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NEGLIGENCE-FEDERAL EMPLOYER'S LIABILITY ACT-EXTENSION OF THE SAFE PLACE TO WORK DOCTRINE

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NEGLIGENCE—FEDERAL EMPLOYER'S LIABILITY ACT—EXTENSION OF THE SAFE PLACE TO WORK DOCTRINE—Plaintiff, a lumber inspector employed by the defendant railroad, was inspecting railroad ties on a dock owned by an independent lumber company. The employees of the lumber company had piled the ties so that the ends were either flush with or protruded over the edge of the dock. In order to inspect the ends, the plaintiff assumed a "bent-over" position in which his right foot was on the edge of the dock, his left hand on the pile and his left foot suspended in the air. After losing his balance, he placed his left foot on the dock where it struck either a stone or piece of bark. His foot twisted and he fell, severely injuring his ankle. The plaintiff had made prior inspections on this dock and had informed his superior of the manner in which the ties were piled. In an action under the Federal Employer's Liability Act, the trial court entered judgment for the plaintiff.[1] On appeal, *held,* affirmed. Edmonds, J., dissented. *Ericksen v. Southern Pacific Co.,* (Cal. 1952) 246 P. (2d) 642.

The Federal Employer's Liability Act provides that a railroad engaged in interstate commerce[2] is liable to its employees for injuries resulting (1) "in whole or in part from the negligence" of *its* officers, agents, or employees, or (2) "by reason of any defect or insufficiency due to *its* negligence, in *its* cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."[3] The meaning of "negligence" is determined "by the common law principles as established and applied by the federal courts."[4] We first face the question of the duty imposed upon the defendant by the act. As a general rule an employer at common law, and thus under the act, has the duty to furnish employees a reasonably safe place in which to work and reasonably safe equipment with which to work.[5] In the principal case it is clear that the defendant had no control over the dock or the activities thereupon.[6] Therefore, liability, if any, must arise from the negligence of the defendant's officers, agents, or employees under section (1) of the act above. The majority opinion relies heavily upon *Terminal Ry. Assn. of St. Louis v. Fitzjohn.*[7] In that case the employee, who was a crew member on an engine which the defendant railroad was operating over a private industrial siding, recovered damages for injuries

[1] The defendant, relying upon the comparative negligence provision of the act, 35 Stat. L. 66 (1908), 45 U.S.C. (1946) §53, contended that the damages were excessive. For discussion see principal case at 643.

[2] The court held that the plaintiff was engaged in interstate commerce. See principal case at 645.

[3] 35 Stat. L. 65 (1908), 45 U.S.C. (1946) §51. (Emphasis added). The numbers (1) and (2) have been inserted for convenience in reference.

[4] Urie v. Thompson, 337 U.S. 163 at 174, 69 S.Ct. 1018 (1949).

[5] See 56 C.J.S. 900, note 9 (1948) for citations.

[6] The phrase "its . . . equipment" in 45 U.S.C. §51 is interpreted to require only control, as distinguished from ownership. Campbell v. Canadian Northern Ry. Co., 124 Minn. 245, 144 N.W. 772 (1914).

[7] (8th Cir. 1948) 165 F. (2d) 473. This case will be referred to in the discussion as the Fitzjohn case to avoid confusion with Porter v. Terminal Railroad Assn., infra note 10.

sustained from a contact with an obstruction which was only six inches from the engine upon which he was riding. It is not entirely clear whether the railroad had control over the obstruction. The majority in the principal case concluded that, since lack of control over the obstruction in the *Fitzjohn* case did not absolve the employer of liability, lack of control over the dock will not absolve the defendant of liability in this case. Does this conclusion follow? Liability in the *Fitzjohn* case, where the railroad through its officials was actively operating the engine and supervising the employees, can be based upon the foreman's failure to warn the employee of the dangerous condition under section (1) of the act, above, independent of the question of control over the obstruction. In the principal case the employer was neither operating the dock nor supervising the employees.[8] Moreover, the plaintiff was aware of the danger, if any, and thus there was no breach of the duty to warn.[9] Judge Edmonds, dissenting, felt that the majority opinion, in addition to being contrary to the common law[10] and the intent of Congress,[11] misinterprets the *Fitzjohn* case. He suggests that the obstruction in that case was considered "its" (the railroad's) within section (2) of the act, above, because of the fact that the railroad was operating its train along the track having the close clearance.[12] If this interpretation of the *Fitzjohn* case is valid, the principal case is certainly distinguishable since there is no possibility, as pointed out above, of basing the defendant's negligence on section (2) of the act. It would seem that the

