

where the servant was injured by machinery, left unfenced in contravention of the provisions of a statute: "While the machinery was fenced, was not the contract of the plaintiff: 'I will work with fenced machinery'; after it was broken, was not the contract: 'I will continue to work, if you will restore the fencing?'" This conception of a change in the implied terms of the contract does not, however, appear to have been very generally adopted (a).

Perhaps the most generally received view is that the inference which would normally be drawn, that the servant intended to assume the new risk, or was guilty of contributory negligence, in remaining in a service in which that risk must be constantly incurred, is rebutted by evidence that the promise was relied on. In other words, that waiver of a certain right of action which, apart from the promise, would be imputed to the servant as a consequence of his continuance of work, will not be implied where a promise has been given. Thus in the case just cited Cockburn, C.J., draws a distinction between "the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied," and lays it down that, "in the latter case the servant by no means waives his right to hold the master responsible for any injury which may arise to him from the omission of the master to fulfil his obligation" (b).

(a) In *Greene v. Minneapolis, & N. W. R. Co.* (1884), 31 Minn. 248, the court favoured that reason for the rule which would place it on the ground of "a contract on the part of the employee that, if a servant continues in the service, in the meantime and until the defects are remedied, the employer and not the servant will assume the risks," but it is not easy to say from this statement whether it is referable to the idea of a substituted contract, or of the continuance of the original one. That the true rationale of the situation existing after the promise is that a new conditional contract comes into force is indicated very strongly by those cases in which the promise to remove a specific cause of danger is given before the servant undertakes his work: *Hyatt v. Hannibal, & C. R. Co.* (1885), 19 Mo. App. 287, [master liable for exposing servant to extreme cold, against which he has been assured that he will be protected]; *Cheaney v. Ocean S. S. Co.* (1893), 92 Ga. 726, [master liable for injuries resulting from his violation of a promise to station a man at the hatch of a ship in order to protect labourers in the hold while the loading is going on].

(b) Compare the statement of Mr. Cooley in his well-known work on Torts, p. 559, that "the assurances of the master that the danger will be removed remove all ground for argument that the servant by continuing to work engages to assume the risk," (quoted with approval in *Hough v. Railway Co.*, 100 U.S. 215). See also the language used in *Picart v. Chicago, & C. R. Co.* (1891), 82 Iowa 148; *Texas, & C. R. Co. v. Bingle* (1894), 9 Tex. Civ. App. 322.