

VAN WICKLE *v.* MANHATTAN RY. CO.

(Circuit Court, S. D. New York. January 14, 1886.)

MASTER AND SERVANT—FELLOW-SERVANTS—ENGINEER AND TRACK-REPAIRER.

A track-repairer and an engineer of an elevated railroad company are fellow-servants, and for a personal injury resulting to the former, while in the course of his employment, solely from the negligence of the latter in running his train at too high a rate of speed, the company is not liable; such negligence of the engineer being one of the natural and ordinary risks incident to the track-repairer's employment.¹

At Law. On motion for new trial.

Edward Gebhard, for plaintiff.

Hugh L. Cole, for defendant.

COXE, J. The plaintiff, while engaged as track-repairer upon the structure of the elevated railroad on Sixth avenue, New York, was injured solely by the negligence of an engineer in running his train at too high a rate of speed. Both were employes of the defendant. The court directed a verdict for the defendant, upon the ground that the engineer and the plaintiff were fellow-servants, and for the former's negligence, it being one of the natural and ordinary risks incident to the work in which plaintiff was engaged, no action could be maintained by him against the common master. The plaintiff now moves for a new trial.

It cannot be denied that the rule which exempts the master from liability in such cases is being gradually relaxed, so as to permit recoveries in many cases which would have been promptly dismissed a few years ago. Indeed, it may be said that the tendency of many recent decisions—noticeably, *Garrahy v. Kansas R. Co.*, 25 Fed. Rep. 258—is to restrict it to such narrow limits that, practically, it exists in name only. Recognizing the marked lack of unanimity among the decisions, it may still be confidently affirmed that the proposition that persons holding the relation that this plaintiff and the engineer held to each other, are fellow-servants is maintained by a great preponderance of authority. Whether the reasons which brought the rule into being require that it should still be maintained, may well be doubted but it is entirely clear that so far at least as this circuit is concerned the rule is still recognized and enforced. The following authorities, among others, sustain the view taken upon the trial: *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Boldt v. Railroad Co.*, 18 N. Y. 432; *Coom v. Railroad Co.*, 5 N. Y. 492; *Vick v. Railroad Co.*, 95 N. Y. 267; *Brick v. Railroad Co.*, 98 N. Y. 211; *Quinn v. Lighterage Co.*, 23 Blatchf. 209, 23 Fed. Rep. 363.

The motion for a new trial is denied.

¹Upon the point as to who are fellow-servants within the meaning of the rule exempting the master from liability for injuries resulting to an employe through the negligence of a co-servant, see *Reddon v. Railroad Co.*, (Utah,) 15 Pac. Rep. —, and note.

HALSTED and others v. STRAUS.

(Circuit Court, D. New Jersey. October 5, 1887.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.

Under the statute of New Jersey (Revision, p. 36,) declaring void all preferences in assignments for the benefit of creditors, an assignment for the benefit of creditors containing preferences, made in New York by a firm doing business there, is not void against a firm of creditors doing business in New York, one of whose members is a resident of New Jersey.¹

2. SAME—ATTACHMENT IN ANOTHER STATE.

Where one made an assignment for the benefit of creditors in New York, the subsequent attachment in New Jersey by a New York creditor of a debt owing to the assignor is not of itself a defense to an action by the assignee for the recovery of the debt.

3. SAME.

The attachment of a debt in New Jersey by a resident of New York, after the execution in New York, by the owner of the debt, of an assignment for the benefit of creditors, will not prevent the federal courts from entertaining a suit by the assignee for the recovery of the debt.

McCarter, Williamson & McCarter, for plaintiffs.

R. Byington and Edward M. Colie, for defendant.

BRADLEY, Justice. This is an action of *indebitatus assumpsit*, brought by the plaintiffs for the use of their assignee, Lewis May, all citizens of New York, against Straus, a citizen of New Jersey. The defendant pleaded in abatement that, before the bringing of this suit, the debt sued for was attached by writ of attachment issued out of the supreme court of New Jersey, at the suit of certain persons trading under the firm name of Deering, Milliken & Co., (one of whom was a citizen of New Jersey, the others not,) creditors of Halsted, Haines & Co., the plaintiffs in this suit; and that the attachment had gone to judgment by default against the latter, and a *scire facias* against the defendant, to show cause why he should not pay the debt involved in this suit to the said plaintiffs in attachment. The plaintiffs replied that before the execution of said attachment Halsted, Haines & Co., who were doing business in New York, made a general deed of assignment of all their property and assets, both partnership and personal, including the debt now in dispute, to the said Lewis May, in trust for the creditors of said firm of Halsted, Haines & Co., and of the individual members of said firm, in the manner and proportions set forth in said deed, which is fully set out in the replication; that May accepted said trust, and proceeded to execute the same; that the attachment referred to in the plea was issued to recover a debt incurred by Halsted, Haines & Co. in New York, where said firm of Deering, Milliken & Co. transacted business, and that they have never carried on business in New Jersey. It appeared by the deed of assignment set out in the replication that the assignors made preferences in

¹A voluntary general assignment for the benefit of creditors, if valid where made, will be valid to transfer personal property wherever situated, except as it conflicts with the rights of resident creditors. *Schuler v. Israel*, 27 Fed. Rep. 851.