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A RECENT ATTEMPT TO LIMIT THE INDEPENDENT CONTRACTOR DOCTRINE.

By a bare majority of four to three the New York Court of Appeals has lately defeated an attempt to fasten an important limitation upon what may be termed the Independent Contractor Doctrine, i. e. the rule, briefly stated, that an employer is not liable for injuries resulting from the negligence of an independent contractor employed by him. The attempted limitation is contained in the proposition that the employer must have exercised reasonable care to select a competent contractor.

In the case before the Court of Appeals (Berg v. Parsons, 156 N. Y. 109), the facts were as follows: Defendant owned a vacant lot adjoining plaintiff's house in the City of New York. Desiring to build upon his lot, he made a contract with one T. to excavate for a cellar, the work requiring blasting in proximity to plaintiff's house. The blasting could have been done by a skillful man without damage to plaintiff. The contractor, however, did it so recklessly and unskillfully that plaintiff's house was partially wrecked. The plaintiff, of course, had a good cause of action against the contractor. This, however, was of no practical value, because the contractor was financially irresponsible. Plaintiff, therefore, began an action against the employer upon the ground that the contractor "was not a com-"petent, skillful or careful man, but, on the contrary, was "incompetent and unskillful and an improper person to do the "said work of excavation, and that the defendant did not exer-"cise proper care or due regard for the safety of the plaintiff's "said house and premises in permitting and employing said T. "to do said work."

To appreciate the bearing of this allegation it is necessary to take a glance at the history and present status of the Independent Contractor Doctrine.

The rule that a man is not liable for damages caused by the negligence of another employed by him to do a specific piece of work, provided that other renders the service in the course of an independent occupation, using his own means and methods and representing the will of the employer only as to the result of his work, is in the nature of a limitation upon the familiar doctrine of *respondeat superior*. The maxim *respondeat superior*, though inherited from the Roman law and become a practical necessity of modern business conditions, is weak in theoretical foundation, and its abstract justice has sometimes been questioned.* A sense of its harshness and a desire to restrict its operation are no doubt partly responsible for the evolution of the Independent Contractor Doctrine. That doctrine, though now firmly established, is of recent origin. It was refused recognition one hundred years ago in the famous English case of Bush v. Steinman (1 Bos. and Pull. 404). In that case A., having a house, contracted with B. to repair it for a fixed sum. B. contracted with C. to do the work, and C. with D. to furnish the materials. The servant of D. placed lime in the road in front of A.'s premises, by reason of which plaintiff's carriage was overthrown and the plaintiff injured. It was held that plaintiff was entitled to recover damages of A., the owner of the house. The court which decided Bush v. Steinman confessedly found difficulty in assigning satisfactory grounds for the decision, and repeated assaults made during the next fifty years finally resulted in its overthrow. It was sought to be sustained upon two grounds: 1st, the ground of agency and the doctrine of *respondeat superior;* 2d, the ground that an owner of real estate is liable for damages resulting from work done upon his land under the maxim *sic utere tuo ut alienum non lædas*. The case of Quarman v. Burnett (6 M. & W. 499, decided in 1840), finally disposed of the first ground, and Reedie v. L. & N. W. Ry. Co. (4 Exch. 244, decided in 1849), disposed of the second, holding that there is no distinction between the owners of real estate and the owners of personalty. These cases firmly established the Independent Contractor Doctrine in England.

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* See for example remarks found in Collett v. Foster, 2 Hurlst. and N. 356; Smith v. Keal L. R. 9 Q. B. Div. 340; Hays v. Millar, 77 Pa. St. 238; Shea v. Reems, 36 La. Ann. 966.

