Slaves as Fellow Servants: Ideology, Law, and Industrialization

by PAUL FINKELMAN*

Guarded from want, from beggary secure,
He never feels what hireling crowds endure,
Nor knows, like them, in hopeless want to crave,
For wife and child, the comforts of the slave,
Or the sad thought that, when about to die,
He leaves them to the cold world's charity,
And sees them slowly seek the poor-house door—
The last, vile, hated refuge of the poor.

. . .

Secure they toil, uncursed their peaceful life,
With labor's hungry broils and wasteful strife.
No want to goad, no faction to deplore,
The slave escapes the perils of the poor.

. . .

That, when disease or age their strength impairs,
Subsistence and a home should still be theirs—
What wonder would that gracious boon impart,
What grateful rapture swell the peasant's heart!
How freely would the hungry list'ners give
A life-long labor thus secure to live!

William J. Grayson, "The Hireling and the slave"[1]

The new technology of the transportation revolution was not very safe. Steamboats ran aground, tipped over, sank, and exploded with disarming frequency. They crashed into other ships, bridges, and anything that might get in their way. Railroad trains were no safer. They too crashed, fell off

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1. William J. Grayson, *The Hireling and the Slave, Chicora, and Other Poems* (Charleston 1856), reprinted in, and quoted from, *Selected Poems by William Grayson* 48-49 (Mrs. William H. Armstrong ed. 1907).

their tracks, caused fires, and ran over people, animals, and other vehicles.[2] Passengers and passers-by were easily injured by these marvels of modern nineteenth century technology. Those who bought tickets and bystanders were not the only victims. The men who worked on these mechanical monsters were often—almost literally—eaten by them. The workers in the factories, mills, and machine shops of antebellum America faced similar dangers.

Industrial accidents led to litigation and to developments in common law adjudications; innovations in law relieved emerging industries of the burden of paying some of the costs for the damages caused to persons and property by industrialization.[3]

One of the most important common law developments during this period concerned the right of a worker to sue his employer for job related injuries caused by other workers. If workers could sue their employers for injuries caused by fellow workers they might be able to recover meaningful damages. The burden of industrial accidents would then fall on corporate owners and shareholders. On the other hand, if injured workers could not sue their employers, but could sue only a negligent co-worker, then there would be little chance of recovering damages. Nineteenth century workers were, in today's parlance, judgment proof.

Before the nineteenth century the common law in both England and America generally held an employer liable for injuries caused by an employee, under the theory of *respondeat superior*. As Nathan Dane put it: "The master is responsible for the acts of his servant, if done by his

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2. *See generally* George R. Taylor, *The Transportation Revolution, 1815-1860* (1951). For early cases on these problems, *see Burroughs v. Housatonic Railroad Co.*, 15 Conn. 124 (1842); *Hart v. Western Railroad Company*, 54 Mass. (13 Metc.) 99 (1847); *Ryan v. New York Central Railroad Company*, 35 N.Y. 210 (1866). In Massachusetts and elsewhere common law judges denied the rights of plaintiffs to sue in wrongful death cases. *Carey v. Berkshire Railroad*, 55 Mass. (1 Cush.) 475 (1848). *See* Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw*, 155-62 (1957); Lawrence M. Friedman, *A History of American Law* 465-85 (2d ed. 1985).

3. In the 1830's and 1840's the New York courts ruled that common carriers could not limit their liability for goods through contracts with shippers. But, by the 1850's New York had changed its position. Morton J. Horwitz, *The Transformation of American Law* 205-07 (1977). Massachusetts courts narrowly followed the New York rule for goods in transit, but developed new rules to exempt railroads from certain liabilities after goods arrived at their destination. Levy, *supra* note 2, at 141-55. However, as early as 1838 the South Carolina Supreme Court "remind[ed] the owners of steamboats that they have but to give public notice that they will not be liable . . . [to] relieve themselves, whenever essential to their interests, by special acceptances." *Patton v. McGrath*, 23 S.C.L. (Dudley) 159, 163 (1838). In *Swindler v. Hilliard*, 31 S.C.L. (2 Rich. L.) 286, 303 (1846), the same court held that a carrier "by notice, and of course by agreement, [may] divest himself of his liability for negligence or want or care." Joseph Story agreed with this trend, but also asserted that carriers could not "exempt themselves from responsibility in cases of gross negligence and fraud." Joseph Story, *Commentaries on the Law of Bailments* §549 (Cambridge 1832).

command, expressly or impliedly given."[4] Thus, if one worker injured a second worker, the second worker could sue their common employer.

In 1837 an English Court rejected the application of *respondeat superior* to injuries caused to one employee by a co-employee or fellow servant.[5] A year later the South Carolina Court applied this new theory of adjudication, known as the fellow servant rule. But coming "from a little-regarded state court," this "weakly reasoned" opinion "faded quickly into relative obscurity."[6] Four years later, in *Farwell v. Boston and Worcester Railroad,* the highly regarded Massachusetts Supreme Judicial Court, led by Chief Justice Lemuel Shaw, the nation's most influential state jurist, also adopted the fellow servant rule.[7]

Chief Justice Shaw's prestige and the importance of the decision for emerging industries helped lead to the near universal acceptance of the fellow servant rule. Indeed, judges uncomfortable with the rule resisted it "by creating exceptions to it rather than by rejecting it outright."[8] One of the most important exceptions concerned injuries to slaves, or accidents caused by negligent slaves. For a variety of reasons, virtually every southern court agreed that slaves could not be fellow servants of anyone within the terms laid down in *Farwell.*

I

The *Farwell* Case and The Emergence of the Fellow Servant Rule

Nicholas Farwell was a railroad engineer whose train derailed because another railroad employee—a fellow servant—neglected to properly move a switch. Farwell was thrown from the train, which crushed his right hand. The maimed Farwell sued his employer, the Boston and Worcester Railroad, claiming that "a master, by the nature of his contract with a servant, stipulates for the safety of the servant's employment, so far as the master can regulate the matter."[9]

In rejecting this argument Shaw asserted that job safety could best be accomplished by the workers themselves, because:

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4. Nathan Dane, *General Abridgement and Digest of American Law* 494 (Boston 1823), cited in Jerrilyn G. Marston, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860,* 132 U. Pa. L. Rev. 579, 584 (1984).

5. *Priestly v. Fowler,* 3 Mees. & Welsb. 1, 150 Eng. Rep. 1030 (1837).

6. *Murray v. South Carolina Railroad,* 26 S.C.L. (1 McMul.) 385 (1838). Marston, *supra* note 4, at 590.

7. *Farwell v. Boston and Worcester Railroad,* 4 Met. 49 (1842). On the importance of Shaw as a judge see Levy, *supra* note 4. Grant Gilmore noted "Shaw was also one of our great judges." G. Gilmore, *The Ages of American Law* 38 (1977). *See also* G. E. White, *The American Judicial Tradition: Profiles of Leading American Judges* (1976). Shaw applied the fellow servant rule to a case that did not involve railroads in *Albro v. Agawam Canal Co.,* 6 Cush. 75 (1850).

8. Marston, *supra* note 4, at 583.

9. *Farwell,* 4 met. at 49-50.

> Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other.[10]

Much in *Farwell* is problematic. Shaw's motives or agenda are certainly open to question.[11] Shaw's analysis rested on the dubious assumption that a worker was in a better position than a manager to watch over the actions of his "fellow servant." In complex industries like railroads it was likely that workers might be harmed by the negligence of fellow servants they had never seen or met.[12] It would have been impossible for Farwell to police the actions of the switchman without stopping the train at every switch. This would have destroyed the efficiency of the railroad.[13] Nevertheless, Shaw concluded that economic efficiency required that an injured worker "must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer."[14] For Farwell this meant suing the presumably judgment proof negligent switchman. Thus, the efficiency Shaw opted for was one which ultimately placed a great deal of the burden of industrialization on those workers who were injured, maimed, or killed by accidents.

In addition to this 'tort' analysis of industrial accidents, Shaw offered a relatively simplistic 'contract' analysis. Shaw noted that Farwell received a raise—to two dollars a day—as an engineer. Shaw argued that Farwell

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10. *Id.* at 59.

11. Most of Shaw's assumptions in this case are dubious. Given the precarious nature of nineteenth century industrial employment, for example, it is unlikely that most employees would have been in a position to "leave the service" of their employers over questions of safety. For criticism of this case, see Levy, *supra* note 2; Horwitz, *supra* note 3; Marston, *supra* note 4; Friedman, *supra* note 2.

12. Shaw admitted this, noting that in a rope factory, "several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together." *Farwell,* 4 met. at 60. Shaw used this example to support his position that it would be impossible to draw fine lines between workers who were interdependent, and therefore truly "fellow servants," and workers who were not really "fellow servants." Since "it would be extremely difficult to establish a practical rule" for determining which workers were co-workers and which were not, *id.*, Shaw opted for a simple—and thoroughly unrealistic—solution: all workers employed by the same company were fellow servants.

13. *Farwell,* 4 met. at 59. This is an example of what Morton Horwitz correctly calls the use of "law in order to encourage social change" and an example of a judge "play[ing] a central role in directing the course of social change." Horwitz, *supra* note 3, at 4, 1. This change benefitted entrepreneurs at the expense of workers.

14. *Farwell* 4 met. at 59.

took this job with "a full knowledge of the risks incident to the employment,"[15] and by accepting the new job, with a higher wage, Farwell was assuming the risks that came with the job.

In *Farwell* Shaw found three categories of job safety which he believed depended on good relations between workers, rather than management. First, he noted "the safety of each [worker] depends much on the care and skill with which each other shall perform his appropriate duty"—a 'mutual skill' category. Next Shaw found that in the workplace "each [worker] is the observer of the conduct of the others,"—thus a category of 'mutual observer.' This led Shaw to assert that each worker "can give notice of misconduct, incapacity or neglect of duty,"—a category of 'mutual notice.' Thus, if workers carefully monitored each other "the safety of each" could be "much more effectually secured" than by allowing workers to sue management for the negligence of other workers.[16]

In addition to these 'worker-worker' relations, Shaw found three ways workers might help management improve job safety. First, workers could give 'notice' to management of unsafe conditions or irresponsible fellow servants. At that point "if the common employer" would "not take such precautions, and employ such agents as the safety of the whole party require," then the worker had a second alternative, which was to "leave the service" of the employer.[17] Thus, Shaw believed workers had a 'right to quit' if the job was dangerous, and after notice the employer refused to remedy the working conditions. Finally, Shaw argued in *Farwell* that the contract between a worker and management took into account the dangers of the job. In Shaw's scheme a 'compensation for dangerous work' category also explained why Farwell's suit for damages was an inappropriate way of securing job safety. In Shaw's mind, if a job was truly dangerous, a worker should bargain for a higher wage.

Besides these three remedies for dangerous work—'notice' to management; a 'right to quit,' and 'compensation for dangerous work'—Shaw argued that by accepting a dangerous job a worker voluntarily gave up any rights not contracted for. The worker's contract with the owner implied an assumption of risk and limited the liability of the employer.[18]

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15. *Id.* The invalidity of this theory is discussed in Charles Warren, *Volenti Non Fit Injuria in Actions of Negligence*, 8 Harv. L. Rev. 457 (1895).

16. *Farwell*, 4 met. at 59.

