

whether the negligence was in the exercise of superintendence or in the performance of some other function(c). See secs. 9, 10, 11, post.

As regards the lower grades of employ  s, it may be said that, so far as any general principle can be extracted from the decisions, a court will not disturb a finding that the delinquent employ   was exercising superintendence, if the evidence tends to shew that he was in full charge of some specific piece of work and invested with a discretionary power to determine the manner in which the general instructions of the employer or of some higher official should be carried out (d). In such cases the inference that the descriptive words of the statute are applicable is sometimes corroborated by specific testimony which tends to shew that the superior servant did not work, and was not expected to work, with his hands (e). But it does not appear that the absence of such testimony is of itself a sufficient reason for denying the plaintiff's right to recover.

It is also well settled that, if the existence of the other elements of liability is made out, a court will not say, as matter of law, that the plaintiff must fail in his action because the negligent employ   did a certain amount of manual labour in connection with the work which he supervised. That fact is not conclusive upon the

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(c) Testimony shewing the acts of one alleged to be superintendent of defendant's foundry, in putting persons out of the shop, and what he said while doing so, is admissible, as tending to shew whether or not he was acting as superintendent. *McCabe v. Shields*, 56 N.E. 699, 175 Mass. 438.

(d) A stevedore's foreman superintending a subdivision of the work of unloading a ship may properly be found to be a vice-principal. *Wright v. Wallis* (C.A. 1885) 3 Times L. R. 779. Evidence that the delinquent was a section foreman who had immediate charge and superintendence of a gang of five men, engaged in handling freight, and that it was his duty to take receipts, check the freight into the cars, and see that it was loaded into the right cars, warrants a finding that his principal duty was that of superintendence. *Mahoney v. New York & C. R. Co.* (1894) 160 Mass. 573. A foreman of a section gang upon a railroad, not at work himself, but looking on and seeing that the work is done, and, in addition to the performance of other functions, giving warning of the approach of trains to the section men, may be properly found to be a vice-principal. *Davis v. New York, N.H. & H.R. Co.* 159 Mass. 532, 34 N.E. 1070, distinguishing *Shepard v. Boston* (1893) 158 Mass. 174, 33 N.E. 508, where it was laid down in unqualified terms that a section foreman is not a person entrusted with and exercising superintendence, so as to render the railroad company liable for personal injuries to a section hand occasioned by negligence in running a hand car on which the gang is riding.

(e) *McPhee v. Scully* (1895) 163 Mass. 216, 39 N.E. 1007, where the delinquent was the foreman of a gang of men employed on a pile-driver, with authority to employ and dismiss men, who frequently had charge of the work, and who gave all the directions which were given at the time the injury was received.