NORTHERN LABOR LAW AND SOUTHERN SLAVE LAW: THE APPLICATION OF THE FELLOW SERVANT RULE TO SLAVES

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The transformation of the American economy in the nineteenth century went hand in hand with dramatic changes in law:[1] contract, tort, property, commercial and corporate law evolved to accomodate the new technologies and business practices of the era.[2] Industrial and financial innovations brought fortunes to some, while changing the lives of nearly all Americans. The children of farmers became factory workers,[3] while farms themselves were turned into ponds for mill dams and roadbeds for railroad tracks.[4]

The dramatic changes in the American economy sometimes overshadowed the costs to individuals injured by this new technology. Steamboats, railroad trains, factory machinery and even older technologies, such as mines, became more dangerous, as the entire economy moved at a new, faster pace. Steamboats sank and crashed, often killing their crews, passengers, and other river travelers. Railroad trains were particularly dangerous; they crashed, caused fires, and destroyed nearby buildings.[5] Pedestrians, onlookers, and passengers were all threatened by these new forms of technology. Consumers of the new technology, or innocent passers-by, were not the only victims. The men who worked on these mechanical monsters were often—almost literally—eaten by them. The workers in America's factories and mines faced similar dangers. One clear cost of industrialization was human life and property.

Accidents, of course, led to litigation. In the 1830's and 1840's important changes took place in how the courts treated losses to goods shipped,[6] injuries to passengers or pedestrians, and damages to property caused by passing

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1. Portions of this Article appeared in Finkelman, *Slaves as Fellow Servants: Ideology, Law, and Industrialization*, 31 AM. J. OF LEGAL HIST. 269-305 (1987). The present Article has been reconceptualized, and new material has been added in order to explore the question of race and law in the American South for this issue of the NATIONAL BLACK LAW JOURNAL. The author acknowledges the help of Beth L. Borchers in the final preparation of this manuscript.

2. *See generally*, M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1977).

3. *See, e.g.*, T. DUBLIN, WOMEN AT WORK (1979).

4. L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957).

5. *See* Burroughs v. Housatonic Railroad Co., 15 Conn. 124 (1842); Hart v. Western Railroad, 54 Mass. (13 Met.) 99 (1847); Ryan v. New York Central Railroad Co., 35 N.Y. 210 (1866).

6. Antebellum courts initially held that common carriers could not limit their liability for goods shipped, but by the 1850s New York, Massachusetts, and a few other states had concluded that they could do so. New York even allowed carriers to exempt themselves from all liability, but this rule was not followed by a majority of states. *See, e.g.*, M. HOROWITZ, *supra* note 2, at 205-07; L. LEVY, *supra* note 4, at 141-55; J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 549 (1st ed. 1832).

trains.[7] These legal developments in part shifted some of the costs of industrialization from shareholders to victims. The loss was allowed to lie where it fell.

Often that loss fell on workers and their families who could ill afford the cost. One of the critical developments in industrial law concerned the right of workers to sue their employers for on-the-job injuries, which were usually caused by the negligence of other workers. This was not an issue of simple burden shifting. Rather, it was a problem of whether injured workers would actually collect damages. If workers could sue their employers, then they could be recompensed for their injuries. If workers were forced to sue their negligent co-workers—their "fellow servants" in nineteenth century terminology—then they would be unlikely to recover anything. Their fellow servants were, in modern terms, almost always judgment proof.

The common law of pre-industrial England and America held an employer liable for any injuries or damages caused by his employees, under the theory of *respondeat superior*. As the legal scholar, Nathan Dane, summarized in 1823: "the master is responsible for the act of his servant, if done by his command, expressly or impliedly given."[8]

In *Priestly v. Fowler*,[9] the English Court of Exchequer rejected the application of *respondeat superior* for injuries caused to one employee by a co-employee, or "fellow servant." A year later, in *Murray v. South Carolina Railroad*,[10] the South Carolina court accepted this new theory of adjudication. But, this undistinguished court was not likely to set a trend for other American jurisdictions to follow. However, four years later in *Farwell v. Boston and Worcester Railroad*,[11] the Massachusetts Supreme Judicial Court applied the rule. This court was one of the most distinguished in the nation, and was led by Chief Justice Lemuel Shaw, the nation's most influential state jurist.[12]

Farwell set a precedent that nearly every other American jurisdiction accepted. Indeed, where judges refused to follow Shaw, they did so by "creating exceptions" to the rule "rather than by rejecting it outright."[13] One important exception to this rule was its application to injuries caused by slaves, or injuries to slaves, working in southern industries.[14] Ultimately, virtually all southern jurists agreed that slaves could not be fellow servants of anyone, within the terms laid down by Chief Justice Shaw in *Farwell*.

The application of the fellow servant rule to slaves illustrates the problem

7. L. LEVY, *supra* note 4, at 151-62; L. Friedman, A HISTORY OF AMERICAN LAW 415-16 (1st ed. 1973). In Massachusetts and elsewhere judges denied the rights of plaintiffs to sue in wrongful death cases. Carey v. Berkshire Railroad, 55 Mass. (1 Cush.) 475 (1848); Ryan v. New York, 55 N.Y. 210 (1866). Although decided immediately after the Civil War, this decision is indicative of antebellum legal theory and reasoning.

8. N. DANE, GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW, cited in Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule*, 1837-1860 132 U. PA. L. REV. 579, 584 (1984).

9. 3 Mees. & Welsb. 1 (1837); 150 Eng. Rep. 1030 (1837).

10. 26 S.C.C.Eq. (1 McMul. Eq.) 385 (1838).

11. 45 Mass. (4 Met.) 49 (1842).

12. L. LEVY, *supra* note 4. On Shaw see also, G. GILMORE, AGES OF AMERICAN LAW 38 (1977); G.E. WHITE, AMERICAN JUDICIAL TRADITION 35-63 (1976).

13. Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule*, 132 U. PA. L. REV. 579, 590 (1984).