17. *Id.*

18. *Id.* at 60. In practice, of course, the economy of the nineteenth century did not function this way. The employees of large companies rarely bargained with their employers over salary or working conditions. As Charles Warren pointed out in 1895, "students of political economy know that as a matter of facts wages of a particular workman are not regulated" so "that an employee's compensation is regulated according to the risks." Warren, *supra* note 15, at 466. The other alternative, to "leave the service" of a company, forced a worker to quit and be without employment—which was a step few workers could afford. Similarly, as the facts of *Farwell* indicate, it would have been impossible for many workers to observe their fellow servants.

II

The Tort Question: Could Slaves Be Fellow Servants?

For a variety of reasons, Shaw's Premises and theories, however dubious they were for northern workers, were almost entirely inapplicable to slaves used in southern industries. The nature of slavery made it impossible, in a legal sense, for workers—slave or free—to depend on slave fellow servants. None of the mutuality of interest and care that Shaw applied to free workers could apply to slave workers.

A: Mutual Skill

The assumption of "mutual skill" could not be applied to slaves for two reasons, one actual and the other ideological. First, masters could, and did, hire out slaves for tasks they were not capable of performing. Slaves, of course, had no legal way of opposing such a hiring. The coercive power of the master made it difficult for slaves to avoid labor they were unsuited for.

The ideological component of this question turns on the assumption that "fellow servants" would be mutually skilled. Noting that the switchman was an experienced, "careful and trustworthy servant" of the railroad, Shaw argued in *Farwell* that "where . . . suitable persons [were] employed," the fellow servant rule would apply.[19] This implied that if an employer hired unsuitable persons, the rule would not apply.

The ideology of the South assumed that slaves could not be as skilled or as intelligent as whites. This expectation can be best understood through Thomas R. R. Cobb's *An Inquiry Into the Law of Negro Slavery in the United States of America*.[20] This defense of black enslavement also explains why slaves could not be fellow servants. In his treatise Cobb asserted that "the negro race is inferior mentally to the Caucasian." Cobb found that

> [t]he prominent defect in the mental organization of the negro, is a want of judgment. He forms no definite idea of effects from causes. He cannot comprehend, so as to execute the simplist orders, unless they refresh his memory as to some previous knowledge. He is imitative, sometimes eminently so, but his mind is never inventive or suggestive. Improvement never enters his imagination. . . . This mental defect, connected with the indolence and want of foresight of the negro, is the secret of his degradation.[21]

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19. *Farwell*, 4 met. at 50, 59, 62. The common law theory of *respondeat superior* assumed that "the master at his peril, employ servants who are skilful and careful." Tapping Reeve, *The Law of Baron and Femme, Of Parent and Child, Guardian and Ward, Master and Servant, and of the Powers of Courts of Chancery* 358 (2d ed., L. Chittenden ed., Burlington, Vt. 1846).

20. T.R.R. Cobb, *An Inquiry Into the Law of Negro Slavery in the United States of America* (Philadelphia and Savannah 1858).

21. *Id.* at 34, 35-36.

Such racist claptrap was of course disproved daily, on every plantation and in every mine, factory or business which used slave labor. Indeed, had slaves been incompetent they would have been virtually useless to non-agricultural enterprises. The demanding jobs performed by slave boatmen, railroad workers, and miners belie the inferiority that Cobb attributed to them. But the issue here is not what was, but what the courts and the lawmakers believed. Similarly, slave workers obviously knew when a dangerous situation existed. The critical issue, however, is not what they knew as human beings, but rather, what their capacity was as slaves. To phrase the problem another way: because under the law and by social custom slaves were persons of limited status and capacity, they could not be held legally responsible in the same way that whites were. Cobb spoke for most Southerners when he asserted that slaves could not be expected to have good judgment, and indeed, were incapable of good judgment. Thus, would it be reasonable for lawyers and judges to expect that slaves could be held accountable for unsafe working conditions caused by themselves, their fellow servants, or their employers? If slaves could not be expected to form any "definite idea of effects from causes,"[22] as Cobb put it, then the courts could not apply the fellow servant rule to them.

B: Mutual Observer and Mutual Notice

The ideological analysis used to explain the inapplicability of 'mutual skills' to slave workers, also applied to the categories of 'mutual observer' and 'mutual notice.' Applying these aspects of the fellow servant rule would have undermined the social structure of the South. These two categories must be understood in the context of the industrial use of slaves.

One striking aspect of antebellum industrial labor was its level of integration. Blacks and whites worked side by side in textile mills, mines, iron factories, and on railroads and steamboats.[23] For example, the Tredegar Iron Company "pair[ed] blacks and skilled white ironworkers," to train slaves "for the most skilled and high-paying positions at the works."[24]

Under Shaw's fellow servant rule workers were to observe each other and insure that unsafe conditions were not allowed. But, was this possible where whites and blacks worked together? Could a slave reprimand a white? Could a slave "give notice of any . . . neglect of duty"[25] by a white fellow servant? Obviously a slave could not make such complaints. As

22. *Id.* at 35-36.

23. For example, *see* Randall M. Miller, *The Fabric of Control: Slavery in Antebellum Southern Textile Mills*, 55 Bus. Hist. Rev. 471, 475-78 (1981). *See generally* Robert S. Starobin, *Industrial Slavery in the Old South* (1970). However, Starobin notes that after 1850 this integration declined. *Id.* at 479.

24. Ronald L. Lewis, *Coal, Iron, and Slaves: Industrial Slavery in Maryland and Virginia, 1715-1865* 31, 33 (1979).

25. *Farwell*, 4 met. at 59.

Chief Justice Thomas Ruffin of North Carolina observed,[26] "it has been repeatedly declared by the highest judicial authorities, and it is felt by every person, lay as well as legal" that "in the nature of things" there is a very different relationship "between persons who are in *equali jure,* as to freemen, and those who stand in the very great disparity of free whites and black slaves." Ruffin believed that slavery could exist only if there was clear racial subordination:

> It involves a necessity, not only for the discipline on the part of the owner requisite to procure productive labor from them, but for enforcing a subordination to the white race, which alone is compatible with the contentment of the slaves with their destiny, the acknowledged superiority of the whites, and the public quiet and security. . . .[27]

With such subordination, could a slave have questioned the actions—however dangerous—of a white fellow servant? Would it have been permissible for a slave to "observe" the activities of a white and report them to another white? The answer, at least in a legal sense, must clearly have been no. Otherwise discipline and race control would have been undermined.[28]

Nor were slaves in a position to effectively observe other slaves. Presumably, all the slaves in an industrial situation were under the direction of a white.[29] Could one slave question the activities of another, when the second slave was acting on orders from a white? Again, such a situation would have been an intolerable stress on the system.

Thus Judge Joseph Henry Lumpkin, who was Thomas Cobb's father-in-law, declared that the "interest to the owner and humanity to the slave, forbid" the application of the fellow servant rule to the peculiar institution. Only *"free white agents"* could be fellow servants in Georgia. This conclusion rested in part on the inability of slaves to observe fellow servants or give notice to whites. Lumpkin declared that slaves "dare not interfere with the business of others. They would be instantly chastised for their impertinence." Lumpkin reiterated, they "dare not intermeddle with those around"

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26. *State v. Caesar,* 9 Iredell (N.C.) 391 (1849). This case involved a slave (Caeser) who had accidently killed a white man while the deceased was illegally beating a second slave. Ruffin dissented from the majority, which found that there was some justification for Caesar's actions, and thus he had not committed a capital offense. The material quoted below, however, is representative of a general view of how slaves ought to behave, and is not necessary to the outcome of the case. The *Caesar* majority no doubt agreed with Ruffin's remarks here, but simply thought that an exception should be made for this case.

27. *Id.* at 413, 421.

28. Many southern planters in fact thought that industrial slavery was a threat to the system of bondage in the South. Other observers of the antebellum South agreed with this assessment. Charles B. Dew, *Disciplining Slave Ironworkers in the Ante-bellum South: Coercion, Conciliation, and Accommodation,* 79 Am. Hist. Rev. 393 (1974); Lewis, *supra* note 24, at 218-23. On the connection between slavery and urbanization—that is the threat to slavery posed by urbanization—*see* Richard Wade, *Slavery in the Cities: The South, 1820-1860* (1964).

29. The use of slave overseers would not change this. While slave overseers might have authority over slaves, they had that authority only to the extent that whites gave it to them.

them, slave or free. "Bound to fidelity themselves" they could not possibly be the fellow servants of anyone they worked with. Slaves had "nothing to do but silently serve out their appointed time, and take their lot in the mean while in submitting to whatever risks and dangers are incident to the employment."[30]

C: The Right to Leave Service

In the world that Chief Justice Shaw described, a worker could reprimand his fellow servants for their carelessness, and if that failed, the worker could take "leave of service." This option, 'the right to quit,' was not available to a slave. A slave leaving his place of employment would be a runaway. As T. R. R. Cobb explained, the slave could never leave his place of work "without the consent of his master." The moment a slave leaves his master "he is at all times subject to be retaken, and placed again under the power of the master."[31]

Even running from a hirer back to an owner would not be legal. As Judge Ruffin noted in *State v. Mann,* "[o]ur laws uniformly treat the master or other persons having the possession and command of the slave as entitled to the same extent of authority. The object is the same—the services of the slave; and the same powers must be confided." Thus, a hired slave owed his labor to and was bound to obey, not his true owner, but the hirer. The facts of *Mann* illustrate this point, and the potential risks to a slave who attempted to avoid working in a dangerous place. In *Mann* a unanimous court reversed the assault and battery conviction of a white who had shot and wounded a rented slave when she "ran off" to avoid chastisement. Ruffin held that the hirer of a slave had exactly the same rights as the owner to punish or correct a slave. The question of "the liability of the hirer to the general owner for an injury permanently impairing the value of the slave" was left to "the general doctrine of bailment." But, as long as a hired slave was in the possession of a hirer, the slave was bound to be obedient to the temporary master, whose power "is conferred by the laws of man at least if not the law of God."[32] Under this reasoning, a slave had no right to leave an unsafe workplace, even to return to his or her owner in order to escape a negligent hirer.

Georgia's Judge Lumpkin agreed with this analysis. In *Scudder v. Woodbridge* Lumpkin noted that a slave was totally at the command of his or her owner, or temporary master. Thus, if the deceased slave in this case "had been ordered by the captain to perform the perilous service in which he had lost his life, and he had refused," the ship captain would have been

30. *Scudder v. Woodbridge,* 1 Ga. 195, 199 (1846).

31. Cobb, *supra* note 20, at 110.

32. *State v. Mann,* 2 Dev. (N.C.) 263 (1829).

justified in punishing him.[33] The slave, in other words, was required to do his assigned tasks, and to refuse—or to leave service—would justify punishment. As long as a slave could not "with impunity, desert his post," to use the language of the Kentucky Court,[34] then slaves could not 'leave service.' Indeed, no aspect of the fellow servant rule was more antithetical to the concept of slavery than a right 'to leave service.'

