

these broader aspects where the work is continued for the reason that the servant is assured by the master or by some agent authorized to speak for him, that steps will be taken to remedy the defective conditions to which the extraordinary danger is traceable. That the promise was made, and that the servant's conduct was influenced by it, are circumstances which merely introduce new factors into the investigation (*a*). The two defences will be available to the master whether he has undertaken to remove the cause of danger or not (*b*). Practically the sole result of the giving of the promise is to diminish the number of cases in which the court would be justified in pronouncing, as a matter of law, that one or other of those defences is open to the master (*c*).

In England the exposition of the law which was furnished in the well-known case of *Holmes v. Clark* (*d*) seems to have entirely satisfied the profession, for since the date of that decision no court of review has ever been invited to discuss the subject (*e*). In the United States, on the other hand, that case merely had the effect of opening the floodgates of litigation.

(a) *Manufacturing Co. v. Morissey* (1883), 40 Ohio street, 148.

(b) If specific authority be needed for a proposition so simple, it will be sufficient to refer to *Holmes v. Clark* (1862), 7 H. & N. 937; (see more especially the opinion of Crompton, J., who stated that he founded his judgment on two propositions, viz., that there was no defence under the principle of law laid down in *Priestley v. Fowler* (1837), 3 M. & W. 1, and that the plaintiff had not contributed to his injury by his own negligence.)—See also *Lewis v. New York, &c., R. Co.* (1891), 153 Mass. 73; 10 L.R.A. 513; *Schlaker v. Mining Co.* (1891), 89 Mich. 253. Sometimes, it may be observed in passing, the ambiguity of the phrase "assumption of risks," which in common parlance covers negligent conduct, has produced an apparent confusion between the two defences: see, for example, *Roux v. Blodgett, &c., Co.* (1891), 85 Mich. 519. Those who wish to see how far this misuse of words has been carried in the judgments of American courts are referred to an article by the present writer in the *American Law Review* for September, 1897.

(c) The effect thus ascribed to a promise to remove a specific cause of danger is, it will be observed, analogous to that ascribed to a direct order, which, under appropriate circumstances, operates as an implied assurance that there is no present danger, and relieves the servant of the imputation of contributory negligence, except in cases in which no prudent man would have obeyed the order: *Patterson v. Pittsburgh, &c., R. Co.* (1874), 76 Pa. 389; *Chicago, &c., R. Co. v. Hayfield* (1877), 37 Mich. 204. Not infrequently the evidence shows a reliance by the servant on an assurance of present safety, as well as a promise to make such changes as will restore the defective instrumentality to its usual condition: *Flynn v. Kansas City, &c., R. Co.* (1883), 78 Mo. 195; *Sensikowski v. McCormick Mach. Co.* (1895), 58 Ill. App. 418.

(d) (1862), 7 H. & N. 937.

(e) *Holmes v. Worthington*, 2 F. & F. 533, a nisi prius case tried pending the appeal in *Holmes v. Clark*, is of interest chiefly because it reports a charge to the jury by Willes, J., one of the judges who afterwards concurred in the decision in that case in the Exchequer Chamber. The question does not appear to have yet come under the consideration of any Canadian court whose decisions are reported.