or legislative authority. It is said to be based on the authority of a judicial decision *(Priestley* vs. *Fowler)*, but when that decision is examined, the case usually cited as the first authority for the rule is found on examination to be no authority at all, or at all events not to be an authority for the much wider proposition referred to it." *(Mr. Ilbert, Q,* 312; 1876.) So, Lord Justice Brett (now Lord Esher, M.R.), says, *inter alia*, "I have, therefore, I think, shown that the principle upon which this

(*) There the plaintiff, a bricklayer, was employed by the foreman of the defendants, and told by him to assist certain other bricklayers in erecting a cornice above a certain front wall, the property of the defendants, in accordance with a plan drawn up by an architect, engaged by the defendants. Owing to the faulty plan of the architect portion of the cornice, when almost completed, suddenly tumbled in, with the result that the plaintiff and other workmen were knocked down from some scaffolding and injured.

rule is founded is the principle of an *implied* contract. It is either that or it is upon the assumption that the servant knew, or ought to have known, the risks at the time that he accepted the employment. Now, with regard to its being an implied contract, my objection to that is founded upon what I said before; it does not seem to me to come within the rule that all persons of ordinary intelligence must assume that both the master and the servant had that matter in their minds at the time they made the original contract of service. It seems to me that the rule is founded upon an erroneous assumption of fact. My view is this, that it is impossible to say truly that when a workman makes his contract of service with his master, that servant has in his mind the recollection, or the memory, that he may be injured by the negligence of a fellow servant. It is not true, in fact, and it cannot be said that it is, and that, therefore, is not any ground upon which you ought to imply a supposed agreement on his part. If it is to be put on the ground that he knew at the time, of course that means that he knew, in fact, that means that he remembered, in fact; and, therefore, that brings you to the same point as the other. If it is put on the ground that he ought to know, that, of course, everybody must judge for themselves; but I cannot conceive that a servant, or a workman going into employ, ought to know that he has to run the risk of the negligence of a fellow servant in the same employ, of whom he knows nothing, and never will, probably, know anything until the accident happens. I have, therefore, always thought that this exception of a master's liability for the act of his servant, in respect of the injury done by that servant to another servant, is founded upon a wrong application of the principle of implied contract" (Q. 1926). Even Lord Bramwell, who favours the retention of the exception, saw the untenableness of resting it on the notion of an implied contract, and in turn suggested an untenable way out of the difficulty. "Now the expression that is used is, I think, an unfortunate one, that is to say, that a servant contracts that he will make no claim against the master for injury done by the negligence of a follow servant. The obvious difficulty in the way of 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. But I think, if put in another way, it would be reasonable enough, that is to say, they establish a relation between them, of which one of the terms is not, that the master shall be liable for the negligence of a fellow servant" (Q. 1103: 1877). But this last is rather a distinction in words, or in the mode of expression, than a distinction in principle, for the terms of the relation must be implied; and as the relation of master and servant is established by contract, the terms

thereof are also implied by the contract. I have already commented on the decision of Lord Cairns in *Wilson* vs. *Merry*, and find that others have also expressed themselves as unsatisfied with the principles it lays down. (Q 299—300; 1876.) In England the feeling has recently grown in favour of restricting the operation of the exception, and hence, by the Employers' Liability Act, if injury is caused to a workman, by reason of the negligence of another workman standing in authority over him, under the same common employer, the workman injured, or, in case of his death, his legal representative shall have the same right of compensation and remedies against the employer, as if the workman had been a stranger. The employer is, in other words, held answerable for the acts of those of his servants, who are in delegated authority under him. Legislation on this subject is still proceeding in England, and a writer in the November number of the *Nineteenth Century* at p. 703, says: "Lawyers and laymen alike are almost unanimous in the opinion that it is inequitable that the claim of an injured workman should be defeated because another workman in common employment with him may have contributed to cause the accident." In a similar manner, I notice that, in the United States, although the exception which I have been considering also prevails in that country, the feeling is gaining ground in favour of abolishing this exception altogether, or of restricting it within narrower limits. In a learned American work we read: "The general rule is, that the master is not liable to a servant for injuries caused by the negligence of a fellow servant. This negligence is one of the risks, which the servant takes into account in entering the employment. The hardships, which this rule has brought about in cases where a large number of persons are employed in dangerous operations, as railroad and other corporate employees, have caused very general dissatisfaction, and in many States the rule is entirely abrogated, either by the decisions of the Courts or by express statute. There is a general tendency in the American decisions to hold that one, to whom the master entrusts the whole supervision of the employment, or possibly any separate department of the employment, is not a fellow servant with other servants of the same master, but is a substituted master, and so renders the master liable." (*Greenleaf on Evidence, vol.* 2, § 332, *b*; *note (b) page* 232, 14*th edit.*; *cf. L.Q. Review, vol.* 1, *p.* 283.)