D: Slaves and Fellow Servants: The Impossibility of Litigation

The fact that slaves could not flee from danger underscored Judge Lumpkin's conclusion that "[n]o two conditions can be more different than . . . slaves and free white citizens" and thus "it would be strange and extraordinary indeed if the same principle should apply to both."[35] Even if slaves could have been deemed "skilful" workers capable of observing their fellow workers, the fellow servant rule would not have worked for accidents involving slaves. There were two reasons for this. First, slaves could not be sued. Thus, even theoretically, injured parties could not have relied on the fellow servant rule to seek compensation for losses. Second, if the fellow servant rule applied to injured slaves, the burden of industrial accidents would have been shifted from the worker to the owner of slaves. This would have been counterproductive in the slave South.

Under Shaw's theory an injured worker could only sue the fellow servant whose negligence caused his injury. Shaw, happy with his legal theories and legal fictions, never faced the fact that a fellow servant would probably be judgment proof, and thus the injured worker could never be compensated for his loss. Shaw was able to do this because it was at least theoretically possible for one worker to sue another. However, it was impossible for a slave to be sued by anyone. Thus, if a free worker or hired slave were injured by a negligent slave, and the fellow servant rule applied, there would have been no remedy for the injured party.

If a free worker were injured by a slave, and the fellow servant rule applied, then the outcome might have been similar to the actual result where the injury was caused by a judgment proof free worker. The injured party would not be able to collect damages. The losses would lay where they fell. The economic advantage of the fellow servant rule would have been maintained: the cost of injuries would be borne by free workers. But another outcome was more likely. Since slaves could never be sued, an application of the fellow servant rule to slaves might have made the owner of a slave liable for injuries caused to a slave's fellow servant. This would have shifted some of the burden of industrial accidents to the owners of hired-out slaves. Thus, in refusing to apply the rule to slaves the Louisiana

33. *Scudder*, Ga. at 199.

34. *Louisville and Nashville Railroad v. Yandell*, 17 B. Mon. (Ky.) 586, 596 (1856).

35. *Scudder*, 1 Ga. at 199.

court asked rhetorically: "How could a free servant hold the owner of a slave responsible for an injury occasioned by the want of skill of a slave in the performance of a duty peremptorily required of him by his superior, under the rule that the reparation is due by the wrong-doer and not by the common master?"[36]

Equally problematic was the remedy when slaves were injured by the negligence of other slaves. If the fellow servant rule had been applied, then the loss would not have fallen on the worker, but rather on the owner of the slave. This would have harmed the most important class in the South: the slaveowners. Thus, when slaves injured other slaves, the employer of the slaves was held liable for damages.

The protection of the slaveowner's investment thus made the fellow servant rule inapplicable to hired slaves, whether the injury was caused by another slave or by a free worker. The cost of injured slaves fell not on the worker, or on the slave's owner, but on the hirer. Any other result would have placed the burden of industrial accidents on slaveowners, and perhaps led to the needless destruction of slave property. In *Scudder* Judge Lumpkin warned that "the life of no *hired* slave would be safe" if the owner could not sue the renter.[37] Only when renters were forced to pay for the loss of a slave would they carefully supervise their employees to prevent such losses.

This of course meant that the fellow servant rule could not benefit southern industry as much as it did northern industry. When slaves were injured by presumably judgment proof free whites southern courts could not shift to the burden of the loss to the fellow servant, because the loss would then be born by the slave owner. Equally important, the logic and the law of slavery precluded the application of the employee-to-employee aspects of the fellow servant rule. Slaves simply could not be fellow servants of their co-workers. Applying the fellow servant rule in this way would have eroded slave discipline and white-black relations. In effect, southern judges were forced to choose between protecting slaveowners and protecting industrialists. Not surprisingly, the courts of the South invariably chose to protect slave owners and their property interests.

III

The Contract Question: Could Slaves Negotiate At the Workplace?

Besides setting down rules for relations between workers, *Farwell* analyzed the contract relationship between a worker and a hirer. Shaw asserted that Farwell accepted the more dangerous job as a railroad engineer because the job paid more than his previous employment. This extra

36. *Howes v. Steamer Red Chief,* 15 La. Ann. 321, 323 (1860).

37. *Scudder,* 1 Ga. at 199.

compensation, Shaw believed, was the price the employer paid for inducing men to accept dangerous employment. This was the beginning of the concept of "assumption of risk" in employment law. Shaw's analysis may have been partially correct. Hard pressed on low salaries, workers may have taken more hazardous jobs for higher wages. But Shaw was surely wrong in asserting that workers negotiated their salaries, taking into account any extra risk that might prevail. Workers in large enterprises rarely negotiated their salaries with anyone.[38]

At one level the contract rationale, or market place approach, to industrial injuries was applicable to slavery. A slave owner could in fact take into account the risk to the slave when negotiating with the hirer. Thus, an owner renting a slave to a dangerous industry could ask for a higher rental fee, an insurance policy on the slave, or that the slave be kept from certain dangerous tasks. As the North Carolina court noted in 1858, "it is obvious that it is in [the master's] power also, by stipulations in the contract, to provide for the responsibility of the bailee for exposing the slave to extraordinary risks, or for his liability to the owner for all losses arising from any cause."[39]

This contract approach was, however, undermined by the status and value of a slave. A free worker might in fact be willing to assume a certain degree of risk for a larger salary. A "risk preferrer," to use modern concepts, might be willing to gamble with his own physical safety for the higher wage. But a slave had far fewer incentives to take such a risk. So, in fact, did the owner of a slave. Healthy slaves varied in value from five hundred dollars to more than a thousand.[40] Few owners would risk a valuable slave merely to gain a small increment in the rental.

Nevertheless, owners did rent slaves out. In doing so they sometimes neglected to take into account the possible risks of the rental. They did this at their peril.[41] Yet, merely making the renter liable for the value of a lost slave might not really make an owner "whole." Slaves, after all, were not completely fungible. A jury might not value a slave as much as a master did.[42] A dead or injured slave might not be easily replaced. To avoid this problem some owners attempted to limit the kind of work their slaves would do. Owners rented slaves to mines on the condition that they not be sent underground,[43] to railroad contractors and mines with the stipulation

38. Warren, *supra* note 15.

39. *Ponton v. Wilmington and Weldon Railroad,* 6 Jones (N.C.) 245, 247 (1858).

40. On the fluctuations in the prices of slaves see Kenneth Stampp, *The Peculiar Institution: Slavery in the Antebellum South* 414-18 (1956). In 1857 slaves in Virginia sold for as much as $1550 each. Skilled slaves in New Orleans sold for as much as $3,000 per slave. *Id.* at 415-16.

41. 6 Jones (N.C.) at 247.

42. This problem is discussed in Mark Tushnet, *The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest* 158-69 and *passim* (1981).

43. For example, *see Kelly v. White,* 17 B. Mon. (Ky.) 124 (1856).

that they be kept away from explosives,[44] and to ship owners with provisions that they be kept out of the water.[45]

Such limitations raised new problems, however, because industrial situations were not always predictable. If a ship was in danger of sinking, or was stranded, should the captain order a slave into the water in violation of the contract? If the slave remained on board the ship might sink. But if the slave joined the rest of the crew to help save the ship, and died in the process, the renter might be responsible for the death of the slave. Similarly, could a foreman always prevent a slave from being near explosives? Could a foreman be expected to remember which slaves could work near explosives and which could not?

All of these contractual problems complicated the attempt to limit the hirer's liability for an injured slave. The issue was further complicated by a critical ideological consideration. The limited liability of an employer under Shaw's opinion was based on the fact that the employee was a free agent, who could think and act for himself. It was not expected that an employer in a New England factory would have to carefully watch over his employees. They were expected to be able to care for themselves while doing their jobs. But slaves were theoretically incapable of self-regulation. Whether in the field or the factory they needed overseers to keep them at their jobs. Indeed, statutes throughout the South required that slaves be supervised by whites.[46]

Under such conditions it was impossible to assume that whites in charge of slaves should not be responsible for those slaves. Thus, the Louisiana court quoted *Farwell* to support the proposition that the hirer was not liable for the safety of those freeman working for him. But the slave was "a passive being, an immovable by the operation of the law,"[47] and could never be a fellow servant of anyone.

IV

The Fellow Servant Rule and Southern Courts

Louisiana was not the only state which had difficulty applying the fellow servant rule to slaves working in southern industries. Mark Tushnet has asserted that

> there was explicit disagreement among the courts over the question of a hirer's liability to an owner for injuries to the hired slave caused by the hirer's other employees, and that disagreement rested precisely on

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44. *Harvey v. Skipworth,* 16 Gratt. (Va.) 393 and 410 (1863).

45. *Gorman v. Campbell,* 14 Ga. 137 (1853); *Scudder v. Woodbridge,* 1 Ga. 195 (1846).

46. Cobb, *supra* note 20, at 108-09.

47. *Howes,* 15 La. Ann. at 323.

> the varying degrees to which the courts were willing to go in treating the owner-hirer-slave relationship as a purely market relationship.[48]

This analysis is, I think, incorrect. For the most part southern jurists agreed that the fellow servant rule was inapplicable to slavery.

Virtually all slave state courts rejected the employee-to-employee aspects of Shaw's *Farwell* opinion. Southern judges were unwilling to admit that a slave could be the fellow servant of *anyone*. To do so would have undermined the entire nature of southern slavery. The only disagreements in this area concerned *why* the tort aspects of the rule could not apply to slaves. But, while rationales differed, the outcomes did not.[49]

Similarly, all southern judges accepted the notion that a contract might limit the use of a slave by a hirer. This was not based on differing concepts of a "market relationship" since all judges recognized that the rental of a slave was in part a market place transaction. The only disagreements, and they were hardly "explicit," were over the extent to which masters needed to protect their property interest in rented slaves with specific contract provisions. The North Carolina courts placed a special burden on the master to negotiate limitations on the use of a slave. However, when limitations were negotiated, the North Carolina courts were willing to enforce them. Other slave jurisdictions were more likely to find implicit restrictions in contracts, based on the accepted and common use of slaves.[50]

When adjudicating disputes between owners and hirers southern courts faced one special problem unknown to northern courts: how to allocate responsibility for the injuries caused by the injured slave's own negligence. In addition to the employee-employee relations and the contract relationship within the fellow servant rule, there was implicit in Shaw's opinion the idea that contributory negligence would prevent an injured worker from winning a tort suit. If the employee negligently contributed to his or her own injury, then the employer would not be liable

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48. Tushnet, *supra* note 42, at 183.

49. Alabama was the only slave state court that heard a slavery-related fellow servant rule case and did not explicitly reject its application to slaves. Here a hired slave died after a steamboat explosion. The court held that the steamboat engineer had committed "gross negligence, and a criminal inattention to his duties" and that the hirer was negligent because he had failed to fire the engineer. *Walker v. Bolling*, 22 Alabama 294, 310 (1853). Language in the opinion hinted that the Court would in fact not hold the fellow servant rule applicable to slaves, but the court was not specific on this issue. *Id.* at 309. The Alabama court also sidestepped the issue in *Cook & Scott v. Parham*, 24 Ala. 21 (1853), while again upholding damages for the owner of the deceased slave.

50. *Satterfield v. Smith*, 33 N.C. 60 (1850). Here the court was willing to allow a "nominal" recovery for a slave used contrary to an explicit provision of a contract, even though "there was no evidence of any damage" done to the slave. *Id.* at 61. The plaintiff lost in this case, the jury apparently believing that there had not actually been a contract between the owner and hirer forbidding the hirer from using the slave in the manner objected to.

for the injury. Shaw noted that "the *implied contract* of the master does not extend to indemnify the servant against the negligence of anyone but himself [the master]; and he [the master] is not liable in tort, as for the negligence of his servant. . . ."[51] If the master was not liable for the negligence of one servant to another, he certainly could not be liable (under Shaw's theory) for any injury caused by the negligence of the injured party.