14. For another discussion of this problem, see Note, *Slavery and the Fellow Servant Rule: An Antebellum Dilemma*, 61 N.Y.U. L. REV. 1112 (1986).

that slavery posed for southern jurists. It shows that antebellum southern jurists were severely limited in their ability to join in the mainstream of Anglo-American legal developments. It also shows that it was impossible to segregate the legal problems raised by slavery from other legal questions. Slavery after all, was woven into the entire fabric of southern culture and economics. Thus, it should not surprise us that slavery—and of course race relations—affected law beyond what we might initially expect.[15] In the case of the fellow servant rule, the results were important for the development of southern industry as a whole. The *Priestly* and *Farwell* cases offered a valuable rule for Anglo-American industrialists. It was one that could relieve stockholders and investors of some of the costs of industrial accidents. The South was not able to take full advantage of the fellow servant doctrine because of slavery and the racism on which it was based.

I. THE FELLOW SERVANT RULE

Before turning to southern applications of the fellow servant rule, a brief review of the *Farwell* case is in order.

Nicholas Farwell was a railroad engineer whose hand was crushed when his train derailed. This accident was caused by another railroad employee—a fellow servant—who neglected to properly move a switch. 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."[16]

In denying Farwell's claim, Chief Justice Shaw argued that industrial safety could best be attained by the workers themselves. Shaw declared:

> 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.[17]

Shaw's analysis rested on the dubious assumption that a worker was in a better position than a manager to supervise other workers. In large enterprises, like railroads, this would have been impossible. Farwell, for example, may not have even known the negligent switchman. He could not have policed his actions without stopping the train at every switch to examine it. That would have destroyed the efficiency of the railroad. A similar situation existed in other industries. Indeed, in his opinion Shaw admitted that in a rope factory workers "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."[18] Nevertheless, Shaw was willing to lump all such workers into the category of fellow servants. The efficiency Shaw

15. *See* Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77-116; AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH (D. BODENHAMER & J. ELY eds. 1984).

16. *Farwell*, 45 Mass. at 50-51.

17. *Id.* at 59.

18. *Id.* at 60.

sought was one which led to the efficient accumulation of capital at the expense of injured workers.[19]

In addition to this relatively simplistic "tort" analysis, Shaw offered an equally simplistic "contract" analysis. Shaw noted that Farwell received a substantial raise—to two dollars a day—as an engineer. Shaw argued that Farwell took this job with "full knowledge of the risks incident to the employment." Shaw found that the "*implied contract* of the master" did "not extend to indemnify the servant against the negligence of any one but himself [the master]; and he [the master] is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied."[20]

This is not the place to dissect Shaw's motivation, his opinion, or its results.[21] As already noted, virtually all American courts adopted the precedent, at least when free workers were involved. The rest of this Article examines the principles of *Farwell* and how they were applied to industrial accidents involving slaves in the antebellum South.

II. THE PRINCIPLES OF FARWELL

In *Farwell* Chief Justice Shaw concluded that for three reasons workers were in a better position than management to police the safety of a job site. First, he noted that "the safety of each [worker] depends on the care and skill with which each other shall perform his appropriate duty." This might be called a "mutual skill" category. Second, was a "mutual observer" category, in which each worker was "the observer of the conduct of the others." Finally, he found a category of "mutual notice" in which each worker could give to management "notice of misconduct, incapacity or neglect of duty." Therefore, if each worker took care to watch over 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.[22]

Shaw also found three ways—other than a tort suit—in which workers might deal with management to create a safe working environment. First, workers could give "notice" to management of unsafe working conditions or irresponsible co-workers. At that point "if the common employer" failed to "take such precautions, and employ such agents as the safety of the whole party requires," then the worker had a second alternative, which was to "leave the service" of the employer.[23] Consistent with nineteenth century concepts of free labor and liberal capitalism, Shaw believed a worker had a legal right "to quit," presumably even in breach of a contract, if working conditions were unsafe.

Finally, in *Farwell* Shaw argued that when negotiating with his employer the worker should take into account the hazards of the workplace. In Shaw's view, workers could gain extra compensation for dangerous work, or perhaps,

19. For a more a detailed critique of Shaw's opinion, *see* Finkelman, *supra* note 1, at 272-73.

20. *Farwell*, 45 Mass. at 59-61.

21. *See* Finkelman, *supra* note 1. *See also* Warren, *Volenti Non Fit Injuria in Actions of Negligence*, 8 HARV. L. REV. 457 (1895); Comment, *supra* note 8.

22. *Farwell*, 45 Mass. at 59.

23. *Id.*

even negotiate for a safer place to work. Implicit within this concept was an acceptance of the notion of assumption of risk. Shaw's decision implied that the worker assumed whatever risk came with the job. If Farwell had not wanted to assume the risk of having his hand crushed because of a negligent switchman, he should have bargained for this in his contract with the railroad. Failure to do so, Shaw believed, limited the railroad's liability.

This last notion of negotiating with an employer, either for a higher wage or reduced risks, was probably the least realistic for free workers. In the nineteenth century, with unions generally impotent and collective action usually impossible, workers had few opportunities to negotiate collectively for wages or safer working conditions. They took what was offered. Farwell's higher wage as an engineer had little to do with his bargaining power, as an individual, with the corporation. Rather, it reflected the supply and demand factors of the marketplace, and no doubt the assessment by railroad managers that engineers had a higher status than other workers, and therefore should have a greater salary.[24]

Ironically, this was the one aspect of the *Farwell* decision that southern courts were willing to apply to slaves. This is because slaves did not negotiate with southern industrial employers, as free workers negotiated with northern industrial managers. Rather, the owners of slaves negotiated with the managers. It is likely that in such negotiations the owners of slaves were often equal to the managers in both social status and bargaining power. Southern slaveowners were often the leaders of their communities, and were less likely to be intimidated by the management of any industry than a northern factory worker would have been. Moreover, slaveowners had viable alternatives to renting their slaves to railroads, mines, and other dangerous industries. Accordingly, it was perhaps not unreasonable for some southern courts to assert that masters should bargain for the safety of their slaves. Free workers in the North, however, had little bargaining power against employers.

The other components of *Farwell* theoretically could have been applied to free workers in the North. They could have demanded competent co-workers, reprimanded their fellow workers who threatened their safety, complained to management about unsafe workers or conditions, and even walked off the job. These actions might have had disastrous economic results for the worker, but they could theoretically have been done. Practically, of course, most of these remedies were not available to most workers. Farwell himself, as we have seen, could neither have reprimanded not supervised the negligent switchman.

Despite the real world difficulties of implementing the concepts of *Farwell*, the decision was intellectually sound, especially for a judge interested in fostering the economic expansion of his state. The decision supported the needs of the emerging railroad industry in Massachusetts. Shaw "made the railroad the beneficiary of the common law" and "by generally giving preferential treatment to industrial interests over strictly personal ones, tended to insulate the former from tort liability."[25] Most likely Shaw saw *Farwell* as protecting railroads and other industries from vexatious suits.[26] Thus, Shaw

24. *See* Warren, *Volenti Non Fit Injuria in Actions of Negligence, supra* note 21, at 466.

25. L. LEVY *supra* note 4, at 179.

26. This rule was applied to other industries in Albro v. Agawam Canal Co., 60 Mass. (6 Cush.) 75, 77 (1850).

probably did not see his ruling as placing the burden of industrial accidents on laborers—although that certainly was the result of the case in the North.

III. THE TORT QUESTION: COULD SLAVES BE FELLOW SERVANTS?

As already noted, the contract aspect of the fellow servant rule, which was in reality least applicable to free workers, was the part of the rule most applicable to slaves. Conversely, the tort components of the rule, which to a lesser or greater extent might actually have worked for free laborers in the North, could not be applied to slaves in the South. In many cases it was legally impossible to apply the *Farwell* decision to slavery. And, where the tort aspects of the case were not legal impossibilities, they were clearly social impossiblities.

A. *Mutual Skill*

For two reasons, one actual and the other ideological, the assumption of "mutual skill" could not be applied to slaves. First, masters could, and did, rent their slaves for tasks they were not capable of performing. This does not imply that slave workers were not skilled. The successful use of slaves in southern industries proves beyond any doubt that slaves were as skilled as any other workers.[27] Rather, the argument here is that slaves ultimately had no legal control over who they worked for or where they worked. A slave might be able to convince a master not to hire him for a job he could not handle, but not all slaves were so persuasive, and many slaves might not have dared to try. Consequently, slaves were indeed hired for tasks they were incapable of performing. The results could be tragic.

Consider the sad example of a North Carolina master who hired his ten or eleven-year old slave to work in a gold mine. There the young child was used for "driving a horse attached to a whim." In January 1850, this youth, who "did not have an overcoat," was required to be at work "at about 9 o'clock in the evening, with orders to continue the driving through the night until the next morning." Just "before daylight in the morning, and when it was dark," the slave was "directed . . . to start his horse, and the boy, being drowsy, in attempting to go to his horse fell into the pit and was killed."[28] It is reasonable to argue that a poorly clad child was not fit—or outfitted—to work in a mine at night, in the winter. The master, not the slave or the slave's parents, made the determination that this was a proper employment for a young boy.[29] Although here the slave only injured himself, it is clear that he was not a "skilled worker." In this accident, the issue of mutual skill might well have arisen, had another worker been injured.

The ideological component of this question turns on the assumption that fellow servants would be mutually skilled. The common law theory of *respon-*

27. *See* R. STAROBIN, INDUSTRIAL SLAVERY IN THE OLD SOUTH (1970); Dew, *Sam Williams, Forgeman: The Life of an Industrial Slave in the Old South*, in REGION, RACE AND RECONSTRUCTION 199-239 (J. KOUSSER AND J. MCPHERSON, eds. 1982).

28. Heathcock v. Pennington, 53 N.C. (11 Ired.) 640, 641 (1850).

29. This was not a fellow servant case, but a negligence case against the hirer. However, the facts of the case illustrate how easily this slave child could have injured a co-worker, and thus raised the fellow servant question. The North Carolina court found that there was contributory negligence on the part of the slave, and thus the hirer was not responsible for the accident.

deat superior assumed that "the master at his peril, employ servants who are skillful and careful."[30] In *Farwell*, Shaw implied his assent to this theory, by taking pains to point out that the switchman, Farwell's fellow servant, was a long time employee and "a careful and trustworthy servant" of the railroad. Thus, Shaw concluded that "where . . . suitable persons [were] employed," the fellow servant rule would apply.[31] This implied that if employees were unsuitable, the employer might be liable for their negligent acts. For southern legal theorists this analysis raised the problem whether a slave could be a "suitable person" or a "careful and trustworthy servant."

The day-to-day experience of southern planters and industrialists confirmed that slaves were indeed suitable workers and "trustworthy servants." Otherwise, the entire system of slavery would have failed. However, the ideology of the South precluded admitting what was generally obvious. The antebellum South's peculiar institution was, after all, based on a profoundly racist ideology which continuously asserted that Blacks were inferior to Whites. This was indeed the only way to justify slavery in a republican society. The South's legal culture reflected this ideology, and indeed, was a key component of it. This racism is best expressed by Thomas R.R. Cobb, a Georgian attorney. Cobb was no ordinary attorney. He was in fact the official reporter for the Georgia Supreme Court, a prime mover in the creation of the Lumpkin Law School (a forerunner of the University of Georgia School of Law), and the son-in-law of the Chief Justice of Georgia, Joseph Henry Lumpkin.[32] In 1861 he would be a key drafter of the Confederate Constitution, and is considered, the "James Madison" of that document.[33] In 1858, Cobb published the South's only pro-slavery legal treatise, *An Inquiry into the Law of Negro Slavery in the United States of America*.[34] Cobb's analysis explains why, for ideological reasons, southern jurists could not treat slaves as fellow servants of anyone.

Cobb asserted that "the negro race is inferior mentally to the Caucasion." 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 simplest 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.[35]

Such racist nonsense was of course disproved daily, everywhere that black slavery existed. Nevertheless the issue here is not what was in reality, but what jurists and attorneys believed. Similarly, slave workers were fully

30. T. 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 (L. CHITTENDEN 2D ED. 1846).

31. *Farwell*, 45 Mass. at 50, 62.

32. W. MCCASH, THOMAS R.R. COBB: THE MAKING OF A SOUTHERN NATIONALIST (1983); R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S. (1983).

33. C. LEE, JR., THE CONFEDERATE CONSTITUTIONS (1963).

34. T. Cobb, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA (1858).

35. *Id.* at 34-36.

capable of recognizing a dangerous work place. The critical question is not what they knew as human beings, but rather, what their capacities were as slaves.

To rephrase the problem: because slaves were, under the law and by social custom, persons of limited status and ability, they could not be held legally responsible in the same manner as Whites. Cobb spoke for most White 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 hold slaves 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,"[36] as Cobb put it, then could the courts apply the fellow servant rule to them?

Courts in the South agreed with Cobb's theoretical analysis concerning the abilities of blacks. Even before Shaw decided *Farwell*, a case involving the "abilities" and "judgment" of slaves and the problem of fellow servants arose in Virginia. In the 1830s a slaveowner named 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 examine the condition thereof, and to ascertain whether the foul air was gone, so that the labourers could be safely sent down." This slave was also a foreman at the mine, "and [was] one of the most experienced labourers at the pits, perfectly competent to make such an examination, and worthy of full confidence."[37] This description of the slave obviously undermines the theoretical notion, asserted by Cobb, that Blacks and slaves were incapable of good judgment. Clearly, the owner of this mine thought his slave was the best person to determine if the mine was safe. Nevertheless, the reality here clashed with legal theory and racial justice.

Randolph's slave reported the mine safe, and ten slave miners, including Hill's slave, were sent down to work in the mine. Significantly, the court record notes that "none of whom [the laborers] were unwilling to go down" into the mine. Despite assurances that the mine was safe, the workers quickly became ill, and were "drawn out as fast as it coud 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."[38]

Hill sued for the value of his slave, and his victory before a jury was affirmed by a divided Virginia Court of Appeals.[39] Judge William Brockenbrough noted that the "jury might fairly have inferred, from the evidence

36. *Id.*

37. Randolph v. Hill, 34 Va. (7 Leigh) 383, 383-85 (1836).

38. *Id.*

39. The four judges on the court were equally divided, and so the lower court decision was upheld. The two opinions supporting the lower court were longer, more detailed, and far better reasoned than the two supporting the request for a new trial.

given, . . . that the defendant and his agents were guilty of the negligence charged."[40] He felt that the procedure of testing the mine for gas could have been inadequate, and that 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 be biased against the plaintiff.[41]

Judge Dabney Carr asserted that Hill's slave had died because of the negligence and incompetence of Randolph's slave. Carr noted that the "examination" of the pit was "by a single person and that a negro slave." He admitted this slave "Was experienced and confidential," but nevertheless asked rhetorically, "Was this taking sufficient precuation, where so many human lives depended on the issue?"[42]

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 appeared to have accepted an "assumption of risk." However, it is apparent that the slaves actually had little or no choice in the matter. Once the white overseer decided to send them into the mine, their only alternative to going down was willful disobedience, with all that such behavior entailed. Slaves who disobeyed their masters could be severely punished. Moreover, none of the slaves could have known what the conditions in the mine were, and thus, they were forced to assume a risk without any knowledge of what might be awaiting them. The only person with such knowledge was the slave who examined the mine. This slave was truly the fellow servant of the slave who died. Under Shaw's fellow servant rule he might have been deemed the negligent party, and thus the only one liable to Hill for the loss of his slave. 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."[43] Judge Carr accepted and reinforced this racist argument.[44] A slave could not be a fellow servant, in the eyes of Carr, because he could never, by definition, be a "suitable person"[45] or a "skillful and careful" coworker.[46]

Equally important, because slaves could not be sued, they could not be fellow servants for purposes of litigation. As this case demonstrated, a slave's negligence might indeed cause harm to another slave. In theory a free worker could sue another free worker, even if the defendant was virtually or completely judgment proof. Yet, as a matter of law, no one could sue a slave.

B. *Mutual Observer and Mutual Notice*

The ideological analysis used to explain the inapplicability of "mutual skills" to slave workers applied with equal or greater force to the categories of

40. *Randolph*, 34 Va. at 389-90.
41. *Id.* at 389.
42. *Id.* at 391.
43. *Id.* at 388.
44. *Id.* at 383-84.
45. *Farwell*, 45 Mass. at 62.
46. T. REEVE, *supra* note 30, at 358.

"mutual observer" and "mutual notice." Incorporating these concepts into southern law, and applying them to slaves would have undermined the entire code of race relations in industrial settings.

Antebellum southern industry was remarkably integrated. Indeed, it was far more integrated than it would be after the Civil War. This integration was possible not because antebellum notions of racial equality were somehow more enlightened than those of a later period. Rather, it was because as *slaves* Blacks could be integrated into work situations without undermining the racial status quo. Thus, Black slaves and free Whites worked side by side in textile mills, gold mines, coal mines, iron factories, and on railroads and steamboats.[47] The Tredegar Iron Company, for example, paired "blacks and skilled white ironworkers."[48] By 1864 the company's Richmond factory "employed about four hundred white men and two hundred blacks," while in other facilities Blacks outnumered Whites.[49]

This level of integration was only possible because Blacks, as slaves, could be strictly controlled by *any* Whites in the facility. As long as Blacks were slaves there was no chance of racial equality, even where there might be close contact and integration. Blacks might even have equal facilities, food, and housing at industrial sites, without undermining the southern whites' sense of racial propriety.

One component of this system of racial etiquette was the unwritten rule that slaves could not be in a superior position to Whites, nor could they contradict Whites. But, under Shaw's fellow servant rule, workers were to observe each other to insure that the workplace was safe. However, was this possible between slaves and Whites? Could a slave reprimand a White? Could a slave "give notice of any . . . neglect of duty,"[50] if a White fellow servant was incompetent or negligent? Obviously a slave could not make such complaints.

The best analysis of the limitations on slaves is probably that of Chief Justice Thomas Ruffin of the North Carolina Supreme Court. Ruffin was clearly one of the brightest stars of the antebellum southern judiciary. In *State v. Ceasar*,[51] Ruffin examined the role that slaves were expected to play in the South. Although a dissent in a criminal prosecution, Ruffin's opinion nevertheless expresses the sentiments of the entire southern bench on how slaves were expected to behave towards Whites. Ruffin observed 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 slavery could exist only by "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."[52] Ruffin thought that Whites must "forever feel and assert a superiority and exact an humble submission from slaves; and the latter, in all they say and do, not only profess, but plainly

47. Miller, *The Fabric of Control: Slavery in Antebellum Southern Textile Mills*, 55 BUS. HIST. REV. 471, 475-78 (1981); R. Starobin, *supra* note 27, at 479; R. LEWIS, COAL IRON, AND SLAVES: INDUSTRIAL SLAVERY IN MARYLAND AND VIRGINIA, 1715-1865 (1979).

48. R. Lewis, *supra* note 47, at 31.

49. *Id.* at 33.

50. *Farwell*, 45 Mass. at 59.