The American courts, while not entirely agreed, have generally adopted the later English view and repudiated Bush v. Steinman. Some of the cases in which the question has been most elaborately considered are referred to in the note.*

The doctrine elaborated in these cases is subject, however, to certain well recognized limitations. These have been variously classified, perhaps nowhere more clearly than in the opinion of Chief Judge Andrews in a recent New York case (Engel v. The Eureka Club, 137 N. Y. 100). Judge Andrews, after briefly stating the general doctrine of non-liability of the employer for the negligence of his contractor, goes on to say:

"There are well-understood exceptions to this rule of exemp-
"tion. Cases of statutory duty imposed upon individuals or
"corporations; of contracts which are unlawful, or which pro-
"vide for the doing of acts which, when performed, will create
"a nuisance, are exceptions. In cases of the first-mentioned
"class the power and duty imposed cannot be delegated so as to
"exempt the person who accepts the duty imposed, from respon-
"sibility, and in those of the second class exemption from lia-
"bility would be manifestly contrary to public policy, since it
"would shield the one who directed the commission of the
"wrong. * * * There are cases of still another class where
"the thing contracted to be done is necessarily attended with
"danger, however skillfully and carefully performed, or, in the
"language of Judge Dillon, is 'intrinsically dangerous,' in which
"case it is held that the party who lets the contract to do the
"act cannot thereby escape from responsibility for any injury
"resulting from its execution, although the act to be per-
"formed may be lawful (2 Dillon on Mun. Corp., Sec. 1029,
"and cases cited). But if the act to be done may be safely
"done in the exercise of due care, although in the absence of
"such care injurious consequences to third persons would be
"likely to result, then the contractor alone is liable, provided it
"was his duty under the contract to exercise such care."

In this statement Judge Andrews does not notice the limitation contended for in Berg v. Parsons, which was already begun when the Engel case was decided. The proposition, however, was by no means unheard-of. On the contrary, had frequently been assumed, by both judges and text-book writers, to

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*Blake v. Ferris, 1 Seld. 48; Hilliard v. Richardson, 3 Gray 349; Cuff v The N. & N. Y. R. R. Co., 35 N. J. Law 17; McCafferty v. S. D. & P. M. R. R. Co., 61 N. Y. 178.

be the law.* It was even supposed to have been squarely adopted as the ground of the Court's decision in at least two cases, one in Connecticut and one in Missouri.† A close scrutiny of these cases, however, does not quite bear out the assumption. In the Connecticut case (an action for injuries caused by blasting) the trial Court had charged the jury: "If "you find from the evidence that those contractors, or either of "them, were unskillful and incompetent to perform the work "assumed by them under the contract, and that the borough, "knowing this, employed them to do the work, the borough "would be negligent in knowingly employing such a person to "do the work, and would be responsible for any negligence of "such a contractor, in the same manner that the contractor "would be liable for his own negligence." The Supreme Court said: "We think this language imposed upon the borough a "too limited measure of liability; that it would be liable, as "stated, not only in consequence of negligence which would "certainly be most gross, in knowingly employing incompetent "contractors, but also in failing to exercise due and reasonable "care to select such as were skillful and competent." This language is closely in point, but as other questions were involved in the case, and the Court had already decided in favor of the appellant on other grounds, the point was unnecessary to the decision.

* In McCafferty v. S. D. & P. M. R. R. Co., 61 N. Y. 178 (the leading case in New York upon non-liability of an employer for blasting done by an independent contractor), the Court says (per Earl, C., p. 182): "The injuries were "not occasioned in consequence of the omission of any duty which was incum- "bent on the defendant. *It had let the contract, so far as appears, to a com-* "*petent person.*"

In Cuff v. The N. & N. Y. R. R. Co., 35 N. J. Law 17 (a case arising out of the negligent use of nitro-glycerine by the employee of a sub-contractor), it is said:

"When the work is not in itself a nuisance, and the injury results from "the negligence of such contractor or his servants in the execution of it, the "contractor alone is liable, *unless the owner is in default in employing an* "*unskillful or improper person as the contractor.*"

Similar expressions are to be found in Ardesco Oil Co. v. Gilson, 63 Pa. St. 146; Connors v. Hennessey, 112 Mass. 96; Sturges v. Theological Educational Society, 130 Mass. 414; Ware v. St. Paul Water Co., 2 Abb. U. S. 261 (Circ. Ct. Minn., 1870, Nelson, J.); Burns v. McDonald, 57 Mo. App. 599.