However, this was not such a simple matter for slave state jurists. Proslavery ideology asserted that slaves were irresponsible and incapable of caring for themselves. Therefore, it might be incumbent on the hirer of a slave to protect the slave from both the negligence of others and from his or her own negligence. Thus, in upholding damages to the owner for a slave injured by a blasting accident, the Virginia Court of Appeals noted that "the notorious improvidence and carelessness of our negro slaves" required that the hirers take special care to prevent slaves from negligently injuring themselves.[52] Similarly, the Georgia Supreme Court held that a hirer was obligated to "watch over" the "lives and safety" of rented slaves. This was because the "improvidence" of slaves "demands it." Slaves were "incapable of self-preservation, either in danger or in disease."[53]

In rejecting the fellow servant doctrine for slaves, southern jurists developed four modes of analysis. Some courts used a combination of them. First, some courts used blatantly racist arguments against the application of the rule to slaves. These courts asserted that blacks had such limited capacities for judgment that they could not possibly be held responsible for their actions. Thus, the courts protected them from the negligence of others, including fellow servants. Second, some courts based their analysis on an idealized conception of how slaves actually performed their duties in the society. Since the slave was required by law to "stand to his post,"[54] even in the face of lethal danger, the fellow servant rule was inapplicable to his situation. A third mode of analysis stemmed from the legally degraded position of blacks in the South. Since slaves were "wholly irresponsible, *civiliter*"[55] for their actions they could not be fellow servants. A fourth mode of analysis rejected the rule because slaves were "property." As the Florida Court declared: "In all relations, and in all matters, except as to crimes, the slave is regarded by our law as *property*."[56] As such, slaves could not be fellow servants, any more than a machine or a draft animal could be a fellow servant.

Southern courts applied these general concepts to the categories laid out by Shaw in *Farwell*. Courts explored whether slaves could be considered to have "mutual skill," could "observe" others in the workplace, give

51. *Farwell*, 4 met. at 60.

52. *Harvey v. Skipwith*, 57 Va. (16 Gratt.) 410, 417 (1863).

53. *Gorman v. Campbell*, 14 Ga. 137, 143 (1853).

54. *Louisville and Nashville Railroad v. Yandell*, 17 B. Mon. (Ky.) 586, 596 (1856).

55. *Scudder v. Woodbridge*, 1 Ga. 195, 199 (1846).

56. *Forsyth v. Perry*, 5 Florida 337, 344 (1853).

"notice" to whites in charge, or could "leave service" when there was danger. In addition, courts analyzed the extent to which hirers were required to supervise and protect slaves from their own negligence. Similarly, courts explored the nature of the contract between an owner and a hirer. Some courts examined all aspects of the fellow servant rule, while others examined only parts of the rule.

One approach to the problems of slavery and the fellow servant rule is to examine how southern courts analyzed specific aspects of Shaw's opinion. This doctrinal approach demonstrates the overwhelming rejection of *Farwell* by southern courts adjudicating slavery related issues. It also has the advantage of providing an overview of "southern law" on the subject.

Certainly there were legal trends in the South, as recent literature has demonstrated.[57] When adjudicating the law of slavery, states borrowed from each other and cited each other's cases as precedents.[58] Nevertheless, the law of the South was made up of the law of a number of states. Thus, a state-by-state analysis of the fellow servant rule and slavery, rather than a doctrinal approach, is helpful for developing the parameters of "southern law."

Besides blurring jurisdictional differences and nuances, a doctrinal approach understates chronological development within jurisdictions.[59] A jurisdictional analysis avoids this problem, by illustrating how specific states dealt with the fellow servant rule and slavery over time. Finally, a case-by-case analysis illustrates the complexity of reasoning in southern courts. Some courts rejected more than one aspect of the rule. To analyze those cases doctrinally would require parsing out one case among many sub-topics. Equally important, some courts rejected the rule without specifically declaring which aspects of Shaw's analysis they would not adopt. As with so much else in southern law, slavery led to peculiar applications of the fellow servant rule.

What follows then is a state-by-state analysis of the major southern cases dealing with the fellow servant rule and slavery.[60] This analysis

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57. *See* for example, Paul Finkelman, *Exploring Southern Legal History*, 64 N.C.L. Rev. 77 (1985) (hereinafter Finkelman, *Exploring Southern Legal History); Ambivalent Legacy: A Legal History of the South* (David Bodenhamer & James Ely eds. 1984) (hereinafter *Ambivalent Legacy).*

58. For examples other than those in this article, *see* Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (hereinafter Finkelman, *An Imperfect Union*); ch. 7 (1981); Paul Finkelman, *The Law of Freedom and Bondage* chs. 3, 4 (1986) and the articles by Fede and Schafer in this symposium.

→ Paul Finkelman, *The Peculiar Laws of the Peculiar Institution,* 10 Revs. Am. Hist. 358-63 (Sept. 1982).

60. This article does not discuss Alabama, Tennessee or Texas because no cases directly on the fellow servant rule and slave arose. However, courts in those states did construe hiring contracts in favor of the owner of the slave. A large number of Tennessee cases in particular dealt with contracts for hired slaves. Where no contracts existed, the courts in those states used "custom" to find for the owner against the hirer in cases where slaves were used in unusual and dangerous ways. There are no relevant cases from Arkansas, Mississippi, Missouri, Maryland and Delaware.

reveals the complexity of applying fellow servant doctrine to slaves. This examination also suggests, that at least in this area of the law, the South diverged quite dramatically from the North.[61] To do otherwise would have undermined slavery and "a proper regard for the interest of the owner" of hired slaves.[62] As the backbone of southern society, the interests of the master class took precedence over developments in law or the needs of developing industries.[63]

A: Virginia

Even before Shaw decided *Farwell* a fellow servant question arose in the Virginia Court of Appeals, in *Randolph v. Hill.* Hill hired his slave to one Randolph, the owner of a coal mine. One morning there was a "foul air" in the mine which made the workers ill. The next morning "the overseer superintending the pit . . . sent down one of the negro labourers at the pit (who, it seems, was a slave belonging to Randolph) with a lamp . . . to ascertain whether the foul air was gone, so that the labourers could be safely sent down." This slave, a foreman at the mine, was "one of the most experienced labourers at the pits, perfectly competent to make such an examination, and worthy of full confidence." He reported the pit was safe, and ten slaves, including Hill's, were sent down to work. Significantly, the court record notes that "none" of the slaves "were unwilling to go down" into the mine. Despite the assurances of the mine's safety, the workers quickly became ill and were

> drawn out as fast as it could be done, one or at most two at a time; no preference was given to Randolph's own slaves, one of whom was the last drawn up, sending before him the body of Hill's slave, who had fallen into some water in the pit, about eighteen inches deep: he appeared to have been drowned, and could not be revived: all the other labourers were made sick by the foul air, but none dangerously.[64]

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61. On the divergence of southern and northern law, *see* Finkelman, *Exploring Southern Legal History, supra* note 57; *Ambivalent Legacy: supra* note 57. On another divergence of southern and northern legal developments *see* Finkelman, *An Imperfect Union, supra* note 58.

62. *Gorman,* 14 Ga. at 143.

63. Owners did not usually win suits over accidents caused entirely by the negligence of slaves, and where there was no relationship to the accident and a hiring of the victim. In *Sims v. Macon & Western R.R. Co.,* 28 Ga. 93 (1859), the Georgia Supreme Court refused to award damages to the owner of a slave killed by the railroad, on the ground that the slave was entirely at fault. In this case the slave fell asleep next to the track and was caught in the cow catcher and killed in broad daylight. Before the accident the engineer had blown the train's whistle, but the slave did not respond. A similar result occurred in *Mann v. Macon and Western R.R. Co.,* 32 Ga. 345 (1861). In *Poole v. North Carolina R.R. Co.,* 53 N.C. 340 (1861) the owner of a deaf slave killed by a train could not recover damages. The Court ruled that the engineer could not have known that the slave was deaf, and thus reasonably assumed that the slave would get off the tracks when the train blew its whistle.

64. *Randolph v. Hill,* 7 Leigh (Va.) 383, 383-85 (1836).

A divided Virginia Court of Appeals upheld Hill's claim for damages. Judge William Brockenbrough noted that the "jury might fairly have inferred, from the evidence . . . that the defendant and his agents were guilty of the negligence charged." He felt that the procedure of testing the mine for gas could have been inadequate, and this was an issue for the jury to decide. He also noted that "since the labourers were slaves and not competent to give evidence," all the testimony in the case came from the white employees of Randolph, who were of course likely to bias the testimony against the plaintiff.[65]

In concurrence Judge Dabney Carr went directly to the question of slaves as fellow servants. Hill's slave had died because of the negligence or incompetence of Randolph's slave. Carr noted that the "examination" of the pit was "by a single person and that a negro slave." Admitting this slave was "experienced and confidential," Carr nevertheless asked rhetorically "was this taking sufficient precaution, where so many human lives depended on the issue?"[66]

This case illustrates the difficulties of applying the fellow servant rule to slaves. In his defense Randolph's witnesses noted that none of the slaves objected to going into the mine. Under Shaw's conceptions, the slaves agreed to an "assumption of risk." However, it is apparent that the slaves had little choice in the matter. Once the overseer decided to send them into the mine, their only alternative was willful disobedience, with all that it entailed. The only person with personal knowledge of the condition of the mine was the slave who examined it. Under the "fellow servant rule" he would have been negligent, and thus the only one liable to Hill. But of course, Hill could not have sued a slave. More to the point, perhaps, was the argument of Hill's counsel that "[a]n owner of coal mines ought not to have trusted an ignorant negro, however long he might have been accustomed to work in them, to ascertain whether foul and noxious air had got into them." This notion was reinforced by Judge Carr.[67] A slave, in other words, could not be a fellow servant, not only because he could not be sued, but also because a slave could never be a "suitable person" or a "skilful and careful" fellow servant.

A year later, in *Spencer v. Pilcher,* the Virginia court upheld damages for a master whose slave was improperly employed under an implied contract. Although decided five years before *Farwell,* the decision antici-

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65. *Id.* at 390. The four judges on the court were equally divided, and thus the lower court verdict was upheld. The two opinions supporting the lower court were longer and far more detailed than the two supporting the request for a new trial. Judge Brockenbrough noted "[i]f there was any negligence in the case, [the white overseers employed by the defendant] were the persons who were guilty of it." Nevertheless the plaintiff was "compelled to make them witnesses, or to lose his testimony altogether." *Id.* at 389.

66. *Randolph v. Hill,* 7 Leigh (Va.) at 389.