Let me now turn to the law of Scotland. In *Dixon* vs. *Ranken*, decided in 1852, Lord Cockburn said, "I can conceive some reasonings for exempting the employer from liability altogether, but not for exempting him only when those who act for him injure one of themselves. *It rather seems to me, that these are the very persons who have the strongest claim upon him for reparation, because they incur danger on*

his account, and certainly are not understood by our law to come under any engagement to take those risks upon themselves." The House of Lords, however, in the *Barton's Hill Colliery Cases*, in 1858 (4 Jur. N.S.,) decided that the Scotch law was similar to that of England, and, in their zeal for establishing uniformity in the jurisprudence of the two countries, the Law Lords endeavoured to explain away the reasoning by which the Scotch Judges supported their view. The Courts north of the Tweed were, however, not convinced, and although they were bound to respect the decision of the House of Lords, they readily restricted that decision and tried to keep it within more reasonable limits. Hence, they held that if a person is placed in superintendence and authority or control over the others, he is not to be considered as the fellow workman of those over whom he is so placed. (*Per Lord Chelmsford, in Wilson* vs. *Merry*). But unfortunately, in 1868, the House of Lords again disapproved of the Scotch view. The Scotch Judges had, however, the satisfaction of witnessing the virtual repeal of the effect of the decision of the House of Lords in *Wilson* vs. *Merry*, by the Employers' Liability Act, by which the law was declared more nearly as they had attempted to lay it down.

I come now to the modern law of Continental Europe. It is said by Professor Holland (in a note to the 3rd edition of his Jurisprudence, at page 132), that the exception, admitted by the English and American common law, in favour of exempting the master from liability where a servant is injured by a fellow servant, in the doing of a common service, is unknown on the Continent. This is true of France and those countries which have adopted the Code Civil, but not also of Prussia and the German Empire. Art. 1384 of the Code Civil reads as follows: "A person is liable, not merely for the injury caused by his act, but also for the injury which he has occasioned by his negligence or carelessness. Masters, and persons who employ others to transact their business, are liable for the injury caused by their servants and employees, while acting in the service and business entrusted to them. This responsibility holds good, unless the masters and employers can prove that they could not have prevented the injury, for which it is sought to render them responsible." In *Dalloz, Juris. Gen., vol.* 39, § 630, I find a discussion of this article of the Code Civil, by reference to a decision of the Court of Cassation, pronounced on the 28th June 1841, in the case of *Reygasse* vs. *Plazen*. It appears that one Reygasse had been seriously injured through the negligence of a fellow workman, named Bley, acting with him in the same employment, and had brought an action against both his fellow workman, and his employer (Plazen). The Court of Toulouse held that the action did not lie against the employer,