51. 31 N.C. (9 Ired.) 391 (1849).

52. *Id.* at 413.

exhibit a corresponding deep and abiding sense of legal and personal inferiority."[53] These, he declared, were "the habits of the country."[54]

In a country with such "habits" would it be possible for a slave to question the actions—however dangerous—of a white fellow servant? Would it be permissible for a slave to "observe" or spy on the activities of a White, or report them to another White? The answer to these questions, at least in a legal sense, must certainly have been no. Otherwise, the whole system of discipline and race control would have been undermined. Indeed, some slaveowners and proslavery theorists opposed southern industrial development precisely because they believed it would undermine the South's peculiar institution.[55] While not necessarily articulating the theories of the fellow servant rule, these commentators readily saw that if slaves and whites worked together as equals on the job, the system of slavery and racial subordination would soon unravel.[56]

Clearly, slaves were not in a position to reprimand their White fellow servants. Nor were they in a position to even reprimand other slaves, unless they were given authority over those slaves by a White person. However, could one slave in an industrial setting question the actions of another slave, if neither was in a supervisory position? Theoretically, all slaves were under the control of a white. Thus, a slave questioning the action of another slave was actually questioning the authority of the white person in charge. This would clearly have undermined slave discipline.

The inapplicability of the mutual observer aspects of *Farwell* to slaves is illustrated by the Kentucky case of *Louisville and Nashville Railroad v. Yandell*.[57] Here the Kentucky court explicitly faced—and rejected—the application of *Farwell* to slaves. Ironically, the facts of *Yandell* were almost identical to *Farwell*. Yandell's slave, Henry, lost his leg in a railroad accident which "reduce[d] greatly the value of the slave, if not to render him valueless."[58] This injury was not caused by Henry's negligence, but by that of the train's engineer, who was, within the concept of *Farwell*, Henry's fellow servant. The engineer ran the train too fast while cars were being added, and Henry's leg was crushed between the two trains and later amputated.[59]

The railroad's lawyers argued that the fellow servant rule prevented Yandell from recovering for the loss of Henry, because Henry had been injured by a negligent fellow servant. These attorneys contended that there was "overwhelming" legal "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."[60] The first case cited for this "overwhelming" authority was of course *Farwell*.[61] However, Judge B.

53. *Id.*
54. *Id.*
55. This phrase was used by southerners themselves to describe slavery. *See* K. STAMPP, THE PECULIAR INSTITUTION (1956).
56. R. Lewis, *supra* note 47, at 218-23; Dew, *Disciplining Slave Iron Workers in the Ante-Bellum South: Coercion, Conciliation, and Accommodation*, 79 AM. HIS. REV. 393 (1974). *See also* R. WADE, SLAVERY IN THE CITIES (1964), for a discussion of how urbanization undermined slavery.
57. 56 Ky. (17 B. Mon.) 586 (1856).
58. *Id.* at 593-94.
59. *Id.*
60. *Id.* at 587.
61. *Id.*

Mills Crenshaw was unconvinced. He asserted:

> Whatever may be the wisdom and policy of this rule of law, when applied to free persons employed in conducting and managing locomotives and trains upon railroads, 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 the two classes of 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.[62]

Judge Crenshaw did not rely on the racist theory that Judge Carr had articulated in Virginia, to conclude that slaves could not be fellow servants. Crenshaw simply concluded that the position of the slave in the South precluded any attributes of a free person. In doing so, Crenshaw explained why the fellow servant rule was so ill-suited for slaves.

> 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 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.[63]

Even when faced with the "possible destruction of life or limb" the slave was required to "stand to his post."[64] The slave was "fettered by the stern bonds of slavery—necessity is upon him, and he must hold on to his employment."[65] Therefore, the Kentucky court could "not perceive the propriety of applying this [the fellow servant] doctrine to the present case, in which an injury to a slave is the complaint."[66]

Judge Crenshaw argued that cases like this one "should be determined by the well-known principles which have been heretofore adopted by this court in the cases of the bailment or hiring of slaves." The court admitted that in hiring a slave to a railroad or other dangerous enterprises an owner "must be understood as risking the dangers incident to the employment."[67] This might have been a step towards implementing the contract aspect of Shaw's opinion. The Kentucky court, however, was not prepared to take that route. The court clearly saw that there were two interests in conflict here: those of the slaveowners of the bluegrass state, and those of the emerging industries in the state. Given a choice, the court sided with the slaveowners. Thus, Crenshaw backed away from any strict contract analysis, and asserted that accepting the "dangers incident to the employment" did not include accepting risks for "injuries inflicted upon a slave through the negligence and carelessness of" the hirer or his agents.[68] For injuries "attributable to the mismanagement of the bailee or his agents" the owner could recover damages.[69]

Unlike the Virginia court, the Kentucky court did not base its decision on racist presumptions about the biological inferiority of Blacks. The court assumed that slaves were capable of perceiving dangers and making rational decisions about how to avoid them. Still, the Kentucky court did accept two

62. *Id.* at 595-96.
63. *Id.* at 596.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 596-97.
68. *Id.*
69. *Id.*

other presumptions about slavery, and thus supported the inferior status of slaves which was in part tied to questions of race. First, the court agreed that no slave could ever reprimand a white man for his carelessness. Slaves, in other words, would always be legally inferior to Whites. Second, Crenshaw noted that the slave was required to "stand to his post, though destruction of life or limb may never be so imminent."[70] This notion fit well into another ideological underpinning of slavery: the myth of the loyal and faithful slave. This analysis dovetailed perfectly with the myth of antebellum southern paternalism. 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 the slaves might cease to be loyal.

The decision in *Yandell* complemented a similar decision reached by the Georgia Supreme Court a decade earlier. In *Scudder v. Woodbridge*,[71] Judge Joseph Henry Lumpkin declared that the "interest to the owner and humanity to the slave, forbid" the application of the fellow servant rule to southern bondage.[72] Lumpkin held that only "*free white agents*" could be fellow servants in Georgia.[73] This conclusion rested in part on the inability of Black slaves to observe Whites or give any type of notice to their masters. They "dare not interfere with the business of others. They would be instantly chastised for their impertinence."[74] Lumpkin reiterated, "they dare not intermeddle with those around "them, slave or free."[75] "Bound to fidelity themselves,"[76] they could not possibly be the fellow servant of anyone they worked with. They could only be the loyal servant of their master or his agent. Slaves had "nothing to do but silently serve out their appointed time, and take their lot in the meanwhile in submitting to whatever risks and dangers are incident to the employment."[77] Such a role in society precluded acting like a fellow servant or being treated like one.