67. *Id.* at 389-91.

pated and undermined the contract aspects of that case, as they might be applied to slaves in non-agricultural settings.[68]

Pilcher rented his thirteen-year-old slave Monroe to Spencer, on the assumption that Spencer would use the slave for local agricultural purposes. Instead, Spencer took Monroe on a voyage to New Orleans. At night Monroe fell into the Ohio River and was never seen again. In upholding the award of damages to Pilcher, the Virginia Court did not have to face a tort aspect of a fellow servant question. Pilcher's case did not turn on the negligence of Spencer or the others on Spencer's flat boat. Rather, the court decided the case on contract grounds. The court denied that "the bailee of a slave for hire has all the rights of a master during the period of bailment." The renter could not use the slave however he wished, even if he was not constrained by contract. Rather, the bailee "must not only observe the covenants of hiring" but was also "bound to perform what has been omitted to be inserted [in the contract for hiring], but ought reasonably to be done." Thus, the renter was held to a higher standard of care for the slave than the owner himself.[69]

Spencer v. Pilcher complicated the use of hired slaves in Virginia by denying a renter the flexibility to use a hired slave as he might use his own. Rather, the hirer could use the slave only for general agricultural purposes. The hirer lacked the right to employ a slave in an industrial setting unless that right was specifically contracted for. The court declared that it "will not be presumed, without proof" that "to place [the slave] under the dominion of a temporary bailee," means the slave may "be used how and where [the bailee] pleases." And unless a contract specifically allowed an industrial use of the slave "it ought not to be permitted to the bailee to immure him in an unhealthy mine, or to subject him to the hazards of distant voyages, and the perils of a business he has never followed."[70]

In 1857 the Virginia legal system directly faced the problem of applying the tort aspects of the fellow servant rule to a case involving a slave. Although decided by arbitrators, *Strachan v. Richmond and Danville Railroad Co.* nevertheless indicates the direction of analysis in Virginia on this subject.[71]

On January 1, 1856 the railroad hired Strachan's slave Arthur. Twelve days later, while working as a fireman, Arthur was killed in an accident caused by the negligence of an engineer who also worked for the railroad.

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68. *Spencer v. Pilcher*, 8 Leigh (Va.) 565 (1837).

69. *Id.* at 583. The court explicitly noted at least one right that a master had that a renter did not. The court observed that the renter could not take the slave to "England, where the moment he touches the soil he is disenthralled, or to one of the non-slaveholding states, where the dangers of seduction and loss are probable and imminent." *Id.* at 584.

70. *Id.* at 583-84.

71. *Strachan v. Richmond and Danville Railroad*, 2 Q.L.J. 257 (1857). I thank Professor W. Hamilton Bryson of the University of Richmond School of Law for bringing this case to my attention.

No one disputed that previous to this accident both engineers involved in the collision had been "competent, trusty and faithful officers" of the railroad. Thus, the railroad was not negligent in who it hired. Nor was Arthur employed in violation of the contract for hire. The railroad had in fact specifically negotiated with Strachan to use Arthur as a fireman, and for this dangerous assignment "gave increased hire." The only question for the arbitrators was whether Arthur had been a "fellow servant" of the negligent engineer, and if so, whether that barred Strachan from recovering damages from the railroad. Citing *Farwell* and its successor cases from throughout the nation, the attorneys for the railroad argued precisely this point.[72]

Acknowledging the force of this argument, even as they rejected it, the arbitrators noted that their decision could not "be fully reconciled with the remarks of the judges in some of the English and American cases." But, those cases "related to *free* agents" which were "themselves irreconcilable with the views of the employer's liability in the case of *slaves*, assumed in the Southern cases" cited by Strachan's attorney. Citing *Randolph v. Hill* and the Georgia case of *Scudder v. Woodbridge*,[73] the arbitrators concluded that slaves could never be fellow servants because they were "to be regarded, not merely as a person employed, but as a property *bailed* to the master under a contract for hire." In holding that a slave hiring was simply rental of property, the arbitrators avoided any complex analysis of the nature of slavery. They did, however, point out that an alternative analysis, leading to the same result, could be based on the "broader ground" that "the duty of passive obedience on the part of the slave, takes the case out of the operation of the rule in the case of *free* agents. . . ."[74]

The strict limitations on the use of hired slaves was reaffirmed by the last Virginia case on the subject, *Harvey v. Skipwith*. Although initiated in 1853, because of continuances and retrials the case was not finally decided until 1863. Harvey, a railroad contractor, had hired Skipwith's slave Jefferson, with "the distinct understanding and agreement that the said slave should not be employed in or about the blasting of rocks or using powder, or exposed to hazard to life or serious injury from being thus dangerously employed."[75]

However, Jefferson did transport gunpowder to a blasting site, where he was blinded by an apparently accidental explosion caused by a white

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72. *Id.* at 258, 260, 262.

73. *Scudder v. Woodbridge*, 1 Ga. 195 (1846). This case is discussed *infra*, at notes 80-87.

74. *Strachan*, 2 Q.L.J. at 264-66.

75. *Harvey v. Skipwith & als.*, 16 Gratt. (Va.) 393, 394 (1863); *Harvey v. Skipwith*, 16 Gratt. 410 (1863).

worker—a fellow servant—who actually did the blasting.[76] Both Jefferson's actual owner, Thomas Skipwith, and Skipwith's mother, who held a life estate in the slave Jefferson, sued Harvey. The Skipwiths eventually won both cases. The opinion of Judge Daniel in the second case underscored the impossibility of applying the fellow servant rule to slaves. Daniel noted that Harvey should have kept Jefferson away from the blasting, not only because "of the danger attending the use of powder even by the most prudent and cautious persons," but because "of the notorious improvidence and carelessness of our negro slaves." The injuries to Jefferson were "only another illustration of the dangerous nature of" blasting and were neither "unnatural or extraordinary."[77] The case did not turn on the liability of the fellow servant for Jefferson's injuries, or on Jefferson's own contributory negligence. Rather, it turned on the failure of the hirer's employees—Jefferson's fellow servants—to keep Jefferson away from the blasting and the contract violation in allowing Jefferson to transport blasting powder. Since the contract prohibited the use of the slave "about the blasting of rocks" it was unnecessary for the plaintiff to prove that the explosion was actually caused by negligence. The plaintiff only had to prove that the defendants were negligent in allowing the slave to be near the blasting site.

The Virginia courts based their decisions on the perceived limitations of blacks.[78] Slaves could not be expected to act in their own best interest. Their judgment about the safety of a mine or a blasting site could not be trusted. They could not be held liable for injuries to others or to themselves, "notwithstanding the slave may have been negligent or imprudent or have acted in disobedience of the orders of the hirer in respect to such employment, and notwithstanding such negligence or imprudence or disobedience may have been the proximate cause of the injury."[79] Virginia's industrialists were limited in how they could use hired slaves. They would have to constantly watch over them. Slaves in Virginia could never be fellow servants. The employers of slaves would always be liable for injuries to them or caused by them.

B: Georgia

In 1846, in *Scudder v. Woodbridge,* Georgia became the first slave state to specifically consider whether a slave could be a fellow servant. Scudder hired Woodbridge's slave Ned to work on his steamboat as a

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76. *Harvey v. Skipwith & als.*, 16 Gratt. at 402. It is unclear if the explosion was caused by negligence or was truly an accident. The white who handled the powder, W.S. Davis, was nearly killed by the explosion and his hand was severely injured. Jefferson was blinded because he was standing directly behind Davis when the explosion took place.

77. *Harvey v. Skipwith,* 16 Gratt. at 416-17.

78. This was not true in the arbitration case.

79. *Harvey v. Skipwith & als.*, 16 Gratt. at 405.

carpenter. Ned drowned when caught in the boat's water wheel while helping to launch the craft. Woodbridge sued, arguing that the "negligence or want of skill" of Scudder's employees were responsible for Ned's death. The jury awarded Woodbridge five hundred dollars, and Scudder appealed.[80]

In deciding the case, Judge Joseph Henry Lumpkin[81] noted Joseph Story's analysis of fellow servants in his treatise on agency, the *Farwell* precedent, and other cases supporting the fellow servant rule. He observed that Georgia was usually "disposed to recognize and adopt" Story's analysis as well as such precedents as *Farwell*. But he found that the "interest to the owner and humanity to the slave, forbid" the application of the fellow servant rule "to any other than *free white agents*." The fellow servant rule could not "be extended to slaves, *ex necessitate res*."[82]

Lumpkin presented the slave as the passive instrument of his master, who could only do what he was told to do. Lumpkin restated the principles laid down by Shaw in *Farwell* and analyzed them in accordance with Georgia's public policy. He noted that the policy argument in favor of the fellow servant rule was based on the concept "that each person engaged on steamboats and railroads should see that every other person employed in the same service does his duty with the utmost care and vigilance." But, Lumpkin asked, "[c]an any of these considerations apply to slaves?" He answered his own question: "*They* dare not interfere with the business of others. They would be instantly chastised for their impertinence." Equally important, they could not refuse orders from their employers. Lumpkin noted that if Ned, "although shipped as a carpenter, had been ordered by the captain to perform the perilous service in which he had lost his life, and he had refused or remonstrated" the captain would probably have been justified in punishing him. Lumpkin pointed out that slaves could not testify in court against whites, they "dare not intermeddle with those around" them, and that "they have nothing to do but silently serve out their appointed time, and take their lot . . . submitting to whatever risks and dangers are incident to the employment." Because slaves were "[b]ound to fidelity themselves" they could not possibly be the fellow servants of anyone. Lumpkin concluded that "[n]o two conditions can be more different than . . . slaves and free white citizens" and thus "it would be strange and extraordinary indeed if the same principle should apply to both."[83]

The safety of working conditions also made the fellow servant rule inapplicable to slaves. Shaw theorized that the worker was in the best

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80. *Scudder v. Woodbridge*, 1 Ga. 195 (1846).

81. No modern biography of this important southern judge has been written. For a superb analysis of Lumpkin's decisions relating to the political issues of slavery and secession, *see* Reid, *Lessons of Lumpkin: A Review of Recent Literature on Law, Comity, and the Impending Crisis*, 23 Wm. & Mary L. Rev. 571-624 (1982).

82. *Scudder*, 1 Ga. at 198. The other cases, from England, South Carolina, and New York, are found *infra* note 118. These cases were also cited by counsel in *Scudder*.

83. *Id.* at 199.

position to know if the job site was safe. A worker could either complain about unsafe conditions or quit the job. Lumpkin had already demonstrated that slaves could do neither. Moreover, the master, who maintained a financial interest in the slave, could not "know of the condition of the vessel, road, work or machinery, where his servant is employed, or of the skill or prudence of the persons associated with him."[84] Thus, the only way to protect the master's property was to make the hirer liable for the slave's safety.

Equally important for Lumpkin was the place of blacks in Georgia society; the issue was as much one of race as status. Lumpkin did not analyze the question from a racist perspective, as the Virginia court had done.[85] Lumpkin's main concern was with the legal position of blacks—slave and free—in Georgia, and their relationship to whites. The judge noted that "a large portion of the employees at the south are either slaves or free persons of color" and that they were "wholly irresponsible, *civiliter,* for their neglect or malfeasance."[86] As such they could not be fellow servants. Indeed, in passing Lumpkin noted that the engineer on Scudder's steamboat was a free black. Was Woodbridge supposed to recover the value of his lost slave from this black engineer? Lumpkin could not conceive of such a thing.

The final aspect of Lumpkin's analysis concerned the economic interests of the owners of slaves. Lumpkin acknowledged that the economy of Georgia was changing through the advent of "numerous navigation, railroad, mining and manufacturing companies which dot the whole county, and are rapidly increasing." These companies relied on "a variety of agents" and many of them, Lumpkin thought, "are destitute of principle, and bankrupt of fortune." Under the fellow servant doctrine, if these "destitute" and "bankrupt" fellow servants injured or killed slaves, the owners of those slaves would be without recourse. If the hirer was not responsible for the slave's well-being then no one would be. If the fellow servant rule were applied to slaves Lumpkin believed the hirer would have no incentive to protect the slave from misuse and "the life of no *hired* slave would be safe."[87] This would directly harm the interests of the slaveowners in Georgia.

Thus, for a variety of reasons the Georgia Supreme Court rejected the application of the fellow servant rule to slaves within four years after Massachusetts first adopted the rule. This position was reaffirmed in 1853, in *Gorman v. Campbell.*[88]

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84. *Id.*

85. *See supra* notes 62-79.

86. *Scudder,* 1 Ga. at 199.

87. *Id.* at 199, 200.

88. *Gorman v. Campbell,* 14 Ga. 137 (1853).

The facts of *Gorman* were similar to those in *Scudder*. Gorman had hired his slave London to work on Campbell's steamboat. The boat became entangled in logs and the white hands went into the water to remove the obstructions. In accordance with local custom; the slave ship hands were ordered to remain on board. Nevertheless, London went into the water to help free the vessel. He worked at this "for about half an hour, in the presence and sight of the captain without anything being said to him." The captain ordered London to leave the water when the log he was cutting finally began to give way. However, before he could do this, London was swept away by the current and drowned.[89]

When Gorman sued Campbell the judge charged the jury that "if they believe the boy London was engaged in the work by the express command or permission of the Captain" then Gorman should recover damages. But, if the jury "believed that the negro engaged in the work of his own free will, and the Captain forbid him to do it, the defendant was not liable, because the owner of the boat and its officers, are not required to keep the negro in chains" in order to keep him out of the water. Under this charge the jury found for the defendant ship owner, and Gorman appealed.[90]

At first glance this case does not appear to raise fellow servant issues. Indeed, the term fellow servant appears nowhere in the case. London, after all, did not die from the negligence of his co-workers. Rather, he died because of his own actions, in violation of the orders of his superiors.

Nevertheless, this case turned on issues quite similar to those in fellow servant cases. In overturning the jury's verdict, Judge Lumpkin asserted that in a contract for hire of a slave the hirer was obligated to "exercise proper care in the supervision of the slave." This was not done here. London was allowed to work in the water—contrary to custom and the implied contract between Gorman and Campbell. The captain worked for Campbell in much the same way that the negligent switchman in *Farwell* worked for the railroad. The captain, who was in effect the fellow servant of the slave London, failed to restrain London from violating the terms of his contract. In rejecting what was the logic of the fellow servant rule when applied to slaves, Lumpkin found Campbell liable for the value of London. Lumpkin asserted that "humanity to the slave, as well as a proper regard for the interest of the owner, alike demand that the rules of law, regulating this contract should not be relaxed."[91]

What Lumpkin meant by "humanity to the slave" is unclear. Lumpkin was concerned about the life and health of slaves, primarily because they were valuable property. Ultimately, Lumpkin did not find for Gorman because "humanity to the slave" required it. Mark Tushnet appears to

89. *Id.* at 138.
90. *Id.* at 139.
91. *Id.* at 143.

overstate the case in asserting that "the rule adopted in *Gorman* can be justified in the end only because humanity demands it."[92] On the contrary, it was "a proper regard for the interest of the owner" that led to the result in this case. Slaves were valuable pieces of property, and Lumpkin believed that this property had to be protected from unnecessary destruction. Lumpkin further believed that the "improvidence" of slaves made them unable to care for themselves. Lumpkin thought slaves "incapable of self-preservation, either in danger or in disease." Thus, Lumpkin asserted that the courts should make "it the interest of all who employ slaves, to watch over their lives and safety." Otherwise valuable property would be lost. Therefore, Lumpkin found that the hirer "not only *may* use coercion even to chains, if necessary, for the protection of the property from peril, but it is his duty to do so."[93] The captain of Campbell's ship had failed to do this and as a result London had died. That made Campbell—and not, significantly, the captain—liable for the value of London.

In reaching his decision Judge Lumpkin cheerfully quoted the South Carolina Supreme Court, which had asserted that "it is in vain to say that the slave is a moral agent—capable of wrong as well as of right action."[94] Indeed, the interest of the master required that the slave be seen solely as a chattel, which the hirer was required to protect.

C: Kentucky

In adjudicating cases involving hired slaves Kentucky rejected both the racism of the Virginia courts and the paternalism of the Georgia courts. The Kentucky court recognized the abilities and even the good judgment of slaves. Nevertheless, the Kentucky court concluded that slaves could not be fellow servants of other workers.

The Kentucky court did not directly face the application of the fellow servant rule to slavery until 1856, when the court explicitly rejected the rule in *Louisville and Nashville Railroad v. Yandell.*[95] However, a decade earlier, in *Swigert v. Graham,* the Kentucky Court had implicitly rejected the application of the fellow servant rule to slaves.[96] This case involved the drowning of Edmund, a slave owned by Graham and rented to Swigert and others, who owned the steamboat on which Edmund worked.

Graham argued that Swigert's agents, who were of course Edmund's fellow servants, had negligently allowed Edmund to drown while trying to

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92. Tushnet makes much of this phrase, arguing that it shows the tension between "humanity" and economic "interest" in the antebellum South. Tushnet, *supra* note 42, at 3-6, 50-54.

93. *Gorman,* 14 Ga. at 143.

94. *Id.* at 144, quoting *Duncan v. South Carolina Railroad Company,* 2 Rich. Law. (S.C.) 613, 616 (1846).

95. *Louisville and Nashville Railroad v. Yandell,* 17 B. Mon. (Ky) 586 (1856).

96. *Swigert v. Graham,* 7 B. Mon. 661 (1847).

move the steamboat off a sand bar. A jury awarded Graham damages, and Swigert appealed. Significantly, Swigert did not argue that his employees could not be held liable for the loss of Edmund. In other words, Swigert did not raise a defense based on *Farwell*. Rather, Swigert argued that his employees had not actually been negligent, and that Edmund's death was caused entirely by his own negligence. Equally important, Graham did not claim that Swigert had violated the terms of their contract. Rather, the entire case was "for tortious negligence or mismanagement in the exercise of rights and duties . . . created by the contract." The case forced the Kentucky court to declare what constituted a "breach of a duty imposed by law upon a party who has the possession and use of a slave of another."[97]

In overturning the verdict for Graham, Chief Justice Thomas Alexander Marshall rejected the extreme racism of the Virginia courts and the extreme paternalism of the Georgia courts. Marshall believed that a slave could be "as capable of taking care of his own safety as the hirer or owner himself, and presumably, as much disposed to do it." Marshall did not find that Edmund had died from the negligence of others on the crew, but from his own actions, in violation of all common sense. Marshall found that a hirer was obligated to provide ordinary care. Had there been a lack of ordinary care, and thus the presence of negligence by Edmund's co-workers, then Graham could have recovered damages. But Marshall found that, at worst, Swigert's other employees were guilty of poor management. The Chief Justice concluded that "[g]ood management in addition to ordinary care, the law does not require."[98]

Swigert set Kentucky apart from Virginia and Georgia in its definition of what might be expected of a slave. However, the case clearly implied that slaves could not be fellow servants of other workers. Chief Justice Marshall was quite willing to uphold damages against Swigert if his employees' negligence had caused Edmund's death. The case implied, but did not directly assert, that a slave could not be considered a fellow servant. Any doubts about this implication were resolved in 1859, in *Louisville and Nashville Railroad v. Yandell*.

Ironically, the facts of *Yandell* were almost identical to those in *Farwell*. Yandell's slave, Henry, was injured while under the hire of the railroad, and as a result his leg was amputated which greatly reduced Henry's value "if not to render him valueless." This injury was not caused by Henry's negligence, but by that of a fellow servant, the railroad engineer, who ran the train at too high a speed while cars were being added to it.[99]

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97. *Id.* at 661-62.

98. *Id.* at 664, 669.

99. *Louisville and Nashville Railroad v. Yandell*, 17 B. Mon. (Ky) 586, 593-94 (1856).

Attorneys for the railroad strenuously argued that the fellow servant rule prevented Yandell from recovering, because Henry had been injured by the negligence of other railroad workers. Citing *Farwell,* the railroad contended that the "authority to the effect that one agent injured by another agent, where they are employed to unite their labor to effect a particular object, can not recover from their common principal is overwhelming."[100] Judge B. Mills Crenshaw was unconvinced:

> Whatever may be the wisdom and policy of this rule of law, when applied to free persons . . . we do not hesitate to reject its application to the present case, in which a slave was an employee; . . . There is, in our opinion, manifest propriety in distinguishing between . . . cases involving free persons on the one hand and slaves on the other, and in applying a different rule of law when a slave is an employee.[101]

Judge Crenshaw explained why the fellow servant rule could not apply to slaves. In doing so he presented the position of the slave in society not as an incompetent racial inferior, but as a person whose status precluded any of the attributes of a free agent. The slave, in Crenshaw's view, was a passive tool:

> A slave may not, with impunity, remind and urge a free white person, who is a co-employee to a discharge of his duties, or reprimand him for him for his carelessness and neglect; nor may he, with impunity, desert his post at discretion when danger is impending, nor quit his employment on account of the unskillfulness, bad management, inattention, or neglect of others of the crew.

Even when faced with the "possible destruction of life or limb" the slave was required to "stand to his post." The slave was "fettered by the stern bonds of slavery—necessity is upon him, and he must hold on to his employment." Thus, the Kentucky court could "not perceive the propriety of applying this [fellow servant] doctrine to the present case, in which an injury to a slave is the complaint."[102]

The Kentucky court instead believed that cases of this kind "should be determined by the well-known principles . . . of the bailment or hiring of slaves." The court admitted that in hiring a slave to a railroad or other dangerous enterprise an owner "must be understood as risking the dangers

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100. *Id.* at 587. The attorney for the railroad also cited *Murray v. South Carolina Railroad,* 26 S.C.L. (1 McMul.) 385 (1838); *Priestly v. Fowler,* 3 Mees. & Welsb. 1, 150 Eng. Rep. 1030 (1837), and the New York case of *Brown v. Maxwell,* 6 Hill 592 (1844). He argued that the only precedent denying the validity of the fellow servant rule was *Little Miami Railroad v. Stevens,* 20 Ohio 415 (1851), in which the railroad's attorney noted "that the court was divided, and the case not authoritative." *Id.* On *Little Miami R.R.*, *see* Marston, *supra* note 4, at 605-09.

101. *Louisville and Nashville Railroad v. Yandell,* 7 B. Mon. at 595-96.

102. *Id.* at 596.

incident to the employment." But this did not include accepting the risks for "injuries inflicted upon a slave through the negligence and carelessness" of the hirer or his employees. For those injuries "attributable to the mismanagement or negligence of the bailee or his agents" the owner could recover damages.[103]

As it had in *Swigert,* the Kentucky court also limited the standard of negligence to "such care, caution, and prudence, as persons generally, in the same circumstances, would observe towards their own slaves." The bailee was not required to maintain a standard of "the utmost care and caution" towards hired slaves.[104] Where the employees of the bailee were negligent, the owner of an injured slave could recover damages, in spite of the fellow servant rule.

