

is this rule applicable when the abnormal conditions would not have existed if the plaintiff himself had done his duty (*b*). In cases of this class the only ground on which the master can be held liable is that he was guilty of negligence in not warning his servants of the increased risk to which they would for the time being be exposed (*c*).

The temporary nature of the abnormal conditions complained of will not, however, protect the master if they amounted to a structural alteration of the appliance in question and that alteration was made by the employé in charge of it (*d*).

A fortiori, where such a structural alteration was intended to be permanent, the servant will not be excluded from the benefits of the statute simply for the reason that the new arrangements were only completed the day before the accident (*e*). Moreover it would

cases, and also on the ground that the accident was an unexpected one, it has been held that a master cannot be held liable under the statute for an injury due to a railway tie with a projecting spike in it which has been taken up with a view to repairing it and placed by the side of a road, where the cause of the injury was the fact that a horse which the plaintiff was leading was frightened and, backing against him knocked him down upon the tie. *McQuade v. Dixon* (1887) 14 Sc. Sess. Cas. (4th Ser.) 1039. Whether this proximate cause of the injury was the negligence of a fellow-servant in regard to the mere use of appliances of the work, is primarily a question for the jury. *Knight v. Overman Wheel Co.* 54 N.E. 890, 174 Mass. 455.

(*b*) A verdict for the plaintiff should be set aside, where his own evidence shews that, if the machine had been properly attended to by himself, the accident would not have happened. *Kay v. Briggs* (Q.B.D. 1889) 5 Times L.R. 233. An employer is not liable for the death of an employé while laying pipe in the bottom of a sewer trench in process of construction by the employer, through the caving in of the walls of the trench, due to insufficient shoring and bracing, where such employé was himself entrusted with superintendence of the shoring and bracing and paid higher wages because of it. *Conroy v. Clinton* (1893) 158 Mass. 318, 33 N.E. 525. This particular situation, however, would seem to be more appropriately referred to the conception of an inability to recover predicated from the contributory negligence of the injured person.

(*c*) *Willett v. Watts* (C.A.) [1892] 2 Q.B. 92.

(*d*) See *Tate v. Latham* (C.A.) [1897] 1 Q.B. 502, holding the absence of the guard of a saw was held to be a "defect," where it had been temporarily removed by the sawyer. This decision practically overrules the dictum of Fry, L.J., that the defects contemplated by the statute are those of a "chronic character." *Willett v. Watts* [1892] 2 Q.B. 92. [In the report in (61 A.L.J.Q.B. 540) the phrase used is "somewhat chronic."] It was pointed out in the latter case by Bruce, J., (Divisional Court), this theory is not necessary to sustain the conclusion arrived at. That conclusion indeed might well be put upon the ground that no negligence was established, as the catchpit into which the plaintiff fell had been opened to allow work to be done, and was left unfenced because it was not possible to do the work while a fence surrounded it.

(*e*) *Copithorne v. Hardy* (1899) 173 Mass. 400, 53 N.E. 915. [Shaft attached to the ceiling of a room by brackets and screws, held not to produce conditions belonging to that transitory class for which the employer is not responsible beyond furnishing a choice of proper materials or instrumentalities].