C. *The Right to Leave Service*

No aspect of the fellow servant rule was as inconsistent with slavery as the determination that if a workplace was unsafe a worker had a right to take "leave of service."[78] In Shaw's world this was possible, although perhaps not feasible. For southern slaves this concept was not only illegal, but dangerous. A slave leaving his or her place of employment, for whatever reason, would be a runaway. As Thomas R. R. Cobb explained, the slave could never leave his place of work "without the consent of his master."[79] When a slave left his master he was "placing himself beyond the pale of the master's protecting power, and being, for the time and *pro tanto*, in a state of rebellion to his lawful authority, he deprives himself of the exemption from the interference of strangers, which at home he enjoys, and becomes, to a limited extent, an out-

70. *Id.* at 596.
71. 1 Ga. 195 (1846).
72. *Id.* at 198.
73. *Id.* (emphasis in original).
74. *Id.*
75. *Id.* at 198-99.
76. *Id.*
77. *Id.* at 199.
78. *Farwell*, 45 Mass. at 59 (1842).
79. T. Cobb, *supra* note 34, at 110.

law in the community."[80]

Even running from a hirer back to an owner would not be legal. In *State v. Mann*,[81] Justice Thomas Ruffin of North Carolina noted that southern "laws uniformly treat the master or other persons having the possession and command of the slave as entitled to the same extent and authority. The object is the same—the services of the slave; and the same powers must be confided."[82] Consequently, a slave hired to an industrial enterprise had to obey whoever was in charge.

The facts of *State v. Mann* illustrate this point. Mann had shot and wounded a rented slave named Lydia, when she tried to run off to avoid punishment. Lydia was not seeking to escape bondage, but only to avoid an angry master's whip. Perhaps she was even trying to return to her true owner, Elizabeth Jones. Jones might have successfully sued Mann for the damages to Lydia. Instead, she secured Mann's indictment for assault and battery. In overturning Mann's conviction, Ruffin held that a renter had exactly the same right as an 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."[83] But, as long as the hired slave was in the possession of the hirer, the slave was bound to be obedient to the temporary master. Ruffin was firm. If the slave system was to function, the "slave, to remain a slave, must be sensible that there is no appeal from his master; that his power is in no instance usurped; but is conferred by the laws of man at least if not the law of God."[84] 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. In the free North, a worker could take leave of his employment, and perhaps face hunger or unemployment; in the South a slave asserting that right could be legally shot and wounded.

Although he would have been offended by the use of such naked force (as indeed Ruffin also was), Judge Lumpkin in Georgia agreed with the analysis in *Mann*. In *Scudder v. Woodbridge*,[85] Lumpkin awarded damages to the owner of Ned, a slave who had been rented out as a ship's carpenter, and had drowned while trying to help launch the boat after it ran aground. Lumpkin agreed that a slave was totally at the command of his owner or his temporary master. Thus, if "this unfortunate boy, although shipped as 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 ship captain would have been justified in punishing him.[86] 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 the slave could not "with impunity desert his post," to use the language of the Kentucky court,[87] then slaves could not leave service under the fellow servant rule. Indeed, no aspect of the rule was more antithetical to the concept of slavery than the right to leave service. The very essence

80. *Id.*
81. 13 N.C. (2 Dev.) 263 (1829).
82. *Id.* at 265.
83. *Id.* at 264.
84. *Id.* at 267.
85. 1 Ga. 195 (1846).
86. *Id.* at 199.
87. *Yandell*, 56 Ky. at 596 (1856).

of the status of a slave was that the person lacked mobility and was always under the absolute authority of the master.

D. *Slaves as Fellow Servants: The Impossiblity of Litigation*

The fact that slaves could not flee from danger underscored Judge Lumpkin's conclusion in *Scudder v. Woodbridge* that "No 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."[88] Indeed, even if slaves could have been deemed "skillful" workers capable of observing their fellow workers, the fellow servant rule would not have been applicable to accidents involving slaves. There are two reasons for this. First, slaves could not be sued; therefore, even theoretically, injured parties would have no way of seeking compensation for their losses if they were hurt because of a slave's negligence. Second, if the fellow servant rule had applied to injured slaves the burden of industrial accidents would not have been shifted from management to the worker rather it would have been shifted from management to the owner of their injured slave. This would have been counterproductive in the antebellum South.

Under Chief Justice Shaw's theory an injured worker could only sue the fellow servant whose negligence caused the injury. Shaw, happy with his legal theories and legal fictions, never faced the fact that the fellow servant would probably have been judgment proof. Farwell was earning two dollars a day when he was injured; the switchman earned less. Suing the switchman would have gained Farwell little or nothing. Nevertheless, Shaw was able to ignore this fact because at least in theory Farwell could have sued the switchman. Consequently, there was not a wrong without a remedy, but simply a wrong where the remedy was worth very little or nothing at all. This was a situation that Shaw could easily live with. A slave, however, could never be the defendant in a civil suit. Thus, if the fellow servant rule applied to slaves, an injured party would have had no one to sue. This would have clearly been a wrong without remedy.

A southern court might have allowed this to pass without comment, because the result would have been the same in reality as in the North. If a southern free worker were injured by a negligent slave, the free worker would have no one to sue and thus no way to recover damages. This would make the southern free worker theoretically worse off than his northern counterpart, but in reality they would both have been in the same situation of not being able to recover for their losses. The losses, in both cases, would ultimately lie where they fell. The economic advantage of the fellow servant rule would have been maintained: the costs of industrial accidents to free workers would not have been borne by the industries.

Free workers however were not the only ones injured by slaves. Slaves could also be injured by the negligence of other slaves, as *Randolph v. Hill*[89] illustrates. If the fellow servant rule had been applied in cases like this one, then the economic loss would not have been born by the workers, but rather by the slaveowner. This would have harmed the most important social and

88. 1 Ga. at 198, 199.
89. Randolph v. Hill, 34 Va. (7 Leigh) 383 (1836).

economic class in the South. Thus, when slaves were injured by other slaves, the employer was liable for damages. In *Randolph v. Hill*, Hill recovered because Randolph was negligent in supervising the slaves and in allowing a slave to make a decision about the safety of the mine.

