of the parties have almost invariably been settled by determining whether the latter of these defences is available. It is obviously a matter of extreme difficulty to fix, upon any satisfactory principle, the limits of a period after which the servant will be deemed to have accepted the new risk, while on the other hand, the circumstances involved in cases of this type are such as will naturally invite a consideration of the servant's conduct as suggesting the exercise or non-exercise of care on his part. The following sections, therefore, will necessarily take the shape of a review of the conclusions at which the courts have arrived in dealing with the effect of a promise from this standpoint.

*III.—When the Defence of Contributory Negligence is open to the Master.*—The question whether a servant was guilty of contributory negligence in view of the testimony which is commonly produced in cases of the kind under review, will be found to depend upon two considerations, viz., whether the election to take the risk was prudent, and, if so, whether due care was exercised by the servant in view of the fact that the employment involved an unusual amount of danger (*a*). These two points are manifestly quite distinct, though they are sometimes not distinguished as clearly as they should be by the courts (*b*). The latter, however, has no direct connection with the promise, and nearly involves a special application of the general principle that everyone is bound to use that degree of care which the circumstances require (*c*). Confining our attention, therefore, to the former point, we find that the courts are unanimous as regards the doctrine that, "if under all the circumstances, and in view of a promise to remedy the defect, the servant was not wanting in due care in continuing to use the defective appliance, the master will not be excused for its failure to supply proper instrumentalities, upon the ground of contributory negligence" (*d*). In

(*a*) *Counsell* v. *Hall* (1887), 145 Mass. 468.

(*b*) See, for example, *Corcoran* v. *Milwaukee Gas Light Co.* (1892), 81 Wis. 191, where the court seems to waver betwen a theory which would deprive the servant of a right to recover on the ground of negligence in continuing to work, and the theory that he did not take appropriate preuautions in view of the dangers of the situation.

(*c*) See the case just cited, and *Meador* v. *Lake Shore, &c., R. Co.* (1894), 138 Ind. 290.

(*d*) *Hough* v. *Railway Co.*, 100 U.S. 213.