on the ground that art. 1384 only renders the master liable to third parties, but not also to a servant, who, when injured by a fellow workman, must be considered to have taken the risk of such injury upon himself, and the master must be held to have freed himself from liability by the payment of wages. By the law of nature *(droit naturel)*, it was said, a person should only be responsible for his own negligence. Art. 1384 has departed from this principle, and renders masters and employers liable for injuries caused by their servants. Hence this article should be strictly construed and not extended to cases, which do not clearly fall within the express terms thereof. It is merely intended to apply to injuries sustained by third parties, who are strangers to the master. The Court of Cassation, however, reversed this decision, on the ground that the Court below was not justified in drawing a distinction, which the code itself does not admit, and in refusing to apply the principle which the code expressly lays down. Dalloz (§ 632) also mentions an earlier case, decided in 1836 by the Court of Lyons, in favour of the master's exemption from liability, but adds that this decision is not acceptable, and he lays down the law as follows: "Responsibility exists over against everybody who is injured. Hence it follows (as M.M. Cotelle in *Proces Verbeaux, p.* 313, and Sourdat, No. 911, have very justly observed) that he, who employs several agents, is responsible for the wrongs of each one of them over against the others, just as he is in the case of third parties. It has been decided in this spirit, that an action lies, without any distinction, against the master for acts causing damage, committed by his servants in the service for which they have been employed. and his liability may specially extend to the injury sustained by one of these servants, caused by the imprudence of another person, receiving wages on the same terms, and engaged in a work which has been entrusted to them in common." At the present moment the subject of employer's liability is engaging the attention of the French legislature, and a bill has been passed in the Chamber of Deputies on the 10th June last, regulating the responsibility for injuries caused by accidents, and providing for compulsory assurance against such accidents. The bill was under consideration of the Senate in September, but I am unable to say whether it has passed into law. I am indebted for this information to Mons. Aubert, the French Consul at Pretoria, who has forwarded to me a communication from the Minister of Foreign Affairs in Paris on the subject, together with a copy of the proposed law, and a report presented to the Chamber of Deputies, showing *inter alia* the present law of most of the countries of continental Europe on the doctrine of the master's responsibility, and the recent European legislation on the subject of compulsory assurance—a matter,

which although connected with the present enquiry, has, however, no special bearing on the point arising for decision.

The Belgian Code, art. 1384, is a mere transcript of the Code Civil, and a learned Belgian writer, Mons. Sainctelette, has in a recent work entitled *de la Responsabilite et de la Guarantie, chap.* 5, discussed the responsibility of the master towards third persons, and towards his servants generally. He places the liability of the employer, for the acts of his servant or workman, upon the right of supervision, and the authority, which the master acquires by the contract of service, over the workman. Hence, if the right of supervision and of authority ceases, the responsibility also ceases. Consequently, if the workman or servant does anything outside the scope of his employment, whereby a third party is injured, the master will not be responsible. Upon the same grounds he holds that the master is liable to the servant for injuries sustained in his service, for the servant is no longer a free agent—it is the will of the master which rules the body of the servant. The servant's right of action to recover damages arises out of the contract of service, for in the contract of service it is *tacitly* agreed between the master and servant that the former will watch over the safety of the latter while acting in the master's service. Although M. Sainctelette does not discuss the precise point of an injury caused by one servant to another, acting in a common employment, it seems clearly to follow from his reasoning that the master will in such case be liable to the injured servant.

The Dutch Code, Art. 1403, is, even as the Belgian, a simple copy of the code civil. There does not exist, so far as I am aware, any decision by the Courts of the Netherlands on the point under discussion, and Opzoomer and De Pinto, in their commentaries on this article of the Dutch Code, make no mention whatever of the master's liability in the case of an injury caused by one servant to another, while engaged in a commen service. In Leon *(Rechtspraak v. d. Hoogen Raad) ad. Art.* 1403 *n.* 9, reference is made to a decision of the Supreme Court of the Netherlands, anno 1871, where it was held that the general rule of the master's liability, laid down by Art. 1403, is also applicable to the State, which is *civiliter* responsible for the negligence of all its servants. The case there decided was this: A naval officer had ordered a workman to attach a wire to a torpedo, which, through the negligence of the officer, was not completely emptied. An explosion occurred resulting in the death of the workman, and, at suit of his widow, an action was held maintainable against the State. The doctrine of a common employment between the workman and the officer, and the consequent non-liability of the State, were not even suggested during the argument

of the case. The Italian Code, Art. 1153, likewise follows the provisions of the Code Civil of France. From a letter I have received from Professor Ingstad of the University of Christiana, it appears that the exception of the English and American common law is also unknown to the jurisprudence of Norway and Denmark.

If we turn, however, to the German system on the subject, we find the law to rest on a different principle. I cannot do better than give here the concise summing up of the matter, as put to me by Mr. Justice Rehbein, one of the members of the Court of Appeal for the German Empire, with whom, through the kindly offices of Herr von Buri, of the German Consulate, I have been enabled to place myself in communication. This is what the learned Judge says:—"According to the law of Prussia, and the common law of Germany, the answer hardly admits of a doubt. In the Prussian law it is regulated by express provision. According to that law (*algemeines landrecht, Th.* 1, *tit.* 6, 60 *ff.*) differing in this respect from the French Code, Art. 1384, the master is not, as a general rule, responsible for damage to third parties, caused by a servant in the exercise of his employment; and a *fellow servant* is necessarily also regarded as a third person. The same rule also applies to employers. The principle rests upon the maxim, common to both the Prussian and the general law of Germany—a man is only liable for his own fault. In connection with this rule must be mentioned the cases, where the Prussian and German law, by way of exception, renders the master liable. These cases are (1) where the master knowingly permits the damage to be caused. *Scire et non prohibere, quum prohibere possit,* is the same as the master's own act, and is the ground of liability. Under this may also be included the neglect of taking the necessary supervision. (2) Where the master employs or retains servants, of whose careless conduct he has notice. (3) Where the master selects or retains servants, of whose unsuitableness for the work he is aware (*culpa in eligendo*). (4) Under the first head will also come the cases where the master orders a work and knows, or ought to know, that the servants could injure themselves or strangers. According to the law of Prussia, the responsibility under 2 and 3 is only subsidiary. I must add that in the draft of the proposed civil code for the German Empire, the liability of employers, contractors, and masters, is rested on the principle of personal fault alone, and failure in the supervision and selection. This advisedly departs from Art. 1384 of the Code Civil of France. The German law of responsibility, of 7th June, 1871, contains a special provision with regard to the liability of mine-owners, for the negligence of their agents or representatives, foremen, and overseers. This law, however, so far as your

question is concerned, contains a confirmation of the general rule, inasmuch as it exempts the mine-owner from responsibility where one workman is injured by another; and this is also clearly established by German judicial decisions." A reference to Holtzendorff's *Encyclopädie*, the chapter on *das heutige römische Recht* § 59, so far as it goes, supports the above statements.

We have conseqnently arrived at the following result: The Roman-Dutch law recognises and adopts the principle, that a master, or employer, is liable for the injuries caused by his servants, or workmen, within the scope of their employment. This general principle is also the law in England, Scotland, the United States of America, France, Belgium, Holland, Italy, Denmark, and Norway; while the common law of Prussia and Germany adopts the rule *culpa tenet suos auctores tantum*. The English and American courts have, however, admitted an exception to the general rule of the master's liability, in the case of injuries sustained by a servant or workman, through the negligence or carelessness of his fellow servant or workman, engaged in a common service or employment. This exception is not recognised by the jurisprudence of those countries, which (like England and America) have adopted the rule of the master's liability for the acts of his servants, and, even in England and America, the tendency is towards narrowing the exception, if not abolishing it altogether. The common law of the German Empire, proceeding from a wholly opposite principle, —a principle, which on the ground of natural justice, has the approval of Lord Bramwell and Lord Justice Brett, can obviously not be of service to us in the decision of the point in appeal, seeing that our law distinctly recognises the general liability of the master for the acts of his servants. The only question is, whether the exception introduced by the English and American courts—an exception of quite modern growth—is to be followed? I have arrived at the conclusion that this exception is foreign to our jurisprudence, and rests upon untenable grounds. The principle laid down in Art. 1384 of the code civil is but the recognition of the rule of the common law of France and the Netherlands, as it prevailed at the commencement of the century. It is also, therefore, the recognition of the rule of our own Roman-Dutch law, and, so far as the exception is concerned, I fully concur with the view expressed by the French Court of Appeal *ubi lex non distinguit, nec nobis est distinguendum*. It may be desirable, so far as great industrial undertakings, which require a large body of workmen for their existence and continuance, are concerned, that the Legislature should regulate more precisely the relation betweeu employer and employed, and the rights and duties to which such relation gives rise;