The protection of the slaveowner's investment thus made the fellow servant rule inapplicable when hired slaves were injured. This was true when the injury was caused by another slave or by a white worker. The cost of injured slaves fell—not on the worker, or on the slave's owner, but on the industry that hired the slave. Any other result would have placed the burden of industrial accidents on the slaveowners. It might also have led to the needless destruction of slave property. In *Scudder v. Woodbridge*, Judge Lumpkin warned that "the life of no *hired* slave would be safe" if the owner could not sue the renter.[90] Only when hirers were forced to pay for the loss of a slave would management carefully supervise employees to prevent such losses.

This of course meant that the fellow-servant rule could not work to the benefit of southern industry, as it did for northern industry. When slaves were injured southern courts would not shift the loss to the fellow servant, because the loss would then be borne by the slaveowner. In effect, southern judges were forced to choose between protecting slaveowners and protecting southern industrialists. Not surprisingly, the courts of the South invariably chose to protect slaveowners and their property interest. As a result, 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 the fellow servants of anyone. An application of the rule would have eroded slave discipline and white-black relations. The economic virtue of the rule would also have been lost whenever a slave was injured.

IV. THE SLAVE AND THE EMPLOYER

Besides his tort analysis, Chief Justice Shaw also offered a limited contract analysis in his *Farwell* opinion. Shaw pointed out that Nicholas Farwell had accepted a more dangerous job as a railroad engineer because the job paid more than his previous employment. This extra compensation was, in Shaw's opinion, the price the employer paid for inducing men to accept dangerous employment. This was the beginning of the concept of assumption of risk in American employment law. To some extent Shaw's analysis may have been correct. Workers, hard pressed on low salaries, may have taken better paying jobs even if they posed greater hazards. However, Shaw was surely wrong in asserting that in the process of negotiating his salary the worker took into account any extra risk that he might face. Employees of large corporations rarely negotiated their salaries with anyone.[91]

Shaw also argue that Farwell might have bargained for greater job safety when he negotiated his contract with the Boston and Worcester Railroad. This was a completely unrealistic assumption, given the relative lack of bargaining power that Farwell had.

Although Shaw's contract analysis was unrealistic and of virtually no use to free workers in the North, it did offer an attractive opportunity for both

90. *Id.* at 200.
91. Warren, *Volenti Non Fit Injuria*, *supra* note 21.

slaveowners and hirers in the South. While northern workers had little opportunity to bargain with their employers, southern slaveowners were in a different position. They could afford to bargain with those who rented their slaves. Indeed, they usually did. Thus, the contract for hire appeared to offer an opportunity for owners and renters to solve the problem of allocating the costs of industrial accidents where slaves were victims.

A. *The Contract as a Way out for the Employer*

For slave owners and slave hirers the least useful aspect of the contract analysis was the price of the labor. A free worker in the North might in fact be willing to assume a certain degree of risk for a larger salary. A "risk preferrer," to use modern tort language, might be willing to accept greater risks for a greater salary, but a slave owner had far fewer incentives to take such a risk. In the 1850s, healthy slaves varied in value from five hundred to more than a thousand dollars. In some parts of the South highly skilled slaves sold for more than three thousand dollars.[92] Few owners would be willing to risk a valuable slave merely to gain a small increment in the rental fee. It would have been impossible for the hirer to pay the owner a high enough rent to compensate for the loss of a slave. Renting out a slave for dangerous work would have gained the master a few dollars, but not enough to make it worthwhile to risk the life or health of the slave.

More useful was the requirement that the hirer purchase insurance for the slave. This too, however, was not entirely satisfactory, because even an insurance policy might not fully compensate the master for a lost slave. Insurance would also add costs to the hirer that might undermine his business efficiency.

Many masters turned to contract limitations to protect their rented slaves. Accordingly, a master, who chose to risk his slave by renting, often required that the slave be kept from certain dangerous tasks. As the North Carolina Supreme Court noted in 1858, "it is obvious that it is in his [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."[93] Thus, owners rented slaves to mines on the condition that they not be sent underground,[94] to railroad contractors and mines stipulating that they be kept away from explosives,[95] and to ship owners, with provisions that the slaves be kept out of the water.[96]

Such limitations raised new problems, however, because industrial situations were not always predictable. If a ship was in danger of sinking, or was stranded on a sand bar, should the captain order a slave into the water in violation of the contract? If the slave remained on board and the ship sank, then the slave might drown, but the renter might not be held liable under the contract. Yet, if the slave joined the rest of the crew to help save the ship, and drowned in the process, should the renter be responsible for the death of the

92. K. STAMPP, THE PECULIAR INSTITUTION, 414-18 (1956).
93. Ponton v. Wilmington and Weldon Railroad, 51 N.C. (6 Jones) 245, 247 (1858).
94. Kelly v. White, 56 Ky. (17 B. Mon.) 124 (1856).
95. Harvey v. Skipwith, 57 Va. (16 Gratt.) 393 (1863); 57 Va. (16 Gratt) 410 (1863).
96. Gorman v. Campbell, 14 Ga. 137 (1853); Scudder v. Woodbridge, 1 Ga. 195 (1846).

slave? Similarly, could a foreman always prevent a slave from being nearby when explosives were used? Could a foreman be expected to remember which slaves could work near explosives and which could not? Slaves were human beings after all, who might ignore, evade, or forget orders to stay away from danger. Were hirers really obligated, as Judge Lumpkin suggested to "resort . . . to chains" if necessary to restrain a slave from harming himself by doing work that was prohibited by the contract?[97]

All of these contractual problems would complicate the attempt to limit the hirer's liability in an industrial accident involving a 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 man and 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. Slaves, on the other hand, were theoretically incapable of self-regulation. Hirers were obligated "to watch over their lives and safety," because the slaves' "improvidence demands it."[98] Judge Lumpkin was not alone in believing slaves were "incapable of self-preservation, either in danger or in disease."[99] Whether in the field or the factory, slaves constantly needed overseers to keep them at their jobs. Indeed, statutes throughout the South required the slaves be supervised by whites.[100]

Southern courts struggled with these problems and dilemmas. However, with the exception of the North Carolina Supreme Court, the general trend favored the owner of a slave over the hirer. With a few exceptions, those who rented slaves were usually liable for damages to those slaves.