Unlike the Virginia courts, the Kentucky court did not base its decision on racist presumptions about the inferiority of slaves. On the contrary, the Kentucky court assumed that slaves were capable of perceiving dangers. Instead, the court reached its decision based on two presumptions about the nature of slavery: first, that a slave could not reprimand a white fellow servant for his carelessness, and second, that the slave was required "to stand to his post, though destruction of life or limb may never be so imminent."[105] This analysis also fit well into the ideology of the South. If slaves were to be loyal servants and workers then they must be protected from the negligence of those in authority over them. Otherwise, the masters would lose their property, and perhaps, the slaves might cease to be loyal.

D: South Carolina

In 1838, in *Murray v. South Carolina Railroad,*[106] South Carolina became the first American jurisdiction to adopt the fellow servant rule. The applicability of the rule to slaves was not directly tested in South Carolina until 1860.[107] However, before this case the South Carolina courts decided a number of cases involving the death or injury of slaves hired by industrial users. In many of these cases slaves were used contrary to the strict letter of

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103. *Id.* at 596-97.

104. *Id.* at 597.

105. *Id.* at 596.

106. *Murray v. South Carolina Railroad,* 26 S.C.L. (1 McMul.) 385 (1838).

107. *White v. Smith,* 12 Rich. (S.C.) 595 (1860). The South Carolina court faced, and avoided, a fellow servant question involving a slave in *McDaniel v. Emanuel,* 2 Rich. (S.C.) 455 (1846). Here a slave, Jack, was employed on a steamboat after his master ordered that he be returned home. The slave and the ship captain both became drunk, and while turning the ship around, Jack fell overboard and drowned. The jury apparently found for Jack's owner on the ground that the captain had no legal right to employ Jack. In upholding this decision the South Carolina Supreme Court acknowledged the precedential value of *Murray,* and said that if Jack was legally employed on the ship then the steamboat owners would be liable for his death only if there was "wilful misconduct or culpable negligence on the part of the captain." 2 Rich. at 459.

the contract between the owner and the hirer. Usually the hirer was not actually at the scene of the accident. These cases illustrate the willingness of the South Carolina court to protect the interests of the owner at the expense of the hirer. Although not explicitly fellow servant cases, the logic behind them was the same.

In *Butler v. Walker,* the slave George was hired to a railroad construction company owned by the Walkers. The contract for hire stipulated that the Walkers were "not *to expose* the slaves to rain, or other bad weather, or *dangers of any kind.*" The hirers also agreed that George would not "labor before daylight or after dark." One day in early February, "between sundown and dark," George and the other slaves were sent back to their quarters, some distance from the work site. An employee of the railroad offered to take the slaves back to their quarters on a hand car, and the overseer agreed to this. On the way back a train approached the hand car, and all those on the car were compelled to leave it. At the time the car was on a bridge, and the occupants had to climb down the posts holding up the bridge. George fell while doing this, and died shortly thereafter.[108]

In upholding a judgment for Butler, Judge John Benton O'Neall asserted that the "covenant not to expose the plaintiff's slaves to dangers of any kind, included . . . their omission (when their overseer was present) to prevent the slave from being in danger."[109] Implicit in this decision was a rejection of the fellow servant rule for hired slaves. The negligence in this case was by the driver of the hand car and by the overseer who allowed the slaves to travel on the hand car. Both of these men might have been viewed as fellow servants of the slaves. Instead, however, they were treated as agents of the hirers, and the hirers were deemed liable for the death of George.

In *Duncan v. South Carolina Railroad Company,* a similar sort of analysis was used to award damages to Duncan, whose slave, Wesley, was killed in a train accident. When Duncan hired Wesley to the railroad as a laborer he placed in the contract a clause prohibiting Wesley from riding on a train, except to be taken to his place of employment with the track crew. One night Wesley did not sleep with the track crew, but instead secreted himself on a train, and the next morning was found some miles from where he was supposed to be. Contrary to the rules of the railroad, and the contract between Duncan and the railroad, the train conductor allowed Wesley to remain on the train, which stopped a mile from where Wesley was supposed to be laboring. Instead of safely getting off there and walking to the work place, Wesley was allowed by the conductor to remain on the train. A mile later Wesley jumped from the train, however, he fell backwards and was killed by the train. In finding for Duncan, Judge O'Neall noted that the transportation of the slave violated the contract between Duncan and the railroad. The railroad, through its agent the conductor, was

108. *Butler v. Walker & Walker,* 1 Rice 182, 183 (1839).

109. *Id.* at 184.

thus liable for Wesley's death. O'Neall refused to consider the conductor and Wesley to be fellow servants and also rejected the contention that "the slave was a moral agent, capable of wrong as well as right action, and that he killed himself by jumping off [the train] when he ought not."[110]

The "humanity" of the slave did not enter into the question. Quite the contrary, the South Carolina court treated the slave entirely as an object of a contract. The South Carolina court quoted Story on Bailments to the effect that if a "thing is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but if a loss occurs, although by inevitable casualty, he will be responsible therefore."[111] George was "a thing" misused, and the railroad was responsible for his value.

The concept of the slave as a "thing" was slightly modified in *White v. Smith,* in 1860. Here the court conceded that a slave was "still a man, wilful and intelligent, and capable of defeating all proper care on the part of those who have him in charge." Thus, if a slave "efficiently contributes to his own destruction" a hirer might not be held liable for the loss. But, where the agent of the hirer was at fault, the court had no doubt that the hirer himself was liable for the death of a slave.[112]

In this case White rented his slave, Charles, to Smith. Smith in turn left Charles "under the authority of Jackson," who worked for Smith. Jackson ordered the slaves under his control, including Charles, to board a train that was already in motion. In the process Charles slipped and was run over by the train.[113]

Smith argued that Charles and Jackson were "fellow servants" and thus he (Smith) was not responsible for Charles's death. The South Carolina Court rejected this argument. The Court unequivocally declared that its 1838 decision in *Murray v. South Carolina Railroad* "was not intended to make a slave such a representative of the master in work done by the slave in common with other hirelings, as to constitute the master a co-employee with the hirelings."[114] In other words, a slave could not be a fellow servant in South Carolina.

E: Florida

In *Forsyth & Simpson v. Perry,* the Florida Supreme Court acknowledged the importance of fellow servant precedents, but denied that they could apply to slaves. In this case a slave hired by Forsyth to work on his

110. *Duncan v. The South Carolina Railroad Company,* 2 Rich. (S.C.) 613, 616 (1846).

111. *Id.* at 616, *quoting* Joseph Story, *Story on Bailments,* at 273. The text of the case does not indicate which edition of Story was used.

112. *White v. Smith,* 12 Rich. (S.C.) 595 (1860).

113. *Id.*

114. *Id.*

steamboat had drowned as a result of the negligence of one of the mates on the boat. A jury awarded Perry damages, and Forsyth appealed on the grounds that this was a classic fellow servant case. Perry, he argued, should sue the mate, and not them.[115]

In upholding the jury verdict the Florida court observed that the slave did not actually contract with anyone, and thus did not "voluntarily incur the risks and dangers incident to" any job. Nor could he protect himself "by refusing to incur the peril, or by leaving the service of his employer." The slave was merely "a passive instrument in the hand of those under whose control he is placed."[116] A passive instrument could not be a fellow servant.

In addition to his passivity, the slave was not a "person" under law. On the contrary, "in all relations, and in all matters, except as to crimes, the slave is regarded by our law as *property*" and thus subject solely to the law of bailments.[117]

While not the most elegant opinion, the Florida court here was hardly "almost incoherent."[118] On the contrary, on one level this court understood the nature of the problem more clearly than other courts. The issue of a slave as a fellow servant could not be dealt with as a problem of labor law, precisely because slaves were not laborers; rather; they were objects, much like machines, to be rented out. Thus, the

> contract for hire in this case constituting a bailment of the property, and it being reciprocally beneficial to both parties, something more than mere *good faith,* on the part of the bailee, is requisite. The owners of the boat were bound to take ordinary care of the slave, and failing to do so, through their agent, they are responsible for the consequences.[119]

Because the hirers failed to take such care, and the slave died, the Florida court had no problem holding the hirers liable for the loss of the rented slave.

F: Louisiana

The key Louisiana case on this subject was *Howes v. Steamer Red Chief.*[120] Here the Louisiana Supreme Court summarized the difficulties of applying the rule to slaves. Howes hired his slave, Tom, to work on the

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115. *Forsyth & Simpson v. Perry,* 5 Fla. 337 (1853).

116. *Id.* at 343

117. *Id.* at 344

118. Tushnet, argues that this opinion is "almost incoherent." Tushnet, *supra* note 42, at 186.

119. *Forsyth & Simpson v. Perry,* 5 Fla. at 344. This rejection of the fellow servant rule for slaves was reaffirmed in *Kelly, Timanus, & Co. v. Wallace,* 6 Fla. 690 (1856).

120. *Howes v. Steamer Red Chief,* 15 La. Ann. 321 (1860).

steamboat *Red Chief*, and in this employment Tom fell overboard and drowned.

The circumstances of the drowning were important in proving the negligence of the employees of the *Red Chief*. The *Red Chief* was lying next to another ship, the *Judah Touro*, in the New Orleans harbor. Tom and the other workmen were required to walk over the planks carrying heavy sacks of grain. In order to facilitate the off-loading from the *Judah Touro*, two six-foot wooden planks were laid across the sides of both boats. These planks were not fastened, and "there was nothing to hold them" on the *Judah Touro* and "nothing to prevent them from slipping" off the *Red Chief*. The two boats were not tied together or properly moored to the docks. Both boats were bobbing in the water, and would move whenever another boat passed by. It was a windy and rainy day and the water was rough. While carrying a sack Tom fell overboard and drowned.[121]

In upholding damages for Howes the Louisiana court carefully considered "all the facts and circumstances of the case" and concluded that the method of transferring goods "was apparently defective, insecure and dangerous, and indicated a want of ordinary care, attention and foresight," of which Tom "was the unfortunate victim."[122]

Having established negligence, the court next had to determine who was responsible for this negligence. The court recognized the importance of the fellow servant rule, and cited *Farwell, Priestly v. Fowler,* and a Louisiana case to support its general application to cases involving injured workers.[123] However, as with other Southern courts, the question here was not whether the fellow servant rule was a good rule, but whether it ought to apply to slaves. Here Louisiana sided with its neighbors, concluding that this was impossible.

Judge Albert Duffel emphatically rejected the idea that slaves could be fellow servants, declaring: "We will not discuss the *status* of a slave." The slave was "responsible to the State for his crimes, but in all other respects he is a passive being, an immovable by the operation of the law . . . he is entirely subject to the will of his master, who may correct and chastise him . . . he is incapable of making any kind of contract."[124] Quoting the Florida Supreme Court, Duffel wrote: "In all relations, and in all matters, except as to crimes, a slave is regarded by our law as property."[125] Because "there could not, from the nature of the case, exist a privity of contract between the slave . . . and the defendants" the relationship between Tom and the free workers on the ship "were not the same, and must, by the force of the case, be governed by different rules."[126]

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121. *Id.* at 321.

122. *Id.* at 322.

123. *Id.* at 322-323. *Hubgh v. N.O. and Carrollton R.R. Co.*, 6 La. Ann. 496.

124. *Howes*, 15 La. Ann. at 323.

