

he who is placed in charge of such separate branch of the service, who alone superintends and has control of it, is, as to it, in the place of the master."

In applying the principles of that decision to the facts of this case, it necessarily results in the conclusion that the court erred in charging the jury that the conductor and engineer of the work train "were not fellow servants of the plaintiff," because neither of them had the right to command the movements of the train, or had any control of the persons employed upon it. They were, under the decision in the Baugh Case, fellow servants with the plaintiff, and for their negligence, if any, he could not recover. The road master was in charge of the working train, directed its movements, and had control of all the persons employed upon it, including the conductor and engineer. He was a vice principal, and for any negligence on his part, if any, that caused the collision, the corporation would be liable.

We deem it unnecessary to discuss the question as to whether the court erred in charging the jury that the burden of proof would rest upon the defendant, by a fair preponderance of evidence, to establish the fact of contributory negligence upon the part of plaintiff or his fellow servants, "by affirmative proof brought here in favor of the defense." The objections raised to this charge will be readily obviated upon another trial by following the principles announced, in *Railroad Co. v. Novak*.¹

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

H. B. CLAFLIN CO. v. DACUS et al.

HURST et al. v. SAME.

(Circuit Court, D. South Carolina. February 23, 1894.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RELEASE—EFFECT.

A general assignment by insolvent debtors provided for payment in full of such creditors as should accept its terms and execute releases within 60 days of its date, and for distribution of the balance of the assets among the other creditors. On the sixtieth day after the execution of the assignment, plaintiff, a creditor, voluntarily notified the assignee that he accepted the terms of the assignment, and 10 days thereafter he executed a release under seal. Upon a contest by the creditors, it was adjudged that he had not complied with the requirements of the assignment. *Held*, that the release was none the less effectual to defeat his right of action on the original debt, even though it was expressed to be executed in consideration of his having priority over the general creditors.

At Law. Actions by the H. B. Clafin Company against Dacus & Jordan, and by Hurst, Purnell & Co. against the same defendants. Judgment for defendants.

Perry & Heyward, for plaintiffs.
Haynsworth & Parker, for defendants.

¹Opinion not yet handed down.

SIMONTON, Circuit Judge. These two cases, presenting precisely the same questions, were tried together, under stipulation, by the court without a jury. Each action was upon promises to pay money due on notes and open accounts for goods sold and delivered. The defense in each case was a release in full of all demands. The facts are Dacus & Jordan, the defendants, being in insolvent circumstances, executed an assignment for the benefit of creditors on 27th November, 1891, to J. C. Rogers. The assignment provided for the realization of the assets, and the payment of all debts due the public, and the debts of such creditors of the said Dacus & Jordan as may, within 60 days from the date thereof, accept the terms of the assignment, and execute a release of their claims against Dacus & Jordan; after such accepting and releasing creditors are paid, the remainder to be divided among all other creditors of this firm. The plaintiffs in each of these cases, on the sixtieth day after the execution of the assignment, by their attorneys notified the assignee, in writing, that they did thereby accept the terms of the assignment made by Dacus & Jordan, as copartners and individually, and offered releases of their claims, respectively, as required by the assignment. Within 10 days thereafter, formal releases were executed and filed with the assignee by these plaintiffs. Those creditors who had released, as well as accepted, within the 60 days, resisted the right of these plaintiffs to rank as among the preferred creditors; and the question being made in the cause of *Armstrong v. Hurst*, 18 S. E. 150, it was decided by the court of South Carolina that these plaintiffs had not so complied with the conditions of the assignment as to rank as preferred creditors. They had allotted to them, and received, dividends, as among the general creditors. They now bring suit against Dacus & Jordan on the original debt. The question in the case is as to the release. It is in these words:

State of South Carolina, Greenville County.

In consideration of the amount to be received by us, and our having priority over nonreleasing creditors in the distribution of the assets of the firm of Dacus & Jordan, we hereby release the said Dacus & Jordan from further liability on account of our claim against them, a statement of which is hereto annexed. [L. S.]

This action on the part of the plaintiffs was taken *suo motu*, with no persuasion or inducement held out to them by Dacus & Jordan, and was based entirely upon their own conviction of their rights and interests in the premises. No want of good faith has been suggested, nor is the transaction impeached in any way. We are in a court of law. The motive for the release stated by the creditors as inducing them to execute it cannot, in this court, affect the release in any way, as Dacus & Jordan were in no sense responsible for it. We deal with the operative words in the release. When nothing is shown against the fairness of a release,—that is, when nothing appears showing ignorance upon the part of the releasor, or circumvention by the released,—a release under seal must be held conclusive. *Perkins v. Fourniquet*, 14 How. 313. See, also, *Baker v. Baker*, 75 Am. Dec. 248; *Shepard v. Rhodes*, 84 Am. Dec.

575. In the cases at bar the releases were executed and delivered. They cannot now be avoided simply because the parties executing them have been disappointed with the result. They persuaded themselves that the course they were pursuing secured them priority. They remained of that opinion until the supreme court of South Carolina decided the contrary. It has been held that, a release being once regularly executed and delivered, it could never afterwards be avoided at law by the failure of one of the parties to perform an act, in consideration whereof the release was given. *Fitzsimmons v. Ogden*, 7 Cranch, 2. A fortiori, the releases in this case cannot be avoided at law. A verdict for defendants will be entered in each case.

UNITED STATES v. CUTAJAR et al.

(District Court, S. D. New York. January 4, 1894.)

CUSTOMS REVENUE—BOND FOR VERIFIED INVOICE—DAMAGES.

The defendant Cutajar imported certain invoices of rice from Italy during the month of November, 1891, and entered the merchandise on a pro forma invoice, executing at the same time, with the defendant Gandolfi, a bond to the United States in the penal sum of \$800, conditioned that the obligors, etc., should, within six months from the date of the bond, produce to the collector of customs for the district of New York a duly-authenticated invoice of the said goods, and pay to the collector the amount of duty appearing by such invoice to be due over and above the amount of duties estimated on the appraisement of said goods; the defendants failed to produce a duly-authenticated invoice within the time mentioned in the condition of the bond, although the collector of the port of New York received within such time the triplicate invoices required, by section 2855 of the United States Revised Statutes to be forwarded from the United States consul, where such invoices were verified in Italy. *Held*, that the United States, upon such default by the defendants, were not entitled to recover the full amount named as penalty in the bond, but only such sum as might be proved to be due the United States for duties upon the importation in question.

At Law.

Action upon a bond executed by the defendants as principal and surety to the United States of America in the sum of \$800, dated the 24th day of November, 1891, reciting that the principal in the bond had applied to the collector of customs for the port of New York to make entry of certain goods, wares and merchandise imported in the Fulda from Genoa, and reciting further that, "whereas it is temporarily impracticable for the said principal to produce a proper invoice thereof duly authenticated according to law, by reason whereof, and in pursuance of law, entry of the said goods, wares, and merchandise, is allowed on affidavit and statement on the execution of this bond;" and setting forth the following condition:

"Now, therefore, the condition of this obligation is such that if the above bounden obligors or either of them, or either of their heirs, executors, or administrators shall and do within six months from the date hereof produce to the collector of the customs for the district of New York a duly authenticated invoice of the said goods, wares and merchandise, and shall pay to the said collector the amount of duty to which it shall appear by such invoice the said goods, wares or merchandise are subject, over and above the amount of duties estimated on the appraisement of said goods, wares and merchandise, then the above obligation to be void; otherwise to remain in full force and virtue." There appeared upon the bond as part thereof a memorandum showing the importation to consist of 2 lots of 100 and 50 bags of rice re-