The Virginia courts held hirers strictly liable to contract limitations. This concept was affirmed in *Harvey v. Skipwith*.[101] Although initiated in 1853, because of continuances and retrials the case was not finally decided until 1863. Harvey, a railroad contractor, had hired Jefferson, a slave owned by Skipwith, 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."[102] In violation of this contract, Harvey used Jefferson to transport gunpowder to a blasting site, where he was blinded by an unexpected, and apparently accidental, explosion. This explosion was caused by a white worker—a fellow servant—who actually did the blasting.[103] Tied to this analysis, and indeed central to it, were the court's assumptions about the "improvidence" of Black slaves.

In awarding damages to the Skipwiths[104] Judge Daniel noted that Harvey should have been more careful to keep Jefferson away from the blasting area, not only because of the "dangerous nature" of blasting, but also because "of

97. Gorman v. Campbell, 14 Ga. 137, 142.
98. *Id.* at 143.
99. *Id.*
100. T. Cobb, *supra* note 34, at 108-09.
101. 57 Va. (16 Gratt.) at 393 (1863) and 57 Va. (16 Gratt.) at 410 (1863).
102. Harvey v. Skipworth, 57 Va. (16 Gratt.) at 393-394.
103. *Id.* at 402.
104. There were actually two suits, one by Thomas Skipwith, and one by his mother, who held a life estate in Jefferson.

the notorious improvidence and carelessness of our negro slaves."[105] The outcome turned, not on Jefferson's contributory negligence or on the negligence of Jefferson's fellow servant, but rather, on Harvey's failure to strictly comply with the contract, which required that Jefferson be kept away from blasting.

A written contract was not always necessary to protect a master whose slave had been used in a dangerous way. In *Gorman v. Campbell*[106] the Georgia Supreme Court upheld the claims of an owner of a slave who was drowned while helping a steamboat break free from some debris in the water. In accordance with local custom, the captain ordered the slaves to remain on board. But, Gorman's slave, London, disobeyed these orders and went into the water and worked "for about half an hour, in the presence and sight of the captain without anything being said to him."[107] When the log London was cutting began to give way the captain ordered the slave back on the boat. But, before he could do this, London was swept away by the current and drowned. Chief Judge Lumpkin upheld the owner's claim for damages for a variety of reasons, including the notion that the captain of the ship had violated the custom of slave owners and hirers, by allowing London to work in the water. Judge Lumpkin, in effect, applied the contract aspects of Shaw's *Farwell* opinion in reverse. Instead of requiring the slave's master to explicitly prohibit the use of the slaves in dangerous situations, Lumpkin interpreted the contract to have implicitly protected the owner's interest according to what might be called a common law of slave bailment.

The only state not to interpret contracts exclusively to benefit of masters was North Carolina. That state's court strictly enforced contracts. Thus, in *Satterfield v. Smith*[108] the court upheld nominal damages for a slave "sent by water" in violation of an explicit contractual prohibition, even though the slave was not injured.[109]

But, the key North Carolina case, *Ponton v. Wilmington & Weldon Railroad Co.*,[110] came eight years later in 1858. The facts of this case resembled *Farwell*. Ponton's slave, hired to the Wilmington and Weldon Railroad, was killed because of the negligence of the switchman. Not surprisingly, Chief Justice Thomas Ruffin began his opinion by briefly reviewing the major fellow servant cases in England and the United States. Significantly, Ruffin mentioned no 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. Instead, he broadly 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 liability to the owner for all losses arising from any cause."[111] Having failed to do so, Ponton could not

105. *Harvey*, 57 Va. at 416-17.
106. 14 Ga. 137 (1853).
107. *Id.* at 137-38.
108. 33 N.C. 60 (1850).
109. *Id.* at 60-61.
110. 51 N.C. 245 (1858).
111. *Id.* at 247.

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 had been diligent in hiring skilled workers.

In *Ponton*, Ruffin 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 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 was 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. He may have wanted to be part of the national legal mainstream; he may have wanted to encourage industrialization in North Carolina. Clearly, Ruffin was not ready to break with his southern colleagues on the question of the role of slaves in the society. His decision did not turn on what the slave might do; the slave, in the end, was irrelevant to Ruffin's decision. Ruffin was only concerned with the contract relationship between the white owner and the white hirer. In this sense, Ruffin's decision was not at all out of step with his southern brethren.

Ruffin no doubt would have easily endorsed the Louisiana court's assertion, two years later, that the tort aspects of the fellow servant rule could never be applied to slaves, because the slave was "a passive being, an immovable by the operation of the law."[112]

V. Slaves, Fellow Servants, and Southern Industrialization

It is not clear how much a burden the loss of the fellow servant rule placed on southern industrialization. Still, it certainly put southern industries at a disadvantage in three ways. First, the lack of a fellow servant rule added some costs to southern industries. Some slave renters took out insurance;[113] others simply bore the costs of accidents as they arose. These were costs which employers in the free states did not face. Second, many industries may have had to take special care to protect their rented slaves from danger. These precautions of course had their costs as well. Contracts with owners that limited the use of slave, such as the one in *Harvey v. Skipwith*, undermined industrial efficiency. Finally, and perhaps most importantly of all, the rejection of the fellow servant rule both reflected a climate of hostility toward industralization and also reinforced that climate.

The decisions on slavery and the fellow servant rule illustrate the great burden of southern legal history, and indeed, of all southern history. The need for racial control forced antebellum southerners to reject innovative legal developments in the North. In this case the development was hardly a progres-

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

113. *See e.g.*, E. Genovese, *The Medical and Insurance Costs of Slaveholding in the Cotton Belt*, 45 J. of Negro Hist. 141-55 (July 1960); T. Savitt, *Slave Life Insurance in Virginia and North Carolina*, 43 J. Southern Hist. 583-600 (Nov. 1977).

sive one. The fellow servant rule placed unreasonable burdens on those least able to afford them. Still, the rule did aid in economic growth, which was something most northern jurists favored.

It would be pleasant to think that the South refused to apply the fellow servant rule to slaves because it was inherently an oppressive rule. Unfortunately, that is not the case. Rather, the antebellum South rejected the rule because it threatened the stability of slavery and undermined the racial control so important to the society. In the end the rule was unacceptable because it would hurt those who owned slaves and because it came too close to elevating slaves to the same status as free White workers.