but that is a matter altogether beyond the province of the Court. Our only duty at present is to consider and decide upon the ruling in the Court below, which proceeded on an exception of recent introduction into the English common law; and I have to come to the conclusion that the ruling appealed against was erroneous, and that the summons does disclose a sufficient *prima facie* case against the Salisbury Gold-Mining Company, the defendants in the action. The appeal must, therefore, be allowed with costs.

MORICE, J., concurred.

ANDREW *vs.* THE ROBINSON GOLD-MINING CO.

Proof of previous publication and use abroad is a bar to obtaining a patent in this country. A plaintiff, therefore, who alleges that he is the first inventor of a certain appliance, and has patented it in the country where he so alleges to have invented it and has also subsequently obtained a patent for it in this State, is not entitled to succeed in an action for an infringement of his patent, where the defendant proves that, previous to the date of the plaintiff's alleged invention, the same invention was already well known and in general use abroad, in countries other than that in which the plaintiff alleges to have first invented and patented it.

KOTZÉ, C. J.—

This is an action instituted by reason of an alleged infringement of the plaintiff's patent. The summons sets forth that the plaintiff is the true inventor of a certain invention providing for the automatic turning over of buckets employed for the purpose of more efficiently hauling up earth or quartz out of mines, and that the plaintiff on the 6th October, 1887, obtained a patent from the Government of this State for his invention:—that since the 1st January, 1892, the defendant Company has unlawfully infringed the plaintff's patent, by using the same without his consent, in the mine at Langlaagte on the Witwaters Rand Goldfields, the property of the defendant Company, whereby the plaintiff has sustained damage to the amount of £500. Wherefore the plaintiff prays that the Company shall be ordered to pay unto him the said sum of £500 as and for damages, and be interdicted from availing itself in future of the plaintiff's patent without his consent. The defendant Company has pleaded in answer to this, that the plaintiff is not the first and true inventor, in as much as the invention has been published and used in America since the year 1867, and also in this State at Barberton and Johannesburg, prior to the granting of the patent to the plaintiff.

It has been proved by the plaintiff that he introduced the particular kind of bucket, or skip, in the beginning of the year 1885 at the De Beer's Mine, where he was at that time employed, and he was generally regarded at Kimberley, in the Province of Griqualand West, as the inventor thereof. In

the year 1886 the plaintiff took out a patent in the Colony of the Cape of Good Hope, and in October, 1887, he obtained a patent for his alleged invention from the Government of this State. On behalf of the Company it has been established that exactly the same kind of bucket, or skip, called the *broad-tread back-wheel skip*, or the *self-dumping skip*, has for the last 25 years been in general use in the mines in North America, and in Venezuela in South America, and also in a tin mine in Cornwall in England. It has also been proved that drawings and a description of this skip have, for the last 20 years, appeared in the catalogue of Fraser & Chalmers, a firm of engineers at Chicago, and in other catalogues, and also in volume 7 of the proceedings of the American Institute of Engineers. The plaintiff, however, denies that he was acquainted with these publications at the time of his alleged invention, and there is no evidence to show that at that period any of these publications were known to the profession or the public at Kimberley.