125. *Id., quoting Forsyth v. Perry*, 5 Fla. 337 (1853).

126. *Howes*, 15 La. Ann. at 323.

Duffel then demonstrated, just as other southern judges had, why slaves were different from other workers and thus not "fellow servants." He found that

> the slave is bound to risk his safety in the service of his master, cannot decline any service, still less leave the service, but is wholly, absolutely, and unreservedly under the absolute control, nay caprice of his master. Again, how could a free servant hold the owner of slave responsible for an injury occasioned by the want of skill of a slave in the performance of a duty peremptorily required of him by his superior, under the rule that the reparation is due by the wrong-doer and not by the common master?[127]

Judge Duffel noted that the problem of applying the fellow servant rule to slaves was two-fold. First, the slave was required by his status to always obey his master. If ordered to do something dangerous, he had no right to object—indeed, it might be illegal for him to do so. Second, if a slave was negligent and the fellow servant rule applied, who could an injured white sue?

Duffel did note the contract aspect of Shaw's *Farwell* opinion, but here again, like most other slave state courts[128] Louisiana did not see that the rule was applicable to the South. Duffel conceded that in renting the slave the owner "took upon himself the ordinary risks of the dangers of navigation" but he was unwilling to "assent to the proposition that he has no recourse against the defendants for the loss of his property occasioned by the fault of their agents." Like Judge Lumpkin in *Scudder*, Judge Duffel realized that the life of a slave would mean little to the boatmen of the South if hirers were not liable for the slave's market value. The "usual carelessness of the steamboat-men, and unfortunately the too little value which is often set on human life, should not be a means of defence, but rather a forcible reason, in the interest of the community at large, not to enlarge the exceptions to the general rule which fixes liability of the master for the act of his agents."[129] This conclusion was not based on "humanity towards the slave," although Duffel no doubt objected to the wanton killing of slaves, as did most other southern leaders. Rather, this decision turned on the law of the slave states which made slaves property, and the need to protect that property from unnecessary destruction.

G: North Carolina

The major exception to the general trend in southern decision making on the fellow servant rule was North Carolina. The North Carolina court never completely adopted the fellow servant rule for slaves. However, in a

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127. *Id.* at 324.

128. The exceptions are Alabama and North Carolina.

129. *Howes*, 15 La. Ann. at 324.

number of cases the North Carolina court showed more concern for protecting the rights of the hirers than in protecting the interests of the slaveowners.

Initially the North Carolina court followed the trends set by other slave state courts. Thus, in *Dailey v. Dismal Swamp Company,* the North Carolina court upheld damages for a slave, rented to the defendants, who drowned "in consequence of the misconduct of the defendants' servants in the management of their business."[130] The fellow servant rule was not an issue in this case, but the result was clearly a rejection of the rule for slaves rented to industries.

After *Dailey* the North Carolina court analyzed cases involving rented slaves in two ways. First, the court used a negligence standard that appears to be more rigorous than that used in other states. However, if negligence on the part of management, or on the part of the employees of management was found, then a slave owner might recover. Thus, in *Heathcock v. Pennington,* the owner of a slave could not recover from the hirer because the court found no negligence. The case involved a slave child between age ten and twelve, working in a gold mine at night, in the winter, and without proper clothing. The working conditions at the mine were generally unsafe, and in the early morning the young boy fell into the mine and died.[131] Courts in other states might have examined the facts more closely, and determined that the mine owners were negligent in not providing better supervision for the slave worker. But, finding no negligence, the North Carolina court easily concluded that the hirer was not liable.

However, when the North Carolina court did find negligence, it also assessed damages. Thus, in *Sparkman v. Daughtry* the court asserted "that the doctrine of *respondeat superior* applied" to the hirers of slaves. In this case the owners of a fishing vessel were held liable for the value of the slave Jacob, who drowned when the boat capsized. The boat had been taken out on "a very dark and stormy night," and this constituted negligence on the part of the owners and their servants, the crew.[132]

Similarly, in *Jones v. Glass* the North Carolina court held the owner of a mine responsible for the negligent treatment of a hired slave by one of his employees. This slave suffered serious injuries from a beating which was "negligently" inflicted. Thus, recovery by the slave's owner was allowed.[133]

But in *Couch v. Jones,* the same standard resulted in a different verdict. Here North Carolina's judges diverged from their southern counterparts. Couch's slave, Calvin, was hired to contractors working on a railroad. During some nighttime blasting Calvin was killed by flying rocks after the contractor had set off a charge. The trial court charged the jury that

130. *Dailey v. Dismal Swamp Company,* 24 N.C. 222 (1842).

131. *Heathcock v. Pennington,* 33 N.C. 640 (1850).

132. *Sparkman v. Daughtry,* 35 N.C. 168 (1851).

133. *Jones v. Glass,* 35 N.C. 305 (1852).

Couch could not recover damages if the jury believed that Calvin had disobeyed orders in staying too close to the blasting site after an order was given to leave the area. Under such a charge the jury found for the defendants, and Couch appealed.[134]

The North Carolina court declared that the standard of negligence in this case was one of "ordinary care." This standard was not violated by the contractor, and with one judge dissenting, the court upheld the jury verdict. Other courts, no doubt, would have agreed with the dissent that blasting after dark was inherently dangerous, and that those in charge of the blasting crew had an obligation to make sure that no slaves were in the area when the blasting took place.[135]

The court did not deny Couch's claim under the fellow servant rule. Recovery would have been possible *if* the defendants had been negligent. However, the North Carolina court used a standard of negligence for hired slaves that no other slave state courts would accept. Here the North Carolina court assumed that slaves should be held to a standard of ordinary prudence and self-preservation that any white would be held to. In this respect, North Carolina differed from the rest of the South.

North Carolina was also more ready to adopt the contract aspects of the fellow servant rule. The court consistently held that masters could contract for certain protections for their slaves. Thus, in *Satterfield v. Smith* the court indicated it would uphold nominal damages for a slave "sent by water" in violation of a contract, even though the slave was not injured.[136]

The key case in North Carolina was *Ponton v. Wilmington & Weldon R.R. Co.*[137] The facts of the case resembled *Farwell*. Ponton's slave, hired to the railroad, was killed because of the negligence of the switchman. Not surprisingly, Chief Justice Thomas Ruffin began his opinion by reviewing the major fellow servant cases in England and the United States. Significantly, Ruffin ignored southern cases dealing with slaves as fellow servants.

Having established the authority of the fellow servant rule, Ruffin declared that the only question at hand was whether it applied to slaves. Curiously, for a judge of his abilities, Ruffin did not carefully examine this question. He did not delve into the master-slave relationship as other judges had. Instead, he simply boldly asserted that this case did not involve the slave *per se*, and thus there was no fellow servant question at all. The only issue was one of contract. Ruffin found that the owner of the slave has "in his power also, by stipulations, in the contract, to provide for the responsibility of the bailee for exposing the slave to extraordinary risks, or for his

134. *Couch v. Jones*, 49 N.C. 402 (1857).

135. *Id.* at 409, 411.

136. *Satterfield v. Smith*, 33 N.C. 60, 61 (1850). The jury, however, awarded no damages.

137. *Ponton v. Wilmington & Weldon R.R. Co.*, 51 N.C. 245 (1858).

liability to the owner for all losses arising from any cause."[138] Having failed to do so, Ponton could not now sue for damages, unless there was gross negligence on the part of the railroad. This Ruffin did not find. Instead, Ruffin found that the railroad company had been diligent in hiring skilled workers, and this was the first time the switchman had failed to perform his duty.

In *Ponton* Ruffin essentially applied the fellow servant rule, not to the slave, but to the master. In effect, the master became the fellow servant of the railroad. The master could have demanded greater protections in the contract, but he did not. Similarly, the railroad was not negligent; only the switchman, the fellow servant, was negligent. What emerged from this decision is a two tier standard for industrial accident cases. If there was ordinary negligence by an employee of the hirer, and a slave was injured or died, then the owner could not recover from the hirer, *unless* there were specific contract provisions on that point. However, if there was gross negligence on the part of the company, in hiring incompetents or in not keeping the workplace safe, then recovery for harm to a slave might be possible.

Why Ruffin took a position different from all other slave state jurists is impossible to know. There are perhaps two logical answers. First, Ruffin was a "great" judge who saw himself as part of national legal culture. He may very well have been unable to break from the *Farwell* precedent, simply because all other major courts, except Ohio, seemed to follow it. Southern nationalists like Lumpkin and the members of the Florida and Virginia courts may not have been so constrained. This explanation is not, however, completely satisfactory. After all, the Kentucky court ought to have been with North Carolina on this issue if the standard was simply the outlook of the jurists.

It is also possible that Ruffin was interested in promoting industrial development in North Carolina. Certainly his decisions in fellow servant cases bear that out. In making a choice between industrialists and slaveowners, Ruffin apparently chose the former. However, he was the only southern jurist to do so, and he did it in a very limited fashion.

V

Slave Fellow Servants and Southern Industrialization

Implicit in all southern court decisions on slavery and industrialization (except perhaps those of North Carolina) was a need to protect the interest of the master in his property. In deciding these cases the southern courts were forced to allocate the costs of industrialization between two property interests: the hiring industries and the owners of slaves. In siding with

138. *Id.* at 247.

masters southern judges may have unconsciously indicated a hostility towards industry. More likely, however, they were simply applying the law as they understood it to the specific concerns of their society. As the cornerstone of southern society, slave property required the utmost protection.

There were many impediments to southern industrialization. At one level the fellow servant rule was not a very important one. After all, it was rare that slaves were injured or killed on the job. Even if railroads, mining companies, ship owners, contractors, and the like had been forced to absorb all the costs of injuries to slaves, these enterprises would probably have remained profitable.

However, at another level, the fellow servant cases illustrate the key problem of southern industrialization. The slave culture of the South required that slaves be limited in what they could do, where they could go, and most of all, what the law could expect of them. The ideology of slavery precluded courts and judges from treating slaves as the fellow servants of whites. The movement towards industrialization in the South was clearly hampered then, by the limitations on a large portion of the available labor. The law as developed in antebellum courts helps our understanding of this problem.

These cases also suggest that the South could not be part of a national legal culture if that culture undermined slavery. Even in North Carolina the courts were solicitous of the needs of masters, and simply asserted that they protect their property through contracts. If such contracts were made, the North Carolina court was ready to enforce them.

The cases on the fellow servant rule illustrate where the South diverged from the North, not only in economic development, but also in legal development. They illustrate great unity among southern jurists. In these cases southern judges cited each other more often than they cited northern judges. These cases also illustrate the tension between law in the antebellum South and the rest of the nation. The southern jurists showed a strong desire to be part of national legal culture. They cited Story and Shaw with respect and admiration. They acknowledged the importance of *Farwell,* and they generally wished to apply it to their own states. But, when the ideas of Story and Shaw came into conflict with the needs of the South's "peculiar institution," the result was fairly predictable. As they did in other contexts,[139] southern judges were quite prepared to sever ties with the intellectual developments in the North or Great Britain, if those developments threatened slavery. Thus, southern judges spoke with near unanimity in declaring that slaves could never be elevated to the status of "fellow servants."

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139. For example, in a different context, *Mitchell v. Wells,* 37 Miss. 235 (1859). The majority opinion in this case rejected any application of northern law to the status of blacks. The dissent argued for secession.