

MASTER AND SERVANT—FELLOW SERVANT.

ter's representative in the establishment. On this last point, see also remarks of Mr. Justice Davis in Fort's case to the effect that Collett, who had been entrusted by the railroad company with the care and management of dangerous machinery, was the representative of the company, which was liable "either upon the maxim of *respondent superior* or upon the obligations arising out of the contract of service" for Collett's wrongful order to the plaintiff—that order relating to a duty within the scope of Collett's employment and outside the scope of the plaintiff's engagement, and wholly disconnected with it.

In this country the *general rule* is recognized as the law by the courts of, perhaps, every state which has passed upon the question, except where it is changed by statute. The only dispute is as to the extent of the rule, or rather as to the cases to which it is justly applicable. It is not necessary to cite the American cases; they will be found mostly collected in the Treatise of Shearman & Redfield on Negligence. We do not recollect any case in the Supreme Court of the United States, either directly sustaining or rejecting the general doctrine. It is noticeable, however, that in the case of the *Northwestern Union Packet Co. v. McCue*, decided at the present term, Mr. Justice Davis, delivering the opinion of the court, remarks: "It is insisted on the part of the plaintiff in error, that a master is not responsible to a servant for injuries caused by the negligence or misconduct of a fellow-servant in the same general business;" but "*whether this general proposition be true or not* it is not necessary to determine in the state of this record." And in Fort's case the same learned justice observes: "It was assumed on behalf of the plaintiff in error, on the argument of this cause, that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury. Whether this proposition, as stated, be true or not, we do not propose to consider, because, if true, it has no application to this case."

This language would lead to the inference that the Supreme Court may entertain doubts as to the soundness of the

rule under discussion. But as the general doctrine is so firmly rooted by judicial decisions in Great Britain and in the different state courts of this country, as it is one which pertains to general jurisprudence, and involves no question of *federal law*, it would seem that it is no more open to re-agitation in a federal court than in any other court of common law powers.

We next mention some exceptions to the rule, or cases which are not considered as falling within its reasons, and to which, therefore, it does not apply. We consider it to be settled, both in England and America, that the master is bound to use ordinary care to employ, or to retain in his employment, *none but competent servants*, and to use like care to *furnish and maintain suitable and safe machinery and structures*. *Bartonshill Coal Co. v. Reid, supra*; *Tarrant v. Webb*, 18 C. B. 797; *Weems v. Mathieson*, 4 Macqueen 215; *Clarke v. Holmes, supra*; and see cases next cited. We also consider that view to be correct, and regard it as quite conclusively settled by the courts, that this duty of the master is so far personal and inalienable that responsibility for injuries directly caused by the negligent discharge of it exists, although the master may for his own convenience act through other servants. On this subject see the following very recent cases in addition to those last cited: *Brothers v. Cartter*, 52 Mo. 372, 1873, and cases cited by Wagner, J.; *Gilman v. Eastern Railroad Co.*, 10 Allen, 233; s. c. 13 Allen 433, and cases cited by Gray, J.; *Laning v. N. Y. Central R. R. Co.* 49 N. Y. 521, 1872. And the reason is that this duty of the master is direct and personal, and must be discharged in person or by others for him, for whose negligent acts and omissions he is responsible where these are the immediate cause of injury to his servants.

On this point we call attention to the following observations of Mr. Justice Davis in Fort's case: "It is apparent, from these findings, if the rule of the master's exemption from liability for the negligent conduct of a co-employee in the same service be as broad as is contended for by the plaintiff in error, that it does not apply to such a case as this. This rule proceeds on the theory that the employee, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking,