

U.S. Rep.]

SMITH V. THE ST. LOUIS, KANSAS CITY, AND N. R. COMPANY.

[U.S. Rep.]

evidence showed that the plaintiff was fully acquainted with the risk he incurred from the nature of his employment and the kind of rails used for guard-rails on defendant's road. It might not be a proper instruction in a case where the employé was inexperienced and ignorant of the danger he incurred in the work he was employed to perform. The judgment is reversed. The other judges concur.

*Reversed.*

*Comments on the foregoing case, by Editor of American Law Review.*

As indicated in the foregoing opinion, there are cases holding otherwise; but they ignore the general principles founded in reason and justice, which the English and American courts have generally agreed upon as governing the master's liability to his servant.

§ 2. *The governing principle stated.*—The governing principle of all such cases is this: The servant, when he enters into the service, is deemed to agree with the master that he will assume all risks which are ordinarily and naturally incident to the particular service. On the other hand, the master impliedly agrees with the servant that the former will not subject the latter, through negligence, fraud, or malice, to risks greater than those which fairly and properly belong to the service in which he is about to engage. If, without the consent of the servant, express or implied, the master subjects him to risks beyond these, and he is thereby injured, the master must pay to him the resulting damages. The negligence for which the master may be thus liable to the servant is generally classified under three heads:—

1. Negligence in subjecting the servant to the risk of injury from defective or unsafe machinery, buildings, premises, or appliances.
2. Negligence in subjecting him to the risk of injury from unskilful, drunken, habitually negligent, or otherwise unfit fellow-servants.
3. Negligence where the master or his vice-principal personally interferes, and either does or commands the doing of the act which caused the injury.

For the purpose of this discussion, negligent injuries of the third class may be left entirely out of view. In the first two cases, the unfitness of the building, premises, machine, appliance, or fellow-servant, must have been known to the master, or must have been such as, with reasonable diligence and attention to his business, he ought to have known. It must also have been unknown to the servant, or such as a reasonable exercise of skill and diligence in his department of service would not have discovered to him.

If the master has not been personally negligent in any of these particulars, and hurt nevertheless happens to the servant, the master will not be answerable in damages therefor; but the servant's misfortune will, accordingly as the facts appear, either be ascribed to his own negligence, or ranked in the category of accidents, the risk of which, by his contract of service, he is deemed voluntarily to have assumed.

The master's obligation is not to supply the servant with safe machinery, with machinery not defective, or with any particular kind of machinery; but it is an obligation to use ordin-

ary and reasonable care not to subject him to unreasonable or extraordinary dangers, such as he did not impliedly agree to encounter, by sending him to work in dangerous buildings, on dangerous premises, or with dangerous tools, machinery, or appliances. If the master has failed in his duty in this respect, and the servant has, in consequence of such failure, been injured, without fault on his part, and without having voluntarily assumed the risk of the consequences of the master's negligence, with full knowledge, or competent means of knowledge, of the danger, he may recover damages of the master.

§ 3. *Degree of care exacted of the Master.*—In the preceding case the learned judge correctly says that the liability of railroad companies to their passengers, and their liability to their employés, are to be distinguished. But the statement that "the highest degree of diligence is required in the one case, and the lowest standard in the other," is, to say the least, an extraordinary statement. If railroad managers were to get the impression that this is the law, it would tend greatly to lessen the security of the lives of their employés. We do not believe that any well-considered case can be found which contains even a *dictum* which lends support to this statement. The lowest standard of care which we can imagine one person as owing to another is that which one person may be supposed to owe to another who, at the particular time, is committing an aggravated trespass upon his rights. Trespassers, whether men, children, or dumb beasts, cannot be injured with impunity; and while the person upon whom the trespass is being committed may use the necessary force to expel the trespasser, he is under an obligation to use reasonable care not to inflict another or greater injury than that which may result from the application of this necessary and reasonable force. The rule is undoubtedly as firmly settled as any rule can well be, that a carrier of passengers is bound to exercise, to promote the safety of those whom he undertakes to carry, a very high degree of care. Whatever may be said against the soundness of dividing care, or its antithesis, negligence, into degrees, we must ignore the teaching of all the adjudications before we can reach the conclusion that the carrier of passengers is held only to the exercise of ordinary care. We must do the same in order to reach any other conclusion than that, in order to avoid subjecting his servants to risks beyond those which he impliedly agreed to assume, the master must exercise reasonable and ordinary care. He duty of selecting and maintaining safe machinery and competent servants is not an absolute one. He is not an insurer of the safety of his servants in this respect. He does not warrant the competency of his servants or the sufficiency of his machinery. His duty to them is discharged by the exercise of reasonable or ordinary care; and this, as in every other situation, is measured by the character, the risks, and the exposure of the business.

He is not bound even where the element of skill or art comes in, as against a workman without special skill, to exercise exhaustive care or the highest degree of diligence.

The test of liability is therefore said to be, not whether the master omitted to do something which he could have done, and which would have prevented the injury, but whether he did any thing which, under the circumstances, in the exercise of care and prudence, he ought not to have done, or omitted any precaution which a prudent