In the fifth edition of Shearman & Redfield on Negligence, Section 168, it is said: "To this exemption from responsibility (i. e. of the employer for the "negligent acts of the contractor), there is a single important qualification— "*that the employer must have used ordinary care to select a contractor of* "*proper skill and prudence.*"

See also Wharton on Negligence, Sec. 181; Story on Agency, Sec. 454a, note; II Thompson on Negligence, p. 899; Thomas on Negligence, p. 343.

† The Norwalk Gaslight Co. v. The Borough of Norwalk, 63 Conn. 495; Brannock v. Elmore, 114 Mo. 55.

In the Missouri case (also an action for damages from reckless blasting done by independent contractors) it appeared that the contractors had been in the habit of blasting without covering their blasts with timber, as required by a municipal ordinance, and that the employer knew this. In view of such knowledge the Court held the employer liable on the theory of an implied permission to the contractors to blast in the improper manner to which they were accustomed, which implied permission, said the Court, "is equivalent to a direction to do "so." This somewhat unsatisfactory reasoning impairs the value of the case as an authority on the question involved in Berg v. Parsons, despite some favorable dicta in the opinion.

We have referred to these two decisions somewhat at length because one or two recent authors have too hastily assumed that they settled the law. On the contrary, the real situation before Berg v. Parsons may be summarized in the words of a text-book writer twelve years ago:* "Some of the judges in "their opinions have qualified the rule (i. e. the Independent "Contractor Doctrine) by assuming that it is only applicable to "cases where the proprietor has not been guilty of negligence "in awarding a contract to a person incompetent, habitually "negligent, or otherwise unfit to be intrusted with it. No case "has been found, however, where a proprietor has been held "answerable for the negligence of an independent contractor, "upon this ground alone."

So much for the status of the Independent Contractor Doctrine when Berg v. Parsons started upon its somewhat checkered course. When the case came to trial, plaintiff introduced evidence tending to show that the contractor was incompetent, and that the defendant failed to exercise proper care in his selection. The evidence uponthe latter point was to the effect that the contractor was unknown to the defendant, and not well known in the business, but was the lowest bidder for the work; that he had shown recklessness or want of skill in previous jobs of the same character; that he was wholly illiterate, and lived in a shanty on the rocks, of which facts defendant had notice; that he was very intemperate and showed it in his personal appearance. The defendant on the other hand introduced evidence tending to show that some inquiry had been made and some care exercised. The Court, upon the strength of the Connecticut case already referred to, and after considerable hesitation, denied a motion to dismiss and sent the case to the

* II Thompson on Negligence, p. 908 (1886).

jury, and the jury gave plaintiff a verdict for the amount of damage proved. Defendant thereupon took an appeal to the General Term of the Supreme Court, an intermediate appellate tribunal. The General Term (two justices sitting) rendered an opinion approving the proposition of law for which plaintiff was contending, but reversed the judgment and ordered a new trial for errors in the admission of evidence and in the charge to the jury.* A new trial was had before another judge and jury, and plaintiff again obtained a verdict. The judgment entered upon this verdict was affirmed by the General Term (three justices sitting,)† and defendant appealed to the Court of last resort.

Up to this point five judges of the Supreme Court had passed upon the law of the case, and all had pronounced in favor of plaintiff's position. Three judges of the Court of Appeals took the same view. The other four, however, thought otherwise, and reversed the judgment. The prevailing opinion, after a lengthy citation of authorities upon the general proposition that an employer is not liable for the negligence of his contractor where the relation of master and servant, or principal and agent, does not exist, concludes as follows:

"There are certain exceptional cases where a person em-
"ploying a contractor is liable, which, briefly stated, are: Where
"the employer personally interferes with the work, and the
"acts performed by him occasion the injury; where the thing
"contracted to be done is unlawful; where the acts performed
"create a public nuisance; and where an employer is bound by
"a Statute to do a thing efficiently and an injury results from
"its inefficiency. Manifestly, this case falls within none of the
"exceptions to which we have referred. There was no inter-
"ference by the defendant. The thing contracted to be done
"was lawful. The work did not constitute a public nuisance,
"and there was no Statute binding the defendant to efficiently
"perform it. In none of those exceptional cases does the ques-
"tion of negligence arise. There the action is based upon the
"wrongful act of the party, and may be maintained against the
"author or the person performing or continuing it. In the case
"at bar the work contracted for was lawful and necessary for
"the improvement and use of the defendant's property. Con-
"sequently no liability can be based upon the illegality of the
"transaction, but it must stand upon the negligence of the
"contractor or his employee alone. It seems very obvious that,
"under the authorities, the defendant was not responsible for
"the acts of the contractor or his employees, and that the Court
"should have granted the defendant's motion for a nonsuit. If

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*Berg v. Parsons, 84 Hun 60.

