

"The master's liability here arises from his implied contractual obligation to his servant to furnish a reasonably safe place in which, and reasonably safe appliances with which, to do his work. The liability of the servants charged as defendants in this case was to arise from their personal and affirmative acts directly causing the injury, as for trespass. No concert of action is alleged between the master and his servants in this case. On the contrary, the petition is full of allegations that, if the servants had done their duty to their master properly, no injury would have resulted to the plaintiff. It is true, the petition charges that all of the defendants were guilty of joint negligence, and that all of them placed the car where it was in its defective condition; but, in the absence of a specific allegation that the defendant railroad company was present by some representative or superintending officer, we must assume that the company was only constructively present in the presence of its agents, the car inspectors and brakemen, who are made codefendants, and that its liability is not based on anything akin to the personal interference of a natural master."

So, in the case at bar, in the physical causation there was no actual concurrence or concert of action among these defendants. By reason of the act of Bradbury in placing the water spout where he did, the injury came to plaintiff, unaided, and in no degree promoted, by any movement or encouragement of the railway company. Therefore, there were no two forces put in motion, one by one defendant and the other by the other defendant, which coacted in producing the given result. The misfeasance of Bradbury was the vis major which singly and alone wrought the mischief to the plaintiff, and gave him an action in tort against Bradbury, independent of any contractual relation; while the railway company's liability is wholly constructive, dependent on a contract obligation which the law implies from the relation of master and servant. It seems to me, therefore, illogical to say that this cause of action is not severable because of the concurring torts of two defendants, when the act of one was positive, a misfeasance, and the other was negative, a nonfeasance, and the liability of one arises *ex delicto* and the other *ex contractu*; that is, it must depend upon a contractual relation between master and servant. And the right of severance ought the more especially to exist in a case like this, where the misfeasance of Bradbury was wholly independent of, and, as between him and the railway company, was not promoted by, the company, and where the injury resulting from Bradbury's tort was complete without any act of the company other than of omission in failing to do something independent of Bradbury. It is to be conceded to the contention of the learned counsel for plaintiff that there is on this question of procedure a division of opinion among respectable courts; but, in my humble judgment, the conclusion reached by Judges Taft and Lurton rests upon the better reason, and, in the absence of a ruling more obligatory upon this court of trial, their judgment will be followed. It results that the motion to remand is denied.

EVERETT v. HAULENBEEK et al.

(Circuit Court, S. D. New York. September 24, 1896.)

COSTS—WHO LIABLE FOR.

Where a defendant by contesting the complainant's claim makes a master's services necessary, and such defendant is defeated, he must pay the fees of the master.

This was a motion by William W. Everett, complainant, to compel the payment of master's fees by John W. Haulenbeek, defendant. The accounting in this case was contested only by the defendant Haulenbeek. The master found in favor of the complainant. At the time of the rendition of the master's report, there was due him for fees \$325, which he apportioned, \$175 to complainant, and \$150 to defendant. Complainant refused to pay the balance due, on the ground that the charges should be paid by the defeated party. Defendant stated no reason for his failure to pay the same, except lack of funds.

Thomas Cooper Byrnes, John Hunter, Jr., and Walter D. Edmonds, for the motion.

Samuel G. Adams, opposed.

LACOMBE, Circuit Judge. The master's fees are hereby taxed at \$500. Since he has been paid \$175, it only remains for the court to indicate who shall pay the balance of his compensation, \$325. The defendant H., by contesting complainant's claim, made it necessary to call upon the master to render these services; and, since he is the defeated party, he should pay them. An order directing such payment will be made. Any question as to defendant's pecuniary condition may be considered upon any future motion to enforce such order. They are not properly raised upon this motion.

WESTERN UNION TEL. CO. v. NORMAN, Auditor.

(Circuit Court, D. Kentucky. June 8, 1896.)

1. CIRCUIT COURT—JURISDICTIONAL AMOUNT.

The circuit court has jurisdiction, where the citizenship is diverse, of a bill by a telegraph company to enjoin a state auditor from collecting an alleged illegal tax claimed to be due to the state, and from certifying to the county clerks the proportion of local taxes to be collected in each county, when it appears on the face of the bill that the amount claimed to be due to the state, and also the aggregate amount of such local taxes, exclusive of interest and costs, exceeds \$2,000.

2. SAME—EQUITY JURISDICTION.

The equity jurisdiction of the federal courts, in the case of a bill by a telegraph company to enjoin a state auditor from certifying to the various county clerks the proportions of an alleged illegal tax to be collected in their several counties, is sustainable on the ground of preventing a multiplicity of suits, and because of irreparable injury, where such local taxes, taken separately, would be less than \$2,000. *Telegraph Co. v. Poe*, 61 Fed. 469, and *Sanford v. Poe*, 16 C. C. A. 305, 69 Fed. 546, followed.

3. STATE TAXATION—INTERSTATE COMMERCE.

A state cannot tax interstate or foreign commerce as such, nor can it tax its agencies or instrumentalities in such a manner as to interfere with the regulation of this commerce, which belongs exclusively to congress. But a state may tax property within its limits, though it be employed in whole or in part in foreign or interstate commerce.

4. SAME—KENTUCKY STATUTE.

The provision in the Kentucky Statutes of 1894 (section 4077), that certain classes of corporations and companies shall, in addition to the other taxes imposed by law, "pay a tax on its franchise," etc., when construed in connection with the subsequent sections, providing the method of ascertaining the value of such "franchise," means a tax, not on the corporate