

question whether his principal duty was that of superintendence (*f*). See also sec. 11, post.

The fact that a foreman is paid higher wages than the ordinary labourers is a circumstance to be considered in connection with other evidence upon the question whether his sole or principal duty is that of superintendence (*g*).

(*c*) *Employés for whose negligence the master is not liable.*—The courts have taken the position that something more than the mere exercise of control is necessary to constitute an employé a super-

(*f*) "If you have a person whose sole or principal duty is to superintend the work of others, the master will be liable for injuries to those who act in obedience to his orders, even though such superintendent should himself casually do manual labour." Smith, J., in *Kellard v. Rooks* (1887) 19 Q.B.D. 585 (p. 588). See also *Crowley v. Cutting* (1896) 43 N.E. 197, 105 Mass. 436 [Superintendent of quarry sometimes helped to attach the dogs by means of which heavy stones were hoisted.] *Reynolds v. Barnard*, 168 Mass. 226, 46 N.E. 703 [Superior servant here was a foreman of slaters]; *McCabe v. Shields* (1900) 175 Mass. 438, 56 N.E. 699 [Superior servant who participated in the work, and, in the absence of the employer, gave directions]. It is error to nonsuit a plaintiff, where the evidence is that an employé denominated a "walking superintendent" gave the negligent order from which the injury resulted, although it was also proved that he helped his subordinates to perform the work to which his order related. The jury should be asked whether he was one of those persons whose duty it was not to work himself, but to see that others work. *Ray v. Wallis* (C.A. 1887) 51 J.P. 519, aff'g (Q.B.D. 1885) 3 Times L.R. 777. In *Prendible v. Connecticut River Mfg. Co.* (1893) 160 Mass. 131, it appeared that a staging which fell was erected in the yard of the defendant's sawmill by the side of a wood pile for the purpose of enabling the workmen to pile the wood higher. There was evidence for the plaintiff that the staging was built by C., who was in the defendant's employ, assisted by a member of the piling gang; that no one gave any orders to this gang except C.; that he was the foreman of the gang; that he sometimes worked with his hands; but worked when he pleased, and did whatever work he pleased; that when he was working he was overseeing the men and giving them directions; that he placed the men at work whenever he saw fit; and that he hired workmen at different times, upon their application to him for work. Two of the defendant's witnesses testified that C. had general authority over the gang of workmen. Held, that the jury would be warranted in finding that C.'s principal duty was that of superintendence. Whether A., employed by the defendant as foreman of its yard but who at times worked with his own hands, is one whose "principal duty is that of superintendence," is a question for the jury where the plaintiff was injured by the falling upon him of a large iron pump, which, loaded upon a truck, he with others was moving from one place to another in the defendant's works, in accordance with A.'s directions. *Geloveck v. Dean & Co.* (1896) 165 Mass. 202. The testimony of an employé that it took most of his time telling the other employés what to do and giving them their work, and that during the whole day he kept run of the men, and kept them at work, and told them what to do and what not to do, justifies a finding by the jury that his principal duty was that of superintendence, notwithstanding his later testimony that he worked about three-quarters of the time with his own hands, and that during that time he was bossing the men. *Riou v. Rockport Granite Co.* (1898) 50 N.E. 525, 171 Mass. 162.

(*g*) *O'Brien v. Look* (1898) 171 Mass. 36, where the servant was allowed to recover upon evidence shewing that the delinquent, besides receiving higher wages, employed and discharged men, and that he had seventeen or eighteen men working under him and subject to his orders as to the time of beginning and quitting work and as to the manner of its performance.