†Berg v. Parsons, 90 Hun 267.

"a contrary rule were established it would not only impose "upon the owners of real property an improper restraint in con- "tracting for its improvement, but would open a new and un- "limited field for actions for the negligence of others which has "not hitherto existed in this State, and practically overrule a "long line of decisions in this Court, which firmly establish a "contrary doctrine."

It is to be regretted that the Court did not see fit to enter upon a discussion of the theory and merits of plaintiff's position on broad grounds of reason and justice, instead of confining itself so closely to the question of precedents. The prevailing opinion, while it makes the law, does little to make it acceptable. The real difficulty with plaintiff's proposition appears to have been (and this was probably the obstacle in the minds of the Court), not any lack of abstract justice, but the lack of some rule of existing law which could be stretched to cover the case. The judgment could scarcely be sustained on the simple ground of negligence of the employer, because, granting that the employer was guilty of an act of negligence in employing the incompetent contractor, that act was not the proximate cause of the injury. The connection between defendant's negligence and plaintiff's injury was broken by an intervening responsible cause.* Nor under the doctrine *respondeat superior*, because that doctrine, as already seen, has been limited to cases where the strict relation of master and servant exists. Nor on the ground that defendant was creating or permitting a nuisance on his land.† Recourse must be had, therefore, to the broad ground of public policy.

It would, of course, be more satisfactory to the advocates of the innovation if they were not compelled to fall back upon this indefinite and somewhat overworked plea. "Public policy" is too often made the excuse for arguments and even decisions for which no solid basis can be found in logic or precedent. The fact remains, however, that some of the legal doctrines oftenest invoked have no better foundation. The doctrine of *respondeat superior* is a notable example, as far at least as our English law is concerned.‡ A reason assigned by high authority for that

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* I Shearman & Redfield on Negligence, Sec. 32 et seq.; Cuff v. The N. & N. Y. R. R. Co., 35 N. J. Law 17.

† Booth v. Rome, Watertown and Ogdensburg Terminal Railroad Co., 140 N. Y. 267.

‡ The explanation of the doctrine in the Roman Law appears to be historical, going back to the time when servants were slaves. See elaborate note by Judge O. W. Holmes at star page 260, II Kent's Commentaries, 12th Edition.

doctrine is, that "it is the duty of the master to employ ser-"vants who are honest, skillful and careful."* Why should not the same duty exist in the employment of independent contractors? The proposition seems eminently reasonable. As said in the dissenting opinion in Berg v. Parsons:

"The principle of the decision below, in the present case, in "my judgment, in no respect weakens the doctrine of the "exemption of the general employer from liability for damages "caused by the negligence of the independent contractor; nor, "in any wise, threatens its stability. Nor does it affect it, "otherwise than by establishing a reasonable safeguard against "too broad a claim for exemption. It seems to me a proposi-"tion, as clear as it is reasonable, that the assumption that "there has been an exercise of due care in the selection of a "competent and careful contractor, is a part of the foundation "for the doctrine. I do not think that it would do to hold that "a person, by the mere act of employing a contractor to do some "work of a nature in itself obviously hazardous to others, "thereby discharges himself of all responsibility. Something "more is required of him. With that due regard for his neigh-"bor's rights, which is obligatory upon all, in the use which "they make of their own property, he should be held to the "exercise of reasonable care and of some deliberation in the "selection of a contractor."

The law at present stands otherwise. With all respect for the New York Court of Appeals, however, we venture the prediction that other courts may decline to follow its lead, and that possibly the last word upon the subject, even in the State of New York, has not yet been spoken.

CHARLES W. PIERSON.

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* II Kent's Commentaries (fourteenth edition), star page 259.