The question must be decided by reference to the Patent Law, No. 6 of 1887. Under this statute everyone, whether he be a citizen of this State or not, is at liberty to obtain a patent for "a *new* invention suitable for use as an object of trade or industry." The law was passed with the view of encouraging new and lawful industries, and entitles strangers coming from abroad, as well as citizens of the State, to patent their new inventions in this country. By § 36, it is provided that "all grounds, upon which the cancellation of a patent may take place, shall also serve as a defence to an action for an infringement of a patent;" and in § 29 it is *inter alia* laid down that the cancellation of a patent may be demanded on the ground (*b*) that the person who is alleged to be the first and true publisher (*uitgever*) was not such; or (*c*) that the invention is not new, *i.e.*, has prior to the granting of the patent been published, or in use, in this country. The provision in sub-section (*c*) seems to be in conflict with the provision in sub-section (*b*), and it may be a question whether we ought not to read *inventor* (*uitvinder*), in sub-section (b) instead of *publisher* (*uitgever*). It is clear from the evidence that there is no proof that the skip had been published, or in use, in this country, prior to the obtaining of the patent by the plaintiff in October, 1887. On the other hand it is also quite clear that the plaintiff, a foreigner, is not the first and true inventor, or publisher, seeing that the bucket or skip in question has for several years previously been known and in general use in America and in a tin mine in Cornwall. If we must take it that the meaning of the provision under sub-section (*b*) is that the party is not the first and true publisher (*uitgever*) in *this country*, then the provision in sub-section (*c*) would be quite unnecessary, unless it be regarded as a

means of proof, to show that the party is not the first and true inventor or publisher, and in that case the provision may as well be expunged, or included under sub-section (*b*). But, just because of the words "*i.e.*, has prior to the granting of the patent been published, or in use, in this country" occurring in sub-section (*c*), we must interpret the provision under sub-section (*b*) in a wider sense, as including publication or use *abroad*. It cannot be the intention of the law that a foreigner, so far as the obtaining of a patent is concerned, should stand on a better footing than a citizen of this State. If the interpretation, which I have suggested, be not given to sub-section (*b*) the law will directly promote fraud, and hamper industry, to the detriment of the inhabitants of this country; for it would then be an easy matter for any unscrupulous adventurer, who may choose to do so, to come to the Transvaal and obtain a patent for inventions known and in use in other countries (whether these are patented there or not), and in this way prohibit the use of appliances or other inventions, elsewhere known and adopted, unless he be first bought off or satisfied by the payment of large sums of money. For the law to permit a practice of this kind is tantamount to legalising extortion. I am aware that in some countries the law allows the pirating and patenting of another's invention. Thus in *Rolls* vs. *Isaacs* (L.R. 19 ch. Div.) Vice-Chancellor Bacon says "When an invention is communicated by a foreigner to an Englishman, if it should be proved that it has been used *in all the other regions of the world*, but never here before, the invention may be the subject of a valid patent, and there is no kind of objection to it." The case there was that of an invention properly patented in the colony of Natal, and subsequently patented by another person in England. The Vice-Chancellor held the second patent to be valid. The decision may indeed be supported by reference to the language of the *Statute of Monopolies*, inasmuch as the invention was new within the *realm*, the Colony of Natal (having its own patent office) being considered for this purpose outside the realm. But to admit the soundness of the language of the Vice-Chancellor, as a matter of general principle, would certainly be contrary to the true interests of commerce and industry in this State. The English doctrine is also observed in the United States, although formerly a different rule obtained in America, viz., that prior use in any part of the world was a bar to the patent (*Robinson on Patents, vol.* 1, § 320, *note* 4). It has, however, been long established, both in England and America, that if a foreign invention be published in England or America, *i.e.*, properly brought to the notice of the public by means of publication, no third person can obtain a patent in either country for the invention. By this means the