7. Master liable though injured servant was not under the control of the negligent employé.—The mere fact that the "superintendence" was not exercised over the person hurt will not disable him from recovery (*a*).

8. Deputy superintendents, liability for negligence of.—In two of the reported cases the servant's right to recover for the negligence of an employé who was temporarily acting as foreman was denied on the ground that the evidence did not warrant a finding that his sole or principal duty was that of superintendence (*a*). These decisions are unsatisfactory in this respect, that they do not deal with the question which is obviously involved in the facts in evidence, viz., whether the spirit, if not the letter, of the statutes does not require the conclusion that any employé exercising superintendence for a definite period, as the deputy of the person regularly discharging that function, should be regarded as a representative of the master. On general principles, of course the

(*a*) *Ray* v. *Wallis* (C.A. 1887) 51 J.P. 519. It has been held by Denman, J., in a nisi prius case, that the statute is applicable wherever there is a common master, though the injured servant was employed in a department distinct from that controlled by the negligent servant. *Kearney* v. *Nicholls* (1880) 76 L.T. Journ. 63, [Machinist killed owing to negligence of person superintending structural alterations on a mill]; *In Kansas City M. & B. R. Co.* v. *Burton* (1892) 97 Ala. 240, 12 So. 88, the court reasoned thus: "We are unable to agree with counsel that 'the superintendence which comes within the contemplation of the statute shall be a superintendence over the person who complains of the negligence of the person intrusted with it.' The remedy for negligence of superior in the control of inferior employés whereby injury results to the latter is given by sub-section 3. Under sub-section 2, it is manifest, we think, the liability of the defendant is in no sense dependent upon the relations existing in the service between the negligent and the injured person. If the former has superintendence intrusted to him and is negligent in the exercise of it to the injury of any 'servant or employé in the service or business of the master,' whatever be the relation inter se of the servants, the master is made liable therefor by the very terms of the statute. If a yard-master, charged with the duty of keeping the tracks clear, should negligently obstruct a track, and in consequence the president of the company should be injured in the service of the employer, the corporation, it cannot be doubted that the latter would have to respond in damages."

(*a*) *Kellard* v. *Rooke* (1887) 19 Q.B.D. 585; S.C. (1888) 21 Q.B.D. (C.A.) 367; 4 Times L.R. 709. There the theory upon which the court proceeded was that the very fact of the negligent persons being merely a temporary superintendent acting as such during the absence of the defendant himself who usually directed the work shewed conclusively that he was ordinarily engaged in manual labour. In *Dowd* v. *Boston & A. R. Co.* (1894) 162 Mass. 185, 38 N.E. 440, the evidence was that under the general superintendent there was a foreman who hired men and exercised superintendence, more or less, in the superintendent's absence, on that part of the work where the negligent employé was engaged, and that the negligent employé received orders from the superintendent or this foreman in regard to his own work and that of the men working with him, and gave these men directions about the work in the absence of the superintendent. The negligent employé was doing the same kind of work and receiving the same wages as his fellow-labourers.