[8] For cases which indicate this distinction, see Albert Miller Co. v. Wilkins, (7th Cir. 1913) 209 F. 582 (recovery by employee who was injured by a defective hoist which was owned by a third party and used on the third party's premises by defendant employer); American Machinery Co. v. Ferry, 141 Ky. 372, 132 S.W. 546 (1910) (employee recovered for the negligence of master's foreman while repairing tank on premises of the owner of the tank); Grand Trunk Ry. Co. v. Tennant, (1st Cir. 1895) 66 F. 922. Cf. Ryan v. Twin City Wholesale Grocery, 210 Minn. 21, 297 N.W. 705 (1941) and Porter v. Terminal Railroad Assn., infra note 10. The dictum in the Fitzjohn case, supra note 7, and the Albert Miller and American Machinery cases, supra this note, is broad enough to include the principal case. However, in all these cases the liability can be predicated upon the employer's active supervision over the employee or his control over the equipment being used.

[9] AGENCY RESTATEMENT §504 (1933): "The master's duty as to working conditions does not extend to the condition of premises not in his control, nor to the conduct of third persons with whom the servants are to be brought into contact during the course of the work, except that he has a duty to disclose dangerous conditions of which he should know."

[10] Roche v. Llewellyn Ironworks, 140 Cal. 563, 74 P. 147 (1903) (no liability to repairman for injuries incurred when sent to make repairs on appliances belonging to third persons); Lang v. Lilley & Thurston Co., 20 Cal. App. 223, 128 P. 1028 (1912); Bosarge v. Gaines, (5th Cir. 1938) 93 F. (2d) 800. Majority opinion in the principal case at 647 refers to authority abrogating the common law rule, but as pointed out in the dissent, no cases are cited. It would appear that Porter v. Terminal Ry. Assn. of St. Louis, 327 Ill. App. 645, 65 N.E. (2d) 31 (1946), where defendant railroad was held liable for injury to employee caused by X railroad's negligence in failing to cut weeds, the employee having been directed by his employer to pilot X's engine and crew over X's track, would most nearly support the majority. See also the Ryan case, supra note 8.

[11] See principal case at 649.

[12] For discussion of this doctrine and citations, see principal case, dissenting opinion at 650.

doctrine announced by the principal case, if followed, will be applicable in any master-servant case and not limited to actions under the Federal Employer's Liability Act. As a matter of policy, to what extent should we hold the employer liable for the negligence of third parties? It must be conceded that the minority view would permit employers with impunity to require their employees to work in places of known danger so long as the employer has no control and the employee is warned of the danger.[13] However, under the majority view the railroad can avoid liability when it is aware of the danger only by refraining from sending the employee upon the premises. The next case to arise may well be one in which the employer is not aware of the dangerous premises. Would the court impose a duty upon the employer to inspect the premises? If liability is not based upon control or active supervision of some sort, why should it matter whether the employer actually knows of the danger or as a reasonable man should have had that knowledge? The severity of this doctrine is obvious, particularly if applied to all master-servant cases.

Assuming a duty, we face the further problem of breach of duty. Since liability must be based on the negligence of the employee's superior, the test is whether the superior, knowing of the condition of the premises, failed to use due care in sending the plaintiff thereupon. An affirmative answer would necessarily require a finding that either the existence of the foreign object or the manner in which the ties were piled constituted a dangerous condition. If reasonably prudent men would differ as to this, the question should go to the jury.[14] Query whether the evidence in this case really supports the finding of a dangerous condition?[15]

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[13] Principal case at 647.

[14] Unless the evidence is so clear that reasonable minds could not differ on whether there was a dangerous condition, this question should go to the jury. For citations see 45 U.S.C.A. 470, note 682 (1943).

[15] The dissent suggests that the defendant would be liable under the majority view if an employee was hit on a public street while on business for his employer. Assuming a duty, query whether a court would allow a jury to find breach in this situation? See Bosarge v. Gaines, supra note 10.